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Volumes 105A and 105B

105A: Reconstructing the treaty network

General report
David G. Duff (Canada)
Daniel Gutmann (France)

EU report
Alfredo Garcia Prats
Werner Haslehner
Volker Heydt
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OECD report
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Jessica Di Maria

Summary and conclusions of all branch reports

105B: Exchange of information: issues, use and collaboration

General report
Tatiana Falcão (Brazil)
Armando Lara Yaffar (Mexico)

EU report
Reinhard Biebel
Jasna Voje

Summary and conclusions of all branch reports

List of Cahiers published since 1939

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Once a year the Cahiers de Droit Fiscal International are published and distributed free to all the members of the Association. These Cahiers contain a wealth of domestic and international material in dealing with the main subjects to be discussed at the following IFA Congress. They comprise IFA branch reports together with a general report on each of the two subjects selected. This year the main subjects will be discussed during the virtual programme.

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INTERNATIONAL FISCAL ASSOCIATION

The International Fiscal Association (IFA) is a leading independent and neutral non-governmental, international non-profit organisation devoted to the study of international tax law. It comprises taxpayers, their advisers, government officials and academics and is a unique forum for discussing international tax questions.

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General report Subject 1

Reconstructing the treaty network

David G. Duff (Canada)
Daniel Gutmann (France)

Reconstructing the treaty network

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General report

David G. Duff (Canada)[1]
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Summary and conclusions

Among the many actions in the OECD/G20 Base Erosion and Profit-Shifting (BEPS) project, one of the most ambitious involved a number of modifications to tax treaties. Intended to help neutralize the effects of hybrid mismatches, to prevent the granting of treaty benefits in inappropriate circumstances, to prevent the artificial avoidance of permanent establishment status, and to improve the resolution of international tax disputes, these modifications were proposed in BEPS Action Plans addressing each of these areas, and subsequently incorporated into the 2017 OECD Model Tax Convention and Commentaries.

Significantly, these modifications were also included in the Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting, which was designed to facilitate the swift and efficient amendment of thousands of bilateral tax treaties. Described as "an historical turning point in the area of international taxation" that introduces a third layer of rules for the taxation of cross-border taxation in addition to domestic tax law and bilateral tax treaties, this multilateral instrument (MLI) modifies specific provisions of Covered Tax Agreements (CTAs) that are designated by contracting jurisdictions to the Convention.

Although the MLI is intended to quickly re-shape or reconstruct the international tax treaty network, the extent to which it accomplishes this objective depends on the number of jurisdictions that enter into the Convention, the number of CTAs that each of these contracting jurisdictions designates, the specific provisions of the MLI that each of these contracting jurisdictions chooses to adopt, and the extent to which these choices match with those of other contracting jurisdictions. At the same time, the impact of the BEPS project on the tax treaty network may also be assessed by considering the extent to which the revised treaty provisions in the MLI and the 2017 OECD Model Tax Convention have been incorporated into bilateral and regional tax treaties that have been concluded in light of the BEPS project, even if these treaties are not themselves subject to the MLI. In addition, the ultimate effectiveness of these treaty revisions also depends on their practical implementation among contracting states.

Subject 1 of IFA in 2020 reviews the impact of the BEPS Actions and the MLI on the structure and operation of the international tax treaty network, assessing the direct impact of the MLI on tax treaties, the broader impact of the BEPS project on bilateral and regional tax treaties that are not subject to the MLI, and the practical implementation of these revised treaty provisions. This general report draws on 41 branch reports from around the world, as well as OECD and EU reports.

Part One of the general report examines the impact of the BEPS Actions and the MLI

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on the international tax treaty network, both directly through CTAs subject to the MLI and indirectly through tax treaties concluded in light of the BEPS project that are not themselves subject to the MLI. It starts with a description of the main features of the BEPS project and provides a detailed survey which shows that many countries had taken measures in response to BEPS concerns even before the BEPS project started and before the MLI was concluded.

The direct impact of the MLI is assessed by the number of contracting jurisdictions and of covered tax agreements. We also examine all the provisions adopted by the contracting jurisdictions and we try to account for the great diversity of choices made by them, to the extent made possible by the MLI. A detailed approach shows that the impact of the MLI is significantly different depending on the provision at stake and the tax policy choices made by every country.

In addition to the direct impact of the BEPS project on the tax treaty network through provisions of CTAs that are modified by the MLI, the BEPS project has also had an impact on the tax treaty network though revisions to tax treaties that have been concluded in light of the BEPS project, even though these treaties are not subject to the MLI. We also note that bilateral tax treaties negotiated since the MLI was signed, often include provisions which the jurisdiction opted not to apply in the context of the MLI. We try to explain these results, drawing on the material provided by the branch reports.

Part Two of the general report focuses on the actual steps taken by states in order to implement the MLI and attempts to assess and predict to what extent the MLI has indeed changed, or will change, the "law in action". It starts with a synthesis of the most interesting findings relating to the implementation procedures followed in the countries which signed the MLI. It also looks at the choices made by tax administrations in terms of publication of synthetized and/or consolidated versions of tax treaties following the MLI and shows the practical difficulties connected to these choices.

Some interpretation issues relating to the MLI and the covered tax agreements are then described, as well as interpretation issues relating to other tax treaties. In particular, we show that the structural diversity of legal systems entails significant differences as to whether the interpretation process bears on the MLI itself, or on covered tax agreements, or on domestic legislation implementing the MLI. The complexity of interpretation issues also relates to the hybrid nature of the MLI, which modifies other treaties and contains provisions of substantive tax law. We then turn to the way jurisdictions address questions which have already become "classical" in international tax literature, in particular regarding the impact of the legal status of the Explanatory Statement and of the BEPS report on tax treaty interpretation.

A third chapter is on the impact of the BEPS Action Plan on tax planning. While it is not disputed that that the BEPS Action Plan has significantly changed practice in the sense that much greater attention is paid by practitioners to the risk incurred by taxpayers when setting up of borderline tax planning schemes, it is more disputed whether the changes brought by the MLI to tax treaties are more apparent than real. We explain this by looking at the impact of the new treaty preamble, the principle purpose test and the LOB mechanism.

We conclude that with 94 signatories as of March 2020, and over 1,600 CTAs subject to modification by the MLI, the OECD can rightly claim a considerable measure of success – success that is properly measured not only by treaty provisions that are directly modified by the MLI but also by the inclusion of these modifications in bilateral tax treaties that have been concluded in light of the BEPS project.

At the same time, it is important to note that the impact of the MLI and the 2017 revisions to the OECD Model has, so far at least, been limited primarily to the minimum standards on treaty abuse and dispute resolution, and that the adoption of other provisions through the

MLI and bilateral tax treaties concluded in light of the BEPS project has been much more limited.

It is also worth noting that the treaty modifications in the MLI and the 2007 revisions to the OECD Model were not entirely unknown within the tax treaty network but were anticipated in a number of practices and treaty provisions that preceded the BEPS project altogether. As a result, while the inclusion of these provisions through the MLI or bilateral tax treaties may represent a significant change for some jurisdictions, this is much less for other jurisdictions. While the limited adoption of provisions beyond the minimum standards thus far suggests that this process still has some way to go, further progress can be expected as contracting jurisdictions to the MLI withdraw reservations to particular provisions and subsequent bilateral tax treaties include provisions based on the 2017 OECD Model.

A final question is whether the MLI can be expected to remain as a permanent "third layer" of international tax law, or whether it will fade into historical insignificance over time as jurisdictions renegotiate bilateral tax treaties. Although the answer to this question may depend on whether contracting jurisdictions view the MLI as an instrument to implement future treaty-related modifications such as those designed to address challenges of the digitised economy, branch reports suggest that many jurisdictions regard the MLI as a temporary instrument whose role is solely to facilitate the swift and efficient modification of the current tax treaty network, not to supplant or permanently supplement the bilateral tax treaty network that remains the core international law dimension of international tax law.

Part One: Impact of the BEPS Actions and the MLI on the Tax Treaty Network

1.1. Background to the BEPS Actions and the MLI

In order to assess the impact of the BEPS Actions and the MLI on the international tax treaty network, it is necessary first to summarize the treaty modifications proposed in the BEPS Actions and incorporated into the MLI and the OECD Model Tax Convention and Commentaries, and to consider pre-BEPS project responses to the concerns that these modifications are intended to address. This chapter provides this background to the BEPS Actions and the MLI.

1.1.1. BEPS Actions and the MLI

As the OECD report explains, the purpose of the BEPS project was "to design tools, at both the domestic and international levels, for jurisdictions to ensure that profits are taxed where economic activities take place and where value is created, while at the same time giving businesses greater certainty by reducing disputes over the application of international tax rules and standardising compliance requirements." To this end, the BEPS Actions included best practices, recommendations, and four minimum standards which members of the OECD/G20 Inclusive Framework on BEPS have committed to implement.

Of these minimum standards, two involve modifications to tax treaties in order to counter treaty abuse (BEPS Action 6) and to improve the resolution of international tax disputes (BEPS Action 14). In addition to these minimum standards, the BEPS Actions also include other treaty

modifications to neutralize the effects of hybrid mismatch arrangements (BEPS Action 2), to prevent specific treaty abuses (BEPS Action 6), and to prevent the artificial avoidance of permanent establishment status (BEPS Action 7). Each of these treaty modifications was incorporated into the 2017 OECD Model Tax Convention and Commentaries and included in the MLI in order to facilitate their swift and efficient implementation throughout the global tax treaty network.

Beginning with the minimum standard on treaty abuse, BEPS Action 6 concluded that "countries should agree to include in their tax treaties an express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation through tax evasion or avoidance, including through treaty shopping arrangements" and "should also implement that common intention" in one of three ways:

- through a general anti-abuse provision based on the principal purpose of transactions or arrangements (the principal purposes test or "PPT"),
- through a PPT and a more specific anti-abuse rule based on the limitation-on-benefits ("LOB") provisions found in treaties concluded by the United States and a few other countries, or
- through LOB provisions, supplemented by domestic or treaty provisions to address conduit arrangements not already dealt with in tax treaties.[3]

The statement of common intention is included in the preamble to the 2017 OECD Model Tax Convention and may be implemented through article 6(1) of the MLI. Article 6(3) of the MLI also allows contracting jurisdictions to choose additional preamble language expressing a desire "to further develop their economic relationship and to enhance their co-operation in tax matters."

The LOB and PPT provisions are incorporated into the 2017 OECD Model Tax Convention as new articles 29(1) to (7) and 29(9) and may be implemented through articles 7(8)-(13) and 7(1) of the MLI. Article 7(4) of the MLI also allows contracting jurisdictions to select a "discretionary benefits rule" authorizing competent authorities of contracting jurisdictions that have denied treaty benefits under the PPT to allow the same or different treaty benefits if they determine that such benefits would have been granted in the absence of a transaction or arrangement subject to the PPT, while article 7(17)(a) permits contracting jurisdictions to indicate that they accept the PPT alone as an interim measure and intend where possible to adopt a LOB provision, in addition to or in replacement of the PPT, through bilateral negotiation.

The minimum standard on the resolution of treaty disputes requires countries to include in their tax treaties a mutual agreement procedure (MAP) based on article 25(1) to (3) of the OECD Model Tax Convention, according to which:

- countries should either permit a request for MAP assistance to be made to the competent authority of either contracting state, or implement a bilateral notification or consultation process for cases in which the competent authority to which the MAP case was presented does not consider the taxpayer's objection to be justified;
- taxpayers are allowed to present a MAP case within at least three years from the first notification of action resulting in taxation not in accordance with the provisions of the treaty;
- the competent authority to which the case is presented shall endeavour, if the objection to it appears to be justified and is not in itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other

[3] OECD/G20 Base Erosion and Profit Shifting Project, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, Action 6: 2015 Final Report, para. 22 [hereafter BEPS Action 6 Final Report].

contracting state, with a view to the avoidance of taxation which is not in accordance with the treaty;
- countries should either permit any mutual agreement to be implemented notwithstanding any time limits in the domestic law of the contracting states, or accept alternative treaty provisions limiting the time during which a contracting state may make adjustments to the profits of an enterprise under article 9(1) or to the profits of a permanent establishment under article 7(2) in order to avoid late adjustments for which MAP relief will not be available; and
- the competent authorities of the contracting states shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the treaty, and may consult together for the elimination of double taxation in cases not provided for in the treaty.[4]

Provisions consistent with this minimum standard are included in articles25(1) to (3) of the 2017 OECD Model Tax Convention, and may be implemented through article 16 of the MLI – which allows contracting jurisdictions to satisfy the minimum standard in one of two ways: (1) through treaty provisions that are fully consistent with those in the 2017 OECD Model Tax Convention, or (2) by indicating that it intends to meet the minimum standard by ensuring that its CTAs include a bilateral notification or consultation process for cases in which the competent authority to which the MAP case was presented does not consider the taxpayer's objection to be justified and provisions limiting the time during which a contracting state may make adjustments to the profits of an enterprise or the profits that are attributable to a permanent establishment of an enterprise. In addition to these provisions, article 17 of the MLI permits contracting jurisdictions to add a provision based on article 9(2) of the OECD Model requiring a corresponding adjustment to the profits of an enterprise subject to a transfer pricing adjustment, while articles 18 to 26 of the MLI allow contracting jurisdictions to select mandatory binding arbitration as a mechanism to address unresolved MAP issues. A framework for mandatory binding arbitration is also authorised by article 25(5) of the OECD Model Tax Convention and the Commentary on this provision.

In addition to the minimum standards on treaty abuse and dispute resolution, the BEPS Actions also include other proposed modifications to tax treaties. In order to address BEPS concerns attributable to hybrid mismatch arrangements, BEPS Action 2 recommended that tax treaties should include:
- a new treaty provision for transparent entities, providing that "income derived by or through an entity that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State shall be considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income or a resident of that State";[5]
- a revised tie-breaker rule for dual-resident entities, requiring mutual agreement by the competent authorities;[6] and
- modifications to the elimination of double taxation provisions of tax treaties, either through: (A) a provision precluding the exemption method where the other contracting state applies provisions of a treaty to exempt or limit the rate of tax on income or capital;

[4] OECD/G20 Base Erosion and Profit Shifting Project, *Making Dispute Resolution Mechanisms More Effective*, Action 14: 2015 Final Report, paras. 9-17 and 34-41 [hereafter BEPS Action 14 Final Report].

[5] OECD/G20 Base Erosion and Profit Shifting Project, *Neutralizing the Effects of Hybrid Mismatch Arrangements*, BEPS Action 2: 2015 Final Report, paras. 434-435 [hereafter BEPS Action 2 Final Report].

[6] *Ibid.*, paras. 430-431. This recommendation is also found in the BEPS Action 6 Final Report at paras. 45-48.

(B) a switch-over rule allowing contracting states to apply the credit method, as opposed to the exemption method, for dividends that are deductible in the payer state; or (C) the complete replacement of the exemption method with the credit method.[7]

These recommendations are incorporated into the 2017 OECD Model Tax Convention and Commentary as new article 1(2), revised article 4(3), and articles 23A and B, and may be implemented through articles 3, 4, and 5 of the MLI. Article 5 of the MLI permits contracting jurisdictions to select either of the three alternative options for the elimination of double taxation in the BEPS Action 2 Final Report, which are identified as Options A, B and C.

In order to address specific treaty abuses, BEPS Action 6 also proposed the following treaty modifications to tax treaties:

– a minimum shareholding period to qualify for the reduced rate of withholding tax on dividends paid to a company with a substantial ownership interest;[8]
– language that extends the rule for gains from the alienation of shares more than 50 per cent of the value of which is derived from immovable property situated in a jurisdiction to gains from the alienation of "comparable interests, such as interests in a partnership or trust" and prevents avoidance of this rule by providing that the 50 per cent threshold applies "at any time during the 365 days preceding the alienation";[9]
– an anti-abuse rule for a permanent establishment in a third jurisdiction that is exempt from tax in the jurisdiction in which it is a resident and subject to a relatively low rate in the third jurisdiction;[10] and
– a "saving clause" confirming the right of a contracting jurisdiction to tax its own residents.[11]

These modifications are incorporated into the 2017 OECD Model Tax Convention as articles 10(2), 13(4), 29(8) and 1(3), and may be implemented through articles 8, 9, 10 and 11 of the MLI.

Finally, in order to prevent the artificial avoidance of permanent establishment status, BEPS Action 7 recommended the following modifications to the treaty definition of a permanent establishment:

– changes to the concept of a dependent agent permanent establishment to address commissionaire arrangements and similar strategies to avoid permanent establishment status;[12]
– changes to the specific activity exemptions to restrict each of the exceptions to activities that are of a preparatory or auxiliary character;[13]
– an anti-fragmentation rule to prevent the artificial avoidance of permanent establishment status by fragmenting a cohesive business operation into smaller operations carried on by the same enterprise or closely related enterprises that would otherwise be eligible for one or more of the specific activity exemptions;[14]
– optional language to prevent the artificial avoidance of permanent establishment status by splitting-up contracts in order to qualify for the exemption for a building site or construction or installation project lasting less than a specified period of time;[15] and

7 BEPS Action 2 Final Report, paras. 442-444.
8 BEPS Action 6 Final Report, paras. 34-40.
9 *Ibid.*, paras. 41-44.
10 *Ibid.*, paras. 49-52.
11 *Ibid.*, paras. 61-63.
12 OECD/G20 Base Erosion and Profit Shifting Project, *Preventing the Artificial Avoidance of Permanent Establishment Status*, BEPS Action 7: 2015 Final Report, paras. 5-9 [hereafter BEPS Action 7 Final Report].
13 *Ibid.*, paras. 10-12.
14 *Ibid.*, paras. 14-15.
15 *Ibid.*, paras. 16-17.

– a definition of closely-related enterprises for the purposes of these provisions.[16]

These modifications are incorporated into the 2017 OECD Model Tax Convention as revisions to articles 5(5) and (6), revisions to article 5(4), new article 5(4.1), new Commentary to article 5(3), and new article 5(8), and may be implemented through articles 12, 13, 14 and 15 of the MLI. Consistent with the BEPS Action 7 Final Report, which observes that some states consider that BEPS concerns related to the specific activity exemptions arise only where there is fragmentation of activities among the same enterprise or closely-related enterprises,[17] the MLI gives Contracting jurisdictions the option in article 13(2) to restrict all specific activity exemptions to activities of a preparatory or auxiliary character (Option A) or to limit the application of a preparatory or auxiliary element to the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any activity that is not specifically listed in a CTA or solely for any combination of such activities (Option B), and the option in article 13(4) to add an anti-fragmentation rule to prevent the artificial avoidance of permanent establishment status by fragmenting a cohesive business operation into smaller operations.

Although all members of the Inclusive Framework have committed to implement the minimum standards on treaty abuse and dispute resolution, jurisdictions are not required to sign the MLI and those who choose to do so, are not required to list all their tax treaties as CTAs. In addition, the BEPS Action Plans and the MLI provide different options on the ways in which jurisdictions may satisfy the minimum standards on treaty abuse and dispute resolution, and allow jurisdictions to decide whether or not to adopt other modifications to their tax treaties. As a general rule, moreover, the MLI modifies provisions of tax treaties only when all contracting jurisdictions list the treaty as a CTA and choose to apply the same option or provision. As the OECD report explains, although this optionality and flexibility contributed to the complexity of the MLI, this was necessary to achieve a broad consensus on the BEPS Actions and the MLI.

As a result, although the MLI is intended to facilitate the swift and efficient amendment of thousands of bilateral tax treaties, the extent to which it does so depends on the number of jurisdictions that enter into the Convention, the number of CTAs that contracting jurisdictions designate, the specific options and provisions that contracting jurisdictions choose to apply, and the extent to which these choices match with those of other contracting jurisdictions. At the same time, the broader impact of the BEPS project on the tax treaty network also depends on the extent to which the treaty modifications contained in the relevant BEPS Actions and included in the 2017 OECD Model Tax Convention and Commentaries, are incorporated into tax treaties concluded in light of the BEPS project that are not themselves subject to the MLI.

1.1.2. *Pre-BEPS project responses to BEPS concerns*

In order to understand the decisions that jurisdictions have taken regarding these treaty modifications, it is helpful to consider measures that they have taken prior to the BEPS project in response to BEPS concerns that these treaty modifications are intended to address.

[16] *Ibid*. paras. 9, 15 and 17.

[17] *Ibid*., para. 13.

1.1.2.1. *Preamble*

Beginning with the preamble to these treaties, branch reports indicate that the stated purpose of most pre-BEPS treaties is to avoid double taxation and prevent fiscal evasion, or simply to avoid double taxation. In addition to these purposes, the preambles of several pre-BEPS treaties also declare a further purpose to enhance economic cooperation. A few pre-BEPS treaties also express an intention to prevent tax avoidance,[18] though these treaties do not expressly refer to an intention to prevent tax avoidance through treaty shopping arrangements. In contrast, Switzerland explicitly rejected the view of the pre-2017 OECD Commentary that a purpose of tax treaties is to prevent tax avoidance, but has withdrawn this observation following 2017 revisions to the OECD Model that include this purpose in the preamble.

Although several branch reports emphasize the limited role that preambles have played in the interpretation of tax treaties, the India branch report cites a notable case in which the Indian Supreme Court referred to a stated intention in the India-Mauritius Tax Treaty to encourage "mutual trade and investment" to conclude that "many developed countries tolerate or encourage treaty shopping, even if it is unintended, improper of unjustified, for other non-tax reasons, unless it leads to a significant loss of tax revenues."[19]

1.1.2.2. *Treaty shopping*

With respect to tax treaty shopping, branch reports indicate a considerable diversity of approaches prior to the BEPS project. Although most branch reports note the availability of domestic anti-avoidance doctrines, such as sham and substance over form, as well as statutory general anti-avoidance rules (GAARs), there is considerable uncertainty in some jurisdictions as to whether statutory GAARs can apply to tax treaties absent agreement to this effect in treaties themselves.[20] In addition, while courts in some jurisdictions such as France have applied domestic anti-avoidance doctrines and statutory GAARs to challenge tax treaty-shopping arrangements,[21] courts in other jurisdictions such as Canada have been reluctant to apply these measures to tax treaty shopping arrangements on the grounds that the abusive nature of these arrangements is not clear.[22] In addition, branch reports from Argentina, Chile, Colombia, India ,Mexico, Poland and the United Kingdom note that their domestic GAARs are relatively new and not yet tested in the context of tax treaty shopping.

Irrespective of domestic anti-avoidance doctrines and statutory GAARs, some jurisdictions have taken the position that tax treaties include an inherent anti-abuse principle, based on the *pacta sunt servanda* principle that treaties should be interpreted and applied in good faith. In Switzerland, for example, the Federal Court relied upon this principle to reject a tax treaty-

[18] In Germany, for example, the 2013 basis for negotiation expressed an intention to allocate taxing rights "in a way that avoids both double taxation and non-taxation."

[19] *Union of India v. Azadi Bachao Andolan* (2003) 132 Taxman 373 (SC).

[20] In France, on the other hand, the Conseil d'Etat has held that the domestic GAAR applies to tax treaties even if this is not explicit in the treaty. Conseil d'Etat, 25 October 2017, *Verdannet*, n°396954. In other jurisdictions (e.g., Australia and Canada), domestic legislation makes tax treaties explicitly subject to domestic GAARs.

[21] Decisions 2012-47, 2013-25, 2018-24 and 2013-26, and Administrative Court of Appeal (Versailles), 24 July 2018, Holding Yaka, n°15VE04006.

[22] *MIL Investments (SA) v. The Queen*, 2006 TCC 460, aff'd 2007 FCA 236 (Canada); and *Alta Energy Luxembourg S.A.R.L. v. The Queen*, 2018 TCC 152, aff'd 2020 FCA 43.

shopping arrangement in *A Holdings ApS v. Federal Tax Administration*, (2005), 8 ITLR 536 (Swiss FC). The District Court of Tel Aviv relied on a similar principle to reject a tax treaty-shopping transaction in *Yanko-Weiss v. Holon Assessing Office*, (2007), 10 ITLR 524 (Tel Aviv – Yafo DC). In Japan, however, courts appear to have rejected this interpretation.[23] As a result, although paragraph. 9.5 of the 2003 Commentary to article 1 of the OECD Model Convention affirmed a "guiding principle" that "the benefits of a double tax convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable tax treatment in these circumstances would be contrary to the object and purpose of the relevant provisions," it is not clear that all jurisdictions have agreed on this guiding principle. As well, branch reports from Canada and Norway suggest that it is unclear whether this principle, even if accepted, applies to tax treaties negotiated before the 2003 revisions to the OECD Commentary.

Another way that many jurisdictions have challenged tax treaty-shopping arrangements is through the requirement that the recipient of certain kinds of income must be the "beneficial owner" of the income in order to qualify for treaty benefits. Added to the OECD Model Tax Convention in 1977, this requirement appears in the articles for dividends, interest and royalties in most treaties concluded over the past 40 years, and is regarded as a requirement for treaty benefits under these provisions in France and Italy even in the absence of specific treaty language.[24] Although originally intended primarily to ensure that treaty benefits are granted to the real owners of these payments, not agents or nominees on whose behalf these payments might be received,[25] the beneficial owner requirement has also been interpreted more broadly to deny treaty benefits in the context of conduit arrangements entered into in order to obtain treaty benefits that would otherwise be unavailable to the ultimate recipient of the income.

According to branch reports from Brazil, the People's Republic of China, Denmark, Israel, the Republic of Korea, Poland, Russia and Switzerland, courts in these jurisdictions have adopted a broad interpretation of the beneficial owner requirement, employing an economic substance approach to the meaning of this term in order to prevent tax avoidance through treaty shopping. In contrast, courts in Belgium, Canada and the Netherlands have favoured a narrower interpretation of this concept based on traditional aspects of legal ownership such as possession, use, control and risk, thereby limiting the scope of the beneficial owner requirement as an instrument to prevent tax treaty-shopping. In Australia, Colombia, Germany, New Zealand and Singapore, courts have yet to address the meaning of the beneficial owner requirement, resulting in considerable uncertainty. In the meantime, revisions to the 2014 OECD Commentary on articles 10, 11 and 12 appear to favour a narrower interpretation of the term, stating that a recipient of income will not be regarded as its beneficial owner only where the recipient's right to use and enjoy the income is "constrained by a contractual or legal obligation to pass on the payment received to another person" and only where this contractual or legal obligation depends on the receipt of the payment by the intermediary. More generally, although the Commentary to these provisions states that the beneficial owner requirement "deals with some forms of tax avoidance," it also emphasizes

[23] *Guidant Japan Case* (Tokyo High Court, 28 June 2007; and *Japan-Ireland Tax Treaty Case* (Tokyo High Court, 29 October 2014).

[24] Conseil d'Etat, *Eurotrade Juice*, n°383838 (23 November 2016); and Italian Supreme Court, 16 December 2015, no. 25281; and 25 May 2016, no. 10792.

[25] Richard Vann, "Beneficial Ownership: What Does History (and Maybe Policy) Tell Us, in M. Lang, et. al., *Beneficial Ownership: Recent Trends*, (Amsterdam: IBFD, 2013) 267-331 at 273-279.

that "it does not deal with other cases of abuse, such as certain forms of treaty shopping" which may be addressed by other approaches.

In addition to the beneficial ownership requirement, many tax treaties entered into before the BEPS project also include specific anti-avoidance provisions to prevent tax treaty shopping. For example, branch reports from Belgium Chile, Colombia, Japan, Singapore, Spain, Switzerland and Uruguay refer to treaties with "look-through" provisions that deny treaty benefits to entities resident in the other contracting state to the extent that they are not owned directly or indirectly by residents of that state, "exclusion" provisions that deny treaty benefits to entities enjoying special tax privileges in the other contracting state, "subject-to-tax" provisions that limit treaty benefits to income that is subject to tax in the other contracting state, and "channel" provisions that deny treaty benefits for income received by entities in the other contracting state that is used primarily to satisfy claims of one or more non-arm's length persons resident in other states. More significantly, branch reports from Argentina, Australia, Austria, Canada, People's Republic of China, France, Japan, the Netherlands, New Zealand, Singapore and the United Kingdom mention treaties with provisions that deny treaty benefits where "the main purpose or one of the main purposes" of a transaction or arrangement was to obtain the benefit.[26] In addition, detailed LOB provisions have been included in US tax treaties since the late 1980s and were added to the US Model Tax Convention in 2006, and are also increasingly found in tax treaties entered into by other jurisdictions such as Argentina, Chile, India, Japan, Mexico, the Netherlands, Poland and Russia.

Finally, some branch reports identify specific anti-treaty-shopping provisions in domestic law. The United States, for example, introduced anti-conduit rules in the mid-1990s, which allow the revenue authority to disregard an intermediate entity's participation in a financing arrangement where the entity is acting as a "conduit entity" engaged in a tax avoidance plan to reduce non-resident withholding tax. Germany also introduced a domestic anti-treaty-shopping rule in the mid-1990s, denying treaty benefits to a foreign company to the extent that the company's shareholders would not be entitled to these benefits if they had received the income directly, unless the income is derived from the company's own economic activity or there are sound economic or other non-tax reasons for interposing the company and the company participates in general commerce through an appropriately equipped business establishment. Similarly, Switzerland adopted a domestic anti-treaty-shopping provision in 1962, that protects treaty partners by denying treaty benefits where a Swiss resident receives a payment that qualifies for a reduced rate of withholding tax and this relief directly or indirectly benefits residents of third countries to whom the income is forwarded.

1.1.2.3. *Hybrid mismatches*

In contrast to the pre-BEPS Project responses that many jurisdictions adopted to prevent tax treaty shopping, branch reports suggest much less attention to hybrid mismatches. Although the 2006 U.S. Model Tax Convention included a provision for transparent entities that is similar to Article 1(2) of the 2017 OECD Model Tax Convention and Article 3(1) of the MLI, only the branch reports from Chile, Germany, Japan and New Zealand refer to similar

[26] These provisions generally apply either to the interest and royalty articles or to these articles and the article for dividends, but sometimes also apply to capital gains or more broadly to all treaty benefits.

provisions in treaties concluded before the BEPS Project.[27] Instead, some countries such as Austria approach transparent entities in accordance with principles contained in the OECD Partnership Report, while others like India reject this approach and regard partnerships as fiscally opaque but not themselves liable to tax and therefore not entitled to treaty benefits. Other countries such as Australia, Mexico, New Zealand, Sweden, and the United Kingdom have introduced domestic rules to address BEPS challenges posed by hybrid mismatches. Branch reports from Serbia and Singapore, on the other hand, indicate that their jurisdictions either have little experience with or little concern about hybrid mismatches.

Pre-BEPS Project provisions for dual resident entities are similarly varied, with relatively few branch reports expressing concerns about BEPS issues attributable to dual residence. Although branch reports from Korea, Portugal, India, the United States and the United Kingdom mention pre-BEPS treaties with tie-breaker provisions that require mutual agreement by the competent authorities having regard to relevant factors and otherwise limit treaty benefits to those agreed upon by the competent authorities, branch reports from Argentina and Chile explain that their treaties generally rely on the entity's place of incorporation to address cases of dual resident entities, while branch reports from Austria, Belgium, China, France, Germany, Italy Luxembourg and Spain observe that their treaties generally refer to the place of effective management to resolve these cases.

Finally, although branch reports indicate that several jurisdictions use the exemption method to eliminate double taxation, many jurisdictions use the credit method. For this reason, many pre-BEPS treaties already include provisions like Option C in Article 5(1) of the MLI. In general, therefore, branch reports do not identify significant BEPS concerns relating to the exemption method for eliminating double taxation.

1.1.2.4. *Specific treaty abuses*

With respect to specific treaty abuses addressed by the MLI and revisions to the 2017 OECD Model Tax Convention, branch reports from Australia, Belgium, Germany, Japan, Liechtenstein, Poland, Portugal, Spain, Switzerland and the United States indicate that many treaties concluded by their jurisdictions before the BEPS project already included minimum holding periods for a reduced withholding tax rate on dividends paid to a parent company, while branch reports from Canada, Chile, India and Japan note that many treaties concluded by their jurisdictions before the BEPS project commenced included a substituted property rule for gains from the alienation of shares or other interests in entities deriving their value primarily from immovable property. Not surprisingly, however, minimum holding periods for dividends are not included in treaties like the France-US Tax Treaty that exempt all dividends from withholding tax, or in treaties concluded by countries that do not impose withholding tax on dividends like India, or do so at a single rate like Peru. Nor do substituted property rules appear in treaties with countries like Brazil and Chile that apply source taxation to gains from the alienation of shares of resident companies irrespective of whether their value is derived primarily from immovable property.

Among branch reports identifying treaties with minimum holding periods for a reduced withholding tax rate on dividends paid to a parent company, these periods range from six months to two years, but are generally one year. Among branch reports identifying treaties

[27] In addition, the Canadian branch report mentions unique provisions in the Canada-US Treaty that address hybrid mismatches.

with a substituted property rule for gains from the alienation of shares or other interests deriving their value primarily from immovable property, none mention "look back" rules like the rule in article 9(4) of the MLI that applies the proportionate value test at any time during the 365 days preceding the alienation. In other jurisdictions, such as Belgium, Luxembourg and the Netherlands, treaties with substituted property rules often include carve-outs for insubstantial interests, publicly-traded shares and/or property in which the taxpayer's business is carried on.

Relatively few branch reports mention pre-BEPS project treaties with provisions addressing triangular permanent establishments that are subject to little or no tax in a third jurisdiction and exempt from tax in the jurisdiction in which they are resident. Although a triangular permanent establishment provision was added to the US-Netherlands Tax Treaty in 1993 and has been included in subsequent US tax treaties where relevant, branch reports from Brazil, Chile, India, Japan and the Netherlands observe that their jurisdictions do not regard these arrangements as a significant source of BEPS concerns, and the Swiss branch report states that Switzerland does not consider low taxation as a sufficient justification for withholding treaty benefits.

Finally, branch reports suggest that only US tax treaties appear to have consistently included a saving clause confirming the right of a contracting jurisdiction to tax its own residents. As the US branch report explains, because the US levies worldwide tax on its citizens regardless of their residence, this provision is intended to ensure that treaty benefits do not accrue to US citizens who are residents of other countries under the treaty. Although saving clauses may have other purposes, such as ensuring the treaty compatibility of CFC rules, the fact that almost no other country in the world taxes non-resident nationals on their worldwide income makes it unsurprising that these provisions are generally absent from treaties concluded before the BEPS Project other than those concluded with the US

1.1.2.5. *Avoidance of permanent establishment status*

Branch reports suggest a wide diversity of pre-BEPS project responses to the avoidance of permanent establishment status through commissionaire arrangements and similar strategies, use of the specific activity exemptions, and the splitting up of contracts for a building site or construction or installation project. While some jurisdictions appear to have taken no measures to counteract the avoidance of permanent establishment status in these ways, others have relied on various approaches both to expand the concept of a permanent establishment and to prevent the avoidance of this status.

Beginning with commissionaire arrangements and similar strategies, courts in some countries appear to have adopted a broader interpretation of the dependent agent permanent establishment concept than might otherwise be suggested by the pre-2017 OECD Model Tax Convention. In Italy, for example, the *Philip Morris* case gave the tax authorities the ability to apply a broad substance-over-form approach to the interpretation of a permanent establishment.[28] In France and Norway, however, judicial decisions have held that commissionaire arrangements and similar strategies have not resulted in a permanent establishment. While France and the United Kingdom have also challenged these structures on transfer pricing grounds, the branch report from France suggests that this response has

[28] See the judgements of the Italian Supreme Court of 7 March 2002, nos. 3367 and 3368; 25 May 2002, no. 7682; and 6 December 2002, no. 17373. See also the Belgian branch report.

had limited success. Alternatively, several branch reports note that their treaties often include a broader definition of a permanent establishment than the definition in the OECD Model Tax Convention, including assembly and supervisory permanent establishments (India), services permanent establishments (Chile), resource exploration and development (Denmark and Norway), and insurance businesses (Australia).

Regarding the specific activity exemptions, branch reports indicate that Germany, Japan, and the United Kingdom have taken the position that all listed activities must be of a preparatory or auxiliary character. Indeed, this approach has been judicially approved in Japan,[29] and appears to have been confirmed by judicial decisions in India holding that liaison offices of non-resident entities were not permanent establishments where they carried on support functions that were regarded as preparatory or auxiliary,[30] but not where they performed core business activities like marketing and sales.[31] Other jurisdictions such as Belgium and Chile take the position that the specific activity exceptions are inherently preparatory or auxiliary and therefore do not need to satisfy these additional criteria. In either case, branch reports make no mention of pre-BEPS project treaties with anti-fragmentation rules like the rule in article 13(4) of the MLI and article 5(4.1) of the 2017 OECD Model Tax Convention.

Finally, branch reports from Chile, Japan and the Netherlands identify treaties with provisions designed to prevent the avoidance of permanent establishment status by splitting up of contracts for a building site or construction or installation project. In contrast, the revenue authorities in India have successfully challenged these arrangements under domestic anti-avoidance doctrines,[32] while Belgium has opted to counteract these arrangements through domestic anti-avoidance rules.

1.1.2.6. Dispute resolution

Regarding dispute resolution, branch reports indicate that most tax treaties concluded before the BEPS project commenced included a mutual agreement procedure similar to the MAP in the OECD Model Tax Convention. In most of these treaties, however, the request for MAP assistance could only be made to the competent authority of the residence state, except in cases involving non-discrimination in which the request had to be made to the state of which the taxpayer is a national. In addition, several treaties included limitation periods less than three years (Belgium and France), many did not allow implementation of a MAP agreement irrespective of time limits in domestic law (France, Italy and Japan), and some did not include provisions allowing the competent authorities to consult in order to eliminate double taxation in cases not provided for in the treaty (Brazil and Italy).

While branch reports also state that most treaties concluded before the BEPS project commenced, also included provisions for corresponding adjustments, the reports from Belgium, Japan and New Zealand note that these provisions were often absent from older treaties. Notwithstanding the absence of these provisions from certain treaties, however, the branch reports from Belgium and India note that corresponding adjustments are routinely applied in order to prevent economic double taxation contrary to the treaty. In Argentina,

[29] Tokyo High Court, 28 January 2016.
[30] *Sumitomo Corp. v. DCIT* (2008) 114 ITD 61 (Del).
[31] *ADIT v. GE Energy Parts Inc.* [2019] 101 taxman.com 142 (Delhi H.C.).
[32] *J. Ray Mcdermott Eastern Hemisphere Ltd. v. JCIT* [2010] 39 SOT 240 (Mum).

Brazil, and Russia, however, domestic law has only recently allowed for corresponding transfer pricing adjustments.

In contrast to the MAP and corresponding adjustments, branch reports suggest that relatively few treaties concluded before the BEPS project commenced, included provisions for mandatory arbitration. Nonetheless, these provisions were included in several treaties concluded by many European countries (e.g., Austria, France, Italy, Liechtenstein, Netherlands, Norway, Sweden and Switzerland), some of which also have experience with mandatory arbitration under the EU Arbitration Convention which came into force in the mid-1990s and applies to transfer pricing adjustments involving associated enterprises or the profits of a permanent establishment. In contrast, developing countries have much less experience with mandatory arbitration and are often reluctant to include these provisions in tax treaties since, as the branch report from Serbia explains, "enabling foreign bodies to decide on tax matters would put restraints on the exercise of [their] fiscal sovereignty.

1.2. Direct impact of the BEPS Actions and the MLI

Since the MLI applies to a treaty only where all parties to the treaty designate it as a CTA, and generally modifies only those provisions which all parties to the CTA have chosen to adopt, its impact on the tax treaty network depends not only on the number of jurisdictions that have signed the MLI, but also on the extent to which the choices made by each contracting jurisdiction match the choices made by other contracting jurisdictions. This chapter considers the direct impact of the MLI on the tax treaty network, reviewing the number of signatories, CTAs and provisions that will be subject to the MLI, and the reasons why jurisdictions have signed or not signed the MLI, designated or not designated treaties as CTAs, and chosen to apply or not apply specific provisions of the MLI.

1.2.1. *Contracting jurisdictions*

As of 11 March 2020, 94 jurisdictions had signed the MLI, 44 of which had deposited their instrument of ratification, acceptance or approval with the OECD, as a result of which the MLI has already come into effect for many of the tax treaties designated as CTAs. Of the 41 jurisdictions that submitted branch reports, 38 have signed the MLI and 3 have not.

Among jurisdictions that have signed the MLI, the reasons for doing so are numerous. According to many branch reports, the decision to sign the MLI is consistent with a policy priority to combat international tax avoidance and to preserve the integrity of the international tax system. Several branch reports add that the decision to sign the MLI also reflects a commitment to a multinational rules-based framework, while others emphasize the advantages of increased consistency and certainty that multinational coordination can bring to the international tax regime. Branch reports also note that the MLI facilitates the standardization of their tax treaties in a swift and efficient manner, which is particularly appreciated by jurisdictions with limited capacity for negotiating a large number of bilateral tax treaties. As well, some branch reports state that their jurisdictions anticipate additional revenues from the measures contained in the MLI, though these revenue gains are generally considered relatively small or difficult to quantify precisely. Finally, some branch reports mention the appeal of some MLI provisions to source jurisdictions, while others emphasize the enhancements to dispute resolution contained in other provisions of the MLI.

Among jurisdictions that have not signed the MLI, the reasons for doing so also vary. Although Brazil has provided no official justification for not signing the MLI, the branch report suggests that this decision was made in order to preserve autonomy in the field of tax treaty policy and because bilateral negotiations are considered less complicated than the MLI. The US, on the other hand, an official statement for why the US did not sign the MLI explained that many of its provisions are consistent with long-standing US tax treaty policy, and that US tax treaties already have robust LOB provisions to prevent tax treaty shopping and other rules to limit exposure to base erosion and profit shifting. The other jurisdiction submitting a branch report that has not signed the MLI is Chinese Taipei, which is neither a member of the OECD nor the Inclusive Framework on BEPS, but has committed to satisfying the BEPS minimum standards in each of its 32 tax treaties.

Although some branches report that their jurisdictions have examined the impact of the MLI on tax compliance and administration as well as revenue,[33] several branch reports note that there has been little or no detailed impact analysis of the MLI and little or no public disclosure of any analysis that has been conducted.[34] Instead, jurisdictions appear to have relied on assessments by the OECD about the harmful effects of base erosion and profit shifting on tax revenues and the international tax regime more generally.[35]

1.2.2. *Covered Tax Agreements*

Although 94 jurisdictions have signed the MLI, many of these jurisdictions have not listed all of their tax treaties as CTAs and many jurisdictions that have signed the MLI have listed as CTAs, treaties with jurisdictions that have not signed the MLI. As a result, the number of tax treaties that will be modified by the MLI is much fewer than the number that would be modified if these jurisdictions had listed all their treaties as CTAs and if these CTAs were also listed by other jurisdictions that had signed the MLI. In practice, branch reports from Finland, Poland, Portugal, Sweden, and the United Kingdom suggest that roughly 55% to 75% of CTAs will be modified by the MLI. As of 1 March 2020, the OECD reports that 1,630 bilateral tax treaties will be modified by the MLI, comprising approximately half of the pre-BEPS project tax treaty network.

Among jurisdictions that have signed the MLI, it is possible to discern two distinct groups. The first group, comprising most jurisdictions that have submitted branch reports, have listed all or most of their tax treaties as CTAs: Argentina (17 of 20), Australia (42 of 44), Belgium (96 of 101), Bosnia and Herzegovina (37 of 40), Canada (84 of 93), Chile (34 of 34), People's Republic of China (102 of 107), Colombia (10 of 14), Denmark (65 of 70), Finland (70 of 78), France (91 of 128), India (93 of 95), Israel (53 of 58), Italy (80 of 99), Republic of Korea (63 of 93), Liechtenstein (14 of 18), Luxembourg (81 of 82), Mexico (61 of 61), Netherlands (81 of 94), New Zealand (37 of 40), Nigeria (19 of 19), Peru (7 of 7), Poland (78 of 88), Portugal (79 of 79), Russia (71 of 100), Serbia (64 of 64), Singapore (86 of 91), South Africa (76 of 79), Spain (86 of 94), Sweden (64 of 86), Turkey (90 of 90), United Kingdom (121 of 130) and Uruguay (20 of 20). The second group, comprising Austria, Germany, Japan, Norway and Switzerland, have listed only a fraction of

[33] See, e.g., the branch report from the UK, which states that this analysis indicated a limited impact on businesses and the revenue authority; and the branch report from Sweden, which states that the MLI is expected to increase use of the mutual agreement procedure and the workload for the tax authority and the courts.

[34] See, e.g., the branch reports from Argentina, France, Japan, Serbia and Uruguay.

[35] See, e.g., the branch report from Bosnia and Herzegovina.

their treaties as CTAs: Austria (38 of 88), Germany (35 of 96), Japan (39 of 71), Norway (28 of 84) and Switzerland (12 of 105).

For the first group of jurisdictions, the main reasons to exclude some treaties from their CTAs are threefold: (1) that treaties under negotiation or recently concluded after the BEPS project had commenced could incorporate minimum standards and other provisions without relying on the MLI, (2) that older treaties, multilateral treaties and treaties with a different legal status are not readily amenable to modification by the MLI, and (3) that there is no point listing treaties with jurisdictions that have not signed the MLI. In addition to these reasons, the second group of jurisdictions also takes the position that it is best to amend treaties bilaterally than to rely on parallel instruments that increase complexity.

1.2.3. *Provisions adopted*

In contrast to the two distinct groups of jurisdictions that can be identified regarding the number of treaties listed as CTAs, it is more difficult to categorize jurisdictions by the number of MLI provisions that they have chosen to adopt. Although branch reports indicate that Austria, Finland, Republic of Korea, Liechtenstein, Luxembourg, Singapore, Sweden and Switzerland have taken a minimalist approach by adopting only provisions implementing the minimum standards on treaty abuse and dispute resolution, while Australia, Denmark, Israel, New Zealand and Norway have taken a maximal approach by adopting as many provisions as possible, branch reports indicate that most jurisdictions have adopted some, but not all, provisions beyond those implementing the minimum standards.

Among jurisdictions taking a minimal approach, the reasons for this approach are threefold. First, these jurisdictions generally share the view of jurisdictions that have listed few treaties as CTAs that tax treaties are best negotiated bilaterally in order to minimize complexity and address the particular circumstances of the contracting states. Second, some jurisdictions take the position that they have already adopted adequate measures to counteract aggressive tax planning, so do not need to include additional provisions in the MLI. Finally, several branch reports note that a minimalist approach allows reservations to be withdrawn at a later date.[36] Indeed, at least three jurisdictions have already withdrawn reservations between the date that they signed the MLI and the date when they deposited their instrument of ratification, acceptance or approval with the OECD.

Among jurisdictions taking a maximal approach, branch reports suggest that the main reasons for this approach are to increase the number of treaty measures to prevent base erosion and profit shifting while also providing improved access to dispute resolution. Another reason is the desire to standardize all tax treaties with the 2017 OECD Model Tax Convention because it is now used as a point of departure for negotiating the jurisdiction's tax treaties.

Among jurisdictions that have adopted some but not all MLI provisions beyond those implementing the minimum standards on treaty abuse and dispute resolution, branch reports suggest that the main reasons that these jurisdictions have chosen not to apply specific provisions of the MLI is because they consider existing domestic rules or treaty provisions sufficient to counteract the specific abuse addressed by the provision of the MLI, because the MLI provision targets a type of abuse that is not relevant to their jurisdiction, or

[36] See, e.g., the branch reports from Finland and Sweden.

because their jurisdiction disagrees with the approach adopted in the MLI. These reasons are best explained by reference to the specific provisions of the MLI.

1.2.3.1. *Minimum standard on treaty abuse*

Beginning with the minimum standard on treaty abuse, all jurisdictions signing the MLI are required to adopt the preamble language in article 6(1), except for CTAs that already include preamble language expressing an intent of the contracting jurisdictions to eliminate double taxation "without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents in third jurisdictions)." As a result, since 1,630 bilateral tax treaties will be modified by the MLI, it follows that at least this number of treaties will include this modified preamble language.

In addition to this provision, branch reports suggest that a number of jurisdictions have also adopted the additional preamble language in article 6(3) of the MLI expressing a desire on the part of the contracting jurisdictions "to further develop their economic relationship and to enhance their co-operation in tax matters." Although the OECD report provides no figures on the number of CTAs that will be modified by this additional preamble language, branch reports from Belgium and Chile suggest that the percentage of CTAs modified by this provision is approximately 35% of CTAs, which would affect around 570 tax treaties. Whether this additional preamble language will have much effect on the interpretation of these CTAs is uncertain, though India's experience with the *Union of India v. Azadi Bachao Andolan* case presumably informed its decision not to adopt this additional preamble language.

With respect to article 7 of the MLI, all signatories have adopted the PPT in article 7(1), 14 have adopted the simplified LOB provisions in article 7(8) to (13), 27 have adopted the discretionary benefits rule in article 7(4), and 11 have indicated that they accept the PPT alone as an interim measure and intend where possible to adopt a LOB provision, in addition to or in replacement of the PPT, through bilateral negotiation. Since the MLI will modify 1,630 bilateral tax treaties, at least this number of treaties will include the PPT. According to the OECD report, only about 50 tax treaties will be modified to include the simplified LOB. Although this report provides no figures on the number of CTAs that will include the discretionary benefits rule in article 7(4) of the MLI, branch reports from Australia and Belgium suggest that the percentage of CTAs modified by this provision is less than 25%, which would affect roughly 400 tax treaties.

Regarding these choices, branch reports suggest that jurisdictions have adopted the PPT because it is the easiest way to satisfy the minimum standard on treaty abuse, because it is a familiar approach that is broadly consistent with the domestic GAARs in many jurisdictions and the OECD's guiding principle on the improper use of tax treaties, and because it is more effective to counteract unforeseen abuses than more mechanical provisions like LOB provisions. In contrast, branch reports regarded LOB provisions as more complex to administer, potentially incompatible with EU fundamental freedoms, and requiring substantial bilateral customization. The last of these considerations is presumably why several jurisdictions did not adopt the simplified LOB provision in the MLI but indicated that they intend where possible to adopt a LOB provision, in addition to or in replacement of the PPT, through bilateral negotiation. Finally, while branch reports from the Netherlands, Switzerland and the United Kingdom explain that their jurisdictions have adopted the discretionary benefits rule in order to prevent a potentially punitive application of the PPT, branch reports from Norway,

Sweden and Germany state that their jurisdictions consider this provision unnecessary or undesirable on the grounds that adverse tax consequences may be mitigated in other ways, such as by invoking the mutual agreement procedure, or should not be mitigated in order to discourage aggressive tax planning.

1.2.3.2. *Hybrid mismatches*

Provisions addressing hybrid mismatches have been adopted by about a third of the signatories to the MLI, though the percentage varies for each specific provision. While 28 jurisdictions (30% of signatories) have opted to include the look-through provision for hybrid entities in article 3, 34 jurisdictions (36% of signatories) have adopted the rule for dual resident entities in article 4, and 21 jurisdictions (22% of signatories) have selected either Option A or C in article 5. Another 37 jurisdictions have allowed these options to apply to residents of the other contracting jurisdiction by not reserving the right for article 5 not to apply to its CTAs. As a result, according to the OECD report, article 3 will modify 207 tax treaties, article 4 will modify 246 treaties, and article 5 will modify 123 treaties.

For jurisdictions that did not adopt the rule for hybrid entities in article 3, branch reports suggest that the main reasons are that these entities may be regarded as treaty residents, or that domestic rules and general principles on income attribution are adequate to address abusive arrangements. Other jurisdictions have little experience with hybrid entities, so considered the provision complex and unnecessary. In contrast, branch reports submitted by jurisdictions that adopted this provision indicate that it was consistent with many of their tax treaties and provided a more secure legal foundation for the application of treaty provisions to hybrid entities.

Among jurisdictions that did not adopt the rule for dual resident entities in article 4, branch reports indicate that the main reason is that these jurisdictions do not regard the fact of dual residence as necessarily abusive. In addition, these jurisdictions were concerned about the additional administrative burden and uncertainty that resolution through a mutual agreement procedure would impose on dual resident entities. Indeed, although Australia and New Zealand both chose to include this provision of the MLI, branch reports from these jurisdictions note that the prevalence of entities that are resident in both jurisdictions led to an administrative agreement between the revenue authorities in these countries to allow dual resident entities to self-determine their place of effective management for treaty purposes, provided that various criteria are satisfied (relating to legal form, income, the value of intangible assets and compliance history). As with article 3, branch reports from jurisdictions that have adopted article 4 indicate that this approach is consistent with many of their tax treaties, and more likely than established tie-breaker rules based on place of effective management or incorporation to prevent manipulation.

Although branch reports had less to say about choices regarding article 5 of the MLI, jurisdictions selecting Option A and exercising the right under article 5(9) of the MLI not to permit the other contracting jurisdiction to apply Option C, take the position that replacement of the exemption method of eliminating double taxation by the credit method was a major change that should be subject to bilateral negotiation, not modification through the MLI. Among jurisdictions that reserved the right under article 5(8) for the entirety of article 5 not to apply to their CTAs, the main reason appears to be that opportunities for abuse are limited since most treaties entered into by the jurisdiction already apply the credit method of eliminating double taxation. In contrast, Denmark and Portugal have chosen Option C

in order to align all their tax treaties with the most recent version of the OECD Model Tax Convention,[37] or chosen not to adopt any option but to allow other contracting jurisdictions to apply their chosen option to their own residents by not reserving the right for the entirety of article 5 not to apply to their CTAs.

1.2.3.3. *Specific treaty abuses*

Turning to the specific treaty abuses addressed by articles 8 to 11 of the MLI, 42 jurisdictions (45% of signatories) have opted to apply the rules for dividend transfer transactions in article 8, 54 jurisdictions (57% of signatories) have chosen to adopt either the substituted property rule or the look-back rule in article 9, 25 jurisdictions (27% of signatories) have opted to apply the rule for triangular permanent establishments in article 10, and 25 jurisdictions (27% of signatories) have chosen to adopt the saving clause in article 11. On this basis, according to the OECD report, article 8 will modify 180 tax treaties, article 9 will modify 350 treaties, article 10 will modify 138 treaties, and article 11 will modify 137 treaties.

For jurisdictions such as Austria and the United Kingdom which chose not to adopt the 365-day holding period for the reduced withholding tax rate for dividends in article 8 of the MLI, branch reports suggest that the main reasons are that the rule could deny treaty benefits in circumstances that are not abusive, that domestic anti-avoidance rules or the PPT should be adequate to address abusive transactions, and that the addition of this holding period so some treaties and not others could lead to unintended tax planning strategies. Other reasons identified in other branch reports include the rejection of any limitation on the source taxation of dividends (Chile), or the fact that dividends are either subject to withholding tax at a single rate (Argentina) or exempt from source taxation altogether (United Kingdom).[38] Among jurisdictions adopting this provision, the main reasons are to prevent abusive transactions and to standardize the rules adopted in different tax treaties. Notably, Canada and Denmark have opted to apply article 8 notwithstanding the absence of domestic legislation providing for a minimum holding period, which will presumably have to be enacted for the provision to have any practical effect.

Among jurisdictions not opting to apply the substituted property and look-back rules in article 9 of the MLI, branch reports indicate that one reason is the view that arrangements that may be caught by this rule are not necessarily abusive and that abusive arrangements can be addressed by domestic anti-avoidance rules and the PPT. Another reason is that the provision has no relevance to the jurisdiction because gains from the alienation by non-residents of shares or other interests in entities deriving their value primarily from immovable property are not subject to domestic tax. In contrast, several jurisdictions have chosen to adopt the substituted property rule and/or the look-back rule notwithstanding the absence of domestic legislation, which will have to be adopted before article 9 can have any practical effect.

As with articles 8 and 9 of the MLI, jurisdictions like Belgium, France and Switzerland that have chosen not to adopt the anti-avoidance rule for triangular permanent establishments in article 10, take the position that these arrangements are not necessarily abusive and can be addressed by domestic anti-avoidance rules and the PPT. In contrast, branch reports from Australia and Norway indicate that their jurisdictions consider this provision unnecessary

[37] See, e.g., the branch reports from Denmark and Portugal.

[38] Interestingly, however, India and Peru both chose to adopt art. 8 notwithstanding that the former does not levy withholding tax on dividends and the latter levies withholding tax at a single 5% rate.

because their treaties generally adopt the credit method for eliminating double taxation. In contrast, even if their treaties generally use the credit method, the branch report from the Netherlands states that this jurisdictions has opted to apply article 10 on the basis that it is fair to countries that give up their taxing rights on the assumption that income will be taxed in the other contracting state.

As noted earlier, saving clauses appear to have originated in US tax treaties in order to ensure that treaty benefits do not accrue to US citizens who are treaty residents in other countries. As a result, although Belgium has opted to apply the saving clause in article 11 in order to ensure that their CFC rules are compatible with treaty obligations, branch reports from France, Germany and the Netherlands report that their jurisdictions consider this provision unnecessary. The Japanese branch report adds that Japan reserved its right for this provision not to apply on the grounds that the complexity of coordinating with other jurisdictions to determine which provisions should be excluded from a saving clause, made this provision more suitable for bilateral negotiation.

1.2.3.4. Permanent establishment status

Provisions addressing the avoidance of permanent establishment status have been adopted by roughly half of signatories to the MLI, with 46 jurisdictions (49% of signatories) opting to apply the revised rules in article 12 to counteract commissionaire arrangements and similar strategies, 56 jurisdictions (60% of signatories) choosing to adopt one of the options in article 13 relating to the specific activity exceptions, and 30 jurisdictions (32% of signatories) opting to apply the anti-avoidance rule in article 14 to address the splitting up of contracts for a building site or construction or installation project. According to the OECD report, 309 tax treaties will include the revised rules in article 12, 350 treaties will include Option A or B in article 13, 516 treaties will include the anti-fragmentation rule in article 13(4) and 153 treaties will include the anti-avoidance rule in article 14.

Among jurisdictions not adopting the rules for commissionaire arrangements and similar strategies in article 12, branch reports suggest that the main reason is that the provision does not specifically addresses abusive arrangements but instead shifts taxing rights from residence jurisdictions to source jurisdictions. Other jurisdictions take the position that domestic anti-avoidance doctrines or rules are sufficient to address abusive arrangements. In contrast, France regards these arrangements as abusive and not readily amenable to domestic anti-avoidance provisions and many developing countries undoubtedly regard a shift toward greater source taxing rights as a welcome improvement.

Branch reports have less to say about the choices that jurisdictions have made regarding the specific activity exemptions in article 13, except to note that the choices between Option A or B confirm long-standing approaches to the interpretation of article 5(4) of the OECD Model Tax Convention. While Japan and the Netherlands regard Option A to be a useful revision to address problematic cases or the challenges of the digital economy, jurisdictions such as France and Luxembourg which have chosen Option B do not consider it abusive for an activity to qualify for an exemption without also being of a preparatory or auxiliary character and add that the addition of this qualification for each activity would create unnecessary uncertainty.

Finally, branch reports from Austria, Belgium, Germany, Japan, Liechtenstein and Sweden indicate that these jurisdictions decided not to adopt the anti-avoidance rule in article 14 on the grounds that this provision could apply to legitimate business arrangements, and that abusive transactions could be addressed by domestic anti avoidance doctrines or rules or by

the PPT. In contrast, as with article 12 of the MLI, this provision has been adopted by many developing countries, presumably because it may not only address abusive arrangements but may also expand source taxing rights.

1.2.3.5. *Dispute resolution*

Although virtually all tax treaties concluded before the BEPS project commenced, already included provisions for a mutual agreement procedure, all jurisdictions signing the MLI are required to adopt the minimum standards in article 16. As a result, it follows that all 1,640 CTAs will either already include these minimum standards or be modified to do so. According to the OECD report, two-thirds of signatories have chosen to adopt the first sentence of article 16(1) allowing a taxpayer to present a case to the competent authority of either jurisdiction, as a result of which approximately 600 treaties will include this modification. Other jurisdictions such as Chile, Germany, Italy and Singapore, have reserved their right for this sentence not to apply to their CTAs and will satisfy the minimum standard through a bilateral notification or consultation process.

Most tax treaties concluded before the BEPS project commenced, also included provisions for corresponding adjustments consistent with article 17 of the MLI. As a result, although more than half of all signatories have opted to apply this provision in article 17 in order to modify older treaties that do not include this provision, the OECD reports that only 470 treaties will be modified by this provision.

In contrast to provisions for a MAP and corresponding adjustments, relatively few tax treaties concluded before the BEPS project commenced, included provisions for mandatory arbitration. Nonetheless, the OECD reports that only 30 jurisdictions have opted to apply the arbitration provisions in Part VI of the MLI and that these provisions will modify only 211 treaties. Most of the MLI signatories have chosen the "final offer" approach, while eight jurisdictions have chosen the "independent opinion approach".

Motivations for choosing (or not) arbitration are quite diverse, as evidenced by the branch reports. Countries which have opted in to the arbitration provisions may have done so because they had committed to arbitration in an EU-context anyway and felt that they had to be consistent at a broader level (with the notable exception of Poland which followed an exactly opposite reasoning and considered that since most of its treaty partners are EU members, there is no reason to go for arbitration beyond the EU). They may also have done so because their treaty policy had changed already, even before the MLI was signed. Other jurisdictions like Denmark and New Zealand note that arbitration can encourage speedy resolution of mutual agreement procedures by the competent authorities, which may be particularly important given the PPT and other anti-avoidance rules in the MLI.

Among countries that have opted out of arbitration, there is a great variety of motivations ranging from the reluctance towards giving up a bit of national sovereignty to the lack of financial and human resources to handle arbitration procedures. The US report also contains an interesting statement in this respect, namely that the US Treasury Department was concerned that the MLI's arbitration provision gave signatory countries excessive discretion to narrow the scope of arbitration in contravention of US treaty policy. This shows that opting out (or not signing, in the case of the US) does not necessarily mean that arbitration is rejected in principle. The Norwegian report also provides an example of a country that has recently renegotiated a few treaties in order to include arbitration but takes the view that the design of arbitration in the MLI does not suit its policy and prefers to include arbitration provisions

through bilateral negotiations. The South African report also explains that arbitration has not been chosen in the MLI because South Africa first wishes to test arbitration at the regional level “before moving to the global stage”. These indications tend to show that a statistical approach to the number of countries that have opted for arbitration should be used with caution and that arbitration may become more widespread in the next years.

1.3. Indirect impact of the BEPS Actions and the MLI

In addition to the direct impact of the BEPS project on the tax treaty network through provisions of CTAs that are modified by the MLI, the BEPS project has also had an impact on the tax treaty network though revisions to tax treaties that have been concluded in light of the BEPS project, even though these treaties are not subject to the MLI. Indeed, many branch reports observe that treaties concluded after the BEPS project commenced, include provisions implementing the minimum standards on treaty abuse and dispute resolution, as well as several other provisions included in the MLI and incorporated into the 2017 OECD Model Tax Convention. This impact is confirmed by a review by the OECD of 465 bilateral instruments among 154 jurisdictions concluded since the BEPS project commenced, which reports that most treaties concluded after 2018 include the minimum standards, but that relatively few include other provisions addressing hybrid mismatches, specific treaty abuses, the avoidance of permanent establishment status and arbitration.[39]

Notwithstanding these statistics, several branch reports also note that bilateral tax treaties negotiated since the MLI was signed, often include provisions which the jurisdiction opted not to apply in the context of the MLI. In addition, branch reports from jurisdictions that did not sign the MLI indicate that treaties concluded after the MLI was signed, are likely to include the minimum standards as well as other provisions included in the MLI. Indeed, the US branch report notes that the 2016 US Model Tax Convention includes several MLI provisions, including the revised preamble language in article 6(1) of the MLI, a 365-day ownership requirement for the reduced withholding tax rate on dividends paid to a parent company, a rule to prevent the avoidance of permanent establishment status by splitting up contracts for a building site or construction or installation projects, and rules to improve dispute resolution through mandatory binding arbitration. In addition, it is notable that several jurisdictions that reserved the right for provisions of the MLI not to apply to their CTAs, have not entered reservations regarding corresponding provisions in the 2017 OECD Model Tax Convention, suggesting that these provisions may be included in bilateral treaties negotiated subsequent to the MLI.

[39] See the OECD report, reporting that only 58 tax treaties included the rule for hybrid entities in art. 3 of the MLI, only 91 included the rule for dual resident entities in art. 4 of the MLI, only 54 included the minimum shareholding period in art. 8 of the MLI, only 50 included the substituted property rule in art. 9 of the MLI, only 19 included the anti-avoidance rule for triangular permanent establishments in art. 10 of the MLI, only 45 included the revised language for dependent agent permanent establishments in art. 12 of the MLI, only 52 included revised rules for the specific activity exemptions consistent with art. 13 of the MLI, and only 83 included arbitration provisions.

Part Two: Practical Implementation of Provisions of the MLI

The second part of the guidelines sent to branch reporters focused on the actual steps taken by states in order to implement the MLI and asked them to examine to what extent the MLI has indeed changed, or will change, the “law in action”. It also requested reporters from countries which are not signatories of the MLI, to provide some input on the way the BEPS Action Plan impacts tax treaty interpretation and tax planning.

In this part of our general report, we therefore start with a synthesis of the most interesting findings relating to the implementation procedures followed in the countries which signed the MLI. We then describe some interpretation issues relating to the MLI and the covered tax agreements, as well as interpretation issues relating to other tax treaties. A third chapter is about the impact of the BEPS Action Plan on tax planning.

2.1. Procedural aspects

2.1.1. Ratification process

A vast majority of signatory states has implemented (or in the process of implementing) the MLI through a ratification procedure in parliament. Depending on the constitutional structure of the state and on the monist or dualist approach to the relationship between treaties and domestic law, the ratification process may entail submitting the text of the MLI to the constitutional court, to a special finance committee in parliament, to the Council of State, or even to the Chamber of Commerce (Portugal). Only in rare cases has parliament not been required to vote (e.g. New Zealand, where a parliamentary committee has nevertheless been consulted) or has it delegated its authority to the government (e.g. Singapore). In federal states, complexity may reach its climax: the Belgian report notes that because the MLI affects the taxing powers of the federal government and also touches upon the regions and communities’ competences, it had to be ratified by six parliaments.

It is worth mentioning that most countries seem to have focused their attention on the MLI itself, without requiring parliament to vote on the covered tax agreements impacted by the MLI. A notable exception is in Germany, where the ratification of the MLI through a parliamentary procedure was not considered sufficient. There will also be separate legal instruments to ratify the implementation of changes brought to covered tax agreements.

Although the degree of scrutiny exercised by the domestic legislator on the MLI is high from a formal perspective, it is striking to observe that in most countries, it has proved to be very low in substance. Sometimes it is clearly stated by branch reporters that no budgetary and economic assessment of the impact of the MLI has been conducted (e.g. Mexico). In some countries, the impact assessment (if any) relies on very general views regarding the overall structure of the economy. For instance, a cabinet paper in New Zealand has stated that “data limitations prevent officials from accurately estimating the actual impact on net tax revenue. However, as New Zealand is a capital importer and the MLI covers the majority of New Zealand’s double taxation agreements network, it is expected that overall impact on tax revenue will be positive”. In most countries, there seems to have been no genuine effort to inquire about the actual effect of the MLI. Branch reporters repeatedly state that parliament has simply been convinced by the need to fight base erosion and profit shifting, aggressive tax planning, tax evasion, etc. This explains why in most countries, little or no change has been

suggested to the MLI clauses chosen by the department of Finance at the time of signature. Debates in national parliaments have generally been quite short.

Little criticism has been voiced about this. The South African report has however clearly pointed out that most of the questions raised by the MLI in terms of financial impact and administrative practicability have received no answer during the parliamentary process. Along the same line, it is worth mentioning that a statement issued by the French Court of Accounts on 31 May 2019 (Référé S 2019-1421) has observed that the discrepancy between the scarcity of the quantitative analysis and of the human resources invested by the tax authorities during the ratification process are in sharp contrast with the financial amounts at stake, in particular for a country such as France which is a residence state for many multinational companies. This official report goes as far as concluding: "without neglecting the difficulties of such an analysis, the Court thinks that moving forward without a robust assessment of the economic impact of negotiations, hence almost blindly, is likely to harm the defence of our interests". This strong statement may be completed by the South African report's conclusion regarding these issues: "The experience with the MLI in South Africa's parliament illustrates some weaknesses in the work of the OECD and the Inclusive Framework about implementation of the BEPS project. It can be questioned if enough attention was given, during the design of the MLI, to the difficulty that national parliaments may face in domesticating an extremely complex legal instrument. The need to ensure legitimacy of the BEPS Package in the eyes of lawmakers beyond OECD member countries has been an Achilles heel of the implementation project, since national lawmakers are beyond the reach of the peer review mechanism and it can't be expected that they only nominally consider proposals for hard-law implementation".

2.1.2. Publication of synthetized texts of covered tax agreements

Many countries have considered or started publishing synthetized texts of covered tax agreements as modified by the MLI, following the guidelines provided by the OECD in the Guidance for the development of synthetized texts (November 2018) where the original text of the MLI is reproduced in boxes which are inserted after the relevant provisions of the covered tax agreement. Branch reporters from such countries all insist on the idea that the publication of synthetized texts is not a legal obligation stemming from the MLI, which is in line with the Guidance (§ 2.1, at 4) and with the Explanatory Statement on the MLI; the development of synthetized texts therefore takes place for "educational purposes" (Australian report) or as a "matter of courtesy" (Austrian report).

Consistent with the idea that synthetized texts are optional, they do not have a legal value of their own. This unanimous statement by branch reporters is in line with the Guidance (§ 2.1.4, at 19). Accordingly, the prevailing view is that whenever a conflict appears between the content of the synthetized text and the content of the tax treaty as modified by the MLI, the latter prevails and the taxpayer cannot argue that he could legitimately rely on the content of the synthetized text. Branch reports generally do not bother about this finding but in some countries, the question of the legal protection granted to the taxpayer in this situation has explicitly been raised. This is the case in France, where published administrative guidelines may, under certain conditions, be opposed to the tax authorities even where they contradict the content of the law or of the treaty (but one may wonder whether a synthetized text is a form of administrative guideline). The Norwegian and Argentinian reports also raise the question to what extent a taxpayer who has in good faith complied with the synthetized

version, or who committed an excusable mistake, should not deserve legal protection. It should be observed, though, that synthetized versions generally provide in an explicit manner that the original text of the covered tax agreement prevails, in which case there is no possibility for a taxpayer to develop such an argument based on good faith.

The practice described in branch reports shows that the development of synthetized versions of covered tax agreements by signatories of the MLI does not always take place in a fully coordinated way. In many cases, synthetized versions are prepared in cooperation with treaty partners in order to make sure that both states share a common understanding of how the MLI interacts with the covered tax agreement. This is in line with the advice provided by the OECD. However, there are also examples of countries which prepare synthetized versions without consulting with the treaty partner (or even countries which consult with some treaty partners but not with others). The outcome is inevitable: the versions published in parallel do not necessarily coincide. The Indian report provides for several interesting examples of such differences in the synthetized versions published by India on the one hand, and by Japan, Singapore and the United Kingdom on the other.

Few countries seem to have considered going further than just publishing a synthetized version of covered tax agreements and develop a truly consolidated version of these agreements, where the results of the MLI modifications are directly inserted in the text of the treaty. Austria had favoured this approach but abandoned it because the MLI ad hoc group selected the technique of synthetized texts and because it might have caused constitutional problems with respect to the principle of legality. A legal issue relating to consolidation has also been raised in Liechtenstein where the legal provisions published in the official gazette must be shown in a consolidated fashion. This obligation has however not been found to be applicable because, “after intense internal debates” (in the branch reporter’s words), the tax authorities took the view that the provisions of the MLI do not have a similar effect on a CTA as a revision protocol, which entails that the MLI and the bilateral covered tax agreements will have to be read in parallel to each other and that no consolidation can take place. Interestingly, an opposite result has been reached in Switzerland, where it is also compulsory to publish consolidated texts of tax treaties. As Switzerland is of the opinion that the MLI changes the content of the covered tax agreements and does not simply coexist with them, the Swiss authorities consider that there is an obligation to publish a consolidated version of the treaty and has included in its list of covered tax agreements only those which were concluded with a contracting state which shares the “amending view” rather than the “coexisting view” promoted by the OECD.

Lastly, one may observe that some countries seem to have developed an intermediate practice (somewhere between “synthesis” and “consolidation”). This is the case in France, where the tax authorities have published new versions of some covered tax agreements which do not exactly follow the practice recommended by the OECD (in the sense that there is an effort to present the articles of the treaties as they appear after their modification by the MLI) although they do not consist in truly consolidated versions of the covered tax agreements.

2.2. Interpretation issues relating to the MLI and the covered tax agreements

An obvious problem raised by the MLI is its idiom, which does not necessarily correspond to the language of covered tax agreements. According to the final clause of the MLI, its authentic languages are English and French. Accordingly, the Explanatory Statement (§ 317) states that

where questions of interpretation arise in relation to Covered Tax Agreements concluded in other languages or in relation to translations of the Convention into other languages, it may be necessary to refer back to the English or French authentic texts of the Convention.

For some countries, such as Japan, this is not really an issue because most treaties provide that the English text shall prevail in case of divergence of interpretation between the authentic versions of the treaty. However, several reports point out the inevitable character of semantic uncertainties which will stem from the fact that a multilateral treaty with two authentic languages modifies bilateral treaties with other authentic languages. An additional practical problem is likely to appear when the MLI is submitted to parliament in a linguistic version which is that of the country at stake and published in that version (see for instance the Mexican report). However, considering that 83.92% of treaties in the global treaty network have English as the language of at least one of their texts, 7.68% have French, the proportion of treaties with neither English or French as an authentic language is 8.40%.[40] The language problem should not be overestimated.

The main questions relating to treaty interpretation after the MLI and the BEPS Action Plan are mostly related to substantive issues. According to article 2.2. of the MLI, "as regards the application of this Convention at any time by a Party, any term not defined herein shall, unless the context otherwise requires, have the meaning that it has at that time under the relevant Covered Tax Agreement". This rule only deals with one dimension of the interpretation issue raised by the MLI, i.e. its semantic dimension. However, interpretation issues raised by the MLI and its interaction with covered tax agreements are far more complex for numerous reasons which pertain to the hybrid nature of the MLI and to the indirect effect which it may have on agreements other than covered tax agreements. The branch reporters have therefore been requested to answer many questions in order to clarify how the MLI impacts tax treaty interpretation in general.

2.2.1. *The object of interpretation: MLI, CTAs, domestic law implementing the MLI?*

It is particularly difficult to present the interpretative issues raised by the MLI in systematic terms (i.e. in terms which are equally valid regardless of the jurisdiction which implements the MLI). This is because the interaction between (i) tax treaties and domestic legislation and (ii) the MLI and covered tax agreements varies according to the legal system of each country and to the interpretation which each country adopts regarding the legal effect of the MLI. Branch reports reveal an enormous diversity in this respect. Even the traditional distinction between monist and dualist countries is blurred by the descriptions found in national reports which reveal that there seems to be some kind of continuum between the two theories, or, to say the least, that the concepts of "monism" and "dualism" are subject to significant variations worldwide.

As to the question whether interpretation issues bear on the MLI itself or on the legal instrument which implements the MLI, most branch reports simply do not address it. Some reports however clarify that the interpretation process of the MLI is to be distinguished from the interpretation process of the domestic legislation which implements it. The German report points out, for instance, that "as an international convention, the MLI has to be interpreted in line with the Vienna Convention on the Law of Treaties (...). However, it

[40] Figures provided by R. X. Resch, The OECD BEPS Multilateral Instrument and the Issue of Language, Intertax, vol. 47, Issue 6 & 7, 2019, p. 563 et seq., p. 565.

should be noted that the two-step approach implies that for tax treaty cases, the MLI itself will generally not be interpreted directly. Instead, it is the domestic law modifying the treaty that needs to be interpreted. The MLI can then become relevant as the context for that law". This analysis goes together with the German approach described above, which considers that every covered tax agreement modified by the MLI must be subject to parliamentary scrutiny.

Although every country has its own way of describing the *object* of interpretation, all countries face the same problem at the end of the day: distinguishing between the "operative" mechanism of the MLI and its "substantive" effect on covered tax agreements. This distinction derives from the hybrid nature of the MLI itself.

2.2.2. The MLI as a hybrid instrument

As indicated in the Explanatory Statement to the MLI (§ 12), the MLI aims at implementing the BEPS measures through a single instrument which modifies covered tax agreements. The MLI is therefore a hybrid instrument: it modifies other treaties and contains provisions of substantive tax law. The interpretation methods used to understand the MLI must reflect this dual nature.

Insofar as the MLI is a tool which modifies existing bilateral treaties, it lays down a complex mechanism through which it does not amend earlier treaties but rather applies "alongside existing tax treaties, modifying their application in order to implement BEPS measures" (Explanatory Statement, § 13). We have seen above that not all countries share this analysis. However, a majority of countries seems to endorse this approach to the relationship between the MLI and the covered tax agreements. Accordingly, these countries should logically follow the interpretation guidelines provided by the explanatory statement which makes a clear distinction between the mechanics of the MLI and its substantive provisions: "while this Explanatory Statement is intended to clarify the *operation of the Conventio*n to modify Covered Tax Agreements, it is *not intended to address the interpretation of the underlying BEPS measures* (except with respect to the mandatory binding arbitration provision contained in Articles 18 through 26)" (§ 12).

One might think that problems of interpretation relating to the operative nature of the MLI will be rare in practice, but the drafting of synthetized versions has already revealed ambiguities about the way in which the MLI actually modifies the covered tax agreements. An example may be found in the Japanese report (footnote 32) which has identified an issue relating to the synthetized version of the treaty between Japan and New Zealand in which a paragraph of article 13 relating to capital gains on real estate companies has been improperly (according to the branch reporter) replaced by paragraph 4 of article 9 of the MLI.

There are also cases in which the implementation of the operative mechanism of the MLI may reveal issues regarding the interpretation of the underlying covered tax agreement. The Indian reporter notes, for instance, that Norway has reserved the right for the entirety of article 17 not to apply as it believes that its covered tax agreement with India already contains the provision for the corresponding adjustment as described in that article. However, the Indian reporter takes the view that a closer look at article 9(2) of the covered tax agreement reveals that the other state "may make an appropriate adjustment" while article 17(1) requires such adjustment to be mandatorily made. The Explanatory Statement states that such a provision which gives discretion to a contracting state to make the adjustment cannot be reserved, which drives the Indian reporter to consider that the reservation made by Norway seems to rely on a wrong interpretation of the covered tax agreement with India.

It is very likely that many other questions relating to the interpretation of the MLI will arise as countries complete its implementation process and develop synthetized versions of their covered tax agreements with their treaty partners. It is therefore important to assess to what extent they may legally rely on the Explanatory Statement (regarding the operative mechanism of the MLI) and on the BEPS reports themselves (regarding the substance of the measures introduced in the covered tax agreements).

2.2.3. The legal status of the Explanatory Statement

All national reports state that the Explanatory Statement should be taken into account in order to analyse the mechanism by which covered tax agreements are being modified by the MLI. The Explanatory Statement states that it "reflects the agreed understanding of the negotiators with respect to the Convention" (Explanatory Statement, § 11). It goes on by saying that "accordingly, the provisions contained in Articles 3 through 17 should be interpreted in accordance with the ordinary principle of treaty interpretation, which is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose" (id.). This is a transparent reference to article 31(1) of the Vienna Convention on the Law of Treaties.

It is however difficult to ascertain whether the Explanatory Note should really be considered as an element of "context" under article 31. Let us recall that article 31(2) defines the concept of "context" for the purpose of interpretation of a treaty and states that it shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. In our view, the Explanatory Note does not seem to fall within the scope of § 2 (a) because a document prepared by the participants in the ad hoc Group, and in the Sub-Group on Arbitration may not be considered as an "agreement relating to the treaty", even though it has been adopted at the same time as the text of the Convention. It does probably not fall within the scope of § 2 (b) either because it is doubtful whether it has been "accepted by the other parties as an instrument related to the treaty".

However, even if the Explanatory Statement is not considered as an element of "context" under article 31(2), it should certainly be considered as a "supplementary means of interpretation" (under article 32(a)) which may be used to determine the meaning of the MLI when the interpretation according to article 31 leaves the meaning ambiguous or obscure. The idea that the Explanatory Statement falls within the scope of article 32 is expressed in some national reports (e.g. Russia). The Swiss report takes a different view and states that there are "good reasons to support the view that the Explanatory Statement is not just a supplementary means of interpretation, but part of the context within the meaning of article 31(1) Vienna Convention. The statement constitutes an essential part as it was written alongside the specific treaty (and not just in relation to a treaty model), which makes the link to the MLI closer than the one between the OECD Model convention and a double tax convention".

Whatever analysis prevails, it is clear that the Explanatory Statement is not a binding instrument of its own but rather a source of inspiration in order to interpret the operative provisions of the MLI. The same can be said about the note of the OECD Directorate on Legal Affairs titled "Multilateral Convention to Implement Tax Treaty Related Measures to

Prevent Base Erosion and Profit Shifting: Functioning under Public International Law" which is, according to its first paragraph, to be read "in conjunction with the Explanatory Statement to the MLI".

An exception to this reasoning may however be made in the very specific case of a country which has submitted the Explanatory Statement to a parliamentary vote during the ratification process of the MLI. This has happened in Belgium, where the bill of consent (i.e. the bill ratifying the MLI) specifically states that both the MLI and the Explanatory Note shall come into full force and effect. The Explanatory Note has therefore acquired the status of "hard law" in this country.

2.2.4. *The legal status of BEPS reports*

Since the Explanatory Statement is not intended to address the interpretation of the BEPS measures enshrined in the MLI (except with respect to the mandatory binding arbitration provision contained in articles 18 through 26), the question arises whether the BEPS reports published by the OECD during the process which has led to the signature of the MLI, may be taken into account for the purpose of interpreting the MLI.

The Explanatory Statement takes a position in this respect by making an implicit reference to article 31(1) of the Vienna Convention on the Law of Treaties. Paragraph 12 of the Explanatory Statement states that "the object and purpose of the Convention [i.e. the MLI] is to implement the tax treaty-related BEPS measures. The commentary that was developed during the course of the BEPS Project and reflected in the Final BEPS Package has particular relevance in this regard. It should be noted that while in some cases (…), the provisions of the Convention differ in form from the model provisions that were produced through the BEPS Project, unless noted otherwise, these modifications are not intended to make substantive changes to those provisions. Instead, they are intended to implement the agreed BEPS measures in the context of a multilateral instrument that applies to a widely varied network of existing treaties".

The development of the BEPS Action Plan is certainly essential in order to understand "the object and purpose" of the MLI according to article 31.1. of the Vienna Convention on the Law of Treaties. This statement is not incompatible with the idea that the actual content of the final BEPS reports is also to be taken into account as "supplementary means of interpretation" to which recourse may be had, according to article 32, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure.

Several branch reports endorse this analysis (e.g. India, Mexico, Japan, Portugal, South-Africa). Even some non-OECD reporters share the view that some legal value should be attributed to the OECD BEPS reports because their countries belong to the inclusive framework or to the G20 and have, in that capacity, actively contributed to the development of the BEPS Action Plan. The Chinese report, for example, presents the pros and cons of the debate on this issue and stresses that it could seem "unreasonable" for China not to give value to the outcomes of the BEPS Action Plan when interpreting the MLI. The Chinese reporter however calls for further clarification from the tax authorities in this respect.

Although the BEPS reports can certainly not be ignored, they may not always be considered relevant for the purpose of interpreting covered tax agreements. The Australian report interestingly points out that while the BEPS final reports are likely article 32 material under the Vienna Convention, they are "broad and not necessarily focused on the text of the

MLI and are not directly related at all to any specific Covered Tax Agreement (...). As such, the usefulness of the BEPS Reports in determining the meaning of any particular article of a Covered Tax Agreement is uncertain". The Liechtenstein report also notes that "as these reports were published earlier than the MLI negotiations took place, it remains to be seen how much weight will be given by the courts to content which was not incorporated into the MLI, its Explanatory Statement or into the OECD Model Convention 2017 and its commentary".

Along the same line, one may note that even though BEPS reports may be considered as "supplementary means of interpretation" within the meaning of article 32, their convincing value is often considered lower than that of OECD Commentaries on the Model Convention because they may be less accurate than the wording of the articles of tax treaties. Besides, as the Japanese and Swedish report rightly point out, there is an important difference between the OECD Commentary on the Model Convention and BEPS reports: the former is a consensus document which may be subject to reservations and observations (in the absence of which it may be assumed that a jurisdiction adheres to the content of the commentary), which is not the case of the latter. It may however only be a question of time, as the Mexican reporter notes, before case law recognises that final BEPS reports carry the same weight as OECD Commentaries where they provide for a clear-cut explanation of the provisions of the covered tax agreements, as modified by the MLI. Besides, some elements in the BEPS reports have been incorporated into the 2017 Commentary: as far as they are concerned, the debate on the status of BEPS reports as such for tax treaty interpretation may become partially irrelevant.

2.2.5. The "ex-post" interpretation of covered tax agreements

Branch reporters have been asked whether the modification (or the absence of modification) of an existing tax treaty by the MLI could impact the interpretation of that treaty in its "pre-MLI" version. A few reports answer that retroactivity of treaties (in this case, of the MLI) is forbidden by article 28 of the Vienna Convention on the Law of Treaties. In dualist countries, the same outcome may be reached by virtue of the non-retroactivity principle enshrined in the constitution. A deeper analysis of the problem however reveals a more complex legal reality, as the following examples will show.

The question first arises whether some provisions of the MLI could be regarded as having a declaratory or clarifying nature, particularly in areas where the tax treaty interpretation according to the Commentaries of the OECD offered already this interpretation. Along this line, the Austrian report suggests that the wording of the preamble suggested by article 6(1) of the MLI (which clarifies that treaties do not intend to create "opportunities for non-taxation or reduced taxation through tax evasion or avoidance") does not innovate with respect to the aims of the Model Convention before the update of 2017.[41] The Austrian tax authorities take the view that this conclusion could be drawn from the Commentary on article 1 OECD Model Convention 2014 which allows states to disregard abusive transactions such as those entered into with the view to obtaining unintended benefits under the provisions of these conventions. A similar reasoning may be found in the Indian and Singapore reports. It should be noted, though, that this "retrospective" interpretation of tax treaties may only take place in countries that follow the "guiding principle", which is not always the case (see for instance the

[41] The Austrian reporter also points out that a similar result could be achieved with regard to the application of art. 12 MLI concerning artificial avoidance of permanent establishment status through commissionaire arrangements and similar strategies.

caselaw quoted in the Japanese report). It is also worth stressing that any kind of retrospective interpretation is likely to harm the taxpayer's legitimate expectations and should therefore be subject to very strict conditions.

Another case in which the implementation of the MLI may help interpreting a treaty prior to its modification arises where a state opts for a mechanism provided by the MLI which is believed to confirm the existing content of the tax treaty or reserves a provision of the MLI, based on the idea that the covered tax agreement already contained a similar one.

The Belgian report illustrates the first situation with respect to article 13 of the MLI on "Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions", which offers a choice between two options regarding the conditions required to enjoy the specific activity exemption. Belgium has opted in favour of Option B, which preserves the exceptions for activities described in article 5(4)(a) through (d) of the Covered Tax Agreement, irrespective of whether the activity is of a preparatory or auxiliary character. The Belgian government stated that this confirms its current interpretation of article 5(4) of the OECD Model Convention as it read until 2014. Beyond Belgium, § 169 of the Explanatory Statement recalls that « some States consider that some of the activities referred to in Article 5(4) of the 2014 version of the OECD Model Tax Convention are intrinsically preparatory or auxiliary and, in order to provide greater certainty for both tax administrations and taxpayers, take the view that these activities should not be subject to the condition that they be of a preparatory or auxiliary character, and that concern about inappropriate use of the specific activity exemptions can be addressed through anti-fragmentation rules".

Another similar example (albeit more complex) may be found in the Indian report commenting on the choice made by India of Option C in article 5(6) of the MLI (implementation of the credit method to eliminate double taxation in a contracting jurisdiction, except to the extent that the provisions of the covered tax agreement allow taxation by that other contracting jurisdiction solely because the income is also income derived by a resident of that other contracting jurisdiction). The Indian reporter observes that "India opted for Option C in article 5 but has not notified the CTA provisions where it follows the credit method for relieving double taxation of its residents. Arguably, it could be the understanding of the Indian tax authorities that the additional words inserted in that provision by article 5(6) (relieving India of the obligation to give credit for taxes imposed by the other state solely to tax its residents) are merely clarificatory and should apply to all treaties". This case is particularly interesting because it suggests that the content of *non-notified* covered tax agreements could be interpreted by reference to the option chosen by the contracting jurisdiction.

As far as the second situation is concerned (i.e. a situation where a reservation made by a contracting jurisdiction may reveal the interpretation of the covered tax agreement prior to the MLI), complex issues are also likely to arise in practice because a reservation may be explained in many ways: it may stem from the idea that the existing treaty needs no modification (in which case the reservation actually reveals the interpretation of that treaty); it may also rely on policy choices, such as a preference to implement BEPS measures through bilateral agreements rather than through the MLI itself. Therefore, a reservation on a provision cannot be systematically understood as an indirect means of interpretation. In order to understand the proper meaning of a reservation, it is necessary to refer both to the MLI and to the way reservations have been justified by the parties to the MLI. The MLI itself provides some tools in this respect. For instance, article 6 ("Purpose of a Covered Tax Agreement") explicitly states that "A Party may reserve the right for paragraph 1 [*new wording of treaty preamble*] not to apply to its Covered Tax Agreements that already contain preamble language describing the intent of the Contracting Jurisdictions to eliminate double

taxation without creating opportunities for non-taxation or reduced taxation, whether that language is limited to cases of tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the Covered Tax Agreement for the indirect benefit of residents of third jurisdictions) or applies more broadly".

One might wonder to what extent these interpretation techniques may be reconciled with article 31.3 of the Vienna Convention which provides that "there shall be taken into account, together with the context : (a) any subsequent agreement between the parties regarding the interpretation of the treaty of the application of its provisions ; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties". In our view, this provision of the Vienna Convention does not apply in the situation where the content of a covered tax agreement is interpreted in light of later in time reservations or options because the latter are adopted in a unilateral way by the parties to the MLI and cannot be regarded as revealing any kind of bilateral agreement between the contracting jurisdictions of a covered tax agreement.

In conclusion, an "ex-post" interpretation of covered tax agreements is not always excluded from a legal perspective but should be handled very carefully.

2.3. Interpretation issues relating to other tax treaties

May the MLI and the Explanatory Statement have an impact on the interpretation of tax treaties which are not covered tax agreements? From a technical perspective, the answer is of course negative because only covered tax agreements are modified by the MLI.

However, it is likely that in practice, many bilateral treaties concluded by signatories to the MLI which are not covered tax agreements will undergo a "BEPS interpretative shift", simply because the BEPS Action Plan will serve as a general matrix for tax treaty interpretation. Administrative practice in some countries shows that BEPS reports start being referred to in tax audits involving the interpretation of tax treaties prior to their modifications by the MLI (see the Mexican and Chilean reports). The German report also notes that even though the MLI has no legal implications when a tax treaty is not a covered tax agreement, it may have factual implications as the judiciary may pursue a uniform interpretation of double taxation treaties even where the context is technically different.

One may equally predict that bilateral tax treaties concluded after the presentation of the final BEPS reports, either by signatories of the MLI or by non-signatories, will necessarily be interpreted by taking into account the BEPS material. The OECD report, established for the purpose of these *Cahiers* shows that in many bilateral tax treaties concluded or modified between 1 January 2014 and 18 June 2019, there has been a considerable uptake of treaty-related BEPS measures. This cannot remain without effect in terms of tax treaty interpretation, even though the legal basis for having recourse to the BEPS material will differ from country to country:

– In countries that are OECD members, the 2017 revised model and commentary will serve, either as an element of context (article 31 of the Vienna Convention) or as a supplementary means of interpretation (article 32 of the Vienna Convention) of treaties concluded later in time, depending on the judicial approach prevailing in these countries. For treaties concluded after the publication of the BEPS reports but before the revision of the OECD Model and Commentaries, the question will arise whether the 2017 revision may be taken into account for interpretation purposes – a question that will receive different answers

depending whether the jurisdiction at stake accepts ambulatory interpretation or not.

– In countries which are not OECD members, the 2017 revision of the model and commentary should remain without impact as such although judicial practice shows that even in non-member countries, OECD Commentaries may be taken into account by tax judges because they have "persuasive value" (see the Indian report) or are considered as "a valuable auxiliary tool" (see the Colombian report). In any case, several branch reports point out that regardless of the actual legal value to be attributed to the OECD Commentary as such, BEPS final reports may play a decisive role for future tax treaty interpretation because they simply played an important role in the revision or conclusion of bilateral tax treaties (see 2.2.4).

2.4. Tax planning after the BEPS Action Plan

Branch reporters generally agree that the BEPS Action Plan has significantly changed practice in the sense that much greater attention is paid by practitioners to the risk incurred by taxpayers when setting up borderline tax planning schemes. From a "sociological" perspective, the international tax world has therefore entered a new era.

In legal terms, it is well-known that the MLI has implemented the Action 6 minimal standard. Accordingly, all signatories are bound by this minimal standard.

It is more disputed whether the changes brought by the MLI to tax treaties are more apparent than real. Let us explain this by looking at the impact of the new treaty preamble, the principle purpose test and the LOB mechanism.

2.4.1. *Impact of the new preamble to tax treaties*

It is well-known that article 6 of the MLI modifies the preamble of covered tax agreements by making clear that tax treaties tend "to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions)".

We have already noted that the extent to which this wording really alters tax treaty interpretation is disputed (see 2.2.5 above). Several reports consider that this is not the case when a jurisdiction already applied the OECD Commentaries on article 1 which allow tax authorities to disregard abusive uses of tax treaties (e.g. Austria and Singapore). Other reports take the same view but justify it differently: they rather stress that the existing tax treaties generally expressed the objective to fight tax evasion (e.g. Chile, Colombia, Nigeria, Uruguay and many more). The Italian report also mentions that a 2017 decision of the Supreme Court had already considered that the object and purpose of a tax treaty would be defeated if the treaty was used to achieve double non-taxation or to obtain undue tax benefits.

Only a few reports take a dissenting (and interesting) view by observing that the new preamble goes much further than the previous wording of tax treaties because double non-taxation may take place without tax evasion, or because the concept of "tax evasion" is in itself very vague and does not necessarily coincide with analogous concepts that were used in tax treaties. The Liechtenstein report provides an interesting example by noting that the concept of "fiscal evasion", which was frequently introduced in the preamble and in the title

of old treaties, is not identical to "tax evasion", as the former was not meant to cover treaty shopping, but related to the exchange of information agreed upon in the treaty.

At the end of the day, it seems that the actual change brought about by the MLI/BEPS wording of the preamble to tax treaties is difficult to assess. The key issue rather seems to be whether the general anti-avoidance rule which is to be found in article 7 of the MLI or in other articles of bilateral tax treaties independently of the MLI, innovates with respect to earlier practice.

2.4.2. *Impact of the general anti-avoidance rule (GAAR)*

In some countries, the impact of the treaty GAAR introduced through the MLI or bilateral amendments to tax treaties is truly important because there was no legal tool available to the tax authorities in order to disallow benefits under a tax treaty that had been abused. The Luxembourg report states that "the adoption of the PPT is the most significant change for Luxembourg's double tax treaty network". The Japanese report also underlines that the absence of a treaty GAAR so far contrasts with the new policy. However, it observes that, failing any experience of such a provision, it would be surprising to see a sudden change in the tax authorities' practice. This comment from the Japanese reporter goes together with a more general line of comments from other reporters who note that even in countries where a GAAR did exist, judges have often been reluctant to implement it broadly (see the Canadian, Dutch and South African reports). One may therefore wonder whether the new rule will leave things as they are, or whether judges will perceive it as a fundamental legal change which must trigger genuine practical changes.

For countries in which the application of GAARS to tax treaty abuses was already a legal reality, both in theoretical and in practical terms, the impact of the new GAAR is hardly predictable for a number of different reasons pertaining to the pre-existing legal situation. A first group of countries already considered that the *domestic* concept of abuse of law applied to tax treaties (e.g. Argentina, France, Norway, Peru, Portugal). Another group of countries used *treaty* GAARS that were, either considered as "implicit" in tax treaties (as in Switzerland), or perfectly explicit (which does not mean that their wording was identical to the MLI one). For both groups of countries, the question is therefore whether the new GAAR will be considered as an innovation compared to the content of the prior domestic or treaty anti-abuse rule, or whether judges will in practice continue to reason in the same way, albeit under the new umbrella of the BEPS-GAAR. To a certain extent, this is a "sociological" question relating to the judiciary's will and ability to change its mindset and adopt a dual standard of abuse, rather than a legal one. From a purely legal perspective, a dual standard of abuse may raise constitutional problems. According to the Belgian Council of State, for instance, "it goes without saying" that article 7 MLI must be applied under the same constitutional constraints as the ordinary GAAR which applies in a purely domestic context; this example shows that the content of article 7 MLI may well be distorted in order to be harmonised with prior law. Such a harmonisation process between different GAARs will however not always be possible. In some countries, abuse of law requires an exclusive tax goal, which is not the case of the new GAAR which is based on the "principal purpose test". Often too, the rule governing the burden of proof of abuse in article 7 MLI does not coincide with the rule which applies in several countries (e.g. France, Canada).

In other words, while concepts (especially vague ones) may be flexible enough to be interpreted in a stable way notwithstanding the change in their wording, there is a limit to

this flexibility and it is inevitable that a dual standard of abuse will take place. Taking also account the interpretative constraints which derive from EU law (see the EU report), one can predict that not only two but certainly three and maybe even more standards of abuse of law will have to coexist in the future. Against this background, one may certainly welcome initiatives directed towards more legal safety, such as the Finnish one on advanced rulings regarding the implementation of the principal purpose test or the Dutch "international tax certainty board".

2.4.3. *Impact of LOB provisions*

The minimum standard established by Action 6 of the BEPS Action Plan includes the possibility to agree on either complete or simplified LOB provisions (in which case they can supplement the PPT rule). The OECD report released for the purpose of these Cahiers shows that under paragraph 6 of article 7 of the MLI, thirteen jurisdictions have chosen to apply the simplified LOB provision found in article 7 (paragraphs 8 to 13) of the MLI. Because the MLI LOB is an optional provision that can only apply where contracting Jurisdictions both decided to adopt the option, only around 50 covered tax treaties will include it.

The MLI has therefore not drive a significant increase in the recourse to LOB provisions in the treaty network. A closer look at the branch reports however shows that, as always, things are a bit more complex. Countries which had tax treaties without LOB provisions (or only with treaty partners, such as the US, for whom LOB are a structural choice in treaty policy) logically rejected the LOB in the MLI and most of them also refused to allow their treaty partners to implement such a provision unilaterally. More strangely, some countries that are very familiar with LOB provisions and often include them in their treaties have made the same choice (see for instance, Japan, the Netherlands, Sweden). In some cases, this can be justified by the potential issues raised by LOB provisions with respect to EU law (as clearly shown by the EU report). In others, the rationale rather seems to leave more flexibility to bilateral negotiations. However, even though the LOB mechanism is by far less widespread than the PPT, it does not decline either, and it is interesting to note that some countries which have not signed the MLI are ready to accept LOB provisions in their new bilateral treaties (see the Brazilian treaty concluded with Singapore in 2018, which contains a detailed LOB clause – albeit not identical to the Action 6 model). LOB provisions could even be on the rise in the future, since some countries (e.g. Canada, India, Poland, Norway, Spain) which have so far opted for the PPT mechanism, have presented this choice as an interim measure and announced that they would attempt to negotiate the inclusion of a detailed LOB article in their tax treaties in addition to, or in replacement of, the PPT.

Conclusion

Among the many BEPS Actions, one of the most ambitious involves modifications to the international tax treaty network through the MLI and the 2017 revisions to the OECD Model Tax Convention. As the Final Report on BEPS Action 15 explained, the MLI is intended to facilitate the swift and efficient amendment of thousands of bilateral tax treaties, quickly re-shaping or reconstructing the international tax treaty network to implement treaty-related minimum standards and best practices formulated in the context of the BEPS Project.

With 94 signatories as of March 2020 and over 1,600 CTAs subject to modification by the

MLI, the OECD can rightly claim a considerable measure of success – success that is properly measured not only by treaty provisions that are directly modified by the MLI but also by the inclusion of these modifications in bilateral tax treaties that have been concluded in light of the BEPS project.

At the same time, it is important to note that the impact of the MLI and the 2017 revisions to the OECD Model has, so far at least, been limited primarily to the minimum standards on treaty abuse and dispute resolution, and that the adoption of other provisions through the MLI and bilateral tax treaties concluded in light of the BEPS project has been much more limited. Indeed, it is notable that the OECD report itself acknowledges that the future multilateral efforts to modify the international tax treaty network, for example to address challenges of the digitised economy, might "invest more time in reaching a strong prior consensus on the underlying measures and standards to be implemented in tax treaties."

It is also worth noting that the treaty modifications in the MLI and the 2007 revisions to the OECD Model were not entirely unknown within the tax treaty network, but – as the branch reports clearly demonstrate – were anticipated in a number of practices and treaty provisions that preceded the BEPS project altogether. As a result, while the inclusion of these provisions through the MLI or bilateral tax treaties may represent a significant change for some jurisdictions, this is much less for other jurisdictions which had already adopted many of these practices or treaty provisions and have used the MLI and subsequent treaty negotiations to formalise and standardise these practices and provisions across all of their tax treaties. While the limited adoption of provisions beyond the minimum standards thus far suggests that this process still has some way to go, further progress can be expected as contracting jurisdictions to the MLI withdraw reservations to particular provisions and subsequent bilateral tax treaties include provisions based on the 2017 OECD Model.

A final question is whether the MLI can be expected to remain as a permanent "third layer" of international tax law, or whether it will fade into historical insignificance over time as jurisdictions renegotiate bilateral tax treaties. Although the answer to this question may depend on whether contracting jurisdictions view the MLI as an instrument to implement future treaty-related modifications such as those designed to address challenges of the digitised economy, branch reports suggest that many jurisdictions regard the MLI as a temporary instrument whose role solely is to facilitate the swift and efficient modification of the current tax treaty network, not to supplant or permanently supplement the bilateral tax treaty network that remains the core international law dimension of international tax law.

EU report Subject 1

Reconstructing the treaty network

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EU report

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Summary and conclusions

European Union law overlaps and interacts with both the OECD's Base Erosion and Profit Shifting project (BEPS) and its implementation and the member states' tax treaties between them and with third countries, and there is also an area where all three fields meet. This intersection of EU law, BEPS and member states' (mostly) bilateral tax treaties is the subject of this report.

First, it should be noted that the Union's competence under article 115 TFEU not only covers purely internal situations, but the Union can also use its internal competence to specify the treatment of non-EU investors or third-country investments, and it has done so, e.g., in the Anti-Tax Avoidance Directive (ATAD). This has potential impact also on tax treaties between the member states and with third countries: Given the supremacy of EU (secondary) law, domestic law implementing Directives (e.g., the ATAD) might, under certain conditions, arguably take precedence over (pre- and post-accession) tax treaties between the member states, even if that implementation is detrimental to taxpayers and irrespective of whether the specific tax treaty was concluded before or after a provision of a Directive entered into force. As for tax treaties with third countries the TFEU contains a differentiating rule, as article 351 TFEU (ex-article 307 EC) grandfathers (only) member states' treaties with third countries, including tax treaties, that a member state concluded before 1 January 1958 or, for acceding states, before the date of their accession, so that EU law arguably takes precedence over post-accession tax treaties with third countries and, therefore, may directly affect the relevant member state's (but of course not the third country's) tax system.

Second, the European Commission has issued various Recommendations with regard to post-BEPS tax treaties of the member states. A 2012 Recommendation "on aggressive tax planning" addressed (also) tax treaty-based double non-taxation and encouraged member states to include an appropriate subject-to-tax clause in their double taxation conventions. The Commission's 2016 Recommendation dealt with the inclusion of a subject-to-tax clause in tax treaties, the definition of "permanent establishments" to prevent their artificial avoidance (article 5 OECD MC) and the use of an EU-compatible Principal Purposes Test (PPT), which refers to "a genuine economic activity" as a carve-out to align the clause with the case-law of the Court of Justice of the European Union as regards the abuse of law.

Third, the OECD BEPS project has established a (political) minimum standard regarding measures against treaty shopping (article 7 MLI and article 29 OECD MC), and the Limitation on Benefits (LoB) clause in particular raises issues with regard to its compatibility with the EU fundamental freedoms. In particular, LoB clauses are confronted with continuing doubts regarding their compatibility with the freedom of establishment. These concerns have also

[1] This report was prepared within and by the members of the ECJ Task Force of the CFE Tax Advisers Europe with the support of CFE Tax Advisers Europe's President, Piergiorgio Valente. Although this report has been drafted jointly within the ECJ Task Force, its content does not necessarily reflect the position of all members of the group.

found expression not only in various documents of the European Commission but also in the BEPS Action 6 Final Report, where the OECD noted that some countries may have "concerns based on EU law that prevent them from adopting the exact wording of the model provisions that are recommended in this report", further specifying those concerns by recognizing "that the LOB rule will need to be adapted to reflect certain constraints or policy choices concerning other aspects of a bilateral tax treaty between two Contracting States" such as "concerns based on EU law". Indeed, the "ownership clauses" in LoB provisions face scrutiny because the company's residence state has agreed to give better conditions to companies held by shareholders resident in its own territory as compared to the ones resident elsewhere in the EU and the EEA. In such circumstances and in light of the *Open Skies* judgments, LoB clauses could thus be regarded as the immediate source of the discriminatory treatment. It is, however, unclear whether other – objective or subjective – tests in a typical LoB clause make them "EU compatible", and if the source state's perspective might require a different analysis in light of the ECJ's decision in *ACT Group Litigatio*n.

Fourth, and while the OECD BEPS project has not established a minimum standard with regard to mandatory binding arbitration, the 2017 Tax Dispute Resolution Directive (TDRD) has established a mechanism for binding arbitration with regard to tax "disputes". While the TDRD does not address double taxation outside of a tax treaty context, it is a huge step towards the removal of double taxation caused by diverging interpretation and application of tax treaties between member states.

Fifth, the OECD BEPS project has addressed situations of treaty-based non-taxation, which might also raise state aid questions under article 107 TFEU in cases where the misapplication of a tax treaty leads to "white income". While generally "the need to avoid double taxation" would be a basis for a possible justification, it might indeed be asked if a double taxation convention must be interpreted, in light of article 107 TFEU, to not give rise to "white income" (e.g., through an unconditional exemption of untaxed income) or to "overcompensation" (e.g., through a tax sparing credit). That rather extreme path, however, was not (yet) taken by the Commission in the McDonald's case: Indeed, to show selectivity, the Commission attempted merely to prove that Luxembourg had misapplied the applicable tax treaty. It did not rely on the alternative argument that double non-taxation resulting from the application of a tax treaty *ipso facto* amounts to state aid.

1. Introduction

European Union law overlaps and interacts with both the OECD's Base Erosion and Profit Shifting project (BEPS) and its implementation[2] and the member states' tax treaties between them and with third countries,[3] and there is also an area where all three fields meet. This

[2] See specifically S. Douma, "EU Report", in: IFA (ed.), *Subject 1: Assessing BEPS: origins, standards and responses*, CDFI Volume 102a (2017), p. 65-89.

[3] For comprehensive analyses see, e.g., P. Pistone, *The Impact of Community Law on Tax Treaties: Issues and Solutions* (Kluwer, Alphen aan den Rijn, 2002), G. Kofler, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, Vienna, 2007), and E. Raingeard de la Blétière, *Les relations entre le droit communautaire et le droit fiscal international: nouvelles perspectives* (2008); E.C.C.M. Kemmeren, "Double Tax Conventions on Income and Capital and the EU: Past, Present and Future", 21 *EC Tax Review* (2012), p. 157-177. For a recent overview of issues see Y. Brauner and G. Kofler, "Interaction of Tax Treaties with International Economic Laws", in: R. Vann et. al. (eds.), *Global Tax Treaty Commentaries (GTTC)*, IBFD Online Collection (2019).

intersection of EU law, BEPS and member states' (mostly) bilateral tax treaties is the subject of this report. It will deal with a variety of legal and policy issues:

– First, the relationship between EU law that implements BEPS measures, especially the Anti-Tax Avoidance Directive (ATAD),[4] and tax treaties between the member states and with third countries needs to be explored.
– Second, the European Commission (EC) has issued various Recommendations with regard to post-BEPS tax treaties of the member states. These deals, inter alia, with the inclusion of a subject-to-tax clause in tax treaties,[5] the definition of "permanent establishments" to prevent their artificial avoidance (article 5 OECD MC) and the use of an EU-compatible PPT approach.[6]
– Third, the OECD BEPS project has established a (political) minimum standard regarding measures against treaty shopping (article 7 of the Multilateral Instrument, MLI, and article 29 OECD MC).[7] However, both a Principal Purposes Test (PPT) and a Limitation on Benefits (LoB) clause raise issues with regard to their compatibility with the EU fundamental freedoms and EU tax policy. These issues need to be explored in light of the Commission's recommendation of an EU-compatible PPT approach[8] and the continuing doubts regarding the compatibility of LoB clauses with the freedom of establishment.[9]
– Fourth, the OECD BEPS project has established a minimum standard with regard to mutual agreement proceedings (e.g., articles 16 and 17 MLI),[10] but no such standard has been agreed with regard to mandatory binding arbitration.[11] In the EU, however, such binding arbitration is foreseen both in the multilateral 1990 Arbitration Convention for

4 Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, [2016] OJ L 193, p. 1, as amended by Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, [2017] OJ L 144, p. 1.

5 Commission Recommendation of 6 December 2012 on aggressive tax planning, [2012] OJ L 338, p. 41 ("2012 Recommendation").

6 Commission Recommendation (EU) 2016/136 of 28 January 2016 on the implementation of measures against tax treaty abuse, [2016] OJ L 25, p. 67 ("2016 Recommendation").

7 See OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report* (2015) ("BEPS Action 6 Final Report"), and also OECD, *BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Peer Review Documents* (2017); OECD, *Prevention of Treaty Abuse – Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6* (2019).

8 Commission Recommendation (EU) 2016/136 of 28 January 2016 on the implementation of measures against tax treaty abuse, [2016] OJ L 25, p. 67.

9 See for critical approaches, e.g., "Taxation: Commission asks the Netherlands to amend the Limitation on Benefits clause in the Dutch-Japanese Tax Treaty for the Avoidance of Double Taxation", Case No 2014-4233, MEMO/15/6006 (19 November 2015), and the Commission Working Paper on "EC Law and Tax Treaties", DOC(05) 2306 (9 June 2005), para. 19. For a detailed discussion of that issue, also in light of ECJ, 12 December 2006, C-374/04, *ACT Group Litigation*, EU:C:2006:773, see CFE ECJ Task Force, "Opinion Statement ECJ-TF 1/2018 on the Compatibility of Limitation-on-Benefits (LoB) Clauses with the EU Fundamental Freedoms", 58 *European Taxation* (2018), p. 419-425.

10 See OECD, *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents* (2016), and the MAP Peer Review Reports.

11 Rules on binding arbitration are foreseen in Part VI of the MLI, and a number of countries had already committed to a mandatory binding arbitration process; see the list of countries in OECD, *Making Dispute Resolution Mechanisms More Effective – Action 14 2015 Final Report* (2015), para. 62.

transfer pricing disputes[12] and the 2017 Tax Dispute Resolution Directive (TDRD),[13] which covers all tax "disputes".[14]

– Fifth, and finally, may the (correct) application of a tax treaty that leads to double non-taxation trigger state aid scrutiny under article 107 TFEU? While generally "the need to avoid double taxation" would be a basis for a possible justification,[15] it might indeed be asked if a double taxation convention must be interpreted, in light of article 107 TFEU, to not give rise to "white income" (e.g., through an unconditional exemption of untaxed income) or to "overcompensation" (e.g., through a tax sparing credit).[16] That rather extreme path, however, was not (yet) taken by the Commission in the *McDonald's* case.[17]

There are also potential areas of interest that are not dealt with in this report (e.g., the developments with regard to the automatic exchange of information outside tax treaties). Three of those more remote issues should, however, be mentioned:

– First, tax treaty issues were raised with regard to the EU Commission's (failed) proposal for a "digital services tax" (DST), i.e., a 3% tax on the turnover from certain digital services rendered within the EU by large enterprises.[18] The focal point of the discussion related to the question whether such a tax, which was politically conceived as an "equalization levy" to collect tax revenues otherwise out of reach of the corporate tax systems, would nevertheless qualify as tax on "income" under article 2 OECD MC and hence put it at variance with the member states' treaty obligations with third countries.[19]

– Second, EU law addressing BEPS issues might also lay down rules that avoid double taxation beyond what can be achieved under tax treaties. A concrete example is the obligation of member states to implement the exit taxation regime of article 5 ATAD and the avoidance of a potential (time-delayed) double taxation. While the OECD MC

[12] Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of transfers of profits between associated undertakings, [1990] OJ L 225, p. 10, as amended. See also the Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, [2009] OJ C 322, p. 1.

[13] Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, [2017] OJ L 265, p. 1.

[14] See, e.g., I. Richelle, "Dans les arcanes de la nouvelle directive sur le règlement des différends fiscaux", in: J. Wildemeersch and P. Paschalidis (eds.), *L'Europe au présent ! – Liber Amicorum Melchior Wathelet* (Bruylant, Brussels, 2018), p. 883-927; G. Kofler, "EU Tax Dispute Resolution Directive: The Deathblow to Double Taxation in the European Union", 28 *EC Tax Review* (2019), p. 266-269.

[15] See para. 139 of the Commission's notice on the notion of State aid as referred to in art. 107(1) of the Treaty on the Functioning of the European Union, [2016] OJ C 262, p. 1.

[16] See, e.g., W. Haslehner, "Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law", in: I. Richelle, W. Schön & E. Traversa (eds.), *Allocating Taxing Powers within the European Union* (Springer, New York, 2013), p. 133, at p. 135-143.

[17] See the Commission Decision of 19 September 2018 on tax rulings SA.38945 (2015/C) (ex 2015/NN) (ex 2014/CP) granted by Luxembourg in favour of McDonald's Europe, C(2018) 6076 final [19 September 2018]).

[18] Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM/2018/0148. No agreement on the DST was reached in December 2019 (Doc. 14885/18 FISC 510 ECOFIN 1148 [29 November 2018] and Doc. 14886/18 FISC 511 ECOFIN 1149 [29 November 2018]) and the proposal was subsequently confined to digital advertising services in March 2019 (Doc. 6873/19 FISC 135 ECOFIN 242 [1 March 2019]) and effectively given up in March 2019 (Doc. 7368/19 PRESSE 12 [12 March 2019]).

[19] For a detailed discussion and further references see D. Hohenwarter, G. Kofler, G. Mayr and J. Sinnig, "Qualification of the Digital Services Tax under Tax Treaties", 47 *Intertax* (2019), p. 140-147.

does not provide for an automatic solution,[20] article 5(5) of the ATAD solves that issue by requiring the "import" state to give a step-up to the market value, i.e., "that Member State shall accept the value established by the Member State of the taxpayer or of the permanent establishment as the starting value of the assets for tax purposes [...]".

– Third, the long-drawn discussion whether a "static" or an "ambulatory" ("dynamic") approach to tax treaty interpretation should be taken with regard to the Commentaries to the OECD Model Tax Convention (OECD MC Comm.) has become even more relevant after the BEPS-induced amendments. Since the OECD MC Comm. is changed frequently without corresponding changes to the Model itself, it becomes relevant which version of the OECD MC Comm. should be used when interpreting an OECD MC-based tax treaty: The one existing at the time the concrete OECD-based tax treaty is applied ("ambulatory approach")[21] or the one at the time the respective tax treaty was concluded ("static approach", "frozen meaning"[22])? Quite surprisingly, the ECJ might recently have endorsed an ambulatory (dynamic) use of the OECD MC Comm. in the "Danish beneficial ownership cases",[23] where it found that the tax treaty notion of "beneficial ownership" is relevant with regard to the interpretation of that concept in the 2003 Interest-Royalties-Directive (IRD).[24] In considering which guidance might be derived from the OECD MC Comm., the Court implicitly referred to the 1977 and 2003 versions of the OECD MC, the latter addressing certain conduit companies. The ECJ, however, did not (explicitly)[25] refer to the 2014 Update of OECD MC Comm., which brought significant changes to the treaty notion of "beneficial owner". This might either imply that it did not want to go "fully dynamic" or that it did not consider it necessary. Moreover, the ECJ's seemingly dynamic approach might not technically be "dynamic" at all: While the IRD was proposed in 1998, it was adopted in Council on 3 June 2003, whereas the 2003 OECD Update was already adopted by the OECD Council on 28 January 2003[26] and was based on an even earlier 2002 Report,[27] i.e. both were introduced before the IRD was passed. A dynamic approach, however,

[20] The OECD takes the position that a tax treaty does not prevent the application of that form of taxation, but also notes that "[t]he application of such taxes, however, creates risks of double taxation where the relevant person becomes a resident of another State which seeks to tax the same income at a different time, e.g. [...] when assets are sold to third parties". See OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report* (2015), para. 66.

[21] See, e.g., Intro no. 3 and nos 33-36.1 and art. 5 no. 3 OECD MC Comm.

[22] See for that position, e.g., Austrian VwGH, 31 July 1996, 92/13/0172; German BFH, 8 December 2010, I R 92/09; Tax Court of Canada, 18 August 2006, *MIL (Investments) S A v. The Queen*, 2006 TCC 460; UK First Tier Tribunal, 12 April 2016, *Fowler v Revenue and Customs*, [2016] UKFTT 234 (TC) ("limited value").

[23] Grand Chamber of the ECJ, 26 February 2019, C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg I, X Denmark, C Danmark I and Z Denmark*, EU:C:2019:134, and 26 February 2019, C-116/16 and C-117/17, *T Danmark and Y Denmark*, EU:C:2019:135.

[24] For discussion see CFE ECJ Task Force, "Opinion Statement ECJ-TF 2/2019 on the CJEU decisions of 26 February 2019 in C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg I et al*, and C-116/16 and C-117/17, *T Danmark et al*, concerning the "beneficial ownership" requirement and the anti-abuse principle in the company tax directives", 59 *European Taxation* (2019), p. 487-502, at p. 498.

[25] It did, however, implicitly refer to a notion that was introduced by the 2014 Update of the OECD Model (the "in substance" criterion) in explaining the indicia for abuse. See ECJ, 26 February 2019, C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg I, X Denmark, C Danmark I and Z Denmark*, EU:C:2019:134, para. 132.

[26] As "The 2002 Update to the Model Tax Convention".

[27] Entitled "Restricting the Entitlement to Treaty Benefits" (adopted by the OECD Committee on Fiscal Affairs on 7 Nov. 2002).

would not be surprising, as the ECJ in *Berlioz*[28] had already used the 2012 Commentaries on article 26 of the OECD Model[29] to interpret the concept of "foreseeable relevance" in the 2011 EU Mutual Assistance Directive.[30] It is, however, hard to see how such a dynamic understanding and attribution of "relevance" would fit into the EU legal order, since – as AG Kokott, who certainly prefers a static approach,[31] succinctly pointed out – "[o] therwise the contracting countries to the OECD would have the power to decide on the interpretation of an EU directive".[32]

2. EU law, BEPS and "Treaty Overrides"

The European Union is a "player" in international tax policy also because it has legislative competences for binding positive tax integration, i.e., for harmonizing member states' tax systems: It enjoys the competences conferred on it by the EU Treaties ("principle of conferral"; article 5 TFEU), such that competences in direct taxation within the European Union (an "internal market" matter) are shared between the European Union and the member states (article 4(2)(a) TFEU). Indeed, the general internal market competence that allows the issuance of "directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market" under (now) article 115 TFEU (ex-article 94 EC) has been used as the legal basis for a number of directives in the area of direct taxation, especially with regard to corporate taxation: It has been claimed by the Commission for its proposals for direct tax harmonization as early as 1969,[33] and these proposals as well all those made subsequently were and are based on what is now article 115 TFEU. While the "traditional" company tax directives (such as the Parent-Subsidiary Directive and the Interest-Royalty Directive) focus the internal market on the rights of the four freedoms and aim at removing tax distortions of the internal market, to allow enterprises to adapt to the requirements of the internal market and to improve their competitive strength at the international level, some directives approach the internal market through the lens of "practices of tax evasion and tax avoidance".[34] This is not only true, e.g., for the directive on mutual assistance between tax administrations in the area of exchange of

[28] ECJ, 16 May 2017, C-682/15, *Berlioz Investment Fund SA*, EU:C:2017:373, para. 66.

[29] "Update to Article 26 of the OECD Model Tax Convention and its Commentary", adopted by the OECD Council on 17 July 2012, and later included in the 2014 Update of the OECD MC, adopted by the OECD Council on 16 July 2014.

[30] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, [2011] OJ L 64, p. 1.

[31] Opinions of AG Kokott of 1 March 2018 in C-115/16 (*N Luxembourg 1*, EU:C:2018:143, para. 52), C-118/16 (*X Denmark*, EU:C:2018:146, para. 52), and C-119/16 (*C Danmark I*, EU:C:2018:147, para. 52), noting that "[a]t most, should it transpire from the wording and history of the directive that the EU legislature was guided by the wording of an OECD Model Tax Convention and the commentaries (available at the time) on that OECD Model Tax Convention, a similar interpretation might be appropriate".

[32] See, e.g., Opinion of AG Kokott of 1 March 2018, C299/16, *Z Denmark*, EU:C:2018:148, para. 53.

[33] See the proposals for the Parent-Subsidiary-Directive in COM(69)6 and for the Merger Directive in COM(69)5.

[34] It has been noted already in the 1970s that these practices extend across the frontiers of member states, they "lead to budget losses and violations of the principle of fair taxation and are liable to bring about distortions of capital movements and of conditions of competition", and "therefore affect the operation of the common market". See, e.g., the Preamble to the original Council Directive of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (77/799/EEC), [1977] OJ L 336, p. 15.

information (and its expansion in scope),[35] but also for the more recent developments with regard to substantive anti-tax avoidance measures (ATAD I and II).[36]

However, the Union's competence under article 115 TFEU not only covers purely internal situations, but the Union can also use its internal competence to specify the treatment of non-EU investors or third-country investments.[37] While some doubt that legally relevant distortions on the internal market can arise from third-country relations at all,[38] others argue that the Union's competence under article 115 TFEU may indeed be triggered because differences among the member states in their treatment of third-country investments may lead to distortions in the flow of investments and of competition in the internal market.[39] The latter notion also seems to be held by the Commission.[40] However, regulating the treatment of non-EU nationals in internal legislation may create conflicts with existing bilateral tax treaties (e.g., where a directive would ask for taxation where a treaty would foresee exemption).[41] This potential conflict becomes evident, e.g., with regard to the scope of application and a number of substantive provisions of the ATAD I[42] and II[43] (and in the

35 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, [2011] OJ L 64, p. 1 ("DAC1"), as amended.

36 For doubts as to the Union's competence with regard to the ATAD see, e.g., I. Lazarov and S. Govind, "Carpet-Bombing Tax Avoidance in Europe: Examining the Validity of the ATAD Under EU Law", 47 *Intertax* (2019), p. 852-868.

37 G. Kofler, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, Vienna, 2007), pp. 322-323; D. S. Smit, "The Influence of EU Tax Law on the EU Member States' External Relations", in: W. Haslehner, G. Kofler and A. Rust (eds.), *EU Tax Law and Policy in the 21st Century* (Kluwer, Alphen aan den Rijn, 2017), p. 215, at p. 221 and pp. 223-224.

38 See, with regard to external competence, in this direction A. P. Dourado and P. Wattel in: P. Wattel, O. Marres and H. Vermeulen (eds.), *European Tax Law*, Volume 1, 7th edn (Kluwer, Alphen aan den Rijn, 2018), p. 209.

39 See D. S. Smit, "The Influence of EU Tax Law on the EU Member States' External Relations", in: W. Haslehner, G. Kofler and A. Rust (eds.), *EU Tax Law and Policy in the 21st Century* (Kluwer, Alphen aan den Rijn, 2017), p. 215 (at p. 224).

40 See, e.g., the Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, COM(2017)335 (noting that "the actual level of protection of the internal market is overall defined by reference to the weakest Member State" and that, therefore, "a cross-border potentially aggressive tax planning arrangement that engages one Member State in reality impacts on all States").

41 It does moreover call for an examination of whether it might lead to an (exclusive) external, treaty-making Union competence in the spheres covered by those acts. See for a detailed discussion, e.g., G. Kofler, "EU Power to Tax: Competences in the Area of Direct Taxation", in: *C. HJI Panayi, W. Haslehner and E. Traversa* (eds.), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020) [in print]. This issue might also come on the political agenda in the future. See, e.g., the European Parliament resolution of 16 December 2015 with recommendations to the Commission on bringing transparency, coordination and convergence to corporate tax policies in the Union, P8_TA(2015)0457 (16 December 2015), point AT(i) (noting that the "the Commission should be mandated to negotiate tax agreements with third countries on behalf of the Union instead of the current practice under which bilateral negotiations are conducted, which produce sub-optimal results").

42 According to its art. 1, the ATAD (Council Directive (EU) 2016/1164, [2016] OJ L 193, p. 1) "applies to all taxpayers that are subject to corporate tax in one or more Member States, including permanent establishments in one or more Member States of entities resident for tax purposes in a third country", i.e., also to third-country corporations with EU permanent establishments.

43 See Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, [2017] OJ L 144, p. 1, which explicitly covers third-country situations.

proposals for the C(C)CTB)[44]. And while the Union is generally careful not to interfere with tax treaties, one example for such potential conflict are the income inclusion rules under the controlled foreign company (CFC) regime of articles 7 and 8 ATAD. These also apply to a "permanent establishment of which the profits are not subject to tax or are exempt from tax in that member state", i.e., to a low-taxed permanent establishment either located in another member state or a third country. By referring to profits that "are not subject to tax or are exempt from tax" in taxpayer's member state, the ATAD might be viewed as obliging member states to effectuate a "treaty override" where a specific tax treaty would otherwise foresee an exemption (e.g., based on article 23A OECD MC).[45]

In any event, EU law has supremacy and thus prevails over domestic law and tax treaties.[46] This is also true for directives under article 288(3) TFEU, which are addressed to the member states and must be implemented by them.[47] Domestic law implementing directives (e.g., the ATAD) might therefore arguably take precedence over (pre- and post-accession) tax treaties between the member states,[48] even if that implementation is detrimental to taxpayers and irrespective of whether the specific tax treaty was concluded before or after a provision of a directive entered into force;[49] however, it is not fully clear if states whose constitutional framework prohibits "treaty overrides" would rather be obligated to additionally amend or terminate their tax treaties to give full effect to the directive's implementation into domestic law.[50] As for tax treaties with third countries, however, the TFEU contains a differentiating rule: Article 351 TFEU (ex-article 307 EC) grandfathers (only) member states' treaties with third countries, including tax treaties,[51] that a member state concluded before 1 January 1958 or, for acceding states, before the date of their accession. Under article 351 TFEU, the "rights and obligations" arising from such agreements "shall not be affected by the provisions of the Treaties". This, *a fortiori*, means that EU law takes precedence over post-accession tax treaties with third countries and, therefore, may directly affect the relevant member state's

[44] That concerns the scope of application as well as substantive provisions. Under art. 2(2) of the Commission's proposal for a CCTB (COM(2016)685), that Directive would, under certain conditions, also "apply to a company that is established under the laws of a third country in respect of its permanent establishments situated in one or more Member State". Likewise, third-country situations are, e.g., addressed in the area of anti-abuse provisions under arts. 59 and 61 of the Commission's proposal with regard to CFC rules and hybrid mismatches.

[45] For the substantive, third-state relevant provisions of the ATAD see the overview by W. Haslehner, "EU-US Relations in the Field of Direct Taxes from the EU Perspective: A BEPS-Induced Transformation?", in: P. Pistone and D. Weber (eds.), *Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study* (IBFD, Amsterdam, 2018), Ch. 3.3.

[46] ECJ, 5 February 1963, 26/62, *van Gend & Loos*, EU:C:1963:1.

[47] ECJ, 17 December 1970, 11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114.

[48] See, e.g., ECJ, 14 February 1984, 278/82, *Rewe*, EU:C:1984:59, para. 29; ECJ, 27 September 1988, 235/87, *Matteuccci*, EU:C:1988:412, para. 14 and 20-21. It should be noted, however, that an intensive discussion exists whether taxpayers can rely on tax treaty (e.g., with regard to a reduced withholding tax rate) notwithstanding the fact that the more beneficial reduction under domestic implementing law (e.g., implementing the withholding tax exemption of the Parent-Subsidiary-Directive) is not granted because of abuse; the Dutch Supreme Court recently held so and granted the reduced treaty withholding rate despite denying the withholding tax exemption under the Dutch implementation of the Parent-Subsidiary-Directive (see Hoge Raad, 10 January 2020, 18/00219, NL:HR:2020:21).

[49] See, e.g., ECJ, 10 November 1992, C-3/91, *Exportur*, EU:C:1992:420, para. 8, and, with further references, G. Kofler, *Doppelbesteuerungsabkommen und Europäisches Gemeinschaftsrecht* (Linde, Vienna, 2007), p. 272.

[50] See for that perspective E.C.C.M. Kemmeren, *Principle of Origin in Tax Conventions – A Rethinking of Models* (2001), p. 233-234.

[51] See, e.g., the Commission's Working Paper on "EC Law and Tax Treaties", DOC(05) 2306 (9 June 2005), para. 15-19.

(but of course not the third country's) tax system (again perhaps conditional on the domestic approach "treaty overrides"). Indeed, article 351 TFEU merely aims at protecting the rights of third states (and, *vice versa*, the obligations of member states) in compliance with international public law.[52] However, it also calls on member states to "take all appropriate steps to eliminate the incompatibilities established", including, where necessary, by denouncing the bilateral agreement. With regard to the Union's internal competence, the ECJ applies article 351 TFEU not only in situations where provisions of a pre-accession tax treaty are incompatible with the "provisions of the Treaties", i.e., primary law,[53] but also when provisions of a pre-accession tax treaty become substantively incompatible with a subsequent directive.[54] It is, however, unclear if a member state's post-accession tax treaties with third countries are also covered through an analogous application of article 351 TFEU if those bilateral tax treaties have been compliant with Union law, but subsequently became substantively incompatible with a directive.[55] Given those uncertainties and also the unclear scope of potential consequences,[56] it is quite welcome that the Commission makes attempts to take tax treaties into account in its proposals.[57]

[52] See, e.g., ECJ, 11 March 1986, 121/85, *Conegate*, EU:C:1986:114, paras 24-25; ECJ, 10 March 1998, C-364/95 and C-365/95, *T. Port GmbH & Co.*, EU:C:1998:95, para. 60; ECJ, 16 May 2017, Opinion 2/15 ("Singapore"), EU:C:2017:376, para. 254.

[53] See, e.g., ECJ, 14 January 1997, C-124/95, *Centro-Com*, EU:C:1997:8, paras. 56-61.

[54] ECJ, 2 August 1993, C-158/91, *Jean-Claude Levy*, EU:C:1993:332.

[55] That issue was, e.g., explicitly left open in the Opinion of AG J. Kokott, 13 March 2008, C-188/07, *Total France*, EU:C:2008:174, paras 94-98.

[56] See W. Haslehner, "EU-US Relations in the Field of Direct Taxes from the EU Perspective: A BEPS-Induced Transformation?", in: P. Pistone and D. Weber (eds.), *Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study* (IBFD, Amsterdam, 2018), Chapter 3.5.2.

[57] See, e.g., art. 53 of the Commission's proposal for a CCTB, COM(2016)685, under which the switch-over clause will "not apply where a convention for the avoidance of double taxation between the Member State in which the taxpayer is resident for tax purposes and the third country where that entity is resident for tax purposes does not allow switching over from a tax exemption to taxing the designated categories of foreign income". Another example is, e.g., the Commission's proposal for a significant digital presence (COM(2018)147), where art. 2 specifies that the directive would, "in the case of entities that are resident for corporate tax purposes in a third country with which the particular Member State in question has a convention for the avoidance of double taxation", only apply "if that convention includes provisions similar to Articles 4 and 5 of this Directive in relation to the third country and those provisions are in force". Complementing this delimitation of the directive's scope, the Commission has simultaneously issued a recommendation to member states to (bilaterally) amend their tax treaties with third countries and to include provisions on significant digital presences (see the Commission's Recommendation of 21.3.2018 relating to the corporate taxation of a significant digital presence, C(2018)1650). Another example is art. 9(5) ATAD 2 (Council Directive (EU) 2017/952, [2017] OJ L 144, p. 1), which generally provides that, "[t]o the extent that a hybrid mismatch involves disregarded permanent establishment income which is not subject to tax in the Member State in which the taxpayer is resident for tax purposes, that Member State shall require the taxpayer to include the income that would otherwise be attributed to the disregarded permanent establishment', but also postulates that this does not apply if "the Member State is required to exempt the income under a double taxation treaty entered into by the Member State with a third country".

3. BEPS and EU Recommendations on Post-BEPS tax treaties

3.A. Introduction

The European Commission 2016 Recommendation "on the implementation of measures against tax treaty abuse"[58] appears as the "tax treaty prong" of the 2016 EC's comprehensive plan against corporate tax abuse, the EU's 2016 Anti-Tax Avoidance Package (ATAP).[59] Even though the ATAP was adopted shortly after the final BEPS reports had been issued in October 2015,[60] its scope is more limited. This explains why this tax treaty prong of the ATAP does not refer to all BEPS actions dealing with treaties (Actions 2, 6, 7 and 14) but only to those dealing with substantive corporate tax issues: Action 6 ("Preventing the Granting of Treaty Benefits in Inappropriate Circumstances")[61] and Action 7 ("Preventing the Artificial Avoidance of Permanent Establishment Status")[62]. The ATAP required or recommended action at all levels: domestic, EU and international (tax treaties). For the latter, directives would not be appropriate (namely because most of the tax treaty network of member states refers to treaties with third countries). In this context, the 2016 Recommendation, a non-binding ("soft"), secondary law instrument under article 288(5) TFEU, appeared to be a viable option. The 2016 Recommendation is addressed to the EU member states. However, this one has a *vis expansiva* as it aims to be applied in all treaties signed by member states (including those signed with third countries).

It should be noted in passing that even before the BEPS project the European Commission had issued a Recommendation "on aggressive tax planning" in 2012, in which it addressed (also) tax treaty-based double non-taxation: It recommended that "[w]here Member States, in double taxation conventions which they have concluded among themselves or with third countries, have committed not to tax a given item of income, Member States should ensure that such commitment only applies where the item is subject to tax in the other party to that convention". To that end the Commission encouraged member states to include an appropriate clause in their double taxation conventions.[63]

[58] Commission Recommendation (EU) 2016/136 of 28 January 2016 on the implementation of measures against tax treaty abuse, [2016] OJ L 25, p. 67 ("2016 Recommendation").

[59] See *https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en* (last access 31 January 2020)

[60] A direct reference can be found in para 6 of the 2016 Recommendation's preamble.

[61] OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report* (2015) ("BEPS Action 6 Final Report").

[62] OECD, *Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 – 2015 Final Report* (2015), p. 42-43 ("BEPS Action 7 Final Report").

[63] The wording suggested in point. 3.2 of the 2012 Recommendation reads: "Where this Convention provides that an item of income shall be taxable only in one of the contracting States or that it may be taxed in one of the contracting States, the other contracting State shall be precluded from taxing such item only if this item is subject to tax in the first contracting State". For a critical analysis see, e.g., M. Lang, "Aggressive Steuerplanung" – eine Analyse der Empfehlung der Europäischen Kommission", 23 *Steuer und Wirtschaft International* (2013), p. 62 et seq.

3.B. Recommendation on an EU-compliant Principal Purposes Test

The first part of the 2016 Recommendation concerns the proposed changes regarding abuse of treaties in the BEPS Action 6 Final Report. The Preamble of the Recommendation makes an explicit reference to both an amendment of treaties' preambles and an introduction of a general anti-abuse rule based on an EU-compliant "principal purpose test" (PPT).[64]

Nonetheless, the "operative" part of the Recommendation ignores the preamble part and is limited to the introduction of a general anti-avoidance rule based on a principal purpose test (PPT). It is difficult to understand the reasons behind such a restriction. Particularly considering that in the framework of the BEPS Action 6 Final Report, the amendment of the treaty preamble is considered a minimum standard.[65] Moreover, the operative part of the Recommendation refers to only one of the modalities for meeting the minimum standard. One should recall that BEPS Action 6 allowed three options to meet the minimum standard,[66] i.e., (i) the inclusion of a PPT rule,[67] (ii) the inclusion of a simplified Limitation-on-Benefits (LOB) rule[68] together with a PPT rule, or (iii) the inclusion of a detailed LOB rule[69] together with a provision dealing with conduit arrangements that are not dealt with in tax treaties.[70]

The operative part of the 2016 Recommendation proposes a deviation in what concerns the PPT rule as proposed by the OECD. In the version recommended by the European Commission, benefits of the convention could be granted not only where it is considered to be "in accordance with the object and purpose" of the respective tax treaty but also[71] to situations where the claimed benefit "reflects a genuine economic activity". The recommended wording (with the proposed deviation in italics) is:

> Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that it reflects a *genuine economic activity* or that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.

The Commission explains that this deviation was introduced to ensure "compliance with EU Law" and is based on the assumption that the OECD's PPT clause "needs to be aligned with the case-law of the Court of Justice of the European Union as regards the abuse of law"[72]. This deviation raises some issues. This deviation introduces a fundamental concern that may not have been taken into account by the European Commission: An entity or transaction may be absolutely genuine but, nevertheless, be used to obtain a benefit that falls outside the treaty's object and purpose. In these cases, the OECD is clear and considers that the mere infringement of the treaty object and purpose is enough to disqualify the entity or transaction. Understood

64 Para 3 of the 2016 Recommendation.
65 See paras 22 and 23 of the BEPS Action 6 Final Report.
66 Paras 19 and 22 of the BEPS Action 6 Final Report.
67 As mentioned in para. 26 BEPS of the BEPS Action 6 Final Report.
68 Para. 25 of the BEPS Action 6 Final Report.
69 Para. 25 of the BEPS Action 6 Final Report.
70 Paras 19 and 22 of the BEPS Action 6 Final Report.
71 The conjunction "or" indicates that this is a second prong in the application of the test.
72 Para. 7 of the Preamble of the 2016 Recommendation.

in this sense, the deviation proposed by the European Commission would decrease the level of protection against treaty abuse required by the OECD. Considering that all EU member states (out of the three available options for meeting the minimum standard) opted for the PPT, this situation leads to a conundrum. States opting for being compliant with the 2016 Recommendation would not be OECD compliant; States opting for implementing the OECD PPT rule without deviation would not be compliant with the 2016 Recommendation. This may be the reason why all EU member states decided to ignore the deviation proposed by the Commission. A careful examination of the full treaty network[73] reveals that no member state includes (or plans to include) such deviation in its tax treaties.[74]

3.C. Recommendation on the definition of "permanent establishment"

The second part of the 2016 Recommendation concerns the BEPS proposed changes regarding the PE definition. The preamble of the 2016 Recommendation[75] expresses the need to amend tax treaties to prevent (i) the avoidance of a permanent establishment through commissionaire arrangements and similar structures and (ii) the "abuse" of the exceptions concerning preparatory or auxiliary activities. Nonetheless, and unlike the previous one, this second Recommendation makes a full and unrestricted remission to the conclusions of the BEPS Action 7 Final Report, "encouraging" Member States to adopt them in their full treaty network:

> Member States are encouraged, in tax treaties which they conclude among themselves or with third countries, to implement and make use of the proposed new provisions to Article 5 of the OECD Model Tax Convention in order to address artificial avoidance of permanent establishment status as drawn up in the final report on Action 7 of the Action Plan to address Base Erosion and Profit Shifting (BEPS).

3.D. Follow-up by the European Commission

The Commission has not established or suggested a time frame for the implementation of the 2016 Recommendation.[76] The same occurred at the OECD level, where BEPS Actions were generally silent in this regard, even those that included minimum standards.[77] For the Commission and at the moment of the Recommendation, it was enough to require member states to inform it of any measures related with the implementation, stating that a report would be published "within three years after its adoption". As the Recommendation was

[73] Using IBFD's tax treaty research platform, available at *https://research.ibfd.org/#/* (last accessed 1 January 2020)

[74] The Austria-France Tax Treaty (1993) makes reference to "genuine economic reasons". However, this cannot be seen as an implementation of the EC recommendation since (i) the expression is used in the framework of the provision regarding taxation of capital gains and (ii) the treaty provision dates from 1993, more than two decades before the adoption of the recommendation.

[75] Para.4. of the 2016 Recommendation.

[76] Which is in line with prior recommendations in direct tax matters.

[77] For instance, para. 23 of the BEPS Action 6 Final Report stated: "Since the conclusion of a new treaty and the modification of an existing treaty depend on the overall balance of the provisions of a treaty, however, this commitment should not be interpreted as a commitment to conclude new treaties or amend existing treaties within a specified period of time".

adopted in January 2016, this report should have been published in January 2019. However, one year later, nothing has yet been published. The Commission requested the member states to inform not only of the implementing measures but also of "any changes made to such measures". In our view, this would cover not only the measures adopted in the strict implementation of the Recommendation but all treaty measures falling down the objective scope of the Recommendation, i.e. any changes on the PE definition and on a treaty GAAR. However, in the absence of further clarification and of the publication of the follow-up report, it is difficult to understand what the Commission wanted and what it is effectively monitoring in this regard.

4. Treaty shopping and EU law

4.A. Introduction

Countering abusive and fraudulent practices is a well-established principle of European Union law.[78] Therefore, insofar as EU law is applicable (e.g., within the scope of a company tax directive), all member states must counter such practices, including so-called "directive shopping". Anti-avoidance issues also arise with regard to tax treaties, especially with regard to treaty shopping. Treaty shopping generally involves the establishment of an intermediate holding company in a state with tax treaties with both the state of residence of the investor, and with that of a source of profit, in order to get a more favourable regime than if the investor had received the profit directly. Countering such treaty shopping must, however, conform to all other EU law principles and rules, since otherwise the primacy of European over domestic and treaty law[79] would be undermined.

These EU law obligations might, however, lead to tensions with the OECD BEPS Action 6 political "minimum standard", which is now reflected in article 7 MLI and article 29 OECD MC 2017.[80] Indeed, both a Principal Purposes Test (PPT) and a Limitation on Benefits (LoB) clause raise issues with regard to their compatibility with the EU fundamental freedoms and EU tax policy that need to be explored in light of the Commission's 2016 Recommendation of an EU-compatible PPT approach[81] and the continuing doubts regarding the compatibility of

[78] See ECJ, 26 February 2019, C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg I et al*, EU:C:134, para. 101; ECJ, 26 February 2019, C-116/16 and C-117/16, *T Danmark et al*, EU:C:2019:135, para. 75.

[79] See *supra* ch. 2. It should be remembered that, from the perspective of European Union law, also tax treaties are part of national legislation. Therefore, EU member states may not invoke the application of a treaty to overcome the primacy of supranational legislation of the European Union, except for those treaties that were signed before its establishment, or, for the non-founding member states, their date of accession (see art. 351 (1) TFEU). In some situations, also involving treaties concludes with non-EU member states, this has generated conflicts. In some circumstances, the Court of Justice has obliged member states to ensure an equivalent treatment by means of their domestic legislation (see ECJ, 21 September 1999, C-307/97, *Saint-Gobain ZN*, EU:C:1999:438); in others, by *de facto* obliging them to either terminate the treaties, or find alternative solutions, including at EU level, in order to remove the problem (see ECJ, 5 November 2002, C-466/98 et al., *Commission v. United Kingdom et al.*, EU:C:2002:624).

[80] See for that "minimum standard" already *supra* ch. 3.

[81] Commission Recommendation (EU) 2016/136 of 28 January 2016 on the implementation of measures against tax treaty abuse, [2016] OJ L 25, p. 67.

LoB clauses with the freedom of establishment.[82] These concerns have also found expression in the BEPS Action 6 Final Report, where the OECD noted that some countries may have "concerns based on EU law that prevent them from adopting the exact wording of the model provisions that are recommended in this report",[83] further specifying those concerns by recognizing "that the LOB rule will need to be adapted to reflect certain constraints or policy choices concerning other aspects of a bilateral tax treaty between two Contracting States" such as "concerns based on EU law".[84]

4.B. Limitation on Benefits clauses (LoB)

A simplified Limitation on Benefits (LoB) clause under article 7(6)-(13) MLI and article 29(1)-(7) OECD MC has undoubted merits insofar as it outlines the qualified persons entitled to treaty benefits alongside criteria that reflect their low exposure to treaty shopping[85] and applies objective tests and sub-tests that allow for excluding potential cases (e.g., "active conduct of a business", derivative benefits, companies traded on a stock exchange). However, the main EU law compatibility issue of a simplified LoB clause is that its "ownership clause" generally requires that resident entities only qualify for treaty benefits if at least 50% of their shares are held by other qualified persons (e.g., individuals resident in one of the contracting states or companies traded on a recognized stock exchange), so that other entities are excluded unless they meet one of the other objective tests (e.g., the "active conduct of a business" test) or receive discretionary relief. Such "ownership clause" may, however, lead to different treatment as between EU companies controlled by residents of a contracting member state and those controlled by residents of a non-contracting member state,[86] i.e., it can deprive a company resident in a member state, which is controlled by residents of another member state, of entitlement to the benefits of tax treaties that it would otherwise enjoy along with other residents of the former member state. Since the reason for that disadvantageous treatment typically coincides with the exercise of a fundamental freedom, i.e., the right of an EU national or EU company to establish a subsidiary in another member state, such problems may be regarded as the source of a substantive obstacle when the application of LoB clauses completely excludes the exercise of such right in the case of a genuine practice, or

[82] See for critical approaches, e.g., "Taxation: Commission asks the Netherlands to amend the Limitation on Benefits clause in the Dutch-Japanese Tax Treaty for the Avoidance of Double Taxation", Case No 2014-4233, MEMO/15/6006 (19 November 2015), and the Commission Working Paper on "EC Law and Tax Treaties", DOC(05) 2306 (9 June 2005), para. 19. For a detailed discussion of that issue, also in light of ECJ, 12 December 2006, Case C-374/04, *ACT Group Litigation*, EU:C:2006:773, see CFE ECJ Task Force, "Opinion Statement ECJ-TF 1/2018 on the Compatibility of Limitation-on-Benefits (LoB) Clauses with the EU Fundamental Freedoms", 58 *European Taxation* (2018), p. 419-425.

[83] BEPS Action 6 Final Report, p. 14.

[84] BEPS Action 6 Final Report, p. 19 (para. 21).

[85] Such as in the case of individuals, contracting states, their political subdivisions, agencies and instrumentalities, publicly traded companies and entities (including the related affiliates), non-profit organisations and recognized pension funds, and in some cases of collective investment vehicles.

[86] See already the critical approach in the Commission Working Paper on "EC Law and Tax Treaties", DOC(05) 2306 (9 June 2005), para. 19.

of a procedural one, when their application makes it more burdensome.[87] The compatibility issue therefore does not affect the goal of LoB clauses, which also matters for EU law, but rather how this type of instrument achieves such goal and, more specifically, the impact that the instrument may have on the exercise of genuine rights protected by EU primary law.

Despite the extremely diversified range of LoB clauses, all of them share one structural problem, which has prompted the European Commission to a critical position already in 2005[88] and to initiate an investigation on the compatibility of an LoB clause with EU law in a case concerning the tax treaty between Japan and the Netherlands in 2015.[89] Indeed, the Reasoned Opinion of the EU Commission finds this specific problem in the fact that the Netherlands has agreed to give better conditions to companies held by shareholders resident in its own territory and to companies traded on its stock exchanges as compared to the ones resident or traded elsewhere in the EU and EEA. In such circumstances, LoB clauses are thus to be regarded as the immediate source of the discriminatory treatment. The Commission argues:

> The European Commission asked the Netherlands today to amend the Limitation on Benefits (LOB) clause in the Dutch-Japanese Tax Treaty for the Avoidance of Double Taxation, which entered into force on 1 January 2012. The Commission believes that, on the basis of previous cases such as C-55/00 *Gottardo* and C-466/98 *Open Skies*, a Member State concluding a treaty with a third country cannot agree better treatment for companies held by shareholders resident in its own territory, than for comparable companies held by shareholders who are resident elsewhere in the EU/EEA. Similarly, it cannot agree better conditions for companies traded on its own stock exchange than for companies traded on stock exchanges elsewhere in the EU/EEA. However, under the current terms of the LOB clause, some entities are excluded from the benefits of the tax treaty. This means that they suffer higher withholding taxes on dividends, interest and royalties received from Japan than similar companies with Dutch shareholders or whose shares are listed and traded on 'recognised stock exchanges', which include certain EU and even third-country stock exchanges.

The specific consequence of the application of the LoB clause is therefore that the exclusion of such entities from the application of the double tax treaty makes the interest and royalties received from Japan by foreign-owned Dutch companies more heavily taxed than they would otherwise be, thus producing potential dissuasive effect on the exercise of the right of establishment of EU nationals into the Netherlands, or of the free movement of capital even in relations with third countries.[90] Indeed, and as the Commission has pointed out,

[87] For a detailed analysis and further references see CFE ECJ Task Force, "Opinion Statement ECJ-TF 1/2018 on the Compatibility of Limitation-on-Benefits (LoB) Clauses with the EU Fundamental Freedoms", 58 *European Taxation* (2018), p. 419-425.

[88] Commission Working Paper on "EC Law and Tax Treaties", DOC(05) 2306 (9 June 2005), para. 19.

[89] See "Taxation: Commission asks the Netherlands to amend the Limitation on Benefits clause in the Dutch-Japanese Tax Treaty for the Avoidance of Double Taxation" in the Commission's Fact Sheet "November infringements package: key decisions", MEMO/15/6006 (19 November 2015). Until present, there has been no development in this investigation, but the Commission has not closed this file.

[90] While the entitlement to the right of establishment only operates in favor of EU nationals and within the EU internal market, EU law protects free movement of capital under art. 63 ff. TFEU regardless of nationality within the EU internal market and, on a unilateral basis, also in relations with third countries regardless of the nationality.

there is a structural similarity between LoB clauses and the nationality clauses contained in air traffic agreements concluded by several EU member states with the US in the *pre-Open Skies* era, i.e., before the EU liberalization of air traffic routes and the conclusion of an EU-US agreement,[91] which the Court of Justice has regarded as incompatible with the EU right of establishment.[92] If one were to follow that line of reasoning, the issue is that a member state may not agree in its treaties with third countries a better treatment for companies held by shareholders resident in its own territory, than for comparable companies held by non-resident ones, and that such a situation would still prevail if certain "equivalent beneficiaries" under a so-called "derivative benefits" clause were included. Notwithstanding this, however, it is also under discussion whether other – objective or subjective – tests in a typical LoB clause make them "EU compatible".

A similar yet different compatibility issue may arise if the state of source is an EU member state that effectively deprives residents of the other contracting state of the entitlement to the benefits of the tax treaty based on an "ownership clause", i.e., based on whether they are controlled by qualifying shareholders of either contracting state. This issue was addressed by the ECJ in the rather complex *ACT Group Litigation* case,[93] with regard to the operation of the "ownership test" of the LoB in the Netherlands-United Kingdom tax treaty, according to which certain benefits granted by the source state (i.e., the UK) were denied to the recipient of a dividend in the residence state (i.e. a Netherlands entity) because its sole shareholder was resident in a third member state (i.e. Germany). The ECJ dealt with this issue in light of a horizontal discrimination analysis and held that the LoB clause at issue did not infringe upon the freedom of establishment:

> Thus, the grant of a tax credit to a non-resident company receiving dividends from a resident company, as provided for under a number of DTCs concluded by the United Kingdom, cannot be regarded as a benefit separable from the remainder of those DTCs, but is an integral part of them and contributes to their overall balance (see, to that effect, [ECJ, 5 July 2005, C-376/03, D, EU:C:2005:424], paragraph 62). [...] The same applies to the provisions of the DTCs which make the grant of such a tax credit subject to the condition that the non-resident company is not owned, directly or indirectly, by a company resident in a Member State or a non-member country with which the United Kingdom has concluded a DTC which does not provide for such a tax credit. [...] Even where such provisions extend to the situation of a company which is not resident in one of the contracting Member States, they apply only to persons resident in one of those Member States and, by contributing to the overall balance of the DTCs in question, are an integral part of them.[94]

While it is still not entirely clear that the ECJ in *ACT Group Litigation* wanted to give *carte blanche* to source member states to apply "ownership clauses",[95] other precedents addressing the

[91] The EU-US Open Skies Agreement was signed in Washington DC on 30 April 2007.

[92] See the (non-tax) judgments ECJ, 5 November 2002, C-466/98 et al., *Commission v. United Kingdom et al.*, EU:C:2002:624 ff. Furthermore, the EU Commission has also invoked another non-tax law precedent, namely ECJ, 15 January 2002, C-55/00, *Gottardo*, EU:C:2002:16.

[93] ECJ, 12 December 2006, C-374/04, *ACT Group Litigation*, EU:C:2006:773.

[94] ECJ, 12 December 2006, C-374/04, *ACT Group Litigation*, EU:C:2006:773, paras 88-90.

[95] For critical discussion see, e.g., CFE ECJ Task Force, "Opinion Statement ECJ-TF 1/2018 on the Compatibility of Limitation-on-Benefits (LoB) Clauses with the EU Fundamental Freedoms", 58 *European Taxation* (2018), p. 423-425.

residence member state that has agreed to them, such as *Gottardo*[96] and *Open Skies*,[97] rather clearly imply that those clauses might indeed be considered a relevant discrimination and potential infringement of the freedom of establishment that would require a justification, e.g., based on the attempt to counter abusive practices, and must be proportionate. As for the latter, the principle of proportionality requires a case-by-case analysis, which gives the taxpayers a right to prove the genuine nature of their transactions and accordingly protects the exercise of their rights, as granted by EU law. This prevents EU law from using irrefutable (so-called *iuris et de iure*) presumptions, for their overkill effects on genuine practices,[98] and limits the rebuttable (so-called *iuris tantum*) ones to the cases in which the rule of experience indicates the likelihood of an abusive practice.[99] Moreover, the exercise of genuine rights may not become more burdensome as an indirect consequence of their proximity to abusive practices, since this would be tantamount to not protecting such rights at all.

Another issue is not just whether the standard of article 7 MLI and article 29 OECD MC is compatible with EU law, but also and especially how tax authorities will act in such a context. This also applies for the "discretionary relief clause" contained in the text of the LoB clause (article 29(6) OECD MC), which may not be interpreted as giving tax authorities absolute powers, including that to subordinate the entitlement to treaty benefits to conditions that are in fact impossible to meet. By contrast, this clause is an instrument for them to also grant the treaty benefits when the tests of the LoB would otherwise fail to do so. Insofar as we interpret the clause in line with the requirements of the rule of law, which play a particularly important role under EU law, tax authorities not only have the power to grant relief under the treaty, but also the obligation to do so.

4.C. Principal Purposes Test (PPT)

The Principal Purposes Test (PPT) under article 7(1) MLI and article 29(9) OECD MC allows tax authorities to reject the entitlement to treaty benefits in the presence of grounds that indicate the existence of an abusive practice, i.e., "if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention". If the application of this measure is based on an effective rule of experience that indicates the abusive nature of a given practice and allows the taxpayer to prove the contrary, it may in principle fit within the justification admitted by the Court of Justice for admitting the restrictions on the exercise of fundamental freedoms. It has, however, been addressed by the Commission's 2016 Recommendation[100] and might indeed raise a number of concerns because it arguably deviates from the standard of abuse established under EU law. On the one hand, the application of this measure allows for a certain degree of flexibility, which is compatible with a proportionate reaction to abusive practices and thus may help reducing the overkill effects on the genuine exercise of rights. On the other hand, the PPT takes an

[96] ECJ, 15 January 2002, C-55/00, *Gottardo*, EU:C:2002:16.

[97] ECJ, 5 November 2002, C-466/98 et al., *Commission v. United Kingdom et al.*, EU:C:2002:624.

[98] See ECJ, 18 December 1997, C-286/94, C-340/95, C-401/95 and C-47/96, *Garage Molenheide*, EU:C:1997:623.

[99] See ECJ, 28 October 1999, C-55/98, *Bent Vestergaard*, EU:C:1999:533.

[100] See *supra* ch. 3.

approach that deviates from established EU anti-abuse doctrine: First, the "reasonableness test" is not *per se* a problem if it is understood that it requires the tax authorities to give proper evidence and effectively allows taxpayers to give evidence to the contrary without making the burden of proof too difficult or using unlimited discretionary powers. Second, the standards of tolerance for treaty shopping under the PPT ("one of the principal purposes") may be in fact lower than the ones established by settled case law of the ECJ ("essential purpose") to justify restrictions on the exercise of fundamental freedoms for countering abusive practices.

It is, however, not yet clear if those concerns merely relate to policy or if they may amount to a question of EU compatibility with regard to the fundamental freedoms. On the one hand, one might argue the latter for cases where the application of the PPT amounts to a non-discriminatory restriction such as at issue in *Deutsche Shell*[101] or where differences in the application of countering abuse in the domestic and cross-border scenarios lead to a *de facto* discrimination.[102] On the other hand, one might argue that the PPT *per se* can never lead to a relevant restriction: It merely denies a treaty benefit so that taxation is (again) exclusively governed by domestic law, and if such domestic law is non-discriminatory the cross-border situation is not treated worse than a comparable domestic transaction; likewise, even if the denial of treaty benefits would lead to double taxation, this would not infringe upon the freedoms.[103] It will, however, eventually be for the Court to decide that matter if so asked.

5. Beyond the MLI: binding dispute resolution

Juridical double taxation "is the most serious obstacle there can be to people and their capital crossing internal borders".[104] However, outside the limited scope of the company tax directives,[105] EU law neither provides for explicit substantive mechanisms to avoid juridical double taxation of income or capital between member states[106] nor has the ECJ so far found

[101] ECJ, 28 February 2008, C-293/06, *Deutsche Shell*, EU:C:2008:129.

[102] In those situations, proportionality would require a case-by-case analysis that gives the taxpayers a right to prove the genuine nature of their transactions and accordingly protects the exercise of their rights, as granted by EU law.

[103] ECJ, 14 November 2006, C-513/04, *Kerckhaert-Morres*, EU:C:2006:713; see also, e.g.,ECJ, 12 February 2009, C-67/08, *Block*, EU:C:2009:92, ECJ, 19 September 2012, C-540/11, *Levy and Sebbag*, EU:C:2012:581, and also EFTA Court, 7 May 2008, E-7/07, *Seabrokers*, para. 49 et seq.

[104] Opinion of Advocate General Colomer, 26 October 2004, C-376/03, *D*, EU:C:2004:663, para. 85.

[105] Such as the avoidance of juridical double taxation of inter-company dividends under the Parent-Subsidiary Directive (Council Directive 2011/96/EU) and of inter-company interest and royalty payments under the Interest-Royalties-Directive (Council Directive 2003/49/EC). Also, the step-up provided in art 5(5) of the ATAD (Council Directive (EU) 2016/1164) is a measure to avoid – time delayed – double taxation of the same capital gain.

[106] The only provision directly dealing with double taxation was former art. 293(2) of the EC Treaty, which urged the member states, "so far as is necessary, [to] enter into negotiations with each other with a view to securing for the benefit of their nationals ... the abolition of double taxation within the Community". That provision was not directly applicable to the benefit of taxpayers (ECJ, 12 May 1998, C-336/96, *Gilly*, EU:C:1998:221, para. 15) and was also subject to intense debate with regard to its interpretation. Art. 293 of the EC Treaty was, however, repealed by the Treaty of Lisbon (Point 280, [2007] OJ C 306/1) and speculation as to the reasons for its repeal and its effect are ongoing.

that the fundamental freedoms offer relief.[107] It is nevertheless common ground that the abolition of double taxation is, still,[108] an objective of the TFEU and even a "priority objective" of the Union,[109] as the overlap of taxing jurisdictions may result in distortions of the internal market.[110] In light of the un-harmonized international tax systems of the member states and their competence to conclude bi- and multilateral tax treaties, the Commission's focus has always been on procedural mechanisms to avoid those distortions: As early as 1976, the Commission had tabled a proposal for a directive regarding an arbitration procedure for the elimination of double taxation resulting from transfer pricing adjustments,[111] but this proposed directive was not adopted by the Council due to member states' resistance, largely on sovereignty concerns.[112] The member states have, instead, concluded the multilateral 1990 Arbitration Convention,[113] which is based on former article 293 of the EC Treaty (ex-article 220 EEC Treaty). This multilateral convention deals exclusively with the – narrow, but extremely important – issues of transfer pricing and profit attribution and has also been made workable in practice through the guidance developed by the EU's Joint Transfer Pricing Forum (JTPF).[114] Despite the OECD's work in that area, especially in the framework of Action 14 of the BEPS project and Part V of the Multilateral Instrument (MLI), there are still many situations where double taxation can persist, even within the European Union.

Accordingly, from an EU perspective, the Commission has long viewed the lack of an overall binding dispute resolution procedure for intra-EU situations as an issue to be addressed for both internal market reasons and global competitiveness.[115] Having announced further work

[107] The Grand Chamber of the ECJ, in its 2006 decision in *Kerckhaert-Morres*, i.e., at a time when (old) art. 293(2) EC Treaty was still part of primary law, declined to hold juridical double taxation to be incompatible with the fundamental freedoms (ECJ, 14 November 2006, C-513/04, *Kerckhaert-Morres*, EU:C:2006:713), and the Court has since confirmed that conclusion at a number of occasions (see, e.g.,ECJ, 12 February 2009, C-67/08, *Block*, EU:C:2009:92, ECJ, 19 September 2012, C-540/11, *Levy and Sebbag*, EU:C:2012:581, and also EFTA Court, 7 May 2008, E-7/07, *Seabrokers*, para. 49 et seq.).

[108] See ECJ, 12 September 2017, C-648/15, *Austria v. Germany*, EU:C:2017:664, para. 26, noting "the beneficial effect of the mitigation of double taxation on the functioning of the internal market that the European Union seeks to establish in accordance with Article 3(3) TEU and Article 26 TFEU". In the past, the ECJ specifically referred to – now repealed – art. 293(2) of the EC Treaty to establish that "the abolition of double taxation is one of the objectives of the Community to be attained by the Member States" (see, e.g., ECJ, 12 May 1998, C-336/96, *Gilly*, EU:C:1998:221, para. 16, and ECJ, 19 January 2006, C-265/04, *Bouanich*, EU:C:2006:51, para. 49).

[109] See, e.g., "Taxation in the Single Market", Periodical 6/1990, 25.

[110] Discussion paper for the Informal Meeting of Economic and Financial Affairs Council (ECOFIN) Ministers, Taxation in the European Union, SEC(96)487 final, 7 (20 March 1996).

[111] Proposal for a Council Directive on the elimination of double taxation in connection with the adjustment of transfers of profits between associated enterprises (arbitration procedure), COM (76) 611 final (25 November 1976) = [1976] OJ C 301/4.

[112] The proposal was eventually withdrawn two decades later; see [1997] OJ C 2/6.

[113] Convention 90/463/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, [1990] OJ L 225/10, as amended.

[114] For a detailed overview on the Convention and the JTPF's work see, e.g., G. Kofler, "Tax Disputes and the EU Arbitration Convention", in: E. Baistrocchi (ed.), *Resolving Tax Treaty Disputes: A Global Analysis*, Cambridge University Press 2017, 205-236.

[115] The following brief analysis is largely based on G. Kofler, "EU Tax Dispute Resolution Directive: The Deathblow to Double Taxation in the European Union", 28 *EC Tax Review* (2019), p. 266-269.

in this area in the early 2010s,[116] the Commission made a proposal for a directive on dispute resolution in 2016,[117] which was swiftly adopted by the Council.[118] This directive provides a binding procedural mechanism for resolving disputes between member states regarding EU resident taxpayers (article 2(1)(d)) when those disputes arise from the interpretation and application of agreements and conventions (i.e., tax treaties between member states and the EU Arbitration Convention) that provide for the elimination of double taxation of income and, where applicable, capital;[119] it hence does not apply to double taxation created by the interaction of domestic laws (e.g., the implementation of the ATAD), if the dispute is not based on the "interpretation and application" of a tax treaty. The directive had to be implemented by member states by 30 June 2019 and it "shall apply to any complaint submitted from 1 July 2019 onwards relating to questions of dispute relating to income or capital earned in a tax year commencing on or after 1 January 2018".

The directive contains strict timelines and detailed rules for initiating the procedure (article 3), for the MAP and for arbitration (articles 4 to 14), the composition of the arbitration panels (articles 8, 9 and 10), details on the rules of functioning, the costs and the procedure regarding evidence etc (article 11, 12 and 13),[120] the opinion of the arbitration panel (article 15), a number of taxpayer safeguards to keep the process moving,[121] exclusions (e.g., for cases of penalties regarding tax fraud under article 16(6)), rules regarding the interaction with national proceedings and dispute resolution under tax treaties (article 16) and simplifications for individuals and small undertakings (article 17); the final decision rests with the competent authorities (which can deviate from the arbitration panel's opinion), but "if they fail to reach an agreement as to how to resolve the question in dispute, they shall be bound by that opinion" (article 15). Moreover, a resolution requires that the taxpayer agrees and renounces the right to any other remedy or terminates any action, and in that case the decision must be implemented "irrespective of any time limits prescribed by the national law"(articles 4(2), 15(4)).

[116] See, e.g., the Commission's Communication on "Double Taxation in the Single Market", COM(2011) 712 final (11 November 2011), at p. 11, where it is stated that the "Commission sees a need to analyse the improvements that can be made to the procedures for the resolution of double taxation disputes within the EU. In particular, the possibility of a mechanism to effectively and swiftly resolve these disputes in all areas of direct taxation should be explored".

[117] Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union, COM(2016)686 (25 October 2016).

[118] Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, [2017] OJ L 265/1.

[119] See, e.g., the comprehensive analysis by H. M. Pit, *Dispute Resolution in the EU* (IBFD 2018). For a comparison between the OECD and the EU approaches see S. Govind, "The New Face of International Tax Dispute Resolution: Comparing the OECD Multilateral Instrument with the EU Dispute Resolution Directive", 27 *EC Tax Review* (2018), 309-324.

[120] The Commission has issued standard rules of functioning for the Advisory Commission and the Alternative Dispute Resolution Commission in case the competent authorities either have not agreed upon such rules or only done so incompletely. See Commission Implementing Regulation (EU) 2019/652 of 24 April 2019 laying down standard Rules of Functioning for the Advisory Commission or Alternative Dispute Resolution Commission and a standard form for the communication of information concerning publicity of the final decision in accordance with Council Directive (EU) 2017/1852, [2019] OJ L 110/26. For an overview see also, e.g., K. Perrou, "Taxpayer Rights and Taxpayer Participation in Procedures Under the Dispute Resolution Directive", 47 *Intertax* (2019), p. 715–724.

[121] The directive contains taxpayer safeguards throughout the procedure, e.g., recourse to the Advisory Commission where not all member states involved accept a complaint (art. 6) or appointment by competent courts or a national appointing body should the competent authorities not set up an arbitration panel in time (art. 7).

The directive's substance scope covers "disputes between member states when those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital".[122] It hence requires the existence of a tax treaty (or the Arbitration Convention) between the member states. This is, however, not a high hurdle: Out of the 378 possible bilateral tax treaty relationships between the (current) 28 member states, only five are not covered by a tax treaty.[123] Moreover, and unlike the Commission proposal,[124] the directive applies to all kinds of income tax disputes, whether business or individual. However, the directive only addresses income and capital taxation, but neither extends to inheritance and gift taxation or double taxation with other taxes (e.g., car registration taxes, consumption taxes etc),[125] i.e., areas where few tax treaties exist. However, it is a significant progress as compared with bilateral mechanisms given the fact that the directive clearly covers disputes in situations involving three or more member states, a typical "risk area" for unrelieved double taxation.[126]

The directive covers "disputes" between member states that arise "from the interpretation and application" of tax treaties or of the Arbitration Convention. Those disputes certainly cover cases of "double taxation" within the meaning of article 2(1)(c) of the TDRD but are not limited to those. Rather, the directive extends to disputes beyond issues of double taxation, e.g., with regard to the application of non-discrimination provisions. However, the directive deviates from article 25 OECD MA in that its article 2(1)(c) specifically defines "double taxation" as "the imposition by two or more Member States of taxes covered by an agreement or convention referred to in article 1 in respect of the same taxable income or capital when it gives rise to either: (i) an additional tax charge; (ii) an increase in tax liabilities; or (iii) the cancellation or reduction of losses that could be used to offset taxable profits". What seems hence not to be included in the directive's notion of "double taxation" are situations of so-called "virtual double taxation", where a tax treaty would, in principle, require exemption even if the other state does not tax the income (e.g., because of an exemption under domestic law or an unresolved

[122] This is broader and at the same time narrower than the Commission's proposal: The proposal would have applied "to all taxpayers that are subject to one of the taxes on income from business listed in Annex I" – i.e., the Member States' income and corporate taxes –, "including permanent establishments situated in one or more Member State whose head office is either in a Member State or in a jurisdiction outside the Union", i.e., irrespective of the existence of a double taxation convention between the member states (making, instead, "international practice in matters of taxation such as the latest OECD Model Tax Convention" the yardstick for arbitration).

[123] As of January 2020, those are the relations between Cyprus and Croatia (the 1985 treaty was terminated); Cyprus and the Netherlands (with a treaty initialled in September 2019); Denmark and France (the 1957 treaty was terminated effective January 1, 2009, and a new treaty is currently under negotiation); Denmark and Spain (the 1972 treaty was terminated effective 1 January 2009); and Finland and Portugal (the 1970 treaty was terminated effective 1 January 2019, and the 2016 treaty is not yet in force).

[124] The Commission's proposal with its limitation to "income from business" raised criticism from the European Parliament which (quite correctly) pointed out that the impact of "[d]isputes on the taxation of income, such as pensions and salaries" on individuals "can be significant". See Amendment 16 of the European Parliament legislative resolution of 6 July 2017 on the proposal for a Council directive on Double Taxation Dispute Resolution Mechanisms in the European Union (P8_TA(2017)0314), [2018] OJ C 334/266.

[125] There is hence ample room for expansion as to the taxes covered by the EU dispute resolution mechanism. See, e.g., the Commission's Communication on "Tackling cross-border inheritance tax obstacles within the EU", COM(2011) 864 final (15 December 2011), and the Report of Commission's expert group on "Ways to tackle inheritance cross-border tax obstacles facing individuals within the EU" (December 2015).

[126] See, e.g., art 2(1)(c), speaking of the imposition of taxes "by two or more Member States", and similar language throughout the Directive.

negative conflict of qualification).[127] Conversely, situations of conflicts of qualification, where, e.g., "one Member State interprets a source of income as salary while the other Member State interprets the same source of income as profit", would be covered by that definition,[128] and relevant "double taxation" arguably also exists where member states tax the same income but in different taxable years. Likewise, classical economic double taxation in transfer pricing and profit attribution cases (i.e., the object also of the EU Arbitration Convention) seems to fall squarely within the directive's notion of "double taxation", as it does not require that double taxation occurs in the hands of the same taxpayer. That said, the distinction of whether a "dispute" involves "double taxation" is relevant: This is because, under article 16(7), a member state may "deny access to the dispute resolution procedure under Article 6 on a case-by-case basis where a question in dispute does not involve double taxation".[129] However, that case-by-case exclusion is limited to the arbitration procedure, whereas access to the directive's mutual agreement procedure remains available for all relevant "disputes".

In line with the concept of the Arbitration Convention, the primary tool for dispute resolution after a failed Mutual Agreement Proceeding is arbitration by a so-called "Advisory Commission". As said above, the directive provides a detailed set of rules on procedure, timing, appointments, information, evidence, hearings, costs etc (and the Commission has further drafted standard rules of functioning[130]), and – in article 15 – also determines that the Advisory Commission has to issue a – reasoned – independent "opinion" in writing (which may or may not be accepted by the competent authorities)[131]. This opinion is to be based "on the provisions of the applicable agreement or convention [...] as well as on any applicable national rules". While an independent opinion might certainly have its benefits, a recent international trend is to agree on the so-called "final offer", "last best offer" or "baseball" arbitration,[132] where the arbitration panel (only) has to decide between competing proposals made by the competent authorities (e.g., a specific monetary amount of income or expense). This implicitly forces the competent authorities to take reasonable and well-considered positions in their submissions, while also barring the arbitration panel from simply "splitting the difference".[133] That said,

[127] For a detailed analysis of this definition of double taxation and further nuances see R. Ismer, "Was ist internationale Doppelbesteuerung?", in: R. Ismer, E. Reimer, A. Rust and Ch. Waldhoff (eds.), *Territorialität und Personalität, Festschrift für Moris Lehner*, Otto Schmidt 2019, 27-46.

[128] The European Parliament refers to that situation as "economic double taxation". See Amendment 16 of the European Parliament legislative resolution of 6 July 2017 on the proposal for a Council directive on Double Taxation Dispute Resolution Mechanisms in the European Union (P8_TA(2017)0314), [2018] OJ C 334/266.

[129] See for that compromise of keeping a (broader) scope of the directive and permitting member states to deny access to the dispute resolution procedure on a case-by-case bases paras 8-10 in Doc. 9011/17 FISC 99 ECOFIN 345 (12 May 2017).

[130] See Commission Implementing Regulation (EU) 2019/652, [2019] OJ L 110/26.

[131] Under art. 15, it is for the competent authorities to agree on how to resolve the question in dispute within six months after the opinion. The competent authorities may take a decision which deviates from the opinion of the Advisory Commission or Alternative Dispute Resolution Commission. However, if they fail to reach an agreement as to how to resolve the question in dispute, they shall be bound by that opinion.

[132] It should be noted, e.g., that under Part V of the OECD's Multilateral Instrument (MLI) as of December 2019, 22 out of the currently 30 States opting for mandatory binding arbitration have chosen "baseball arbitration" (these are Australia, Austria, Barbados, Belgium, Canada, Curacao, Denmark, Fiji, Finland, France, Germany, Ireland, Italy, Liechtenstein, Luxembourg, Mauritius, Netherlands, New Zealand, Singapore, Spain, Switzerland and the UK, whereas Andorra, Greece, Japan, Malta, Papa New Guinea, Portugal, Slovenia, and Sweden have opted out of baseball arbitration).

[133] For a brief analysis see, e.g., N. Bravo, "Mandatory Binding Arbitration in the BEPS Multilateral Instrument›, Nathalie Bravo", 47 *Intertax* (2019), p. 693, at p. 698-699.

the directive gives member states a tool to opt for "baseball arbitration" in that it foresees, in article 10, the setting up of an "Alternative Dispute Resolution Commission" (ADRC) to resolve the dispute instead of an Advisory Commission. Indeed, the ADRC may apply "any dispute resolution process or technique", "including the 'final offer' arbitration process (otherwise known as 'last best offer' arbitration)", hence enabling the choice of a streamlined process. Also, "baseball arbitration" does not necessarily mean that the arbitration panel must be prevented from giving reasons for the decision, although article 23(1)(c) of the OECD's MLI takes the clear position that the arbitration panel's decision "shall not include a rationale or any other explanation of the decision"; in contrast, the directive would certainly allow for "baseball arbitration with reasons".[134] Moreover, the ADRC is not limited to ad hoc arbitration, but can also have a permanent nature (a so-called "Standing Committee"), which could be a real chance for a permanent arbitration structure[135] or even serve as a first step towards the establishment of a European tax court.[136]

In summary, the TDRD certainly has a number of shortcomings and raises questions as to taxpayer's fundamental rights,[137] but it nevertheless is a welcome and potentially huge step to prevent persisting double taxation in the European Union and might even open further avenues for the establishment of a permanent arbitration structure.[138] Moreover, and even if some technicalities might need to be worked out in practice, the mere existence of a legally enforceable, tightly timed arbitration mechanism will certainly have a positive impact on the member states' willingness to speedily resolve double taxation issues in mutual agreement proceedings before cases are taken out of their hands and into independent arbitration.

6. Treaties, non-taxation and state aid?

A further crucial question from an EU law perspective concerns whether double non-taxation amounts to illegal state aid under article 107 TFEU.[139] It is clear that any exemption from taxation normally imposed by a taxpayer's residence state amounts to a relevant "advantage"

134 See, however, J. F. Avery Jones, "Types of Arbitration Procedure", 47 *Intertax* (2019), p. 674, at p. 675, who considers "baseball arbitration with reasons" as "the best of both worlds".

135 See, e.g., the discussion in para. 14-17 in Doc. 9011/17 FISC 99 ECOFIN 345 (12 May 2017), and the ideas on a permanent structure developed by S. Piotrowski, R. Ismer, P. Baker, J. Monsenego, K. Perrou, R. Petruzzi, E. Reimer, F. Serrano Antón, L. Stankiewicz, E. Traversa and J. Voje, "Towards a Standing Committee Pursuant to Article 10 of the EU Tax Dispute Resolution Directive: A Proposal for Implementation", 47 *Intertax* (2019), p. 678-692.

136 See J. Voje, "EU Tax Dispute Resolution Directive (2017/1852): Paving the Path Toward a European Tax Court?", 58 *European Taxation* (2018), p. 309-317.

137 See, e.g., K. Perrou, "Taxpayer Rights and Taxpayer Participation in Procedures Under the Dispute Resolution Directive", 47 *Intertax* (2019), p. 715-724.

138 It might be noted in passing, however, that the compatibility of the dispute resolution mechanism under the TDRD with arts. 18, 267 and 344 TFEU in light of the ECJ's judgment in *Achmea* (ECJ, 6 March 2018, C-284/16, *Achmea*, EU:C:2018:158) has been questioned. See for that discussion, e.g., S. Piotrowski, R. Ismer, P. Baker, J. Monsenego, K. Perrou, R. Petruzzi, E. Reimer, F. Serrano Antón, L. Stankiewicz, E. Traversa and J. Voje, "Towards a Standing Committee Pursuant to Article 10 of the EU Tax Dispute Resolution Directive: A Proposal for Implementation", 47 *Intertax* (2019), p. 678, at p. 682-684; J. Monsenego, "Does the Achmea Case Prevent the Resolution of Tax Treaty Disputes through Arbitration?", 47 *Intertax* (2019), p. 725, at p. 733-735; K. Perrou, "Taxpayer Rights and Taxpayer Participation in Procedures Under the Dispute Resolution Directive", 47 *Intertax* (2019), p. 715, at p. 719-723.

139 For extensive analysis see C. Marchgraber, *Double (Non-)Taxation and EU Law* (Kluwer, 2017).

for the taxpayer who receives it, irrespective of whether it is granted unilaterally or by way of a bilateral tax treaty. What is less clear, however, is under which circumstances such an advantage will be considered "selective" and, thus, *prima facie* illegal.

The EU Commission has in the past considered "provisions to prevent double taxation" to be of a "purely technical nature" and thus not constitute state aid where "they apply without distinction to all firms and to the production of all goods".[140] In contrast to this fairly broad exception, it noted in its 2016 explanatory notice merely that "the need to avoid double taxation" would be "the basis for a possible justification".[141] While this still seems to protect member states' freedom to provide relief from double taxation[142] and, indeed, to choose different methods for doing so in different tax treaties,[143] it is not clear that this remains true in cases where a particular relief mechanism leads to "overcompensation" that expresses itself as non-taxation, such as in the case of exemption granted for untaxed foreign income.[144]

In the *McDonald's* case,[145] the EU Commission initially considered that the exemption in Luxembourg of profits attributed – at least under domestic law[146] – to a permanent establishment in the US would amount to state aid if the US did not tax those profits. It ultimately reversed course, however, and concluded that the applicable tax treaty – interpreted in line with guidance from the OECD Commentaries – did not require taxation in the source state as a precondition for the obligation on the residence state to exempt income

[140] See para. 13 of the Commission's notice on the application of the state aid rules to measures relating to direct business taxation, [1998] OJ C 384, p. 3.

[141] See para. 139 of the Commission's notice on the notion of state aid as referred to in art. 107(1) of the Treaty on the Functioning of the European Union, [2016] OJ C 262, p. 1.

[142] See, e.g., W. Schön, "Taxation and State Aid Law in the European Union", 36 *Common Market Law Review* (1999), p. 911, at p. 935; W. Schön, "State Aid in the Area of Taxation", in: L. Hancher, T. Ottervanger & P. J. Slot (eds.), *EU State Aids*, 3rd edition (Sweet & Maxwell, 2016), p. 393, at p. 426 (noting that "[t]ax provisions which are advantageous to foreign or domestic investors engaged in cross-border activities are not at all 'aids' insofar as they only strive to reduce or compensate for the disadvantageous effects of double taxation").

[143] *See*, e.g., R. Luja, "Tax Treaties and State Aid: Some Thoughts", 44 *European Taxation* (2004), p. 234 et seq.

[144] See on this discussion, e.g., C. HJI Panayi, "Limitation on Benefits and State Aid", 44 *European Taxation* (2004), p. 83 et seq.; R. Luja, "Tax Treaties and State Aid: Some Thoughts", 44 *European Taxation* (2004), p. 234 et seq.; F. Ph. Sutter, "Die DBA-Freistellungsmethode als unzulässige Beihilfe i. S. d. Art. 87 EG?", 14 *Steuer und Wirtschaft International* (2004), p. 4 et seq.; C. HJI Panayi, *Double Taxation, Tax Treaties, Treaty-Shopping and the European Community* (Kluwer, 2007), p. 169 et seq.; S. Leitsch, "Stellt die fiktive Quellensteueranrechnung gemäß DBA eine unzulässige Beihilfe dar?", 28 *Steuer und Wirtschaft International* (2018), p. 217 et seq. For a broad perspective based on the recent OECD BEPS discussion see P. Rossi-Maccanico, "Fiscal Aid, Tax Competition, and BEPS", 75 Tax Notes International (Sept. 8, 2014), p. 857, at p. 865-866, and P. Rossi-Maccanico, "Fiscal State Aids, Tax Base Erosion and Profit Shifting", 24 *EC Tax Review* (2015), p. 63 et seq.

[145] Case SA.38945 on possible aid granted by Luxembourg to McDonald's Europe: [2016] OJ C 258, p. 11 ('McDonald's Opening Decision') and [2019] OJ L 195, p. 20 ("McDonald's Final Decision").

[146] It was unclear from the Opening Decision whether the attribution to such permanent establishment was in line with the proper reading of the terms of the applicable double tax convention, since it remained uncertain whether there was such an establishment from the US perspective; ultimately, the Commission concluded that the attribution under Luxembourg's domestic law was decisive by virtue of art. 3(2) of the double tax convention (see paras 112-113 of the McDonald's Final Decision).

properly allocated to the former.[147] Notably, to show selectivity, the Commission attempted merely to prove that Luxembourg had misapplied the applicable tax treaty.[148] It did not rely on the alternative argument that double non-taxation resulting from the application of a tax treaty *ipso fact*o amounts to state aid.

So, at this point in time, the Commission seems to identify each individual tax treaty as the appropriate reference framework to establish "normal taxation", instead of either national corporation tax system in its entirety. Consequently, only selective misapplication of a tax treaty to give a taxpayer benefits that are not due under the proper interpretation, will be recognized as state aid. Notably, the Commission is likely to consider any interpretation that deviates from the treaty-related OECD Commentaries to be erroneous and thus aid. However, if the Commission chose the reference framework differently – and it almost certainly could do so as this choice is not pre-determined[149] – the benefits granted by a tax treaty could be directly scrutinized as prima facie aid with the consequence that "double taxation relief" would have to be relegated to an issue of justification and thus – crucially – be subject to a proportionality analysis.[150] Under this alternative approach, one might even go as far as questioning treaty benefits that result in "white income" because they are not made dependent on the other contracting state domestically exercising the taxing right assigned to it through a subject-to-tax clause:[151] Exempting income that would not otherwise be at risk of double taxation is not "necessary" to avoid double taxation, nor is it possible to characterize a system that freely grants such benefit as implementing the least far-reaching measures to achieve that goal. Such inquiry would, however, be at odds with the accepted principle of capital import neutrality.[152]

As the Commission appears to be motivated partly by a desire neither to upset the balanced allocation of taxing rights resulting from a tax treaty nor the perceived "international standard" visible in the OECD Commentaries, the distinction between the approaches outlined above is likely to become less pronounced following the implementation of the new post-BEPS standard through the MLI. As the latter makes it clear that existing tax treaties do

[147] Specifically, the Commission accepted that the non-taxation outcome was not the result of a conflict of qualification and thus not subject to the corresponding solution suggested in the OECD Commentaries. See for details on the proceedings and arguments, e.g., R. Szudoczky, "Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law: Comments", in: I. Richelle, W. Schön & E. Traversa (eds.), *State Aid Law and Business Taxation* (Springer, 2013), p. 163, at p. 171-173; O. R. Hoor & K. O'Donnell, "McDonald's State Aid Investigation: What the European Commission Got Wrong", 83 *Tax Notes International* (Sept. 12, 2016), p. 975 et seq.; F. Shaheen, "Tax Treaty Aspects of the McDonald's State Aid Investigation", 86 *Tax Notes International* (Apr. 24, 2017), p. 331 et seq.; B. Larking, "How Did McDonald's Get Off the EU State Aid Hook?", 93 *Tax Notes International* (Feb. 4, 2019), p. 479 et seq.

[148] See McDonald's Final Decision, paras 107-109.

[149] W. Haslehner, "Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law", in: I. Richelle, W. Schön & E. Traversa (eds.), *Allocating Taxing Powers within the European Union* (Springer, 2013), p. 133, at p. 138-143.

[150] See para. 140 of the Commission's notice on the notion of state aid as referred to in art. 107(1) of the Treaty on the Functioning of the European Union, [2016] OJ C 262, p. 1, referring to the ECJ, 8 September 2011, C-78/08 to C-80/08, *Paint Graphos and others*, ECLI:EU:C:2011:550, para. 75.

[151] See, with further references, W. Haslehner, "Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law", in: I. Richelle, W. Schön & E. Traversa (eds.), *Allocating Taxing Powers within the European Union* (Springer, 2013), p. 133, at p. 135-143; R. Szudoczky, "Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law: Comments", in: I. Richelle, W. Schön & E. Traversa (eds.), *State Aid Law and Business Taxation* (Springer, 2013), p. 163, at p. 169-179.

[152] See in the area of the fundamental freedoms, e.g., ECJ, 12 December 2002, C-385/00, *De Groot*, EU:C:2002:750; ECJ, 28 February 2013, C-168/11, *Beker and Beker*, EU:C:2013:117).

not intend to create opportunities for non-taxation,[153] the Commission would be somewhat[154] strengthened in scrutinizing a double non-taxation outcome derived from a misapplication of the relevant tax treaty.

EU state aid rules do not by themselves rule out member states concluding or maintaining tax treaties that allow double non-taxation to occur; however, it is undoubtedly the case that such outcomes will be scrutinized even more closely going forward.

153 Art. 6 MLI.

154 The argument must be limited by the fact that the preamble text included via art. 6 MLI is not the equivalent of adding a subject-to-tax clause into the tax treaty; therefore, the limits of interpretation must be heeded.

OECD report Subject 1

Reconstructing the treaty network

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Summary and conclusions

This report presents the impact of the OECD/G20 Base erosion and profit shifting Project (the BEPS Project) on the global bilateral tax treaty network. In particular, it discusses the lessons to be learnt from that experience and how the BEPS treaty-related measures were implemented in existing tax treaties through the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the MLI). It also discusses how those BEPS treaty-related measures were implemented in existing and new tax treaties via bilateral negotiations.

The MLI represents an unprecedented coordinated effort to comprehensively modify existing tax treaties so that new international taxation norms can be implemented in a coordinated and efficient way. With 94 covered jurisdictions and over 1,630 "matched agreements" as of 1 March 2020, jurisdictions at all levels of development have demonstrated strong support for a coordinated, multilateral approach to resolving BEPS issues and changing tax treaties. It is important to look at the elements that have contributed to the success of the MLI, as well as lessons that could be drawn from the MLI experience so that future changes could be implemented.

Part I of this report discusses the lessons to be learnt from such experience and, in particular, how the MLI experience could inspire future multilateral changes to international tax standards. It concludes that while the complexity of the MLI was necessary to achieve its purpose (namely to offer signatories wide flexibility in making policy choices), a future multilateral instrument – namely in the context of the ongoing work to address the digitalisation of the economy – could focus on core measures for broad and consistent implementation.

Part II provides the statistical impact of the BEPS Project on bilateral tax treaties. It also looks at the impact of the MLI on tax treaties as compared with bilateral amendments to existing treaties in order to implement the BEPS tax treaty measures. Based on the analysis, the number of tax treaties modified by the MLI is significantly greater than the number of tax treaties modified through bilateral renegotiation. Indeed – subject to the MLI signatories' internal ratification process, about half of the existing global treaty network will be modified by the MLI. This therefore demonstrates strong support from jurisdictions at all levels of development, for a coordinated, multilateral approach to resolving BEPS issues and changing tax treaties. The MLI experience thus shows us that coordinated effort is needed to comprehensively and swiftly modify existing tax treaties and implement internationally agreed tax norms.

Going forward, particularly in light of the ongoing work to address the tax challenges posed by the digitalisation of the economy, it will be essential to draw on the MLI experience to implement future internationally-agreed treaty-related measures. The MLI will pave the

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way for future changes to the international tax system and will inform how future changes could be implemented even more effectively.

1. Introduction

1. This OECD IFA report presents the impact of the OECD/G20 Base Erosion and Profit Shifting Project (the BEPS Project) on the global bilateral tax treaty network. In particular, it discusses the lessons to be learnt from that experience and how the BEPS treaty-related measures were implemented in existing tax treaties through the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the MLI). It also discusses how those BEPS treaty-related measures were implemented in existing and new tax treaties via bilateral negotiations.
2. The MLI represents an unprecedented coordinated effort to comprehensively modify existing tax treaties so that new international taxation norms can be implemented in a coordinated and efficient way. The MLI experience has paved the way for future changes to the international tax system. As a result, it is important to look at the elements that have contributed to the success of the MLI, as well as lessons that could be drawn from the MLI experience so that future changes could be implemented – including those that go beyond changes to bilateral treaties – even more effectively. This is one of the tasks of this report.
3. Therefore, Part I of this report discusses the lessons to be learnt from such experience and, in particular, how the MLI experience could inspire future multilateral changes to international tax standards. Then, Part II provides the statistical impact of the BEPS Project on bilateral tax treaties. It also looks at the impact of the MLI on tax treaties and compares it with bilateral amendment to existing treaties in order to implement the BEPS tax treaty measures.

2. Background

4. Two years after the publication of the BEPS Action Plan, OECD countries together with the G20 and partner jurisdictions launched the Final OECD/G20 Base Erosion and Profit Shifting Package in October 2015 (the BEPS Package).[3] The BEPS Package took the form of 15 actions set out in separate reports. The aim of the BEPS Project was to design tools, at both the domestic and international level, for jurisdictions to ensure that profits are taxed where economic activities take place and where value is created, while at the same time giving businesses greater certainty by reducing disputes over the application of international tax rules and standardising compliance requirements. The BEPS Package contained recommendations, best practices, and minimum standards. Jurisdictions have committed to implement all four BEPS minimum standards to ensure a minimum level of protection against BEPS.

[3] This work began with the report *Addressing Base Erosion and Profit Shifting* released by the OECD in February 2013. The BEPS Action Plan was then adopted by the OECD and G20 leaders in September 2013. This Action Plan formed the basis of the Final BEPS Package.

5. Following the launch of the BEPS Package, the Inclusive Framework on BEPS ("IF") was established in 2016 to ensure that interested countries and jurisdictions, including developing economies, could participate on an equal footing in the development of standards on BEPS and related issues, while reviewing and monitoring the implementation of the BEPS Project. On 15 December 2019, the IF had a membership of 135 jurisdictions from all over the world and at all levels of development.
6. In order to implement the BEPS treaty-related minimum standards and measures in existing tax treaties, Action 15 of the BEPS Package[4] recommended the development of a multilateral instrument to allow all interested jurisdictions to modify the existing network of bilateral tax treaties in a swift and coordinated way, without the need for bilateral renegotiations.[5]
7. Negotiations of that multilateral instrument were quickly convened in 2016 with the formation of an ad hoc group for the development of the MLI (the ad hoc Group), which had been approved by the OECD Committee on Fiscal Affairs and endorsed by the G20 in February 2015. On 24 November 2016, the ad hoc Group formally adopted the text of the MLI, the first legal instrument of its kind in tax matters able to modify all existing bilateral tax treaties in force.
8. The MLI was then signed by the first group of jurisdictions on 7 June 2017. On 15 December 2019, the MLI had already been signed by 92 jurisdictions and formally ratified by 37 jurisdictions; it would thus modify over 1,600 bilateral tax treaties – half of the pre-BEPS tax treaty network.[6] Its impact on the global tax treaty network has already proven to be significant because of the efficiency gains it offers jurisdictions: through a single process of signature and ratification, jurisdictions may implement all treaty-related BEPS measures in accordance with their policy choices.
9. Signing the MLI, however, is not a minimum standard. Members of the IF may freely determine how they implement the treaty-related BEPS measures in their treaty network. They could do so through the MLI or through bilateral renegotiations. To assist bilateral renegotiations, all treaty-related BEPS measures are included in the 2017 version of the OECD Model Convention on Income and Capital (OECD MTC)[7] and its Commentary – a model whose influence extends beyond the OECD member countries.

2.1. The BEPS treaty-related Minimum Standards

10. While jurisdictions may decide how to implement the BEPS treaty-related measures, they have committed to introduce the treaty-related minimum standards in all their tax treaties in force. The BEPS Package includes two treaty-related minimum standards: the Action 6 minimum standard for the prevention of treaty abuse, and the Action 14

[4] See OECD (2015), *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15-2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241688-en.

[5] Unless otherwise specified, we use the term "tax treaties" in this paper interchangeably with "double taxation agreements", referring specifically to comprehensive treaties for the elimination of double taxation.

[6] As set out in arts. 1 and 2 of the MLI, the Convention "modifies" any tax treaty in force between parties to the MLI which has been listed by both contracting jurisdictions as an agreement which they wish to be covered by the MLI (defined as a "Covered Tax Agreement").

[7] OECD (2017), *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD Publishing, Paris, https://doi.org/10.1787/mtc_cond-2017-en.

minimum standard for making dispute resolution mechanisms more effective. The implementation of these minimum standards is currently being monitored through the Action 6 Peer Review and Action 14 Peer Review processes.

2.1.1. *Action 6 Minimum Standard – Preventing Treaty Abuse*

11. The Action 6 Final Report[8] introduced treaty anti-abuse rules to provide safeguards against the abuse of treaty provisions and to prevent the granting of treaty benefits in inappropriate circumstances. A key focus of the report was treaty shopping, which involves the attempt by a person to indirectly access the benefits of a tax treaty between two jurisdictions without being a resident of either one of those jurisdictions.[9] The Action 6 Final Report set out one of the BEPS minimum standards that deal with treaty abuse.
12. The Action 6 minimum standard requires jurisdictions to include two elements in their tax agreements: first, an express statement of common intention, generally in the preamble, to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty-shopping;[10] second, one of three measures to implement that common intention:[11]
    i. a principal purpose test (PPT)[12] together with either a simplified or a detailed version of the limitation on benefits (LOB) rule;[13]
    ii. the PPT alone; or
    iii. a detailed version of the LOB rule together with a mechanism (such as a treaty rule that might take the form of a PPT rule restricted to conduit arrangements, or domestic anti-abuse rules or judicial doctrines that would achieve a similar result) that would deal with conduit arrangements not already dealt with in tax treaties.

2.1.2. *Action 14 Minimum Standard – Making Dispute Resolution Mechanisms More Effective*

13 The work carried out under Action 14 aimed to improve treaty dispute resolution mechanisms for disputes arising between contracting jurisdictions. The Action 14 Final Report[14] contained a number of measures, recommendations and best practices. It also set out a minimum standard which requires jurisdictions to include in their bilateral tax

8 OECD (2015), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241695-en.

9 See para. 17 of the BEPS Action 6 Final Report (2015). As the report also notes, cases where a resident of the contracting state in which income originates seeks to obtain treaty benefits (e.g. through a transfer of residence to the other contracting state or through the use of an entity established in that other state) could also be considered a form of treaty shopping.

10 This measure can be implemented through art. 6 of the MLI.

11 This measure can be implemented through art. 7 of the MLI.

12 Included at para. 9 of art. 29 of the 2017 OECD MTC.

13 Included at paras 1 to 7 of the 2017 OECD MTC.

14 OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241633-en.

treaties paragraphs 1 to 3 of article 25 of the OECD MTC as modified by the BEPS Project.[15] Paragraphs 1 to 3 provide that:

- *Choice of competent authority*: where a person considers that the actions of one or both of the contracting jurisdictions result or will result for that person in taxation not in accordance with the provisions of a tax treaty, that person may, irrespective of the remedies provided by the domestic law of those contracting jurisdictions, present the case to the competent authority of either contracting jurisdiction;
- *Specific time limit*: the case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty;
- *Commitment to resolve objections*: the competent authority shall endeavour, if the objection to it appears to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other contracting jurisdiction, with a view to the avoidance of taxation which is not in accordance with the tax treaty;
- *Implementation notwithstanding domestic time limits*: any agreement reached by the competent authorities shall be implemented notwithstanding any time limits in the domestic law of the contracting jurisdictions;
- *Commitment to resolve difficulties or doubts*: the competent authorities of the contracting jurisdictions shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the tax treaty; and
- *Consultation*: the competent authorities may also consult together for the elimination of double taxation in cases not provided for in the tax treaty.

2.1.3. *Other treaty-related BEPS measures*

14. In addition to the Action 6 and Action 14 minimum standards, the BEPS package contained several additional best practices and recommendations that address a variety of BEPS issues. These measures, which were developed under BEPS Action 2 (Neutralising the Effects of Hybrid Mismatch Arrangements), Action 6 (Preventing Treaty Abuse), Action 7 (Preventing the Artificial Avoidance of Permanent Establishment Status) and Action 14 (Making Dispute Resolution Mechanisms More Effective), are briefly described below.

2.1.4. *Action 2 - Neutralising the Effects of Hybrid Mismatch Arrangements*

15. The following treaty-related BEPS measures were developed under the Action 2 Final Report and aim to neutralise the effect of hybrid instruments and entities:[16]
    - *Transparent entities*: provisions that prevent treaty benefits being granted where neither contracting jurisdiction treats the income of an entity as income of one of its residents under its domestic law;[17] and

[15] These measures can be implemented through art. 16 of the MLI.

[16] OECD (2015), *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241138-en

[17] Included in para. 2 of art. 1 of the 2017 OECD MTC and applicable through art. 3 of the MLI.

– *Application of methods for elimination of double taxation*: provisions that address problems arising from the inclusion of the exemption method in treaties with respect to items of income that are not taxed in the jurisdiction of source.[18]

Action 6 – Non-minimum Standard Provisions

16. In addition to the minimum standard, the Action 6 Final Report proposed the following treaty-related measures alongside the Action 6 minimum standard:
    – *Dual resident entities*: a provision that ensures that competent authorities may resolve the residence of dual-resident entities on a case-by-case basis;[19]
    – *Dividend transfer transactions*: a provision that requires a person to hold shares for a minimum period in order to benefit from a reduced rate on dividends received from a foreign subsidiary;
    – *Capital gains from alienation of shares or interests of entities deriving their value principally from immovable property*: a provision that strengthens the rules that address situations in which the value of immovable property held by an entity is diluted ahead of a sale of shares or interests in that entity, which can deprive the jurisdiction where that immovable property is located of the taxing rights it might otherwise have had;[20]
    – *Anti-abuse rule for permanent establishments situated in third jurisdictions*: measures that address the double non-taxation which may arise when the profits of an enterprise are attributed to a permanent establishment situated in third jurisdictions;[21] and
    – *Application of tax agreements to restrict a jurisdiction's right to tax its own residents*: a provision that confirms the right of a contracting jurisdiction to tax its own residents.[22]

2.1.5. Action 7 - Preventing the Artificial Avoidance of Permanent Establishment Status

17. The work carried out under Action 7 led to changes in the definition of permanent establishment to address certain arrangements commonly used to artificially avoid permanent establishment status. The specific treaty-related measures proposed in the Action 7 Final Report[23] are as follows:
    – *Dependent and independent agents*: rules that strengthen the permanent establishment definition relating to activities undertaken in a jurisdiction by a dependent agent of a foreign company (including through commissionaire arrangements);[24]
    – *Specific activity exemptions*: rules that restrict the application of certain specific activity exceptions to the definition of permanent establishment to those activities that are of a preparatory or auxiliary nature;[25]

[18] Paras 442 through 444 of the Action 2 Report; art. 5 of the MLI and art. 23A of the 2017 OECD Model Tax Convention.
[19] Included in para. 3 of art. 4 of the 2017 OECD MTC and applicable through art. 4 of the MLI.
[20] Included in para. 4 of art. 13 of the 2017 OECD MTC and applicable through art. 9 of the MLI.
[21] Included in para. 8 of art. 29 of the 2017 OECD MTC and applicable through art. 10 of the MLI.
[22] The so-called "saving clause" is included in para. 3 of art. 1 of the 2017 OECD MTC and applicable through art. 11 of the MLI.
[23] OECD (2015), *Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241220-en
[24] Included in paras 5 and 6 of art. 5 of the 2017 OECD MTC and applicable through art. 12 of the MLI.
[25] Included in para. 4 of art. 5 of the 2017 OECD MTC and applicable through art. 13 of the MLI.

– *Anti-fragmentation of activities*: ensuring that an enterprise cannot circumvent permanent establishment status through the fragmentation of activities of a cohesive business operation;[26]
– *Splitting-up of contracts*: a measure addressing the splitting-up of contracts related to a specific project where this circumvents a provision stipulating a period of time after which the project constitutes a permanent establishment;[27]
– *Definition of a person closely related to an enterprise*: a definition of a person closely related to an enterprise for the purposes of the above changes to the permanent establishment definition.[28]

Action 14 – Non-minimum Standard Provisions

18. The Action 14 Final Report, alongside its minimum standard, encouraged jurisdictions to make the appropriate corresponding adjustments in the context of taxing associated enterprises, and to resort to resolving any case by mutual agreement where necessary.[29]
19. It also provided for the development of a mechanism for mandatory binding MAP arbitration, which was subsequently developed by a sub-group of interested jurisdictions and is now in Part VI of the MLI.[30]

3. Part I: Insights from the MLI experience and the effects on the global tax treaty network

20. The MLI experience has shown that a multilateral approach for the implementation of internationally agreed standards in existing tax treaties has been a success. As of 1 March 2020, 94 jurisdictions joined the MLI, which then applied to over 1,630 "matched agreements" that would become covered tax agreements[31] once the MLI enters into force for both contracting jurisdictions.
21. Subject to the MLI signatories' internal ratification process, about half of the existing global treaty network will be modified by the MLI. This demonstrates strong support from jurisdictions at all levels of development, for a coordinated, multilateral approach to resolving BEPS issues and changing tax treaties. Based on our analysis contained in Part II of this report, the number of tax treaties modified by the MLI is significantly greater than the number of tax treaties modified through bilateral renegotiation.
22. This Part presents what went well with the MLI and what could be improved in the future, drawing on feedback received from policy experts of the Ministries of Finance of MLI

[26] Included in para. 5(4.1) of the 2017 OECD MTC and applicable through para. 4 of art. 13 of the MLI.
[27] Included in para. 3 of art. 5 of the 2017 OECD MTC and applicable through art. 14 of the MLI.
[28] Included in para. 8 of art. 5 of the 2017 OECD MTC and applicable through art. 15 of the MLI.
[29] Included in para. 2 of art. 9 of the 2017 OECD MTC and applicable through art. 17 of the MLI.
[30] Included in para. 5 of art. 25 of the 2017 OECD MTC as well as the related Commentary. We note that several measures included in Part VI of the MLI were transposed into the Commentary on para. 5 of art. 25 of the 2017 OECD MTC in the form of a sample mutual agreement on arbitration.
[31] As set out in arts. 1 and 2 of the MLI, the MLI "modifies" any tax treaty in force between parties to the MLI which has been listed by both contracting jurisdictions as an agreement which they wish to be covered by the MLI (defined as a "Covered Tax Agreement").

signatories and parties. It also discusses what could enrich future multilateral efforts to streamline the implementation of future measures or changes in existing tax treaties, noting that part of the feedback received was made in light of possible changes to tax treaties that may be required as a result of the work carried on to address the challenges posed by the taxation of the digitalised economy.

3.1. Efficiency and consistency

23. The MLI experience demonstrates that it is possible to negotiate and implement changes throughout the global tax treaty network in a coordinated and effective manner. A tax treaty network consisting of thousands of bilateral tax treaties cannot be easily updated through the renegotiation of each individual treaty: the traditional bilateral negotiation process is costly, time consuming, and necessarily gives rise to uncoordinated approaches.
24. Changing more than half of the global treaty network over a few years would not have been possible without the MLI. This experience has allowed jurisdictions to seize the momentum and promptly tackle BEPS issues without delay. It has also demonstrated that existing bilateral tax treaties are not frozen in time and that internationally agreed norms and standards can be quickly implemented.
25. If the efficiency of the MLI in implementing the BEPS treaty-related measures is undeniable, the MLI has also ensured that the texts of those agreed measures would be implemented in the treaty network in a consistent manner throughout the global treaty network. This has been particularly important for anti-abuse measures such as the PPT. For instance, the analysis conducted on bilateral uptake has shown that, before the implementation of the MLI, a wide variety of anti-abuse measures existed in the global treaty network. If those rules all pursued the same objective, they presented different scopes or terminology that may have led to uncertainty in their application. The 26. variety observed was also sometimes present within specific jurisdictions' treaty networks.
26. The implementation of the BEPS treaty-related measures through the MLI ensures that all anti-BEPS measures are implemented consistently in the global treaty network. This will be key to further ensure those measures are given the same interpretation and application in the future.

3.2. Flexibility and optionality: key elements in reaching a broad consensus

27. The purpose of the MLI is to swiftly implement the tax treaty-related BEPS measures. Consistent with that purpose, the ad hoc Group of about 100 jurisdictions that negotiated the MLI on an equal footing, considered that the MLI should enable all parties to meet the treaty-related minimum standards that were agreed as part of the Final BEPS Package. Given, however, that each of those minimum standards can be satisfied in multiple different ways, and given the broad range of countries and jurisdictions involved in negotiating the MLI, it was agreed that the instrument needed to be flexible enough to accommodate the positions of different countries and jurisdictions while remaining consistent with its purpose. The MLI also needed to provide flexibility in relation to BEPS treaty-related measures that did not reflect minimum standards. It does so in the following ways:

- *Specifying the tax treaties to which the MLI applies (the "Covered Tax Agreements")*. Although it was intended that the MLI would apply to the maximum possible number of existing treaties, there may be circumstances in which a jurisdiction prefers not to include a specific agreement in the scope of application of the MLI. This is accomplished by ensuring that the MLI only applies to a treaty specifically listed by the parties to that treaty in their MLI positions.
- *Flexibility with respect to provisions that relate to a minimum standard*. Where a minimum standard can be satisfied in multiple alternative ways, the MLI must not give preference to a particular way of meeting the minimum standard. To ensure that the minimum standard can be met in such circumstances, however, in cases where parties to a given treaty each adopt a different approach to meeting a minimum standard, those parties must endeavour to reach a mutually satisfactory solution consistent with the minimum standard. It should be noted that, with respect to the Action 6 minimum standard, all MLI parties and signatories have agreed to implement the MLI PPT.
- *Opting out of provisions or parts of provisions with respect to all Covered Tax Agreements.* Where a BEPS treaty-related measures does not reflect a minimum standard, jurisdictions are free to opt out of the MLI provisions which reflect those measures entirely through the mechanism of reservations. Where a reservation is made under an MLI article, that article does not apply between the reserving party and all other parties to the MLI.
- *Opting out of provisions or parts of provisions with respect to Covered Tax Agreements that contain existing provisions with specific, objectively defined characteristics.* The ad hoc Group recognised that even when a party intends to apply a particular provision of the MLI to its treaty network, it may have policy reasons for preserving the application of specific types of existing provisions. To accommodate this, the MLI permits a party in a number of cases to reserve the right to opt out of applying a provision to a subset of Covered Tax Agreements in order to preserve existing provisions that have specific, objectively defined characteristics. When a party makes one or more such reservations, all such reservations will apply between the reserving party and all contracting jurisdictions to the Covered Tax Agreements that are covered by such reservations.
- *Choosing to apply optional provisions and alternative provisions.* In some cases, the output of the work on BEPS produced multiple alternative ways to address a particular BEPS issue. In other cases, the work resulted in a main provision that could be supplemented with an additional provision. The MLI incorporates a number of alternatives or optional provisions that generally will apply only if all contracting jurisdictions to a Covered Tax Agreement affirmatively choose to apply them.

28. The flexibility introduced through the MLI has ensured that jurisdictions would retain control over their treaty policy choices. Given the alternatives proposed in the BEPS Package and the non-minimum-standard BEPS treaty-related measures, the MLI necessarily had to incorporate a certain degree of flexibility to fulfil the ad hoc Group's mandate. This was key in ensuring many jurisdictions would join the instrument and use it as a tool for swift implementation.
29. If the optionality and flexibility offered by the MLI facilitated the achievement of a consensus among different groups, it also created a level of complexity in the instrument and gave rise to possible mismatches in the adoption of options and alternatives.
30. The MLI is a complex instrument, whose complexity is mainly explained by the necessity

to "match" the MLI positions of the signatories and parties to each covered tax agreement in order to determine the effects of the MLI on that agreement. This brings an additional level of complexity to the exercise when compared with the application of traditional bilateral tax treaties.

31. In the future, it may be worthwhile to invest more time in reaching a strong prior consensus on the underlying measures and standards to be implemented in tax treaties. This would reduce the need to integrate flexibility and optionality within the instrument, and would therefore lead to less complexity.

3.3. Signature and ratification

32. In June 2017, 76 jurisdictions joined the MLI. That number has increased to 94 in February 2020. The key to this success has been to seek early political commitment. Throughout the negotiations, jurisdictions' delegates ensured that the agreement was aligned with their domestic and international political objectives. In the case of the BEPS Package, there was agreement at the political level and in particular at the G20 level on the objectives of the BEPS Project at an early stage.
33. The need for a strong political commitment however remains essential beyond the negotiation and signature phases to ensure effective implementation. Ratification of the MLI has proceeded more slowly than many jurisdictions at first thought. This is for a number of reasons specific to the internal processes that each jurisdiction has to carry out related to domestic approval. One recurring cause of delay was the technical complexity of the MLI and the fact that it is unprecedented. This may have slowed down discussions among interested internal parties.
34. To improve the pace of ratification of future multilateral efforts, jurisdictions could be encouraged to liaise at an early stage with all their internal interested parties, including their ministry of foreign affairs and relevant legislative bodies. Ensuring coordination within governments has shown to be important for the swift ratification of the MLI.

3.4. Interpretation and implementation of the MLI

35. The flexibility built into the MLI was key to the broad uptake of the instrument. Nevertheless, these same features pose certain challenges relating to the application and interpretation of the MLI.
36. Governments, businesses and tax advisors are becoming familiar with the application of the MLI. Because of the instrument's complexity, further implementation tools needed to be developed (notably the matching databases and synthesised texts). The flexibility of the MLI requires additional layers of analysis as compared to the interpretation of more traditional instruments. As discussed above, to determine the effect of the MLI in relation to a given tax treaty, a "matching" exercise must be conducted based on the review of both treaty partners' MLI positions, read alongside the relevant provisions of the MLI and the underlying tax treaty. This method of interpretation is unprecedented, and differs from traditional methods of interpreting tax treaties and related amendments or protocols. Interested parties have therefore taken some time to grow comfortable applying and interpreting the MLI and using the implementation tools that were developed.
37. One of the most used tools developed to support the implementation of the MLI, was the

MLI matching database that shows all of the choices, options and reservations made by MLI signatories and parties. The MLI matching database also allows users to extract a snapshot of the application of the provisions of the MLI to a given tax treaty.

38. The Secretariat has published guidance for tax administrations to prepare such synthesised texts in a consistent manner and encourages their publication, as they have proven to be a useful tool for interpretation. Also, parties and signatories have prepared synthesised texts of their covered tax agreements as modified by the MLI to detail the application of each MLI provision to the relevant provisions of their tax treaties. These synthesised texts significantly improve tax certainty and simplicity in the application and interpretation of the MLI by taxpayers and tax administrations.
39. On the interpretation and application of the provisions of the MLI, applying measures that do not change specific existing provisions (i.e. applying the PPT in a covered tax agreement that did not contain any existing anti-abuse provisions that deny all or part of the benefits that would otherwise be provided) will lead to less interpretation and application challenges. This will be simpler than applying, for example, the measures relating to BEPS Action 7 to address the avoidance of permanent establishment status. These measures, contained in article 12 through article 15 of the MLI, mostly modify the application of existing provisions in covered tax agreements and could lead to challenges when these existing provisions are not based on the OECD or UN Model Tax Conventions.
40. In the future, it may be preferable to implement measures in the global treaty network without changing specific existing provisions or by superseding entirely those existing provisions with new measures.

3.5. Future multilateral efforts and tax-treaty changes

41. The MLI exercise will certainly enrich future multilateral efforts to streamline the implementation of future measures or changes in existing tax treaties. This could be particularly relevant when considering the possible changes to tax treaties that may be required as a result of the work carried on addressing the challenges posed by the taxation of the digitalised economy.
42. The work on the tax challenges of the digitalisation of the economy contemplates changes to key concepts of the international tax system embedded in tax treaties that could impact the allocation of taxing rights. If new measures are agreed upon by jurisdictions, these would again require changes to the tax treaty network to ensure all treaty barriers are duly removed for the exercise of new taxing rights.
43. The changes could be implemented through an instrument similar to the MLI (that would modify existing tax treaties), or through a different instrument (that would supplement and prevail over the global treaty network for in-scope taxpayers). The choice of the instrument to implement those changes would depend on the exact nature of the changes.
44. When compared to the work on the digitalisation of the economy, the BEPS project generally sought to change and fix traditional concepts of the international tax system (e.g. changes to the permanent establishment definition, changes to the mutual agreement procedure provisions, etc). The changes brought by the BEPS Project generally targeted existing treaty provisions or concepts already in place in bilateral tax treaties or in model tax conventions. As a result, to change those existing provisions, the MLI had to apply alongside bilateral tax treaties and modify their application.

45 By contrast, the changes discussed under the work on the digitalisation of the economy may involve the development of new concepts, such as the coordinated taxation of an MNE group by multiple jurisdictions. An agreement on those new concepts may require the implementation of new measures that would sit with difficulty on top of bilateral tax treaties. Updating existing treaty provisions may not be the most effective way of implementing such changes and, subject to further developments, it may become desirable to design a multilateral convention that would operate independently from (and concurrently with) the existing tax treaty network for in-scope taxpayers.

46. Regardless of the design options chosen to coordinate the implementation of future changes to the tax treaty network, learning lessons from the MLI experience is an invaluable exercise.

47. After observing the marked success of the MLI as a novel measure to implement new measures across the global treaty network in a swift and coherent manner, we have gained valuable insights to apply to future changes. While the complexity of the MLI was necessary to achieve its purpose, a future multilateral instrument could focus on core measures for broad and consistent implementation.

48. Going forward, particularly in light of the ongoing work to address the tax challenges posed by the digitalisation of the economy, it will be essential to draw on the MLI experience to design a robust multilateral implementation framework. The scope of the multilateral instrument that may result from this work, will likely go beyond that of the MLI – namely, to cover relationships between jurisdictions that do not have a tax treaty in force. This will therefore require the development of new design features. Nevertheless, the MLI experience will remain a central reference point in this work.

4. Part II: The impact and implementation of the treaty-related BEPS measures in the global tax treaty network

49. This Part presents the comparative impact of the MLI and bilateral negotiations on the global tax treaty network. It also discusses the overall implementation and uptake of the BEPS treaty-related measures.

50. For the MLI, results are based on policy choices reflected in the provisional list of options, notifications and reservations (the MLI position) deposited by each jurisdiction upon signature, or, if available, in their definitive MLI position deposited upon ratification. As of 1 March 2020, 94 jurisdictions joined the MLI, which then applied to over 1,630 "matched agreements" that would become covered tax agreements[32] once the MLI enters into force for both contracting jurisdictions.

51. For bilateral negotiations, bilateral instruments concluded between 1 January 2014 and 30 June 2019 were reviewed – recognising, however, that bilateral negotiations often span several months, or even years, and that, for some of the BEPS measures, specific treaty language was only introduced with the Final Reports published in October 2015.

[32] As set out in arts. 1 and 2 of the MLI, the MLI "modifies" any tax treaty in force between parties to the MLI which has been listed by both contracting jurisdictions as an agreement which they wish to be covered by the MLI (defined as a "Covered Tax Agreement").

52. In total, 465 bilateral instruments concluded by 154 jurisdictions were reviewed.[33] These jurisdictions included both members and non-members of the IF, and signatories and non-signatories of the MLI. The time period under review covers the creation of the Inclusive Framework[34] and the adoption of the MLI. Some of the parties to these bilateral instruments that committed themselves to the BEPS measures did so at different times.

4.1. Implementation through the MLI

53. A jurisdiction that joins the MLI does not necessarily adopt all BEPS treaty-related measures. To accommodate different policy preferences, the MLI allows for different forms of flexibility through a system of reservations and notifications of choices between alternative provisions and choices to apply optional provisions. A jurisdiction's list of Covered Tax Agreements, reservations and notifications is submitted in the form of a completed template and constitutes the jurisdiction's MLI position.
54. Irrespective of the MLI position taken by its treaty partners, the modifications to the application of a jurisdiction's bilateral tax treaties can never go beyond the boundaries of the jurisdiction's own consent as defined in its MLI position and with the consequences set out in the relevant provisions of the MLI. For instance, the application of a bilateral treaty concluded by the jurisdiction will not be modified unless it has been listed by that jurisdiction as a Covered Tax Agreement and an MLI provision will not modify the application of any of that jurisdiction's bilateral treaties if the jurisdiction has made a reservation opting out of an MLI provision. Accordingly, in ratifying the MLI, the jurisdiction consents to a possible set of modifications to the application of bilateral tax treaties and this consent is given independently of the MLI position which may be taken by its treaty partners.
55. As a result, in interpreting the MLI findings, it is necessary to distinguish between the rate of uptake of a given provision by MLI signatories and parties, and the proportion of covered tax agreements that will be modified as a result.

4.1.1. Implementation of the Action 6 minimum standard

56. The Action 6 minimum standard to prevent treaty abuse requires jurisdictions to include in their tax treaties an express statement of common intention and one of three methods to address treaty shopping. The minimum standard does not, however, prescribe the method through which these two components are to be implemented.
57. The first component of the Action 6 minimum standard, the express statement of common intention, is set out in article 6(1) of the MLI. It has been included in all covered tax agreements as MLI signatories can only opt out of article 6 for agreements that already include the required statement. As a result, all covered tax agreement will include the first component of the Action 6 minimum standard.
58. The second component of the Action 6 minimum standard offers more flexibility in its

[33] Texts that were either not readily available, or that had not been translated into either English or French were excluded from the analysis.

[34] When it was first formed, the Inclusive Framework included 82 member jurisdictions. On 15 December 2019, the Inclusive Framework counts 135 member jurisdictions.

implementation and has three alternative anti-treaty-shopping provisions. The MLI allows jurisdictions to adopt two of the three alternatives: the MLI does not include a detailed version of an LOB provision.

59. Further, one of the three available options, the PPT rule included in article 7(1) of the MLI, is presented as the default option. Although jurisdictions may opt out of the PPT for agreements that already include the anti-treaty-shopping measures or when they wish to adopt a detailed version of an LOB provision, all have in practice adopted it.
60. The MLI also contains a simplified version of an LOB provision to supplement the PPT rule. Under paragraph 6 of article 7 of the MLI, thirteen jurisdictions have chosen to apply the simplified LOB provision found in article 7 (paragraphs 8 to 13) of the MLI. Because the MLI LOB is an optional provision that can only apply when contracting jurisdictions both decided to adopt the option, only around 50 covered tax treaties will include it. Additional treaties could be modified where a signatory, under article 7(7) of the MLI, allows for the possibility to apply the simplified LOB if a treaty partner agrees to apply this rule, in either a symmetrical or an asymmetrical manner.

4.1.2. *Implementation of the Action 14 minimum standard*

61. The Action 14 minimum standard can be implemented through article 16 of the MLI. This provision offers several alternatives to meet the Action 14 minimum standard, which in some cases involves commitments by signatories to follow certain administrative practices without necessarily updating the language of their tax treaties. This means that a jurisdiction that does not choose to apply all of the treaty language proposed in article 16 of the MLI, could still comply with the Action 14 minimum standard.
62. Two-thirds of the MLI signatories have chosen to modify their treaties to allow a taxpayer to present a case to the competent authority of either contracting jurisdiction as provided in the first sentence of article 16(1). This provision will affect around 600 covered tax agreements. The remaining third of MLI signatories made a reservation on the basis that they intend to meet this element of the Action 14 minimum standard through the implementation of a bilateral notification or consultation process.
63. All MLI signatories have chosen to introduce the three-year time limit to present a case in the second sentence of article 16(1). As for the first sentence of article 16(2), most covered tax agreements already meet the requirement under the Action 14 minimum standard whereby a competent authority must endeavour to resolve a case by mutual agreement with the competent authority of the other contracting jurisdiction if the objection to it appears to be justified and if it is not itself able to arrive at a satisfactory solution. The impact of the MLI here is therefore less important and about 40 treaties will be updated in this respect.
64. The vast majority of MLI signatories have chosen to introduce the second sentence of article 16(2) that provides that any agreement reached in the context of a mutual agreement will be implemented notwithstanding any time limits in the domestic law of the contracting jurisdictions. This measure will modify around 380 tax agreements that do not already contain that rule.
65. Article 16(3) of the MLI provides that the competent authorities shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of a tax treaty, and that they may also consult together for the elimination of double taxation in cases not provided for in a treaty. It applies to a covered tax agreement

in the absence of similar measures and no reservation can be made to omit it. As a result, all covered tax agreements that do not currently comply with this measure will be brought into compliance under this article.

4.1.3. Implementation of the Action 6 non-minimum-standards provisions

66. The optional measures proposed in Action 6 have each been applied by a substantial number of MLI signatories. The greatest number – more than 55% – have chosen to strengthen their rules for determining the value threshold applicable to capital gains from the alienation of shares or interests in entities deriving their value principally from immovable property.[35] This rule will consequently apply to around 350 covered tax agreements. The new tie-breaker rule applicable to dual-resident entities will modify 246 covered tax agreements.[36] More than a third of MLI signatories has also chosen to apply the minimum shareholding period in dividend transfer transactions, which will modify around 180 covered tax agreements.[37] The anti-abuse rule[38] applicable to permanent establishments situated in third jurisdictions was taken up by 32% of MLI signatories (modifying 138 covered tax agreements) and the so-called "saving clause"[39] confirming the right of a jurisdiction to tax its own residents was taken up by 27% of MLI signatories (modifying 137 covered tax agreements).

4.1.4. Implementation of the Action 14 non-minimum-standards provisions

67. The two principal treaty-related measures in Action 14 outside the minimum standard, as discussed above, are those relating to corresponding adjustments and to mandatory binding MAP arbitration. Just over half of the MLI signatories chose to include the requirement to make corresponding adjustments in the transfer pricing context and the measure will apply to over 470 covered tax agreements.[40] (Many existing treaties already contain this requirement to make corresponding adjustments.)
68. As for mandatory binding arbitration contained in Part VI of the MLI, 30 MLI signatories, including those countries that had already committed to arbitration at the time of the development of the Action 14 Final Report, adopted the optional part of the MLI. As a result, 211 covered tax agreements will include the MLI mandatory binding arbitration provisions.
69. The MLI provides for two types of arbitration processes. The "final offer" arbitration process, whereby the arbitrators have to choose one of the positions advanced by the competent authorities, is the default process under the MLI, except where the competent authorities agree on different rules. Most of the MLI signatories that have chosen to apply Part VI have chosen this approach. The alternative is the "independent opinion approach", under which the arbitration panel can reject both competent authorities' positions and

[35] Art. 9 of the MLI.
[36] Art. 4 of the MLI.
[37] Art. 8 of the MLI.
[38] Art. 10 of the MLI.
[39] Art. 11 of the MLI.
[40] Art. 17 of the MLI.

come to one of its own. Eight jurisdictions have chosen this method (except to the extent that the competent authorities agree on different rules).

4.1.5. Implementation of Action 2 - Neutralising the Effects of Hybrid Mismatch Arrangements

70. Around one-quarter of MLI signatories have taken up treaty-related measures from the Report on Action 2. The measures applicable to income earned through transparent entities[41] was chosen by 32% of signatories (modifying 207 covered tax agreements), and 24% of signatories chose to update their mechanisms to eliminate double taxation to better align them with the domestic measures applicable to transparent entities[42] (modifying 123 covered tax agreements).

4.1.6. Implementation of Action 7 - Preventing the Artificial Avoidance of Permanent Establishment Status

71. Part IV of the MLI contains four measures resulting from work on BEPS Action 7 to counter the artificial avoidance of permanent establishment status. Each of these measures has a rate of uptake by MLI signatories of around 50%, with the exception of the rule on splitting up of contracts relating to a specific project,[43] taken up by only 36% of MLI signatories. The number of covered tax agreements modified by these measures varies considerably. The new anti-fragmentation rule[44] will apply to more than 516 covered tax agreements, while the splitting-up of contracts rule will only apply to 151 of them. The updates to the rules relating to intermediaries and commissionaire arrangements[45] will modify 309 covered tax agreements and the restrictions on the specific activity exemptions[46] will modify more than 350 covered tax agreements.

4.1.7. Summary of the MLI's effects

72. The MLI has had – or soon will have – a wide-ranging effect on more than half of the world's bilateral tax treaties. Its impact is greater in implementing of the Action 6 and Action 14 minimum standards. Nevertheless, there has been a material use of the MLI for the non-minimum-standard provisions, considering that the implementation of such measures on a bilateral basis would have taken decades in comparison.

[41] Art. 3 of the MLI.
[42] Art. 5 of the MLI.
[43] Art. 14 of the MLI.
[44] Art. 13(4) of the MLI.
[45] Art. 12 of the MLI
[46] Art. 13(1 to 3) of the MLI. Art. 13 contains two options. To modify a covered tax agreement, both contracting jurisdictions must decide to apply the same option.

4.2. Bilateral uptake of treaty-related BEPS measures

73. A high-level analysis of 465 bilateral instruments on the IBFD tax treaty database was conducted to study the extent to which jurisdictions implemented treaty-related BEPS measures by way of bilateral negotiations, compared with implementation through the MLI. These include new tax treaties or instruments that modified existing tax treaties that were concluded between 1 January 2014 and 18 June 2019.
74. A comparison between the adoption of treaty-related BEPS measures in the bilateral instruments compared with the MLI is necessarily imperfect. The MLI modifies existing instruments and is aimed exclusively at implementing treaty-related BEPS measures. By contrast, a new bilateral instrument will be concluded for reasons beyond BEPS implementation.

4.2.1. *Implementation of the Action 6 minimum standard*

75. As noted above, the Action 6 minimum standard is two-pronged. For the first component of the minimum standard (the express statement) the texts of the bilateral instruments that were reviewed did not always contain the full preamble text, though this could be because until recently the IBFD did not reproduce the preamble to treaties in its database.[47]
76. With that caveat, around a quarter of reviewed bilateral instruments contain preamble text that is fully compliant with the first component of the Action 6 minimum standard. Half of these were concluded after 2018. This suggests an acceleration of the pace at which jurisdictions are bilaterally bringing their existing treaty networks into compliance with the Action 6 minimum standard.
77. The express statement may take a number of forms, with many possible formulations that could satisfy this first component of the Action 6 minimum standard. Many preamble texts of the reviewed bilateral instruments, however, were only partially compliant. The majority contained a statement of common intention to prevent fiscal evasion, but did not mention an intention to prevent double non-taxation or reference to other forms of treaty abuse. Nevertheless, 46% of the bilateral instruments containing partially compliant statements were concluded between treaty partners that are both members of the IF, and that have therefore committed to update their treaty network to reach full compliance with the Action 6 minimum standard. Higher levels of full compliance are therefore expected in future.
78. The second component of the Action 6 minimum standard can take the form of a PPT alone, a combination of the PPT and an LOB (either simplified or detailed) or an LOB rule accompanied by anti-conduit-arrangements rules. Around half of the reviewed bilateral instruments include the PPT or a similar provision. More than three-quarters of these covered the entire treaty, while the remainder only apply to specific types of income. Similar provisions that did not have as broad a scope as the PPT, varied widely, in particular with respect to which types of income were subject to their application.
79. A clear trend over the period under analysis was nevertheless observed, both towards the wider adoption of provisions that resemble the PPT and the adoption of the PPT itself. For

[47] 96 out of the 465 reviewed bilateral instruments did not display preamble text.

example, almost all instruments concluded in the first half of 2019 (20 out of 21) contained the PPT or something that was a similar, fully compliant, broad-scope provision.

80. As for the LOB, although about 7% of the reviewed bilateral instruments included a version of that provision, there was no increase in its adoption rate similar to that of the PPT.

4.2.2. *Implementation of the Action 14 minimum standard*

81. More than a quarter of the reviewed bilateral instruments included new MAP language to meet the Action 14 minimum standard, in whole or in part. All of these involved at least one treaty partner that is currently a member of the Inclusive Framework.
82. The most common treaty-related element of the Action 14 minimum standard adopted on a bilateral basis, is language that offers taxpayers the choice to present a case to the competent authority of either contracting jurisdiction (first sentence of paragraph 1 of article 25 of the 2017 OECD MTC).

4.2.3. *Implementation of the Action 6 non-minimum-standard provisions*

83. Some bilateral implementation of Action 6 measures outside the minimum standard was observed. The minimum shareholding period applicable to dividend transfer transactions was implemented in 54 bilateral instruments; the stricter valuation threshold for capital gains from the alienation of shares or interests of entities deriving their value principally from immovable property was implemented in 50 bilateral instruments. Of the reviewed bilateral instruments, 91 included the measure relating to dual-residency whereby the competent authorities must resolve such cases on a case-by-case basis, failing which the entity cannot be granted treaty benefits. Only 19 bilateral instruments included the measure relating to permanent establishments in third jurisdictions.

4.2.4. *Implementation of the Action 14 non-minimum-standards provisions*

84. Arbitration provisions included in the reviewed bilateral instruments (78 in total) generally followed the latest version of the OECD MTC. An additional five with highly customized arbitration provisions were identified. An additional 13 bilateral instruments included a provision in which the treaty partners agreed to implement an arbitration clause if one of them were to agree to such a clause in favour of a third-party jurisdiction (a “most favoured nation”-type clause).

4.2.5. *Implementation of Action 2 - Neutralising the Effects of Hybrid Mismatch Arrangements*

85. Fifty-eight bilateral instruments introduced a provision addressing the concerns posed by hybrid mismatches and income derived by entities or arrangements treated as wholly or partly fiscally transparent, similar to that set out in article 3 of the MLI and paragraph 2 of article 1 of the 2017 OECD MTC.

4.2.6. Implementation of Action 7 - Preventing the Artificial Avoidance of Permanent Establishment Status

86. Most of the permanent establishment provisions contained in the reviewed bilateral instruments were customised versions of the 2014 OECD MTC, and did not include the Action 7 recommendations. Only 45 reviewed bilateral instruments contained the stricter rules on dependent agent PEs similar to article 12 of the MLI. Fifty-two included the restricted specific activity exemption similar to article 13 of the MLI. The provision preventing the splitting-up of contracts to avoid the creation of a permanent establishment was more popular, and is contained in more than half of the bilateral instruments reviewed. Its inclusion has also been steady throughout the years under review (52% in 2014, 63% in 2017, and 57% in the first half of 2019).

4.2.7. Summary of the bilateral uptake of BEPS treaty-related measures

87. The bilateral uptake of the BEPS treaty-related measures is by far less important than their implementation through the MLI in existing treaties over the same period. Based on our analysis, it seems that without the MLI, jurisdictions would not have been able to swiftly implement the BEPS treaty-related measures in their existing treaties.
88. Recognising however that bilateral negotiations often span several months, or even years, the negotiations of some of the instruments reviewed, started before the launch of the BEPS Project in October 2015. As a result, comparing the implementation of the BEPS treaty-related measures at this stage remains imperfect. It however seems that jurisdictions are moving towards a wider adoption of the BEPS treaty-related measures: instruments concluded in 2018 or 2019 included more BEPS treaty-related measures than those concluded before 2018.

5. Conclusion

89. The MLI is an unprecedented coordinated effort to comprehensively modify existing tax treaties and has allowed jurisdictions to implement new international taxation norms in a coordinated and efficient way. It has shown that a multilateral approach for the implementation of internationally agreed standards in existing tax treaties has been a success.
90. With 94 covered jurisdictions and over 1,630 "matched agreements" on 1 March 2020, the MLI demonstrates strong support from jurisdictions at all levels of development, for a coordinated, multilateral approach to resolving BEPS issues and changing tax treaties.
91. Beyond the strong support from all jurisdictions, the analysis contained in this report suggests that jurisdictions would not have been able to swiftly implement the BEPS treaty-related measures in about half of the existing global treaty network without a multilateral instrument that could modify all their existing treaties at once. The MLI experience thus shows us that coordinated effort is needed to comprehensively and swiftly modify existing tax treaties and implement internationally agreed tax norms.
92. Going forward, particularly in light of the ongoing work to address the tax challenges posed by the digitalisation of the economy, it will be essential to draw on the MLI

experience to implement future internationally agreed treaty-related measures. The MLI will pave the way for future changes to the international tax system and will inform how future changes could be implemented even more effectively.

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Reconstructing the treaty network

Argentina

Branch reporters
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Pablo Sergio Varela[2]

Summary and conclusions

Argentina has adopted an active role with regard to the implementation of several measures proposed by the Organization for Economic Cooperation and Development (OECD) as part of its project on base erosion and profit shifting (BEPS).

In line with Actions 6 and 7 of the BEPS Action Plan, specific clauses have been included in the bilateral tax treaties signed during 2015 and 2016, such as preamble language describing the intent of contracting jurisdictions to eliminate double non-taxation; principal purpose test clauses (PPT) combined with limitation on benefits provisions (LOB) and mutual agreement procedures (MAP) on dual resident entities disputes.

Traditionally, the country has experienced on the application of GAARs included in the domestic legislation to international transactions covered by a bilateral tax treaty which are closed to the PPT clauses. Thus, it was an innovation to incorporate LOB provisions.

It is pending the final decision of the Argentine Supreme Court of Justice on the application of the GAARs to a case covered by the first tax treaty signed with Chile -that had already been denounced and renegotiated- which does not follow the OECD Model Tax Convention on Income and on Capital (OECD Model Tax Convention) or the United Nations Model Double Taxation Convention between Developed and Developing Countries (UN Model Tax Convention) and does not have a clause rejecting double non-taxation.

Argentina has signed the Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting (MLI) in June 2017 but the instrument is still pending approval as of 30 September 2019.[3] Despite a delay in the internal proceeding to be approved by the National Congress, we deem the MLI will be passed into law.

The government provisionally informed that 85% of the existing bilateral tax treaties at the time of signature were covered by the MLI. With respect to the treaties entered into by Argentina and not included by the MLI, it concerns the tax treaties signed with Germany and Brazil where a new treaty and a Protocol of Amendment –already approved-, respectively, were being negotiated on the date of signing of the MLI. The exclusion of the treaty with Bolivia is based on the fact that it was written according to the guidelines of the principle of source or territoriality provided for in the Andean Pact Model.

The contracting jurisdictions of the Covered Tax Agreements (CTAs) have also signed it and 76% of them have already ratified it definitively by 30 September 2019.

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[3] The report has been made with the information available until 30 September 2019.

After the signature of the MLI, substantial legislative changes have been made in domestic legislation that incorporate provisions set forth, among others, in Actions 1, 3, 4, 7, 10, 13 and 14 of the BEPS Action Plan.

Several bilateral tax treaties were negotiated during the last two years that also include clauses set forth in the BEPS Action Plan and specifically in the MLI.

Thus, the BEPS Action Plan and the MLI already have an indirect impact on the tax treaty network due to the bilateral tax treaties negotiated since 2015 and will have a direct impact -with different levels- on the CTAs once the provisions of the MLI take effect.

Argentina also communicated its desire that the treaties covered by the MLI contain the SLOB clause. Based on the statements expressed to date, the SLOB clause could impact once the provision takes effect in 36% of the CTAs.

The only reservations made by Argentina are intended to prevent application of the modifications proposed by the MLI to the treaties that already provide similar provisions. An important aspect is that Argentina has not opted for the binding arbitration included in section VI of the MLI.

Taking into account the provisional reservations made by Argentina and the similar or definitive ones made by the co-contracting countries, 137 clauses out of a total of 510 could be modified; thus, 27% of the total number of provisions would be modified by the MLI.

Argentina reported to the OECD[4] that for its agreement subject to a bilateral complying instrument, Argentina is implementing the preamble statement and the PPT combined with the LOB. Nevertheless, LOB provisions were included in only 17% of the bilateral tax treaties entered into after the signature of the MLI.

There might be interpretation problems due to the fact that the official language in Argentina is Spanish and 25% of the CTAs do not have an English or French version.

The government unofficially informed that consolidated texts would be agreed upon with the co-contracting countries and will be available online for consultation, but they will not be considered as official texts. Such a decision could help to avoid situations of legal uncertainty or insecurity but will not eliminate the risk of disputes.

The relevant changes introduced in the OECD Model Tax Convention and the Commentaries will be considered either by the tax officials, the taxpayers, the advisors and the judges at the time of analyzing a particular transaction, particularly concerning PPT and SLOB rules.

The complexity of the new framework will demand the enactment of clear and precise domestic rules to provide legal certainty and transparency.

[4] OECD Report on Prevention of Treaty Abuse - Peer Review Report on Treaty Shopping published in February 2019 (OECD (2019), Prevention of Treaty Abuse - Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264312388-en).

Australia

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Summary and conclusions

While Australia has a modest treaty network (44 treaties), its treaties cover a large majority of direct and indirect investment into and out of Australia. Its major trading partners include the US, China and the UK. Australia's treaty practice is based on the OECD Model with a number of exceptions including importantly:

- a broader definition of permanent establishment (reflecting Australia's dependence on mineral resources);
- imposition of tax on dividend, interest and royalty at source and subject to higher than usual rates of withholding;
- a reservation relating to the ability to impose tax on permanent establishments without necessarily having regard to the functionally separate enterprise principle;
- modern treaties including a limitation on dividend, interest and royalty articles where one of the main purposes was to access those benefits; and
- explicitly providing in domestic law, which incorporates each treaty into domestic law, that it was subject to being overridden by certain GAARs and SAARs.

Prior to the MLI, Australia had made some domestic and limited bilateral agreements relating to what are now termed the BEPS initiatives. These included:

- limited domestic foreign hybrid provisions applying transparent treatment to certain limited partnerships and LLCs and other entities which would otherwise be taxed as companies for Australian tax purposes;
- only one of Australia's signed (but then unenacted) treaties included pre-amble wording that specifically addressed the desire to avoid "creating opportunities for non-taxation or reduced taxation";
- comprehensive and complex statutory anti-hybrid rules that came into effect on 1 January 2019 which, in some actions, go beyond BEPS Action item 2.

Australia has, at the time of writing, 27 outstanding MAP matters relating to transfer pricing and 17 relating to other aspects of treaty practice.

Australia signed the MLI listing 43 of its 44 comprehensives tax treaties (based on counterparty positions, 32 of Australia's treaties will be amended by the MLI). The only treaty Australia excluded was the 2016 Australia-Germany DTA which was concluded after the publication of the MLI and met the MLI minimum standards. Australia also subsequently excluded the agreement with Chinese Taipei as it is of less than treaty status. Australia's stated position with regard to the MLI is to adopt the minimum standards and as many of the optional articles as possible and make limited use of the MLI reservation system. The

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most important treaty not to be modified, from a bilateral trade perspective, is the treaty with the US.

The MLI has entered into force, consistent with Australia's treaty practice, as a schedule to the International Tax Agreements Act 1953. But for particular GAAR and SAAR provisions, treaties override Australia's domestic law (including, in at least one case, to impose domestic tax via a deemed source article where no tax would otherwise be imposed). There is nothing in the manner in which the MLI has been incorporated into Australian law indicating that its text will be construed differently to that of other bilateral treaties by reference to the Acts Interpretation Act 1901 and to the Vienna Convention of the Law of Treaties 1969 (VCLT). While Australian law favours the text as written, interpretation of treaty instruments generally gives greater weight to context and purpose (e.g. by reference to article 31 of the VCLT).

Consistent with article 32 of the VCLT, when the meaning resulting from the application of article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, recourse is frequently had to supplementary materials. It is likely a question will arise on how far this recourse to supplementary materials extends in the context of a Covered Tax Agreement. The Base Erosion and Profit Shifting Action Item Reports are likely article 32 material under the Vienna Convention, but they are broad and not necessarily focussed on the text of the MLI and are not directly related at all to any specific Covered Tax Agreement. The formal separation of the MLI from existing bilateral treaties is not overly convincing, and Australian statutory interpretation tends to read an instrument that depends on another for its effect (such as the relationship of the MLI to a Covered Tax Agreement) as a single instrument. As such, the usefulness of the BEPS Reports in determining the meaning of any particular article of a Covered Tax Agreement is uncertain.

Informally, the reaction to the MLI within the Australian tax community has been relatively calm (with the exception of the residency changes in article 4) as Australian tax planning strategies are often not treaty dependent. Australian domestic law provides that an entity incorporated outside Australia can be an Australian resident if (broadly) it has central management and control in Australia. Accordingly, a large number of companies may be prevented from benefiting from Covered Tax Agreements as dual residents (i.e. foreign incorporated and Australian controlled). On the positive side, the confusion caused by article 4 has led to a rapid increase in bilateralism at least between Australia and New Zealand whose revenue authorities released a joint *MLI Article 4(1) Administrative Approach* providing for self-assessment of a place of effective management where a taxpayer satisfies certain eligibility criteria (e.g. for small to medium enterprises) as such entities may often have elements of control in both countries.

The hybrid provisions in article 3 have been seen as reducing and increasing complexity depending on a taxpayer's particular position. Australia, somewhat uniquely, treats limited partnerships as companies. Currently, the position is that a foreign limited partnership is assessable separately from the partners and often without treaty benefits and required to pay the tax assessed, although the Commissioner would be barred from enforcing a judgment against a partner that was entitled to treaty benefits. Where the provisions of article 3(1) of the MLI are available, this may provide greater certainty for inbound investors that they are positively entitled to treaty benefits and protected from taxation in the hands of the deemed company for Australian tax purposes.

Austria

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Summary and conclusions

Prior to the MLI Austria had entered into tax treaties with 88 jurisdictions. Tax treaties concluded with OECD member states generally follow the OECD Model. Tax treaties concluded with non-OECD member states or developing countries normally follow the UN Model, unless those countries were prepared to follow the OECD Model at least partially. Austrian domestic law provides for a number of provisions which are similar to those covered by the BEPS Action plans. The tax procedural law provides for a general anti-avoidance rule ("GAAR") which adheres to the general principle that the duty to pay tax cannot be circumvented or reduced by abusing constructions under civil law. In such situations, taxes shall be collected as they would have been if the economic events, facts and circumstances had been legally structured in a reasonable way. This rule is rather similar to the PPT clause of the MLI respectively article 29(9) of the OECD Model Convention 2017. On a more general level the Austrian procedural law provides for the substance over form principle. According to this rule the true economic substance shall prevail over the form of a transaction. Austrian jurisprudence also supports the view that the mere fact that a treaty does not contain specific anti-avoidance rules ("SAAR") must not lead to the conclusion that trustee structures aiming at claiming undue treaty benefits or abusive civil law constructions, are permitted according to treaty law. In the absence of specific anti avoidance provisions in the treaty, contracting states are not prevented from protecting themselves against abusive claims for treaty benefits. Concerning hybrid entities Austria follows the guidelines of the OECD partnership report when applying tax treaties in hybrid situations which may lead to conflicts of qualification or of allocation of income. This was the reason why Austria opted out of article 3 (transparent entities) of the MLI.

Austria signed the MLI on 7 June 2017. The instruments of ratification have been deposited at the Secretary-General of the OECD on 22 September 2017. The MLI entered into force for Austria on 1 July 2018. The main reasons for signing the MLI were the intention of the Austrian government to follow the BEPS Action Plan of the OECD/G20 in order to avoid artificial shifting of profits to low or no tax jurisdictions by allocating profits to those jurisdictions where the value was created and by the improvement of mechanisms for dispute resolution. The list of covered tax agreements (CTAs) contains 38 tax treaties. Compared to the current number of tax treaties in force, i.e. 89 treaties, 43% of the Austrian treaty network is covered by the MLI. Originally, Austria had listed about 60 treaties as CTAs. Due to the positions of the other treaty partners as of 7 June 2017 only 38 jurisdictions remained as matching treaty partners. All CTAs fulfil the minimum standard. According to the list of reservations and notifications attached to the MLI Austria opted in for article 5 (application of methods for elimination of

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double taxation - option A), article 6 (preamble), article 7(1) (PPT clause alone), article 10 (third jurisdiction PE), article 13(2) (artificial avoidance of permanent establishment status through the specific activity exemptions - option A), article 16 (mutual agreement procedure, except for the first sentence of paragraph 1), article 17 (corresponding adjustments), article 18 (application of Part VI), article 19 (mandatory binding arbitration according to paragraph 1, replacing the two-year period by a three-year period and application of paragraph 12), article 24 (different resolution), article 26 (reservation for existing mandatory arbitration procedure with Germany and Switzerland). For the rest of the MLI provisions Austria entered reservations for the entirety of the articles. Austria already entered into new bilateral tax treaty negotiations or finished such negotiations since the MLI was signed. These treaties (UK and Kosovo) meet the BEPS minimum standard by using the new text of the preamble (article 6 of the MLI) and the PPT clause (article 7(1) of the MLI). The treaties provide for access to MAP according to the BEPS standard, thereby respecting the Austrian position to article 16(1) of the MLI concerning the state of residence as the one where the MAP has to be presented. They also provide for the mandatory binding arbitration procedure according to article 25(5) of the OECD Model Convention. The BEPS Action Plan has also indirectly influenced the Austrian tax treaty policy before the MLI was signed in June 2017. The new tax treaty with Japan, which was signed on 30 January 2017, went even far beyond the minimum standard. The recent tax treaty between Austria and Japan clearly shows that the restrictive approach chosen by Austria in its MLI policy does not hamper the degree of flexibility at the bilateral level.

The procedure for implementation of the MLI was the same as Austria has to follow in bilateral treaty situations. As a "monist" country the MLI is self-executing for Austria. Despite the lack of any legal obligation for consolidating international law agreements it was seen as a matter of courtesy to follow the recommendation of the OECD to prepare "synthesised" versions of the covered bilateral tax treaties which do not have any legal force *per se*. Following the considerations laid down in the Explanatory Statement to the MLI, the Austrian tax administration is prepared to attribute to the BEPS reports the same legal weight as to the OECD Commentaries for the purposes of interpretation of the MLI provisions. Generally, the Austrian tax administration is committed to the ambulatory tax treaty interpretation following the OECD Recommendation of 23 October 1997 concerning the OECD Model Tax Convention. Retrospective effects of the MLI on the treaty interpretation of existing tax treaties could arise in particular in those areas where the existing commentaries of the OECD already offered this interpretation on the basis of pre-MLI treaties.

Currently it cannot be expected that the number of CTAs will be increased. Further BEPS amendments will more likely be achieved through bilateral protocols or treaties.

Branch reporters
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Summary and conclusions

Belgium's international tax policy mirrors its willingness to encourage cross-border economic exchanges, as it is expressed in the preambles of many of its pre-MLI treaties. Belgium has treaties in force with 95 countries. It signed new treaties with six other countries. New treaties are currently under negotiation with five other countries. Since 2007, Belgium has its own model ("Standard") that is based on the OECD-MC as almost all its treaties were before. Belgium remedies double taxation by exempting foreign source income.

The Belgian pre-MLI environment can be described as follows. Domestic anti-abuse rules are not specifically geared towards treaty-shopping. Because treaties supersede domestic legislation, the compatibility of domestic anti-abuse rules is a sensitive issue, but it may be tested through MAPs. However, Belgium has included in its treaties rules that specifically target treaty-shopping.

When acting as the residence country, Belgium subjects the exemption of foreign income (cf article 23A OECD-MC) to taxation by its partners while the "recapture rule" copes with the deduction of foreign establishments' losses in two countries. Anti-channelling rules prevent the allowance of a credit for foreign tax on interest and royalties in inappropriate circumstances.

In a number of treaties, some tax relieves are subject to a purpose test but Belgium seldom denies treaty protection to taxpayers for the reason that they are mainly owned by residents of other countries (LOB). Belgium is also reluctant to deny dual-residents treaty protection (cf article 4(3) OECD-MC) and to look through real estate companies when determining where the gains realized on their shares should be taxed (cf article 13(4) OECD-MC).

Although Belgium broadly defines a Belgian establishment of a foreign enterprise for domestic purposes, the narrower definition of a permanent establishment based on the OECD-MC supersedes for treaty purposes. When acting as the source country, Belgium generally grants a reduced rate of tax on dividends depending on a minimum holding of the recipient in the distributing company. In some 20 treaties, such relief is subject to a minimum holding period. Besides, 14 pre-MLI treaties concluded by Belgium already included a binding-arbitration clause in their MAP provisions.

The 2003 OECD's guiding principle has had a limited impact on treaty interpretation because Belgium sticks to the treaty language if it is clear.

Belgium signed the MLI as soon as it was open to signature on 7 June 2017. When ratifying the MLI on 26 June 2019, it modified some of its notifications and reservations made two years before. Belgium selected among the "optional" provisions those that it considered to be balanced remedies to treaty abuses and in line with its traditional policy.

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Belgium listed as CTAs almost all its existing treaties (even if not yet in force). Its treaty with Japan meets the OECD's minimum standard. Norway and Switzerland prefer negotiating bilateral protocols and a new bilateral treaty with Germany is currently under negotiation. The treaties with those countries are not covered.

Depending on the date of its partners' ratification, the MLI substantive rules will have effect as from 1 January 2020 at the earliest. The Branch report forecasts the impact of the MLI on Belgium's treaty-network from the information made available on the OECD's website as of 17 July 2019.

Belgium opted out of article 4 MLI because it is not in favour of a discretionary approach when dealing with dual-resident companies.

As mentioned before, Belgium signs treaties to enhance economic and tax cooperation. Consequently, it opted for article 6(3) MLI and is now joined by 32 of its partners, while treaties already saying the same will remain unchanged.

Belgium remains with the PPT provision (article 7 MLI). All of its partners agreed on the same and 65 treaties will be affected. However, Belgium opted for the "discretionary relief" under article 7(4) MLI softening a rough application of the PPT while only 22 of its partners share this option.

Belgium opted for article 8 MLI, including a minimum holding period requirement for a reduced taxation at source on dividends, in order to align its treaties with its Standard. Although it notified 74 CTAs, only 18 partners agreed on the same.

Thirteen treaties already applying a "look-through" assessment of real estate companies will extend their rules to interest in other investment entities when determining where the gain realized on shares in such entities must be taxed (cf article 9(1)(b) MLI).

Belgium opted-out of the third-country permanent establishment rule (article 10 MLI).

Belgium is willing to generally apply article 11 MLI in order to secure the efficiency of CFC or CFC-like rules provided by domestic legislation but only 18 treaties will include it.

Despite the reservation made in June 2017 to article 12 MLI relating to commissionaire-arrangements, Belgium opted for this provision upon ratification. Only 29 treaties should be affected.

Belgium restated its interpretation of the specific activity exemption under article 5(4) of the pre-MLI OECD-MC and refused the anti-splitting-up of contracts rule proposed by the MLI, although a like-kind of rule is included in its domestic legislation. Belgium found that the MLI anti-splitting up of contract was too harsh because, by its automatic application, it may catch good faith situations.

Belgium definitely wants to enhance dispute resolution and, therefore, it opted for baseball binding arbitration as the default rule (articles 18-26 MLI). Arbitration will be introduced in 17 treaties.

The implementation of the MLI raises a number of institutional problems: the mixed nature of the MLI (within responsibilities of the federal government and Belgium's subdivisions); language issues; constitutional approval and gazetting obligations within the ongoing process of signature and notification by other countries making different choices.

Bosnia and Herzegovina

Branch reporters
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Summary and conclusions

On 30 October 2019 Bosnia and Herzegovina (B&H) signed the MLI becoming the 90th jurisdiction to join this agreement. Even though this step shows B&H's commitment towards fighting tax treaty abuses, especially treaty shopping, the report will show that maybe the signing was the first but also easiest step to take in the long road ahead of us. The report will emphasize many unknowns and challenges that will arise when it comes to implementation and interpretation of MLI provisions, questioning the ability of B&H, as developing country to deal with it. The reasons for this attitude and expectation are many, national but also international ones.

Following its distinct constitutional structure, the tax system(s) and accompanying policies, including one concerning DTC, are very complex and challenging in B&H. A first and general remark is that international taxation is still not an issue of great importance in B&H. Currently, Bosnia and Herzegovina has 37 bilateral tax treaties in force, mostly with European, neighboring countries. The peculiarity of the tax treaty network is the fact that ten treaties are implemented, based on succession from ex-Yugoslavia, including ones with major European countries, like France and Germany. The time framework and complete list of signed treaties actually show that the DTC policy in B&H is not coherent and does not have a well-defined goal. All of the DTCs, implemented on the basis of succession, do not refer to prevention of tax evasion within its title and purpose. When it comes to new treaties, some of them refer to prevention of fiscal evasion, while others within its title contain only purpose of preventing tax evasion. None of the treaties concluded before the MLI, contained any provision aimed at curbing treaty shopping and since there are no ongoing tax treaty negotiations at the moment, it is difficult to assess if the choices made in the MLI position, will be included in future treaties.

In line with the practice of the majority of Inclusive Framework members, Bosnia and Herzegovina listed all tax treaties that are currently in force, which are 37 tax treaties in total. Out of 37 countries, to date 27 countries have also covered the treaty with Bosnia and Herzegovina in their MLI position. On the other side, 32 tax treaty partners of B&H have submitted their MLI position to the OECD Secretariat (whether provisional or final). It is important to note that a number of treaties with important economic partners are left out of CTAs by the other contracting jurisdictions, mostly where the treaty was concluded by former Yugoslavia and later assumed by Bosnia and Herzegovina as one of the successor states.

No prior impact assessment of the MLI on tax compliance and administration, nor on the economic activity has been made. The authorities seem to have relied on the assessments

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presented by the international organizations about the harmful effects of treaty shopping in terms of global losses of tax revenue and the vast acceptance of the MLI as an instrument to curb those losses.

Assessing the overall budgetary impact of the MLI in Bosnia and Herzegovina would be particularly difficult. As part of the standard procedure prior to the signature of the Convention, the impact on the budget of Institutions of B&H was assessed as none. This is due to the constitutional setting, where income taxation is solely within the competences of the subnational governments, two entities and the Brcko District. The impact of the MLI is therefore to be expected in the budgets of these three jurisdictions. To the best of the authors' knowledge, these effects were not assessed so far.

Among other provision presented in the report, Bosnia and Herzegovina decided to meet the OECD's BEPS minimum standard on treaty abuse by applying the Principal Purpose Test (PPT) in article 7(1). Further, not many other provisions of the MLI addressing tax treaty abuse were chosen. This reasoning is in the line with everything else presented in the report, especially the fact that international taxation and the problem of treaty shopping is not the issue in Bosnia and Herzegovina and that even prior to the MLI, these issues were not recognized by the judiciary practice or the general public and stakeholders.

While it is admirable that B&H supports global effort for curbing the base erosion and profit shifting, not only by signing MLI but taking over other obligations, it is very questionable and hard to predict how the MLI will become functional in the complex and challenging setting of Bosnia and Herzegovina.

Brazil

Branch reporters
Marcus Livio Gomes[1]
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Summary and conclusions

Brazil has been active as part of the BEPS steering group and of the Inclusive Framework. As a consequence of this, many BEPS Actions such as 6 – Preventing Treaty Abuse, 13 – Country by Country Reporting and 14 – Mutual Agreement Procedures, have been implemented locally.

The country has a local GAAR provision which, though not yet regulated, is still used by tax authorities and courts to disregard transactions which are not considered to have a business purpose.

It is also in the process of signing new tax treaties (recent ones include Switzerland, Singapore, Uruguay and the United Arab Emirates) and renegotiating older ones (such as the treaties with Argentina and Switzerland).

Brazil can be said to be protective of its taxing rights. It participated in both the UN Model and OECD Model tax discussions and it is fair to say that it has played a part in the provisions which protect taxing rights for source countries. Examples of how Brazil protects its taxing rights can be seen in (i) elevated remittance tax burden such as on imports of services and royalties and (ii) treaty clauses which protect source country taxing rights, sometimes even more than the UN model itself, as is the case with the Capital Gains article in most treaties. However, new treaties can be said to follow MLI orientation in the preamble, and in clauses such as Permanent Establishment and LOB while the UN model can be noticed in article 12A regarding services and lack of arbitration in MAP.

Though it has not signed the MLI, influence of the MLI´s text can be se en in the new treaties signed by Brazil in aspects such as the preamble and LOB clauses.

As will be shown throughout this report, even though there are interesting local peculiarities in Brazilian treaties, the country has been striving to align with international standards.

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Canada

Branch reporters
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Summary and conclusions

This report consists of two parts. Part One canvasses the impact of the Multilateral Instrument (MLI) and the BEPS Action Plan on Canada's tax treaty network and its treaty-based doctrines and practices. Part Two reviews the adoption of the MLI in Canadian legislation and discusses related implementation issues for Canadian courts, practitioners and taxpayers.

Part One: The MLI's impact on Canada's approach to preventing base erosion and profit shifting

Prior to ratifying the MLI, Canada relied on targeted domestic provisions, a domestic anti-avoidance rule of general application, judicial doctrines, and anti-avoidance provisions in treaties to counter abusive treaty shopping and cross-border planning. Due to Canada's limited success in addressing treaty shopping, the government contemplated enacting a domestic anti-treaty shopping provision. In 2013, the government released a consultation paper, surveying proposals addressing treaty shopping. However, the proposals were ultimately shelved in anticipation of the OECD's BEPS initiatives.

The MLI's effect on Canada's bilateral treaties will largely depend on the following: (1) Canada's adoption of the minimum standards for treaty shopping and dispute resolution; (2) Canada's list of reservations; and (3) the list of Covered Tax Agreements (CTAs) to which Canada has signed. Upon signing the MLI, Canada announced that it would adopt the minimum standards for treaty shopping using a two-fold approach: (1) the adoption of a treaty preamble stating that the intention of the CTAs is the elimination of double taxation without creating opportunities for non-taxation or reduced taxation; and (2) the adoption of the PPT. Additionally, to meet the minimum standards for mutual agreement procedure, Canada committed to mandatory binding arbitration.

Canada initially adopted a minimalistic approach to its commitments under the MLI by registering reservations on all other provisions. However, in May 2018 Canada expressed its intention to adopt four optional MLI provisions: articles 4, 8, 9 and 5. The first three articles pertain to dual residence entities, dividend transfer transactions and capital gains from the alienation of shares or entities deriving their value principally from immovable property. Article 5 grants Canada's treaty partners some flexibility in relieving double taxation.

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The adoption of the MLI will, at least initially, potentially affect approximately 80% of Canada's tax treaties, but this percentage is anticipated to increase as other countries become signatories to the MLI. To date, 75 of Canada's 93 tax treaties have been listed as CTAs. Bill C-82 (the legislation implementing the MLI in Canada) received royal assent on 21 June 2019, although the MLI will only become effective after Canada deposits its instrument of ratification with the OECD and its effectiveness for a particular CTA will depend on when Canada's counterparty to that treaty deposits its own instrument of ratification with the OECD and the options/reservations selected by that counterparty. The day upon which the MLI will enter into effect for a particular CTA is different for withholding taxes as compared to other types of taxes. Finally, the adoption of the MLI will influence most treaties currently being negotiated or renegotiated by Canada.

Part Two: Implementation of the MLI

The MLI's implementing legislation, Bill C-82, proceeded through Canada's House of Commons and Senate as well as related committees. Bill C-82 was passed and became law on 21 June 2019. The Department of Finance plans to prepare unofficial synthesized versions of CTAs. Those synthesized texts will not take precedence over the original enactment in the event of any inconsistency.

Bill C-82 provides that where the implementing act and the MLI are inconsistent with Canada's other laws, the provisions of the implementing act and the MLI prevail. This high-order ranking is displaced where the *Income Tax Conventions Interpretation Act* (ITCIA) applies. The ITCIA permits Canada to override tax treaties by, among other provisions, allowing the government to apply the general anti-avoidance rule ("GAAR"). Given the language in subsection 33(2) of Canada's *Interpretation Act* and since both the ITCIA and the MLI aim to alter the bilateral income tax conventions, it is likely that the ITCIA applies to the MLI.

Canada will grapple with how the MLI should affect treaty interpretation and application. However, given the amendments to the OECD commentaries, the courts will likely have regard for the MLI changes. For example, the MLI will introduce language into Canada's treaties stating that while tax treaties are intended to avoid double taxation, they are not intended to create non-taxation. This may influence future court decisions, whereas the courts have previously stated, at least in in one Tax Court of Canada decision, that the preamble was too vague to be relied on.

The most significant changes to the treaty network will revolve around the introduction of the principal purposes test (PPT) and Canada's commitment to mandatory arbitration. Canada's experience with the GAAR may shed some light on how the PPT will be applied; however, there are variances in the provisions that should be noted. First, it is plausible that the PPT will compel courts to look at the economic substance of a transaction, a step that courts were largely unwilling to take while applying the GAAR. Second, the PPT may deny the whole tax benefit while the GAAR permits the decision-maker to recharacterize the transaction. Further issues include whether both the GAAR and the PPT should be applied, and the ordering of application.

Finally, how Canada's commitment to mandatory arbitration will affect dispute resolution is unclear, given that Canada has limited previous experience with mandatory arbitration. Canada has reserved on the issue of whether the PPT can be subject to mandatory arbitration; as a result, it cannot.

Chile

Branch reporter
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Summary and conclusions

Chile was one of the 68 jurisdictions that signed the MLI in the ceremony held in Paris on7 June 2017. Chile notified all its 34 treaties, but only 26 will be CTAs (76%). It is expected that the MLI will have not only a direct impact on Chile's treaty network but also a relevant indirect impact on Chile's treaty policy. The total number of provisions included in Chile's CTAs is 767. The MLI will directly impact 133 out of these 767 provisions (17.34%).

Prior to the MLI, treaty abuse was counteracted either through general principles of treaty interpretation, specific anti-avoidance rules contained in treaties (mainly exclusion provisions) or in domestic laws or domestic GAAR. In the MLI, Chile decided to meet the minimum standard on treaty abuse by way of adopting the PPT as an interim measure and declaring its intention to adopt a SLOB through bilateral negotiations. The PPT contained in the MLI will affect (directly or to the extent of incompatibility) 24 out of 34 Chilean treaties (70%). The SLOB contained in the MLI will impact five treaties (14,7%) to the extent of incompatibility.

As to the minimum standard on dispute resolutions, Chile reserved the right not to apply the rule that allows the taxpayer to present its case to the competent authority of any of the two contracting states. Chile commits to fulfill this minimum standard by allowing the taxpayer to present its case to the competent authority of the state of its residence or, if the case presented by that person comes under a provision of a CTA relating to non-discrimination based on nationality, to the state of which that person is a national. Chilean treaties will be impacted only by changes contained in articles 16(1) second sentence, 16(2) second sentence and 16(3) second sentence.

Further, Chile notified all the treaties that contain a rule dealing with the transfer of interests in immovable property companies with the purpose to supplement or replace those provisions by the general rule of article 9(1) MLI which reflects both the 365-day testing period and the broad ownership interest concept. Changes contained in article 9(1) MLI will directly affect nine treaties (26%). While five of these nine treaties will be partially affected (either in relation to the 365-day testing period or the broad concept of ownership interest), four will be affected by both changes.

Regarding PE provisions, the rule on low-taxed PEs in third jurisdictions contained in article 10 MLI will directly affect five out of 34 Chilean treaties (14,7%). Additionally, changes on the agency PE concept included in article 12(1) MLI, and changes on the independent agent concept included in article 12(2) MLI, will either replace or modify the provisions contained in

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ten treaties (29%). Finally, the anti-fragmentation rule of article 13(4) MLI will impact 18 out of 34 (53%) Chilean treaties.

Chile reserved the application of the provision on hybrid entities of article 3(1) in treaties that already contain a similar provision. This provision will impact 12 out of 34 (38%) Chilean treaties.

Chile fully reserved the provision of article 4 on dual resident entities, article 8 on dividend transfer transactions, and article 14 on splitting-up of contracts since those aspects have been already dealt with by Chile's tax treaties. Further, Chile reserved the right not to apply articles 18 thru 26 (arbitration) since it is considered a complex mechanism on which Chile does not have enough experience as to its effects.

The MLI has not only directly impacted Chile's CTAs but also indirectly impacted Chile's treaty policy. Chile has not entered into tax treaties after the signature of the MLI. Yet, Chile has entered into six post-BEPS treaties after 2015, i.e. with Argentina, China, Czech Republic, Italy, Japan and Uruguay. In general, with the exception of the Czech Republic, these post-BEPS treaties reflect the principles and provisions contained in the MLI and associated revisions to the 2017 OECD Model. For instance, the new preamble of article 6 MLI has been included in these treaties (except with the Czech Republic). Further, treaties with Argentina, China and Uruguay include a GAAR plus an LOB, whereas only a GAAR has been included in the treaties with Italy and Japan.

The MLI has not yet entered into force in Chile. Yet, a bill for the ratification of the MLI is currently under discussion before the Chilean Congress. This bill specifically states that the MLI is envisaged not only to have a direct impact on tax treaties entered into prior the MLI, but also an indirect impact on future Chilean treaty policy. In fact, Chilean treaties concluded from 2015 onwards have consistently adopted provisions based on the MLI and associated revisions to the 2017 OECD Model, e.g. treaties with Argentina, China and Uruguay include a GAAR plus an LOB, whereas only a GAAR has been included in the treaties with Italy and Japan; rules modelled after article 9 MLI (sale of interests in real estate entities) article 12 MLI (commissionaire or similar arrangements) have also been included, among others.

Once ratified by the Chilean Congress, the MLI will become part of the domestic legislation and its provisions should prevail over domestic law in case of conflict. The MLI and more generally BEPS principles have exerted some influence on the interpretation of tax treaties. In fact, certain recent rulings issued by the tax authority reflect a more purposive or teleological interpretation of tax treaties.

China, People's Republic of

Branch reporter
Na Li[1]

Summary and conclusions

The People's Republic of China (hereinafter China) was among the first group of jurisdictions signing the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI") on 7 June 2017. The MLI, however, has not come into force in China as of 9 December 2019, because it is still under the ratification process at the National People's Congress of China. A total of 102 Chinese tax treaties were listed as the Covered Tax Agreements ("CTAs"), representing nearly 96% of all Chinese tax treaties by then.

China opted-in all the MLI articles reflecting the minimum standards of the BEPS Actions 6 and 14, namely article 6 (Purpose of a Covered Tax Agreement), article 7 (Prevention of Treaty Abuse) and article 16 (MAP). Also, China opted-in some articles reflecting the best practice measures of the BEPS Actions, including article 4 (Dual-resident entities), article 8 (minimum shareholding period), article 9 (alienation of shares) and article 17 (corresponding adjustments). In the meantime, China opted out of six MLI articles and did not choose the optional articles for the exemption method and the mandatory arbitration. The new bilateral tax treaties and re-negotiated tax treaties, which China concluded after the signature of the MLI, also have included all the MLI articles reflecting the minimum standards of the BEPS Action Plan, although some of the contracting states are not signatories to the MLI yet. This may demonstrate China's determination to implement the outcomes of the BEPS Action Plan. With regard to the MLI articles beyond the minimum standard measures, the new tax treaties selectively included some of these articles, perhaps due to different treaty policies and negotiation results between China with the respective treaty partners.

It is unnecessary to enact a domestic law particularly for the purpose of implementing the MLI in China, because the implementation mechanism of the MLI is not conflicting with Chinese domestic laws and China is subject to the monist theory. The State Administration of Taxation of China shall modify the CTAs in accordance with the matching and compatibility mechanism of the MLI, when the MLI comes into force in China. If any modified treaty provision is in conflict with Chinese domestic laws, the treaty provision shall prevail. Such effect of the MLI on Chinese tax treaties and tax policies is different from the OECD MC and Commentaries, which have no legally binding effect on China although in practices they have significantly influenced Chinese tax legislation and administration. As a general principle, retrospective effect should not arise on Chinese tax laws and tax treaties upon the CTAs being modified by the MLI, unless the retrospective effect is for a purpose to better protecting the interest and rights of taxpayers.

Interpretation of the MLI will be a quite debatable issue in China, particularly on the following two questions: (a) what is the role of the MLI Explanatory Statement in interpretation of the MLI? And (b) what are the roles of the OECD MCs, Commentaries and the outcomes of the BEPS Action Plan? Debates already commenced and will become more

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intensive when the MLI comes into force in China. It is still unclear that whether the MLI will change the approaches in which tax treaties are interpreted, and the author has not observed any move in China from the method of static tax treaty interpretation to the method of ambulatory tax treaty interpretation. However, teleological interpretation is expected to be more frequently adopted, because a number of the MLI articles opted-in by China are subject to the purposive test.

A number of anti-tax avoidance doctrines and provisions already exist in both Chinese domestic tax laws and tax treaties, including the SAARs and GAAR, procedures for treaty entitlement, concept of "beneficial owners", PPT and LOB provisions, and treaty provisions for applying domestic anti-tax avoidance rules. Upon the CTAs being modified by the MLI, more anti-treaty shopping provisions will be available in the CTAs. The Chinese GAAR will also be applied by Chinese authorities in parallel with other treaty-based doctrines for the purpose of tackling treaty abuse. Hence both the taxpayers' uncertainties and the tax administration cost are expected to increase, and more tax disputes might arise. However, as of today, no official document is published with regard to the impact of the MLI on tax treaties, tax compliance and administration, economic activities and budgetary matters of China; nor has any measure been enacted by the Chinese government for the purpose of dealing with the potential uncertainties which the MLI may bring to treaty interpretation and application in China.

Chinese Taipei

Branch reporter
Chi Chung[1]

Summary and conclusions

Chinese Taipei's tax treaty network does not seem to have dramatically changed before and after the Multilateral Instrument (hereafter referred to as the MLI). Chinese Taipei, ranking as the world's twelfth largest merchandise exporter and eleventh largest merchandise importer in 2018 excluding intra-EU trade, is not a party to the MLI but is watching the MLI-related developments carefully. In Part One, I offer an overview of Chinese Taipei's tax treaty network, and describe Chinese Taipei's positions on the issues that are addressed by the MLI. In Part Two, I offer observations with respect to the procedure required to implement the MLI, interpretations issues, and potential influence on tax planning and tax administration.

Although Chinese Taipei is not a party to the MLI, it has addressed some issues in its domestic law. For example, Chinese Taipei has a general anti-avoidance rule in its Tax Collection Act and the Act Protecting Taxpayer's Rights. A treaty-specific anti-avoidance rule may be found in Chinese Taipei's Regulations Governing the Application of Agreements for the Avoidance of Double Taxation with Respect to Taxes on Income. In addition, on 24 June 2019, Chinese Taipei's Ministry of Finance issued the Explanatory Decree No. 10800577770 regarding "the Application of Beneficial Owner under Agreements for the Avoidance of Double Taxation with Respect to Taxes on Income."

Chinese Taipei has also sought to address other issues in bilateral negotiations with its treaty partners. Chinese Taipei's treaty partners are, in the order in which the treaty took effect, as follows: Singapore (1982), Indonesia (1996), South Africa (1996), Australia (1996), New Zealand (1997), Vietnam (1998), Gambia (1998), Eswatini (1999), Malaysia (1999), North Macedonia (1999), Netherlands (2001), United Kingdom (2002), Senegal (2004), Sweden (2004), Belgium (2005), Denmark (2005), Israel (2009), Paraguay (2010), Hungary (2010), France (2011), India (2011), Slovakia (2011), Switzerland (2011), Germany (2012), Thailand (2012), Kiribati (2014), Luxembourg (2014), Austria (2014), Italy (2015), Japan (2016), Canada (2016) and Poland (2016).

On its website, the Ministry of Finance notes that Chinese Taipei is neither a member of the Inclusive Framework on BEPS of the Organisation for Economic Co-operation and Development (OECD), nor a party to the MLI. The Ministry also notes that Chinese Taipei, as a member of the global community, has committed itself to supporting and implementing international anti-avoidance tax measures. Further, the majority of Chinese Taipei's 32 tax treaties, according to Chinese Taipei's self-assessments, meet the Actions on Base Erosion and Profit Shifting (BEPS) Minimum Standards set forth in the Final Reports.

My personal interpretation is as follows: Chinese Taipei is willing to support and implement international anti-avoidance tax measures, but it is premature for Chinese Taipei to make a general decision regarding all the recommendations of the BEPS Action

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Plan. Chinese Taipei, however, does announce on its website its negotiating positions on some of the issues covered by the MLI. If there continues to be practical difficulties related to Chinese Taipei's participation in the Inclusive Framework on BEPS of the OECD, or the MLI, Chinese Taipei may enact statutes or promulgate regulations that support and implement international anti-avoidance tax measures.

If Chinese Taipei signed the MLI, it would need to be ratified by Chinese Taipei's Legislature to take effect in Chinese Taipei. The Legislature would have to examine the actual content of the MLI; the Legislature has to approve the actual full content, rather than only the "principle of" implementing the MLI. Income tax treaties, in contrast, are authorized by Chinese Taipei's Legislature through article 5 of the Tax Collection Act to take effect in Chinese Taipei as soon as the Cabinet (Executive Yuan) approves the income tax treaties. Article 124 of the Income Tax Act states that whenever a provision of an income tax treaty is more specific than that of the Income Tax Act, the provision of the income tax treaty prevails over that of the Income Tax Act.

If Chinese Taipei signed and ratified the MLI, the MLI would have primacy over existing domestic legislation, and it could not be overridden by subsequent domestic legislation. On the relationship between domestic law and international law, Chinese Taipei adopts the monist theory; the MLI may be applicable in Chinese Taipei without further domestic legislation.

The MLI has not given rise to specific interpretation issues in Chinese Taipei, whether by the government or by the courts. Indeed, and further, the explanatory memorandum of the MLI, titled "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Functioning under Public International Law," has not been granted any legal weight in Chinese Taipei.

Chinese Taipei's interpretation of tax treaties has been a method of dynamic (ambulatory) interpretation in accordance with the Vienna Convention on the Law of Treaties. Chinese Taipei's method of treaty interpretation has not been affected by the MLI. The OECD reports published during and after the BEPS project were considered when Chinese Taipei either enacted statutes or promulgated administrative regulations. To the extent the OECD reports were considered a type of legislative intent or the evidence thereof, they may have legal value in Chinese Taipei. The same also holds for the OECD Commentaries on its Model Tax Convention.

Tax professionals in Chinese Taipei should have taken the Principal Purpose Test into account when advising clients or planning their clients' affairs. Some court cases may be expected to arise over time to clearly draw the line between tax avoidance and legitimate advising on the application of tax law in concrete cases. On the side of tax administration, there has been no indication or evidence that assessment practices have changed regarding tax treaty shopping and other tax treaty abuses. Indeed, in Chinese Taipei, as both tax professionals and tax officers attentively watch the BEPS Action Plan, both of them may be informed of the possibilities of the abuse of tax law.

Colombia

Branch reporter
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Summary and conclusions

Colombia has a network of 14 treaties to avoid double taxation, ten of them in effect and four signed but not concluded at the time of this report. All the treaties follow the OECD Model Convention.

As associated party in the developing of the OECD/G20 BEPS package and keen to implement some of the actions of the BEPS plan, Colombia signed the Multilateral Convention to implement tax treaty related measures to prevent base erosion and profit shifting (MLI) on 7 June 2017, and notified as covered tax agreements (CTAs) to be modified by such instrument the treaties with Spain, Switzerland, Chile, Mexico, Canada, France, Portugal, India, the Republic of Korea and the Czech Republic, all of them in effect at the time of this report. With the notification of the CTAs several provisions of the MLI targeting treaty abuse where chosen, amongst them the new preamble, the principal purpose test and the simplified limitation of benefits (in order to meet the minimum standard as required by Action 6 of the BEPS plan), the dividends transfer transactions, capital gains from the alienation of shares or interest in land-rich companies, and the artificial avoidance of permanent establishment status through commissionaire arrangements.

Colombia has also signed four treaties under the OECD/G20 BEPS project: the treaty with the United Kingdom before the 2017 OECD Model Convention and the signature of the MLI, and the treaties with Italy, United Arab Emirates and Japan after the signing of the MLI and under the 2017 OECD model that generally mirrors the MLI´s provisions. These treaties already include provisions preventing treaty abuse as those set out in the final Action 6 report and in the MLI.

The MLI still needs to complete the constitutional procedure for any international treaty to be incorporated in the Colombian regulation and thus to be able to modify the CTAs.

Once concluded, the MLI will be at the same level and will have the same value as any other type of Colombian law, therefore as any other law it will be subject to and shall be respectful of the Colombian Constitution but at the same time protected by this norm or norms which mandates that in its foreign affairs Colombia shall adhere to the principles of international law as those enshrined in the Vienna Convention of the law of the treaties and shall respect its international commitments.

With the aim to ease the interpretation and application of the CTAs modified by the MLI, it is foreseeable that even though not mandatory for the Colombian taxing authorities, they will jointly prepare with the tax administrations of other jurisdictions parties to a CTA, synthesized texts following the "Guidance for the development of synthesized texts" prepared by the OECD Secretariat.

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With the ratification and conclusion of the MLI, not only the guidelines provided in the instrument but also in its explanatory memorandum, could be regarded as interpretative aid by the government and the courts when solving interpretative issues of the CTAs modified by the MLI and of those signed under the 2017 OECD Model.

The BEPS reports could also be regarded an auxiliary criterion of interpretation of the treaties signed by Colombia that have been influenced by the BEPS/G20 package, though they could not be regarded as a mandatory interpretation tool neither for the judges nor for the tax authorities, given that they do not have the status of internal regulation. Nevertheless, the status of the BEPS reports may change once Colombia is admitted as OECD member, when the reports could have more weight as interpretative tools of the new DTTs influenced by the OECD/BEPS package and those modified by the MLI.

The MLI could also help to interpret those treaties signed under the 2017 OECD model and previously to the signature or conclusion of the MLI even if those treaties are not modified by the instrument, under the understanding that the 2017 Model and the MLI have the same purpose.

By contrast the MLI could not be applied to interpret retrospectively facts and circumstances that took place under treaties which rules are substantially different to the MLI´s.

The preambles under the MLI could be used to interpret treaties retrospectively under the understanding that what matters in a scenario of non-taxation or reduced taxation is whether it was achieved through tax evasion, as in the majority of the treaties concluded previous to the MLI is stated as one of the intention of the parties to prevent tax evasion, which has always been addressed in the OECD Commentaries. The same could be said about the treaty shopping expressly targeted in the new preamble: this type of treaty abuse has been challenged in the OECD Commentaries that have accompanied the treaties concluded before the BEPS Plan, and some of them also include special anti-avoidance and LOB rules preventing treaty shopping.

It could be envisaged that the new provisions of the MLI and of the 2017 OECD Model Convention strengthened to target treaty abuse, will demand new efforts of the Colombian tax administration, not only in identifying tax behaviors that may appear to be abusive but also in analyzing the proofs prepared by the tax payers supporting that their transactions have enough economic substance, and are adhered to the terms of the CTA´s provisions and aligned with the object and purposes of the same. This may require for example a special committee to assess tax payers under the PPT.

Even though the whole Colombian treaty network includes a mutual agreement procedure (MAP) to tackle treaty disputes, in the tax reform "Act 1943 of 2018"[2]MAP was introduced in the domestic regulation, establishing that the agreements signed by the tax authority by virtue of this procedure will have the same effects as a final judicial ruling. Likewise, by means of Resolution 53 of 2019 it is stated for all cases that will grant the right to the tax payers to apply for the MAP and the requirements that need to be adhered to for such purpose.

[2] This Act was in force until 31 December 2019, however the MAP was included again in Act 2010 enacted at the end of such year.

Denmark

Branch reporter
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Summary and conclusions

On 28 March 2019, the Danish Parliament adopted a bill ratifying the OECD Multilateral Instrument (MLI), and on 30 September 2019 Denmark deposited its instrument of ratification. Accordingly, the MLI will wield influence on Denmark's covered tax treaties as of 1 January 2020.

Denmark does not have an official model convention. Instead, with certain deviations, Denmark's point of departure for the negotiation of tax treaties is the OECD Model Tax Convention on Income and Capital (hereinafter the OECD Model). Denmark's tax treaties typically contain a preamble stating that the purpose of the treaty is both to promote avoidance of double taxation and to prevent tax evasion. Moreover, Denmark's tax treaties normally contain the anti-avoidance rules directly mentioned in the OECD Model itself.

As the aim of the MLI is to mitigate base erosion and profit shifting related to tax treaties, the Danish government was of the opinion that the content of the MLI should apply to all of Denmark's tax treaties, despite the fact that they are not completely alike. When signing the MLI, Denmark therefore listed 65 out of its 70 tax treaties as *covered tax agreement*s. With respect to the remaining tax treaties, it has been decided to (wholly or partly) implement the content of the MLI through other *complying instruments*.

Even though Denmark has decided to include all elements of the MLI, a number of choices still had to be made between the different available alternatives in some of the MLI provisions. With respect to general anti-avoidance provisions, Denmark has decided to apply the *principle purpose test* (PPT). Denmark's preference for the PPT was no surprise as Denmark had already implemented a similar OECD inspired PPT-rule in domestic law in 2015. However, in line with article 7(7)(a) of the MLI, Denmark will apply the simplified limitation on benefits provision (SLOB) if the treaty partner has decided to adopt the SLOB.

The relationship between domestic Danish law and international law is based on a dualistic principle and Denmark's ratification of the MLI required a statutory basis, which was established by the parliament's enactment of a law. Constitutionally, nothing hinders the Danish parliament from passing a law that is in conflict with the MLI. However, it is generally recognized that Danish authorities and courts should advance an interpretation of Danish law that makes it compliable with Denmark's international law obligations and should presume that the intention of the parliament has not been to enact legislation in breach of Denmark's obligations.

Pursuant to Danish case law, the Commentary to the OECD Model plays a significant role when it comes to interpretation of Denmark's tax treaties. In this context, it must be expected that the Explanatory Statement to the MLI as well as the OECD reports, on which the MLI rests, will also constitute important means of interpretation onwards.

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All in all, even though Denmark's ratification of the MLI must be expected to increase legal complexity and uncertainty in some areas, Danish businesses and lobby groups have generally been quite positive towards the MLI. An important reason for the positive attitude was the fact that at the end Denmark decided to opt for mandatory binding arbitration. Accordingly, the prevailing opinion appears to be that a sensible balance has been struck.

Finland

Branch reporter
Tuomas Ahonen[1]

Summary and conclusions

Prior to the MLI, Finland had tax treaties with almost 80 jurisdictions. Treaties concluded by Finland generally follow the OECD Model Convention. There are only a few specific anti-avoidance doctrines targeting treaty shopping in domestic tax legislation or Finland's tax treaties. All of the tax treaties entered into by Finland include provisions for a mutual agreement procedure but none of them provide for mandatory binding arbitration. New or amended bilateral tax treaties are in line with the OECD's minimum standard.

Finland has signed the MLI in 2017 and deposited the instrument of acceptance on 25 February 2019. The MLI entered into force in Finland on 1 June 2019. Finland has listed almost all of its comprehensive tax treaties as covered tax agreements (CTAs). Due to the other contracting states' decisions on signing the MLI or their own CTAs, about two thirds of Finland's tax treaties will actually be covered by the MLI.

Apart from choosing to apply part VI of the MLI concerning mandatory binding arbitration, Finland has chosen to apply only those provisions of the MLI that are necessary to satisfy the OECD's minimum standard. This will significantly limit the number of tax treaty provisions modified by the MLI. Finland has decided to satisfy the OECD's minimum standard on treaty abuse by applying the principal purpose test (PPT).

The MLI was ratified in Finland by parliament and entered into force by a decree issued by the government. Once ratified, the MLI was incorporated into the domestic legislation by an Act of Parliament. For the treaties that the MLI modifies, synthetized texts of the revised tax treaties will be made publicly available. However, only the treaties themselves are authentic for purposes of law.

As of now, the MLI has not given rise to any specific interpretations in Finland. No specific interpretation guidelines have been published with respect to the MLI. There has not been notable debate on whether the MLI may have an impact on the interpretation of treaties concluded before the MLI was ratified or whether the amended preamble might be used in a retrospective manner for the purpose of interpreting tax treaties.

It is unclear what impact the MLI will have on tax planning and tax administration. There are no plans to establish a special PPT committee to review potential assessments. Regarding tax certainty, it is possible for taxpayers to apply for an advance ruling on the application of the PPT from the tax administration. The number of MAP requests is anticipated to increase over time as more cases than previously will eventually be resolved in arbitration if the competent authorities fail to reach an agreement.

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France

Branch reporter
Nicolas De Boynes[1]

Summary and conclusions

France is a long-time supporter of both the BEPS initiative and multilateralism. It is therefore not a surprise that the multilateral instrument implementing the BEPS Action Plan (the "MLI") has been endorsed and vigorously promoted by the French government. Such enthusiasm vis-a-vis the MLI translated in a strong political support by the French parliament during the ratification discussions: almost all provisions of the MLI were adopted, except when such provisions contradicted French international tax principles or were not useful or relevant given domestic tax law. Decisions on options and reservations under the MLI did not result from an economic/pragmatic approach under which French representatives would have tried to choose the best options for French taxpayers or tax authorities. For instance, no detailed impact analysis was prepared by French tax authorities and provided to the members of parliament. Decisions on the MLI were rather driven by the political and diplomatic objective of showing France's support to the MLI initiative.

The direct impact of the MLI on French taxation is quite limited at this stage, for two reasons. First, the general anti-abuse rule provided by article 7 of the MLI is not expected to have practical consequences on international tax schemes since French case law already authorized the tax authorities to apply domestic anti-abuse rules in a tax treaty context. Second, France's treaty partners have made choices that do not necessarily match France's choices, resulting in very few amendments being in effect at this stage. This is particularly true in respect of article 12 on agents and commissionaire structures, which is certainly one of the most important provisions of the MLI in the French context. Recent treaty bilateral negotiations, such as the new treaty between France and Luxembourg, have shown that MLI standards are pushed by French tax authorities and comprehensively integrated in new tax treaties, resulting in a similar outcome as an adoption through the MLI. However, such bilateral processes were precisely what the promoters of the MLI wanted to avoid. Even though such evolution in France's tax treaty policy clearly relates to the BEPS Action Plan, it is difficult to argue that they stem from the MLI.

From the point of view of tax practitioners, the main recent evolution in the French tax market practice has resulted from the implementation under French law of the principal purpose test ("PPT") for the characterization of abusive transactions. Such standard is provided in article 7 of the MLI but had actually been introduced into French domestic law before the MLI took effect, through the implementation of the Anti-Tax Avoidance Directive ("ATAD"). Since the scope and limits of this PPT concept are uncertain, one could notice a recent trend showing that taxpayers and tax practitioners tend to be more cautious and conservative in respect of tax structuring, waiting for guidance and precedents to be provided by French courts in the years to come. There again, this evolution is clearly a consequence of the BEPS Action plan, but not so much the MLI. Actually, the ATAD proved to be much more

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efficient than the MLI to accomplish the goals set by the BEPS Action Plan (with a limited geographical scope though).

Therefore, taking into account the reservations made by France and its key treaty partners as well as BEPS-inspired changes already enacted under French domestic law, it is fair to say that the effective impact of the MLI is not significant at this stage. From a practical standpoint, changes that will significantly impact taxpayers are limited to (i) mutual agreement and arbitration procedures and (ii) the 365-day period to take into account in respect of dividends and capital gains on real estate companies. Such impact may be even more limited because it is not clear whether the reference to a 365-day period in respect of real estate companies may be applied for French tax purposes. Such provision would be tougher than domestic tax provisions, and there is a debate under French law as to whether income that is not taxable in France under domestic law may become taxable by the effect of tax treaties as amended by the MLI.

On a more optimistic note, since we started this summary by noting that the main goal seems to have been of a political and diplomatic nature, one could consider that the objective has been achieved despite its limited practical consequences.

Germany

Branch reporters
Silke Bruns[1]
Roland Ismer[2]

Summary and conclusions

I. Prior to the MLI, Germany had concluded Double Tax Conventions on income and on capital (in the following: DTCs) with 96 states and jurisdictions. The MLI (which can only amend existing DTCs) and the BEPS Action Plan have not had any discernible impact on the number of DTCs.

Preventing treaty abuse already constituted an important aim prior to MLI/BEPS. Most preambles to German DTCs include a reference to avoiding non-taxation. Subject-to-tax-provisions, the beneficial owner concept and a proviso for domestic anti-abuse legislation have formed an integral part of treaty policy. The latter include a provision addressing treaty- and EU-Directive-shopping regarding reduced source state taxation; CFC rules; exit taxes; and a domestic general anti-avoidance rule. Germany being a member of the EU, the European anti-avoidance doctrine is also relevant within the scope of application of EU law. DTCs often contain further clauses, such as an activity proviso, limiting tax treaty benefits without, however, being clearly targeted at abuse situations. By contrast, LoB clauses, rules on third jurisdiction PEs and the avoidance of PEs as well as specific rules for hybrid entities are still rare. While MAP procedures were regularly included in treaties even before the MLI, a certain reluctance as to the scope of arbitration is apparent both before and after MLI/BEPS.

Germany, which has signed the MLI, but not yet ratified it, intends to update its nomination during the ratification process. In respect of the options under the MLI, it has made a number of reservations. In particular, it has opted for a PPT, but reserved the right to exclude its application where the DTC already contains a general anti-abuse clause. It has chosen not to apply article 11 (savings clause) and 12 (artificial circumvention of the permanent establishment status by commissionaire models and similar strategies). It has made a reservation to articles 13(4) and 15 for reasons of legislatorial technique and to article 14 (Splitting-up of contracts). Regarding the artificial circumvention of the PE status through certain activities, Germany has chosen option A contained in article 13(3) of MLI so that the exemption of certain activities is limited to cases where these activities are of a preparatory nature or constitute an auxiliary activity. Regarding the provisions addressing hybrid mismatch arrangements, Germany has reserved the right not to apply article 3. This is because many DTCs do not specifically exclude partnerships from the reduced withholding tax rate under article 10 (2)(a) OECD MC 2014. It has also made a reservation to article 4 as it does not share the basic assumption that a dual resident company is generally set up as such in order to obtain tax advantages. Regarding the methods to eliminate double taxation (article 5 MLI), it has decided against choosing any of the options A to C in article 5. While it

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has opted for the application of Part VI, the impact on its DTCs will be limited: It has already agreed arbitration clauses with most states prepared to accept such clauses. Germany has formulated reservations excluding cases from arbitration procedures under article 28(2) of MLI for cases in which an abuse prevention provision applies; cases in which persons act in breach of regulations or are liable to prosecution; cases where there is no double taxation; cases falling under the EU Dispute Resolution Directive or the EU Arbitration Convention; cases of application of the credit method instead of the exemption method; as well as cases of “mutual agreement on facts” (tatsächliche Verständigung).

The BEPS Action Plan and the MLI have indirectly impacted Germany´s treaty policy. Thus, the MLI options that Germany has chosen may well already influence treaty negotiations. Furthermore, the MLI led to a considerable number of such negotiations. However, this was not a one-way-road: The MLI was partly developed by treaty negotiators of the states and jurisdictions participating in the BEPS-project. Some treaty provisions that were not common pre-BEPS, thus found their way into the MLI.

II. The constitutional prerogative of parliament *(Parlamentsvorbehalt*) and the principles of legal determination (Gesetzesbestimmtheit) have led Germany to make a reservation under article 35(7) MLI. Modifications to CTAs will thus be applicable in Germany only when it has completed the domestic procedures necessary for such application and has notified the depositary. In addition to ratifying the MLI, Germany therefore needs a second legal step for each CTA. While it is currently not decided what precise form this domestic law will take, it appears clear that it is this second step that will determine the content of the then modified DTC. As an alternative, the DTCs may be amended by means of bilateral protocols, which may turn out to be the preferred avenue of implementation. This does not imply that the MLI would be devoid of significance, as it makes such negotiations easier and less time-consuming.

In the context of the MLI, several distinct interpretation issues arise. They concern the interpretation of the MLI itself, the interpretation of the DTCs generally as well as the interpretation of treaties concluded before the MLI. As an international convention, the MLI has to be interpreted in line with the Vienna Convention on the Law of Treaties. When it comes to interpreting DTCs concluded after the MLI with signatories to the MLI and which mirror a clause from the MLI, there are good reasons for interpreting the tax treaty in accordance with the MLI. Regarding pre-MLI DTCs, several cases need to be distinguished: Where the tax treaty is not a CTA, the MLI has no legal implications. Where, by contrast, the respective provision of a CTA is amended by the MLI, the MLI forms the context in the sense of article 3(2) OECD MC. Particular problems arise where a state does not have to implement a minimum standard as the treaty already contains an equivalent provision.

Given that Germany has not yet ratified the MLI and the bilateral protocols are still in the process of negotiation or ratification, the MLI’s impact on tax planning and administration cannot be predicted with sufficient clarity.

India

Branch reporters
Ganesh Rajgopalan[1]
Rakhi Modi[2]

Summary and conclusions

India has actively participated in the Base Erosion and Profit Shifting (BEPS) initiative and its positions have shaped the outcome in some areas of contention. India is largely a source state from where the foreigners derive income on which India can collect only limited tax, especially due to the operation of double tax avoidance treaties. However, if the benefits arising from bilateral treaties are claimed by parties belonging to third countries, it leads to the erosion of the Indian tax base and imposes an increased tax burden on resident taxpayers disproportionate to their income. That India embraced the BEPS Project whole-heartedly is evident from its adoption of most of the BEPS countermeasures contained in the Multilateral Instrument (MLI). Its reservations and opt-outs are consistent with its policies and practices.

Notable amongst such reservations given by India is with respect to the application of article 3 on transparent entities. This reservation only echoes India's stand that the provisions to flow through the income of a transparent partnership to its partners and the consequent treaty benefit need to be bilaterally discussed and negotiated. Consistent with its views against treaty shopping and bilateral agreements being used by residents of third countries, India disagrees with the OECD's view that the term "income derived by or through an entity or arrangement" includes income derived by or through an entity that may not be a resident of either one of the contracting states, would be an invitation for treaty shopping.

India has, of course, adopted the Preamble and the Principal Purpose Test (PPT), these being minimum standards, though India expects the PPT to be only an interim measure until it negotiates a limitation of benefits provision in addition to or in place of the same.

India has opted for other BEPS measures though to some extent some of these modifications of the Covered Tax Agreements (CTAs) are not necessary as the CTAs already contain similar provisions. For instance, India adopted the mutual agreement procedure (MAP) as the provision to determine cases of dual residence for all its CTAs though similar provisions exist in many CTAs currently. Similarly, some treaties give taxing rights to the source state on items of assets not specified in article 13 – Capital Gains of those treaties. Thus, even in the absence of provisions for an extended testing period and enhanced scope of interests for gains on alienation of shares or other comparable interests in an entity deriving substantial value from immovable property situated in the source state, India as the source state would be able to tax such gains under this residuary paragraph in article 13 of a CTA if its domestic law permits. Thus, these modifications by the MLI are BEPS-Plus. India has also adopted the savings clause to enable it to tax its residents freely.

With respect to the provisions dealing with artificial avoidance of permanent establishment status, India has opted in for the enhanced agency PE provisions in article 12.

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It has also opted for provisions requiring the specific activity exemptions to be of a preparatory and auxiliary character and has adopted the anti-fragmentation rule. For construction PEs, it has adopted provisions with respect to the splitting of contracts.

India has not adopted mandatory binding arbitration provisions of the MLI. India has adopted all provisions relating to MAP excluding the provision entitling a person to notify a case to either contracting jurisdiction. In its place, India has expressed its intent to meet the minimum standard for improving dispute resolution by ensuring that its CTAs permit a person to present his case to the state of which he is a resident, or as the case may be a national, and also by implementing a bilateral notification or consultation process with the competent authority of the other state where it considers that in the case presented before it, the taxpayer's objection was not justified.

India has also signed bilateral treaties with countries post-signing of the MLI with provisions which are BEPS-inspired.

India has deposited its final list of reservations and notifications. Out of its total 95 tax treaties, 57 treaties are estimated to be affected by the MLI with approximately 432 treaty provisions modified. Over and above these numbers, in two treaties, treaty-related BEPS countermeasures have been incorporated through bilateral negotiations.

Branch reporter
Ofir Levy[1]

Summary and conclusions

Introduction

Since its establishment, Israel has entered into double tax treaties with 58 countries around the world. The process of negotiating a tax treaty is usually led by the State Revenue Administration and representatives of the Israeli Tax Authority (hereinafter: the "ITA").

During recent years, countries around the world, including Israel, are facing with taxpayers, including multinational entities and individuals, that conduct "treaty shopping", which generally means the taxpayers are using the provisions of the tax treaties in order to reduce their worldwide tax liability, by means of base erosion and profit shifting, which may eventually lead to "double non-taxation".

In order to fight this phenomenon, Israel has enacted anti-avoidance rules in its domestic tax laws since its establishment. In addition, Israel joined the OECD in 2010 and is now committed to implement Action 15 of the BEPS Project, including signing the new multilateral instrument that was developed by the OECD, the MLI.

Anti-avoidance rules under domestic tax law

A. General anti-avoidance rule 1 – Artificial transaction

Under article 86 of the Israeli Income Tax Ordinance (the "ITO"), the Israel assessing officer, at his sole discretion, is authorized to disregard the formal form of a transaction conducted by a taxpayer or to change its facts, and to impose tax on such transaction according to its true and economic nature.

In order to do so, the assessing officer must prove that the said transaction is "artificial". Artificial transaction generally means a transaction that has only one commercial purpose of reducing or avoiding tax liability in Israel and/or abroad. Also, the Israeli Supreme Court determined that this "commercial reason test" is an auxiliary test which is part of broader test that, inter alia, takes all the facts and circumstances of each case into consideration.

B. General anti-avoidance rule 2 – Reclassification

The Israeli Supreme Court has established the reclassification rule under which the assessing officer has the authority to view a transaction made by a taxpayer differently than the way

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the taxpayer views it, and to reclassify such transaction for tax purposes according to his/her view and not according to the taxpayer's view, which may result in higher tax liability for the taxpayer.

C. Specific anti-avoidance rules – CFC regime

Section 75B of the ITO establishes a Controlled Foreign Corporation (CFC) regime which serves as a specific anti-avoidance rule. Under the CFC regime, Israeli residents who are controlling shareholders of a foreign company will be subject to income tax in Israel, on a current basis, on certain undistributed types of passive income of that foreign company, which will be viewed as "deemed dividends". The aim of this CFC regime is to undermine potential tax-deferral advantages with respect to passive income, which can be achieved by the utilization of foreign corporations in low tax jurisdictions.

D. Specific anti-avoidance rule – Transfer pricing

Section 85A of the ITO and its accompanying regulations contain elaborate transfer pricing provisions, including the arm's-length principle, that apply to any international transaction in which there is a special relationship between the parties to the transaction and for which a price was settled for property, a right, a service, or a credit.

Under the arm's-length principle, in the case that a foreign parent company extends a loan to its Israeli subsidiary and the loan bears interest which is below the market price, such loan might result in "notional" interest income for the foreign parent company, based on the market price charged for such capital notes, unless certain conditions are met. In the case where section 85A applies, the Israeli subsidiary may be eligible to deduct such interest expenses and reduce its taxable income in Israel.

E. Beneficial ownership

Generally, when a foreign entity claims tax benefits under a tax treaty, the ITA usually examines whether such taxpayer is indeed (i) a tax resident of the relevant jurisdiction and (ii) that it is the "beneficial owner" of the relevant item of income (e.g., dividends, interest and royalties) or, alternatively, whether the income should be attributed to another entity (typically an affiliated entity). This includes an examination of whether the foreign entity in question has sufficient economic substance.

Generally, the ITA interprets the term "beneficial ownership" to mean the entity is not a mere "conduit" that passes the income on to others. For this purpose, the ITA published a number of tax circulars[2] listing several factors which may indicate the existence of a 'conduit entity'. Such indications include minimal business activity, lack of assets/minimal assets, lack of justification for the existence and provision of "back-to-back" loans.

[2] ITA Circular 22/2004; ITA Circular 3/2001.

The MLI

On 7 June 2017, Israel signed the MLI and on 13 September 2018, after ratifying the MLI, Israel submitted the ratification documents to the OECD. The MLI entered into force in Israel on 1 January 2019.

Israel has listed 53 treaties out of the total of 58 countries with which Israel has signed a tax treaty, as CTAs.

Israel had no reservations with respect to articles 3 to 15 of the MLI. However, Israel chose not to apply part VI of the MLI.

Recently, synthesized texts of the tax treaty between Israel and Austria and the tax treaty between Israel and Japan were published. Such synthesized texts include an explicit statement that the authentic legal texts of the existing tax treaties and the MLI take precedence over the synthesized texts.

Also, under Israeli law, the tax treaty provisions should not prevail over the domestic law, such as the Israeli tax laws, in the event such provisions impose a heavier tax burden on the taxpayer than the burden imposed on such taxpayer by the domestic law.[3] In addition, the synthesized texts mentioned above include an explicit statement that the authentic legal texts of the existing tax treaties and the MLI take precedence over the synthesized texts. Also, it seems that the provisions of the MLI will not have retrospective effect.

Finally, we expect that the assessment practices of the ITA regarding tax treaty shopping and other treaty abuses will be significantly affected by the MLI.

[3] Income Tax Appeal (Tel Aviv) 1255/02 Jetek Technologies Ltd vs. the Income Tax Assessor of Kfar Saba, Misim 19(3) E-196 (2005); The Interpretation Anthology, S. 196: Double Tax Treaties, pages J-106 and J-107.

Branch reporter
Alban Zaimaj[1]

Summary and conclusions

Italy signed the MLI in the course of the inaugural signing ceremony held in Paris on 7 June 2017, although it has not ratified it yet.

At the date of signature of the MLI Italy had 99 tax treaties in force, which generally follow the OECD Model Tax Convention.

Italy notified 80 of its 99 tax treaties (i.e. more than 80%) as covered tax agreements under the MLI. However, 18 out of the 80 notified treaties are with countries that have not signed the MLI or have not included Italy among their CTAs. Therefore, all in all, 62 out of 99 treaties currently in force are covered by the MLI (i.e. more than 60% of the Italian treaty network).

On prevention of treaty abuse, Italy (i) notified all its CTAs in order for the preamble text provided for under article 6 (1) of the MLI to apply and (ii) decided to comply with the minimum standard by applying the principal purpose test under article 7(1) of the MLI. However, the application of article 6(1) and 7(1) should not significantly affect the notified CTAs. As a matter of fact, the abuse of tax treaties has generally been challenged by the tax authorities (i) under the “abuse of law” doctrine developed by the Italian Supreme Court starting from the leading cases of 23 December 2008, No. 30055, 30056 and 30057, (ii) under the general anti-avoidance rule introduced in article 10-bis, Law of 27 July 2000, No. 212 or (iii) under general or specific anti-avoidance rules contained in the tax treaties, such as PPT clauses or the beneficial ownership requirement. Furthermore, the preamble of almost all Italian CTAs includes in the purpose of the treaty the prevention of fiscal evasion; in addition, the majority of the treaties entered into by Italy contains a reference to either (i) the prevention of fiscal evasion or (ii) the prevention of fiscal evasion and tax fraud in the title.

With respect to taxation of capital gains realized upon alienation of shares or comparable interest in real estate companies, Italy opted for the application of article 9(4) of the MLI, which gives primary taxing rights to the source state if, at any time during the 365 days preceding the alienation, more than 50 per cent of the value of the shares or comparable interest was derived directly or indirectly from immovable property situated therein. Article 9(4) would significantly affect the Italian CTAs as only a few of these contain similar clauses.

As far as permanent establishment articles of the MLI are concerned, Italy opted out of article 10 *(Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions)*, article 12 (*Artificial Avoidance of Permanent Establishment Status through Commissionaire Arrangements and Similar Strategies*) and article 14 *(Splitting-up of Contracts). As regards article 13 (Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions*), Italy chose to apply Option A, which in practice provides for the adoption of the new article 5, paragraph 4

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of the OECD Model Convention under which the exception from the definition of permanent establishment only applies if each of the listed activities has a preparatory or auxiliary nature.

Italy has chosen to apply Part VI of the MLI and adopt the mandatory binding arbitration procedure as a dispute resolution mechanism. It will apply the so-called "final offer" arbitration process (otherwise known as "last best offer" arbitration). The application of Part VI of the MLI is one of the most significant and innovative choices made by Italy in the context of the MLI, as only few of its tax treaties include a mandatory arbitration clause.

Reservations made by Italy on the content of the MLI are particularly significant. Further to the reservations made in relation to the permanent establishment articles 10, 12 and 14, Italy has also opted out of article 3, concerning hybrid mismatches created through the use of transparent entities, out of article 4 on dual resident entities, and chosen to apply none of the options under article 5, relating to methods for the elimination of double taxation.

As regards the indirect impact of the BEPS Action Plan, it must be noted that the new treaties entered into by Italy after the signature of the MLI are generally consistent with its MLI (provisional) position. In particular, the most recent treaties with the People's Republic of China (PRC), Colombia, Jamaica and Uruguay include:

– a preamble language consistent with article 6(1) of the MLI;
– a PPT provision with the same language of article 7(1) of the MLI;
– a clause providing for source taxation of the gains from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the source state.

There are however some discrepancies between the MLI-position and the latest treaties entered into by Italy. For instance, the majority of these treaties does not contain a mandatory arbitration clause. In addition, certain provisions of the MLI which have not been adopted by Italy could be found in the most recent treaties. This is the case for instance of article 4 of the MLI on dual resident entities, which was included in the treaties entered into with Colombia, Jamaica, the PRC and Uruguay.

Finally, as the MLI has not been transposed in the Italian domestic system yet, neither tax authorities nor courts have issued specific guidelines dealing with interpretation issues which might arise from its implementation.

Japan

Branch reporter
Mayuko Nakamura[1]

Summary and conclusions

Japan signed the MLI on 7 June 2017 and deposited its instrument of acceptance of the MLI on 26 September 2018, after the MLI was approved by the National Diet of Japan in May 2018. The MLI entered into force for Japan on 1 January 2019.

At the time the MLI came into effect for Japan, Japan had 71 tax treaties in force, or more precisely, 61 tax treaties applicable to 71 jurisdictions. Out of the 71 existing tax treaties, Japan listed 39 tax treaties as Covered Tax Agreements ("CTAs"). Japan intends to list as a CTA any tax treaty with a contracting state that has signed the MLI and listed the tax treaty as a CTA, after Japan confirmed there is no inconsistency between its notification and the notification from the other contracting state. Therefore, all 39 tax treaties listed as CTAs by Japan are also listed as CTAs by the other contracting states (tentatively at the time of signing or definitively at the time of ratification). This is because Japan wants to avoid uncertainty regarding the application of the MLI due to an inconsistency between the notifications. In addition, Japan also intends to exclude from the list of CTAs newly concluded or revised tax treaties in which measures to prevent BEPS provided in the MLI have already been incorporated through bilateral negotiations.

As one of the countries that has taken the initiative in the BEPS project, Japan has made choices under the MLI to incorporate measures to prevent BEPS to the greatest extent possible, other than those measures that Japan considered unnecessary to introduce through the MLI. The main provisions that Japan chose not to adopt are: (i) article 5 (application of methods for the elimination of double taxation); (ii) article 7 (Simplified Limitation on Benefits); (iii) article 8 (dividend transfer transaction); (iv) article 11 (the "saving clause"); and (v) article 14 (splitting-up of contracts). As for (i), it is not necessary for Japan to apply this provision because Japan has not adopted the exemption method for eliminating double taxation. The reasons for not adopting (ii),(iii), and (v) are that similar provisions have already been incorporated in existing tax treaties, or Japan has a policy to implement measures to prevent BEPS different from the MLI (especially with regard to (v), Japan intends to use the Principal Purpose Test (PPT) as it feels article 14 may prevent legitimate business activity). As for (iv), the saving clause is just for purposes of clarification, so Japan chose not to adopt this provision under the MLI, considering the complexity involved in coordinating with other contracting states with regard to what provisions are exceptions to the saving clause. In light of these reasons, it is unlikely that Japan will make any changes with regard to its choices under the MLI in the near future.

Since signing the MLI on 7 June 2017, Japan has signed 15 bilateral tax treaties. The provisions of the MLI and associated revisions to the 2017 OECD Model Tax Convention have a significant impact on these new tax treaties. The same or similar provisions under the MLI or 2017 OECD Model Tax Convention, as modified according to Japan's choices, have been

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incorporated into the bilateral tax treaties signed after the MLI. However, there are some differences between these treaties and the MLI. For example, Japan chose not to adopt the saving clause under article 11 of the MLI, but the saving clause has been incorporated into the new bilateral tax treaties. In addition, Japan chose Option A under article 13 of the MLI so that all of the exemption activities would be subject to the requirement of "preparatory or auxiliary character". However, most of the new bilateral tax treaties signed after the MLI adopted a modified Option B, and thus, some limited activities ("delivery" is omitted from Option B) will not be subject to the requirement of "preparatory or auxiliary character". This is because bilateral treaty negotiations enable Japan to make more flexible adjustments or adopt customized provisions, while the MLI only allows each contracting state to adopt prefixed provisions.

Publication of the synthetized text is not mandatory in Japan, but due to policy reasons (to provide clarification and foreseeability for taxpayers and tax authorities), the synthesized texts of the revised tax treaties have been made publicly available at the website of the Ministry of Finance (https://www.mof.go.jp/english/tax_policy/tax_conventions/mli.htm#a05).

So far, no specific interpretation issues regarding the MLI have been officially raised, either by the Japanese government or by the courts. However, some issues must have arisen through the making of the synthetized texts, as the MLI left some ambiguity in interpretation, especially on how it modifies each CTA. It is also unknown whether the method of tax treaty interpretation is being changed because of the MLI. Further, it is unclear as to whether there is any change in the assessment practice regarding tax treaty abuse. Some changes might be observed if a case involving the implementation of the PPT arises, because the application of the PPT has not been known in Japan, although some tax treaties have already introduced the PPT provisions. Because of the MLI, the number of tax treaties with PPT provisions will increase significantly, thereby allowing us to observe how the PPT will be applied in Japan in the future. As Japan has no experience with the PPT, and there are currently no special guidelines or procedures for the application of the PPT provisions, it is still unclear how the PPT provisions will be implemented or interpreted in Japan. In this respect, examples in the OECD Commentaries would to some extent be helpful .

As Japan chose to apply the arbitration clause of the MLI, the number of tax treaties with arbitration clauses will also increase. However, many countries, including those that have a considerable number of tax disputes with Japanese taxpayers such as the People's Republic of China, India, Indonesia, and the Republic of Korea, have chosen not to adopt the arbitration clause, so the impact of the MLI on tax disputes might be limited.

Republic of Korea

Branch reporter
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Summary and conclusions

As of today, 93 tax treaties are in force with the Republic of Korea (hereinafter Korea). In order to prevent the abuse of tax treaties, (i) the tax laws of Korea set forth the substance-over-form doctrine (see article 14 of the National Basic Tax law (NBTL) and article 2-2 of the International Tax Coordination Law (ITCL)], and (ii) based on the assumption that the above provisions also apply to the interpretation and application of tax treaties, the Supreme Court of Korea restricts a nominal owner from enjoying tax treaty benefits when the nominal owner is different from the beneficial owner and such difference is intended for avoiding tax, and (iii) the tax treaties signed by Korea include provisions regarding the limitation of treaty benefits, the prevention of abuse of tax treaties for each type of income and the concept of a beneficial owner for each type of income, i.e. dividend, interest and royalty income.

On 7 June 2017, the Korean government signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). According to the bill to ratify the MLI submitted by the Korean government on 20 August 2019, the existing tax treaties concluded by Korea will be amended pursuant to the provisions on the limitation on benefits (article 7), the provisions on tax dispute resolution process (article 16) and the provisions on corresponding adjustments between two contracting jurisdictions for tax dispute resolution (article 17) under the MLI. Upon its entry into force, the MLI is expected to impact 73 out of 93 tax treaties signed by Korea.

Indeed, in order to reflect the provisions of the MLI and the OECD framework on base erosion and profit shifting (BEPS), the governments of Korea and the Czech Republic executed the amended tax treaty as of 12 January 2018 by (i) newly incorporating article 26, paragraph 1 to deny the benefits of the treaty when the enjoyment of the benefits is the principal purpose of a transaction or an act and (ii) modifying article 23, paragraph 1 to allow a taxpayer to file an application for mutual agreement procedure with the authorities of both contracting jurisdictions.

In principle, the MLI applies to the existing laws of Korea. However, the issue of interpreting or applying the MLI has not been specifically discussed in the court or government of Korea to date. If such an issue is raised, the document or guidance published by the OECD may be cited as a reference, albeit having no legal binding force.

The MLI will not fundamentally change the current Supreme Court's methodology of interpreting and applying tax treaties. However, it should be closely monitored whether the MLI will make the court expand the application scope of the substance-over-form doctrine.

In practice, business entities are expected to adjust their business or transaction structure for tax planning purposes in consideration of the "limitation of tax treaty benefits" provisions under the MLI, while the National Tax Service of Korea (NTS) is anticipated to

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tighten up on aggressive tax avoidance practices of multinational enterprises, such as business restructuring and denial of permanent establishment status for tax avoidance purposes.

Liechtenstein

Branch reporter
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Summary and conclusions

Liechtenstein has signed the Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting (hereafter MLI) in June 2017. The entry into force of the MLI is expected for 1 January 2020. The ratification report, by which the government submits its proposal to parliament, has been released on 8 October 2019. Parliament will be asked to approve the text of the MLI and the relevant reservations and notifications thereto, but not consolidated versions of the covered tax agreements (CTA), as in the view of the administration a consolidate reading of MLI and CTA is not possible. In order to still make the effect of the MLI easier to understand for the reader and taxpayer, Liechtenstein will publish synthesized texts of the "amended" bilateral CTA. For this purpose, Liechtenstein is in the process to consult with its treaty partners how and where the MLI exactly modifies the respective treaty.

The signing of the MLI by Liechtenstein has led to a systematic review of tax treaty policies by the government and tax authority regarding treaty abuses. The treaties of Liechtenstein pre-MLI contain quite a few anti-abuse provisions, but with varying texts and scopes of application, leaving a fairly heterogenic impression. The development of the MLI brings order to this diversity and standardizes the provisions.

As it stands now, Liechtenstein will use the MLI as an efficient opportunity to include some of the standardized treaty-abuse provisions developed in the OECD-lead project countering Base Erosion and Profit Shifting (BEPS) into all its existing tax treaties. The instrument eliminates the need for bilateral renegotiations and revisions, which are time-consuming and administratively expensive. Liechtenstein will activate the BEPS minimum standards set by BEPS Action 6 (treaty abuse) and Action 14 (mutual agreement procedure) plus just a few more provisions of the MLI, to avoid too much complexity. Liechtenstein will also use the opportunity provided by the MLI to improve dispute resolution through arbitration. The MLI is intended to adapt those fourteen Liechtenstein tax agreements that do not already fully meet the prescribed minimum standards.

It is important to make a differentiation between the MLI instrument and the broader tax policy of Liechtenstein. The tax treaty policy clearly encompasses more of the BEPS-project-generated anti-avoidance provisions than just the minimum standard. Accordingly, it is fully expected that the newly signed Liechtenstein tax treaties will contain more provisions along the lines of the OECD 2017 Model Tax Convention than the ones Liechtenstein will be adopting through the MLI. This is confirmed by the MLI ratification report of the government to parliament, which states that the implementation of further BEPS measures in the Liechtenstein tax treaties will take place within the framework of bilateral negotiations, where it is possible to respond to the individual needs of the contractual partners.

The interpretation of the MLI is expected to be as for any other international treaty of

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Liechtenstein. Liechtenstein's administration and courts routinely use the Commentary to the OECD Model Convention for the interpretation of its tax treaties. The MLI has own explanatory notes which have been prepared and approved by the Ad-Hoc-Group together with the text of the MLI and thus reflect the views of the MLI negotiators, of which Liechtenstein was a party. These notes, the OECD Model Convention 2017 and its Commentary will be used by Liechtenstein's administration and courts to assist in the interpretation of the new treaty clauses. Liechtenstein has a strong tradition of static interpretation and it is not expected that the MLI will change treaty interpretation by the Liechtenstein Supreme Court from static to dynamic. Irrespective of this, it is undisputable that the BEPS-project has had an impact on actual behaviours of taxpayers and that the practical impact of the BEPS-related treaty clauses – whether introduced through the MLI or in bilateral negotiations – is substantial and had an effect well before the entry into force of the MLI. It has become best practice for tax practitioners to take the PPT and other anti-abuse clauses into account in any tax consideration.

Branch reporters
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Summary and conclusions

Luxembourg signed the MLI on 7 June 2017. Prior to this date, Luxembourg had signed and ratified 81 double tax treaties which broadly followed the OECD Model Convention, as amended. Almost all of these double tax treaties defined the purpose of the respective treaty to eliminate double taxation and combat tax fraud. Each of these 81 double tax treaties contains a mutual agreement procedure, 66 a corresponding adjustment provision while only 13 provide for a mandatory binding arbitration. Luxembourg currently has 83 double tax treaties (DTT, hereafter used for singular and plural) in force of which 81 are covered by the MLI.

With regard to the principal purpose test (PPT), it is interesting to note that Luxembourg withdrew a reservation in the 2017 version of the OECD Model Convention. Here, Luxembourg did not share the view that there is generally no conflict between anti-abuse provisions under the domestic law of a contracting state and the provisions of its DTT. Instead, absent a specific provision in an applicable DTT, Luxembourg considered that a contracting state can only apply its domestic anti-abuse provisions after recourse to the mutual agreement procedure. Such domestic anti-abuse provisions further need to be interpreted in accordance with the rules laid down in the respective DTT so as to prevent treaty overrides.

Since Luxembourg does not levy withholding taxes (WHT) on arm's length interest and royalty payments and dividend payments may (under certain conditions) benefit from a domestic WHT exemption, the potential conflict between domestic and treaty-based anti-abuse provisions was limited to exceptional cases and treaty shopping could have been addressed through treaty-specific provisions.

Luxembourg's MLI choices are mostly limited to the minimum standards, including the adoption of the PPT and an amended preamble as well as measures that are beneficial for taxpayers such as the mutual agreement procedure (including mandatory binding arbitration) and the corresponding adjustments provision.

In addition, Luxembourg opted for the provision on transparent entities which aims to avoid qualification conflicts and according to which DTT benefits should only be granted if and to the extent income derived by or through a transparent entity or arrangement is brought into account for tax purposes as the income of a resident taxpayer of that jurisdiction. The application of this provision is, however, subject to the condition that Luxembourg's taxation rights shall not be limited.

Overall, the adoption of the PPT is the most significant change for Luxembourg's DTT network. As Luxembourg is a major hub for international investments (for example, private equity, venture capital, real estate and infrastructure) and business activities, the question

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arises as to what will be the impact of the PPT on investments. It is reasonable to conclude that investments are made for legitimate commercial purposes (generating regular income, maximisation of value, etc.). Therefore, the PPT should in accordance with the guidance provided in the Commentary to the OECD Model generally not apply regardless of the fact that tax implications cannot be completely neglected when investments are made. Likewise, multinational groups that implemented an investment platform in Luxembourg to manage, for example, their subsidiaries in Europe should in general not be affected by the PPT.

There remains, however, some uncertainty as to when foreign tax authorities may deny DTT benefits. Given the attitude of some foreign tax authorities in regard to the application of anti-abuse provisions, it might be expected that the PPT will be interpreted differently in different jurisdictions. Therefore, it would be wise for taxpayers to establish the reasoning of their choice to invest via a Luxembourg company or investment platform so as to be prepared for potential questions from foreign tax authorities.

In an EU context, the jurisprudence of the Court of Justice of the European Union ("CJEU") is particularly helpful for the interpretation of anti-abuse provisions such as the PPT. Apart from established case law, the more recent decisions on French and German anti-abuse rules confirm the CJEU's adherence to its longstanding "wholly artificial arrangement" tenet which puts strict limitations to the scope of anti-abuse legislation.

In contrast to these cases, a recent decision of the CJEU regarding the denial of WHT relief by the Danish tax authorities, did not contribute much to legal certainty. While it was not for the CJEU to assess the facts in the cases, the CJEU specified indicia of abusive or fraudulent acts and when an EU parent company may not be the beneficial owner of interest income with a view to guide the national court in the assessment of the cases. It is now for the Danish courts to finally decide the cases in accordance with the guidance provided by the CJEU and its previous case law.

Nevertheless, the application of the PPT is a key challenge for tax advisors in times that are characterized by chronic legal uncertainty.

Mexico

Branch reporters
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Summary and conclusions

Mexico is and has been an active member state of the OECD and G20. As such, Mexico has been an enthusiastic participant in the BEPS Action Plan. As early as 2014, prior to the publication of the BEPS reports, Mexico was a pioneer including in its domestic tax laws anti-hybrid mismatch rules under Action 2.

Furthermore, it is highly likely that new rules will be included as part of Mexico's domestic legislation as proposed in the 2020 Tax Bill presented before Congress for next year ("2020 Tax Bill"). Such rules amongst others refer to: (i) taxation of the digital economy (Action 1); (ii) broadening of current anti-hybrid rules including "imported hybrid" rules (Action 2); (iii) changes to Mexican CFC rules (Action 3); (iv) interest deduction limitation based on 30% EBITDA rule (Action 4); (v) broadening the scope of the permanent establishment ("PE") clause and restricting the application of the "preparatory and/or auxiliary test" (Action 7); (vi) mandatory disclosure rules (Action 12); and, (vii) introduction of a general anti-abuse rule ("GAAR") applicable for all tax purposes i.e. not limited to income tax.

Although Mexico used to take a more formalistic approach regarding the granting of benefits under Double Taxation Treaties ("DTT's"), based on the foregoing it is expected for Mexico to take a pro-active approach once the MLI comes into full force and effect. At the moment of publication of this report the same has been executed by the Executive Branch i.e. 2017 but has not been ratified by the Mexican Senate. There is no clear indication on the timing for ratifying the MLI, but it is expected to take place in 2020.

Once approved, the MLI will be hierarchically superior to both Federal and Local laws but always subordinate to the Federal Constitution.

As the reader will recognize from this report, as a result of the MLI, the international tax arena will be a new level playing field. Many DTT's included as Covered Tax Agreements ("CTA's") will be modified in the sense that the principal purpose test ("PPT") will be applicable, the PE status rules will be strengthened i.e. anti-fragmentation provision, triangular provision, and dependent agent rules will be included (it is highly likely that this rules will already be included in domestic legislation as per the 2020 Tax Bill).

Once the MLI comes into force, look-back provisions regarding minimum holding periods for capital gains and dividends will be applicable to practically all of Mexico's CTA's. In practice this could present some infirmities which may give rise to litigation for example shares could be considered "regular" under domestic legislation and "real property" shares under a DTT.

Other important issues will be related to the interpretation of the CTA's executed in languages that are not English or French, since this DTT's will have to be interpreted in several languages, which seems a bit odd. However, in our view this is more an academic discussion,

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since Mexican courts will likely apply the Spanish text of both the CTA and the MLI.

The MLI together with the 2020 Tax Bill will result in Mexican tax authorities having broader powers to curtail tax evasion schemes derived from treaty shopping, amongst other undesirable taxpayer conducts. Therefore, tax professionals and taxpayers should not view lightly the enactment of the MLI and the changes of the same as a result of the matching elections between member states.

Performance of a correct analysis will be of the utmost importance and it would be advisable for the Mexican tax authorities to publish condensed versions of the CTA's as amended by the MLI. This practice has taken place in Mexico previously; however, such condensed versions are only of an informative nature and if the same have an error, the same could not be claimed as a right by a taxpayer; we believe it would be a best practice for the Mexican tax authorities, given the complexity of the changes that will derive from the MLI, to continue publishing condensed version of the CTA's, even exclusively for informative purposes.

Apparently due to sovereignty issues, Mexico will at this time pass on the opportunity to accept a binding arbitration framework to solve disputes between the members states.

Finally, it must be noted that Mexico changed its initial position regarding article 3 of the MLI pertaining hybrid mismatches in the case of transparent entities by including a reserve to such provision so Mexico will continue not to recognize the transparency of foreign entities. Apparently, this change is the reason behind the MLI not yet being ratified by the Senate.

Netherlands

Branch reporters
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Summary and conclusions

The impact of the BEPS Action Plan on the Dutch treaty network is largely the result of the MLI, which entered into force for the Netherlands on 1 July 2019. As of that time, the Netherlands had listed 81 of its 96 treaties as potential covered tax agreements (CTAs) under the MLI.

Relevant background for assessing the impact on the treaty network is the monistic legal system of the Netherlands according to which treaties take precedence over conflicting domestic law. The Dutch Supreme Court has traditionally been reluctant to apply the domestic anti-abuse doctrine of *fraus legis* (an *ultimum remedium*) to treaty situations. In relevant cases, the Supreme Court has attached importance to the text of the treaty provision and assessed whether the application of this domestic doctrine is supported by a shared intention of the contracting states as expressed in the text of the treaty or the explanatory notes of both contracting states. Absence of taxation was not considered a violation of the object and purpose of the treaty, if this was not supported by the treaty text or the explanatory notes of both contracting states. The Supreme Court has also denied treaty benefits in some abusive cases where it was not clear whether the Supreme Court applied *fraus legis/fraus conventionis* or a qualification method such as 'substance over form'; most of these cases concerned 'last minute tax planning'.

In the past, the Dutch treaty policy focused on exchange of information, mutual assistance in recovery and an arm's length profit attribution, whereas (specific) anti-abuse rules gained policy attention in later years.

Before the BEPS Reports, the Dutch treaty network contained several anti-abuse rules, such as main purpose tests, LOBs, provisions for low-taxed PEs, hybrid entity rules and anti-splitting rules. A (negative) definition of the beneficial ownership concept was also introduced in Dutch domestic law. Dutch treaties are moreover aligned with the OECD MC beneficial ownership concept. All treaties contain mutual agreement procedures (MAPs) for dispute resolution and arbitration clauses have been part of Dutch treaty policy for decades.

The government has endorsed the BEPS Action Plan and intends to implement almost all of the proposed BEPS provisions in all Dutch tax treaties, mostly through the MLI. Four considerations were noted in this regard. First, combatting tax avoidance is a policy priority of the government; the MLI was described as an instrument to prevent inappropriate use of the treaty network by better aligning treaty application with economic reality. Second, measures against international tax avoidance are considered particularly meaningful if they are coordinated at an international level. Third, the MLI corresponds with the government's efforts to implement anti-abuse rules in Dutch tax treaties with developing countries.

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Fourth, the government supports more effective dispute resolution mechanisms, especially by mandatory and binding arbitration.

The government proposed for 87 (91%) of the Dutch treaty partners implementation of BEPS provisions, mostly by the MLI; for treaties under renegotiation, the government proposed for pragmatic reasons a bilateral implementation. As of 1 October 2019, these efforts resulted in agreed BEPS provisions for two-thirds of the Dutch treaty network.

The impact of the BEPS provisions as of 1 October 2019 mainly concerns the BEPS minimum standards of BEPS Action 6 (treaty abuse) and BEPS Action 14 (dispute resolution); for two-thirds of the treaty network implementation of a PPT and the new preamble language was agreed and the start of a MAP in either contracting jurisdiction was agreed for more than 40% of the treaty network. The other BEPS provisions have a more limited effect, mostly because BEPS provisions endorsed by the Netherlands were not chosen by treaty partners under the MLI. The impact of the BEPS Action Plan on possibilities against treaty abuse and to improve dispute resolution is stronger when existing treaty provisions are taken into account; provisions against treaty abuse and tax avoidance were agreed for more than 75% of the Dutch treaty network (by PPTs, main purpose tests, LOBs and treaty provisions on the application of domestic anti-abuse rules); for more than 45% of the treaty network a provision was agreed on the treaty application in cases of hybrid entities; for 40% of the treaties a MAP tiebreaker was agreed and mandatory and binding arbitration has been agreed for more than 30% of the treaties, while in total 55% contain a form of arbitration.

The BEPS Action Plan has also had an impact on bilateral negotiations. The Netherlands has agreed on at least the BEPS minimum standards in the eight most recently agreed amending protocols/treaties. Before the BEPS Reports, the Netherlands had already approached 23 developing countries in order to implement provisions against treaty abuse.

The Dutch parliament approved the Dutch MLI position unanimously, although a majority voted for a reservation not to apply the provision concerning commissionaire arrangements. The government expressed its intention to publish the consequences of this MLI position for Dutch tax treaties, although this is not obligatory.

The MLI will prevail over conflicting domestic law in the monistic Dutch legal system. There is however no jurisprudence yet on interpretation issues concerning the MLI.

The impact of the PPT on tax planning has led to more risk assessments and an increased importance of (transfer pricing) documentation. Taxpayers are being advised that the relevant substance of entities in the Netherlands must be commensurate to the activities performed in the Netherlands. Procedures for the PPT application by the tax authorities are not published, although a new ruling policy on inter alia PPT application was published; in cases of a lack of sufficient nexus with the Netherlands, avoidance of Dutch or foreign tax or transactions with low-taxed or non-cooperative jurisdictions, ruling requests will be denied.

Finally, according to the BEPS Action 14 peer review report (Stage 2), Dutch efforts to implement BEPS Action 14 minimum standards have had a positive impact on dispute resolution.

New Zealand

Branch reporters
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Summary and conclusions

As at 8 June 2017, when New Zealand signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI"), New Zealand had a network of 40 double tax agreements ("DTAs") that covered almost all its major trading and investment partners. Since signing the MLI, New Zealand has commenced negotiation of DTAs with several countries with which New Zealand does not currently have a DTA, as well as on amendments to existing DTAs.

There is no publicly available New Zealand model DTA or other official explanation of New Zealand's negotiation positions. Ascertaining New Zealand's treaty policy, therefore, requires examining New Zealand's DTAs and its reservations in respect of the OECD Model.

Though generally following the OECD Model, New Zealand has made reservations and observations in respect of it, generally to preserve greater source country taxing rights than the model would allow. The most notable of these include: a broader definition of permanent establishment ("PE"), especially as regards the ability to tax income from the exploitation of natural resources; its reservation in respect of the so-called "Authorised OECD Approach" to profit attribution now reflected in article 7 of the OECD Model (2017); and its preservation of source country taxing rights to "other income" and of greater source country taxing rights to interest and royalties than under the OECD Model.

New Zealand signed the MLI when it opened for signature in June 2017, and was one of the first countries to ratify it. It is expected that 31 of New Zealand's 40 DTAs will be covered by the MLI, although several of the DTAs not covered already include, or will be amended to include, provisions consistent with the MLI.

Although the extent to which a particular DTA will be modified will depend on the positions of the relevant DTA partner, New Zealand's approach has been to adopt as many MLI provisions as possible.[3] This is considered consistent with New Zealand's policy of seeking to protect source country taxing rights.

Even so, domestic law anti-avoidance measures are likely to have a greater practical impact on cross-border arrangements than the MLI. In the past few years, New Zealand has implemented amendments to its interest withholding tax, thin capitalisation and transfer pricing rules, further limiting opportunities for tax planning and increasing the effective tax

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Opinions expressed are the personal opinions of the reporters and not necessarily those of Inland Revenue. The report does not take into account developments announced or occurring on or after 1 January 2020. The Branch reporters would like to thank Matt Woolley (Senior Solicitor, Russell McVeagh) and Carmel Peters (Strategic Policy Advisor, Policy and Strategy Division, Inland Revenue) for their valuable contributions.

[3] Finance and Expenditure Committee *International treaty examination of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (February 2018) at [32]–[34].

rate on inbound investment. New Zealand has also implemented comprehensive anti-hybrid mismatch rules, reflecting the recommendations in the OECD's BEPS Action 2 Report.

Further, New Zealand has a general anti-avoidance rule ("GAAR") which the courts have interpreted broadly and that, following recent amendments, may apply to override relief that would otherwise be available under a DTA. New Zealand has opted for the principal purpose test ("PPT") in article 7(1) of the MLI as the mechanism for countering treaty-abuse, but the PPT is likely to be similar in effect to the GAAR, such that its addition will not have a major impact in practice.

New Zealand has also enacted a new specific anti-avoidance provision directed at arrangements that, in reliance on a DTA that is not modified by article 12 of the MLI (artificial avoidance of PE status through commissionaire arrangements and similar strategies) avoid the creation of a PE. This provision, like the GAAR, may apply to override relief that would otherwise be available under a DTA.

The MLI has only recently been ratified by New Zealand, and as at the date of this report is not yet in force in relation to all of New Zealand's covered tax agreements. It will therefore likely take some time before the practical consequences of its application emerge.

One issue that has already emerged is that article 4 of the MLI (which replaces the tie-breaker test for dual resident companies (generally based on place of effective management) with the need to obtain a competent authority determination) may be problematic, particularly in the context of New Zealand's DTA with Australia. The fact that both countries have broad domestic law residence definitions for companies, combined with the close integration of the two economies, increases the possibility of a company inadvertently becoming a dual resident.

The effect of article 4 of the MLI is that such a company will not be entitled to DTA relief in the absence of a determination by the competent authorities as to its residence for the purposes of the DTA. New Zealand and Australia have recognised the practical difficulties to which article 4 of the MLI gives rise by agreeing on a practical administrative approach (allowing a dual-resident company to self-determine its residence for the purposes of the DTA based on its place of effective management) if it meets certain criteria.

New Zealand's experience in respect of article 4 of the MLI illustrates one of the practical challenges associated with amending bilateral DTAs through a multilateral instrument. That is that a given amendment, even if it has a sound rationale in theory, may have undesirable consequences in the context of a particular DTA and the relevant domestic laws, which the relevant parties do not foresee when formulating their positions in the context of the MLI.

Nigeria

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Summary and conclusions

The Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting (Multilateral Instrument-MLI) was signed into law by Nigeria on 17 August 2017. The MLI came into effect on 24 November 2016, at Paris and prior to that time, Nigeria had signed DTTs with 18 countries, with different dates for the DTTs to come into effect and other treaties having no dates to come into effect specified yet . The DTT with Singapore which is the nineteenth country was signed on 02 August 2017, after the MLI came into effect.

Nigeria's DTTs are in compliance with the OECD and UN Model, though it tilts more towards the UN Model Convention which generally favours and gives greater weight to the retention of greater taxing rights under a tax treaty to the "source country", which is the host country of investment.

The direct impact of the MLI on Nigeria's DTT are incorporated in the Nigeria's BEPS MLI Position document which contains a provisional list of expected reservations and notifications to be made by Nigeria pursuant to articles 28(7) and 29(4) of the MLI Convention.

Signature and ratification, acceptance or approval of the MLI

Article 27 of the MLI deals with signature and ratification, acceptance or approval and states that as from 31 December 2016, the Convention shall remain open for signature and is subject to ratification, acceptance or approval. This implies that even if it is signed but not ratified, accepted or approved, then the mere fact that it has been signed will not suffice. It is noteworthy to also state that even though Nigeria signed the MLI on 17 August 2017, it has not deposited the instrument of ratification, acceptance or approval as required by article 34 of the MLI and consequently, it has not come into force.

Preamble statement, principal purpose test (PPT), beneficial interest and treaty shopping

Nigeria is implementing the preamble statement and the Principal Purpose Test (PPT) of the MLI, meant to tackle treaty shopping. Consequently, it has adopted article 7 (1) & (2) of the MLI that provides for prevention of treaty abuse. The provision is to the effect that irrespective of the provisions of a CTA/DTT, a benefit under it shall not be granted in respect of an item of income or capital if it is reasonable to conclude, that obtaining that benefit was one of the

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principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.

Interpretation of tax treaties

The interpretation of tax treaties is generally the same with that of other statutes in Nigeria, except that with respect to section 45 (1) of the Companies Income Tax Act (CITA), where there is a conflict with the double taxation treaty, the latter will prevail. The imposition of taxes is based on a tax law establishing it. There is no retrospective use or application of tax laws in Nigeria.

Anti-tax avoidance provisions

Nigerian legislature undertakes periodic amendments to our tax laws with a view to addressing incidences of tax avoidance, evasion, BEPS and even treaty shopping. We have certain provisions of our laws intended to curb avoidance or curtail it. Some of the provisions are stated sections 22 and 94 of Company Income Tax Act 2004,[2] section 20 Capital Gains Tax Act,[3] and sections 7, 9, 17, 95 and 96 of the Personal Income Tax Act.[4] The guiding principle is that the benefits of a double taxation convention should not be available when the main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position etc.

Tax treaties currently being negotiated or renegotiated

Nigeria has entered into a comprehensive bilateral tax treaty with Singapore which came into force on 1 January 2019, since the MLI was signed. There are other tax treaties negotiated and signed, but have not come into force. Nigeria currently has some DTTs that are yet to be ratified.

Conclusion

Nigeria's DTTs are in compliance with the OECD and UN Model, though it tilts more towards the UN Model Convention which generally favours and gives greater weight to the retention of greater taxing rights under a tax treaty to the "source country", such that the host country of investment enjoys more taxation rights or power, compared to those of the "residence country" of the investor, as stipulated in the OECD Model.

[2] See Cap C. 21, Laws of the Federation of Nigeria, 2004.

[3] See Cap C. 1, Laws of the Federation of Nigeria, 2004 (as amended 2011).

[4] See Cap P. 8, Laws of the Federation of Nigeria, 2004 (as amended 2011).

It is hoped that Nigeria will do the needful with respect to the MLI, enter into more DTT/ CRA and speedily domesticate them so as to encourage more investment and business activities in the economy. The DTT between Nigeria and Mauritius is a typical example and it was entered into in 2012+ there is no gain saying that it is long overdue for ratification as these delays in the ratification of the DTTs are currently holding back the flows of certain foreign direct investment into Nigeria.

Norway

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Summary and conclusions

Norway signed the MLI on 7 June 2017, and deposited its instrument of ratification 17 July 2019. For Norway, the MLI will enter into force on 1 November 2019, effective from the income year 2020. Consequently, it is difficult to assess the practical impact of the MLI now and in the future at this point in time, such as potential interpretation issues or the influence the MLI may have on other treaties not covered by the MLI.

Prior to the MLI, some Norwegian tax treaties contained treaty based anti-avoidance provisions. These are, however, limited in number. Examples of such are exclusion provisions, LOB provisions and purpose test-rules. Furthermore, Norwegian domestic legislation contains both a non-statutory GAAR and several SAARs. None of these are specifically aimed at treaty shopping or treaty abuse situations. However, such domestic rules are applicable in both domestic and cross border situations, and therefore may be applicable in cases of treaty abuse within the scope of the treaty in question. Some domestic SAARs are influenced by the OECD/G20 BEPS work.

Norway has an extensive treaty network that covers more than 90 jurisdictions. These generally follow the OECD Model. Approximately a third of the treaties are listed as Covered Tax Agreements under the MLI. It is reasonable to expect that all these CTAs will eventually be covered by the MLI as well. In considering which treaties to cover under the MLI, Norway has considered whether a treaty is suited for MLI coverage. Norway has also chosen to not include treaties that were already subject to bilateral negotiations.

As for the content of the MLI, Norway has opted to include most of the optional provisions. Most noteworthy of the provisions opted out from, perhaps, is the provision relating to the simplified Limitations on Benefits (LOB) rule and the provisions introducing mandatory binding arbitration to the covered tax agreements. Norway has declined to include these in the MLI, as such provisions are considered more suited for bilateral negotiations.

For treaties not chosen for MLI coverage, Norway has indicated that it will pursue or continue bilateral negotiations with the relevant parties in order to implement the BEPS minimum standards. This process has already begun, as Norway recently signed amending protocols to two treaties in order to meet these standards. Based on this, we expect that Norway will not lift any of its reservations to the MLI in the near future, nor include any further CTAs.

With regard to the practical implementation of the MLI, this has followed the same procedures as any other tax treaty in Norway. While Norway generally adheres to the dualist theory of international law, there is special domestic legislation in place that simplifies

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the implementation of tax treaties, compared to other treaties. Consequently, a treaty is automatically considered incorporated into Norwegian domestic law upon parliament's approval to the treaty entering into force.

Peru

Branch reporter
Juan Pablo Porto[1]

Summary and conclusions

This report has been prepared taking into account the directives and guidelines provided by the general reporters and by IFA.[2] The purpose of this report is to review the impact of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI") on the structure and operation of the tax treaty network. The report will assess the direct influence of the MLI on Covered Tax Agreements, its indirect influence on the negotiation of bilateral tax treaties and issues relating to the practical implementation of the MLI.

Peru wants to be an OECD member by 2021. In this light, Peru has adopted relevant BEPS measures as the approval of a full flesh GAAR; and, it will replace interest deduction based on a ratio of equity (3:1) to a percentage of tax EBITDA. Furthermore, transfer-pricing rules are extensive and regularly subject to tax audit assessments. and procedures for exchange of information and mutual assistance between Tax Administrations have been included. Finally, rules on identification of beneficial owners will become effective and applicable for Peruvian entities, trust, and funds, as of 2019.

Moving in the same direction, Peru has signed the MLI on 27 June2018. The internal procedure requires it to be approved by Congress and ratified by the President. Congress has been dissolved and it will be elected and subsequently reconvene after the elections in March 2020. After the new Congress is installed, it will refer to the MLI and probably vote on its approval so finally the President can ratify it and become a valid and binding part of Peruvian law.

Tax treaties are rare in Peru. We only have seven bilateral treaties and a multilateral instrument with the member of the Andean Community. From the countries with whom we have tax treaties, under the OECD Model, only Brazil has not signed the MLI. Canada and Switzerland have signed and ratified the MLI, and it is enforceable for both states as of 1 December2019. However, neither has considered the treaty with Peru as a CTA that could be affected by the MLI.

On a middle ground, Mexico, Portugal, Chile and the Republic of Korea, like Peru, all signed but still not ratified the MLI. Taking into account that Brazil has not signed the MLI, only six treaties could be considered as CTA by the other contracting states. In the case of Peru only Chile, Mexico and Portugal have also deemed their treaty with Peru as a CTA. Canada, the republic of Korea and Switzerland have not considered the tax treaty with Peru as a CTA.

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[2] Many references and quotes are originally in Spanish. We have made free translations of such references and resources for reading comprehension purposes.

We can sum up the information as follows:

(i) Peru has considered 100% of its tax treaties as CTA.

(ii) Brazil has not signed the MLI. Canada, Chile, Mexico, Portugal, the Republic of Korea and Switzerland have signed the MLI and are at different stages in the ratification process. (As of 1 December 2019, the MLI would be binding for Canada and Switzerland).

(iii) Peru has six tax treaties out of seven (86%) that could be subject to modification by the MLI.

(iv) Of the six treaties mentioned in (iii) above, only three are qualified as CTA by our contracting counterparty, so only three out of seven (43%) treaties would eventually be affected by the MLI, after Peru, Chile, Mexico and Portugal finish with the internal process for its validity and enforceability.

The MLI includes relevant provisions to avoid tax evasion and to reduce double taxation. Peru has made relevant reservations to the MLI as it has not opted for the hybrid mismatch provision to be included nor has it chosen exclusive arbitration. Worldwide the MLI will have a dramatic effect on the treaty network. In Peru its effect will be diminished.

The Peruvian General Anti Avoidance Rule (PGAAR) is a strong and potent tool that could be used unilaterally to combat aggressive tax planning and tax fraud. Together with new LOB provisions and the elimination of conduit vehicles and pass thru entities, it will generate an atmosphere were treaty shopping and abuse will be rare and it could be reviewed and potently reassessed by the tax administration.

We are moving into a smaller world. Hiding assets, income and profits will be extremely hard as governments will start to automatically exchange information and data.

We hope the MLI helps to reduce tax evasion which results in billions of lost revenue that could be used to further develop economies, reduce the huge inequity and solve dire problems faced by the collective humanity.

Poland

Branch reporters
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Wojciech Morawski[2]

Summary and conclusions

Quite numerous and varied legislative measures aimed at eliminating tax avoidance have recently been introduced in Poland. One can certainly identify a significant number of legislative changes connected with the Base Erosion Profit Shifting project (BEPS) carried out by the OECD/G20. Some conceptual and legislative works took place simultaneously with the developments of the BEPS project but most of the anti-avoidance rules were introduced after the release of the BEPS Final Reports.

The adoption of the BEPS Final Reports coincided with certain changes in the interpretation of tax law by the tax authorities. The tax authorities initiated numerous proceedings aimed at counteracting tax avoidance or aggressive tax planning and relied on provisions that had been in force for long before the entry into force of the afore-mentioned legislative changes.

In mid-2016 the general anti-avoidance rule entered into force. Numerous specific anti-avoidance measures have been introduced since that time. Before the MLI, anti-treaty shopping provisions in the DTCs concluded by Poland were rather rare. The beneficial ownership clause was the most widely used. Immovable property clauses as well as limitation of benefits clauses were also used in a number of DTCs. Anti-treaty shopping or anti-avoidance provisions were also rare in domestic legislation.

Eliminating double taxation was considered to be the purpose of the DTCs that should be taken into account in the process of their interpretation. In the course of the interpretation of the DTCs – as compared to the interpretation of domestic legislation – courts tended to rely more on teleological interpretation.

Poland signed the MLI as one of the first countries as early as on 7 June 2017. The MLI came into force with regard to Poland on 1 July 2018. Poland treated 78 agreements as being CTAs. Potentially, Poland has expressed its willingness to modify 274 provisions of these agreements. Poland has not submitted two important double taxation treaties as CTAs. These are the agreements with the US (which turned out to be irrelevant) and Germany.

The legal value of the MLI is determined by constitutional rules that apply to all international agreements and govern laws of taxation. Ratified international agreements (such as the MLI) are – under article 87(1) of the Constitution of the Republic of Poland of 2 April 1997[3] among the sources of universally binding law of the Republic of Poland. After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute (article 91(1)

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[3] Dz. U. No. 78, item 483, as amended.

of the Constitution). Article 91(2) of the Constitution states that an international agreement ratified upon prior consent granted by statute, shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

The position of ratified international agreements – perceived through constitutional rules – is very strong. One should, however, also pay attention to legislative standards applicable in the sphere of taxation. Article 84 of the Constitution states that everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute. This rule is further developed, with regard to taxes, in article 217 of the Constitution stipulating that the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute.

Portugal

Branch reporters
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Tomás Costa Ramos[2]

Summary and conclusions

At the moment of drafting the present report, the Portuguese instrument of adherence to the MLI awaits final Presidential ratification and deposit with the OECD, to enter into force.

Portugal adopts a monist system regarding international law and therefore the MLI and tax treaties are automatically applicable in Portuguese territory, after their entry into force, with no need to be incorporated into national law. Therefore, international law prevails over national law which may not override tax treaties.

Generally, the Portuguese double tax treaty network follows the OECD Model Tax Convention (hereinafter OECD MTC), but for instance in case of royalty taxation it adopts the United Nations Model Tax Convention (hereinafter UN MTC).

Although there are disparities among Portuguese tax treaties in relation to the provisions chosen to counter tax avoidance, as a whole, the pre-MLI Portuguese tax treaty network which foresees the fight against tax evasion, is well furnished with specific anti-avoidance rules. Apart from that, the Portuguese domestic GAAR, recently revamped by EU ATAD Directive, is also adequate to counter tax avoidance in cross-border situations. Although debatable, the application of the domestic anti-avoidance rules in a tax treaty situation is expressly permitted by some tax treaties entered into by Portugal.

Portugal indicated all of its 79 double tax treaties as covered tax agreements. However only 57 of the current double tax treaties in force became effectively covered tax agreements, considering the MLI positions of the treaties' counterparties, as analysed by the authors at 26 September 2019.

As regards the fight against tax evasion and treaty shopping, Portugal opted to include a PPT clause without a SLOB clause. This option is aligned with the previous treaty policy to counter tax avoidance as 28 double tax treaties already entailed a PPT provision and the recently revamped domestic GAAR is also a PPT provision.

Additionally, the option for a PPT at the same time does not conflict with the EU-freedoms, which could happen in a situation with an objective test like an LOB clause, that could more easily generate situations of discrimination contrary to European law.

In addition to the new wording of the preamble (including the prevention of situations of non-taxation), this option implies a significant change in its double tax treaty network, with a potential positive effect in the fight against tax evasion, as 74% of the Portuguese DTT network now have a PPT clause in line with the one proposed by the MLI.

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2 Tax Department at Energias de Portugal (EDP).
The authors have held two informal meetings to generally discuss the Portuguese MLI position with the Portuguese tax authorities' representatives, namely Mr João Pedro Santos and Mr Miguel Marques Serrão from Centro de Estudos Fiscais – CEF, whom they would like to thank.

Hence, it is crucial to design a procedure to deal with cases of treaty abuse under the application of the PPT clause, like the procedure already foreseen for the domestic GAAR, to ensure taxpayer's rights and promote legal certainty.

Portugal also opted to introduce holding periods both for situations of dividend transfer transactions and capital-gains taxation related with entities deriving its value principally from immovable property.

As regards the artificial avoidance of a permanent establishment status, Portugal opted for the rule on the anti-fragmentation of specific activity exemptions subduing the analysis on the preparatory/auxiliary activities to the cohesive business operation test.

In light of the strengthening of the fight against treaty shopping and the potential increase of litigation arising thereof, Portugal also decided to reinforce mechanisms for resolving disputes giving rise to taxation not in accordance with the provision of the DTT.

As a result of Portugal's options, access to MAP was reinforced.

Amongst others, Portugal opted to extend the possibility of consultation in case of a situation of elimination of double taxation not foreseen in the treaty and further 29 CTAs will foresee this. In terms of MAP this was the option that will potentially have the greatest impact in Portuguese bilateral relationships.

Given the numerous internal anti-abuse rules introduced under the BEPS terms worldwide (and also under the ATAD Directives), the possibility of resolving economic double taxation in situations not foreseen in the tax treaties, becomes increasingly more relevant for non-EU counterparties in this new international tax framework.

Portugal also opted for mandatory arbitration, though with some scope limitations.

However, the majority of the covered tax agreements that accepted arbitration were EU members, which already have mandatory arbitration procedures under EU instruments.

Towards non-EU states, the option for arbitration was not fully corresponded by its treaty counterparties, as it will only produce effects regarding four non-EU states.

As the Portuguese tax policy on the treaty-related BEPS changes introduced in the updated 2017 OECD MTC was more flexible than the policy formalized in its MLI position, it is expected that in the future, in its treaty bilateral negotiations, Portugal will introduce some of the anti-avoidance measures which have been subject to reserve in the MLI, such as in the case of the recent DTT with Angola.

Finally, the authors concluded that the Portuguese options towards the MLI are very much aligned with the previous tax treaty and domestic policy to counter international tax avoidance. Although Portugal went beyond the minimum standards set by OECD, there is still room to improve in the fight against treaty shopping and tax avoidance and it is expected that more advances may be reached in future bilateral treaty negotiations by Portugal.

Russia

Branch reporter
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Summary and conclusions

The Mutual Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting (MLI) is a new instrument in the Russian tax environment (it was adopted in May 2019 and is still not fully operational at the moment) and therefore there is not much guidance on how this instrument will apply in practice. The execution and ratification of the MLI complemented the following domestic trends affecting international taxation in Russia:

- Codification of the domestic general anti-abuse rules and rapid development of special anti-abuse rules (CFC, thin capitalization, place of management-based tax residence for foreign companies etc.);
- Extensive application of the beneficial ownership concept by the Russian tax authorities and Russian courts;
- Negotiation of the new tax treaties and amending the old ones to comply with the OECD standards arising from the BEPS Action Plan.

The MLI is supposed to apply to the vast majority of the existing Russian tax treaties in respect of withholding taxes applied starting from 1 January 2020 and in respect of other taxes applied starting from 1 January 2021. It is expected that the MLI provisions will not apply retroactively.

The MLI Explanatory Statement and the 2017 amendments to the Commentaries on the OECD Model Tax Convention, although not being formally binding in Russia, will likely be utilized by the Russian tax authorities and by Russian courts as the supplementary means of interpretation of the MLI and the amended bilateral tax treaties under article 32 of the Vienna Convention on the Law of Treaties.

There are different views regarding the anticipated effect of the MLI on the Russian tax system. The proponents emphasize the strong potential that the instrument vests in the hands of the tax authorities to combat all types of tax fraud. The opponents express the fear that enforcement of the MLI could increase the ambiguity within the Russian tax system as some of the concepts employed by the MLI overlap with those developed under Russian domestic tax law which might blur the borderline between tax avoidance and legitimate (permissible) tax planning.

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Serbia

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Summary and conclusions

The Republic of Serbia participated in the work of the ad hoc Working Group for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter: MLI or the Convention) and was one of the 68 jurisdictions to have signed the ensuing Convention on 7 June 2017. Serbia deposited the instrument of ratification on 5 June 2018 leading to the entering into force of the Convention on 1 October 2018.

Although not a member of the OECD, nor a member of the European Union, Serbia enthusiastically embraced various modifications introduced by the Convention. Despite the substantial flexibility the MLI granted to its signatories, Serbia decided to designate all of its double tax treaties (64 in total) as Covered Tax Agreements (hereinafter: CTAs) – not only treaties in force, but also those which have been signed but were not yet in force at the moment of the signing ceremony. Taking into account Serbia's limited treaty negotiating capacity, the Convention was thought to guarantee far less costly and less time-consuming solutions with regard to the revision of the existing tax treaty network in comparison to the usual renegotiation thereof. Moreover, as Serbia usually assumes the role of a capital importing country, certain provisions of the MLI were welcomed as a means to strengthening source taxation, e.g. provisions addressing treaty abuse, as well as those preventing the artificial avoidance of the permanent establishment (hereinafter: PE) status. Unfortunately, no assessment has been made with respect to the projected impact of MLI provisions on the tax administration or bilateral trade and investment flows. As it is generally the case with policy choices in the field of double taxation treaties, decisions vis-à-vis choices offered by the MLI were reached exclusively within the Ministry of Finance, without any precursory public debate.

The only provisions of the Convention for which Serbia reserved the right not to apply in their entirety to its CTAs are: article 3 – Transparent Entities, article 5 – Application of Methods for Elimination of Double Taxation, article 10 – Anti-abuse Rule for PEs Situated in Third Jurisdictions and article 11 – Application of Tax Agreements to Restrict a Party's Right to Tax its own Residents. Additionally, reservation was placed on the first sentence of article 16 – Mutual Agreement Procedure, as well as on article 17 – Corresponding Adjustments with regards to the majority of CTAs, since they already include the latter provision. Pursuant to the long-standing opposition of Serbian policy makers towards mandatory binding arbitration, Serbia refused to opt-in part VI of the Convention.

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[2] Full professor at the University of Belgrade Faculty of Law and Vice-Rector of the University of Belgrade.

[3] LLM. Teaching Assistant at the University of Belgrade Faculty of Law.

Serbia opted to modify the existing tie-breaker rule for situations of dual residence in the case of persons other than individuals in all its CTAs by introducing the Mutual Agreement Procedure approach contained in article 4 of the MLI. Regarding modifications of the preamble of double tax treaties, Serbia opted to include in all its CTAs not only the statement emphasizing that the prevention of tax evasion and tax avoidance is one of the purposes of double tax treaties, but also the sentence contained in article 6(3) of the MLI which clarifies that the contracting jurisdictions desire to further develop economic relationships and enhance their cooperation in tax matters. With respect to the prevention of treaty abuse, Serbia opted for the inclusion of the principal purpose test contained in article 7(1) of the MLI but refrained from including the so-called discretionary relief clause contained in article 7(4). Moreover, Serbia agreed to apply article 8(1), as well as to include article 9(4) to all its CTAs. Serbia was rather accepting of the modifications targeted at the avoidance of PE status. It agreed to modify all its CTAs in line with article 12 – Artificial Avoidance of PE Status through Commissionaire Agreements and Similar Strategies, thereby expanding the standard of dependent agent. It opted for Option A under article 13 – Artificial Avoidance of PE Status through the Specific Activity Exemptions, resulting in the addition of the "preparatory or auxiliary" test to all the subparagraphs of article 5(4) of its listed CTAs. Serbia has not exercised its right to place a reservation with respect to paragraph 4 of article 13 dealing with the fragmentation of business activities with the goal of avoiding PE status.

With respect to double tax treaties negotiated after the signing ceremony, Serbia has endeavoured to incorporate the same modifications it has accepted by signing the MLI, subject to the position of the other contracting state.

In order to facilitate interpretation and application of modified double tax treaties, the Serbian Ministry of Finance published synthesized texts of double tax treaties modified by the provisions of the MLI, conforming to the OECD Guidance for the development of synthesised texts. Consolidation of MLI provisions with the texts of CTAs was not legally required for the transposition of the accepted modifications into national law and was therefore not conducted.

Regarding the future application of modified double tax treaty provisions, the most problematic will be the application of the principal purpose test. It is difficult to predict correctly how the Serbian Tax Authorities (hereinafter TAs) will utilise the discretionary power granted thereby. It is to be hoped that the inclusion of the preambular language contained in article 6(3) of the MLI will guide the Serbian TAs towards adopting a less aggressive approach in assessing taxpayers' arrangements and transactions. In any case, the principal purpose test could potentially generate constitutional concerns from the point of view of the principle of legal certainty and horizontal equity.

Singapore

Branch reporters
Robin NG[1]
Yves Van Brussel[2]

Summary and conclusions

One key tenet that guides Singapore's comprehensive avoidance of double taxation agreement policy is the belief that trade and investment are important for the growth of the global economy and that tax treaties promote international trade and investment by increasing legal certainty. In line with these beliefs, Singapore has concluded a wide network of bilateral tax treaties (91 signed tax treaties of which 86 are in force, at 30 June 2019).

The text of older tax treaties may differ from the current OECD MTC in some aspects. Singapore is a member of the Inclusive Framework on BEPS but is not a member country of the OECD. However, the tax treaties concluded by Singapore in recent years are largely based on the OECD MTC, with some modifications. Singapore has provided its position on the main areas of differences in the OECD Commentary since the 2014 edition of the OECD MTC.

Prior to signing the MLI, Singapore already avails for various domestic and treaty-based doctrines, provisions and practices. Some tax treaties contain a preamble that meets the BEPS minimum standard. The Singapore Income Tax Act provides for specific and general anti-avoidance rules. While there is Singapore case law in relation to the domestic application of the GAAR, there is no Singapore case law that deals specifically with the interaction between domestic anti-abuse provisions and abusive use of tax treaties. One key feature in some of Singapore's older tax treaties is the inclusion of a limitation of relief article which is part of Singapore's older tax treaty policy and now considered obsolete by Singapore. Another fairly common anti-abuse provision found in Singapore's tax treaties is the inclusion of a main purpose test. Singapore has in place a stringent administrative procedure and backend checks with respect to issuing a certificate of residence to Singapore tax residents. All of Singapore's tax treaties provide for the possibility for taxpayers to access the MAP.

Singapore signed and ratified the MLI on 7 June 2017 and 21 December 2018, respectively. The MLI entered into force for Singapore on 1 April 2019. In Singapore's instrument of ratification for the MLI deposited on 21 December 2018, Singapore has listed 86 tax treaties that it intends to cover under the MLI. This is approximately 94.5% of all the signed tax treaties. The five tax treaties that were excluded by Singapore are the DTAs entered into with Brazil, Gabon, Greece, the Republic of Korea and Chinese Taipei. Out of the 86 tax treaties listed by Singapore, only 61 are expected to be modified by the MLI when both parties to the tax treaty ratify the MLI. This is approximately 70.9% of the tax treaties listed by Singapore or 67% of all the tax treaties entered into by Singapore. Singapore has opted to apply the BEPS minimum standards (i.e. articles 6, 7 and 16), option B of article 13, allows jurisdictions to make corresponding adjustments and consult with one another in the event of a transfer

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The reporters are grateful to Nico Derksen, Chew Wee Ling and Doris Pok for their support in writing this report.
The views expressed are those of the reporters only.

pricing adjustment (i.e. article 17), and has also opted for mandatory binding arbitration (i.e. articles 18-26). As at 30 June 2019, the MLI provisions, with an exception for the MAP and arbitration provisions, have not entered into effect for any of Singapore's tax treaties. It is therefore premature to assess the impact of the MLI on tax compliance, administration and economic activities. The actual impact of the MLI on Singapore's tax treaties depends on the final choices made or to be made by the other treaty partners, thus currently leaving some uncertainty for taxpayers and tax administrations. Singapore has generally opted out of all the other optional provisions. As providing tax certainty and reducing business compliance costs are key tenets of Singapore's tax treaty policy, Singapore's MLI position should not be viewed as a surprise as the other optional provisions are anti-abuse provisions which may inevitably introduce ambiguity to the ability of legitimate businesses to rely on the provisions of the tax treaties. Singapore's position on the MLI is also aligned with the positions and reservations expressed in the 2017 edition of the OECD MTC. It is the view of the reporters that the provisions of the MLI will likely be weaved into new bilateral tax treaties by the government and it is unlikely that Singapore will rely on the MLI to amend the terms of new tax treaties negotiated and concluded after the signature of the MLI.

Singapore's legal system is based on English common law. Singapore adopted a dualist view with respect to international and domestic law. A treaty concluded by the government on behalf of Singapore does not impose duties or create rights that are enforceable in a court unless that treaty is transposed into primary or subsidiary domestic legislation. As regards tax treaties and the MLI, parliament has delegated the authority to conclude tax treaties and the MLI as well as to implement tax treaties and the MLI into domestic law, to the government.

The website of the Singapore tax authorities contains a separate section dedicated to the MLI and Singapore's position. The Singapore tax authorities provide a detailed overview of the tax treaties that are impacted by the MLI, the date of entry into force and effect of the MLI for each tax treaty, Singapore's position under the MLI as well as answers to frequently asked questions. The MLI binds Singapore with respect to the impact of the MLI provisions on a tax treaty (provided that there is a match and that the MLI has entered into force for both treaty partners). The text of the MLI itself is not a legal basis from which rights and obligations can be derived because the MLI itself was not implemented into domestic law. The text of the MLI as well as the explanatory statement to the MLI can however be consulted for interpretation purposes. A court can consider the OECD MTC, OECD Commentary and BEPS action reports during its decision making process. On multiple occasions courts have referred to and cited OECD publications in their decisions. It follows that the OECD publications can be considered to be relevant and to have a high persuasive value.

Tax professionals generally consider the MLI as one of the most remarkable, broadly supported and tangible outcomes of the OECD BEPS project. It is however still too early to fully evaluate the impact of the MLI on taxpayers' behaviours with respect to cross-border transactions that involve the application of tax treaties. The PPT will make it increasingly relevant in the future to demonstrate business purposes of an arrangement or transaction, and to ensure that there is adequate substance to achieve these purposes. Investors carrying out cross-border transactions and claiming benefits provided for in a tax treaty should review whether their set-up meets the requirements of the post-MLI era. The broad consensus between countries to improve the MAP (whether or not reinforced with mandatory binding arbitration) and the related provisions with respect to a downward corresponding adjustment appear to be beneficial for the Singapore taxpayer.

South Africa

Branch reporters
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Summary and conclusions

As a member of the G20 and observer to the OECD, South Africa has played a role in the development of the various initiatives that led to both the BEPS Action Plan and the MLI to implement some of those recommendations.

South Africa further accepted the BEPS Action Plan as set out in the final reports and recognizes the MLI as the implementation tool for that purpose. The broad range of options contained in the MLI has yielded a number of mismatches.

Little has happened subsequent to South Africa signing the MLI on 7 June 2017. The MLI appears to be in limbo. The MLI was discussed by the responsible parliamentary committee and organs. The Ministry of Finance (MoF) anticipated ratification by the end of 2017 or early 2018. Many questions about the operation, the complexity and broader policy context were raised by members of parliament and the Parliamentary Budget Office (acting in an advisory capacity). The outcome was that the Ministry of Finance had to liaise with the Parliamentary Budget Office about the impact of the MLI and its operation. Whether these investigations will result in any changes to South Africa's notifications or reservations remains to be seen. The political prospect for and timing of ratification remains unclear at the date of this report (October 2019).

Despite several preliminary mismatches, on ratification the MLI is likely to have a significant effect on the South African treaty network. The lasting impact is more likely to be through future bilateral negotiations.

South Africa's preliminary positions on the MLI as regards Permanent Establishments has been cited as a reason in February 2019 to launch a review of the continued use in domestic tax law of the OECD Model's PE definition.

Many of the measures to be adopted, even where no mismatch occurs, are yet to be tested. That said, interpretation and application questions are anticipated. These include transitional questions, such as the loss of treaty access for dual resident companies where material facts remain unchanged and pending competent authority decision. The future operation of the Principle Purpose Test (PPT) in practice remains unclear. Key questions concern whether specific domesticating legislation is constitutionally required to give effect to the PPT and provide taxpayers with a substantive remedy that will not restrict them to judicial review under administrative law. In practice, it remains unclear whether the tax administration will be authorized and required to follow the same procedures and safeguards as apply to the domestic general anti-avoidance rule.

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There has not been evidence to date of the MLI impacting current treaty negotiations as the text of treaties under negotiation immediately before and currently underway is not yet available. Such evidence may reveal much about the impact of the MLI in future.

The application of MAP may be one of the earliest indicators of impact. The OECD has issued the South African Peer Review Report indicating where the MLI may impact the process. However, even here, relative to other countries, South Africa has a small but growing number of MAP cases. The success of failure of the MAP process is also not clear due to the secrecy of the process. What is known from OECD information is that between 2017 and 2018 access for taxpayers to MAP has improved. Under the MLI South Africa reserved to only allow submission of a case to the competent authorities in the residence state of a taxpayer, and not in either contracting state. The trade-off is that South Africa must commit to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS Package by implementing a bilateral notification or consultation process with the competent authority of the other contracting state for cases in which the South African competent authority "does not consider the taxpayer's objection to be justified". As a result, the South African Revenue Service reformed its MAP practice and published extensive guidance in 2018. The improvement to the MAP statistics and SARS practices were not tied to whether a tax treaty is an MLI covered agreement or not, but applies across the spectrum. It is an example where a preliminary position on the MLI correlates to a corresponding impact on the administration of all South Africa's tax treaties.

The South African fiscal authorities have been taking a stronger stance on avoidance and abuse and is an active participant in the various information exchange initiatives.

The Ministry of Finance will still have to take care to ensure that its tax treaty and domestic policies are consistent, as the experience with the MLI has revealed that policy coordination was not always carefully considered. Further and more fundamentally, the experience with the MLI illustrates that there is a need to review the domestication processes for tax treaties in South Africa, given heightened political awareness. It is advisable that a cost/benefit analysis be performed for consideration by the responsible parliamentary organs who vet these treaties prior to ratification.

Spain

Branch reporter
Aurora Ribes Ribes[1]

Summary and conclusions

The MLI was signed by Spain on 7 June 2017. Once it comes into effect (it is expected that after the Senate approval, the instrument of ratification will be deposited with the OECD) it will modify the application of most of the Spanish double tax treaties currently in force. In this respect, Spain has included 86 tax treaties that it wishes to be covered by the MLI.

As an active member of the OECD, Spain has strongly supported the usefulness of this instrument in order to reduce the possibilities of international tax evasion/avoidance. In this sense, it has adopted a proactive position by assuming most of the proposals of the MLI. At the time of signature, the Spanish government released its provisional list of expected reservations and notifications pursuant to articles 28(7) and 29(4) of the Convention, that will be confirmed upon deposit of the instrument of ratification.

From a statistical perspective, it can be quoted that, out of 94 Spanish bilateral tax treaties in force, 91% have been listed by Spain, although due to the other contracting states' decisions on their own CTAs, only 50% are actually matched/covered by the MLI.

Spain has addressed tax treaty shopping both at the domestic and treaty level. Concerning the prevention of treaty abuse, the Spanish agreements that will be modified by the MLI will come into compliance with the minimum standard once the provisions of the MLI take effect. For 84 of its agreements listed under the MLI, Spain is implementing the preamble statement (article 6 of the MLI). For 83 of its agreements listed under the MLI, Spain is implementing the PPT (article 7 of the MLI).

As a member state of the EU, Spain already included in its tax treaties signed with other EU members the minimum holding period for transactions or arrangements undertaken to access the reduced treaty rate on dividends paid to a parent company in article 8 of the MLI.

With regard to the substituted property rule for gains from the alienation of shares or comparable interests deriving their value primarily from immovable property at any time during the 365-day period preceding the alienation of the property in article 9 of the MLI, Spain has chosen to apply article 9(4) of the MLI. The content and purpose of article 10 of the MLI has been positively assessed by Spain, by considering of interest that it be incorporated into all the CTAs.

Regarding article 12 of the MLI, it should be noted that no reservation has been made by Spain. Concerning article 13 of the MLI, Spain has chosen to apply Option A under article 13(1). With regard to the splitting-up of contracts, Spain reserves the right for the entirety of article 14 of the MLI not to apply to its CTA, considering that the provision already contained in this sense in the Spanish double tax treaties is sufficient.

As regards article 3 (Transparent Entities), Spain reserves the right for paragraph 1 not to apply to its CTAs that already contain a provision described in article 3(4) of the MLI. Further, it should be noted that Spain reserves the right for the entirety of article 4 (Dual Resident Entities) not to apply to its CTAs.

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With regard to the impact the MLI is expected to have on the resolution of tax disputes under the mutual agreement procedure and arbitration, the future results will depend on the possible reservations and choices made by the other jurisdictions that opted for Part VI.

Up to now the MLI has not given rise to any specific interpretations in Spain, neither by the government or by courts. In any case, the future interpretations of the MLI by the Spanish authorities should observe the explanatory memorandum of this instrument, as it is intended to clarify the operation of the MLI to modify CTAs.

Sweden

Branch reporter
Dunja Edvinsson[1]

Summary and conclusions

Sweden is a small export-oriented economy, and that has an effect on the country's tax treaty policy. It has historically been important for Sweden to have a large tax treaty network in order to inter alia reduce withholding taxes on dividends, interest and royalties and to eliminate double taxation. It is also in the interest of Sweden that tax treaties provide a reasonable threshold in regard to what activities create a permanent establishment. Different kinds of anti-avoidance provisions have been introduced, both in tax treaties and in Swedish domestic law, more often in the last couple of decades (and now even more rapidly because of the MLI and EU's anti-avoidance work).

Sweden's tax treaties have generally been based on the OECD Model Tax Convention and Sweden is a signatory to the MLI. Sweden has, however, made reservations to all provisions, except those that constitute the minimum standard and article 17 regarding corresponding adjustments (which is "best practice"). The OECD's minimum standard on treaty abuse will be satisfied by applying the PPT in article 7(1) of the MLI.

Sweden has chosen to not apply the provisions preventing the avoidance of permanent establishment status trough commissionaire arrangements and similar strategies (article 12 of the MLI), specific activity exemptions (article 13 of the MLI), or the splitting-up of contracts (article 14 of the MLI) as these changes lower the PE threshold. It is noteworthy that Sweden has made corresponding reservations in relation to article 5 of the 2017 version of the OECD Model Tax Convention.

Sweden has chosen to apply articles 18-26 of the MLI providing for mandatory binding arbitration of disagreements between contracting states. It has reserved the right to replace the two-year period set forth in article 19 with a three-year period and it has reserved the right for article 23(1) (regarding the so-called "final offer" or "baseball" arbitration) not to apply to its CTAs, which means that the "independent opinion" approach would apply. Sweden has also formulated three reservations with respect to the scope of cases that shall be eligible for arbitration.

Parliament has approved the MLI along with the government's reservations and notifications, including a list of CTAs, and the MLI entered into force for Sweden on 1 October 2018. However, in order for the provisions of the MLI to enter into effect for domestic law purposes, each law which gives effect to a CTA in Swedish domestic law will also need to be amended. The government will present proposals to amend these laws to parliament in due course as the other jurisdictions ratify the MLI. Hence, it is not yet possible to provide the exact dates for when the provisions of the MLI will enter into effect.

As the MLI provides for a third layer of law, the Administrative Court of Appeal in Stockholm has expressed the view that it would be desirable to have consolidated versions of each tax treaty. To my knowledge the legislator does not plan to develop consolidated versions; it remains to be seen whether anyone else will do so.

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It follows from the tax treaties that have been negotiated/renegotiated in the last few years, that BEPS has had an impact on the bilateral negotiations. Some of the changes only seek to implement the OECD's minimum standard while other go further and implement provisions of the MLI for which Sweden has reserved the right to not apply them to its CTAs.

The MLI provisions will be implemented by amending the existing tax treaty laws. It is generally expected that the new rules will give rise to interpretation difficulties and an increased workload for the tax authority, the administrative courts and the competent authority. We have some interesting times ahead as the tax authorities, courts, competent authorities and arbitration committees around the globe start interpreting the new provisions introduced because of the BEPS project.

Switzerland

Branch reporters
Stefano Bernasconi[1]
Basil Peyer[2]

Summary and conclusions

Switzerland has a large tax treaty network. Its pre-MLI tax treaties generally follow the OECD Model Tax Convention in the versions of 2014 or earlier and have as the main goal the prevention of double taxation.

Switzerland has to date addressed the problem of treaty shopping in different ways. An implicit treaty GAAR and a relatively strict application of the concept of beneficial ownership, which are both based on a judicial doctrine and various anti-avoidance provisions in the tax treaties, make sure that the tax administrations and the courts have the means to cope with abusive situations. The possibility of the application of the domestic anti-avoidance doctrine and anti-avoidance rules in treaty situations is in contrast disputed in Switzerland. For the taxpayer, the fact that the implicit domestic and the treaty GAAR are both based on jurisdiction of the Federal Supreme Court and are not codified, can provoke legal uncertainties. Having various similar but nevertheless different anti-abuse provisions in the DTC can additionally complicate the application. In this regard, it is to expect that the PPT-rule will bring at least a certain uniformity to the tax treaties.

Switzerland signed and ratified the MLI but notified only very few of its treaties as Covered Tax Agreements (CTA). The main reason for this is legal uncertainty regarding the question whether the MLI "amends" the CTAs or whether it "coexists" with them. Therefore, Switzerland saw itself in the position that it was only able to notify treaties as CTAs if the other contracting state confirmed to share the "amending view" and was willing to mutually agree on a document detailing the amendments caused to the CTA by the MLI. Additionally, the MLI does not provide Switzerland with a tool to fully update its treaty network to the BEPS-Action 14 minimum standards. It is therefore to expect that Switzerland will implement the minimum standards through bilateral negotiations.

Switzerland applied a limited selection of provisions of the MLI. According to the options and reservations made, the scope of the MLI is for Switzerland in principle restricted to the BEPS minimum standards set forth in the 2015 Final Reports on Actions 6 and – as far as possible – Action 14 and includes only very few further provisions.

Despite the relative few notified CTAs, the BEPS-Project respectively its implementation in the MLI and the OECD Model Tax Convention of 2017 had a strong impact on new bilateral treaties concluded by Switzerland since then. The new treaties adhere in principle all to the BEPS minimum standards. Switzerland also agreed to several provisions in bilateral tax treaties that it has not applied under the MLI. However, these clauses were implemented in a customized respectively slightly amended manner.

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The reporters would like to point out that they are expressing their personal views in this report.

According to Swiss domestic law, consolidated texts of all tax treaties must be gazetted in the official collection of legal texts. Since Switzerland applies the MLI only to treaties with states that share the "amending view" and that are willing to agree in a mutual agreement on a text detailing the amendments made to the treaty by virtue of the MLI, the risk of a divergence between the published consolidated text of a CTA and the text of the MLI should be minimized. However, if such a divergence should nevertheless occur, the ratified texts of the MLI as approved by the parliament should prevail over the consolidation of a CTA which only has the legal value of a mutual agreement concluded by the administration. The same holds true in cases where the authentic language of the tax treaty differs from the French and English versions of the MLI since the Swiss law leaves it to a treaty (in this case the MLI) to determine the prevailing wording.

According to the prevailing doctrine and judicature in Switzerland, an international treaty has to be interpreted according to the rules of international law. The BEPS reports and the explanations of the MLI by the OECD will have at least a similar value for the interpretation of the respective provisions as the OECD Model Tax Convention and its Commentary. There are good reasons for the view that the link between the explanatory statement and the MLI is even closer than the one between the OECD Model Tax Convention and a tax treaty.

The main goal pursued by the BEPS-Project was to fight aggressive tax planning. The MLI's impact on the practical behavior in Switzerland is limited, as Switzerland could notify only a very small part of its treaties as CTAs under the MLI and opted out of almost all of the MLI dispositions not representing a minimum standard. Nevertheless, Switzerland implements the respective standards regarding BEPS and is doing so through bilateral negotiations.

Regarding BEPS-Action 6 on treaty-abuse, it is worth mentioning that Switzerland already had instruments in place to counter abusive tax planning schemes before the start of the BEPS-Project. This is why, it can be assumed that BEPS-Action 6 – especially the PPT – will not have a major impact on the assessment practice of the tax administrations and the situation of the taxpayers in Switzerland.

In contrast, it is observed that the increased general awareness of the problem of BEPS and also the BEPS-Actions 5 and 13 regarding transparency through e.g. country-by-country-reporting or the exchange of rulings, has a significant impact in Switzerland. With regard to BEPS-Action 14 in general, even though some positive impact on the duration of dispute resolution and the diligence in the negotiation of mutual agreement procedures can be observed, it remains to be seen if in the long-term the MAP process and the mandatory binding arbitration can counterbalance the increased risks of international disputes caused by the BEPS-Project.

Turkey

Branch reporter
Abdulkadir Kahraman[1]

Summary and conclusions

Before the MLI, the number of Turkey's tax treaties reached 90 and contracting jurisdictions are mostly OECD members. Turkey usually follows the OECD Model Tax Convention. The purpose of these treaties is to eliminate "double taxation", prevent "fiscal evasion". Both Turkey's existing tax treaties and domestic provisions do not have specific anti-abuse or anti-treaty shopping provisions i.e. existing treaties do not include "LOB rules" except a few treaties. As a developing country, Turkey did not include the "minimum holding period for dividend withholding taxation".

Turkey is aware that existing international tax architecture has some deficiencies and discrepancies to fight tax avoidance. Therefore, Turkey considers that the MLI's tools are in favour of governments against existing international tax rules allowing international corporate entities' profits to be artificially shifted to low or no tax jurisdictions in which they have less or no economic activity.

As OECD / G20 member, Turkey signed the MLI on 7 June 2017 and declared that it will implement it. It has not been deposited yet and has not yet entered into force. Turkish tax authorities have not yet done any disclosure to assess the impact of the MLI on tax compliance and administration & economic activity.

According to Turkey's BEPS MLI position paper, Turkey's choices seem to demonstrate Turkey's commitment to implement the "minimum standards". Additionally, the MLI choices may also show the fact that it is a member of the Inclusive Framework and because of that Turkey is subject to the peer-to-peer review whether it is compliant with the BEPS minimum standards.

Turkey has chosen the new treaty preamble text because it clarifies that tax treaties are not intended to create opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty-shopping arrangements. Therefore, Turkey committed to satisfy the OECD's minimum standard on treaty abuse. Moreover, Turkey is going to implement the Principle Purpose Test, which is enabling Turkey to satisfy the BEPS minimum standards.

On the other hand, Turkey has not chosen to apply other "tax treaty abuse" provisions of the MLI and opted out article 8. Moreover, Turkey's tax treaties do not include a minimum shareholding period for the reduced treaty withholding rate on dividend payments but a minimum capital of the company paying the dividends. The minimum holding period of 365-day requirement is not included in Turkey's tax treaties and having a minimum holding period requirement in Turkey's tax treaties may influence and affect "investment decisions of foreign investors, especially short-term capital". The main reason not to adopt a minimum holding period is probably to "attract both more foreign direct investors and capital market investors". Additionally, capital market investors looking for a short-term investment to

[1] Partner, Tax, EY Turkey.

foreign markets may invest other contracting states that do not apply a minimum holding period and it may lead to a treaty shopping arrangement".

Turkey opted in article 9 with reservations and it reserves the right for article 9(1) not to apply to its CTAs. Turkey opted in because of the purpose of this provision to introduce a testing period and to ensure that the provision addresses interests comparable to shares, the threshold provided in existing provisions would be preserved, and where CTAs include exceptions to the application of the existing provisions those exceptions would continue to apply.

Additionally, capital market investors looking for a short-term investment in foreign markets may invest in other contracting states that do not apply a minimum holding period and it may lead to a "treaty shopping arrangement". On the other hand, Turkish investors investing abroad might also have the same outcome. As Turkey opted for Option A, Turkey prepared and included "each specific activity exemptions" of its Covered Tax Agreements with regard to article 13 in Turkey's BEPS MLI position paper.

Turkey chooses not to apply article 14 of the MLI to "address the artificial avoidance of PE status" through the splitting-up of contracts even though there are big infrastructure projects. However, the main reason would be the PPT provision that will address such BEPS concerns related to the abusive splitting-up of contracts as mentioned in the BEPS Action 7 Report as it has chosen to apply the PPT. Therefore, Turkey may consider that the PPT provision addresses the "artificial avoidance of PE status" through the splitting-up of contracts. Moreover, the provisions of splitting-up of contracts are not required to meet a minimum standard. Finally, Turkey's tax treaties include terms that deem a building site, a construction, assembly or installation project or supervisory activities depending on the time period test i.e. six months or 12 months, to constitute a permanent establishment.

There are 58 CTA's signed by Turkey containing five provisions each (excluding the PPT), bringing the total number of provisions to 286. However, it could have been much more than that if Turkey would have a different strategy rather than meeting minimum standards where its CTAs are considered.

Recently, Turkey entered into new bilateral tax treaty negotiations after signing the MLI. Turkey positioned itself to meet "BEPS minimum standards". After taking such a position, it has been observed that the MLI has changed Turkey's bilateral tax treaty approach / strategy. On the other hand, Turkey's choice for the CTAs regarding article 8 of the MLI seemed contradictory because the new treaties' 365-day period provisions may lead to "treaty shopping" as Turkey reserved the right not to apply the same term for the CTAs. With regard to article 8 of the MLI, Turkey adopted the provisions of the MLI on the draft law between Turkey and Argentina treaty while Turkey did not adopt a 365-day period provisions of the MLI on the draft law between the Turkey and Rwanda treaty. Therefore, it may also create "treaty shopping".

Finally, the MLI is also in the form of an international treaty and therefore, it should be treated as part of the Public International Laws in Turkey.

United Kingdom

Branch reporter
Andrew Roycroft[1]

Summary and conclusions

The UK government was an active participant in the BEPS process, implementing more than the minimum standards and doing so earlier than many other jurisdictions. To implement the changes required to its double tax treaties, the UK signed the Multilateral Instrument (MLI) at the OECD's 7 June 2017 signing ceremony in Paris, and a statutory instrument (SI 2018/630) was made on 23 May 2018 that brought its provisions into force in the UK on 1 October 2018 (three months after the UK deposited its instrument of ratification with the OECD, on 29 June 2018), with effect from 2019.

The impact assessments that accompanied the draft legislation to implement the MLI in the UK suggested that the changes made by the MLI were expected to have only limited impact on businesses and HM Revenue and Customs (HMRC). The UK government's approach to what aspects of the MLI to adopt was published before, and with, the draft of what became SI 2018/630, and although that legislation did not restrict the notifications and reservations that the UK government could make, the notifications and reservations ultimately made by the UK did reflect that published position.

The UK government listed 121, comprising over 90%, of its existing double tax treaties as covered tax agreements (CTAs), excluding treaties that could not be CTAs because of the status of the counterparty as a Crown Dependency or similar and treaties with countries with which the UK government was in negotiations to conclude a new treaty, or protocol, that would include the MLI measures that the UK planned to adopt. This reflects the UK's position that the MLI is a tool to update tax treaties to implement the BEPS recommendations consistently, quickly and efficiently. Although the MLI is likely to be of reduced importance in the UK over time as the UK renegotiates treaties that are CTAs, that process may take many years. The MLI is not seen as a means of a wider reconstruction of the UK's treaty network.

The UK government adopted those parts of the MLI that were the minimum standard, reserving against most other provisions and those that it considered unnecessary because of its adoption of the Principal Purpose Test (PPT) (including the discretionary benefits rule). There is no indication that the UK will reverse any of its reservations (for example, in relation to the changes to the definition of permanent establishment or the changes made by articles 8, 9 and 10), as the UK government's stated view was that the mechanical tests introduced by those provisions could deny treaty benefits in circumstances that are not abusive and those provisions would not target any genuine avoidance structures more effectively than the PPT. Additionally, the UK chose to apply articles 18 to 26 providing for mandatory binding arbitration of disagreements between contracting states, opting for final offer (baseball) arbitration as its preferred method. New treaties and protocols signed since the UK implemented the MLI are consistent with this approach, although the UK has been less successful in persuading other countries to adopt, through the MLI or new bilateral treaties, arbitration than the other MLI changes.

[1] Senior editor, Practical Law Tax

As the MLI only has effect in the UK from 2019, and only for a limited number of treaties with counterparties who specified their treaty with UK as a CTA and brought the MLI into force in time for their treaty with the UK to be amended with effect from 2019, it remains to be seen what impact the MLI will have on tax planning or HMRC's assessment practices. Prior to the introduction of the MLI, there were several grounds on which HMRC could challenge treaty relief in situations where it considered that such relief should not be available, including PPTs in the interest and royalties articles of some of its double tax treaties, the *Indofood* interpretation of "beneficial ownership", recourse to the "purposive construction" principle of statutory interpretation (referred to, in tax cases, as the "*Ramsay* principle", or the "principle in *Furniss v. Dawson*"), anti-arbitrage legislation and, since 2013, a general anti-abuse rule. In recent years, pre-dating article 4, the UK's treaty policy has been to replace place of effective management tie-breakers for corporate tax residence with tie-breakers based on mutual agreement. Also, the absence of an obligation to withhold tax from dividends, other than in limited circumstances, and the absence (until recently) of domestic charging provisions for gains made by non-UK residents on the disposal of UK land (or on the disposal of land-rich entities) has limited the types of treaty-based tax planning that might be of concern to the UK authorities. The implementation in the UK's double tax treaties of the MLI's PPT is an additional basis on which HMRC may challenge the availability of treaty reliefs for some cross-border transactions, and the broad wording of the PPT will increase the difficulty faced by businesses seeking certainty as to, and for those advise on, the availability of such reliefs for cross-border transactions. This comes on top of other developments, such as the cross-border reporting requirements imposed by legislation implementing EU Directive 2018/822, whose scope is also uncertain in some respects. In both areas, it is hoped that guidance will provide businesses and advisers with the clarity required to be confident of the consequences of cross-border transactions.

The ability to introduce arbitration provisions into the UK's double tax treaties is an aspect of the MLI that the UK government considers important. It is seen as a "guarantee" to taxpayers that disputes will be resolved and double taxation avoided. If, as seems likely, fewer of the UK's treaty partners agree to implement arbitration in their treaties with the UK than implement other MLI changes (such as PPT), there is likely to be a greater range of situations in which there is uncertainty about the availability of treaty relief and consequent risk of tax authorities taking different positions with resultant double taxation.

Branch reporters
Robert Stack[1]
Daniel Shah[2]
David Lenter[3]

Summary and conclusions

The United States ("U.S.") is not a signatory to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Convention" or "MLI"). The U.S. has in-force income tax treaties that apply in 66 countries – all of which entered into force before the November 2016 conclusion of the negotiation of the MLI. Several other treaties and protocols to which the U.S. Senate has recently consented, as well as treaties still awaiting Senate consideration were negotiated and signed in advance of the MLI, so that the U.S. does not have direct experience with the influence of either the G20/ OECD Base Erosion and Profit Shifting (BEPS) Project or the MLI on its treaty negotiations around the world, at least with respect to negotiations that have been publicly announced by the U.S. Treasury at the time of this writing. With respect to policing tax avoidance, the principal difference between the U.S. Model, on the one hand, and, on the other hand, the OECD Model Tax Convention on Income and Capital ("OECD Model") and the United Nations Model Double Taxation Convention Between Developed and Developing Countries ("UN Model") is the U.S. inclusion of a robust "limitations of benefits" ("LOB") article as the principal means to prevent treaty abuse.

U.S. tax treaty policy – whether expressed in U.S. model treaties or negotiating practice – prior to the MLI was to include in its treaties a variety of provisions included in the MLI, including those relating to: the just mentioned LOB; the taxation of its citizens around the world (saving clause); fiscally transparent entities, dual resident entities, holding periods for eligibility for reduced dividend withholding rates, and a so-called "triangular provision," pursuant to which treaty benefits are denied to permanent establishments of a treaty partner when the permanent establishment is not sufficiently taxed. Therefore, the U.S. did not need to sign and ratify the MLI in order to have such provisions apply throughout its network. In contrast with MLI provisions that are already included broadly across the U.S. treaty network, the U.S. has mandatory and binding arbitration provisions in only seven treaties in force.

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In addition to these specific treaty provisions, it has long been U.S. policy to enter into tax treaties only when the effect is to eliminate double taxation – thus precluding entering into treaties with jurisdictions that impose little or no tax.[4]

The U.S. also has a variety of statutory provisions that intersect with treaty policy, and U.S. courts have a variety of judicial doctrines at their disposal to curtail treaty abuse.

Building on this history of robust anti-tax avoidance measures in treaties, statutes and implemented through case law, the 2016 U.S. Model Income Tax Convention ("2016 Model") contains a variety of BEPS-type provisions, including preamble language reflecting the international consensus that the purpose of an income tax treaty is the elimination of double taxation without creating opportunities for double-non-taxation or reduced taxation through tax evasion or avoidance. Also, of significance in the 2016 Model are provisions that curtail treaty benefits when deductible payments are made to related parties that benefit from low or no-tax "special tax regimes."

Thus, while the U.S. is not a signatory to the MLI, it remains a jurisdiction with robust anti-avoidance measures as reflected in the treaties themselves, principally (although not exclusively) through LOB articles; statutory and regulatory constraints on the availability of treaty benefits; and judicial doctrines that are aimed at preventing treaty abuse. The 2016 Model represented a further effort to take BEPS concerns into account in implementing U.S. treaty policy.

4 As recommended in the BEPS Action 6 Report (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances), the Introduction of the OECD Model Tax Convention (2017) has been updated to reflect these and similar concerns.

Branch reporter
Andrea Laura Riccardi Sacchi[1]

Summary and conclusions

The present work has the character of being the Uruguayan branch report on Subject 1: "Reconstructing the treaty network" of the 74th IFA Conference to be held in Cancun, Mexico, from 4 to 8 October 2020.

In February 2013, the Organization for Economic Co-operation and Development (hereinafter OECD), promoted by the G20, delivered the report "Addressing Base Erosion and Profit Shifting",[2] immediate precedent of the "Action Plan on Base Erosion and Profit Shifting" (hereinafter, BEPS Action Plan).[3] The report concluded that rules in force at that time enabled multinational enterprises to manipulate their benefits by transferring them to no or low-tax jurisdictions and thereby preventing taxation "where economic activity takes place and value is created", and estimated annual tax losses between 100 and 240 billion dollars.

Thus, the BEPS Action Plan was aimed at promoting the adoption of anti-BEPS measures not only at the level of countries' domestic legislation but also at the level of agreed legislation, i.e. with respect to double tax agreements (hereinafter DTAs). In the latter case, and in relation to the global treaty network in force (more than 3.000 DTAs), Action 15, entitled "Developing a Multilateral Instrument to Modify Bilateral Tax Treaties" and intended to "[a]nalyze the tax and public international law issues related to the development of a *multilateral instrument* to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and *amend bilateral tax treaties*" (our emphasis),[4] was set forth.

Within this framework, the "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (hereinafter the multilateral instrument or MLI), a direct consequence of the aforementioned Action 15, represents without doubt a milestone in the history of international taxation. In effect, this instrument, without precedents in the tax world, tried to facilitate the quick adoption of the anti-BEPS measures through the amendment of the text of existing bilateral agreements.

The *República Oriental del Uruguay* (hereinafter Uruguay) is no stranger to this fight against BEPS. Uruguay is a member of the Inclusive Framework (hereinafter, IF) on BEPS and is one of the many countries that have chosen the path of trying to adapt their network of bilateral agreements to the new anti-BEPS standard based on the signature of the MLI.[5] Uruguay has demonstrated a strong adherence to the international standard regarding cooperation in the

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The opinions expressed in this report are the sole responsibility of the author and do not necessarily reflect the position of any of the organizations with which the author is affiliated. The report has been prepared in October 2019, and therefore it reflects the state of play at that time.

[2] OCDE (2013), Addressing Base Erosion and Profit Shifting, OECD Publishing, pp. 87.

[3] OECD (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing, pp. 40

[4] *Ibid.*, p. 24.

[5] As of 30 September 2019, 89 jurisdictions have signed this instrument.

fight against tax fraud and evasion, and even internally[6] it is worth stressing the proliferation during these last years of tax rules with a strong anti-elusive purpose. This commitment is also evidenced by the large number of provisions to combat treaty abuse, incorporated in the DTAs signed prior not only to the signature of the MLI, but even, to the publication of the final reports (2015) of the BEPS Action Plan.

In general, it should be noted that the implementation of the multilateral instrument has not been simple, and its effectiveness is not guaranteed. On the one hand, while the MLI is positively characterized as a flexible instrument, its effective application depends on the matches taking place between the choices made by the signatory countries based on their notifications, reservations and options, and therefore, this characteristic may in fact result in ineffectiveness.[7] That is why it is of vital importance to analyze in depth, based on the choices made by the counterparts, how the commitment assumed by our country at the level of its treaty network, has been affected.

Following the guidelines set forth by the general reporters, the content of this report focuses on sharing the Uruguayan experience regarding the adoption of the recommendations derived from the BEPS Action Plan, especially those provisions incorporated into the MLI as well as to the latest update of the "Model Tax Convention on Income and on Capital" proposed by the OECD (hereinafter OECD MC). The ultimate goal of the branch report is to contribute to the evaluation of the impact of the BEPS project not only on the structure and modus operandi of the more than 3.000 existing DTAs at the global level in the pre-BEPS era, but also on the negotiations of those to be concluded in the future.

The report which respects the structure proposed by the general reporters, presents and analyzes the implementation of the MLI in Uruguay, what measures have been taken, the existing problems, as well as those that are visualized in the future, and is divided in two parts. The first part refers to the impact, both direct and indirect, of the BEPS Action Plan and the MLI on the Uruguayan tax treaty network. The direct impact refers to the modification of the agreements covered by the MLI while the indirect impact refers to the influence that the BEPS project in general is considered to have on the Uruguayan tax treaty negotiation strategy. Thus, the branch report analyzes the policy followed by the Uruguayan government regarding reservations and notifications. The second part refers to the practical implementation of the multilateral instrument in Uruguay.

[6] For a comprehensive detail of such legislation, Pérez Besio, I. y Galeazzi, A., "Anti-avoidance measures of general nature and scope - GAAR and other rules - Uruguay Branch Report", in IFA: Cahier de droit fiscal international, Vol. 103A, 2018, pp. 851-876

[7] For illustrative purposes, at the 13th GREIT Conference ("Multilateralism and International Tax Law"), Traversa and Sanghavi, during their presentation "Permanent Establishment in a Multilateral World. BEPS changes, issues… and the need for more change?", highlighted that of 1.246 potentially covered tax agreements, 277 (22%) have adopted art. 13 of the MLI (Art. 5(4), OECD MC) -further divided into Option A and Option B-, while 206 (17%) have adopted art. 12 of the MLI (art. 5(5) and art. 5(6), OECD MC). At the national level, this aspect has been stressed by Mazz: "This circumstance [flexibility], together with the possible adoption of reservations, has as a consequence that the MLI, which was postulated as very beneficial because bilateral treaties would be quickly modified, without the need to negotiate new agreements, end precisely in what it aimed at avoiding, a renegotiation of each DTA" (our translation; Mazz, A., "La adaptación de los tratados internacionales al marco multilateral propuesto por el Plan de Acción 15 BEPS", RT, No 266, 2018, p. 684).

General report Subject 2

Exchange of information: issues, use and collaboration

Tatiana Falcão (Brazil)
Armando Lara Yaffar (Mexico)

Exchange of information: issues, use and collaboration

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Summary and conclusions

Whereas the exchange of information clause has been an integral part of double taxation conventions (DTCs) for decades, 2019 marked the 10-year anniversary of the G20's call to strengthen international cooperation in exchange of information by developing and adhering to stringent global standards. Currently, the EOI regime is based on three sets of legal norms. First, there is the bilateral tax treaty network with EOI provisions modelled after article 26 of the OECD Model of 2005 and subsequent updates. Secondly, there are the tax information exchange agreements (TIEAs), modelled after the OECD Model TIEA of 2002, with Model Protocol of 2015. Thirdly, there is the multilateral Convention on Multilateral Administrative Assistance in Tax Matters (MCAA), originally signed in 1988 but since 2009 rebranded as the most comprehensive and widely signed instrument on EOI.

The updated TIEA Model and the MCAA have opened ground for the adoption of bilateral and multilateral competent authority agreements (CAAs) on key topics such as the Common Reporting Standard (CRS) and country-by-country reporting (CbCR). These two instruments have been crucial in consolidating the push for widespread application of the automatic exchange of information (AEOI) standard, which has been instrumental in the adoption of CAAs.

The widespread implementation of these instruments has led to the national and regional redesign of tax rules on exchange of information, with a view toward adhering to the heightened standards of tax cooperation and EOI.

Based on the information obtained from forty branch reports and one European Union Report, this general report reviews countries' reported experiences adopting these international instruments and converting them into laws of domestic application. It also reviews the instances where domestic implementation derives from the implementation of more stringent regional rules, as is the case in the European Union, where the standard of cooperation is broader than what is foreseen internationally.

The general report furthermore reviews cross-border initiatives on EOI of a regional nature, analyses the role of US FATCA in the development of CRS, and touches on select topics related to the handling of tax information by tax administrations and tax courts such as confidentiality, data protection, whistleblower protection and use of stolen data, bearing in mind the limited experience the reporting jurisdictions may have with these topics.

The general report denotes that the existing international EOI standards are robust and uniform, with the development of instruments often being interrelated. For example, US FATCA triggered the development of CRS under the auspices of the OECD, which in turn was converted into a binding EU-wide practice through DAC 2. Other DAC amendments bring to the EU direct application of the BEPS standards, and all of these provisions employ the

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standard of foreseeable relevance and EOI methods (EOIR, AEOI, SEOI) previously foreseen in bilateral (DTCs and TIEAs) and multilateral (MCAA) agreements.

The vast majority of countries have committed to the standards and are currently complying with the obligations under one or more legal instruments, be it the double tax treaty network or the MCAA, FATCA or the EU Directives. The MCAA appears to be the most comprehensive instrument in the field of EOI, and it has the broadest coverage, with the ability to elevate countries' commitments to also cover AEOI, both in relation to CRS and CbCR. International pressure to comply with these obligations seems to be high, seeing as some countries go as far as to circumvent their domestic legal systems, or create interpretative doctrines in order to employ certain international obligations even when there is no legal basis under domestic law to do so.

Data quantifying the use of EOI is scarce or unavailable, with rare exceptions. In some cases, this can actually be detrimental to the system as a whole, as countries, and particularly developing countries, are unable to cross-check policy approaches and improve their own tax administration of EOI frameworks. EOI flows are often unbalanced with certain countries receiving exponentially more information than they send out. Some of the quite refined forms of EOI, such as FATCA, effectively operate on a non-reciprocal basis, meaning many countries employ significant resources to provide information to the United States but are not reciprocated with information about its resident taxpayers. For countries where resources are scarce, this type of commitment can be a heavy one to make and may imply the waiving of other international commitments due to the lack of resources.

Despite the existence of some of the EOI instruments, such as EOIR, for quite some time now, it seems that there is insufficient data available and/or publicly disclosed to conduct impact assessments or monitor and evaluate the efficiency of the EOI channels. Independent stakeholders, such as civil societies and intergovernmental organisations other than those mandating those EOI frameworks are therefore unable to provide input on the efficiency of these systems and to impartially assess the benefits.

There seems to be an overall lack of transparency with respect to the types of information exchanged, and how the information is gathered, where the taxpayer has limited insight or control over the reporting of information. A doctrine admitting the use of stolen data in tax cases may provide an incentive for the proliferation of information acquired through illegal means and might set a difficult precedent. On the other hand, the lack of formal protection for whistleblowers in most countries might deter individuals from reporting on their employer's wrongdoings.

Besides the traditional forms of EOI that derive from the international mandate, there also appears to be a wider set of regional initiatives of cooperation between tax authorities also in view of exchanging information, for instance with regard to tax planning arrangements or audit practices. It is difficult to assess the frequency of exchanges occurring under those networks, the quality of the information exchanged and the usability of the information, as the scope of information exchanged under those regional initiatives and instruments is the same as is assumed under international obligations. Despite that, there seems to still be a push from countries to reinforce their commitment to exchange information regionally, within smaller communities of similarly situated states.

The last topic covered in the report is the impact of virtual currencies and particularly cryptocurrencies on the traditional forms of EOI. There is very little regulation of the market, with no single uniform treatment for the taxation of virtual currencies, creating an opportunity for tax arbitrage. Furthermore, the absence of regulation at domestic level, and of an international consensus may increase the potential for illicit financial flows, tax evasion,

and avoidance using blockchain technologies. This last topic is expected to be responsible for most of the upcoming developments in the field of EOI in the years to come.

Overview

This general report aims to provide an overview of the instruments for exchange of information (EOI) in tax matters that have been put in place during the last decade, identify the gaps in the network, and assess its effectiveness in achieving the intended result.

Many of the topics and issues discussed in the present report have already been addressed, totally or partially by past IFA general reports. Exchange of information was covered in the 2013[3] general report, taxpayer rights in relation to EOI was covered in 2015,[4] and country-by-country reporting (CbCR) was one of the topics discussed in the general report on BEPS in 2017.[5] Therefore this general report focuses on specific issues and topics that have either not been dealt with in the past or that have been subject to further development. Considering the extensive scope of the subject, this is not meant to be an exhaustive report.

We are very grateful to the IFA branch reporters, whose work representing the perspectives of 40 jurisdictions around the world forms the basis for the analysis in this general report.[6]

This report is organised into five sections. Section 1 deals with the instruments of international application with potential worldwide coverage; section 2 delves into instruments and processes of regional application; section 3 touches on select issues regarding the handling of tax information subjected to EOI, and section 4 assesses the impacts of virtual currencies on the existing EOI networks. Section five concludes this general report.

This general report is furthermore accompanied by an addendum,[7] that covers, in detail the European Union exchange of Information (EOI) network, as well as other cross-border initiatives on exchange of information.

The general reporters made the editorial decision to deal with European Union (EU) regional practice in detail in this separate document, so that the GR would not be overtaken by EU regulations which only apply to a limited number of countries. On the other hand, these are important regulations, which at times exceed the commitments undertaken at OECD Global Forum level and under the Base Erosion Profit Shifting (BEPS) Programme. Since most of the branch reports are in fact European reports, there was extensive coverage of these regulations by the branch reporters, which is why an addendum was added to cover the rules in detail. Section 2.1 of this general report contains a brief summary of the EU regulations.

To balance this off, it was conceded that the addendum should also cover cross-border initiatives on EOI of a regional nature in greater detail than what is currently included in the

[3] Obserson, "Exchange of information and cross-border cooperation between tax authorities" IFA Cahiers, available at: https://research.ibfd.org/data/ifacahier/pdf/ifacahier_2013_volume2_general_report.pdf.

[4] Baker & Pistone "The practical protection of taxpayers' fundamental rights" IFA Cahiers, available at: https://research.ibfd.org/data/ifacahier/pdf/ifacahier_2015_volume2_general_report.pdf.

[5] Christians, Shay, "Assessing BEPS: origins, standards, and responses," IFA Cahiers, available at: https://www.ifa.nl/media/1403/ifa-cahier-2017-vol102a-general-report.pdf.

[6] All references herein to branch reports are to those produced for subject 2 of IFA Cahiers 2020. The branch reports are not uniform in their response to the guidelines for branch reporters. The general reporters have not researched the laws of individual jurisdictions in preparing this report. All conclusions are based on the information provided by the branch reporters.

[7] The addendum is available for consultation on the IFA website.

GR. Section 1.4 of this general report contains of summary of the cross border initiatives, which are covered in more detail in the addendum. As highlighted there, these are regional group-centred initiatives that might not be as streamlined as the OECD-led programmes, but that might nevertheless contribute to an environment of greater coordination and cooperation in EOI, ultimately leading to greater transparency within a smaller region, or amongst countries sharing a common linguistic, ethnic or economic background.

1. Instruments and processes of international application

Introduction

There are several frameworks under which information may be exchanged in tax matters. The table below aims to illustrate the level of adhesion of the international instruments amongst the reporting IFA jurisdictions.

The table demonstrates that all forty reporting jurisdictions have implemented the exchange of information instruments and standards put forward by the OECD via the Global Forum on Transparency and Exchange of Information for Tax Purposes ('the Global Forum') and as a result of the Base Erosion and Profit Shifting (BEPS) Project.

The table also provides information regarding the adoption of US FATCA, a regional framework of EOI that is discussed in section 2.

Table 1: Exchange of information instruments

Jurisdiction	DTC art. 26	TIEA[8]	CMAATM[9]	MCAA CRS[10]	CbC MCAA[11]	IGA/FATCA[12]
1. Argentina	Yes	Yes	Yes	Yes	Yes	No
2. Australia	Yes	Yes	Yes	Yes	Yes	Yes - In Force
3. Austria	Yes	Yes	Yes	Yes	Yes	Yes - In Force
4. Belgium	Yes	Yes	Yes	Yes	Yes	Yes - In Force
5. Brazil	Yes	No	Yes	Yes	Yes	Yes - In Force
6. Canada	Yes	Yes	Yes	Yes	Yes	Yes - In Force
7. Chile	Yes	No	Yes	Yes	Yes	Yes - signed
8. Chinese Taipei	Yes	Yes	Yes	Yes	Yes	Yes

8 https://www.oecd.org/ctp/harmful/43775845.pdf.
9 http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf.
10 https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/crs-mcaa-signatories.pdf.
11 https://www.oecd.org/ctp/exchange-of-tax-information/CbC-MCAA-Signatories.pdf.
12 https://home.treasury.gov/about/offices/tax-policy/foreign-account-tax-compliance-act.

Jurisdiction	DTC art. 26	TIEA[8]	CMAATM[9]	MCAA CRS[10]	CbC MCAA[11]	IGA/FATCA[12]
9. Colombia	Yes	No	Yes	Yes	Yes	Yes – In Force
10. Czech Republic	Yes	Yes	Yes	Yes	Yes	Yes – In Force
11. Denmark	Yes	Yes	Yes	Yes	Yes	Yes – In Force
12. Finland	Yes	Yes	Yes	Yes	Yes	Yes – In Force
13. France	Yes	Yes	Yes	Yes	Yes	Yes – In Force
14. Germany	Yes	Yes	Yes	Yes	Yes	Yes – In Force
15. Greece	Yes	Yes	Yes	Yes	Yes	Yes – In Force
16. India	Yes	Yes	Yes	Yes	Yes	Yes – In Force
17. Israel	Yes	No	Yes	Yes	Yes	Yes – In Force
18. Italy	Yes	No	Yes	Yes	Yes	Yes – In Force
19. Japan	Yes	Yes	Yes	Yes	Yes	Yes – In Force
20. Korea, Republic of	Yes	No	Yes	Yes	Yes	Yes – In Force
21. Liechtenstein	Yes	Yes	Yes	Yes	Yes	Yes – In Force
22. Luxembourg	Yes	Yes	Yes	Yes	Yes	Yes – In Force
23. Mauritius	Yes	No	Yes	Yes	Yes	Yes – In Force
24. Mexico	Yes	Yes	Yes	Yes	Yes	Yes – In Force
25. Netherlands	Yes	Yes	Yes	Yes	Yes	Yes – In Force
26. New Zealand	Yes	Yes	Yes	Yes	Yes	Yes – In Force
27. Nigeria	Yes	No	Yes	Yes	Yes	No
28. Norway	Yes	Yes	Yes	Yes	Yes	Yes – In Force
29. Peru	Yes	No	Yes	No	Yes	Yes
30. Poland	Yes	No	Yes	Yes	Yes	Yes – In Force
31. Portugal	Yes	Yes	Yes	Yes	Yes	Yes – In Force
32. Russian Federation	Yes	No	Yes	Yes	Yes	No
33. South Africa	Yes	Yes	Yes	Yes	Yes	Yes – In Force
34. Spain	Yes	Yes	Yes	Yes	Yes	Yes – In Force
35. Sweden	Yes	Yes	Yes	Yes	Yes	Yes – In Force
36. Switzerland	Yes	No	Yes	Yes	Yes	Yes – In Force

Jurisdiction	DTC art. 26	TIEA[8]	CMAATM[9]	MCAA CRS[10]	CbC MCAA[11]	IGA/FATCA[12]
37. Turkey	Yes	No	Yes	Yes	No	Yes - Signed
38. United Kingdom	Yes	Yes	Yes	Yes	Yes	Yes – In Force
39. United States	Yes	Yes	Yes	No	No	Yes
40. Uruguay	Yes	Yes	Yes	Yes	Yes	No

DTC - Double Taxation Convention, article 26
TIEA: Tax Information Exchange Agreement
CMAATM: Convention on Mutual Administrative Assistance in Tax Matters
MCAA/CRS – Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information
CbC MCAA – Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports
IGA/FATCA - Intergovernmental agreements (IGAs) with foreign jurisdictions to implement the United States Foreign Account Tax Compliance Act (FATCA)
As may be gathered from the above, the range of instruments fostering exchange of information initiatives is wide, and covers all forms of exchange of information, including EOI on request (EOIR), automatic EOI (AEOI), and spontaneous EOI (SEOI).[13]

1.1. Treaties

1.1.1. *Bilateral instruments*

1.1.1.1. *DTAs containing provisions based on article 26 of the OECD/UN Model*

Bilateral tax treaties are the historic backbone of exchange of information in tax matters. Many, if not all modern tax treaties contain a provision that is to a large extent, if not exactly, modelled after article 26 of the OECD and UN Model. Article 26 of the OECD Model and Commentary, as updated in 2012, is described by the OECD as the principle authoritative source for setting the so-called 'standard on transparency and effective EOIR for tax purposes' ('the EOIR standard').[14]

The EOIR standard is primarily based on the obligation in article 26 to provide all information that is foreseeably relevant to the tax administration or enforcement of the domestic tax laws of the treaty states. Article 26 also details the acceptable ground for declining information requests and provides details on the format of requests. The Model and Commentary also identify specific types of information that requested states must have the authority to obtain and provide, including bank information and identity information.[15] Each jurisdiction reported on by the branch reporters is a member of the Global Forum. As such,

[13] The spontaneous EOI program involves the exchange of information not specifically requested by a treaty party, but which the providing authority determines may be of interest to its treaty partner. The exchanges are generally those discovered during a tax examination, investigation, and other administrative procedure that may suggest non-compliance with the tax laws of the treaty partner.

[14] *See* OECD (2016), *2016 Methodology for Peer Reviews and Non-Member Reviews*, available at: http://www.oecd.org/tax/transparency/about-the-global-forum/publications/revised-methodology.pdf.

[15] *See* art. 26 of the OECD Model and Commentary (2017).

the status and progress of the implementation of the EOIR standard in those jurisdictions in relation to the Global Forum's own 'terms of reference' can be consulted in the Global Forum's peer review reports.[16] Branch reporters were asked to report on the most significant deviations from the Model provisions, if any, and on issues of interpretation and application of article 26.

Some branch reporters referred to the material scope of article 26, especially in older treaties and treaties that do not incorporate the express stipulation used in article 26(1) of the Model that "the exchange of information is not restricted by articles 1 (persons covered) and 2 (taxes covered)." This stipulation makes clear that the competent authorities have wide powers of exchange of information, extending beyond the scope of the treaty itself. The information may include particulars about non-residents and may relate to the administration or enforcement of any kind of taxes, including taxes not covered by the treaty.

It has been reported that most US tax treaties embrace the OECD's expansive scope of article 26. In addition, the US interprets its treaty EOI obligations to allow exchange with respect to all persons regardless of their residence if the treaty provides for EOI for the purposes of domestic tax laws, even where the treaty does not explicitly state that EIO is not restricted by article 1 (persons covered).[17] A similar trend is witnessed in certain other countries, such as Italy, which adopt an ambulatory interpretation with respect to older treaties that do not explicitly provide that exchange of information is not restricted by article 1, so as to allow exchange with respect to all persons regardless of their residence.

A second issue concerns the interpretation by national courts of the foreseeable relevance standard in article 26(1), or more precisely, the lack of such interpretation. The branch reporters were requested to report on developments in national jurisprudence in this regard. Of the 40 reporting jurisdictions, Switzerland is the only country reporting to feature a contemporary body of domestic jurisprudence dealing with interpretation of the foreseeable relevance standard. This is remarkable, given the fact that the concept of 'foreseeable relevance' is a core attribute of the global EOIR regime and given the fact that for most other tax treaty concepts, an abundance of domestic case law exists. This state of affairs is explained by the fact that in most countries, taxpayers and third-party information holders simply have no right to be informed about pending information requests or standing in court to request judicial review of the foreseeable relevance of the requested review.[18] Luxembourg used to allow judicial review of inbound EOI requests under its EOI Act of 2010, and this gave rise to an extensive body of caselaw on the matter. Under pressure of the Global Forum, taxpayers' standing in court for judicial review was abolished in 2014 in order to increase the efficiency of EOIR procedures. The lack of judicial review of the foreseeable relevance standard is however currently challenged in the courts in Luxembourg (and the EUCJ) on the grounds that it violates EU law.[19]

Furthermore, it has been reported that not all tax treaties uphold the standard of foreseeable relevance, which was only introduced in the OECD Model in 2005. For example, a number of Canadian tax treaties still use the language adopted before the 2005 update and refer to the exchange of information that is '*necessary*' (or in some cases '*relevant*') for carrying

16 The Global Forum peer review reports are freely accessible at the OECD iLibrary. *See* https://doi.org/10.1787/2219469x.

17 Global Forum Peer Report, supra note 6, at 98.

18 Baker and Pistone identified and discussed the (in)appropriateness of this trend from the perspective of taxpayers' rights in their 2015 general report on taxpayer rights, *see* s. 9.2 and 9.3.

19 *See* s. 2.1.1.2.1.

out tax provisions. Similarly, many Chilean treaties use the terms '*relevant*', '*information that foreseeably may be of interest*', or, most commonly, '*necessary*' for carrying out tax provisions. The Commentary on article 26(1) of the OECD Model provides however that the change from '*necessary*' to '*foreseeably relevant*' made in 2005 was not intended to alter the substance of the provision, but instead was merely aimed at removing doubts as to its proper interpretation.[20] Furthermore, countries are said to be allowed to agree on an alternative formulation of the standard of foreseeable relevance (*e.g.* by using the terms '*necessary*' or '*relevant*'), as long as it is consistent with the scope of the article and provides for effective EOI.[21] However, under the terms of reference for peer review under the Global Forum, the only standard on which countries are tested is whether a country allows for exchange of information that is '*foreseeably relevant*', which arguably is a higher standard than exchange of information that is 'necessary', notwithstanding the observations in the OECD Commentary to the contrary.

Some branches also report on diverging treaty practice regarding article 26(2) of the OECD Model. For example, a number of Canadian, Australian, German and Argentinian tax treaties do not contain the language of 26(2) of the OECD Model authorising the use of information received via EOI for purposes other than tax when such information may be used for such other purposes under the laws of both treaty states and the competent authority of the supplying state authorises such use.

A number of branch reports refer to the inclusion of specific conditions and requirements for EOI under article 26. For example, Argentinian treaties contain a paragraph providing that if a state makes a request for information, the other state must comply with such a requirement, even though the state that received the request has no tax-related interest in the piece of information. The Argentina-Bolivia Tax Treaty, is based on the (terminated) Andean Pact/Andean Community Treaty, providing that: (i) the purpose of information exchange is to prevent fraud and tax evasion, (ii) information received will be secret, and (iii) the competent authorities may communicate directly.

Several tax treaties omit article 26(5) of the OECD Model providing for a treaty limitation to domestic banking secrecy laws. In a number of (old) Canadian tax treaties, article 26(5) is lacking. It is reported that Chinese Taipei has recently concluded 32 tax treaties for the purpose of implementing treaty-related BEPS measures. Twelve of these new treaties fully incorporate article 26 of the OECD Model. The remaining 20 treaties do not contain certain provisions of article 26, such as the domestic bank secrecy limitation and the client-attorney privilege rule. Most Russian and Turkish tax treaties omit articles 26(4) and (5) of the OECD Model.

Obviously, many of the deviations from article 26 of the OECD Model are explained by the fact that the deviating tax treaties have been signed before the amendments of the OECD Model in 2005 and beyond. It is reported that some countries have been able to circumvent these limitations by resorting to a form of extensively dynamic interpretation of the treaty provision. For example, in the Argentinian tax treaties where article 26 lacks the domestic bank secrecy limitation and the client-attorney privilege, it is well known that the tax administration might nevertheless interpret the clause so as to understand that a broad EOI must apply. Likewise, in Chile, it is reported that even though the exact text of article 26(5) of the OECD Model is not included in the tax treaties, bank information will be exchanged

20 OECD Model (2007), Commentary on art. 26, para. 4.1.

21 OECD Model (2007), Commentary on art. 26, para. 5.3.

by the country, despite any rules preventing it under domestic law.[22] This is illustrative of the countries' willingness to adhere to the international EOIR standard, even if it might entail a violation of domestic law and/or the treaty in question, when interpreted literally. From a theoretical perspective, amending the deviating treaties seems the only justified approach. It is reported in this regard that countries like Finland and Portugal are currently renegotiating old treaties that entered into force before 2005 to include an updated version of the EOI provision, with priority being given to treaties lacking the bank secrecy provision of article 26(5) of the OECD Model.

1.1.1.2. TIEAs

Tax information exchange agreements (TIEAs) modelled after the OECD Model Agreement on Exchange of Information in Tax Matters (Model TIEA) are a second authoritative source on which the global EOIR standard is based.[23] The Model TIEA that was developed in 2002 grew out of the OECD's work to address harmful tax practices. In its seminal 1998 report on harmful tax competition, the OECD identified "the lack of effective exchange of information" as one of the key criteria in pinpointing harmful tax practices.[24] The Model TIEA – which predates the 2005 update of article 26 of the OECD Model – laid the groundwork for the EOIR standard, and included the foreseeable relevance threshold for requested information and streamlined the grounds for declining information requests, request formatting and confidentiality.

A Model Protocol to the TIEA was adopted by the OECD in June 2015 in case jurisdictions want to extend the scope of their existing TIEAs to also cover SEOI and AEOI. Jurisdictions opting to conclude an amending protocol inspired by the OECD Model Protocol are able to exchange information under the amended TIEA automatically, in accordance with the Common Reporting Standard (CRS), or exchange Country-by-Country Reports on a TIEA on an automatic basis. It is said that this is particularly relevant for those jurisdictions that are not (yet) capable of automatically exchanging information under a relevant Multilateral Competent Authority Agreement (MCAA).[25]

TIEAs were essentially used by states to engage in an EOI relationship with non-cooperative jurisdictions. Often, countries perceive that there are not sufficient compelling reasons to enter into a comprehensive tax treaty with those jurisdictions (e.g., there is not significant cross-border investment or the other country does not impose tax) but it remains desirable to have an information exchange relationship. Unlike comprehensive bilateral tax treaties, which cover a wide variety of tax matters, TIEAs deal only with information exchange.

The OECD reported in 2016 that the Model TIEA had been used as the basis for the

[22] Chilean domestic General Banking Law distinguishes between bank secrecy and bank confidentiality. Information covered under bank secrecy includes information regarding deposits and placements made at the bank and also bank account movements of the requested account holder, whereas bank confidentiality concerns all other operations which are not covered under bank secrecy.

[23] OECD (2002), Agreement on Exchange of Information on Tax Matters (Model TIEA), available at: https://www.oecd.org/tax/exchange-of-tax-information/2082215.pdf.

[24] OECD (1998), Harmful Tax Competition - An Emerging Global Issue, 19 May 1998, available at: https://doi.org/10.1787/9789264162945-en, at p. 29.

[25] OECD, *Tax Information Exchange Agreements*, available at: https://www.oecd.org/tax/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm.

negotiation of over 1600 TIEAs.[26] It is believed that most of the TIEAs were signed between 2009 and 2013, whereas some of the reporting jurisdictions have a still-ongoing practice of expanding their TIEA network. India, for example, signed a TIEA with Samoa on 12 March 2020 and with Brunei on 28 February 2019. The United States signed a TIEA with Singapore on 13 November 2018 and with Costa Rica on 17 April 2018. It is reported that a number of countries, like New Zealand, Finland, Norway and Japan, have been amending some of their TIEAs over the last five years to include a form of AOEI, in line with the 2015 Protocol to the Model TIEA. For countries with a relatively small network of comprehensive bilateral tax treaties, TIEAs are of strategic importance, especially those agreements signed with important trading partners and countries in close geographic proximity. In this regard, in the Argentinian report, the importance of its TIEA with Peru (2014) and Uruguay (2012) – countries with which Argentina has no comprehensive tax treaty – is emphasised. The TIEA with Spain was perceived as highly relevant to bridge the gap between the termination of the old tax treaty in 2012 and the entry into force of the new Spain-Argentina Tax Treaty in 2013.

In general, few issues of divergence from the TIEA Model were highlighted by the branch reporters. One reported issue involves the taxes covered under the TIEA, something which is left open in the (bilateral version of) the Model TIEA. It is believed that most TIEAs cover taxes on income or profit, capital, taxes on net wealth, and estate, inheritance or gift taxes (as well as identical or substantially similar taxes). It has however been reported that certain Argentinian TIEAs cover all taxes levied by the country, including customs duties. Some Belgian TIEAs are said to also cover VAT and registration duties.

1.1.2. Multilateral instruments

1.1.2.1. Multilateral Convention on the Mutual Administrative Assistance in Tax Matters (MCAA)

Another important legal ground for EOI is the Convention on Mutual Administrative Assistance in Tax Matters (MCAA).[27] The MCAA was developed jointly by the OECD and the Council of Europe in 1988 and amended by Protocol in 2010. Currently, it is the most comprehensive instrument in the field of EOI: it covers EOIR and SEOI and mandates the treaty states to further agree on AEOI.[28] The standard used in all forms of EOI is that of the foreseeable relevance of the information for the administration or enforcement of domestic laws in the receiving country.[29] The information to be exchanged can relate to any person or entity, regardless of his, her or its status as resident, non-resident or national of a treaty state. Additionally, the MCAA provides for (i) simultaneous tax examinations and participation in tax examinations abroad, (ii) assistance in recovery, including measures of conservancy; and (iii) service of documents.[30]

[26] OECD (2016), *Terms of Reference to Monitor and Review Progress towards Transparency and Exchange of Information on Request for Tax Purposes*, at p. 11, available at: https://www.oecd.org/tax/transparency/about-the-global-forum/publications/terms-of-reference.pdf.

[27] OECD, Multilateral Convention on the Mutual Administrative Assistance in Tax Matters (MCAA), available at: https://www.oecd.org/tax/exchange-of-tax-information/ENG-Amended-Convention.pdf. A list of reservations to the MCAA is available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/127/declarations?desktop=false.

[28] *See* arts. 5, 6 and 7 of the MCAA.

[29] *See* art. 4 of the MCAA.

[30] *See* art. 9 and ss. II and III of the MCAA.

The MCAA is intended to have a very wide material scope. As such, it covers – in theory – all forms of compulsory payments to general government (including general consumption taxes and compulsory social security contributions) but with the sole exception of customs duties.[31] [32] The taxes to which the MCAA applies are however listed by the treaty states in an annex to the Convention.[33] Treaty states are entitled to express reservations to certain provisions of the Convention. States can reserve the right not to provide any form of assistance (which includes EOI) in relation to certain taxes, provided it has not included itself that type of tax as a tax for which it expects assistance from other treaty states. States cannot opt out of the commitment to provide assistance with regard to the assessment and recovery of other treaty states' income tax, capital gains tax and wealth tax.[34] For example, Austria reserved the right to provide assistance in relation to, *inter alia*, compulsory social security, estate, inheritance or gift taxes and taxes on immovable property, but not VAT. Besides the compulsory inclusion of income tax and corporation tax (which include capital gains tax), it only listed VAT as a tax for which it expects assistance. The Netherlands requires assistance with regard to optionally covered taxes like compulsory social security contributions, inheritance tax and VAT, whereas it opted out of providing assistance with regard to, *inter alia*, immovable property tax, excise taxes and motor vehicle taxes. It appears however that most countries have acted on the Convention drafter's intention of a widely applicable instrument, by including nearly all taxes in its scope and by not expressing any reservation against the provision of assistance in relation to specific types of taxes.[35]

The MCAA contains a provision dealing with conflicts of laws requiring that the administrative assistance possibilities under the Convention do not limit, nor are limited by, those contained in existing or future international agreements between the treaty states.[36] The purpose of this provision is to prevent more restrictive EOI provisions in other – present or future – instruments to prevail. On the other hand, less restrictive instruments providing for closer or more specific cooperation between certain treaty states are to be used instead of the provisions of the MCAA.[37]

Under impulse of the OECD, the list of countries participating in the MCAA has been expanded dramatically during the last decade. In February 2020, not less than 136 jurisdictions have signed the original (1988) or amended (2010) MCAA.[38] Not surprisingly, all of the jurisdictions reported on by the branch reporters are signatory states of the MCAA. No significant issues were reported with regard to the application of the Convention. No

[31] *See* art. 2 of the MCAA and Commentary on art. 2 of the MCAA, para. 25 et seq.

[32] Customs and all other import-export duties are covered by the International Convention on Mutual Administrative Assistance in Customs Matters, signed on 27 June 2003 under the auspices of the World Customs Organization, available at: http://www.wcoomd.org/-/media/wco/public/global/pdf/about-us/legal-instruments/conventions-and-agreements/johannesburg/internconvmutualadmineng2003.pdf?la=en.

[33] *See* art. 2(4) and Annex A of the MCAA.

[34] *See* art. 2(1) and 30(a) of the MCAA. The taxes that are immune to the reservation are listed in art. 2(1)(a) of the Convention.

[35] For an overview of reservations and declarations by the state pertaining to the MCAA, *see* the depository maintained by the Council of Europe, available at: https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/127/declarations.

[36] *See* art. 27 of the MCAA.

[37] See Commentary on art. 2 of the MCAA, paras. 266 and 267.

[38] For an overview, *see* the MCAA inventory of participating jurisdictions kept by the OECD (version of 19 February 2020), available at: https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf

issues regarding the application or interpretation of the MCAA specifically were reported by the branch reporters.

1.1.3. *Competent Authority Agreements (CAAs)*

Competent authority agreements are agreements between the duly authorised competent authorities of two or more states for the implementation of certain provisions contained in formal international agreements between the relevant states. With regard to EOI, the legal grounds for CAAs are to be found in bilateral tax treaties, TIEAs and the MCAA. The relevant provisions in those instruments are often drafted in an open-ended fashion, to the extent that the competent authorities are required to determine the procedures to put the treaty provision into effect. The legal status of CAAs depends on the domestic law of each state.

The CAAs discussed below need to be distinguished from competent authority agreements dealing with specific cases or issues of interpretation under the mutual agreement procedure (MAP) referred to in article 25 of the OECD Model, article 13(1) of the Model TIEA or in articles 24(2) and 24(5) of the MCAA.[39]

1.1.3.1. *Bilateral CAAs*

In case exchange of information is based on bilateral instruments (DTA or TIEA), the competent authorities could find it necessary to determine a standardised procedure and mechanism to implement the treaty's EOI obligations in practice. These instruments are known as bilateral CAAs. To this end, article 13(2) of the Model TIEA (2002) provides that in addition to the TIEA, competent authorities may agree on procedures regarding EOIR. Article 1 of the Model TIEA Protocol (2015) inserts new provisions into the Model TIEA according to which the competent authorities may determine procedures to be used for AEOI and SEOI.

Whereas bilateral CAAs have been instrumental for the implementation of the first automatic exchanges of information,[40] it seems that in the last decade this practice has been superseded by the multilateral instruments. As such, few examples of recent bilateral CAA practice are reported by the branches. There is one notorious exception to this observation. Given the fact that the United States has not signed the multilateral CAA on country-by-country reporting (MCAA CbCR, *see* section 1.1.3.2.2), the country had to activate its domestic CbCR regulations by signing bilateral CbCR CAAs with each of its treaty partners. Three CbCR CAA model versions have been released, respectively referring to the MCAA, the relevant DTC or TIEA as the legal ground.[41] In practice, (nearly) all of the about 40 US CbCR CAAs signed between 2017 and 2019 were based on either the DTC or on the relevant TIEA.[42]

39 *See* also art. 24(2).

40 In an introductory report on AEOI released by the OECD, it is indicated that the AEOI state of play in 2012 consisted of bilateral relationships between states. *See* OECD (2012), *Automatic Exchange of Information – What it is, how it works, benefits, what remains to be done*, available at: https://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-of-information-report.pdf.

41 The models are available at: https://www.irs.gov/businesses/international-businesses/country-by-country-reporting-guidance.

42 The only exception is the bilateral CAA signed between the United States and Croatia which refers to the MCAA as its legal ground. *See* the list kept by the IRS at: https://www.irs.gov/businesses/country-by-country-reporting-jurisdiction-status-table (last accessed: 1 April 2020).

The United States also did not sign the multilateral CAA on the Common Reporting Standard (MCAA CRS, *see* section, 1.1.3.2.1.). Instead, it (had already) adopted the Foreign Account Compliance Act (FATCA). The international implementation of FACTA through bilateral intergovernmental agreements (IGAs) based on the FATCA IGA models with pre-existing TIEA or DTC is another example of recent bilateral CAA practice in the field of EOI.

It is reported that in Chinese Taipei a similar development occurred. Because Chinese Taipei is ineligible to sign the MCAA and the CRS MCAA, it has signed bilateral CRS CAAs on the basis of its bilateral tax treaties with some of its treaty partners, such as Japan and Australia. The United Kingdom, pursuant to its International Tax Compliance (Crown Dependencies and Gibraltar) Regulations (2014), has signed bilateral CAAs with Isle of Man, Guernsey, Jersey and Gibraltar to implement a FATCA-like financial information reporting system. The CAAs refer to the relevant (amended) TIEAs as their legal basis.[43] The TIEAs also served as the legal basis for the United Kingdom's bilateral CbCR CAAs signed with its Crown Dependencies in 2017.[44]

1.1.3.2. *Multilateral CAAs*

Article 6 of the MCAA requires the competent authorities of the parties to the Convention to mutually agree on the scope of the AEOI and the procedure to be complied with. This provision served as the legal basis for two multilateral Competent Authority Agreements: (i) the CRS MCAA, for the automatic exchange of financial account information according to the Common Reporting Standard; and (ii) the CbCR MCAA for the automatic exchange of country-by-country reports presented by the parent entities of multinational groups in their jurisdictions. Both instruments were developed under the auspices of the OECD and the G20.

1.1.3.2.1. *The Common Reporting Standard (CRS) MCAA*

The Common Reporting Standard (CRS) was developed by the OECD pursuant to a mandate received from the G20 leaders in September 2013. Early 2014, the OECD released a Model Competent Authority Agreement and the Common Reporting Standard (together referred to as 'the AEOI Standard').[45] The Standard was endorsed by the G20 in February 2014. The Model CAA served as the basis for the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Information (CRS MCAA)[46] which was signed by 61

[43] *See*, for example, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Jersey to Improve International Tax Compliance, signed on 22 October 2013, available at: https://www.gov.je/SiteCollectionDocuments/Tax%20and%20your%20money/LD%20UKJerseyIGA%2020131108.pdf (last accessed: 1 April 2020).

[44] *See*, for example, the Agreement between the Competent Authorities of the United Kingdom of Great Britain and Northern Ireland and Jersey on the Exchange of Country-By-Country Reports, signed on 19 December 2017, available at: https://www.gov.je/SiteCollectionDocuments/Tax%20and%20your%20money/Jersey%20UK%20agreement.pdf.

[45] OECD, Standard for Automatic Exchange of Financial Account Information in Tax Matters (Second Edition), 27 March 2017, available at https://doi.org/10.1787/9789264267992-en.

[46] OECD, Multilateral Competent Authority Agreement on Automatic Exchange of Information, available at: https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/multilateral-competent-authority-agreement.pdf.

jurisdictions on 29 October 2014. By the end of 2019, the number of signatories had risen to 109.[47]

The CRS MCAA is based on article 6 of the MCAA[48] and implements the Common Reporting Standard which is defined in the instrument as "the standard for automatic exchange of financial account information in tax matters (which includes the Commentaries), developed by the OECD, with G20 countries."[49] Under the CRS MCAA, competent authorities will annually exchange on an automatic basis information on persons that are reportable persons in another jurisdiction with respect to each reportable account.[50] The information includes the details of the account holder, the account number, the details of the reporting institution, the account balance or value and the amount of interest paid.[51]

The CRS MCAA essentially applies in a bilateral fashion. A notification process requires each signatory state to notify a coordinating body that it has the laws in place to implement 'the Standard' and whether it wishes to enter reciprocal or non-reciprocal exchange relationships. Signatories also have to submit a list of jurisdictions with which it intends to exchange information. Where two signatories both specify the other in their list of intended exchange partners, the MCAA will then come into effect between those two signatories.[52] If a signatory allows non-reciprocal exchange relationships, it will exchange information with other signatories, even if the latter have not designated the latter as a recipient signatory.

In practice, nearly all signatory states entertain more incoming than outgoing flows of information. For instance, Japan activated bilateral CRS AEOI relationships with 98 states from which it will receive information, whereas it sends information to 69 states. Out of these 98 sending states, 29 states are non-reciprocal signatories from which Japan unilaterally receives information without reciprocating the effort. Examples of such states are Antigua, Ghana and Qatar. Spain receives information from 100 states and sends information to 72 states. Turkey receives information from 73 states and sends information to 55 states.[53]

Except for the United States, all reporting jurisdictions reported signing the CRS MCAA. No specific issues regarding its application were reported. The implementation of the CRS in the Global Forum member states, through the MCAA or similar instrument modelled after the Model CAA, is currently monitored and reviewed under the Global Forum's peer review process.[54]

47 OECD, Signatories of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (status as of 24 December 2019), available at: http://www.oecd.org/tax/exchange-of-tax-information/crs-mcaa-signatories.pdf (last accessed: 1 April 2020).

48 *See* Preamble to the CRS MCAA.

49 *See* CRS MCAA, s. 1, para. 1(f).

50 *See* CRS MCAA, s. 2, para. 1.1.

51 *See* CRS MCAA, s. 2, para. 2.

52 *See* CRS MCAA, s. 7.

53 Information based on the OECD's depository of 'Activated Exchange Relationships for CRS Information' (Last updated: February 2020), available at: https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/exchange-relationships/ (last accessed: 1 April 2020). The numbers in the depository also takes into account bilateral financial account AEOI relationships based on other legal instruments besides the MCAAs, like bilateral CAAs or EU law instruments.

54 For the terms of reference of the peer review, *see* OECD (2018), *The Framework for the full AEOI reviews: the Terms of Reference*, available at: https://www.oecd.org/tax/transparency/AEOI-terms-of-reference.pdf (last accessed: 1 April 2020). For an overview of the implementation of the AEOI Standard, *see* OECD (2019), *The 2019 AEOI Implementation Report*, available at: http://www.oecd.org/tax/transparency/AEOI-implementation-report-2019.pdf (last accessed: 1 April 2020).

1.1.3.2.2. The Country-by-Country Reporting (CbCR) MCAA

1.1.3.2.2.1. Legal framework

Under the BEPS Action 13, the automatic exchange of annual Country-by-Country (CbC) reports was identified as a key step to increase international transparency on the global allocation of income, taxes paid and location of economic activity among the jurisdictions in which MNE groups operate. The exchange of CbC reports is said to allow the assessment of transfer pricing risks and other BEPS risks.

A three-tiered standardised approach to transfer pricing documentation was therefore developed. Under the new standardised three-tiered approach, MNE groups are, first of all, required to prepare a 'master file' that is available to all relevant tax administrations and in which the MNE provides information regarding its global business operations and transfer pricing policies. Second, a specific 'local file' with detailed transactional transfer pricing documentation needs to be provided to each country where the MNE is active. Third, a large MNE is required to file an annual CbC report with per country information regarding the amount of revenue, profit before tax and income tax paid, the number of employees, stated capital, retained earnings and tangible assets. The MNE is also required to identify each entity within the group doing business in a particular jurisdiction and to provide an indication of the business activities each entity engages in.[55]

For the purpose of implementing the three-tiered CbCR approach established under BEPS Action 13, countries participating in the OECD/G20 BEPS project developed an implementation package for government-to-government exchange of CbC reports. The package consists of model legislation to be adopted in the jurisdiction of the 'ultimate parent entity' of an MNE group and which lays down the obligation for the latter to annually file a CbC report.[56] MNE groups within the scope of the CbCR reporting are those groups having total consolidated group revenue of at least EUR 750 million.[57] For the purpose of implementing arrangements for AEOI of the CbC reports, bilateral and multilateral CAA models were developed which have as their legal basis double tax treaties, TIEAS or the MCAA.[58] [59]

Like the CRS MCAA (*see* section 1.1.3.2.1), the CbCR MCAA applies in a bilateral fashion. A notification process requires each signatory state to notify a coordinating body that it has the laws in place requiring the filing of the CbC reports and whether it wishes to be included in the list of non-reciprocal jurisdictions. Signatories also have to provide a list with jurisdictions with respect to which it intends to have the CbCR MCAA have effect or a declaration to have it

[55] *See* OECD (2015), Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, available at: http://dx.doi.org/10.1787/9789264241480-en (last accessed: 1 April 2020), at p. 14 ('*A three-tiered approach to transfer pricing documentation*').

[56] *See* OECD (2015), Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, available at: http://dx.doi.org/10.1787/9789264241480-en (last accessed: 1 April 2020), Annex IV to Chapter V: Model Legislation at p. 39. For the definition of 'ultimate parent entity', *see* art. 1(6). For the CbCR filing obligation and the scope of the report, at art. 2 and 4.

[57] Id., at art. 1(3).

[58] *See* OECD (2015), Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, available at: http://dx.doi.org/10.1787/9789264241480-en (last accessed: 1 April 2020), Annex IV to Chapter V: Multilateral CAA on the Exchange of CbCR at p. 45; CAA on the Exchange of CbCR on the basis of a Double Tax Convention at p. 59; and CAA on the Exchange of CbCR on the basis of a TIEA, at p. 65.

[59] For examples of bilateral CbCR CAA practice, *see* s. 1.1.3.1.

in effect with all other jurisdictions that provided a notification to apply the instrument.[60] As such, merely being a signatory state to the CbCR MCAA does not in itself guarantee automatic access to CbC reports.

In the recipient states, there is no prohibition on using the CbC report data as a basis for making further enquiries into the MNE group's transfer pricing arrangements or into other tax matters in the course of a tax audit and, as a result, appropriate adjustments to the taxable income of a constituent entity may be made. In case an adjustment of the taxable income results from further enquiries, the competent authorities of the jurisdictions in which the affected constituent entities are resident shall consult each other and discuss with the aim of resolving the case.[61]

The CbCR MCAA was signed by the first group of countries on 27 January 2016.[62] As of January 2020, the CbCR CAA has 84 signatories. Except for the United States and Turkey, all reporting jurisdictions have signed the instrument. The OECD reports that over 2400 bilateral exchange relationships have been activated, which includes the relationships based on bilateral CbCR CAA and EU Directive 2016/881/EU (*see* section 2.1). However, based on the country reports and the data in the depository of signatory notifications, it is clear that the effective coverage of the CbCR system is far from global. Of the 84 signatory states, only about 60 states currently receive CbC reports from one or more treaty partners. Of these states, only three countries – Mauritius, Seychelles and South Africa – are located in Africa (which comprises 54 countries) and only three countries – Argentina, Brazil and Uruguay – are located in South America (which comprises 14 countries). Most countries receiving reports have between 40 to 70 activated relationships under CbCR MCAA.

1.1.3.2.2.2. Domestic implementation

The BEPS Action 13 Report recommended that countries have domestic CbCR legislation in place establishing CbC reporting as of the fiscal periods commencing on or from 1 January 2016. At the same time, it was recognised that some jurisdictions would not be able to meet this deadline, which would give rise to transition issues. To solve this issue, the OECD suggests for these countries to allow voluntary filing of CbC reports for ultimate parent entities resident in their jurisdiction. This practice is referred to as 'parent surrogate filing'. When surrogate filing is available, there are no local filing obligations for the MNE in any jurisdiction with constituent entities of the MNE group and which otherwise thus would require local filing.[63]

According to the country reports, Argentina, Australia, Denmark, Japan, Republic of Korea, Lichtenstein, Mexico, Poland, South Africa, and the Netherlands currently admit parent surrogate filing. Australia might exempt an MNE group from filing a local report, if the report provided by the ultimate parent entity of the MNE group is obtainable via EOI. Most countries have however enacted local legislation to comply with the CbCR regime. This legislation will typically contemplate definitions and concepts and inform the taxpayer how the information is to be reported in each field. The CbCR MCAA requires that countries demonstrate that their national laws ensure the "*appropriate use*" of the information in the

[60] CbCR MCAA, s. 8.

[61] S. 6 CbCR MCAA.

[62] OECD, Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbCR MCAA), 27 January 2016, available at: https://www.oecd.org/tax/exchange-of-tax-information/cbc-mcaa.pdf.

[63] *See* OECD (2019), Guidance on the Implementation of Country-by-Country Reporting – BEPS Action 13 (Updated December 2019), available at: www.oecd.org/tax/guidance-on-the-implementation-of-country-by-country-reporting-beps-action13.pdf, at p. 27.

CbC reports, as well as other additional requirements with regard to receiving and using CbC reports.[64] In practice, this meant that many countries had to update their national laws and pass new legislation so that they may access CbC reports.

For example, Belgium is one of the few countries that are said to have published on the government's website a BEPS Guidance on Implementation of CbC reporting. Extensive country-tailored CbCR guidance has also been released in countries like Japan, the Republic of Korea, Mauritius, Mexico, South Africa, the Netherlands and Uruguay. In countries like Denmark, Liechtenstein, Sweden and New Zealand, the national guidance is said to heavily draw on the OECD guidance, which is often perceived as a shortcut to compensate for the lack of tailormade guidelines. Practical CbCR compliance aids like dedicated e-mail addresses and telephone hotlines have been made available in Belgium, Japan, Mauritius, the Netherlands, and Uruguay.

Belgium, Liechtenstein, Mauritius, Mexico, New Zealand, Sweden and the Republic of Korea are some of the reporting countries that have had an open consultation with the industry prior to the introduction of CbCR legislation. Most countries, however, did not have a consultation and this has been described as a missed opportunity to prevent the subsequent need for additional clarification once the legislation had been adopted.

In the Belgian and the UK report, mention is made of an increase in administrative burden and compliance costs of doing business following the implementation of CbCR. Canada is the only country that has reported to have implemented (though not yet applied) penalty provisions for CbC reporting for non-filing or inaccurate or incomplete filing.

It is reported that in Denmark, the incoming CbCR data are transferred to and stored in a 'data warehouse' pertaining to the Danish tax authorities. It allows the latter to make data searches and to issue extracts and specific reports of the CbC data in the warehouse. The transfer pricing risk assessment team of the Danish tax authorities produces standard reports based on the CbCR data, which enables the team to make transfer pricing risk assessments of specific MNEs. The data is also used to make macro-level risk assessments on a cross-sector basis.

However, in most countries, it appears that the information collected via the CbCR reports is not made available for consultation by governments, members of parliament, taxpayers and other identified interested parties. The United States IRS is the only country known to have published aggregated CbCR data in 2019. Although there is indication that some states will follow this move, the use of CbCR data beyond specific tax assessment purposes is currently uncommon. Allowing wider government access to the data obtained via CbCR is important to allow a country to make an informed decision as to whether it should modify its existing tax policy. This is particularly true for developing countries, many of whom have limited access to CbC reports and are therefore unable to make evidence-based policy decisions.

The question currently at hand is therefore whether there should be public disclosure of CbC reports. Most of the country reports did not raise that as an option, since most countries do not currently publish data. Finland was one of the few countries reporting to have had a positive experience with the publishing of company reports on a voluntary basis. Accordingly, Finnish state-owned companies have published their tax footprint in line with the guidelines of the Ownership Steering Department of the Prime Minister's Office, and some private companies have chosen to also do so to better their public image.

If countries were to have public disclosure of CbCR information, all tax administrations

[64] *See* s. 5 and 8(1) of the CbCR MCAA.

could immediately access the reports and act on them. Furthermore, public disclosure would help countries, international organisations, research institutions and civil societies have a clear understanding of the weaknesses of the existing system, and also assist stakeholders in assessing the efficiency and effectiveness of the current system as it stands. For instance, public CbCR disclosure of digital enterprises would, for instance, assist in developing adequate formula-based income allocation rules under the Pillar 1 proposals, undertaken to tackle some of the challenges of the digitalisation of the economy.[65]

The BEPS Action 13 report also included a mandate for a review of the CbC reporting minimum standard, to be completed by the end of 2020.[66] The outcomes of the second annual peer review were released in September 2019.[67] Additionally, the OECD launched a public consultation process on, among other things, possible modifications of the CbC report content, appropriateness of the revenue threshold, effectiveness of filing mechanisms and the implementation of the CbCR MCAA.[68]

1.2. Other international measures related to EOI

1.2.1. *Exchange of tax rulings and APAs under BEPS Action 5 ('Harmful Tax Practices')*

BEPS Action 5 on Harmful Tax Practices introduced a minimum standard which included a process for reviewing preferential tax regimes and a 'transparency framework' for tax rulings. The Action 5 Report identified six types of rulings which should be covered by the ruling 'transparency framework': (i) rulings relating to preferential regimes; (ii) unilateral advance pricing agreements (APAs) or other cross-border unilateral rulings in respect of transfer pricing; (iii) cross-border rulings providing for a downward adjustment of taxable profits; (iv) permanent establishment (PE) rulings; (v) related party conduit rulings; and (vi) any other type of ruling agreed by the Forum on Harmful Tax Practices (FHTP).[69] The minimum standard for the transparency framework is assessed and monitored through the peer review process.[70]

Some branch reports have included statistical information regarding the exchange of tax

[65] See in this respect, *Joint response to OECD public consultation document on the review of Country-by-Country Reporting (BEPS Action 13)*, March 2020.

[66] OECD (2017), *BEPS Action 13 on Country-by-Country Reporting – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, available at: https://www.oecd.org/tax/beps/beps-action-13-on-country-by-country-reporting-peer-review-documents.pdf (last accessed: 1 April 2020).

[67] A compilation of CbCR peer review reports (phase 1) is available at: https://www.oecd-ilibrary.org/docserver/9789264300057-en.pdf?expires=1587192046&id=id&accname=guest&checksum=DF84057EBA29BF17BB693E1B952BAC06 (last accessed: 1 April 2020).

[68] OECD (2020), Public consultation document: Review of Country-by-Country Reporting (BEPS Action 13), 6 February 2020, available at: https://www.oecd.org/tax/beps/public-consultation-document-review-country-by-country-reporting-beps-action-13-march-2020.pdf (last accessed: 1 April 2020).

[69] OECD (2015), Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, available at: http://dx.doi.org/10.1787/9789264241190-en.

[70] For the terms of reference for the conduct of the peer reviews of the Action 5 transparency framework, *see*: OECD (2017), BEPS Action 5 on Harmful Tax Practices – Terms of Reference and Methodology for the Conduct of the Peer Reviews of the Action 5 Transparency Framework, OECD/G20 Base Erosion and Profit Shifting Project,available at: http://www.oecd.org/tax/beps/beps-action-5-harmful-tax-practices-peer-review-transparency-framework.pdf (last accessed: 1 April 2020). A compilation of the 2018 peer review reports is available at: , https://doi.org/10.1787/7cc5b1a2-en (last accessed: 1 April 2020).

rulings in recent years. Most reports point to an upward trend in the exchange of tax rulings, showing that this type of EOI is on the rise. The exceptions are Nigeria and Uruguay, which have as of yet not exchanged any tax rulings, nor introduced any domestic legislation to allow such exchange. Chile has also not implemented BEPS Action 5, although the branch report contends that the country has not done so because it simply does not issue private rulings. According to the report, all rulings issued by the Chilean tax authorities are public and published on the official webpage, thus they are accessible to all and do not need to be formally exchanged.

1.2.2. *Exchange of information regarding aggressive tax-planning schemes under BEPS Action 12 ('Mandatory Disclosure Rules')*

BEPS Action 12 provides recommendations for the design of rules to require taxpayers and advisors to disclose aggressive tax-planning arrangements.[71] The Action 12 Report also contains specific recommendations for the enhancing of information sharing. The report refers in this regard to the expanded Joint International Tax Shelter Information and Collaboration (JITSIC) Network of the OECD Forum on Tax Administration (FTA) which is said to provide an international platform for enhanced cooperation and collaboration between tax administrations, based on existing legal instruments (further information about JITSIC is available in the addendum). This could include cooperation on information obtained by participating countries under mandatory disclosure regimes.[72] [73]

Unlike 'minimum standards', 'recommendations' like the ones formulated under Action 12 are not monitored through a peer review process nor do they result in the adoption of any binding legal instruments.[74] Most of the reported jurisdictions are members of JITSIC, with the exception of Argentina, Brazil, Czech Republic, Nigeria and Uruguay. It is however unclear whether JITSIC members proceed to a systematic exchange of aggressive tax-planning arrangements that have been identified by member countries in line with the recommendations of the Action 12 Report. The branch reports seem to indicate that JITSIC operates on an *ad hoc* basis. For instance, Austria and Italy reportedly were very active in the JITSIC *Panama Papers* working group, set up in the aftermath of the *Panama Papers* affair. Greece is said to be participating in the JITSIC *High Net Worth Individuals (HNWIs)* working group and the *Residency* working group, dealing with issues regarding the taxation of HNWIs and their transfers of tax residency.

1.2.3. *Exchange of beneficial ownership information*

Beneficial ownership information is a crucial component of the AEOI standard. Under the CRS, committed jurisdictions are required to identify account holders and controlling

[71] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, available at: http://dx.doi.org/10.1787/9789264241442-en

[72] OECD (2015), Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, available at: http://dx.doi.org/10.1787/9789264241442-en (last accessed: 1 April 2020).

[73] For more information on JITSIC, *see*: https://www.oecd.org/tax/forum-on-tax-administration/jitsic/ (last accessed: 1 April 2020).

[74] The recommendations under Action 12 did however lay the foundation for the adoption of EU Directive 2018/822 (DAC 6). See s. 2.1.1 and addendum, s. 2.1.6.5.

persons. If an entity account holder is a so-called passive non-financial entity (NFE), then the reporting financial institution must look-through the entity to identify its controlling persons. A similar treatment applies to certain trusts that are investment entities. Furthermore, in 2015 the Global Forum took steps to enhance its EOIR standard by including the availability in the requested state of beneficial ownership information.[75] The EOIR standard requires jurisdictions to have beneficial ownership information available and accessible for legal persons, legal arrangements and bank accounts. As a result, jurisdictions should demonstrate that reporting financial institutions correctly identify and report their offshore account holders, and where relevant their beneficial owners, by conducting the due diligence and reporting procedures contained in the standard.[76]

The impetus of the Global Forum to increase the coverage of beneficial ownership information in its EOI standards comes from the work undertaken by the Financial Action Task Force (FATF), an independent intergovernmental body that develops policies to protect the global financial system against money laundering and terrorist financing. Under the FATF recommendations, beneficial owner identification in due diligence procedures (recommendation nr. 10) and transparency and beneficial ownership of legal personas (recommendation nr. 24) are key-elements of the FATF's global anti-money laundering (AML) and counter-terrorist financing (CFT) standard.[77]

It is clear that the purpose of the FATF beneficial ownership standards developed (*i.e.* combating money laundering) are different from the purpose of beneficial ownership information in the Global Forum's EOI standards (*i.e.* ensuring effective exchange of information). Furthermore, the FATF's use of a comprehensive, principles-based approach to beneficial ownership goes well beyond the strictly defined concept of the same concept under the EOI standard. The OECD warns that while the definition of beneficial ownership under the EOIR standards has been adopted in whole from the FATF standards, in applying the FATF, care should be taken that such application and interpretation do not go beyond what is appropriate for the purposes of ensuring effective EOI for tax purposes.[78]

The OECD/Global Forum currently does not provide specific methods or instruments to implement the current beneficial ownership standard. As to the country practice in this regard, the national experiences are varied. One the one hand, the OECD reports that many jurisdictions are still not compliant with the EOIR standard on beneficial ownership, with many recommendations to countries focusing on flaws in countries' legal framework and deficiencies in supervision to ensure the availability of beneficial ownership in practice (*i.e.* to ensure the natural person behind a legal entity or arrangement is disclosed). For example, the United States was classified as partially compliant with respect to availability of beneficial ownership and identity information.

On the other hand, some countries have taken the initiative and created beneficial owner

[75] OECD (2016), *2016 Terms of reference to monitor and review progress towards transparency and exchange of information on request for tax purposes*, available at: https://www.oecd.org/tax/transparency/about-the-global-forum/publications/terms-of-reference.pdf , at para. 12 (term of reference A.1.4.).

[76] OECD, Transparency and Exchange of Information for Tax Purposes Multilateral Co-operation Changing the World" Global Forum on Transparency and Exchange of Information for Tax Purposes, 10th Anniversary Report, November 2019, available at: https://www.oecd.org/tax/transparency/global-forum-10-years-report.pdf.

[77] *See*: FATF (2019), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (updated June 2019), available at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf.

[78] *See*: OECD (2019), *A Beneficial Ownership Implementation Toolkit*, available at: https://www.oecd.org/tax/transparency/beneficial-ownership-toolkit.pdf.

registries, whether for legal persons, for trusts or for both. The registry stores information about the beneficial owner, such as name, nationality, date and place of birth, country of residence, address, identification number as well as the nature and amount of interest. On 20 May 2015, the EU approved the Fourth Anti-Money Laundering Directive, which requires member states to ensure that the beneficial ownership of legal persons and certain trusts be are registered with the authorities.[79] On 19 April 2018, the EU approved changes in the Fifth Anti-Money Laundering Directive, which requires that beneficial registries for companies and legal persons be publicly accessible and thus accessible by competent authorities for tax purposes.[80] Besides the EU member states, Uruguay reportedly also has created a beneficial ownership registry, although it is not open to the public.

It is debatable how effective beneficial ownership registries can be if they are not public and/or if foreign competent authorities do not have access to them and cannot identify the beneficial owners that are resident in their jurisdiction. The lack of a universal tax identification number on a regional basis (*e.g.* in the EU) or across member states of the Global Forum is an additional complicating factor which makes it more difficult to trace information back to one and the same beneficial owner for EOI purposes.

1.3. United Nations Code of Conduct on Cooperation in Combating International Tax Evasion

The United Nations Code of Conduct on Cooperation in Combating International Tax Evasion (UN Code of Conduct) was proposed by the UN Committee of Experts on International Cooperation in Tax Matters during its Twelfth Session at the end of 2016. Whereas a prior proposal which had been submitted in 2009 and which endorsed the OECD/Global Forum's EOIR standard had not been adopted by ECOSOC, the 2016 version endorses the AEOI standard. The UN Economic and Social Council (ECOSOC) adopted the Code of Conduct on 20 April 2017. In the Code of Conduct, the UN urges its member states to effectively exchange information in both criminal and civil tax matters and to endorse the G20/Global Forum's work on the AEOI standard. As the most internationally represented intergovernmental organisation with a membership that outnumbers the Global Forum, it encourages all countries that have not already done so to sign the MCAA and to take any other unilateral and bilateral or multilateral measures required to implement AEOI. [81] [82]

Argentina and the Czech Republic are the only countries to have reported having assumed obligations under the UN Code of Conduct.

[79] EU (2015), Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L 141, 5 June 2015, p. 73–117, available at: http://data.europa.eu/eli/dir/2015/849/oj.

[80] EU (2018), Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L 156, 19 June 2018, p. 43–74, available at: http://data.europa.eu/eli/dir/2018/843/oj.

[81] United Nations, E/C.18/2016/CRP.9.

[82] United Nations, Report on the twelfth and thirteenth sessions (11-14 October 2016 and 5-8 December 2016), E/C.18/2016/7, available at: https://www.un.org/ga/search/view_doc.asp?symbol=E/2016/45.

1.4. Tax administration cross-border initiatives on EOI

Besides the traditional international EOI frameworks discussed in the previous sections, countries have also come together to commit to EOI within smaller country groupings. These are regional group-centred initiatives that might not be as streamlined as the OECD led programmes, but that might nevertheless contribute to an environment of greater coordination and cooperation in EOI, ultimately leading to greater transparency within a smaller region, or amongst countries sharing a common linguistic, ethnic or economic background.

The branch reporters highlighted the following initiatives in the field of EOI: (i) OECD Forum on Tax Administration; [83] (iii) The International Compliance Assurance Programme (ICAP);[84] (iii) Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC); [85] (iv) Joint Chiefs of Global Tax Enforcement (J5); (v) Inter-American Centre of Tax Administrations (CIAT)[86]; (vi) Centre de Recontondre et d'Etude des Dirigeants des Administration Fiscales (CREDAF);[87] (vii) Nordic Tax Information Exchange Agreement project; (viii) Nordic Mutual Assistance Treaty; [88] (ix) Egmont Group, a network of Financial Intelligence Units (FIUs);[89] and (x) Agreement on Assistance in Tax Matters of the Southern African Development Community (SADC Agreement).[90]

More information about these initiatives is provided in the addendum covering regional approaches to EOI.

1.5. Translating EOI into increased revenue collection ability

According to the OECD annual report, only about 20% of the Global Forum members systematically track additional tax revenues collected with the involvement of EOIR. Even fewer countries, an approximate estimate of only 10%, have put in place systems that would allow monitoring the revenues generated from AEOI. As a result, it is difficult to accurately estimate the revenue gains deriving from increased tax transparency.

In spite of that, the OECD estimates that EOIR has enabled the recovery of nearly EUR 7.5 billion of additional tax revenue.

Australia for example reported to the Global Forum that EOI helped it collect additional revenue in the amount equivalent to approximately EUR 130 million in the 2016-17 financial year. Furthermore, Australia releases an annual report on EOI statistics. Other countries claiming to have increased revenue collection ability include Czech Republic, Israel, Portugal, Russia, South Africa, Sweden, and Switzerland, although the data does not include costs

[83] https://www.oecd.org/tax/forum-on-tax-administration/.

[84] Forum on Tax Administration, OECD International Compliance Assurance Programme (ICAP), available at: https://www.oecd.org/tax/forum-on-tax-administration/international-compliance-assurance-programme.htm

[85] Forum on Tax Administration: Joint International Taskforce on Shared Intelligence and Collaboration, OECD, https://www.oecd.org/tax/forum-on-tax-administration/jitsic/.

[86] CIAT, Model Agreement on Information Exchange uses exchange of information, available at: https://www.ciat.org/Biblioteca/DocumentosTecnicos/Ingles/1999_model_agreement_tax_information_ciat.pdf.

[87] https://credaf.org/en/member-countries/.

[88] The Nordic Mutual Assistance Convention was concluded on 7 December 1989.

[89] Edmont Group, available at: https://egmontgroup.org/content/about.

[90] https://www.sadc.int/themes/economic-development/investment/tax-coordination/.

associated with the implementation of EOI networks and does not tend to be scientifically validated.

In the US and Uruguay on the other hand, the country reporters were unaware of the impact of EOI on the country's revenue collection. Likewise, Argentina, Denmark and Spain have no statistics regarding increase in revenue attributable to EOI and/or BEPS measures. None of the countries reported having data concerning the reduction of tax-related crimes such as tax evasion, illicit financial flows and money laundering.

The reporters from Argentina, Sweden and Uruguay believe, however, that the implementation of the EOI frameworks have contributed to an environment of greater tax and legal certainty and transparency.

For example, in Argentina, the implementation of the AEOI network together with the enactment of a tax amnesty program in 2016 led to the discovery of significant revenues and assets that had been kept abroad. As of March 2017, Argentinian taxpayers declared USD 116.8 billion in previously undisclosed assets and paid USD 9.6 billion in taxes and fees. According to the Argentine Ministry of Finance, total declared assets that had been located outside the country were valued at USD 93.3 billion. Furthermore, individuals composed most of the taxpayers taking part in the amnesty, with entities representing only 4% of the total.

Similarly, in Chile, the administration of an amnesty program contemporaneously to the passing of the domestic provision that would incorporate the CMAA into domestic law led to a substantial increase in revenue collection ability in Chile, in the order of USD 130 million. In France it is estimated that EUR 8 billion was created as a result of the amnesty program that ran between 2014- and 2017. Other countries operating tax amnesty or voluntary disclosure programs include Israel, Italy, Norway, Peru, South Africa, Spain, and Turkey.

In Austria, information on additional tax revenues as a result of administrative cooperation is available only for joint audits. As a result of the Austrian tax administration's participation in 58 simultaneous tax examinations with other EU member states, Austria recorded additional tax revenues in the amount of EUR 119.39 million. These joint audits generated a total of EUR 1.635 billion in additional tax revenues in all participating EU member states.

Belgium has not yet collected any information on the proceeds of cross-border administrative cooperation. The Belgian tax administration refers to the figures on tax regularisation for the impact on combating tax evasion. For example, in 2017 alone, a yield of 590 million was achieved. The success of tax regularisation is largely due to the AEOI with countries with a tradition of banking secrecy.

2. Instruments and processes of regional application

2.1. EU law

At the European Union level, authorities have backed the implementation of the BEPS project through the adoption of several directives. This section will briefly discuss the scope of the directives on administrative cooperation in the field of direct taxation (DAC) known as DACs 1 through 6. More detailed information concerning the background, implementation, compliance cost and impact of these directives can be found in the addendum to this report.

2.1.1. *EU Directive 2011/16/EU concerning exchange of information under the directive on administrative cooperation in the field of direct taxation (DAC/DAC1)*

2.1.1.2. *Coverage*

Directive 2011/16/EU (DAC/DAC1) provides for exchange of information on request, spontaneous exchange in certain cases and (now clearly defined) AEOI.

DAC 1 applies to all type of taxes including indirect taxes. However, VAT, customs duties and excise duties covered by other EU legislation on administrative cooperation are explicitly excluded and remain to be governed in their own legal framework.[91]

There is a high degree of overlap between the DAC and the MCAA, in its version of the 2010 Protocol (*see* section 1.1.2.1). The MCAA has been ratified by all EU member states and some of these were bound by the Multilateral Convention before the entry into force of the DAC on 1 January 2013.

2.1.1.3. *Implementation*

EU member states have been taking different approaches with regard to the domestic implementation (or 'transposing') of the DAC. Some countries have used a single set of regulations to implement the DAC, CRS and FATCA. The UK International Tax Compliance Regulation (2015) is an example in point. Other member states, such as Belgium, have not adopted specific legislation but have added an article to their income tax codes with a literal reproduction of the directive.

Regardless of the implementation approach taken, almost all reporting EU member states refer to the challenges and potential conflicts resulting from the coexistence of the different international regimes. In principle, EU law prevails over international agreements concluded by the member states but obligations stemming from a directive need to be, in principle, transposed into national law. Article 1 of the DAC addresses the conflict of norms issue by stating that there will be no prejudice to the fulfilment of any obligations of the member states in relation to wider administrative cooperation ensuing from other legal instruments, including bilateral or multilateral agreements.

In practice, a strategy adopted by tax authorities in EU member states is to invoke every instrument available so that the most adequate norm can be applied, thus combining references to the relevant double tax treaty and the DAC.

2.1.1.4. *Compliance cost*

The country survey shows that the compliance cost of DAC 1 differed across EU member states. Differences were caused by a combination of factors. The factors include the different level of IT readiness of tax authorities at the start of DAC 1 exchanges, the varying level of sophistication of the IT systems implemented for automatic exchanges, and the adoption of different procurement methods (*e.g.* reliance on services provided by external ICT service providers or in-house expertise). In certain cases, institutional aspects (such as the involvement of subnational tax authorities) may have also played a role.

[91] Art. 2(2) of DAC 1.

2.1.1.5. *Impact*

Little information is reported by individual countries on the additional tax assessed based on EOIR and SEOI. For 2014, four member states reported on additional amount of EUR 29 million of assessed taxes based on information. For 2017, five member states reported an amount of EUR 277 million. These amounts also include additional tax assessed through simultaneous tax audits under the DAC, which is reported to be responsible for about 35% of the increase. SEOI is said to represent less than 0.5% of the incremental tax assessed. The data on which these conclusions were drawn is however incomplete.

The limited available evidence suggests that the AEOI data exchanged under DAC 1 and used by the receiving country did generate an increase in assessed taxes. The same category of information has generated proportionally different increases of assessed tax in different member states. For instance, for 2017, Slovenia reported an additional EUR 2,259 million of assessed taxes based on pension information and EUR 13 million based on immovable property income information. For the same year, Poland reported EUR 3 90 million and EUR 19 million, respectively.

2.1.1.6. *Subsequent amendments to EU Directive 2011/16/EU (DAC/DAC 1)*

The scope of the DAC has subsequently been expanded with regard to AEOI through several amendments (known as DAC 2 to DAC 6). These incremental changes to the DAC were influenced by international developments in the field of anti-avoidance and abuse and the work done at the OECD, either in the framework of BEPS or the Global Forum. Except for DAC 5, the amendments expand the scope of AEOI within the EU. The EU's recent work on EOI mirrors and solidifies to a large extent the global discussions and findings in the field. DACs 2 through 6 are further discussed in the addendum of this report. Below is a summary of the scope of each of these DACs.

DAC 2	The first amendment to the DAC, DAC 2, was adopted by the EU council in December 2014. DAC 2 is the extension of AEOI within the EU to also cover the Common Reporting Standard (CRS), developed by the OECD and endorsed by the G20 in September 2014. Like the CRS, DAC2 was, in part, a response to the adoption in the United States of the Foreign Account Tax Compliance Act (FATCA), which laid down extensive reporting requirements for foreign banks providing financial services to US citizens. Under the DAC 2 obligations, EU member states automatically exchange financial account information, as well as dividends, interests, gross proceeds and other investment income paid to that account during a year.
DAC 3	Automatic exchange of advance cross-border rulings and advance pricing arrangements (scope similar to the obligatory spontaneous exchange on rulings provided by the OECD in BEPS action 5)

DAC 4	Automatic exchange of country-by-country reports (based on the BEPS action 13 related to the OECD standard regarding country-by-country reporting for multinational enterprise groups)
DAC 6	Automatic exchange regarding cross-border tax-planning arrangements (based on the work by the OECD on BEPS action 12: "Mandatory disclosure rules")
Directive anti-tax avoidance (ATAD) 1	BEPS project inspired schemes (actions 2,3,4) relating to the deductibility of interest on loans, controlled foreign companies and hybrid situations
Directive ATAD 2	Directive completing ATAD 1 and concerning hybrid situations with non-EU member states
Directive on tax dispute resolution mechanisms in the European Union	Directive related to tax disputes settlement in the EU, in line with the BEPS standard (action 14)

2.2. US FATCA

2.2.1. Background

In response to concerns that US taxpayers were using offshore financial accounts to conceal income and assets, the US Congress enacted FATCA in March 2010.[92] FATCA generally imposes a 30% withholding tax on certain US-source payments to foreign financial institutions (FFIs) unless they agree to identify and report to the US tax authorities their US account holders. Non-financial foreign entities are subject to the 30% withholding tax unless they report their direct and indirect 10% US owners.

Before FATCA, there was no global system in place to share account information between countries, other than those available via EOI agreements. Inspired largely by FATCA, the OECD established CRS for the reporting and automatic exchange of financial account information between treaty partners. Because the United States taxes its citizens and residents on their worldwide income, FATCA looks to both citizenship and tax residence. In contrast, CRS looks to a person's tax residency. That is one of the main differences between the two and affects the personal scope of application of the norm. Legislative action by the US Congress would be necessary to implement the CRS requirements fully in the United States.

The United States does not participate in the CRS. As a result, it does not utilise the MCAA. However, the United States has agreed to exchange with FATCA partners certain financial account information pursuant to reciprocal Model 1 Intergovernmental Agreements (IGAs) (*see* below), though US domestic law does not currently require all of the reporting necessary for the United States to fully reciprocate in information exchange.

[92] FATCA is the common name used to refer to s. 501 of the Hiring Incentives to Restore Employment (HIRE) Act of 2010, P.L. 111–147, which enacted 26 U.S.C. ss. 1471-1474.

2.2.2. *Legal framework*

To ensure that foreign financial institutions comply with FATCA without violating local law, the United States entered into bilateral intergovernmental agreements (IGAs) with numerous foreign jurisdictions.[93] Two types of model IGAs were used as the starting point in the IGA negotiation process.

2.2.2.1. *FATCA Model 1 IGAs*

The Model 1 IGA requires FFIs in the FATCA partner country to report information regarding US accounts to the competent authority of the FATCA partner, which in turn provides the information to the US tax authorities. The Model 2 IGA requires FFIs in the FATCA partner jurisdiction to enter into an "FFI Agreement" with the US tax authorities in which the FFI agrees to undertake the due diligence and reporting requirements described in the US Treasury regulations.[94]

A 'reciprocal' Model 1 IGA has been adopted which states that the US government "acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange with [FATCA Partner]" and that it "is committed to further improve transparency and enhance the exchange relationship with [FATCA Partner] by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic information exchange." Some of the IGAs are drafted along the lines of this model, but the reciprocity language remains to a large extent inoperative. To fully enable reciprocal IGAs, the US congress would need to enact legislation mandating US FIs to identify reportable account holders and controlling persons and report this information to the US tax authorities.

2.2.2.2. *FATCA Model 2 IGAs*

The Model 2 IGA directs local financial institutions and branches to enter into FFI agreements and disclose reportable accounts directly to the US tax authorities. As a result, a financial institution caught by a Model 2 IGA must only accept new accounts that consent to the disclosure and the partner country agrees to lower any legal barriers to that reporting.

The local financial institutions may be required to withhold on payments to recalcitrant accountholders and non-participating FFIs. Finally, the IGA regulates the functions and obligations that the partner jurisdiction has and its interaction and collaboration duties with the US tax authorities.

Countries signing a Model 2 IGA do not have AEOI with the United States. Hence every financial institution located in the partner jurisdiction must send information from the financial accounts maintained by US taxpayers to the US tax authorities. Prior consent of the account holder is required. Absent an explicit consent from the account holder, financial institutions should only report aggregate information of US taxpayers. It is said that Model

[93] See US Treasury Department website, https://www.treasury.gov/resource-center/tax-policy/treaties/pages/fatca.aspx.

[94] For a comprehensive overview of FATCA, see U.S. Treasury Department website, https://www.treasury.gov/resource-center/tax-policy/treaties/pages/fatca.aspx.

2 IGA is therefore suitable for countries that safeguard the account holder's right to secrecy regarding financial activities.

In case the US tax authority requires more information for its tax evasion prevention objectives, it must formulate a new (group) request for information according to the instrument providing the legal basis for the EOI to take place, such as a double tax treaty or a TIEA.

2.2.3. *Implementation*

2.2.3.1. *In the United States*

FATCA imposes certain obligations on FFIs and non-financial foreign entities (NFFEs) in order to avoid US withholding tax. In addition, FATCA imposes a new reporting requirement (IRS Forms 8938, Statement of Specified Foreign Financial Assets) on US taxpayers with foreign financial assets. The information provided by the taxpayer is then matched against information received by the US taxpayers from FFIs and foreign governments.[95]

The International Data Exchange Service (IDES) is an electronic delivery system where financial institutions and host country tax authorities (HCTA) can securely transmit and exchange information pertaining to FATCA directly with the IRS. IDES also enables the United States to make reciprocal exchanges as described in the IGAs. Information received by the IRS relating to IRS Form 8966, FATCA Report, is first processed through the IDES and then through the International Compliance Management Model (ICMM).[96]

No data has been reported on the effect of FACTA on US revenue collection. As a matter of fact, the national reporters indicate they are not aware of any publicly available studies or data specifically addressing the impact of EOI on revenue collection. One can hypothesise that EOI has at least indirectly increased the country's ability to enforce its tax law by providing the US tax authorities with additional information to pursue cases and thus by serving as a deterrent to would-be tax evaders.

2.2.3.2. *In the other states*

2.2.3.2.1. *Non-FATCA states*

Of all reporting states, only Argentina, Nigeria, Russia and Uruguay have not signed a FACTA IGA.

Argentina is a party to the MCAA and thus upholds the CRS, but the US does not. EOI is (to a limited extent) possible based on the TIEA signed between the countries on 23 December 2016. It has been reported that a FACTA IGA would be welcomed in Argentina, given the importance of the US as a destination for Argentinian foreign investments. The conclusion of an IGA is said to depend solely on the political relations between the newly elected Argentine government and the current US government.

[95] *See, e.g.*, IRS Form 8966 (FATCA Report).

[96] U.S. Treasury Inspector General for Tax Administration, Despite Spending Nearly $380 Million, the Internal Revenue Service is Still Not Prepared to Enforce Compliance with the Foreign Account Tax Compliance Act, No. 2018-30-040 (5 July 2018) (hereinafter 2018 TIGTA FACTA Report).

Interestingly, Russia did not sign an IGA but this does not prevent the US from applying its FATCA legislation to Russian financial institutions. Qualifying institutions report directly to the US tax authorities. Domestic legislation was enacted in Russia to oblige these institutions to report to the Russian tax authorities that they had registered with the US tax authorities for FATCA purposes.

No details were provided regarding the policy towards FATCA in Nigeria and Uruguay.

2.2.3.2.2. Model 1 FATCA IGA states

To implement their respective IGAs, Model 1 partner states, such as Australia and Canada, adopted domestic legislation under which certain financial institutions are required to provide information to the tax authorities annually. The tax authorities then provide the information to the US tax authorities under the EOI provision of the bilateral tax treaty. This means that the local financial institutions do not deal directly with the US tax authorities, which is said to avoid problems that may arise as a result of privacy legislation.

For many states, the purpose of entering into an IGA seems to be to negotiate significant exemptions or characterisation of certain persons or products as deemed compliant and therefore not obliged to report, as these would not be available if the United States would apply FATCA unilaterally. Another purpose of the IGA is the establishment of taxpayer safeguards. Under the Canadian IGA, the Canadian tax authorities transmit information to the US tax authorities under the confidentiality safeguards of the Canada-US Tax Treaty.

A downside of the Model 1 IGA seems to be the increased compliance burden on the FATCA partner state. In Colombia the one-sided burden of carrying the costs of transmitting information under FATCA paired with the *de facto* one-sided flow of information – even if the IGA applies reciprocally – has been perceived as highly controversial.

2.2.3.2.3. Model 2 FATCA IGA states

Model 2 partner states, such as Austria and Switzerland, adopted legislation allowing domestic financial institutions to comply with the FATCA obligations, namely to enter into an FFI agreement with the US tax authorities and to request from their local account holders with US accounts the consent to report certain information to the US tax authorities. The latter then issues group requests regarding non-complying US account holders and the FATCA partner state then collects the respective data from the domestic financial institutions.

In Austria, the increasing compliance burden fulfilling the group requests and the lack of reciprocity led to the repeated request in 2015, 2016 and 2017 for the US to agree to conclude a reciprocal Model 1 IGA. No negotiations have taken place so far. The lack of reciprocity under the Model 2 IGA also triggered Switzerland to change to a reciprocal Model 1 IGA, with a mandate for renegotiation having been approved in parliament. The FATCA reporting from the US to Switzerland is however expected to be less comprehensive than the reporting from Switzerland to the US.

2.2.3.2.4. Implementation issues

Many FATCA partner states report issues of constitutionality regarding the implementation of the IGA.

In Brazil, the supreme court has held in the past that the constitutional principle of secrecy prevents the exchange of banking information. The federal government subsequently eroded this principle by legislating an exception for the implementation of FATCA and the supreme court held that the tax authorities were allowed access to financial information of a taxpayer without prior judicial authorisation.

In Canada, the constitutionality of the FATCA IGA was unsuccessfully challenged in *Deegan, G.L. et al. v. The Quee*n.[97] The federal court held that the "seizure" of account information pursuant to the Canada-US IGA is not an unreasonable search and seizure contrary to section 8 of the Canadian Charter of Rights and Freedoms (Charter). Also, the Canada-US IGA did not result in an unreasonable limitation on the right to equal treatment contrary to section 15 of the Charter. The Charter was not intended to protect the ability of individuals resident in Canada to claim immunity from the duly enacted laws of another democratic state of which they are citizens. In *Hillis*, the federal court held that Canada's implementation of FATCA reporting requirements did not violate the ITA or the Canada-US Treaty, that the provisions of the Canada-US IGA and its Canadian domestic implementing legislation prevail in the event of any inconsistency with any other law (other than Part XVIII of the ITA), and that the automatic disclosure of account holder information for US reportable accounts is legally authorised in Canada.[98] In Israel, the High Court of Justice denied a petition to strike down the FATCA implementation act. The court held that the act did violate the right to privacy but that these violations were for appropriate purposes, proportional and reasonable. Interestingly, the court also considered that refraining from implementing FATCA would have led to serious damage to the Israeli economy and to the international branding of the country as a jurisdiction that encourages tax evasion.[99]

In some reports, the limited beneficial ownership identification is flagged as undermining the practical implementation of FATCA (and CRS). For instance, in Mexico, shortcomings in the legal framework are said to imply that beneficial owners are being identified only to a limited extent. Designated financial institutions rely on customers' self-declaration and for most low -risk legal persons, financial institutions need only obtain information on corporate customers' first layer of legal ownership without establishing who ultimately owns or controls the entity.

2.2.4. *Impact*

2.2.4.1. *In the United States*

It has been reported that according to government review and oversight reports, the US tax authorities have not timely met their targeted FATCA implementation goals, including taking appropriate enforcement action or tracking its performance. Causes cited that contribute to the delay include, *inter alia*, lack of automated processes, need for development and updating of systems, guidance delays, and the lack of data to verify compliance. Another reported issue which is said to frustrate the US tax authorities' enforcement of FATCA is the widespread mismatching and lack of reporting of individual taxpayer identification numbers.

US government reports are said to also have focused on the burdens created by FATCA. A 2019 study by the Government Accountability Office (GAO) highlighted the effects of FATCA on US citizens living abroad. Recommendations were made "to enforce compliance,

[97] *Deegan, G.L. et al. v. The Queen*, 2019 FC 960.

[98] *Hillis v. Canada (AG)*, 2015 FC 1082.

[99] Petition to the High Court of Justice no. 8886/15 Republicans from Abroad in Israel v. the Israeli Government (2 January 2018).

address unnecessary reporting, and better collaborate to mitigate burdens on US persons living abroad".[100]

2.2.4.2. *In the FATCA partner states*

Few of the FATCA partner states report on the impact of FATCA. In Canada, FATCA is reported to have resulted in a sharp increase in the volume of information exchanged with the US tax authorities. As of April 2019, the Canadian tax authorities provided their US peers with information on 158,228 Canadian bank accounts for 2014, 318,345 for 2015, 632,042 for 2016, and 727,280 for 2017.

In the reverse case, it is reported that in 2018, France has received information on 55,000 reports on accounts held with US financial institutions by French tax residents. In the same year, Luxembourg received 16,945 reports on financial accounts held with US financial institutions by Luxembourg tax residents. In the same year, Luxembourg sent 29,799 reports to the United States on financial accounts held by US persons. As to the compliance cost of FATCA, it has been reported that the estimated compliance costs for banks in Luxembourg for the implementation of FATCA, ranged between EUR 56.8 million to EUR 84.1 million with annual recurring costs of EUR 7.5 million to EUR 7.8 million.

Countries like Mauritius report that it is too early to assess the efficiency and impact of exchange of information under FATCA, even though Mauritius has been reporting financial information under FATCA since 2015.

3. Select issues on the handling of tax information subjected to EOI

3.1. Limits to the authority

This section does not intend to be exhaustive in its coverage. The purpose of this section is to summarise the information provided in the country reports, and report on any novel issues arisen since 2015 (when the IFA GR covered this topic) – the general reporters have therefore opted to only cover select topics within the field of data management within EOI frameworks.

3.2. Confidentiality

Article 26 (2) of the DTA Model provides that the information received under the exchange of information agreement is to be treated as secret and afforded the same level of protection as that provided under the domestic law. Information may only be disclosed to persons or authorities, including courts and administrative bodies, whose role is to deal with the assessment and collection of taxes, or the prosecution of claims. The commentaries further explain that the maintenance of secrecy in the receiving state is a matter of domestic law and therefore the information received is treated in the same manner as information obtained under the domestic laws of the receiving state.

[100] U.S. Government Accountability Office, Foreign Asset Reporting, Actions Needed to Enhance Compliance Efforts, Eliminate Overlapping Requirements, and Mitigate Burdens on U.S. Persons Abroad, GAO-19-180 (April 2019).

Article 8 of the TIEA Model broadly reproduces the rule in article 26 (2) of the DTA, with one exception. The last part of article 26(2) authorises the use of information for other purposes, if it is authorised by the laws of both states, and the supplying state authorises such use. Under article 8 TIEA, information can only be disclosed to other persons or entities provided there is express written consent from the competent authority of the requested party (the receiving state). There is no reference to the domestic laws of both states, and no reference to the use of information for purposes other than tax.

Article 22 of the MCTAA reproduces article 26 (2) with respect to the provision authorising the use of information for other purposes but for the fact that the domestic law of the supplying state (and not both states) has to authorise it and the supplying state authorises such use (no regard to a written authorisation). Article 22 further clarifies that the information shared may be further passed on to a third party provided the receiving party in the original relationship authorises it.

There is, therefore, a broad congruence of understanding between the two bilateral agreements and the multilateral agreement as to what is the rule to be followed to safeguard confidentiality in exchange of information. The exception lies in the last rule regarding the sharing with third parties, and the level of authorisation required to provide such information to other persons, or to use it for purposes other than tax. However, considering a bilateral relationship will be amended in light of the MCTAA where the two jurisdictions are signatory to the MCTAA, it follows from the above that the broader rule will apply.

Since it is up to domestic law to determine the threshold of confidentiality, the country reports denote that jurisdictions will provide different standards of protection both with respect to the right to exchange information internationally and with respect to a taxpayer's right to access such information. Most of the information provided in the country reports relates to the latter right (taxpayer access). As such, some countries have thorough legislation regarding the right to confidentiality through tailormade acts such as a privacy act (i.e. Australia), others have made the right to confidentiality a constitutional right (Belgium), and others penalise the other contracting state in case of a breach in the confidentiality rule (United States).

The levels of protection are therefore diverse. In Australia it is not an offence for a taxation officer to disclose taxpayer information for the purpose of meeting the Commissioner's obligations to exchange information under an international agreement. However, if taxpayer information identifies any individual, the 'personal information' has to be protected by Australia's *Privacy Act 1988* ('Privacy Act').

In Austria, although a taxpayer has the right to be informed of an EOI request under domestic legislation, there are several exceptions to this rule. In general, taxpayers are not informed about EOI taking place and are not allowed to take part in the proceedings. Austria also has a specific register on bank accounts (Kontenregister), listing the bank accounts held in Austrian banks and their beneficial owners. If the tax administration uses the information contained in the register to answer to an EOI request, the taxpayer is not notified.

In Belgium, there is a general constitutional right that gives every citizen the right to consult the content of an administrative document. Only certain exceptions laid down by law can override this constitutional right, such as the federal economic or financial interest. However, the Belgian Council of State has clearly stated that these restrictions on the fundamental right must be interpreted restrictively.

Furthermore, in the United States, the IRS has stated that if the United States determines that a tax jurisdiction is not in compliance with the confidentiality and appropriate use restrictions under the relevant information exchange agreement, the United States may

cease exchanging information with the jurisdiction. The IRS has also created an e-mail mailbox for taxpayers or other persons to report suspected unauthorised disclosures or use of exchanged information.[101]

Many countries have reformed the standard of protection with respect to banking information following CRS and FATCA. Austria and Brazil[102] are two countries that required judicial authorisation to access and exchange taxpayer information with other countries, and now have lifted that requirement in order to comply with Global Forum rules.

In Canada, taxpayers can take certain steps to help mitigate risk but there are no guarantees that information disclosed to the tax administration will not be used for other purposes or made available to third parties (including treaty partners, and possibly other third parties such as competitors in a tax litigation).

3.3.2. *Data protection*

Article 22 (1) of the MCTAA is the only provision, amongst the three treaties on the subject, that mentions the protection of personal data. According to the article, safeguards may be put in place by the supplying party, in accordance with its domestic laws, to ensure the protection of personal data.

It follows from the above that EOI relationships constituted exclusively based on bilateral DTAs and TIEAs are not subject to any particular regulation regarding data protection. In the spirit of articles 26 DTA and 8 TIEA, in the absence of a specific rule, the domestic rule of the state should apply.

Absent more extensive regulation internationally, it is not surprising that few jurisdictions have reported on data protection.

Austria is one of the few countries reporting on a data management system. Austria highlights the existence of a management system called Predictive Analytics Competence Centre used to analyse taxpayer data. The legality of the system has been questioned at the domestic level. Most reports mention methods used to safeguard data privacy. Argentina, for example, highlights an intricate system where restricted access is conferred to tax officials according to their grading and seniority. In spite of that, there have been tax leaks reported involving information that had been withheld by the tax authorities.

Given the absence of an OECD report on the topic, it is difficult to know what actions have been undertaken at the international level. It appears that the lack of public disclosure of EOI frameworks as a whole has made it difficult for branch reporters to provide information on this item.

3.3.3. *Whistleblower protection*

The adoption of a legal framework for whistleblowers in tax matters is a topic that has only recently come to the legislator's attention following a number of high-profile cases that were publicly disclosed, such as *Luxleaks*, *Swissleaks*, *the Panama papers* and others. The topic raises

[101] See Reporting Unauthorized Disclosure or Use of Tax Information Exchanged under an International Agreement, IRS, https://www.irs.gov/businesses/corporations/reporting-unauthorized-disclosure-or-misuse-of-tax-information-exchanged-under-an-international-agreement.

[102] RE No. 601.314.

difficult questions regarding the type and scope of information the law wishes to retrieve from the whistleblower, i.e. whether there is public interest in stimulating the disclosure of factual elements, possible reprimandable acts such as tax avoidance and aggressive tax planning[103] or only criminally punishable behaviour such as tax fraud. Other issues include (i) the conditions for whistleblower protection (anonymous reporting, public disclosure of identity), (ii) the scope of the protection (protection against retaliation, discriminatory action or disciplinary action) and (iii) the grant of a reward (as a percentage of the tax revenue gained or a flat fee). Given the diverse legal culture of the reporting states, it is not surprising that the country survey does not reveal a common approach to dealing with such a controversial topic. Many states simply have not adopted any relevant rules.

According to the OECD, whistleblower protection is defined as "Legal protection from discriminatory or disciplinary action for employees who disclose to the competent authorities in good faith and on reasonable grounds wrongdoing of whatever kind in the context of their workplace."[104] This general definition is used in the context of the prevention of corruption in both the public and private sectors, and particularly in the detection of foreign bribery, a topic where the work of the OECD is most advanced.

In many countries, there is no dedicated legal framework for whistleblowers disclosing tax information although they may find a certain degree of protection in the general anti-corruption laws. For instance, in Austria, the whistleblower platform for economic crime and corruption receives and forwards declarations of tax offences. In Canada, whistleblowers are generally protected to the extent that they communicate information to the public authorities. If so, criminal law prohibits an employer from acting against the interests of the employee in question. In New Zealand, the Protected Disclosures Act of 2014 encourages people to report serious wrongdoing in their workplace and gives them protection. Employment contracts cannot override this right. Some disclosures of confidential information may not automatically be protected by law, as there may be a legal reason that overrides the confidentiality of the information. The tax authorities provide guidance on how information can be disclosed anonymously to ensure all taxpayers pay their fair share of tax.

In other countries, like the United Kingdom, the tax code merely provides that no duty of confidentiality or other restriction on disclosure, however imposed, can prevent voluntary disclosure by any person to the tax authorities of information which the person has reasonable grounds for suspecting reveals a breach of the tax laws. Similarly, in Uruguay and Chile no dedicated whistleblower provisions have been adopted, yet this does not prevent the tax authorities from allowing persons to confidentially disclose information that can contribute to the assessment of taxes of other taxpayers.

On the other end of the spectrum, it is reported that in Switzerland – a country subjected to a number of high-profile public tax fraud disclosure cases – whistleblowing is generally considered to be plain or industrial espionage, which is a criminal offence. As such, there are neither incentives nor any protection granted for the breach of confidentiality by the whistleblower in relation to his or her employer or any other owner of relevant information. In Luxembourg, there is no specific protection for tax whistleblowers, but the latter finds some protection in the Freedom of Expression in the Media Act of 2004 and the Anti-Corruption Act of 2011. As such, in 2018 the Luxembourg Supreme Court confirmed the protected whistleblower status of the protagonist in the *Luxleaks* affair, even though the disclosed

[103] BEPS 12 and DAC 6 mandate the disclosure of aggressive tax planning transactions.

[104] OECD, "Committing to effective Whistleblower protection – Highlights" (2016) available at: https://www.oecd.org/corruption/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf.

information (*i.e*. tax rulings) did not necessarily entail tax fraud or evasion and even though the information was disclosed to a media outlet and not to the public authorities.

In the aftermath of *Luxleaks*, the EU adopted both DAC 3 on the exchange of rulings (*see* section 2.1.1 and addendum section 2.1.6.2) and Directive 2019/1937 on the protection of persons who report breaches of European Union law. This is not a tax-specific directive, but it would also encompass whistleblower protection in tax cases. The directive provides protection against retaliation for the reporting person, and protects the reporting of certain breaches relating to the internal market. Under the directive, EU member states are obliged (i) to create a number of mandatory reporting channels for whistleblowers to raise concerns around breaches of EU law; and, (ii) to provide a higher level of protection against retaliation for whistleblowers who report breaches of EU law, including tax law.[105] Member states have until 17 December 2021 to transpose its provisions into domestic law. This is expected to end the current fragmented protection of whistleblowers in the EU, which is sector specific and focused mainly on financial services and not tax.

Worthy of note is the fact that BEPS 12 and DAC 6 both require the mandatory disclosure of aggressive tax schemes. This means that, to some extent, there might be a compulsory obligation to blow the whistle on such schemes. However, only time will tell whether the communication duty will be interpreted by domestic tax systems to in fact require individuals to blow the whistle. Should that be the case, it is expected that national laws will need to provide for a more thorough protection of those involved.

Finally, a small number of states reacted to their own high-profile national tax fraud disclosure cases by implementing a dedicated legal framework to incentivise whistleblowers in tax matters. In the United States, the IRS has established a form for making claims and a Whistleblower Office to evaluate information provided. The Internal Revenue Code authorises the provision of monetary awards to whistleblowers of between 15% to 30% of the tax, interest and penalties in dispute if this amount exceeds USD 2 million. For smaller disputes, the tax authorities have discretionary authority to determine the amount of the award. Interestingly, in the US recognised whistleblowers can still face legal action as a result of providing confidential information, such as under a non-disclosure agreement or by breaching the attorney-client privilege. Similarly, in India, a so-called 'income tax informants reward scheme' was adopted in 2018 for the purpose of inciting citizens' and foreigners' participation in the tax authorities' effort to curb tax evasion. Rewards of up to INR 5 million are offered for specific information about substantial income tax evasion. No reward is granted if the whistleblower also discloses the information to third parties, like the media. The identity of the whistleblower is not disclosed under the scheme. The furnishing of false information is an offence that can lead to prosecution. A similar legal framework exists in Chinese Taipei and in the Republic of Korea. In Taipei, the reward for whistleblowers cannot exceed 20% of fines or the net value of the selling price of forfeited property and is capped at NTD 4.8 million. No reward is due if the whistleblower reports anonymously. In the Republic of Korea, the tax code allows a reward of up to KRW 4 billion (approx. USD 3.6 million) to be granted to the whistleblower who provides information on tax evasion and asset concealment by a tax dodger. Finally, in France, a decree has been adopted in 2017 which allows the remuneration of persons who disclose, on a non-anonymous basis, detailed information on potential tax fraud.

[105] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, 26 November 2019, p. 17–56.

3.3.4. Use of stolen data

3.3.4.1. General pattern of stolen data cases

In the aftermath of the high-profile affairs involving the public disclosure of data illegally obtained from financial institutions, many countries were confronted with the issue of the legal status of 'stolen data'. Many of these affairs share a similar pattern: the data is illegally obtained by an (ex-)employee of a financial institution in a first country ('the data-source country') and transferred by said person to a second country ('the data-acquiring country'), either indirectly via the media or directly via a regulated whistleblower scheme or through a purchase by the state and thus in exchange of money. Subsequently, the data-acquiring country spontaneously exchanges the relevant data to a third country ('the data-receiving country'), often on the latter's (informal) request. In many instances, the data-obtaining country and the data-receiving country will issue formal requests for information to confirm the authenticity of the data and to complete it.

In each of the stages, different questions regarding the legal status of the 'stolen data' can be raised. In the data-source country, besides the question whether the person illegally obtaining the data should be granted whistleblower status (*see* section 3.3.3), the main issues are whether the fruit of the poisonous tree doctrine prevents the data from being used as evidence to establish tax (and criminal) liability of taxpayers and, more importantly, whether the illegally acquired nature of the data serves as a ground to refuse compliance with information requests based on this data and sent by the data-obtaining country and the data-receiving country. In the latter two countries, the same questions are raised: can the data serve as a valid ground for outbound information request and outbound spontaneous exchanges, in the case of the data-obtaining country, and also, can the data and the requested information be used to determine the tax (and criminal) liability of resident taxpayers? In the data-acquiring country, an additional question poses itself as to whether the tax authorities are mandated to purchase illegally obtained information and what the consequences are of the public authorities' involvement in the obtaining of illegally obtained information.

Whereas in theory, a country might face any of the questions in any of the country profiles, the country survey shows that individual countries mostly focus on the issues faced in relation to their individual circumstances either as a data-source country, a data-acquiring country or a data-receiving country.

3.3.4.2. Countries in which the 'stolen data' originates

The Swiss Supreme Court held in 2017 that stolen *Swissleaks* data could not rightfully serve as the basis for subsequent requests for information from the French tax authorities to the Swiss. Subsequently, this stringent interpretation of the public policy exception in article 26(3) of the OECD Model was watered down.[106] In 2018, the Swiss Supreme Court held in relation to Indian information requests based on *Swissleaks* data that the prohibition did not apply to passively obtained stolen data, for instance by means of spontaneous exchange of information, unless the requesting state had signed a memorandum of understanding with Switzerland not to do so.[107] In a third case, decided in relation to data communicated to the French authorities by

[106] BGer 2C_1000/2015.

[107] BGer 2C_648/2017 from 17 July 2018 and BGer 2C_619/2018 from 21 December 2018.

French employees of a French branch of a Swiss bank, the Swiss Supreme Court held that the information requests which were based on data stolen in France were legal. The requests were not based on information derived from acts that were effectively punishable in Switzerland – even if they took place in France – given the territorial scope of the criminal code, including the rules on banking secrecy and employee confidentiality. In Switzerland, the tax authorities are entitled to refuse information requests based on data stolen,[108] which is in line with the general understanding in Switzerland that the theft of data for whichever purpose presents a criminal conduct which prevails, and might qualify as industrial espionage.

It has been reported that Liechtenstein, which witnessed the *LGT Bank* affair in 2008, had been refusing to comply with information requests based on data stolen in the country, in line with the provisions of its EOI Act. In the 2015 Peer Review Report, the Global Forum recommended that Liechtenstein should modify its practice in relation to information requests based on stolen data. According to the 2019 Peer Review Report, the country is currently monitoring this issue.

3.3.4.3. Countries directly acquiring 'stolen data' through purchase or via other means

In Australia, the Paradise Papers which had been illegally obtained in Bermuda, were provided to the Australian tax authorities after publication in the media. In the *Glencore* case, one of the affected taxpayers sought an injunction to prevent the use of the 'stolen data' for the purpose of its tax assessment by invoking the legal professional privilege. The High Court held that the legal professional privilege was not an actionable legal right: it served as a shield, not as a sword. Once privileged communications – the stolen data – had been disclosed, a taxpayer could not rely on it to prevent its use by the tax authorities.[109] In Austria, stolen data had been received but was not used by the tax authorities. The Austrian Supreme Administrative Court has already held in the nineties that in tax proceedings all evidence is admissible even if received by the tax authorities by violation of the law.[110] In criminal tax proceedings, unlawfully obtained evidence is prohibited to the extent that it is determinative for the decision-making. Similarly, in Belgium, the Court of Cassation confirmed in 2015 that unlawfully obtained evidence is not necessarily inadmissible in tax cases. In the case at hand, the Belgian authority which had received taxpayer information from the competent authorities in Portugal was not the formally designated competent authority. This formal deficiency did not prevent the use of the information to assess the taxpayer. The court held that illegally obtained evidence would only be rejected if the tax code contained a special sanction for the acts committed, if the evidence was obtained in a way which is contrary to the principles of sound administration, or if it jeopardised the taxpayer's right to a fair trial.[111] In the UK, the tax courts may admit evidence whether or not it would be admissible in a civil trial. At the same time, the tax courts may exclude evidence that would otherwise be admissible if it would be unfair to admit it. As such, there is no automatic exclusion in the UK tax proceedings of illegally obtained information. 'Stolen data' can be used in whichever

[108] Switzerland: Supreme Administrative Court (BGer), 16 February 2017, 2C_893/2015.

[109] Australia: High Court, 14 August 2019, *Glencore International AG & Ors v Commissioner of Taxation of the Commonwealth of Australia & Ors* [2019] HCA 26.

[110] Austria: Supreme Administrative Court (VwGH), 6 June 1990, 89/13/0262; 16 March 1993, 89/14/0281; 28 May 1997, 94/13/0200; 20 February 2008, 2005/15/0162; 1 September 2015, Ro 2014/15/0023.

[111] Belgium: Supreme Court, 22 May 2015.

way it is obtained, subject to the discretionary power to exclude it where its use would be unfair. Similarly, in Danish tax proceedings, illegally obtained evidence is admissible to the extent that its use does not entail a severe violation of the rights of a party. There is however no specific case law in which these general principles are applied to exchange of information in tax matters.

A key question is whether the act of a government paying for tax information that has been illegally obtained in another country is generally reconcilable with the principles of sound administration. A number of countries, including Australia, Germany, the Netherlands, France, the United Kingdom and the United States, seem to have embraced this practice, or at least implicitly. In Germany, the tax courts expressly confirmed the legality of the use of the illegally obtained data that had been purchased by the tax authorities, *inter alia*, in relation to the Liechtenstein *LGT Bank* affair, as long as the information is considered to be correct. In a criminal procedure, the use of the same information might constitute inadmissible evidence.[112] In the Netherlands, the supreme court recently considered a case involving the use of data that had been illegally obtained from a bank in Luxembourg by an ex-employee and which had been purchased by the Dutch tax authorities with the agreement to conceal the identity of the 'informant'. In a first decision in 2015, the supreme court had held that tax authorities' refusal to disclose the identity of the 'informant' was insufficient for the lower court to annul the tax assessments that were based on the data.[113] In a second decision in the same case, the supreme court overturned another decision of the lower court in which the purchasing of information from a person who (allegedly) committed crimes to obtain the data was held to be contrary to the principles of sound administration. The supreme court held that it had not been established that the public authorities had incited the criminal behaviour in question. Whether or not criminal offences had been committed was furthermore irrelevant for the purpose of the tax proceedings.[114] In France, pursuant to the Finance Act of 2016, the tax authorities are entitled to pay a compensation to individuals who provide information that enables the tax authorities to discover infringements of certain tax rules (issues of residence, transfer pricing, undeclared assets abroad etc.). The system was initially created on a temporary basis but has been made permanent.

Other countries specifically reject the purchase of stolen data or altogether refuse to use illegally obtained information. It is reported that in Finland, the tax authorities would not be mandated to pay for stolen data if offered. In countries like Poland, New Zealand, the Republic of South Korea and Uruguay, the use of illegally obtained information for tax purposes in not allowed. In Turkey, the constitution generally provides that information obtained through illegal methods shall not be considered as evidence. Although the matter is not specifically regulated in tax law, it is believed the constitutional prohibition also covers illegally obtained data received through exchange of information. In other countries, it is less clear whether the prohibition of the use of illegally obtained information only concerns information directly obtained by the tax authorities or also encompasses information that has been legally obtained via exchange of information.

[112] Germany: Tax Court, 15 December 2010, No. 14 V 2484/10 and Federal Constitutional Court, 9 November 2010, 2 BvR 2101/09.

[113] Netherlands: Supreme Court, 18 December 2015, No. 15/01348.

[114] Netherlands: Supreme Court, 8 November 2019, No. 18/01347.

3.3.4.4. *Countries indirectly receiving 'stolen data' from other states through (spontaneous) exchange of information*

In Argentina, the director of the tax authorities made an appeal to France to exchange information regarding Argentinian taxpayers contained in the stolen *Swissleaks* data, *i.e.* data stolen by a former employee of a Swiss branch of an international private bank that was subsequently shared with the French tax authorities. The information request was filed under the EOI provision of the France-Argentina Tax Treaty. The data was then used to file criminal charges against a political opponent of the director. The federal court held that under the relevant tax treaty, the information could not be used to bring criminal charges, without pronouncing itself on the issue of the illegal origin of the data. The charges against the director for misconduct and the violation of state secrets were dismissed in 2019.

In Italy, the Tax Chamber of the Supreme Court confirmed that information obtained from Germany that had been illegally obtained from a bank in Liechtenstein and the French *Swissleaks* information could be used in a tax audit, provided that said information would constitute mere circumstantial evidence that was corroborated by other elements and presumptions.[115] The Criminal Chamber of the Supreme Court upheld however the view that the illegal nature of the original acquisition of the information prevented its use in criminal proceedings.[116] A similar distinction has been made by the German tax courts.[117]

In Spain, the tax authorities' systematic use of the *Swissleaks* information received from the French tax authorities led to a national debate about the use of illegally obtained information. In 2017, the supreme court confirmed that the information could be used in criminal tax investigations.[118] In 2019, the constitutional court held that the use of the stolen data did not violate the affected taxpayers' right to a fair trial. The court observed that the acts that led to the illegal obtaining of the information were not carried out by the Spanish tax authorities and the banking secrecy that had been violated in Switzerland was not a recognised right in Spain where the authorities were able to obtain banking data. As such, admitting the evidence did not create a risk of encouraging practices that might compromise a fundamental right protected in Spain.[119]

In the Netherlands, the supreme court held already in 2008 that the use of illegally obtained data can serve as a valid ground for requests for information if the data-obtaining country was not involved in the obtaining of the illegal data. In the relevant case, the *KB-Lux* affair, the Belgian tax authorities spontaneously exchanged data stolen by an ex-employee of *Kredietbank Luxembourg* in 1994.[120] In 2018, the court of appeal held along the same lines that the information that had been obtained from the *LGT Bank* through an infringement of the law in Liechtenstein and had been purchased by the German tax authorities and spontaneously exchanged with the Netherlands, did not necessarily oblige the Dutch tax authorities to inquire into the source of information and could be used in the underlying tax investigation.[121] The Finnish Supreme Administrative Court came to the same conclusion

115 Italy: Supreme Court, Tax Chamber, Decision 19 August 2015, No. 16950, upholding the Orders 28 April 2015, no. 8605 and 8606.

116 Italy: Supreme Court, Criminal Joint Chambers, Decision 9 April 2010.

117 Germany: Fiscal Court of Cologne, 15 December 2010, No. 14 V 2484/10, ECLI:DE:FGK:2010:1215.14V2484.10.00.

118 Spain: Supreme Court, 23 February 2017, 166/2017.

119 Spain: Constitutional Court, 16 July 2019, No. 1805/2017.

120 Netherlands: Supreme Court, 21 March 2008, No. 43050, ECLI:NL:HR:2008:BA8179.

121 Netherlands: Court of Appeal (Amsterdam), 29 November 2016, No 14/00388-00394.

with regard to the *LGT Ban*k data received from Germany: the data could be used in Finland despite possible criminal actions in the chain of the preceding transfers of information.[122] It is reported that if, however, it were the Finnish tax authorities (instead of the German tax authorities) that would have issued payment to obtain the stolen data, the data could not have been used in Finland.

In Mexico, there is no explicit prohibition on the use of illegally obtained information for tax assessment purposes. There is anecdotal evidence that the tax authorities have been relying on illegally obtained information that was acquired by one or more European countries and subsequently exchanged with Mexico.

4. Impacts of virtual currencies on the established EOI frameworks

Cryptocurrencies operate using a decentralised virtual currency platform called a blockchain. A blockchain is a public register or distributed ledger that contains all transactions in that particular virtual currency, and all transactions are remotely authenticated by all of the users of the system.[123] As a result, blockchain permits participants in a network to confirm transactions without the need for a trusted third-party intermediary. There are two types of currency in circulation: coins and tokens.

4.1. Coins

Coins are a type of cryptocurrency that can be exchanged for a widely circulated denominated fiat currency such as the US dollar or the euro.

Notably, a coin is a product created by a private party to substitute for a fiat currency. The person issuing the virtual currency is not responsible for evaluating the issued cryptocurrency. It is thus an electronic payment system that is based on cryptographic proof, permitting parties to exchange the cryptocurrency with each other using the blockchain technology. It does not require a third-party clearinghouse (e.g., a bank) to validate the transaction. Users who contribute computing power to a network are referred to as “miners.” Alternate coins are created through “mining”–a process of using computers to devise algorithm cryptographic hashes that support locks in a blockchain.

4.2. Tokens and initial coin offerings

Tokens are derivative instruments that stem from a cryptocurrency (also called a virtual currency), commonly referred to as a coin (such as a bitcoin), that may or may not be denominated in fiat currency.

Tokens tend to be issued by private entities or individuals in exchange for another digital currency or, in exceptional cases, for fiat currency. However, a token’s face value is not usually

[122] Finland: Supreme Administrative Court, 28 June 2016, No. HFD 2016:100.

[123] *See, e.g.*, European Securities and Market Authority, “Call for Evidence Investment Using Virtual Currency or Distributed Ledger Technology,” ESMA2015/532 (April 22, 2015). *See also* Tatiana Falcão, “A Token of Elucidation in the Taxation of Initial Coin Offerings,” *Tax Notes Int’l*, 20 August 2018, p. 791.

measured with reference to a fiat currency. The characteristics of a token, including its face value, are defined in a "white paper," a private instrument issued by the token creator usually drafted to target the financing of a specific project. The person issuing the cryptocurrency is not responsible for its evaluation, and obligations toward the cryptocurrency buyer are restricted to the private investment terms regulating the transaction (which in many cases can be null).

In general, a company may wish to issue a token to either (i) raise capital or (ii) use the company's platform to purchase goods and services. Some tokens have equity-like features, such as right to dividend-like payments based on the issuer's predefined performance objectives.

A token is an investment instrument traded and employed outside both a country's national finance system and its authorised markets for the trading of movable property. It tends to be legally similar to a financial asset or investment bond.

Initial coin offerings (ICOs), the digital equivalent of an initial public offering (IPO), were developed to create a cheaper mechanism to finance start-ups and high-risk projects through multiple-party financing without pulverising the company's ownership.[124]

4.2.1. *Regulation of the ICO market*

Most OECD members have produced regulations requiring tokens that bear the same characteristics as a security or a movable financial instrument of the type regulated by the SEC or a similar national regulatory body to follow the rules set by that national entity. For example, the European Securities and Markets Authority has clarified that when the coins or tokens "qualify as financial instruments it is likely that the firms involved in ICOs conduct regulated investment activities, such as placing, dealing in or advising on financial instruments or managing or marketing collective investment schemes . . . any failure to comply with the applicable rules would constitute a breach."[125]

Because this is a market that can be operated and administered by private parties outside the traditional financial market framework, it is unclear whether the players in this market ought to adhere to the same financial reporting standards imposed on traditional financial businesses under the Global Forum's rules and standards on transparency and EOI for tax purposes.

The absence of regulation increases the risk of BEPS, illicit financial flows, tax evasion, and avoidance through the use of blockchain structures. Anonymity may make it difficult for tax authorities to identify the effective beneficiary of the income or to even trace a transaction back to one person or country.

Worthy of note is the fact that out of the forty country reports, only one, Chinese Taipei, refers to the tax treatment of tokens. According to that report, tokens are classified as a type of security by the Financial Supervisory Commission of Taipei. Security transaction tax, instead of income tax, is to be levied on the transaction carried out by using a security token. Financial institutions in Chinese Taipei are restricted from participating in or providing digital currency related services or transactions.

124 T. Falcão, *A Token of Elucidation in the Taxation of Initial Coin Offerings*, Tax Notes International, Emerging Economies Segment, 20 August 2018, p. 791.

125 European Securities and Markets Authority, "ESMA Alerts Firms Involved in Initial Coin Offerings (ICOs) to the Need to Meet Relevant Regulatory Requirements," ESMA50-157-828 (17 November 2017).

4.3. The juridical definition of cryptocurrencies[126]

The OECD, the Financial Action Task Force, and the European Central Bank have each defined virtual currencies, and their respective definitions seem to coincide. Some key characteristics that seem to be implied in all of the definitions include:

- medium of exchange;
- unit of account;
- ability to be transferred, stored, or traded;
- absence of legal tender status;
- absence of guarantee or backing by any one government; and
- conceptually distinct from e-money.

According to the OECD's "Tax Challenges Arising From Digitalisation – Interim Report 2018":[127]

> A cryptocurrency is a digital asset used as a medium of exchange and which relies on cryptography to secure its transactions, to control the creation of additional units, and to verify the transfer of assets. It is a type of virtual currency, meaning a digital unit of exchange that are not backed by government-issued legal tender.

The definition in the Financial Action Task Force's June 2014 report "Virtual Currencies – Key Definitions and Potential AML/CFT Risks" reads:

> Virtual currency is a digital representation of value that can be digitally traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status (i.e., when tendered to a creditor, is a valid and legal offer of payment) in any jurisdiction. It is not issued nor guaranteed by any jurisdiction, and fulfils the above functions only by agreement within the community of users of the virtual currency. Virtual currency is distinguished from fiat currency (a.k.a. "real currency," "real money," or "national currency"), which is the coin and paper money of a country that is designated as its legal tender; circulates; and is customarily used and accepted as a medium of exchange in the issuing country. It is distinct from e-money, which is a digital representation of fiat currency used to electronically transfer value denominated in fiat currency. E-money is a digital transfer mechanism for fiat currency – i.e., it electronically transfers value that has legal tender status." [Emphasis and internal citations omitted.][128]

Finally, in the July 2014 EBA opinion, the European Central Bank stated that cryptocurrencies:[129]

> are defined as a digital representation of value that is neither issued by a central bank or public authority nor necessarily attached to a [fiat currency], but is used by natural or legal persons as a means of exchange and can be transferred, stored or traded electronically. . . .

[126] Based on: T. Falcão, *Coining Legal Terms for the Taxation of Virtual Currencies*, Tax Notes International, Emerging Economies Segment, 15 October 2018, p. 289.

[127] OECD, "Tax Challenges Arising From Digitalisation – Interim Report 2018, p. 209.

[128] OECD, Financial Action Task Force "Virtual Currencies – Key Definitions and Potential AML/CFT Risks" June 2014 report, available at: www.fatf-gafi.org/.../Virtualcurrency-key-definitions-and-potential-aml-cft-risks.pdf

[129] European Banking Authority, "EBA Opinion on Virtual Currencies" EBA/Op/2014/08, p. 10, 4 July 2014.

The United States is the only country amidst all country reports to put forward a definition for virtual currencies. The IRS describes "virtual currency" as "digital representations of value that functions as a medium of exchange, a unit of account, and/or a store of value."

4.4. Legal definition and tax treatment of cryptocurrencies according to the reports

The country classification of cryptocurrencies and crypto-assets in general could not be more diverse. Most countries are of the opinion that cryptocurrencies are not considered to be a type of currency. Countries tend to place cryptocurrencies into one of the following categories: financial assets, derivatives and/or securities, commodities, digital or virtual assets, or securities. Alternatively, some countries classify them as ordinary assets subject to the same treatment conferred to other assets within a company context.

The question surrounding every one of these classifications is whether they would be subject to reporting under FATCA and CRS. Countries are unanimous in reporting that in order for cryptocurrencies to be included within EOI frameworks, they ought to be classified as a financial asset or product. However, only a minority of countries do so and even the United States reports that there is no regulation demanding crypto-based transactions be reported under FATCA.

Amongst the countries that consider cryptocurrencies to be financial assets are Argentina, Brazil, and South Africa. In essence, countries classifying cryptocurrencies as financial assets should in theory subject these to automatic exchange of financial account information under FATCA and the CRS. As a result, in theory these countries should have additional regulation requiring service providers to report information on crypto-assets held by their customers to the tax administration. It is unclear whether this supplementary obligation exists in the cited countries, as it was not mentioned in the country reports.

Canada has classified cryptocurrencies as a commodity. According to the Canadian report, the definition of "financial asset" for CRS and Canada-US IGA purposes includes commodities. Therefore, in Canada cryptocurrencies would also arguably be subject to EOI under CRS and FATCA.

In Australia, where cryptocurrencies are classified under domestic law as foreign currency, financial assets and other assets, each classification attracts a different treatment under existing domestic legislation dealing with financial regulation. Therefore, depending on the classification, it could be subject to EOI under CRS and FATCA.

France, Sweden and Israel consider it to be an asset and thus the sale of a virtual currency generally creates a capital gain event. Furthermore, in Israel it is clarified that the financial intermediaries operating in the virtual currencies services market are currently not defined as "financial institutions" according to the FATCA and CRS Regulations, and accordingly they are not subject to the obligations under these regulations to report on account holders.

Crypto-assets are qualified as other (intangible) assets in Austria, and therefore treated like other business assets for income tax purposes.

The same is true for Chile and the Netherlands, where it is also subject to the regular treatment afforded by the income tax legislation. Coins are classified as a digital asset in Chile and a claim right (not property) in the Netherlands.

Moreover, within the group of countries that have included cryptocurrencies within the regular tax framework is Spain, where the Accounting and Auditing Institute has settled that cryptocurrencies have to be considered as inventories when they are destined to be sold under the ordinary activity of the company. In contrast, they have to be accounted as fixed assets when they are permanently linked to the company.

Chinese Taipei classifies digital currencies such as coins as electronic services and is subject to VAT provided the entity trading in coins reaches a turnover threshold of NTD 40,000 per month.

Cryptocurrencies are furthermore considered a currency in Germany and Italy and is currently only regulated by the banking regulation.

Almost as interesting as the cryptocurrency definitions posted here, is the lack thereof. Out of forty country reports, twenty-three (Colombia, the Czech Republic, Denmark, Finland, Greece, India, Japan, the Republic of Korea, Liechtenstein, Luxembourg, Mauritius, Mexico, New Zealand, Nigeria, Norway, Peru, Poland, Portugal, Russia, Switzerland, Turkey, the United Kingdom, and Uruguay) either did not include a cryptocurrency section or claimed that there was no legal conceptual approach to crypto-asset taxation. Worthy of note is that in 2017 India issued a draft bill proposing to ban the commercialisation of cryptocurrencies and make it a criminal offence punishable with a fine and imprisonment.

In all cases, and particularly in the countries where there is as of yet no legal characterisation of crypto-assets and no definition of the tax system, there is always a concern with the proliferation of risky and unlawful activities. As a result, most jurisdictions refer to work being developed with intergovernmental entities to deter tax evasion, money laundering and illicit financial flows facilitated by cryptocurrencies.

At the EU level, it is argued that the key question at the moment is whether these new instruments should be classified as goods or fiat currencies. A number of reports (France, Luxembourg, but not the EU report), contend that with the ongoing transposition of DAC 6, new tools will be made available to report these assets under the FATCA and CRS networks.

Stablecoin taxation (the Facebook libra is the most notorious example) is a topic that is addressed by a number of reports. A stablecoin is a cryptocurrency that is pegged to the price of another stable asset like gold, commodities or the US dollar. The Luxembourg report for example, contends that the degree of anonymity provided by a stablecoin arrangement may make it more difficult for authorities to track transactions and to identify the BOs of 'stablecoins', making identifying tax evasion more difficult. The EU corroborates with the G7 opinion that no global stablecoin arrangement should start until all the risks associated with the trading of cryptocurrencies are addressed.

The United States is the only country to have put forward a definition for stablecoins. According to the IRS, a convertible virtual currency (stablecoin) is defined as a sub-category of a virtual currency or one "that has an equivalent value in real currency, or that acts as a substitute for real currency."

The EU is still currently assessing how far crypto-assets are covered by current EU legislation and whether new legislation is needed.[130] It will determine whether an extended EOI framework is needed after this initial assessment is made.

5. Conclusion

The existing international EOI standards are robust and uniform. The vast majority of countries have committed to the standards and are currently complying with the obligations

[130] European Commission, Financial services – EU regulatory framework for crypto-assets, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Directive-regulation-establishing-a-European-framework-for-markets-in-crypto-assets

under one or more legal instruments, be it the double tax treaty network or the MCAA, FATCA or the EU Directives. The MCAA appears to be the most comprehensive instrument in the field of EOI, and with the broadest coverage, with the ability to elevate countries' commitments to also cover AEOI, both in relation to CRS and CbCR. International pressure to comply with these obligations seems to be high, as some countries go as far as to circumvent their domestic legal systems, or create interpretative doctrines in order to employ certain international obligations even when there is no legal basis under domestic law to do so.

At the onset of this report, we wanted to make this a practical investigation. In the instructions to the branch reporters, we asked for practical details about the instruments and frameworks utilised for exchange of information. Do they work, are they effective, are they costly, did it require building up new IT networks or the training of personnel? Has the setting up of extensive EOI networks led to an increase in revenue collection ability, which seems to be what the initial purpose of the task taken up by Global Forum: to "discover" new sources of tax revenue that were left untaxed due to tax evasion or BEPS? We wanted to assess the impact of the EOI networks, and the practical effect on countries' economies.

As may be gathered from the branch reports, these have been difficult questions to answer. In first place because most of, if not all, the metadata regarding information exchanged is held privately by tax authorities. Public disclosure of tax information is still a difficult subject in most countries, meaning that oversight over the quality and content of information being exchanged is difficult. It seems only with regard to beneficial ownership registries is there still some discussion over public disclosure of registries, which is mainly due to the EU-led initiative. Even when the branch reporters conclude there to has been an increase in revenue collection ability as a result of an EOI framework, the data does not take into account the cost of operating the EOI network.

Data on EOI is scarce or unavailable with rare exceptions. In some cases, this can actually be detrimental to the system as a whole, as countries, and particularly developing countries, are unable to cross-check policy approaches and improve their own tax administration of EOI frameworks. EOI flows are often unbalanced with certain countries receiving exponentially more information than they send out. Some of the quite refined forms of EOI, such as FATCA, effectively operate on a non-reciprocal basis, meaning many countries employ significant resources to provide information to the United States but are not reciprocated with information about its resident taxpayers. For countries where resources are scarce, this type of commitment can be a heavy one to make and may imply the waiving of other international commitments due to the lack of resources.

Despite the existence of some of the EOI instruments, such as EOIR, for quite some time now, it seems that there is insufficient data available and/or publicly disclosed to conduct impact assessments or monitor and evaluate the efficiency of the EOI channels. Independent stakeholders, such as civil societies and intergovernmental organisations other than those mandating those EOI frameworks are therefore unable to provide input on the efficiency of these systems and to impartially assess the benefits.

There seems to be an overall lack of transparency with respect to the types of information exchanged, and how the information is gathered, where the taxpayer has limited insight or control over the reporting of information. A doctrine admitting the use of stolen data in tax cases may provide an incentive for the proliferation of information acquired through illegal means and might set a difficult precedent. On the other hand, the lack of formal protection for whistleblowers in most countries might deter individuals from reporting on their employer's wrongdoings. In general, one can say that the current EOI regime is an affair between competent authorities, who represent the executive branch of the states committed

to it. The role of the legislative branches in those states is usually limited to signing off on open-end clauses in the underlying international agreements. However, as shown, the crux of the EOI network lays in the provisions contained in competent authority agreements. In most countries, judicial oversight in EOI procedures is nearly non-existent. The only oversight on a country's EOI policy seems to be the peer review process of the Global Forum, whose findings – as illustrated in Luxembourg – have the power to trigger the legislative branch and in that particular case, silence the judiciary. For the moment, that seems to be a price the international community is willing to pay for an efficient network of exchange of information.

Besides the traditional forms of EOI that derive from the international mandate, there also appears to be a wider set of regional initiatives that also implement EOI, often in line with the international standard. It is difficult to assess the frequency of exchanges occurring under those networks, the quality of the information exchanged and the usability of the information, seeing as the scope of information exchanged under those regional initiatives and instruments is the same as those assumed under international obligations. Despite that, there seems to still be a push from countries to reinforce their commitment to exchange information regionally, within smaller communities of similarly situated states.

The most notable example of that effort is in the EU, where all of the EOI-related commitments assumed under the BEPS Actions have been translated into actual EU-wide directives, to be converted by the member states into national law. Some of the legislative framework of the EU, such as beneficial ownership, goes beyond the anti-BEPS initiatives and international commitments. As a result, particularly for EU countries which still represent a majority of the branch reports, it is difficult to assess whether the EOI mechanisms reported run as smoothly for third (non-EU countries) as they do for EU member states. In those jurisdictions, the reports show that the plethora of EOI instruments – often with similar language but under different international legal orders – gives rise to confusion.

The last topic covered in the report is the impact of virtual currencies and particularly cryptocurrencies on the traditional forms of EOI. There is very little regulation of the market, with no single uniform treatment for the taxation of virtual currencies, creating an opportunity for tax arbitrage. Furthermore, the absence of regulation at the domestic level and of an international consensus may increase the potential for illicit financial flows, tax evasion, and tax avoidance using blockchain technologies.

The anonymity of the parties involved in blockchain transactions may make it difficult for tax authorities to identify the effective beneficiary of income or even simply trace the transaction back to one person or country. The traditional exchange of information standard might thus fall short if individuals and multinational entities use crypto-assets and digital financial institutions ('fintech') to trade in currency using alternate instruments such as coins and tokens.

Illicit and criminal activities involving cryptocurrency, including the untapped flow of financial resources arising from corruption and money laundering, may increase. In order for cryptocurrencies to be included within EOI frameworks, they ought to be classified as a financial asset or product. However, only a minority of countries do so and therefore these assets are not subject to any of the stringent reporting standards to which fiat currency is subject, thus opening a window of opportunity for tax evasion, tax avoidance and erosion of the tax base. This last topic is expected to be responsible for most of the upcoming developments in the field of EOI in the years to come.

EU report Subject 2

Exchange of information: issues, use and collaboration

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Summary and conclusions

The EU report outlines the tools for exchange of information and administrative cooperation available at the EU level. The main legislative framework is laid down in the Directive on Administrative Cooperation (DAC) and its subsequent amendments. The DAC provides for three different types of exchange of information (i) exchange of information on request, (ii) spontaneous exchange of information and (iii) automatic exchange of information.

The exchange of information on request enables each EU member state to request another EU member state to communicate information that it has in its possession. In case the requested authority does not have the information in its possession, it may carry out an administrative enquiry. The exchange of information is limited by the standard of foreseeable relevance within the meaning of article 1(1) of the DAC. Further clarification as to the meaning of the standard was given by the Court of Justice of the European Union (CJEU) in *Berlioz*. The request for information can relate to one or more taxpayers, as long as they are individually identified. This is commonly known as 'bulk requests', which are to be distinguished from group requests. Group requests relate to a group of taxpayers that cannot be individually identified, but instead described with a common set of characteristics. The Commission is currently considering the prospect of a new initiative on strengthening administrative cooperation in the framework of the DAC and, amongst other matters, this involves reflecting on the application of the standard on foreseeable relevance.

Under the provisions of spontaneous exchange of information, the EU member states shall communicate information spontaneously at any moment without a prior request from another member state. In addition to the compulsory spontaneous exchange, the competent authorities of each EU member state may communicate, by spontaneous exchange, to the competent authorities of the other EU member states any information which they are aware of and which may be useful to the competent authorities of the other EU member states.

The DAC as adopted in 2011 broadened the scope of automatic exchange of information (AEOI) by making it mandatory, without prior request, for five categories of predefined income and capital: income from employment (EI), directors' fees (DF), certain life insurance products (LIP), pensions (PEN), and ownership of and income from immovable property (IP). The subsequent amendments extended the scope of the DAC with respect to the automatic

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The text represents the personal views of the authors, which do not purport to represent the view of the European Commission.

exchange of information, namely DAC2 with respect to reporting of financial accounts, DAC3 with respect to cross-border rulings and advance pricing agreements, DAC4 with respect to country-by-country reporting and DAC6 with respect to reportable cross-border arrangements. DAC5 obliged the EU member states to grant tax administrations access to beneficial ownership information as collected under the anti-money laundering (AML) framework. At the time of writing, the proposal for the codification of the DAC and all its amendments is pending for adoption in Council.

In addition, the DAC provides for administrative cooperation in the form of presence of foreign officials (PAEO) and simultaneous controls (SC). While not explicitly governed in the DAC, joint audits have been conducted by combining the provisions of PAOE and SC.

Other recent Commission initiatives for administrative cooperation include TADEUS, which is a cooperation network for the EU member states' heads of tax administrations and the Commission, and cooperative compliance, a tool for preventive dialogue between the tax authorities and taxpayers.

As a general rule, the DAC has to be interpreted and applied in the light of the GDPR. All exchanges of information are naturally subject to limitations for reasons related to data protection. Yet, these limitations remain contained in the light of the need to achieve the objectives of the DAC. In addition, the GDPR allows for a restriction by way of a legislative measure in taxation matters. Other provisions of the DAC deal with more specific aspects of confidentiality and data protection. Recently, the whistleblower protection has been put in place in a form of a directive, with the application date of 2021. This directive obliges the EU member states (i) to create a number of mandatory reporting channels for whistleblowers to raise concerns about breaches of EU law; and (ii) to provide a higher level of protection against retaliation for whistleblowers who report breaches of EU law, including tax law.

The exchange of information and administrative cooperation has improved significantly in recent years. This is supported by statistical data presented in this report, which demonstrates an increase in the number of exchanges and the level of cooperation. Most significantly, due to the exchange of cross-border rulings and APAs there were almost 18,000 exchanges in 2017. Since the first exchanges only started under DAC4, the benefits of using information for risk-assessment purposes will become apparent in the upcoming years. As an additional powerful tool for detecting tax avoidance, DAC6 will enable exchanges of reportable cross-border arrangements as of 31 October 2020.

With respect to administrative cooperation, PAEO and SC have been used consistently. Joint audits however have more significant potential, whereby the new upcoming legal framework is expected to enhance and strengthen the cooperation amongst tax administrations.

Crypto assets pose inherent tax challenges with regard to tax avoidance and identifying beneficial ownership. The Commission will assess in the field of financial market initiatives to what extent crypto assets are covered by current EU legislation and whether new legislation is needed. However, only after the financial regulation addresses and defines the nature of the crypto assets will it be possible to determine the tax consequences under the existing framework, namely DAC2. Whether an extended EOI framework is needed will be clearer after the aforementioned initiative.

In mid-February 2020, the Commission published an initiative to strengthen the exchange of information framework in the field of taxation. In addition to joint audits and to improving the existing elements of the DAC, this initiative should provide tax administrations with information on taxpayers who generate income (revenues) through digital platforms. This aims at ensuring the adequate taxation of such revenues both from a direct and indirect tax

perspective. It also will ensure consistency with ongoing work at the international level on the taxation of the digital platform economy.

1. Instruments and processes of application

1.1. Introduction

The European Union actively contributes to the policy developments with respect to the exchange of information. By means of a directive, the European Union introduced tools for exchange of information on request, spontaneous exchange of information as well as for automatic exchange of information. Specifically, the Directive 2011/16/EU on Administrative Cooperation (DAC)[3] aims at providing EU member states legally binding means and powers to efficiently cooperate at the international level to overcome the negative effects of ever-increasing globalisation on the internal market. As such, the rules on administrative cooperation do not replace national rules but provide minimum standards for exchange of information among tax authorities. The DAC also provides for means of administrative cooperation such as the presence of officials of a member state in the offices of the tax authorities of another member state or during administrative enquiries carried out therein. Further, it provides for simultaneous controls (SC) allowing two or more member states to agree to conduct simultaneous controls of person(s) of common or complementary interest, requests for notifying tax instruments and decisions issued by the authority of another member state. The exchange of information and administrative cooperation intend to provide the tax authorities with a more complete set of information on taxpayers that are active across borders. In such a way, the tax authorities are equipped to fight tax fraud, evasion and avoidance.

Over the last seven years, major progress has been made on cooperation between tax authorities of the EU member states. The DAC introduced a new concept of mandatory automatic exchange of information on five specific categories of income and capital. The scope of the DAC with respect to the automatic exchange of information has been expanded through several amendments, namely Directive 2014/107/EU[4] (DAC2); Directive 2015/2376/EU[5] (DAC3); Directive 2016/881/EU[6] (DAC4); Directive 2016/2258/EU[7] (DAC5); and Directive

3 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation (OJ L 64, 11 March 2011, p. 1).

4 Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 359, 16 December 2014, p. 1).

5 Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 332, 18 December 2015, p. 1).

6 Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (OJ L 146, 3 June 2016, p. 8).

7 Council Directive (EU) 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities (OJ L 342, 16 December 2016, p. 1).

2018/822/EU[8] (DAC6). At the time of writing, the proposal for the codification of the DAC[9] and all its amendments is pending for adoption in Council. The new Directive will supersede the various acts incorporated in it. The codification of the DAC fully preserves the content of the acts being codified and does no more than bring them together with only such formal amendments as are required by the codification exercise itself.

The Commission has carried out an evaluation study with respect to the DAC and its first two amendments,[10] detailed data results of which will be presented in this report where relevant. The evaluation study did not include the last three amendments, DAC4, DAC5 and DAC6, which significantly expanded the scope of reporting obligation and consequent exchanges of information among EU member states. In the months ahead, improvements will be considered at EU level for the legal framework with the aim to further strengthen the administrative cooperation among the EU member states.[11] Similar considerations are ongoing at the international level, for example as a result of peer reviews or other evaluations conducted by the OECD.

1.2. Exchange of information under the Directive on Administrative Cooperation in the field of direct taxation (EU) 2011/16 (DAC)

1.2.1. *Background*

The origins of administrative cooperation between member states' tax authorities date back to the late 1970s. As bilateral treaties between the member states proved not to be effective at all times, in December 1977 the Council of the European Economic Communities (EEC) put in place for the first time a legal framework allowing the member states to cooperate to ensure fairness, combat tax evasion and tax avoidance, and allow a correct assessment of taxes, namely the Council Directive 77/799/EEC concerning mutual assistance in the field of direct taxation.[12] This framework, as later amended, provided member states with different administrative cooperation tools: exchange information on request and spontaneously, the possibility to agree on automatic exchange of information, presence of tax officers in other member states' offices, simultaneous controls and notifications of tax decisions. As this instrument was not efficient for the purposes of VAT and excise duties, a separate framework for administrative cooperation was created. Direct taxes were also included in the scope of the Directive on mutual assistance in the recovery,[13] which was repealed

[8] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (OJ L 139, 5 June 2018, p. 1).

[9] Proposal for a Council Directive on administrative cooperation in the field of taxation (codification) COM/2020/49 final.

[10] European Commission, Commission Staff Working Document, Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, SWD(2019) 328 final.

[11] European Commission, Strengthening the exchange of information framework in the field of taxation, available at https://ec.europa.eu/info/law/better-regulation/initiatives/dac_renewal_en.

[12] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the member states in the field of direct taxation (OJ L 336, 27 December 1977, p. 15).

[13] Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties

in 2008. Automatic exchange of information of interest payments to individuals was to a limited extent possible under the Savings Directive, which is no longer in force.[14] However, the existing legal framework was not sufficiently compliant with the standard of articles 26 and 27 OECD Model Convention as updated in 2005, especially as it lacked the 'foreseeably relevant' standard and allowed banking secrecy as a reason for refusal to provide information.

1.2.2. *DAC1*

Following the proved inefficiencies and the momentum created by the financial crisis, a new directive guaranteeing the OECD standards was proposed. DAC was thus adopted in February 2011 and the 'old' Mutual Assistance Directive was repealed. The DAC entered into force on 1 January 2013 and as of that date, member states started to cooperate and exchange information with each other under the new rules. The DAC provides for common minimum rules, allowing the member states agreeing to cooperate on a wider scale. In principle, it applies to all type of taxes including indirect taxes. However, VAT, customs duties and excise duties covered by other Union legislation on administrative cooperation are explicitly excluded[15] and remain to be governed by their own legal framework.

The DAC provides for three types of exchange of information: (i) exchange of information on request, (ii) spontaneous exchange of information and (iii) mandatory automatic exchange of information. While the exchange of information on request and spontaneous exchange of information already started applying as of 1 January 2013, the automatic exchange of information started applying only as of 1 January 2015.[16]

1.2.2.1. *Exchange of information on request*

Each member state has the possibility to request another member state to communicate information that it has in its possession. In case the requested authority does not have the information in its possession, it may carry out an administrative enquiry. The information request may include a reasoned request for a specific administrative enquiry. According to article 3(7) of the DAC, an administrative enquiry includes all controls, checks and other actions taken by EU member states in the performance of their duties with a view to ensuring the proper application of tax legislation. According to article 6(3) of the DAC, the requested authority must arrange for the carrying out of any administrative enquiries necessary to obtain the information covered by information exchange on request. If the requested authority takes the view that no administrative enquiry is necessary, it must immediately inform the requesting authority of the reasons thereof. The request for information can relate to one or more taxpayers, as long as they are individually identified. This is commonly known

[14] Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments OJ L 157, 26 June 2003, p. 38–48.

[15] Art. 2(2).

[16] Art. 8(1) of the Directive specifies that that certain information regarding taxable periods as from 1 January 2014 is to be exchanged automatically. Information is to be exchanged automatically after the end of the taxable period. The reason for the two year gap between the entry into application of DAC on 1 January 2013 and the beginning of AEOI as from 1 January 2015 lies in the technical challenges member states had to overcome to set up an IT system allowing them be able to collect and exchange an unprecedented amount of data.

as 'bulk requests', which are to be distinguished from group requests. Group requests relate to a group of taxpayers that cannot be individually identified, but instead described with a common set of characteristics.

The exchange of information is limited by the standard of foreseeable relevance within the meaning of article 1(1) of the DAC. Recital 9 of the DAC clarifies that the standard of foreseeable relevance is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that member states are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. Furthermore, the CJEU clarified the meaning of foreseeable relevance and its procedural requirements in the *Berlioz* case, which is addressed in section 1.3.2 of this report. The Commission is currently considering the prospect of a new initiative on strengthening administrative cooperation in the framework of the DAC and, amongst other matters, this involves reflecting on the application of the standard on foreseeable relevance.[17]

Further limitations on the exchange of information are laid down in article 17 of the DAC, namely (i) the exhaustion of the usual sources of information which a competent authority could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives, (ii) national law limitations, (iii) legal reasons and (iv) where the exchange would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information, disclosure of which would be contrary to public policy. The requested state, however, has no right to refuse to cooperate solely because a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity holds the requested information or because it relates to the ownership interests of a person. The fact that the requested state does not need the requested information for its own purposes does not entitle it to refuse to cooperate. If information is requested by a member state in accordance with the DAC, the requested member state must use its measures aimed at gathering information to obtain the requested information, even though that member state may not need such information for its own tax purposes.

Between 2013 and 2017, member states sent almost 45,000 requests for information, corresponding to between 8,200 and 9,400 requests per year. This represents a substantial increase compared to the years 2008-2012, when the number of requests exchanged on the basis of the Mutual Assistance Directive ranged between 4,000 – 5,800 per year.

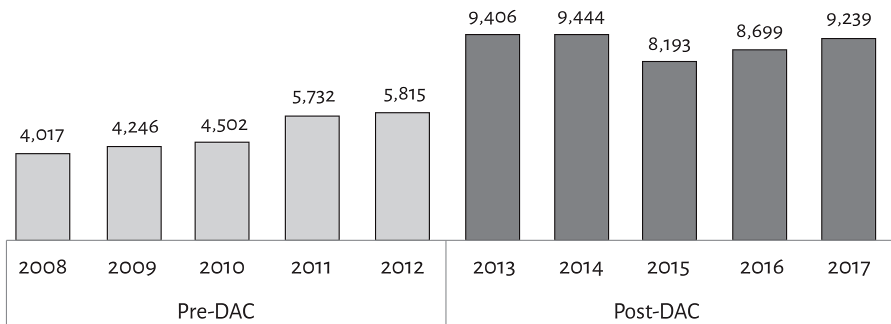

Figure 1: Requests for information (2008-2017)

[17] European Commission, Inception Impact Assessment Ares(2020)795980, p. 2.

1.2.2.2. Spontaneous exchanges of information

In specific situations laid down in article 9(1) of the DAC, the member states shall communicate information spontaneously at any moment without a prior request from another member states. The competent authority to which information covered by compulsory spontaneous exchange becomes available must forward such information to the competent authority of any other member state concerned as quickly as possible, and no later than one month after it becomes available.

In addition to the compulsory spontaneous exchange, the competent authorities of each member state may communicate, by spontaneous exchange, to the competent authorities of the other member states any information which it is aware of and which may be useful to the competent authorities of the other member states.

Since 2013, member states have done almost 158,000 spontaneous exchanges of information to each other with a certain variation over the years and a peak in 2017, when half of the total information was sent.

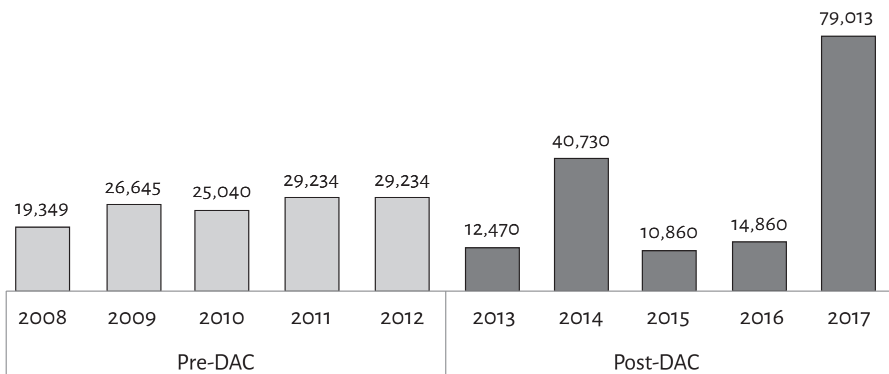

Figure 2: Spontaneous exchanges of information (2013-2017)

Over the 2014–2017 period, only six member states provided quantitative information on the estimated increase in tax assessed due to EOIR, SEOI or AEOI for at least one year; and only two countries (Germany and Poland) provided this information for the whole period.

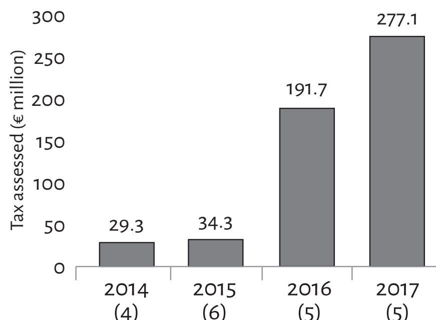

Figure 3: Incremental tax assessed from non-AOEI exchanges and cooperation (2014-2017)

The additional tax assessed across the member states for which data are available increased significantly over the years, i.e. from EUR 29 million in 2014 (reported by four member states s) to EUR 277 million in 2017 (reported by five member states). Over the whole period, the additional tax assessed by the six member states is in the order of EUR 532 million. Once again, there are major differences among member states. Based on this very limited information and taking into account that two of the countries only reported the aggregated value, while the others were able to provide values based on the form of cooperation, it can be estimated that nearly half of the incremental tax assessed is generated by exchanges on request, while another 35% is attributable to simultaneous controls (SC). SEOI represents less than 0.5% of the incremental tax assessed, possibly because of its character: sometimes information received via spontaneous exchanges is not as usable as the sender has expected, whereas requests for information are a tool for addressing a specific need and the reply gives added value, even where it results in a decision that no additional taxes will be imposed.[18]

1.2.2.3. *Automatic exchange of information*

The DAC as adopted in 2011 broadened the scope of AEOI compared to the framework in the repealed Mutual Assistance Directive. The automatic exchange of information was a significant development in the area of administrative cooperation, whereby the tax authorities are supposed to get masses of information regularly, in order to have better background data and thereby ensure correct tax assessments in two or more member states. The member states began exchanging information, without prior request, on five categories of predefined income and capital: income from employment (EI), directors' fees (DF), certain life insurance products (LIP), pensions (PEN), and ownership of and income from immovable property (IP).

According to article 8 of the DAC the competent authority of each member state communicates, by automatic exchange, to the competent authority of any other member state, information that is available concerning residents in that other member state, on certain specific categories of income and capital. According to article 3(9) of the directive, the available information refers to information in the tax files of the member state communicating the information, which is retrievable in accordance with the procedures for gathering and processing information in that member state. The information that falls under the scope of automatic exchange of information must be communicated at least once a year.

18 European Commission (n 10) pp. 46-47.

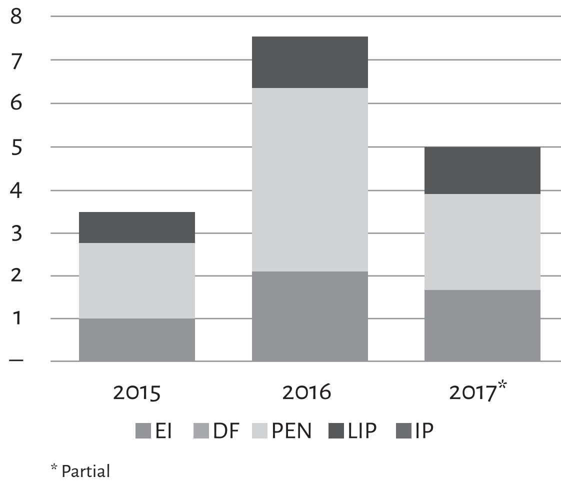

Figure 4: Automatic exchanges of information per income - Number of taxpayers (million) (2015-mid-2017)

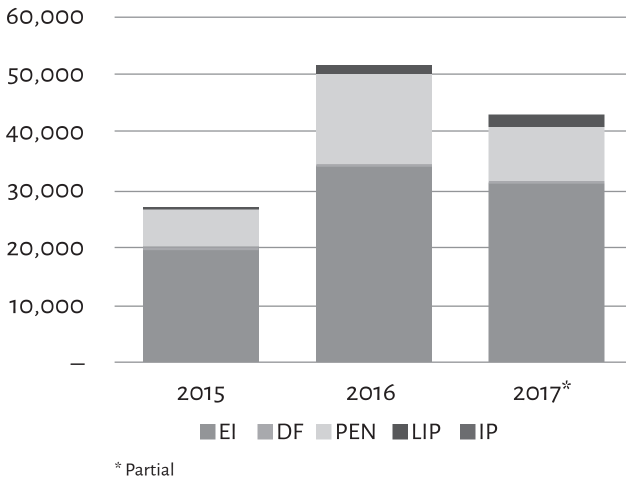

Figure 5: Automatic exchanges of information per income – Value (EUR million) (2015-mid-2017)

In 2017, eight member states had information available for all five categories of incomes/assets covered by DAC1, and another ten had information available for all categories apart from life insurance products. Only one country had information available for only one category of income (namely pensions). The remaining nine countries were in a position to exchange information on three income categories. The limited available evidence suggests that the AEOI data exchanged under DAC1 and used by the receiving country did generate

an increase in assessed taxes. At the same time, the growing trend in the figures reported by some member states suggests that tax authorities are progressively making better use of the information exchanged, which in turn is indicative of possible further increases in the future.[19]

Member States	Year	EI	DF	PEN	LIP	IP	Total
Increase in Tax Base (additional income)							
Belgium	2017[20]	148,593	..	105,837	33	40,040	289,470
Finland	2017	..	..	..	..	..	29,000
Total	2017	..	..	..	..	..	318,470
Increase in Assessed Tax (additional taxes)							
Estonia	2016	..	..	..	..	..	320
	2017	..	..	..	..	..	417
Poland	2015	87	0	3	0	0	91
	2016	830	0	39	0	2	870
	2017	1,108	1	390	0	19	1,519
Slovenia	2016	329	0	495	0	7	830
	2017	1,373	0	2,259	5	13	3,650
Total	2016	..	..	..	..	..	2,850
	2017	..	..	..	..	..	9,236

Figure 6: Additional income or tax assessed from DAC1 AEOI (2016-2017)

The scope of the DAC with respect to the automatic exchange of information has been expanded through several amendments, which were often influenced by external revelations about tax abuse. The following sections address all the amendments to the DAC which involve AEOI. These changes have been influenced by the work done at the OECD, either in the framework of BEPS or the Global Forum. For the most part, the European Union's recent transparency initiatives reflect a worldwide discussion of these issues that has led to commitments by both members and non-members of the OECD to gather and exchange comprehensive information on the activities of taxpayers. As the legislation introduced in the EU was done within the framework of one single legal instrument, i.e. the DAC, the report follows the structure and chronological order of the amendments, while clarifying the link to the work done at the OECD level.

[19] European Commission (n 9) pp. 44, 45.

[20] The information was provided in 2017, with reference to the tax years 2014 and 2015.

1.2.3. DAC2

In December 2014, the Council adopted the first amendment to the DAC (DAC2). This amendment broadened the scope of automatic exchange of information to cover financial accounts, introducing in the EU framework the OECD Common Reporting Standard (CRS). The adoption of DAC2 led to a repeal of the Savings Directive, the instrument that was previously used by member states to automatically exchange information on private savings income. The essential feature is the extension of automatic exchange of information to cover the common reporting standard, or CRS, developed by the OECD and endorsed by the G20 in September 2014.[21] DAC2 (and for that matter, the CRS) was, in part, a response to a unilateral measure of the United States, i.e. the Foreign Account Tax Compliance Act (FATCA), which laid down extensive reporting requirements for foreign banks providing financial services to US nationals. The most important element of DAC2 is the imposition of obligations on third parties in addition to national tax authorities. Reporting financial institutions as defined in the DAC2 are systematically obliged to provide information on account holders and their operations.

In addition, DAC2 provides for a so-called look-through when the holder of a reportable account is an intermediary structure (i.e. a passive non-financial entity), the reporting financial institution is required to communicate the 'controlling person' of that entity. The definition of controlling persons relies on the broad beneficial ownership definition stemming from anti-money laundering legislation. The DAC2 clearly states that the term 'controlling persons' must be interpreted in a manner consistent with the Financial Action Task Force Recommendations, which refer to it as 'beneficial ownership information'. Nevertheless, financial institutions are often called to positively confirm the identity of the Controlling Persons of a given entity, on top of the AML procedures.[22] However, in practice, circumventions of the reporting obligation were showcased which led to addressing this challenge in DAC6, which is presented in section 1.2.7 of this report.

Over the seven-month period spanning from September 2017 to early 2018, member states exchanged some 4,000 messages, concerning some 8.3 million accounts. The exchanges covered several financial indicators linked to the so-called 'reportable accounts'. The analysis presented here focuses primarily on the end-of-year account balances, for which a total value of EUR 2,865 billion was reported. The other financial variables covered by DAC2 exchanges, include: (i) dividends distributed, for a total value of EUR 14.8 billion; (ii) interest income, amounting to some EUR 18.2 billion; (iii) gross proceeds from sales of financial assets (i.e. maturities and redemptions), amounting to some EUR 850 billion; and (iv) other unspecified payments related to the accounts, for some EUR 59.4 billion.

1.2.4. DAC3

In December 2015, the Council adopted the second amendment to the DAC (referred to as DAC3). DAC3 corresponds essentially to the minimum standard under BEPS Action 5,[23] which

[21] OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, (OECD Publishing 2014), available at: https://doi.org/10.1787/9789264216525-en.

[22] European Commission (n 9) p. 67.

[23] OECD/G20, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance – Action 5: 2015 Final Report* (OECD Publishing 2015).

obliges states to exchange cross-border rulings via SEOI. DAC3 is designed as an automatic exchange and it has largely been a reaction to the November 2014 financial scandal “LuxLeaks”. It provides for the automatic exchange of information between tax authorities on cross-border tax rulings and advance pricing arrangements (APAs). This includes rulings on the existence of a permanent establishment, the tax status of a hybrid entity, depreciation, etc. APAs with third countries are excluded from information exchange where the international agreement under which the APA was negotiated prevents disclosure, but in that case, the relevant information referred to in the request for an APA shall be exchanged.[24] Cross-border rulings that exclusively concern individuals are out of the scope of DAC3.

The obligations under Action 5 of the OECD Base Erosion and Profit Shifting project and DAC3 are similar. However, under DAC3, the information on tax rulings is made automatically available to all member states (once uploaded on the central directory) while, under BEPS5, the ruling needs to be transmitted by way of spontaneous exchange to the ‘relevant jurisdictions’ (i.e. those that may be affected).

The number of rulings exchanged significantly increased in 2017, which matches the beginning of the application of DAC3. The nearly 18,000 rulings that were disclosed in 2017 must be compared with the zero or near zero values recorded up to 2015 when this exchange was only spontaneous. Only in 2016, namely after the LuxLeaks scandal and the adoption of DAC3, did member states start exchanging information on a significantly larger volume of tax rulings. But even in that year, the total number of messages sent barely exceeded 2,500.[25]

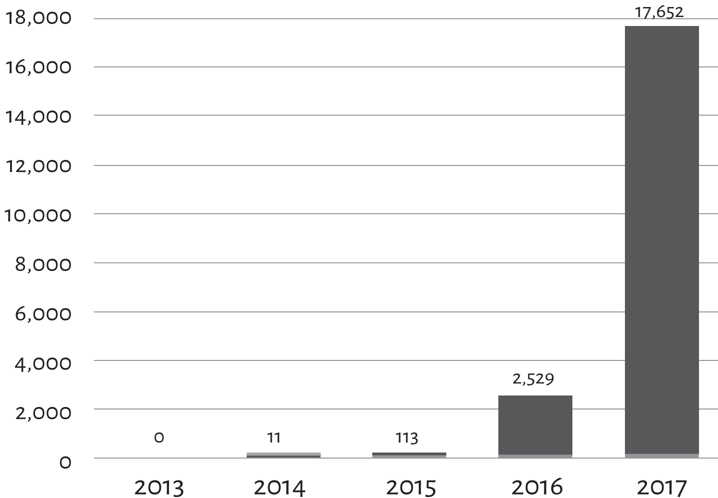

Figure 7: Automatic exchange of rulings (2013-2017)

24 Art. 8a(3) of the DAC.

25 European Commission (n 9) p. 22. Based on the information extracted by the Commission from the central directory (the ‘DAC3 Dataset’). Data refer to 24 countries, as four member states had not sent any DAC3-related information.

As the information provided in the central directory is fully accessible only by member states and the Commission only benefits from limited access, no details are available on the nature of the rulings (i.e. cross-border tax rulings or APA), the date of issuance, the duration or the industry.

1.2.5. DAC4

In 2016, DAC4 further extended the scope of automatic exchange of information by requiring the reporting and exchanges of country-by-country reports (CbCR). The reporting obligation and the AEOI of CbCR of multinational enterprises is governed in article 8aa, with further details on the forms in Annex III. The information to be exchanged concerns companies or groups with a consolidated turnover exceeding EUR 750 million and shall be structured in accordance with the CbCR format. The CbCR model template is illustrated in section III of Annex III of DAC4 and takes into account the standards and relative developments adopted by the OECD in the framework of BEPS Action 13,[26] however with some differences. The CbCR must include key financial data (revenue, profit/loss before tax, taxes paid and accrued, tangible assets) as well as the number of employees and information on the group structure.

The obligation for preparing the CbCR and filing it with the tax authorities of the jurisdiction of tax residence lies with the ultimate parent entity (UPE) of an MNE group or the MNE surrogate parent entity appointed for that purpose. Where the UPE is not resident in an EU member state or in a country required to provide the same information under the CbCR minimum standard, another constituent entity of the group, which may also be a permanent establishment, may be required to file the report locally. The same obligation applies where none of the relevant jurisdictions within the EU have actually received a CbC Report from the UPE.

Member states are required to adopt all the necessary measures to ensure that the reporting obligations of the MNE group are accomplished within 12 months from the last day of the relevant Reporting Fiscal Year. The tax authority to which the MNE reports shall send the CbCR automatically to tax authorities of all other relevant member states, i.e. where one or more constituent entities of the MNE group has its tax residence or is subject to tax in relation to a business carried out through a permanent establishment. Unlike the minimum standard of BEPS Action 13, these exchanges are mandatory under DAC4.

The first exchanges between tax authorities, which concerned the tax year commencing on or after 1 January 2016, had to be performed within 18 months after the end of the fiscal year, i.e. by 30 June 2018. After the first year, DAC4 exchanges between tax authorities shall take place within 15 months after the end of the fiscal year of the MNE group.

In November 2018, the Commission Services received statistics on CbCR exchanged between member states for the first time. Between June 2017 and October 2018, member states sent to each other 19,511 reports.

[26] OECD/G20, *Transfer Pricing Documentation and Country-by-Country Reporting – Action 13: 2015 Final Report*, p. 4, point 10 (OECD Publishing 2015).

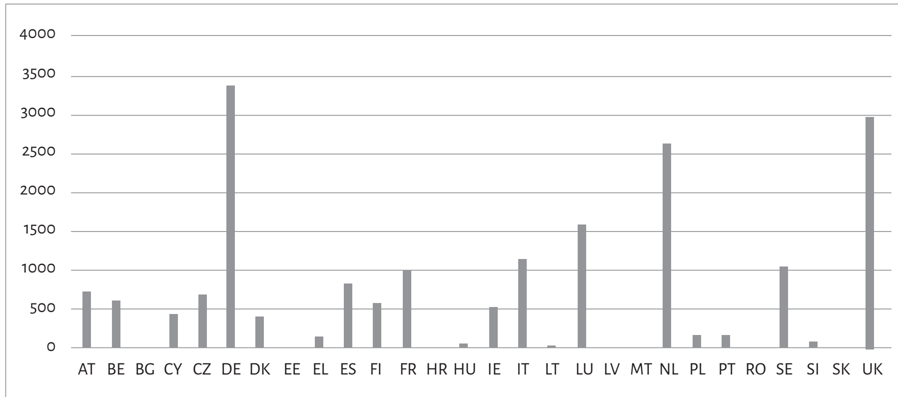

Figure 8: CbC reports sent per member state (2016)

During the same period, member states received from each other 17,319 reports.[27]

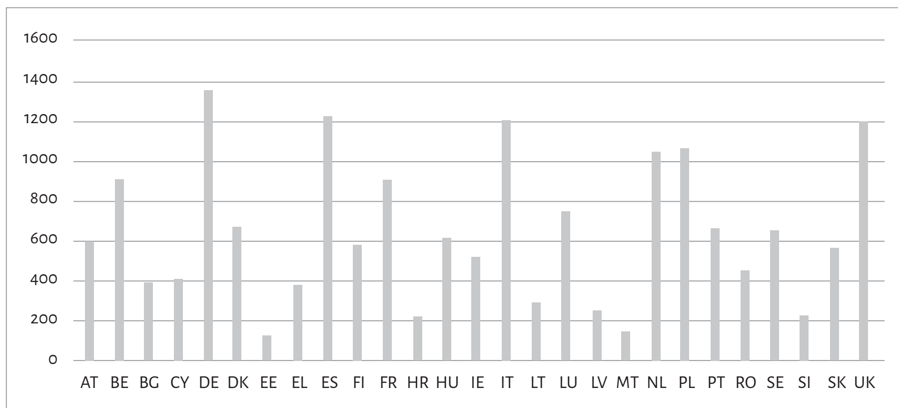

Figure 9: CbC reports received per member state (2016)

At the time of writing, no information is available concerning the quality, use and effect of CbCR. The Commission Services will continue monitoring DAC4 exchanges and report thereon in more detail as part of the next multiannual report on the functioning of the DAC due by 31 December 2022.

1.2.6. DAC5

In December 2016, EU member states adopted DAC5. Composed of essentially only one article, DAC5 introduced (as of 1 January 2018) a legal obligation for member states to grant

[27] European Commission (n 9) p. 97.

tax administrations access to beneficial ownership information as collected under the anti-money laundering (AML) framework, i.e. Directive 2015/849 (the 4th Anti-Money Laundering Directive).[28] DAC5 is an 'isolated tool' in a sense that it does not link with the OECD work, but instead to the EU work done in the field of anti-money laundering.

The synergies between the DAC and the anti-money laundering framework were further reinforced with the adoption of the 5th Anti-Money Laundering Directive,[29] where a link was explicitly made between the two directives, so as to ensure that the updated information obtained by financial institutions through the confirmation of the controlling persons of a given entity automatically prompts an update of the information available under the AML framework. Once the rules of the 5th AMLD are transposed and applied in practice in the member states, the Commission is going to be in a better position to assess the interaction between banking confidentiality rules and the automatic exchange of financial account information within the EU.

1.2.7. DAC6

On 25 May 2018, the Council adopted the fifth amendment to the DAC (often referred to as DAC6), which to provides for a reporting obligation and a subsequent mandatory automatic exchange of information on certain cross-border arrangements which feature-specific characteristics known as hallmarks. DAC6 targets intermediaries such as tax advisers, accountants and lawyers that design and/or promote potentially aggressive tax schemes. The information reported has to be automatically exchanged through a central directory. The first exchanges are due on 31 October 2020.

DAC6 derives inspiration from BEPS Action 12[30] on mandatory disclosure requirements regarding aggressive tax planning arrangements. Aligned with the BEPS Action 12, hallmark D covers reporting of schemes designed to circumvent reporting under the DAC2 or aimed at providing beneficial owners with the shelter of a non-transparent structure. However, DAC6 goes much further in terms of scope and includes additional categories of hallmarks. As the reporting and the corresponding exchanges have not yet happened, no statistical data is available.

[28] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141/73.

[29] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending directives 2009/138/EC and 2013/36/EU.

[30] OECD/G20, *Mandatory Disclosure Rules – Action 12: 2015 Final Report* (OECD Publishing 2015).

1.3. Case law on exchange of information

1.3.1. *Sabou*

In *Sabou*,[31] the taxpayer relied on his right to a fair trial in claiming that he should be involved in forming the request for exchange of information between the competent authorities conducted based on EU law, i.e. Directive on mutual assistance 77/799/EC. In its reasoning, the CJEU rejected the applicability of the Charter of Fundamental Rights of the European Union (the Charter) as it was not adopted at the time when the facts of the dispute arose, but assessed the merits of the case in the light of the general principle of the right to defence.[32]

The CJEU considered this procedure as a preparatory stage that does not result in any decision which could be challenged by the taxpayer. It distinguished the 'investigation stage' from the 'contentious stage', between the tax authorities and the taxpayer. The latter begins after the taxpayer is sent the proposed adjustment.[33] Based on this, the CJEU concluded that the taxpayer cannot rely upon his right to a fair trial in the procedure between two tax authorities and as such does not have the right to be informed of or participate in the procedure of forming the request for information.[34]

1.3.2. *Berlioz*

In *Berlioz*,[35] the taxpayer challenged a decision imposing a penalty for not complying with the order to supply information following a request from France to Luxembourg based on the Directive on Administrative Cooperation 2011/16/EU. The relevance of the case is twofold, as the CJEU had to rule on the compliance of the national procedure with the Charter and also on the standard of foreseeable relevance.

With respect to the compliance with the Charter, the CJEU confirmed that member states were acting in the scope of EU law as the national penalty imposed for the failure to comply with the request for information on the side of the requested person was intended to ensure the application of the DAC.[36] As the request for information and the penalty imposed had an adverse effect on the taxpayer, the CJEU found that the taxpayer can rely on his right to a fair trial in accordance with article 47 of the Charter, but in its reasoning made an important distinction with respect to circumstances that arose in *Sabou*. Unlike in *Sabou*, in *Berlioz*, the taxpayer suffered a penalty based on an order that forms a decision which can be challenged. The taxpayer was therefore entitled to rely on his right to a fair trial with regard to the decision imposing the penalty and when challenging this decision in front of a national court.[37]

On the second question, the CJEU held that 'foreseeably relevant' entails a necessary characteristic of the requested information and further clarified the notion. The requested information must be relevant to the tax affairs of a given taxpayer, relevant and justified for the purpose of the investigation and the requesting authority must be able to determine

[31] Case C-276/12 *Jiří Sabou v Finanční ředitelství pro hlavní město Prahu* EU:C:2013:678.
[32] Ibid. paras. 25, 28.
[33] Ibid. para. 40.
[34] Ibid. paras. 44, 46.
[35] Case C-682/15 *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes* EU:C:2017:373.
[36] Ibid. para. 40.
[37] Ibid. para. 58.

that it would need the requested information for assessing the tax due.[38] In addition, the request shall be submitted only after the requesting competent authority has exhausted the usual sources of information which it has been able to use in the given circumstances in accordance with article 17(1) of DAC.[39] The requested competent authority shall assess whether the foreseeable relevance is demonstrated.[40]

1.3.3. *Case C-245/19 and C-246/19*

The case concerns two requests for information sent by the Spanish tax authorities to the Luxembourg tax authorities on the basis of the bilateral treaty and the DAC. Following the Spanish information requests, the Luxembourg tax authorities issued an order to one of the companies in Luxembourg indirectly held by the taxpayer. The order further provided that no appeal could be filed against the order to provide the information. Nevertheless, the company filed an appeal claiming its admissibility, regardless of the fact that no penalty had been imposed, and that the request was not foreseeably relevant.

At the time of the writing, the hearing at the CJEU has not taken place as it is scheduled for 23 March 2020. This important judgment can therefore be expected only at the end of the year. This case is likely to provide the CJEU's clarification on whether an order for information to a person holding information can be challenged at this stage of the procedure.

1.4. Third-country agreements

The EU has signed agreements on the automatic exchange of financial account information with Switzerland,[41] Liechtenstein,[42] San Marino,[43] Andorra,[44] Monaco[45] and Saint-Barthélemy.[46] These agreements provide for the implementation of the OECD global standard for automatic exchange of financial account information and include provisions similar to those in DAC2.

[38] Ibid. paras. 67-69.

[39] Ibid. para. 70.

[40] Ibid.

[41] Amending Protocol to the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ 19 December 2015, L 333, p. 12.

[42] Amending Protocol to the Agreement between the European Community and the Principality of Liechtenstein providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ 24 December 2015, L 339, p. 3.

[43] Amending Protocol to the Agreement between the European Community and the Republic of San Marino providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ 31 December 2015, L 346, p. 3.

[44] Amending Protocol to the Agreement between the European Community and the Principality of Andorra providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ 1 October 2016, L 268, p. 40.

[45] Amending Protocol to the Agreement between the European Community and the Principality of Monaco providing for measures equivalent to those laid down in Council Directive 2003/48/EC, OJ 19 August 2016, L 225, p. 3.

[46] Agreement between the European Union and the French Republic concerning the application to the collectivity of Saint-Barthélemy of Union legislation on the taxation of savings and administrative cooperation in the field of taxation, OJ 15 November 2014, L 330, p. 12.

These jurisdictions have committed themselves to automatically exchange the information listed in section I of Annex I to the DAC. The jurisdictions with which such agreement is in place are included in the definition of 'participating jurisdiction' of annex I, section VIII(D)(4)(c) of the DAC if they are identified in a list published by the European Commission. Three of these agreements (Liechtenstein, San Marino and Saint-Barthélemy) entered into force on 1 January 2016 and the first automatic exchanges took place in September 2017. The three other agreements, including the one with Switzerland, entered into force on 1 January 2017 and the first exchanges took place in September 2018.

1.5. Administrative cooperation

1.5.1. *Presence of foreign officials (PAOE)*

Article 11 of the DAC provides that by agreement between two member states, officials of the requesting member state may be present in the offices of the requested state's tax authority, as well as during administrative enquiries in the requested member state's territory. The officials of the requesting member state must be given copies of documents available to the requested member state which contain the requested information. If the national law of the requested member state permits, the foreign officials may be allowed, during administrative enquires, to interview individuals directly and to examine records.[47]

Between 2013 and 2017, officials from 13 member states participated in PAOE in other member states, while 15 countries hosted at least one PAOE, for a total of 229 PAOEs. Thirteen countries were not involved in any PAOE, neither hosting foreign officials nor participating in enquiries in other countries, while two (namely Cyprus and Hungary) hosted respectively two and one PAOE, without participating in any PAOE abroad.[48]

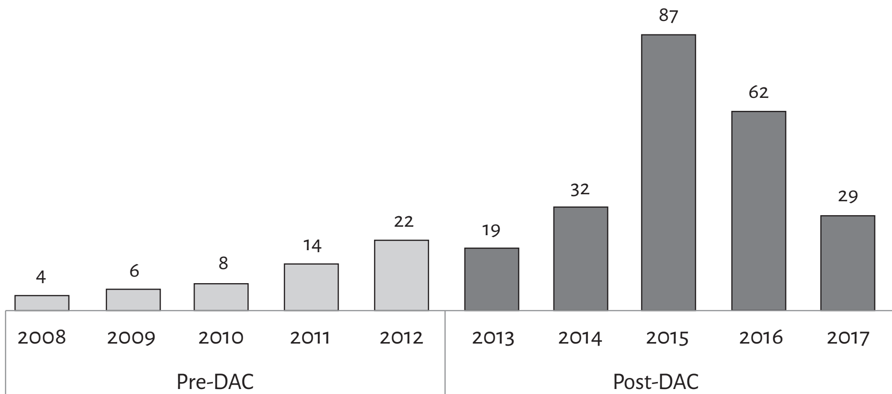

Figure 10: Presence of foreign officials (2013-2017)

[47] Art. 11(2) of the DAC.

[48] European Commission (n 9) p. 22.

In no less than 12 countries, national legislation does not allow officials of another member state to interview individuals directly or to examine records. In another four member states, the permission for such activities is subject to certain caveats.

Since 2015, there were 88 PAOE financed by the Fiscalis programme; about EUR 100,000 of the programme resources were spent on this tool with an average cost of about EUR 1,100 per activity. Each year, on average, around 150-200 presences are organised in the field of VAT and 50 in the field of direct taxation.[49] The share of visits financed by Fiscalis is lower than for simultaneous controls, as presented below.

1.5.2. *Simultaneous controls (SC)*

Article 12 of the DAC provides for SCs by two or more member states, conducted in their respective territories, of one or more persons of common or complementary interest to the member states. The SC is conducted with the aim of exchanging the information so obtained. The member states have the option to propose a SC to the other member state by giving the reasons for this choice. The requested member state is not obliged to accept the proposal, but in case of refusal, it has to provide a reasoned refusal to the requesting authority.

In the evaluated period between 2013 and 2017, 202 simultaneous controls were initiated. Some countries such as Germany, Sweden and the Netherlands were more active than others.[50] There is some evidence of quite high amounts of additional tax revenues on the basis of SCs, but only from a limited number of member states, i.e. the ones that have given results. Over the whole period, the additional tax assessed by six different member states amounts to EUR 532 million, with Sweden covering 80% of the reported total additional tax revenues.[51] Based on this limited information and taking into account that two of the countries only reported the aggregated value, while the others were able to provide values based on the form of cooperation, it can be estimated that nearly 35% of the incremental tax assessed is attributable to SCs.[52]

The Commission supports the administrative cooperation in the context of SCs and PAOEs in two ways. On the one hand, Fiscalis fostered the creation of horizontal tools to improve the awareness, uptake, and effectiveness of PAOEs and SC (e.g. creating working groups for presences in administrative offices and simultaneous controls coordinators, supporting the drafting of operational guidelines). The Commission also directly supports the national tax authorities by compensating the operational costs of participation (i.e. travel costs). The latter support shall be considered as a transfer, rather than an additional cost, as it offsets national expenditures.

Between 2013 and 2017, 22 member states took part in 202 SCs. They were initiated by a total of 15 member states, while another seven countries did not initiate any, but participated in one or more SC.[53]

[49] European Commission, Evaluation of Regulation 904/2010.

[50] European Commission (n 9) p. 23.

[51] Ibid. pp. 28, 46.

[52] Ibid. p. 46.

[53] European Commission (n 9) p. 23.

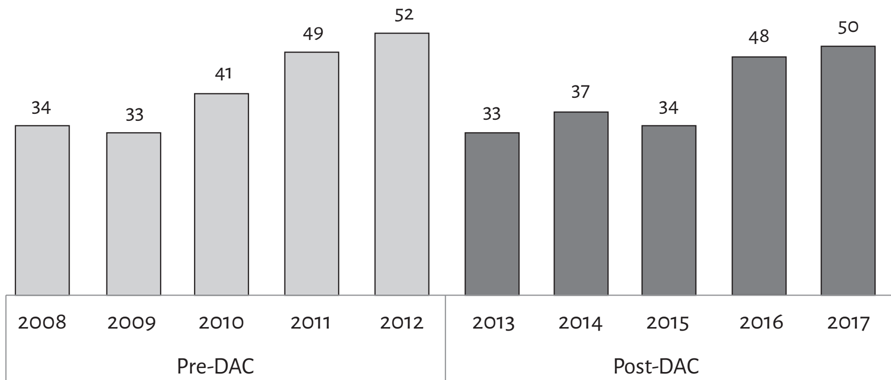

Figure 11: Simultaneous controls (2013-2017)

Between 2014 and June 2018, 245 SCs were financed by the Fiscalis 2020 programme across the various tax areas. In total, the SCs absorbed about EUR 2 million of support, with an average cost of about EUR 8,000 per control.[54] It is not possible to distinguish which simultaneous controls concerned direct taxation. Yet, one should consider (i) that the numbers in the fields of direct taxation and VAT together amounted to around 150-170 SCs per tax area over that period,[55] and (ii) that a significant share of SCs dealt jointly with direct taxation and VAT. On this basis, it can be estimated that Fiscalis 2020 did fund a large share of the SCs deployed under the DAC. It should be noted that the number of SCs and presences financed by Fiscalis does not reflect the total number of actions, as using the Fiscalis budget for these is not mandatory.

1.5.3. *Joint audits*

Businesses increasingly operate on a global basis and engage in cross-border activities while the competences of tax administrations remain largely limited to the national territory as a matter of principle. Tax administrations need to engage in closer cooperation in order to ensure that taxpayers pay the right amount of taxes while, at the same time, they should also enhance tax certainty and prevent double taxation. Due to the continued globalisation of the economy and its rapid digitalisation as well as the territorial limitations faced by tax administrations, the mere exchange of information may not be sufficient or the most efficient and effective route for achieving the best compliance outcomes for administrations and taxpayers. Similarly, acting and auditing unilaterally, rather than jointly, in areas such as transfer pricing, not only risks missing part of the picture but also carries the risk of double taxation for taxpayers. This may then lead to disputes which may require an additional time-consuming process through mutual agreement procedures (MAP) with an uncertain

[54] European Commission, Mid-term evaluation of the Fiscalis 2020 programme, available at: https://op.europa.eu/en/publication-detail/-/publication/c9c68539-33f7-11e9-8d04-01aa75ed71a1/language-en/format-PDF/source-91859413.

[55] Evaluation of Regulation 904/2010.

outcome. Joint audits can play an important role in contributing to a better functioning of the internal market on two fronts: (i) they offer tax administrations a transparent and efficient tool to facilitate the allocation of taxing rights; (ii) they prevent the occurrence of double taxation to the benefit of the taxpayers.

The next step towards a more enhanced cooperation between tax administrations could be to conduct joint audits, whereby two or more administrations form a single audit team in order to examine an issue or set of transactions that pertain to one or more related taxpayers with cross-border economic activities. DAC refers to different forms of administrative cooperation but does not explicitly foresee joint audits. In the current practice, some tax administrations already perform multilateral controls in a way that the procedure and outcome are, in essence, close to the concept of a joint audit. They thus combine the elements of a simultaneous tax inspection with features of PAOE.

Other instruments address joint audits to a certain extent. The Guidelines for a Model European Taxpayer's Code[56] lay down the principles, according to which the taxpayer should, without prejudice to national provisions, have the right to be kept informed about the main developments of an audit. At the same time, the taxpayer should be transparent in a timely manner and share the relevant information with each of the tax administrations involved in the bi- or multilateral control.

The report on a coordinated approach to transfer pricing controls within the EU[57] agreed by the EU Joint Transfer Pricing Forum (EU JTPF) sets out detailed recommendations for both the tax administrations and taxpayers with the aim of arriving at a coordinated approach to transfer pricing controls within the EU. In its analysis, the report relies on the instruments offered by the DAC.

While joint audits may already be performed by combining existing legal instruments, certain challenges remain as identified in the evaluation of the DAC, especially in non-co-operative situations. The main impediment to joint audits has so far been that the current legal framework provided for in DAC does not give a sufficient legal base for a member state to request and bring the other relevant member state(s) into conducting a joint audit. The announced Commission initiative aims to address this issue as well.[58] Through this process, the tax authorities would be expected to form a more comprehensive understanding of the audited taxpayers' affairs and conclude with an assessment of the taxpayer's situation, which they commonly share. This is particularly important in transfer pricing audits where it is critical to ensure that the process does not result in double taxation or non-taxation.

1.5.4. TADEUS

In April 2018, the EU economy and finance ministers agreed to commence discussions on how to foster cooperation between tax administrations further to a series of Commission reports revealing the loopholes in the administrative cooperation. Following this, the heads of tax administration and the Commission decided at a meeting in Thessaloniki in June

[56] European Commission, Guidelines for a Model for A European Taxpayers' Code, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/guidelines_for_a_model_for_a_european_taxpayers_code_en.pdf.

[57] EU Joint Transfer Pricing Forum, Report on a Coordinated approach to transfer pricing controls within the EU, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/jtpf_report_on_a_coordinated_approach_to_transfer_pricing_controls_within_the_eu_en.pdf.

[58] European Commission (n 16) p. 2.

2018 and during the G28 meeting in Vienna in September 2018 to create TADEUS – the Tax Administration EU Summit.

TADEUS is a cooperation network for the EU member states' heads of tax administrations and the Commission. Cooperation activities at operational and expert level already take place under the EU Fiscalis programmes, but this new form of cooperation at senior management level should allow tax administrations to better address common challenges faced by EU countries in today's era of globalisation and digitalisation.

The meetings contribute to developing a long-term process of coordination at a strategic level between the tax administrations in the European Union. Equally, the aim is to find ways of improving administrative cooperation and ultimately support the level playing field in the internal market from a tax administration perspective. In particular, TADEUS aims to build trust between member states' tax administrations, facilitate the implementation and compliance with European Union law, facilitate the formulation of EU-coordinated positions in international fora and issue recommendations for policy makers at national and EU level.

There is already an acknowledgement of the usefulness of the new dialogue and the importance of focusing the TADEUS work on the challenges related to:
a) addressing the digital economy and the digitalisation of tax authorities;
b) generating trust and enhancing the tax compliance level by providing legal certainty and through compliance risk management;
c) implementing EU legislation;
d) managing IT systems and resource constraints;
e) managing human resources and skills;
f) improving operational performance and reporting;
g) facilitating coordinated positions among national tax administrations in international fora.

In practice, the TADEUS cooperation takes place in two forms. There is a Plenary Group, which meets once a year and is composed of the heads of tax administrations and the Commission represented by the EU Commission's Director General for Taxation and Customs Union. Second, there is the Deputies' Group, which meets up to three times a year and is composed of one delegate per member state and the Commission represented at director level. The Commission provides support and financing for the projects through the Fiscalis programme. The implementation of the projects is the responsibility of the member states. The results of the projects are shared with other EU countries and with the Commission for policy-related purposes; for example, to be used in impact assessments and legislative proposals.

The first meeting of the Plenary Group was held in Helsinki on 17-18 September 2019. The heads endorsed the first findings in active projects, including potentially new reporting obligations for certain stakeholders as well as agreed to continue working on certain other projects. Further work will be launched on strengthening EUROFISC, the EU's network to combat VAT fraud, and on developing a new project for monitoring the performance of administrative cooperation in the EU. The next TADEUS plenary meeting will be hosted by Germany in autumn 2020.

1.5.5. *Cooperative compliance*

In the past years, the EU has focused its efforts on tackling tax evasion and boosting transparency. Tax authorities now have a broader set of cooperation tools to detect and tackle all forms of evasion and avoidance. In parallel to these efforts, it is important to avoid imposing undue burdens on compliant taxpayers in the fight against a minority of fraudsters.

In addition, it still remains too burdensome for businesses to operate within the single market with its 27 different sets of substantive tax rules. Therefore, action is also needed at EU level to have a simpler and more modern tax environment that would help compliant businesses to reap the benefits of the single market and therefore sustain the EU's economic growth. In order to achieve this, there are thoughts for a new strategy to strengthen tax compliance. In this context, a new programme designed for the benefit of the taxpayers could increase tax certainty, facilitate tax compliance and create a new space of dialogue and trust between tax authorities and taxpayers. This could include a tool for preventive dialogue between the tax authorities and taxpayers, which could be complemented by a cross-border ruling framework and a dispute resolution mechanism. In this vein, the Commission is currently reflecting on the prospect for giving an EU dimension to cooperative compliance assurance programmes.[59]

2. Incorporation of the instruments and processes into domestic legislation

2.1. DAC transposition

The implementation of the DAC has been influenced by certain features of national legislation and regulations such as the availability of the data to be exchanged under DAC1, the statutes of limitations, the requirements to notify taxpayers of requests for information, and national tax policy developments, such as the introduction of tax amnesties or voluntary disclosure programmes focusing on assets held abroad.

The EU member states have, or are in the process of, as the case may be, transposing the various amendments to the DAC. At the time of writing this report, there are ongoing infringements against a few member states. The overview is provided in the table below. The data on the infringement cases cover both notification and conformity checks. Considering their relatively recent transposition, checks on the transposition and conformity of national implementation for DAC5 are still ongoing. With respect to DAC6, the completeness checks are underway and the conformity checks will start once the former are completed.

[59] European Commission, Roadmap – Action Plan to fight tax evasion and make taxation simple and easy.

Table 1. DAC transposition: state of play – updated in January 2020

Directive	Deadline for transposition	Applicable as of	Infringements opened	Still open
DAC1	31/12/2012	01/01/2013 (01/01/2015 for AEOI)	14	0
DAC2	31/12/2015	01/01/2016 (01/01/2017 for Austria)	15	1
DAC3	31/12/2016	01/01/2017	9	0
DAC4	04/06/2016	05/06/2017	8	1
DAC5	31/12/2017	01/01/2018	11	1
DAC6	31/12/2019	01/07/2020	15	15

With respect to DAC2, the infringement procedure following the conformity checks are expected to be finalised soon.

With regard to DAC4, the Commission initiated the infringement procedure n. 20182360 against Spain by issuing a letter of formal notice on 24 January 2019 pursuant to article 258 TFEU. The Commission found that the current Spanish rules lack a number of elements regarding the reporting obligations of multinational companies. Therefore, the Commission asked Spanish authorities to implement DAC4 in its entirety. Spain committed to carry out the amendments to its law and at this moment the case is on hold.

As for DAC5, the Commission opened infringement procedures n. 20180025 against Ireland by sending first a letter of formal notice on 24 January 2018 and then a reasoned opinion on 7 June 2018 pursuant to article 258 TFEU. The Commission ascertained the failure to communicate the transposition of DAC5. At the moment of writing, the procedure is still ongoing. Conformity checks with a few other member states are still underway.

With respect to DAC6, 13 member states notified their transposition measures and consider themselves that they have fully transposed the Directive. Four member states have communicated a part of their transposing measures and 11 member states have not communicated any transposing measures for DAC6 so far. Therefore, 15 member states received a letter of formal notice.

2.2. Institutional framework of the Commission

2.2.1. *Working group on Administrative Cooperation in Direct Taxation (ACDT)*

Every year the Commission organises quarterly meetings of a group of experts from tax administrations from all EU member states. The work of the group focuses on monitoring the implementation and practical application of the DAC.

2.2.2. *IT aspects*

For the exchange of information, the Commission has built and maintains different IT systems and channels which are available to member states. Member states exchange foreseeably relevant information for direct tax purposes via a secured CCN mail or CCN/CSI platform either when requested or spontaneously. The e-forms were drafted together with the member states, to give a common structure and guidance in communication between competent authorities for (i) requesting from other member state specific information needed for making a tax decision, if the information cannot be obtained otherwise at national level, and (ii) sending spontaneously information foreseeably relevant for tax purposes to another member state. The exchange platform is provided via a centralised system called electronic Forms Central Application (eFCA) centrally deployed in TAXUD Data Centre(s).

The content and form of the information for the mandatory automatic exchange of information is described in the DAC and more precisely in the implementing regulations. The member states send information they have collected about non-residents to their country of residence through the CNN or upload certain information to a central directory accessible to all member states. The AEOI data is intended to be used for risk analysis and comparison of information received from the resident taxpayers nationally. Cross-border tax rulings and APAs under DAC3 and reportable cross-border tax arrangements under DAC6 have to be uploaded on to a central directory, where they are accessible to all member states. The Commission has only limited access to the data stored there, mainly information which is necessary to ensure the proper functioning of the DAC.

2.3. Confidentiality and data protection

2.3.1. *Confidentiality and data protection in DAC*

As a general rule, the DAC has to be interpreted and applied in light of the GDPR.[60] It also states that reporting financial institutions and competent authorities in member states are considered as data controllers in accordance with the EU General Data Protection Regulation (GDPR). All exchanges of information are naturally subject to limitations for reasons related to data protection. Yet, these limitations remain contained in the light of the need to achieve the objectives of the DAC.[61] In addition, the GDPR allows for a restriction by way of a legislative measure in taxation matters.[62]

Other provisions of the DAC deal with more specific aspects of confidentiality and data protection. Article 16 of the DAC sets out the conditions for disclosure of the protected information and documents. Article 21 of the DAC deals with practical arrangements in ensuring the security of the CCN network and national systems; article 23a of the DAC provides for the confidentiality of any information communicated to the Commission, for example the evaluation reporting. Article 25(3) of the DAC confirms that financial institutions

[60] General Data Protection Regulation (GDPR), Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (Text with EEA relevance) (OJ L 119, 4 May 2016, p. 1–88)

[61] Art. 25(1) of the DAC.

[62] Art. 23(1)(e) of the GDPR.

shall inform their clients that information relating to them will be collected and transferred. Reporting financial institutions shall supply their clients with all information that a client is entitled to under the applicable data protection legislation.

2.3.2. *Whistleblowers protection*

Up until recently, the status of whistleblower protection in Europe has been fragmented. Only around ten member states have strong legislative protection for whistleblowers and, at the EU level, the protection of whistleblowers is sector specific and the protection is focused on financial services. Against the backdrop of an increasing number of high-profile corporate scandals, on 7 October 2019, member states adopted the EU Whistleblower Protection Directive (the "Directive").[63] Member states have until 17 December 2021 to transpose the Directive into their national law.

The Directive seeks to accomplish two goals: (i) the creation of a number of mandatory reporting channels for whistleblowers to raise concerns about breaches of EU law; and (ii) a higher level of protection against retaliation for whistleblowers who report breaches of EU law. These include EU laws covering tax, fraud, money laundering, safety, national security, protection of the environment, consumer products, public procurement, competition, and data privacy, among others. The Directive does not however address specific aspects of using the obtained information for tax purposes.

The Directive applies to all public and private companies in the EU with more than 50 employees and regional municipalities with over 10,000 inhabitants. For the first time, under the Directive, an internal reporting program will be mandatory for these entities within the EU. The reporting channels are organised in a cascading system, starting with internal reporting of disclosures, followed by external reporting of disclosures to competent member state authorities and finally could result in reporting to the media in certain restricted circumstances.

Anonymous whistleblowers must be protected from retaliation. Support for whistleblowers shall take the form of information and advice, effective assistance from competent authorities, and legal aid in criminal and cross-border civil proceedings, as well as financial assistance and other support measures.

The protection against retaliation requires member states to adopt effective, proportionate and dissuasive penalties for any person who tries to hinder the reporting or who retaliates against reporting persons, including by bringing vexatious proceedings or by breaching the duty of maintaining the confidentiality of reporting persons. It is clear that the scope of the Directive is broad and will require many EU companies to implement, or upgrade, their whistleblower programs, including in the area of taxation. At the moment of writing, it is too early to evaluate the exact impact of the Directive as it is yet to be implemented by the EU member states.

[63] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, 26 November 2019, p. 17–56.

3. Impact of digitalisation on the established framework

Emerging work streams, such as digital platforms, e-money providers, and crypto-assets highlight a possible need to further strengthen the administrative cooperation.

3.1. Crypto assets

While presenting some benefits in terms of cheap and fast payments as well as financial inclusion, crypto-assets or stablecoin arrangements also pose risks in terms of data privacy, taxation, money laundering and cyber-security. Global stablecoin arrangements (those that can reach a global scale) raise additional challenges in terms of financial stability, monetary sovereignty or competition. One conclusion of the G7 is that no global stablecoin arrangement should start its operations until all these risks are addressed. G7 also highlights the inherent tax challenges connected to the tax avoidance and identifying beneficial ownership.[64]

Given the pseudo-anonymity and lack of traceability of crypto-currencies, crypto-assets and stablecoins, it is very hard to detect such taxable events, especially due to the lack of borders. One of the key questions is whether these new instruments should be classified as goods or fiat currencies. Depending on this, different consequences can be triggered, not only in the area of taxation but also in financial regulation. A comprehensive global solution for tax purposes is therefore needed and this should be one which brings together tax, anti-money laundering and financial regulation.

Stablecoin arrangements should provide sufficient information to allow for a proper assessment and to determine whether they are covered by existing EU legislation. Stablecoin arrangements should be adequately regulated in the EU and there is willingness to act swiftly at EU level on that issue, in cooperation with the European Securities and Market Authority, European Banking Authority and European Central Bank. As a first step, the EU is reflecting on what could be its response to the emergence of crypto assets such as the bitcoin and the effect that these new technologies will have on how financial assets are issued, exchanged, shared and accessed. This initiative will assess to what extent crypto-assets are covered by current EU legislation and whether new legislation is needed.[65] However, only after the financial regulation addresses and defines the nature of the crypto-assets will it be possible to determine the tax consequences under the existing framework, namely DAC2. Whether an extended EOI framework is needed will be clearer after the aforementioned initiative.

3.2. Platforms

The digital platform economy has been growing rapidly and is expected to keep growing. However, tax compliance is suboptimal, and the value of unreported income is likely to be significant. The specific problem is that member states' tax administrations have limited

64 For details see G7 Working Group on Stablecoins, Investigating the impact of global stablecoins available at: https://www.bis.org/cpmi/publ/d187.pdf.

65 European Commission, Financial services – EU regulatory framework for crypto-assets, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Directive-regulation-establishing-a-European-framework-for-markets-in-crypto-assets.

information to correctly assess and control gross income earned in their country with activities (such as renting a property via a digital platform or providing transport services) carried out via a digital platform. This is especially the case when the income or the taxable amount passes via platforms established in another jurisdiction. Several member states have implemented unilateral measures to ensure reporting from such digital platforms, and others are planning to implement similar measures in the short term.

In mid-February 2020, the Commission published an initiative to strengthen the exchange of information framework in the field of taxation. In addition to joint audits and to improving the existing elements of the DAC, this initiative should provide tax administrations with information on taxpayers who generate income (revenues) through digital platforms. This aims at ensuring the adequate taxation of such revenues both from a direct tax and VAT perspective. It also will ensure consistency with ongoing work at the international level on the taxation of the digital platform economy.[66]

It is expected that the effect on tax revenues will be positive, also from an indirect tax perspective. The measure should encourage platforms accurately report taxable activities of the sellers and their revenue from the start. At the same time, standardised reporting of gross income (revenues) generated through the digital platform economy will create a level playing field across businesses (whether they operate through a platform model or not). Making the standardised reporting available also for VAT purposes would enhance efficiency and simplification for the whole tax system. A detailed impact assessment is being prepared to support the preparation of this initiative and to inform the Commission's decision. The work on data collection and the economic analysis has already started. The assessment's publication is expected at the same time as a possible legislative proposal.

4. Conclusion

The exchange of information and administrative cooperation has improved significantly in recent years. This is supported by statistical data presented in this report, which demonstrates an increase in the number of exchanges and the level of cooperation. Most significantly, due to the exchange of cross-border rulings and APAs there were almost 18,000 exchanges in 2017. Since the first exchanges have only started under DAC4, the benefits of using information for risk-assessment purposes will become apparent in the upcoming years. As an additional powerful tool for detecting tax avoidance, DAC6 will enable exchanges of reportable cross-border arrangements as of 31 October 2020.

With respect to administrative cooperation, PAEO and SC have been used consistently. Joint audits however have more significant potential, whereby the new upcoming legal framework will enhance and strengthen the cooperation amongst tax administrations. Other, project-oriented, initiatives such as cooperative compliance and TADEUS are intended to build trust and exchange of good practices among the tax administrations.

The Commission is monitoring and evaluating the implementation and practical application of the DAC. Based on the feedback received from the member states via different channels, it is working on improving the existing legal framework of the exchanges of information and administrative cooperation, including the sharing of best practices and

[66] OECD Forum on Tax Administration, The Sharing and Gig Economy: Effective Taxation of Platform Sellers, https://doi.org/10.1787/574b61f8-en (OECD Publishing 2019).

further development of data analytics tools in order to ensure a better use of the information now available. The improvements to the DAC and new rules for reporting of income earned through a digital platform are expected to be adopted as a Commission proposal by the end June 2020.

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Summary and conclusions

of all branch reports

Exchange of information: issues, use and collaboration

Branch reporters
Adriana Piano[1]
Diego N. Fraga[2]

Summary and conclusions

International exchange of information (EOI) in Argentina is done basically by means of five instruments: 1) double taxation conventions (DTC) approved by National Congress, which include provisions related to EOI (article 26 OECD Model DTC), 2) tax information exchange agreements (TIEAs), which can be executed by the Argentine Revenue Service (ARS) without the intervention of the congress[3], 3) the Convention on Mutual Administrative Assistance in Tax Matters (CMAATM), 4) the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information ('the CRS MCAA') and 5) Multilateral Competent Authority Agreement on the Exchange of CbC Reports (the CbC MCAA).

There are no statistics regarding an increase in revenue attributable to the EOI, but the implementation of these frameworks has contributed to an environment of greater tax and legal transparency. In recent years, taxpayers have started to be aware of this powerful tool and its use by the ARS to discover hidden income and assets. For example, EOI with France – which sent information derived from the *Swiss Leaks* – enhanced the tax amnesties' performance.

The DTC network was historically the only tool available for the EOI. Despite the limited reach of some of the EOI clauses in many of the DTCs signed by Argentina, the tax authorities always had a broad interpretation of those clauses and there was frequent EOI – in most cases on request or spontaneous – with some countries such as Spain, Brazil, Chile, Germany and Norway.

The flexibility of the TIEAs has also helped the ARS to expand its EOI network, especially since 2009, when it concluded those agreements with many tax havens. Most of those agreements were based on the OECD Model.

There were some important agreements concluded in recent years with countries which are common destinations for Argentine investments, such as Uruguay (effective from 2014) and the United States of America (effective from 2018).

The CMAATM had an important impact in the media, as it was the first multilateral agreement signed by Argentina. But the most important benefits came with the AEOI – in which Argentina is strongly committed – starting in 2017 with the CRS MCAA. Some internal regulations were issued to implement it.

The impact of CRS contributed to the success of the latest tax amnesty in 2016/2017. Taxpayers declared USD 116.8 billion in previously undisclosed assets.

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3 However, Congress has ratified some agreements because their scope exceeded mere information exchange.

Moreover, CRS provided information of more than 170,000 accounts abroad held by Argentine tax residents in 2018.

However, the threat of being discovered as a result of the AEOI is probably not be enough to change the behaviour of some taxpayers. The major challenges Argentina faces are linked to restoring faith in the public institutions perceived as corrupt.

It is necessary for Argentina to celebrate a bilateral FATCA agreement (IGA) in order to reduce tax evasion, as the United States is a very common destination for Argentine investment.

Argentina has assumed all obligations under the UN Code of Conduct for exchange of information. Those standards have no conflict with domestic provisions.

Individual or group requests are admitted by the ARS if they are duly justified, but fishing expeditions are not allowed by local legislation.

We believe that EOI has led to a reduction in taxpayer rights because they do not have the right to control the information sent to other countries.

As to resources used in EOI, digital systems have been put in place, especially regarding AEOI. However, human resources and infrastructure are still insufficient to effectively administrate information.

Despite many security measures related to confidentiality and data protection, there were some tax leaks, not related to information exchanged with another countries.

The ARS's investigative powers have not been expanded because of EOI. They have been always very wide in the last two decades. Even though fishing expeditions are not allowed during an investigation, in the last decade the ARS has been establishing countless 'information regimes' in which third parties are obliged to transfer electronically, automatically and periodically massive amounts of information about customers, suppliers, partners, etc. In recent years, the ARS increased the investment in A.I. in order to more intelligently manage its huge database.

The ARS can also obtain information through whistle-blowers, whose names remain private. However, there is not a formal whistle-blower program like there is in the United States. There are no incentives for whistle-blower activity.

Even though the breach of confidentiality by a private party may be criminal conduct, this rule does not apply in fiscal matters.

ARS can use tax information gathered through the EOI frameworks for other purposes. The Anti-Money Laundering Law provides that the ARS must notify the Financial Information Unit of any situation that gives rise to suspicions of money laundering or financing terrorism.

BEPS measures were introduced recently[4] in Argentina, as well as CbCR[5] and master file[6] regulations. A few companies are obliged to submit CbCR.

Even though Argentina has signed a TIEA with the United States, there is not a Competent Authority Agreement for exchanging CbCR yet. Thus, there are some problems for local companies with a head office in the United States.

4 Law 27,430.

5 GR-E 4130/2017.

6 Decree 1170/2018.

There have not been any studies on how much revenue is channelled out of the country untaxed using digital financial networks but, as the tax pressure is high in Argentina, it is easy to conclude that those networks help tax evaders to achieve their goals.

Earnings with cryptocurrencies were recently reached by the income tax[7]. The ARS[8] has also established: 1) an information regime for cryptocurrency exchanges and companies administrating electronic wallets; and 2) a tax collection regime,[9] applicable to payments made through those means.

Besides, the Argentine SEC has made a warning for investors in tokens and cryptocurrencies and the organism in charge of fighting money laundering and terrorism financing is planning to issue some regulations, as is the Central Bank.

We reckon that the EOI obligations will be soon be extended to financial intermediaries operating in the digital financial services market.

7 Law 27,430.

8 GR-E. 4614/2019.

9 GR-E. 4622/2019.

Australia

Branch reporters
James Alsop[1]
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Summary and conclusions

On 14 August 2019, the High Court of Australia confirmed that the Commissioner of Taxation (Commissioner) could use information obtained from the Paradise Papers data leak when assessing a taxpayer.[3] It was a significant win for the Australian Taxation Office (ATO), and Second Commissioner Mr Jeremy Hirschhorn took the opportunity to remind taxpayers that the ATO regularly receives intelligence and data from across the globe. Mr Hirschhorn said:

> We are at the forefront of international cooperation through our active role in the Joint Chiefs of Global Tax Enforcement (J5) alliance and the Joint International Tax Shelter Information and Collaboration Network (JITSIC), as well as through measures such as Country by Country reporting.
>
> The ATO will continue to use all information available to ensure large corporations and those trying to hide money overseas are paying the right amount of tax. Our wide and growing range of information sources and increased collaboration with overseas agencies are vital tools in achieving this objective.[4]

The ATO is indeed at the 'forefront' of international cooperation in the international exchange of information on tax matters. The ATO collaborates with other tax administrators by sharing information to influence tax reform and identify global trends and best practices.[5] Australia is a former Chair of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum). During the 2018-19 financial year, the ATO's involvement with the Organisation for Economic Cooperation and Development (OECD) included co-hosting the fifth meeting of the Global Forum on Value Added Tax and GST and presenting at the Forum on Tax Administration in Chile. The ATO's work on issues raised by the Panama and Paradise Papers was recognised by the Chair of the OECD's Forum on Tax Administration.[6] The ATO combats crime in Australia's tax and superannuation systems through its involvement in the OECD, the Financial Action Task Force (FATF) and the J5 alliance, where it is developing a

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The views expressed in this report are the reporters' own and not necessarily those of Deloitte Legal Pty Ltd.
3 *Glencore International AG & Ors v Commissioner of Taxation of the Commonwealth of Australia & Ors* [2019] HCA 26.
4 Australian Taxation Office Media Release, *High Court confirms ATO can use information from data leaks*, 14 August 2019.
5 Australian Taxation Office, *Annual Report 2018-19*, 16.
6 Ibid, 62.

shared understanding and approach to addressing serious financial crime internationally.[7]

The legal and administrative basis for international exchange of information in tax matters is derived from a series of bilateral and multilateral agreements entered into by the Australian government and adopted into domestic law, as well as wide-ranging domestic powers to compel the production of documents and information, orally or in writing.

Australia's bilateral exchange of information agreements includes an extensive network of double tax agreements, tax information exchange agreements and agreements entered into with antimoney laundering and counter-terrorism financing regulators. Australia's multilateral exchange of information agreements include the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, as amended by the 2010 Protocol.

Australia has implemented a number of initiatives from the Organisation for Economic Co-operation and Development / G20 Base Erosion and Profit Shifting (BEPS) Action Plan, including the spontaneous exchange of rulings contemplated by BEPS Action 5 and country-by-country reporting contemplated by BEPS Action 13. In addition, the Australian government has signed an intergovernmental agreement with the United States government to implement the US Foreign Account Tax Compliance Act and has implemented the Global Forum's Standard for Exchange of Information on Request and the Standard for Automatic Exchange for Financial Account Information in Tax Matters. To date, the Global Forum's peer reviews in relation to Australia's adoption of these mechanisms for international exchange of information have been positive.

Domestically, the ATO is supported in risk profiling taxpayers and conducting tax investigations and examinations by information obtained through compliance activities, and wide-reaching information-gathering powers. In addition to the power to compel taxpayers to produce documents or provide information, the ATO collects information from a range of thirdparty sources to fuel its extensive data matching programs, including from banks, financial institutions, investment bodies and stock exchanges, and works with other government agencies, including Australia's antimoney laundering and counter-terrorism financing regulator, the Australian Transaction Reports and Analysis Centre (AUSTRAC).

Notwithstanding the broad infrastructure in place to facilitate access to global and domestic information, challenges remain. Radical disruption of the world's economy through the advancement of new technologies has generated new challenges that existing frameworks are not fully equipped to deal with, including the rise of digital currencies. In Australia, this has been met with amendments to antimoney laundering and counter-terrorism financing laws to capture intermediates in the cryptocurrency industry and, in 2019, prompted the ATO to launch a specific data matching program. However, a coordinated multinational approach is yet to be seen, and the efficacy of efforts of individual countries will be limited by the inconsistent regulatory responses to the emergence of digital currencies and other technologies.

[7] Ibid, 62.

Austria

Branch reporters
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Summary and conclusions

Austria is exchanging information on request, spontaneously and automatically under different frameworks, namely bilateral treaties, the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and on the basis of EU legislation and its domestic implementation. Whereas Austria previously held a strong banking secrecy and preferred withholding taxes over exchange of information, Austria is now complying with the relevant international standards on exchange of information. In particular, Austria is also exchanging information automatically on financial account information, CbC reports, tax rulings and soon also on cross-border tax planning arrangements. Austria has also concluded a FATCA Model 2 Intergovernmental Agreement which can be considered an unfortunate decision as nowadays Austria is exchanging financial account information automatically with many different countries and the group requests following the transfer of aggregate information on non-compliant account holders cause a considerable administrative burden for the Austrian tax administration.

Information on additional tax revenues as a result of administrative cooperation are available only for joint audits. As a result of the Austrian tax administration's participation in 58 simultaneous tax examinations with other EU member states, Austria recorded additional tax revenues in the amount of EUR 119.39 million. These joint audits generated a total of EUR 1.635 billion in additional tax revenues in all participating EU member states. A cost-benefit analysis to measure the success of exchange of information has not been conducted. However, due to EU law requirements and the political environment – peer review reports measure Austria's compliance with the international standards – it would not be a viable decision to participate in administrative cooperation in tax matters only insofar as it is economically beneficial for the Austrian tax administration.

Whereas the Austrian tax offices acknowledge the benefits of exchange of information for detecting and preventing fraud and ensuring a correct tax assessment, it also causes an administrative burden. In order to comply with the international standards, incoming requests are prioritised as they have to be dealt with within the time limit. In contrast, the response time of some other countries is too long in order to ensure a correct and prompt clarification. As regards the data received under the framework of automatic exchange of information, the lack of a unique tax identification number (TIN) for each taxpayer is problematic, as it makes the allocation of information to a specific taxpayer difficult. The Austrian tax administration also runs a risk management system working with predictive

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analytics and data mining. It remains to be seen whether data received automatically can be processed efficiently or whether its main function is to create a deterrent effect.

The international developments have also influenced the tax authority's powers to request information domestically. Whereas information on a bank account could previously only be accessed if a criminal court proceeding or an administrative penal proceeding for tax violations had been initiated, the tax administration can now be given access to a bank account with the consent of a tax court's judge to clarify doubts about the accuracy of the information provided by the taxpayer. Furthermore, a specific register of bank accounts has been created, listing the bank accounts held in Austrian banks and their beneficial owners.

Belgium

Branch reporters
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Summary and conclusions

'The era of banking secrecy is over' was the bold statement made by the G20 leaders in 2009 in London. Would they – exactly ten years later – ever have expected their communication to have such consequences? Since then, Belgium has been inundated with a multitude of instruments for cross-border cooperation in income taxes. Today, Belgium participates in all those (legal) initiatives.

Belgium has always had an extensive network of Double Taxation Conventions (101 according to the latest overview). Belgium even played a pioneering role in the development of cooperation between states by concluding bilateral agreements, admittedly only in the field of registration fees, as early as 1843 and 1845 with France, the Netherlands and Luxembourg. Today, Belgium is following the OECD's most recent approach to article 26 OECD Model Convention in the application of its Double Taxation Conventions.

Belgium has signed twenty TIEAS with several notorious tax havens. They provide for the same form of exchange of information as the Double Taxation Conventions. Belgium has also concluded 11 administrative arrangements to encourage the exchange of information between states. Most of these administrative arrangements are based on the Convention on Mutual Administrative Assistance in Tax Matters.

As a member of the European Union, Belgium must comply with the provisions of the Directive on Administrative Cooperation 2011/16/EU (DAC) and its five amendments. Belgium has transposed the entire directive into one article of law, namely article 338 of the Income Tax Code 1992. The fifth amendment to Directive 2011/16/EU relates to mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. At the time this report was drafted, Belgium had not yet implemented the directive. However, a second draft version of national legislation was approved by the Council of Ministers. The directive foresees that the implementation must take place by 1 January 2020.

Like most countries in the world, Belgium participates with the United States in FATCA, the bilateral system of automatic exchange of financial information. In implementation of this, Belgium and the United States have already issued an Intergovernmental Agreement (IGA I) on 23 April 2014. Belgium has furthermore complied with the common reporting standard (CRS) since 2017. In order to ensure the correct application of CRS, the Belgian law on consent to the Multilateral Competent Authority Agreement was enacted on 30 August 2017.

The OECD, through the BEPS Action Plan, and the European Commission, through DAC 3 and DAC 4, try to impose exchange of information regarding tax rulings and advanced pricing

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agreements applied by multilateral enterprises. Belgium has already transformed these legal instruments into national measures. The Belgian IEOI-DT unit of the tax administration sees to it that received decisions on rulings and advanced pricing agreements are made available to the designated competent departments. Belgium has established a UBO Register pursuant to the Anti-money Laundering Law. The UBOs of every company had to be registered before the first of October of 2019.

The EU Directive 2016/881 has been implanted in Belgian domestic tax law by the law of 31 July 2016 and is applicable as from financial year 2016. As far as a manual for implementation is concerned, the Belgian tax authorities refer on the relevant website to the BEPS Guidance on Implementation of CbC reporting.

The Large Enterprises Division of the Belgian tax administration started in 2018 a two-year pilot project on cooperative tax compliance. The project aims at transforming the approach of a posteriori tax investigations towards a system of proactive and constructive dialogue on the tax affairs of corporations. The pilot project was only open for very large enterprises. After an initial pilot project with eight countries, Belgium recently decided to join the ICAP 2.0.

The 2018 Peer Review Report on the Exchange of Information on Request concluded that Belgium is overall largely compliant with the standard. Since the 2013 Report, Belgium has made progress with regard to the deadlines for ratifying tax treaties and relating to the efficiency of replies. Nevertheless, Belgium has received a few key recommendations.

When drawing up a request for information to a foreign tax administration, the Belgian tax administration must take into account the substantive requirements imposed by the cross-border exchange of information instruments. As a requested state, Belgium may decline a request for investigation. In practice, the Belgian tax administration has to take into account the conclusions of the Court of Justice in the Berlioz case. The Belgian tax authorities should ask for additional information in order to rule out, from their point of view, any obvious lack of foreseeable relevance with regard to the information requested. On the basis of article 322, § 4 of the Income Tax Code, a foreign request for financial information is always considered equivalent to an indication of tax evasion. As a result, contrary to an internal situation, the Belgian tax authorities may contact the Belgian financial institution directly to obtain the information requested.

In Belgium, there is a tendency towards the acceptance of all types of evidence, regardless of the way in which the information was obtained. To date, criminal prosecution on the basis of the information obtained under administrative exchange of information is only possible in the event of tax evasion.

To ensure the effectiveness of the investigations of the foreign tax administrations, a provision has been inserted in the Income Tax Code waiving the passive publicity obligation incumbent on the Belgian tax administration concerning exchange of information requests. The duty of confidentiality of the Belgian tax authorities with regard to the information received, which is included in the various legal instruments and is reflected in the national professional secrecy of the tax official, comes into conflict with the taxpayer's request to be able to consult the information obtained from abroad in his tax file.

Finally, for the time being, Belgium has not (yet) installed a legislative framework to combat tax avoidance, tax evasion and other tax crimes with regard to the digital financial services market.

Brazil

Branch reporter
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Summary and conclusions

The development of technology over the years has shortened distances in the world and widened paths in international trade relations. This same technology is the tool that supports the ever-increasing need to limit acts that may facilitate the evasion of foreign exchange and taxes derived from these relationships.

Preventing that items of income will remain untaxed in any jurisdiction is the main objective of the action plans that make up the Base Erosion and Profit Sharing (BEPS) Report published by the Organisation for Economic Co-operation and Development (OECD). Information exchange is to a greater or lesser extent covered in Action Plans 5 (Harmful Tax Practices), 12 (Disclosure of Aggressive Tax Planning), 8-10 (Transfer Pricing), 11 (BEPS Data Analysis), 13 (Transfer Pricing Documentation) and 15 (Multilateral Instrument).

Brazil has successfully traveled the road of information exchange over the past few years, enforcing agreements to avoid double taxation with its 33-nation network and has signed specific agreements for this purpose over the past few years – while seeking to adapt to outside rules such as the Foreign Account Tax Compliance Act (FATCA) and the Multilateral Competent Authority Agreement (CRS MCAA).

Information exchange in Brazil has always encountered constitutional limitations and thus the improvement of data collection in accordance with the OECD's BEPS Action Plan 11 has always been restricted. On previous occasions, Brazilian law did not allow Brazilian financial institutions to voluntarily comply with the OECD and FATCA, but that discussion has been superseded by the Federal Superior Court.

However, this success was not reflected in the Federal Revenue Service's attempt to create laws that allow the enforcement of aggressive tax planning, due to the subjectivity that the subject imposes. At the same time, in 2015 the Federal Revenue Service was also unable to create local disclosure rules for such tax plannings, in compliance with BEPS Action Plan 12, in view of the rejection imposed by the National Congress in this regard. In all cases, limitations met constitutional grounds.

Other challenges faced by the OECD are the implementation of common transfer pricing documentation and creation of a country-by-country report to facilitate communication between tax authorities and to boost transparency. Action Plan 13 focuses on the creation of a database shared among countries.

Brazil was relatively successful in complying with such a database: as of 2016, certain

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Brazilian multinational companies were required to submit Country-by-Country Reports, which have been shared between Brazil and 55 jurisdictions. Unlike other governments, however, the Brazilian government does not require the preparation and presentation of the master file or the local documentation file.

The biggest challenge for the Brazilian government is the push of technology; even though the Brazilian Federal Revenue Service is technologically advanced for tax collection and information exchange, the tax legislation itself falls behind: traditional concepts such as buying and selling, services and territoriality, among others, are increasingly losing space and gaining new meanings. Still, there is the emergence of new taxable transactions that are limited by national frontiers, such as transactions on the internet.

The Brazilian perspective towards this issue is poor for two basic structural reasons. The first one is the fact that the basis of the Brazilian tax legislation was drawn up in the 1960s with a focus on a tangible economy that then essentially dealt with transactions involving goods. Because the present and the future are grounded on transactions involving services and intangibles, the Brazilian Federal Revenue Service plugs the loopholes with opinions on how to tax specific situations that were not originally contemplated – such opinions tend to be untimely and have an eye on collection, in addition to often differing from the views held by taxpayers, consequently creating uncertainties and unpredicted burden.

The second one is the fact that the Federal Constitution assigns competence to legislate on tax matters in case of transactions with goods (and a few services) to each of the 26 states (and the Federal District) and competence to legislate on tax matters in case of transactions involving services to each of the 5,570 Brazilian municipalities.

A Brazilian tax reform is under discussion and intends to address these matters, but diverse interests among the various federative entities tend to be a relevant barrier.

The issue involving technology and information exchange faces its biggest challenges in discussions regarding cryptocurrencies. Brazil is late in regulating this type of asset, which tends to facilitate evasion and poor taxation.

In brief, the Brazilian Federal Constitution is restrictive when it comes to the creation, issuance of currencies and other monetary policies – only the federal government may issue them. Cryptocurrencies, therefore, cannot be recognized as currency in Brazil because of these legal obstacles. That has in fact been the express position of the Brazilian Central Bank.

In the view of the Brazilian Securities Commission, cryptocurrencies are not considered securities (even though private investment funds may invest in them), and no further legislation (or even governmental agency) has ever provided a formal concept for them. In such absence, in 2014 the Brazilian Federal Revenue Service decided to tax capital gains from cryptocurrencies as financial assets. The National Congress is currently discussing a project of legislation to fill the vacuum in the Brazilian legal framework.

In 2018, the Brazilian government passed the Brazilian General Data Protection Law to regulate the processing of personal data, including data in digital media, by natural persons or legal entities to protect the fundamental rights of freedom and privacy and the people's free development of civil rights. The issue is still very new in the Brazilian legal system, with no major cases of liability for data leaks or inadequate treatment.

Finally, it is worth noting that Brazilian law is consistent with the OECD statements on the attorney-client privilege by determining that actions and manifestations of lawyers are inviolable in the exercise of the profession, within the limits of the law. Nonetheless, the National Congress is discussing a bill criminalizing lawyers who receive fees from proceeds that he/she knows (or could know) originate from illegal activities.

Canada

Branch reporters
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Summary and conclusions

When the IFA 2013 Cahiers on exchange of information was published, Canada exchanged information mainly under income tax conventions (tax treaties) and tax information exchange agreements (TIEAs).[3] At the time, multilateral exchange of information was at an embryonic stage.

In the past years, Canada has been extensively involved in all areas of the Organisation for Economic Co-operation and Development's (OECD) actions against base erosion and profit shifting, including measures for transparency and exchange of information for tax purposes.

This report compares the scope of exchange of information under Canadian tax treaties to model tax conventions and Canadian TIEAs. It also discusses the numerous instruments of exchange of information that have been introduced in Canada since 2013.

Overall, Canada has developed systems and procedures to exchange, analyse and use information received from all sources, which include information obtained under Canadian domestic tax legislation, tax treaties, TIEAs, the Convention on Mutual Administrative Assistance in Tax Matters, the Foreign Account Tax Compliance Act (FATCA), the Common Reporting Standard (CRS), Country–by-Country (CbC) reporting, automatic exchanges of tax rulings, informant programs, third-party information, voluntary disclosure programs and public domain information.[4]

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The reporters would like to thank the Canada Revenue Agency for their contributions to the preparation of this paper, as well as Wei Bin Tan and Stephanie Beauchamp of Barsalou Lawson Rheault, and Eric Feunekes of PwC Law LLP.
3 Nik Diksic & Jeffrey Shafer "Exchange of information and cross-border cooperation between tax authorities: Canadian Branch Report" in *Cahiers de Droit Fiscal International* (2013) 98b 155—174 [IFA 2013 Cahiers].
4 Sue Murray, Sebastien Rheault & Lynn Moen, "International Information Exchange" (Conference presented at the IFA 2019 International Tax Conference, 14 May 2019) [May 2019 IFA Conference].

Chile

Branch reporter
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Summary and conclusions

A variety of information may be needed in a tax enquiry and jurisdictions need to have in place a legal and regulatory framework to provide access to the authorities to fiscal information and at the same time safeguard taxpayers' rights.

Chile has been an active participant of the Base Erosion and Profit Shifting (BEPS) project of the OECD and has been a firm supporter of the initiatives to achieve greater fiscal transparency.

Most of the recommendations made by the Global Forum on Tax Transparency and Exchange of Information (GFTEOI) have been adopted by Chile, therefore EOI standards currently in force are in line with the ones set by the OECD.

Chile's network of agreements that provide for EOI in tax matters has quadrupled in recent years due to the signature and ratification of the Convention on Mutual Administrative Assistance in Tax Matters (MAAT). Additionally, Chile has signed TIEAs with Guernsey (2012), Uruguay (2014), Jersey (2016) and Bermuda (2016). All of them are based on the OECD Model TIEA of 2002.

MAAT provides for multiple forms of mutual assistance between its signatories: exchange on request, spontaneous exchange, tax examinations abroad, simultaneous tax examinations and assistance in tax collection while protecting taxpayers' rights. It provides the option to undertake automatic exchange while requiring an agreement between the parties interested in this form of assistance.

MAAT regulation takes effect for the administrative assistance relating to the tax years starting on or from the year following that in which the agreement comes into force. Thus, in the case of Chile, the information exchange began in commercial year 2017.

Despite their different wording, all of Chile's DTCs meet the "foreseeable relevance" standard. The three main types of EOI are available in the DTCs Chile has in force, i.e. on request, automatically and spontaneously.

In terms of AEOI, Chile signed the CbC MCAA on 27 January 2016 and submitted a full set of notifications under section 8 of the CbC MCAA on 21 April 2017. It intends to have the CbC MCAA in effect with all other competent authorities that provide notification under paragraph (1) (e) of section 8 of the same agreement. As of 31 August 2019, Chile has 54 bilateral relationships activated under the CbC MCAA.

Chile also signed the CRS MCAA on 4 June 2015, and later adopted the CRS under Decree No. 418 (2017), which aimed at setting forth "the regulation of the obligations for financial institutions to review and identify financial accounts related to individuals with foreign tax residency".

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Regarding the access to banking information, since 1 January 2010, Chile has been in a position to negotiate DTCs including paragraph 5 of article 26 of the OECD model or similar wording, as is the case with the DTCs signed with the United States (2010, not in force), Australia (2010), South Africa (2012), Austria (2013), Czech Republic (2015), Italy (2015), Argentina (2016), China (2016), Japan (2016), and Uruguay (2016). For the remaining treaties in force, it is understood that even though the exact text of article 26(5) is not included in the tax treaties, bank information, in any case, would be exchanged by Chile. This is because Chilean domestic law expressly grants the possibility to exchange bank information under requests based on article 26 of its tax treaties. The coming into force of MAAT allows full exchange of banking information with these new partners as well as many older partners.

In March 2014, Chile and the United States signed an intergovernmental agreement (IGA) under the framework of the Foreign Account Tax Compliance Act (FATCA). This agreement simplifies the disclosure and reduces or eliminates conflicts with local laws. Chile signed IGA model 2, which encourages financial institutions and local branches to sign agreements and directly release the identity of their US account holders to the IRS.

Even though Chile has significantly increased its treaty partners in recent years and established solid EOI relationships with them, there has not been any relevant case law in the field of EOI specifically in the application of article 25 and 26 of the OECD Model Convention.

The most commonly used EOI systems are the automatic and on-request mechanisms. The “on request” method is used on a day-to-day basis and Chile is following the domestic procedure established in SII’s oficio circular No. 18 of 2013 on EOI which addresses in detail EOI on request, spontaneous exchange and sectorial information exchange.

The full implementation AEOI with CRS and CbCR being exchanged brings up the challenge to implement the technical expertise and resources of the SII to process that information and transform it into effective and focalized audit plans.

At this stage of development, Chile now has in force the main tools to exchange information and the impact of it in taxpayer’s compliance, reduction of tax avoidance and the collection of revenue will have to be evaluated in the future, to continue working on greater fiscal transparency.

Finally, the next step in tax transparency for Chile will probably be to face the digital financial services, which now escape from the information obligations currently in force; regulations on cryptocurrencies and Blockchain will have to be implemented sooner rather than later to stop them from becoming a loophole to avoid an effective EOI.

Chinese Taipei

Branch reporters
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Anita Lin[2]

Summary and conclusions

Chinese Taipei is a supporter of Base Erosion and Profit Shifting (BEPS) projects and is active in their implementation, despite the fact that it is neither a member of the OECD Inclusive Framework on BEPS nor a party to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. Chinese Taipei, in 2017, amended the transfer pricing assessment rules[3] to incorporate the three-tiered standardized approach as suggested by the OECD under the BEPS Action 13 Report into Chinese Taipei's domestic law. Effective from financial year 2017, eligible multinational enterprises need to prepare and submit a country-by-country report or master file. Currently, New Zealand and Japan can effectively exchange2017 CbCR with Chinese Taipei, and Australia can effectively change 2018 CbCR with Chinese Taipei. Furthermore, with the aim to improve tax information transparency, Chinese Taipei implemented the Common Reporting Standard (CRS) as well as regulations to provide a legal basis to authorize the Ministry of Finance of Chinese Taipei to enter into a treaty or an agreement for the exchange of information for tax purposes or provision of other mutual tax assistance with other foreign governments or international organizations based on principles of reciprocity. Moreover, anti-tax avoidance rules (e.g. Controlled Foreign Company (CFC) and Place of Effective Management (PEM) regulations[4]) were also adopted. Further to the adoption of the BEPS-related measures, Chinese Taipei also adopted the Foreign Account Tax Compliance Act (FATCA), which allows information to be sent to the United States directly through financial institutions without governmental interference.

Digitalization affects many aspects, including the digitalization of tax administration authority as well as the use of digital currency. Tax administrations of Chinese Taipei have sought to increase their technological capabilities to improve their administrative effectiveness and efficiency through the use of new digital tools and systems. In recent years, as digital currency has been developed and traded in the market, Chinese Taipei is actively amending its rules and implementing systems to address the issues that have derived from the rapid development of digital currency. For digital currency being classified as a security token, it shall adopt a real-name registration system and will be subject to the relevant management and taxation required by law in Chinese Taipei. To date, no official studies can be provided to concretize how much revenue is channeled out of Chinese Taipei through the use of digital currency.

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[3] Regulations Governing Assessment of Profit-Seeking Enterprise Income Tax on Non-Arm's-Length Transfer Pricing.

[4] For the CFC and PEM regulations that was promulgated, the enforcement is yet to come into effect.

Although there are no statistics to show an increase in information transparency or to demonstrate that exchange has actually led to an increase in revenue collection ability or a reduction in tax evasion/illicit financial flows, it can be expected that the increase of information transparency, automatic exchange of tax information and various anti-tax avoidance measures will lead to an increase in the tax revenue, prevent tax avoidance and improve the efficiency of tax collection. Chinese Taipei will continue to adopt the OECD BEPS related measures to tackle base erosion and profit shifting and align with the international tax standards.

Colombia

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Summary and conclusions

The Colombia report is divided into three parts. The first presents the instruments and processes of international application, and the second their incorporation into Colombian legislation. The main conclusions of the report and the critical prospective of the current state of information exchange are presented at the end, including an outline of the third topic suggested by the reports, i.e., the impacts of digitalisation on established frameworks, as a future line of research.

Colombia has endorsed multilateral (MAC, CRS MCAA and CbC MCAA) and bilateral (DTAs and TIEAs) instruments to comply with the high standards of tax information exchange, as well as the internal regulations (articles of the tax code and various administrative acts) for their adequate implementation.

However, there are two difficulties that concern the academic community. One is of a practical nature and the other of a legal nature.

With respect to the first, the practice, and despite the fact that according to information from the International Affairs Office (DIAN) Colombia went from having four exchanges on request (2016-2017) to more than 150 per year (2019), it is evident that the country's human infrastructure is not yet ready for more exchanges (now also automatic and complex). This is due to the fact that there is a certain degree of informality in the formation of the unit in charge of these matters (Office of International Affairs), as well as a lack of suitable training (Office of Information Security).

Information obtained by DIAN through consultation and semi-structured interviews reveals that training is currently being provided to officials in the areas of national and international tax control, transfer pricing, large taxpayers, among others, in order to make good use of the large amount of information that Colombia is receiving by virtue of the tools adopted.

We do not have any statistics that point to increased collection as a result of the exchange of tax information, especially considering that the administration argues that it is impossible to know precisely whether any change is due to the effect of such exchange or whether it is due

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2 I want to express my heartfelt gratitude to Alejandra Sarmiento, graduate assistant of the LLM Taxation programme, and my colleague Alfredo D'Costa, for their support in the research without which it would have been impossible to write this report. I also want to thank the students Nicolás Sanabria, Germán Alejandro Patiño, and Lina Amaya, for the organization of the material and their continuous willingness to cooperate and learn. Finally, I would like to thank Natalia Aristizabal (DIAN's external advisor for international affairs in the 2010-2018 period) and the officials of the upcoming International Affairs Office (DIAN), for allowing me - from semi-structured interviews and petitions - to obtain very valuable information to implement a better approach to international tax realities based within academia.

to other factors. However, the administration recognises that obtaining and publishing such information could have a significant dissuasive effect. It is clear, therefore, that this exchange and its good use would lead to an ostensible increase in audits and, therefore, collection, as has happened in the case of the Panama papers, paradise papers, tax normalisation, and the new transfer pricing system, among others, where the tool has been exploited.

The second obvious -legal- difficulty identified throughout the report is the possible violation of the fundamental rights of taxpayers if their protection is not regulated internally. The proposal would be to enable the taxpayer to have adequate knowledge of the tax information exchanged, to the point, as stated by the doctrine in Colombia, of even being able to oppose the exchange, if, for example, the information is incorrect. There is still no case law on this subject, due to the only recent adoption of the instruments. However, cases will surely arise if the state does not pay special attention to its guarantee.

The impacts of digitalisation on the established frameworks will be an important line of future research in Colombia, even more so with the use of artificial intelligence and digital data management, not only for the implementation of the aforementioned instruments, but also because Colombia is a current part of JITSIC and potentially of ICAP.

Czech Republic

Branch reporter
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Summary and conclusions

The practical importance of automatic exchange of information as a part of multilateral cooperation for the administration of taxes of supranational business structures is increasing. In the area of exchange of information on request, double taxation conventions (DTCs) are still a key instrument for the realisation of policies to prevent tax evasion.

The Czech legislator has opted for clarity and rationality. National rules regarding the exchange of information are set out mainly in a single piece of legislation: Act No. 164/2013 Coll.

The significance of the international and European instrument of cooperation for the administration of taxes in the Czech Republic is shown by judicial and administrative practice. Judges are interpreting the international tax law and the Ministry of Finance, Specialised Financial Office, General Tax Directorate as well as other administrative authorities are active in both the fields of automatic exchange of information and information exchanged on request.

The procedures of international cooperation as a part of the taking of evidence, however, do not have defined rules corresponding to ordinary evidential proceedings. There are many questions related to the still-inadequate protection of taxpayers' rights. As mentioned, the system is evolving to create a future balance between individual rights and the requirements concerning effective administrative cooperation in the field of taxes.

In fine, it must be reiterated that to date, we cannot contrast any concrete scientific data against the cost of implementation of the international and European measures and assess the adequacy of implementation according to the national level of economic or social development. Despite this, we may not agree with the critical remarks of the President of the Czech Bar Association who stated that "today's revolutions are far more dangerous in the field of Law, because trying to act like a perpetrating of Good".[2] The global exchange of information seems however to be necessary for any fair taxation in modern society.

In conformity with the other branch reports, the aim of the Czech report is to provide an update about the issues that have arisen as a result of the implementation of the goals and strategies adopted at the international level. Remarkable progress in the field of tax administrative cooperation has been made since the previous Congress in 2013.

This branch report is divided into the following sections: (1) instruments and processes of international application; and (2) incorporation of the instruments and processes into domestic legislation. Mostly, these points are objectively describable as of this date. Not enough is known yet about the impacts of digitalisation on the established frameworks.

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2 Mr Vladimír Jirousek: „Dnešní revoluce jsou na poli práva mnohem nebezpečnější, neboť se tváří jako páchání dobra". Czech Bar Association International Conference, Prague, 16 April 2019.

There are many questions related to local matters (expectations) and the still-inadequate protection (data protection, taxpayers' rights). The system is therefore evolving to create a future balance between individual rights and the requirements concerning effective administrative cooperation in the field of taxes.

Denmark

Branch reporters
Søren Lehmann Nielsen[1]
Bent Bertelsen[2]

Summary and conclusions[3]

Treaty network
For many years Denmark has been committed to international cooperation and has a very extensive network of bilateral DTAs and TIEAs. Further Denmark has signed both the amended Multilateral Convention (MAAC), is part of the Nordic TIEA and also has a part of the EU multilateral instruments in place.

All bi- and multilateral instruments are further supported by an internal Danish legal framework that allows the use of the international treaties in Denmark.
In figures Denmark has

- 70 DTAs
- 46 TIEAs
- 3 Multilateral instruments (EU, Nordic TIEA, MAAC)

In auspice of the Nordic Council of Ministers, Denmark has had a number of meetings with DTA and TIEA partners together with the Nordic colleagues to ensure smooth cooperation with new partners. The work was done through a workgroup called NAIS from 2009 and onwards, and the group work is ongoing.

The Nordic TIEA opens a very wide area of cooperation. It has been in use for decades and has been a very efficient tool for cooperation, as the Nordic countries' ways of handling taxation issues are very much alike.

As an EU member, Denmark is a participant in the EU directives including the 2011/16/EU on exchange of information (on request, spontaneously and automatically).

Denmark has been a part of the FATCA IGA since November 2015, the CRS since October 2014 and the MCAA on CbC since October 2018 and is committed to the Directive 2015/2376 (DAC3) on Tax Ruling.

Finally, Denmark is an original signatory of the MAAC from 1995 and has committed itself to the amended protocol that came into force in June 2011.

Practical use of the treaty network
Due to Denmark's extensive network of treaties, many partners are covered by more than one treaty. As a result hereof, Denmark can choose the most suitable treaty when sending requests for information.

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[2] Competent Authority, Danish Tax Agency.
[3] The report is prepared as the result of a collaboration between Plesner Lawfirm and the Danish Tax Agency. It should be noted that this report is not an authoritative source with respect to the views of the Danish Tax Agency albeit several of the contributors are employed with the agency.

The exchanges are done as follows:
- EU eFCA portal
- Nordic countries Tunnel encrypted E-mail (unless covered by the eFCA portal)
- Outside EU/Nordic Either e-mail, bluewhale or ordinary mail.

Effect of the EOIR
No direct measurements of the effect have been made.

Beneficial ownership registration
Denmark is a member of the FATF and follows the recommendations put forward. Denmark has established a B.O. registry starting in May 2017 where corporate and legal entities are obliged to report their B.O. The B.O. registry covers approximately 36,.000 entities, whereof 97.2% have registered B.O by May 2019.

The 5th AML directive has been implemented by Denmark and will come into force in January 2020.

Standard of EOIR in Denmark
Denmark admits all forms of EOIR and AEOI based on the standard put forward by the Global Forum on Transparency. Denmark has only rejected a few incoming requests when the request was not in line with the standard and where consultations with the requesting partner did not solve the problem.

Besides ordinary EOIR and AEOI, Denmark also uses the ability to participate in simultaneous examinations and multilateral controls/joint audits when the agreements allow this.

Finally, Denmark is a member of the JITSIC network and participates in a number of projects within the network.

Domestic adoption
The Danish Tax Authority has a comprehensive legal power to collect data either automatically or by request from a large number of professional domestic data holders. As a general rule, data can only be requested/collected when the data are proportional to the purpose of collection and the data is needed to decide on a taxation matter.

According to domestic legislation, Denmark can use similar domestic collection powers to provide information to treaty partners.

In general, Denmark allows the use of information received from anonymous sources, from other authorities and information obtained by other means. One Danish authority is (in general) obliged to forward information to another Danish authority if it finds that the information is useful for the latter authority.

If information is collected by third parties illegally, this will not necessarily disallow the use of the information, as the courts have to apply a balance test of the severity of the breach itself on the one side and the severity of the alleged crime and the importance of the information on the other.

Practical work on EOIR and AEOI
The tax agency has a designated competent authority for EOIR. The unit is monitoring the workload on a biweekly basis and allocates resources internally to meet the short deadlines. The general staffing is evaluated on a yearly basis to ensure that the obligations under the treaties can be fulfilled.

There are a number of processes in place to ensure that all incoming and outgoing EOIR is handled correctly and with the data- and access security needed and in line with the EU GDPR obligations.

In general, data from the tax agency databases can only be accessed by staff that need the data for their work, and their access is logged.

Impact of digitalization on the established frameworks

In general, cryptocurrencies and blockchain technology are not a significant problem at the moment, according to the central bank and other financial institutions.

Branch reporter
Kristiina Äimä[1]

Summary and conclusions

Finland is, along with other Nordic countries, among the forerunners in the field of international mutual assistance and information exchange. Finland has concluded income tax treaties with around 80 countries. Finland has implemented the EU Mutual Assistance Directive. Accordingly, Finland has an agreement on mutual assistance based on either a tax treaty, a tax information exchange agreement (TIEA) or the Mutual Assistance Directive with all EU and EEA member states. Finnish income tax treaties generally follow the OECD Model Tax Convention on Income and Capital (the OECD Model).

Finland will implement the EU Directive on mandatory disclosure reporting rules. The rules will be applicable from July 2020 onwards. Finland committed itself to mandatory automatic exchange of information on advance rulings and advance pricing agreements with authorities of other EU member states as from 1 January 2017. Finland is a member of the CoE/OECD Convention on Mutual Administrative Assistance in Tax Matters and is committed to the Country-by-Country Multilateral Competent Authority Agreement (CbC MCAA). Finland exchanges CbC reports based on the directive or the multilateral CbC MCAA. Exchange with the US is based on a bilateral CbC CAA. Currently, Finland exchanges CbC reports with 59 jurisdictions.

Most companies must file a notification of their actual beneficial owners with the Finnish Trade Register. All limited liability companies and co-operatives must file a notification. The Act on Money Laundering defines beneficial owner as a person who either owns a company or otherwise exercises control over the company. In most cases, a beneficial owner is the owner of the company.

Finland participates actively in the work of the OECD and EU to combat tax avoidance and tax evasion. Finland has committed to the standards of the Global Forum concerning exchange of information and automatic exchange of information. Finland is engaged in all forms of international exchange and mutual assistance. Exchange of information upon request is most commonly used for both outgoing and incoming requests.

The focus on automatic exchange has increased within both the OECD and the European Union. Finland is engaged in automatic exchange. Finland signed a FATCA agreement with the United States on 5 March 2014, which has been in place since 20 February 2015. The FATCA agreement is based on the Model I Intergovernmental Agreement.

The automatic exchange of information of certain income types under EU Directive 2011/16/EU became mandatory as of 2015. Finland also applies Directive 2014/107/EU as of January 2016. Each year, Finland automatically sends tax information to its treaty partners corresponding to income types listed in the relevant tax treaty. Finland has committed

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itself to applying the Common Reporting Standard (CRS) as of 1 January 2017. Finland also automatically sends information as defined under the VAT Regulation.[2]

Finland has ratified the OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters. The convention follows the Nordic multilateral assistance treaty, making possible a broad scope of mutual assistance.

The Nordic countries have concluded a multilateral assistance convention concerning tax matters, enabling a broader scope of mutual assistance than standard income tax treaties.[3] The contracting states include Denmark, Finland, Iceland, Norway and Sweden. The treaty is also applicable in the autonomous regions within Denmark, the Faroe Islands and Greenland.

There is also a separate multilateral convention on the collection of taxes and the transfer of taxes among the Nordic countries. The convention ensures that an advance tax on a salary is charged only in one Nordic country.

The main rule is that official documents are in the public domain, unless specifically provided otherwise in law. Treatment of taxation documents derogate from the main rule. *Tax information is generally subject to secrecy* in Finland and accessible to the public only to the extent explicitly provided in law. Tax information is subject to secrecy under the Act on the Public Disclosure and Confidentiality of Tax Information. The act includes detailed provisions on how tax information may be processed. Section 4 of the act lays down the main rule that taxation documents concerning a taxpayer's financial position and any other taxation documents containing information on an identifiable taxpayer are confidential. Confidentiality is also applied to international exchange of information.

Cooperation between public authorities is quite extensive. Other law enforcement authorities must provide the Finnish Tax Administration (FTA) with information needed in taxation. The only exception is that the authorities need not give information subject to a ban on testimony. This exception mainly applies to priests and doctors.

Tax information exchanged under an international treaty is subject to the same high level of secrecy as any other tax information held by the FTA. Information will be exchanged only if the tax authorities of the requesting state are bound to the confidentiality principle.

The tax administration has very broad information powers under the Assessment Procedure Act. The information necessary for the assessment must be provided upon the tax administration's request. The obligation to provide information also applies to banks and financial institutions. The exceptions to this general rule are, in addition to the attorneys' legal professional privilege, (i) information from the Money Laundering Clearing House of Finland; (ii) information from customs on cash declaration forms filed; and (iii) information from the Financial Supervisory Authority.

Due to the tax administration's wide powers to receive information about taxable events and its digitalized operations, it is not expected that the growth of the digital financial services will ultimately facilitate tax avoidance, tax evasion or other crimes. The tax administration receives information also from other authorities in Finland, such as from the police, customs and financial supervision authorities. As cooperation works well among domestic authorities, in the long run the digital financial services market should not have an impact on the FTA's ability to exchange information and provide other forms of mutual assistance to the tax authorities of other jurisdictions.

[2] Id., at 294.

[3] The Nordic Mutual Assistance Convention was concluded on 7 December 1989.

France

Branch reporter
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Summary and conclusions

Very often, the development of automatic exchanges has been presented by public authorities as the ultimate means to fight tax evasion and tax avoidance.

Besides, tax authorities work much closer than before and share their know-how when it is needed as, for example, within the OECD to process the whole data from leaks such as the so-called "Panama Papers".

However, after having reached peaks, the results of the French tax audit activity have been decreasing since the beginning of the automatic exchanges. This could be one of the ripple effects of the automatic exchanges among which is the deterrent effect for the taxpayers to try to evade taxation.

The French tax authorities (FTA) now have a very wide range of legal tools to get information and they even have put in place a specific organisation to manage the data received from the automatic exchanges.

Yet, despite all of this, governments are facing a new challenge: the development of crypto-currencies which allow peer-to-peer transactions. Information exchanges were developed on a structured economic model with established intermediaries like financial institutions that collect information on their clients. The question now is: how should these transparency tools be redesigned? Should the scope of automatic exchanges be extended to crypto-currency service providers? This would be the easiest way. Alternatively, should the rules merely ensure that only the necessary information is available to the authorities? This might be the more difficult way but it may contribute to a better balance between privacy and the fight against fraud.

Information exchange instruments at the disposal of the French authorities

France has a wide and extensive information exchange network, covering nearly 150 jurisdictions, thanks to double tax conventions (DTCs) with an information exchange clause and tax information exchange agreements (TIEAs).

Besides, as France is an EU member, the FTA may also exchange information with other EU members, based on six directives for direct taxes and two regulations related to the cooperation in the field of VAT and excise duties.

How the French authorities use information exchange instruments

– *Exchange of information on request and spontaneous exchange of information*

In 2018, the FTA sent more than 4,700 requests for information to foreign jurisdictions, while they received only 920 requests from abroad. This practice is actually encouraged by the fact that requests for information may sometimes be used by tax audit services as a means to extend the tax statute of limitations.

However, paradoxically, the practice of the FTA regarding spontaneous exchanges, that is

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to say without prior request, or involvement in multilateral controls with other jurisdictions, remains very low, even though this kind of exchange is likely to enhance the effectiveness of the tax audit services' actions.

– Automatic exchanges
France is involved in the automatic exchange systems related to FATCA, exchanges based on the common reporting standard, country-by-country reporting, cross-border rulings and cross-border tax-planning arrangements.

– Some results that are currently difficult to measure
To date, one cannot accurately measure the results obtained from the development of information exchanges and in particular automatic exchanges. However, in France, three impacts may be pointed out:

- better knowledge of the taxpayers' profile: insofar as taxpayers can be easily identified in automatic exchanges thanks to their tax identification number (TIN), the FTA have information that can be immediately cross-checked with tax returns;
- the deterrent effect: the question today is no longer whether the tax authorities can get information on taxpayers but rather how they organise themselves to use such information. For example, a temporary process was set up in France to regularise undeclared assets before the beginning of automatic exchanges enabled the FTA to collect more than EUR 8 billion. These revenues would probably have never been collected under "standard" tax audits and without the threat of automatic exchanges;
- the development of datamining: automatic exchanges of information have contributed to the creation of a datamining department that is responsible for drawing up lists of taxpayers at risk. The scheduling of tax audits has become more professional than it was before, and the FTA want to increase the percentage of tax audits resulting from datamining to 50% by 2022.

What is the future of automatic exchanges?

Governments face an unprecedented challenge with the emergence of crypto currencies. Whereas there are already more than 2,000 crypto-currencies, several large companies have joined forces to develop a new one and some states are ready to develop their own official crypto-currency.

In Europe, anti-money laundering regulations have been extended to service providers who exchange crypto-assets for legal currencies or who keep their customers' crypto-assets. A tax regime has also been created in France to tax gains on such new kinds of assets.

It cannot be excluded that, to fight tax evasion, some tax authorities may wish to get the same information on crypto-currencies' holders as is provided by automatic exchanges on financial accounts. But an unexpected risk could then arise with respect to privacy. Indeed, depending on the technology used and the legal rules enacted, it could become easier than it now is for these tax authorities not only to get information on the holders of crypto-assets but also to know all the transactions paid with a crypto-currency. This risk could even be increased if taxpayers were not allowed, or did not have the choice, to use any other crypto currency than an official one which would be set up by a state or a private body. On behalf of the fight against fraud and modernity, much more information might then be disclosed to tax authorities than is currently disclosed. However, it is doubtful that citizens, if they are made aware of it by authorities, would really agree to such a transparency.

Germany

Branch reporter
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Summary and conclusions

Germany is a reliable partner when it comes to exchange of information. It has a broad network of treaties currently covering 115 jurisdictions that allows for exchange of information on request, spontaneous exchange of information and automatic exchange of information. It has also ratified the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 Protocol (Multilateral Convention). Although Germany is holding on to its notification requirement when it comes to exchange of information, thus informing the taxpayers about information requests from other jurisdictions before exchanging information, Germany provides in general reliably all requested information as it follows a broad understanding of the term "foreseeable relevance".

Germany reliably implements recommendations of the Organisation for Economic Cooperation and Development (OECD) and the EU. Upon the publication of the final reports of the G20/OECD BEPS Project, Germany committed to the implementation of the minimum standards set out in the relevant reports and introduced the exchange of information on rulings according to Action 5 and the CbC-Reporting requirement according to Action 13. However, due to its federal organisation, in the beginning Germany experienced some challenges to reliably collect all requested information and to exchange them within the set timeframe but it is continuously improving its standards.

Furthermore, Germany has also implemented the CRS and FATCA Reporting for financial information and introduced mandatory disclosure of information on cross border tax structures under DAC6.

In the field of joint audits, Germany takes – together with a handful of other jurisdictions – a pioneering role and is an active promoter of this instrument of real time exchange of information. However, when it comes to spontaneous exchange of information or collaborating with other jurisdictions to detect fraudulent tax schemes, Germany has a more restrained position and takes a rather passive role.

After declining the participation in the first ICAP pilot for procedural reasons, Germany is taking part in the second pilot, which was announced at the OECD Forum on Tax Administration Plenary on 26-28 March 2019 and is eager to further improve its cooperative compliance approaches.

In conclusion, Germany is supporting the international tax transparency as is apparent by the high number of exchanges under the various EOI frameworks and referred to throughout the report. The impact of EOI has not been measured, but it is assumed to be positive from both taxpayer compliance and deterrence standpoints.

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Greece

Branch reporters
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Summary and conclusions

The following report addresses the topic of information exchange in tax matters, as a means to combat tax avoidance and tax evasion.

Going through specific parts of EOI legislation, we analyze relevant issues from an international and European perspective, as well as the corresponding rules existing in Greece.

The report focusses on the latest pieces of regulation regarding EOI, as they are introduced in international conventions and agreements, comparing them with the corresponding Greek tax legislation.

Additionally, the report aims to examine to what extent Greek rules follow the OECD guidance with that respect, shaped as a result of the base erosion and profit shifting project (BEPS project), while specific reference is made to the topic of beneficial ownership and its application in the Greek legal context.

Finally, the report presents numerical data, indicating the actions taken by the Greek tax administration in the context of bilateral exchange of information, in cooperation with other jurisdictions.

The report concludes with an assessment of the extent to which the EOI "project" has proven successful domestically as well as globally.

As part of the globalized economy, the exercise of business activity out of the business's country of residence, the abolition of foreign investment controls and the free movement of capital without a strict regulatory framework are considered part of modern reality. At the same time, the phenomena of tax avoidance and tax evasion are becoming more and more common.

At the European Union level, tax evasion is estimated to reach EUR one trillion per year, while in the United States, public revenue losses due to offshore tax evasion, which occur through tax havens, amount to, approximately, USD 100 billion annually.

However, the consequences of tax evasion are not only budgetary, but primarily material as they concern the violation, undermining and erosion of fundamental constitutional principles, such as the principle of fiscal equality and taxation justice.

In its report "Harmful Tax Competition, an Emerging Global Issue" issued in 1998, the Organisation for Economic Co-operation and Development (OECD) concluded that tax transparency can only be achieved through exchange of financial information among states. Thus, it is now common ground among all developed countries that cooperation between states' tax administrations and enhancing tax transparency through the establishment of worldwide information exchange systems is essential to tackle international tax evasion.

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The exchange of information consists of systematic, periodic and massive transmission of tax information from the source state to the state of residence.[4]

Exchange of information may take various forms, such as automatic exchange of information, exchange of information on-demand and spontaneous exchange of information.

The main objective of the exchange of information, which is carried out at a transnational level through mechanisms set in place by international conventions, is to preserve the principles of tax equality and tax justice which are constitutionally established (see for example art. 4 (5) of the Greek Constitution). Indeed, combating tax avoidance and tax evasion is a key step towards establishing a tax system in which everyone contributes their fair share.

Nevertheless, there are well-founded concerns that modern ways of preventing tax evasion, such as the exchange of tax information between states, may eventually threaten human rights. The risk lies especially in the context of automatic exchange of information, and it is related to information confidentiality and protection of taxpayers' individual rights and personal data.

All in all, the above considerations indicate the great importance of tax cooperation between states in the field of automatic exchange of information with the aim of combating offshore tax evasion and enhancing fiscal transparency. It also becomes clear that transnational exchange of information not only has positive aspects, but also poses risks for human rights and the basic freedoms of taxpayers.

In our view, the international community should not allow an "imprudent" exchange of information on an automated basis, offered at any cost, targeting tax evasion. What should be targeted is finding a fair balance between the public interest pursued by the automatic exchange of information and the effective protection of individual rights, in particular the right to protect personal data through the exchange of tax information.

So far it seems to be accepted (in theory and case law)[5] that modern automatic exchange of information fully complies with the principle of proportionality while any damage or even risk to the taxpayers' individual rights and freedoms in this context is offset with public interest which consists of effective investigation and suppression of tax evasion, this way tackling global economic crisis.

[4] Automatic Exchange of Information, WHAT IT IS, HOW IT WORKS, BENEFITS, WHAT REMAINS TO BE DONE, OECD 2012, p.7.

[5] Theoxaropoulou E., Tax Transparency and Exchange of Information, p. 405 following and especially p. 417. In addition, Decision of the High Court of Administrative Justice (ΣτΕ 2934/2017), with respect to proportionality of the measure of automatic exchange of information among EU member states in relation to the purpose of effective tax enforcement and combat of tax evasion.

India

Branch reporters
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Summary and conclusions

With the liberalisation of restrictions on cross-border flow, new opportunities have opened up for tax evasion across the world through tax havens, misuse of transfer pricing, and other sophisticated methods. The role of tax havens has gradually come under scrutiny globally. Countries all over realised that transparency and cooperation are essential for protecting their tax revenue. Such pressure has increased in recent times in view of the fiscal challenges faced by the countries and public resentment against unethical financial practices. In India as well, tackling offshore tax evasion and unearthing unaccounted money stashed abroad has been a pressing concern for the government of India.

India has been a strong proponent of transparency and exchange of information for tax purposes and has pushed the G20 forum to exert pressures on countries that do not conform to the international standards of transparency. Post 2009, India renegotiated its Double Tax Conventions (DTCs) which were not as per the latest international standards, and in many cases has concluded the renegotiations. Currently, India has one of the largest DTC networks with 94 DTCs which include a legal basis for Exchange of Information (EOI) between India and the partnering jurisdictions. Moreover, India has negotiated Tax Information Exchange Agreements (TIEAs) with 19 countries[3] including tax haven countries with whom India did not have DTCs. India also implemented the regime of Automatic Exchange of Information - US Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS) by amending its domestic legislation. Besides the above EOI frameworks, India is also committed to the spontaneous Exchange of Tax Rulings (ETR) under the BEPS Action 5 and has already commenced exchanges with other committed jurisdictions.

As an enhanced observer in the Organisation for Economic Co-operation and Development (OECD) Committee on Fiscal Affairs, India introduced section 286 of the Income-tax Act, 1961 (ITA) and the relevant rules that impose and enforce Country-by-Country reporting (CbCR) requirements on the parent entity or alternate reporting entity of an MNE group that is resident for tax purposes in India. India's implementation of Action 13 minimum standard meets all applicable terms of reference developed by the Global Forum and OECD relating to the domestic legal and administrative framework, the exchange of information framework and appropriate use. However, certain recommendations were provided by the inclusive framework in its peer review report. Further, as per the 2017 peer review report of the Global Forum on Transparency and Exchange of Information for Tax, India has been rated as "largely compliant" for its overall EOI framework.

India has started using exchange of information agreements much more intensively to combat tax evasion. The Income Tax Department (ITD) has accorded the highest priority

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3 https://www.incometaxindia.gov.in/Pages/international-taxation/dtaa.aspx.

to tackling the menace of black money stashed outside India. Extensive information has been exchanged with other countries under the EOI framework which is being forwarded to the field authorities in India for further investigation and appropriate actions. However, the provisions of EOI are not enough by themselves; they are only an enabling mechanism for curbing tax evasions issues. The efficiency of the legal system, technical expertise of tax officers and the government's political will in India will play an essential role in effective utilisation of the information available.

India has the necessary provisions under its domestic legislation which empowers ITD to take corrective actions against the tax evaders. However, such powers can affect the rights of the taxpayers. Further, to align with international standards on EOI, India is working towards improvement in assessment proceedings, improvement in the technology backbone of the ITD, improvement in the infrastructure facilities, and enhancement of the knowledge of the ITD on EOI. However, it is doubtful whether the current strength/efficiency/skill of the ITD shall be sufficient to deal with such a bundle of information and then take the necessary action. Indian tax laws also contain provisions to protect the confidentiality of the taxpayer's information. However, the same is not that effective in order to respect the rights of the taxpayer and safeguard the interests of the taxpayer and third parties.

The provisions of the EOI agreements have aided the Indian competent authority to gather useful information from the competent authorities of other countries. In practice, how effectively the EOI framework has been implemented by Indian tax authorities is yet to be determined. However, with an improved international EOI framework and amendments in domestic legislations, an environment of compliance is being created in India. India is also trying to inculcate moral, ethical and social values within the citizen of India by involving them in the ITD's efforts to unearth black money and reduce tax evasion.

Last but not the least, it is incumbent to keep track of the growth of digital financial markets around the world. As far as India is concerned, the digital financial market has grown significantly since 2012. The government of India has always conveyed its reservations regarding the use of virtual currencies by issuing various circulars and notifications. Recently, India has proposed a draft bill – "Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019" which proposes to ban cryptocurrencies, criminalise activities associated with cryptocurrencies in India, and provide for regulation of official digital currency.

As there is an increase in awareness of the functioning of the digital currency, tax evaders may take this as an opportunity for creating substitute channels of tax evasion in the form of money laundering and illicit funds transfer. On an international platform, to combat such tax evasion channels, policymakers around the world have to place a specific mechanism to deal with the increase in the functioning of the digital financial market. One should consider amending the FATCA and CRS reporting regime or provide possible and viable solutions to increase transparency on the international platform of the transactions carried out through such digital financial markets.

Israel

Branch reporters
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Summary and conclusions

Israel has a wide network of bilateral Double Taxation Treaties (DTTs) and is a signatory to 58 DTTs, all of which contain a provision for exchange of information between the contracting states. The exchange of information article in most of the bilateral DTTs to which Israel is a signatory party is based on article 26 of the OECD Model Tax Convention. Until 2016, the exchange of information obligations assumed by Israel at the international level were mostly based on the exchange of information article in the DTTs to which Israel is a signatory party.

In practice, the scope of the exchange of information under DTTs has been relatively limited and in fact it had no substantial impact on the enforcement of Israeli tax law. However, due to the absence of an appropriate legal framework for exchange of information under international instruments other than DTTs, Israel could not assume international exchange of information obligations. As the necessity of such a legal framework increased, due to the growth of globalisation and the international community's scrutiny, a new legal framework for the exchange of information was legislated and entered into force in 2016, which enabled Israel to implement exchange of information measures in accordance with the international exchange of information instruments.

Israel assumed exchange of information obligations under a number of international instruments. The first exchange of information obligations outside the scope of a bilateral DTT were assumed by Israel under the FATCA Agreement with the United States, which was signed in June 2014 and ratified by the Israeli government only in August 2016 (after the new legal framework for exchange of information and specific FATCA Regulations entered into force).

Israel has also signed the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters and the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information. In order to implement these agreements as part of its domestic law, new CRS regulations were enacted.

In addition, Israel has begun to implement BEPS related measures, such as the BEPS Action 5 recommendations regarding the exchange of information on tax rulings. Furthermore, Israel signed the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports to implement BEPS Action 13 recommendations, and there is a proposed legislation for the implementation of CbC reporting. However, this proposed legislation awaits further required approvals by the Israeli parliament and it is not clear when the legislation process will be finalised.

As the implementation of exchange of information measures, which are based on multilateral agreements in the Israeli domestic law, is relatively new and the first cases of exchange of information have only occurred in recent years, at this stage in time we cannot

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assess the effectiveness or the influence of exchange of information on tax evasion and on the tax collection level. However, as part of the preparation for the exchange of information under international instruments, the Israeli tax authority offered a voluntary disclosure procedure, which gained relatively high popularity and increased the tax collection even before the implementation of exchange of information measures in Israel.

Italy

Branch reporter
Alessandro Turina[1]

Summary and conclusions

Under the current framework, Italy can be considered a highly integrated jurisdiction within the global exchange of information network, as it enjoys pervasive ties at the global/ multilateral (being a participating jurisdiction to the Multilateral Convention on Mutual Administrative Assistance), regional (EU) and bilateral (with a prevalence of DTAs over TIEAs).

Italy displayed a remarkable degree of proactivity with regard to several hard law as well as soft law initiatives. In particular, it was one of the early adopters of the Common Reporting Standard and, within the framework of the BEPS Project, it readily implemented transparency measures such as exchange of tax ruling and country-by-country reporting. In this regard, it may be argued that EU membership acted as a catalyser, as most of these BEPS-related commitments were crystallised into hard law by virtue of a series of directives aimed at incorporating such new modes and scopes of administrative cooperation into the 2011 administrative cooperation directive (2011/16/EU). In addition to exchanging information upon request, spontaneously and on an automatic basis in relation to all information categories currently mandated by international commitments, Italy is also active in forms of enhanced administrative cooperation, such as the practice of joint audits and the participation in programmes such as the JITSIC. In particular, the participation in the JITSIC seems to have been relevant for Italy on two different planes. On a more traditional plane, information sharing within the JITSIC allowed it to identify 700 Italian taxpayers that came to light in the Panama Papers. These taxpayers were subject to questionnaires and information requests and were placed outside of the earlier voluntary disclosure initiative, where applicable. On a policy plane, it may be argued that the JITSIC's response to the Panama Papers, whereas it pointed to the need for deepening awareness of the various types of tax avoidance arrangements developed by intermediaries, could perhaps be considered as conducive to the climate that eventually led to the proposal and adoption of DAC 6 on automatic exchange of information in relation to reportable cross-border arrangements.

Given such an unprecedented expansion of the exchange of information obligations undertaken by Italy as well as of the amount of information its tax administration is called to handle, both at the EU (by the European Commission) and at the national level (by the Court of Auditors), in-depth studies have been conducted in order to assess the effectiveness and the impact of such a radically enhanced exchange of information framework. Neither the EU Commission Report nor the Italian Court of Auditors Report, which both focused on

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the revised system of administrative cooperation directives, with an emphasis on automatic exchange of information, were able to determine a clear-cut cost benefit analysis and assess the current framework accordingly. This may in particular be due to the circumstance that the deterrence effect of the new exchange of information measures appears particularly arduous to estimate.

One of the cardinal issues that appears to raise the most questions in the current framework, as observed by the Italian Court of Auditors and by the Italian Privacy Ombudsman, is the sheer amount of data currently in the purview of the tax administration deriving from incoming flows of administrative cooperation and the way said information is "integrated" into the domestic information system of databases.

In this regard, the further consolidation of a risk management framework, towards which the Italian tax administration has committed, appears to have manifold ramifications, not only on the efficient integration of administrative cooperation into the audit process but also *vis-à-vis* the relations towards taxpayers and the safeguard of their rights. Thus, also from an Italian perspective, the current scenario raises the issue of the need to increase the safeguard of taxpayers and, in this regard, the author shares the view expressed by the same Court of Auditors, which invoked the adoption of a "common core" of procedural standards at the EU if not at the global level with specific regard to the way information is collected and stored as well as to the right of the concerned taxpayers to access said information.

Such a critical nexus between cross-border inputs and domestic resources also appears as a pre-condition in order to promote the tax certainty agenda towards which Italy has committed, as testified by its joining the ICAP Programme.

Finally, with regard to the challenges associated in particular with cryptocurrencies, anti-money laundering legislation currently appears to be better equipped than tax legislation in order to address possible concerns. Thus, the cooperation and, perhaps, prospectively, integration between administrative cooperation in the field of taxation and in the field of financial regulation, as displayed, for instance, by Directive 2016/2258/EU (so-called "DAC 5") may be considered as one of the strategic goals ahead. In addition, certain peculiar issues concerning the legal connotation of cryptocurrencies and e-wallets for domestic tax purposes (issues on which the Italian tax administration has articulated its view in some rulings), in the view of the author, may perhaps be more suitably addressed within a coordinated framework, regional (i.e. at the EU level) if not global in scope.

Japan

Branch reporter
Oki Yasui[1]

Summary and conclusions

Japan has an extensive EOI network covering 132 jurisdictions, as of 1 October 2019, through 62 DTCs, 11 TIEAs and the Multilateral Convention. It has in place an active negotiation program which includes the negotiating of existing DTCs to ensure that they are up to date and in line with international standards. Therefore, there is no gap between Japan's domestic framework and the international standards in terms of level of information exchange.

Over a period of four years, from July 2014 through June 2018, Japan received a total of 835 requests and sent 2,131 requests for information and provided a total of 932 cases of spontaneous exchange of information and roughly 1.6 million pieces of data as automatic exchange of information. Although no statistical data is available to confirm that the effective employment of these instruments has led to an increase in revenue collection ability etc., it is fair to say that EOI instruments have become integral to today's international tax enforcement.

Japan's EOI agreements and domestic law do not contain language prohibiting group requests, and it is interpreted as allowing the provision of information requested pursuant to group requests. As for the foreseeably relevant standard as a ground for refusal to exchange information, if the National Tax Agency determines that the request received does not satisfy the criteria for foreseeably relevance, then it communicates any identified issues to the requesting jurisdiction and attempts to resolve them before declining the request. This practice resulted in only one refusal due to a lack of foreseeable relevance during the period from April 2014 to March 2017.

In Japan, the main requirements ensuring the availability of beneficial ownership information are contained in the Anti-Money Laundering/Countering the Financing of Terrorism Law, which obliges AML-obligated persons including banks to carry out customer due diligence procedures and to ensure that the information on their customers is accurate and up to date. The Companies Act provides that upon incorporation, all stock companies must open a bank account with a local bank in which to place the funds constituting equity. This guarantees that, at the time of incorporation of a company, beneficial ownership information will be available through the customer due diligence obligations of the bank.

On these bases, Japan has implemented AEOI on non-residents' financial accounts based on the Common Reporting Standard. It had committed to conduct the first exchange by September 2018. At the time of the first exchange, Japan provided 89,672 pieces of data regarding non-residents' financial account information to 58 jurisdictions while it received 550,705 pieces of data regarding its residents' financial account information from 64 jurisdictions.

In Japan, there have been few court cases in which any EOI conduct was presented by taxpayers. Only recently was there one case where the court ruled that an EOI request is not

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subject to the action of revocation of an administrative disposition. Its decision was on the basis that the EOI request itself does not have any legal effects on plaintiffs as it is addressed to foreign tax authorities, and that there is no reason to construe that such an action before actual taxation must be subject to the action of revocation of an administrative disposition.

In order to implement EOI in accordance with DTCs, TIEAs and the Multilateral Convention, the Act on Special Provisions regarding the Application of Tax Treaties provides that tax authorities can conduct inquiry, inspection, retention, search and/or seizure to collect requested information, and provide collected information to foreign tax authorities. Based on these provisions, the National Tax Agency has broad access powers to obtain all types of relevant information including ownership, accounting and banking information from any person in order to comply with obligations under Japan's EOI agreements in the same manner as for domestic tax purposes.

With regard to AEOI on CbCR information, the relevant act was amended in 2016 to introduce the transfer pricing documentation in accordance with BEPS Action 13. Under the new provisions, if the ultimate parent entity is located in Japan, then a Japanese corporation that is a constituent entity of an MNE group with a total consolidated revenue of 100 billion yen or more in the preceding fiscal year is subject to CbCR obligations. This amendment was applicable for the ultimate parent entity's fiscal year beginning on or after 1 April 2016. Japan's CbCR legislation requires local filing from a domestic constituent entity when the jurisdiction of its ultimate parent entity does not have CbCR legislation, while the local filing requirement does not apply in cases where there is no treaty relationship between Japan and a foreign jurisdiction, even when the foreign jurisdiction does have CbCR legislation. This is because the local filing should be regarded and utilized in order for a jurisdiction without CbCR legislation not to be a loophole of the CbCR information-sharing mechanism.

There are adequate confidentiality provisions protecting tax information in Japan's domestic tax laws. These provisions also apply to information exchanged under Japan's EOI instruments. The confidentiality provisions in Japan do not draw a distinction between information received in response to requests and information forming part of the requests themselves. As such, these provisions apply equally to all requests for information, background documents to such requests, including communications between the requesting and requested jurisdictions and communications within the tax authorities of either jurisdiction.

If the cryptocurrency and digital financial markets continue to be outside of government control, then there may be a high risk that all of the existing frameworks for (A)EOI cooperation will be seriously constrained. Although this issue will need to be closely monitored, there have been no apparent symptoms of the issue in Japan so far. Some of the features around the cryptocurrency markets in Japan are worth noting in this respect, namely the fact that the major purpose of cryptocurrency transactions is considered to be investment, just like FX trading, and the recent regulatory developments, including an identity confirmation obligation, for virtual assets exchange service providers.

Republic of Korea

Branch reporter
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Summary and conclusions

The Republic of Korea (hereafter Korea) has made significant efforts to fully adopt the OECD standards for EOI and has worked closely with its treaty partner countries to enhance cooperation in the field of cross-border EOI over the last decade. As part of such efforts, and to ensure the EOI standards are properly implemented in accordance with the OECD/G20 mandate for tax transparency, Korea executed several bilateral and multilateral instruments. In addition, tax and financial laws were newly enacted and amended taking into account the bilateral and multilateral instruments, in order to eliminate the possibility of circumventing the obligations assumed at the international level.

Korea has been very active in seeking overseas tax and finance information through EOIR, based on its EOI channels (94 DTAs and 12 TIEAs). It has also been very cooperative with EOIR applications from its treaty partner countries, taking into account the spirit and objective of the latest OECD tax transparency initiatives. Korea currently engages in AEOI for banking information with 91 countries and jurisdictions pursuant to the CRS platform and within the framework of the MCAA. Since 2016, Korea and the United States have actively engaged in AEOI pursuant to Model 1 IGA and FATCA, for banking information involving Korean and US tax residents.

In the context of the transfer pricing documentation, Korea fully adopted the OECD recommendations in Action 13 and subsequent guidelines on the preparation and exchange of CbCRs. Korea currently exchanges CbCRs with 64 countries.

These efforts have been of great assistance in the tax administration of the Korean government, and tax audits in particular. The strengthened tax audits and access to offshore tax and financial information (including CbCRs) led to an increase in tax assessments/collection and a reduction in tax evasion. There have been a number of successful EOIR cases where the Korean tax authorities requested and successfully obtained information as part of a tax audit.

The new article 26 of the OECD MTC expands the scope of information subject to EOI based on the standard of "foreseeable relevance" and overrides the domestic bank secrecy rules. As a result, a treaty partner country tends to be more cooperative with EOI requests if its DTA with Korea includes the new article 26 of the OECD MTC as opposed to the old article 26 of the OECD MTC. In respect of EOIR, there have been several overseas disputes involving Korean taxpayers. In many of those cases, the Korean taxpayer failed to stop the counterparty competent authority from transmitting the requested information to the NTS, as the tax authority and court of the counterparty country adopted a broad interpretation of the scope of the information subject to EOI.

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The institutional framework for AML/CFT has been substantially modified to ensure compliance with Korea's international EOI obligations and also to ensure that participating financial institutions fully cooperate with the provision of requested information.

Korea maintains strict confidentiality and data protection rules with respect to taxpayer information. However, an exception should apply to information subject to EOI.

The new digitalized economic environment, and in particular the significant increase in cryptocurrency transactions and digital financial market trading, may give rise to a new challenge for the NTS and the effective enforcement of the EOI regulations. Therefore, the Korean government should promptly implement appropriate financial and tax regulations and ensure that those digital transactions are properly reported through the EOI framework.

Branch reporter
Amanda Ess[1]

Summary and conclusions

In the past, a comprehensive legal and regulatory framework on exchange of information for tax purposes was established in Liechtenstein. Through the Liechtenstein Declaration of 12 March 2009 Liechtenstein has committed itself to the global standards for transparency and exchange of information in tax matters developed by the Organisation for Economic Cooperation and Development (OECD). Furthermore, with the Government Declaration of 14 November 2013 Liechtenstein committed itself as a so-called "early adopter" to the new standard of automatic exchange of financial account information (AEOI) under the Common Reporting Standard (CRS) of the OECD with a first exchange in September 2017.

Liechtenstein is member of the Global Forum on Transparency and Exchange of Information for Tax Purposes (GFTEI) and also an active member on a rotation basis of the Peer Review Group, which is responsible for the supervision of the standards on exchange of information on request (EOIR) and AEOI. Like the other GFTEI members, Liechtenstein's EOIR framework and exchange practice is regularly assessed by the GFTEI, which in March 2019 re-confirmed Liechtenstein's "largely compliant" rating. Moreover, the assessment in the area of AEOI which is conducted in a staged approach has so far shown positive results.

Liechtenstein was one of the first non-OECD members to join the Inclusive Framework on Base Erosion and Profit Shifting (BEPS) in 2016. Liechtenstein has implemented the BEPS minimum standards on tax transparency, covering BEPS Action 5 which requires compulsory spontaneous exchange of information on tax rulings (ETR) and BEPS Action 13 which foresees the automatic exchange of country-by-country (CbC) reports. The peer review conducted in both areas has not led to any recommendations for Liechtenstein, thereby confirming that Liechtenstein is meeting the standards on ETR and CbC.

Today, Liechtenstein offers a wide variety of bilateral and multilateral instruments which provide for a full range of mutual administrative assistance in tax matters, including exchange of information (EOI) on request as well as automatic and spontaneous EOI. While those instruments are fully functional, Liechtenstein ensures taxpayers' rights based on legislation of the European Union (EU) which is also applicable for Liechtenstein as a member of the European Economic Area (EEA) through appropriate procedural and confidentiality provisions.

This report provides a comprehensive overview of Liechtenstein's bilateral and multilateral EOI instruments and the related domestic framework. It also describes some of the challenges faced in EOI practice.

[1] Fiscal Authority of the Principality of Liechtenstein, Expert Automatic Exchange of Information.

Branch reporters
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Summary and conclusions

Globalisation has dramatically increased in recent decades. This has led to a proliferation of cross-border transactions; increased mobility of taxpayers; capital shift among different jurisdictions;[3] with consequent challenges for national tax authorities.

In this context, financial crimes, including tax evasion (and corruption) are a threat to the political and economic stability of both developed and developing countries.[4]

Exchange of information (EOI) is one of the answers to these challenges that a globalised economy generates for tax administrations around the world. This form of administrative assistance helps to determine the right to tax for a particular jurisdiction[5] and reduce tax evasion and fraud.

These changes have been paralleled by more globalisation with increasing pressure from other jurisdictions to obtain information relevant for tax purposes. This is motivated by the need to increase tax revenues in such jurisdictions taking advantage of unprecedented technological advances offered by the information data revolution and the appearance of new tools fostering cooperation between tax administrations allowing more effective exchange.

Luxembourg has had a U-turn history in terms of EOI, transforming from a jurisdiction offering limited room for EOI and strong banking and financial institution secrecy protection to a first-mover position swiftly incorporating EU and Organisation for Economic Co-operation and Development (OECD) developments in terms of EOI.

The international (mainly the OECD initiatives including certain BEPS Action plans) and European Union (EU) measures adopted and implemented in Luxembourg in recent years have contributed to the expansion of EOI. This implementation has been done on a consistent basis both within the international and the European frameworks. Indeed, Luxembourg effectively cooperates and effectuates EOI upon request (EOIR), spontaneous EOI (SEOI) and automatic EOI (AEOI) within a consequent, coordinated and harmonised legal framework.

The Foreign Account Tax Compliance Act of 2010 (FATCA) and Common Reporting Standard (CRS) have been the main drivers for the globalisation of AEOI.

Luxembourg is the top EU information sender in terms of Euro amounts. This is partly

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[3] MARINO, Giuseppe (Ed.), New Exchange of information versus tax solutions of equivalent effect, EATLP Annual Congress Istanbul, IBFD Volume 13 EATLP International Tax Series. 2015. p. 4.

[4] See TEJEIRO, Guillermo. Tax evasion and money laundering: The "Whole of Government" OECD Approach. Kluwer, 2015.

[5] LEBAS, Emilien, Automatic exchange of information – treaty and OECD aspects in *Droit Fiscal Luxembourgeois*, IFA – Legitech (Simon, G. Ed.) 2018. p. 943.

explained by Luxembourg's leading role in the financial services sector (in particular, being the second largest investment funds hub in the world) and the fact that it is a jurisdiction that welcomes workers from neighbouring countries on a massive scale.

Luxembourg today is seen as 'largely compliant' with the OECD's international standard for transparency and EOIR, which evaluates criteria such as availability of ownership and identity information, availability of accounting information, availability of banking information, access to information, rights and safeguards for EOIR mechanisms, network of EOIR mechanisms, confidentiality as well as quality and timeliness of response. Indeed, Luxembourg continues to make efforts in terms of human support and means to allow such exchange.

Despite such efforts, Luxembourg should improve the time spent handling the requests which do not meet the target set by the OECD standard.

In terms of EOIR, Luxembourg incorporated the 'foreseeable relevance' criteria as a condition for the exchange to avoid 'fishing expeditions'. Lack of domestic interest in the information and banking, fiduciary or financial institution secrecy are no longer admitted as valid grounds justifying not proceeding with the exchange.

As EOIR continues to expand, national courts and the Court of Justice of the European Union (CJEU) face more and more controversies related to protection of taxpayers' and concerned persons' rights. This is particularly relevant to Luxembourg. Indeed, since the CJEU's ruling in the *Berlioz* case,[6] the applicable Luxembourg legislation has been significantly amended, in an attempt to adapt to such case findings.

The change is mainly driven by the protection of rights contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Fundamental Freedoms and the Charter of Fundamental Rights of the European Union (Charter).

The content of taxpayers' rights in light of the Charter will continue to influence how EOIR operates in Luxembourg and in the EU as a whole. Indeed, the CJEU's interpretation of these rights will carry on shaping the law and how the European judges protect such rights. Therefore, the outcome of the latest preliminary questions referred to the CJEU by the Luxembourg courts should be closely followed.

Regarding confidentiality, the Luxembourg tax administration is bound by strict protocols and rules that aim to safeguard it as p of the tax procedures they undertake (including EOIR, SEOI and AEOI).

Furthermore, Luxembourg does not use the information exchanged for any other purpose than tax, and only admits its use for non-tax purposes if the authority providing the information authorises such use.

Confidentiality and data protection rules appear as the first line of defence of taxpayers on all types of EOI, especially as AEOI expands. The data protection Regulation of the European Parliament and Council (EU) 2016/679 of 27 April 2016 (GDPR) reinforces this protection as it is applicable in the context of FATCA and CRS. Therefore, data protection rights claims in courts are no longer a question of if but when. This manifests the Charter's influence in the application and use of the information exchange under the AEOI framework.

Indeed, the protection of taxpayers in the case of EOI should now shift to GDPR and the protection of rights via the Charter, which only broadly cover European citizens.

The rise of new technologies poses a threat to the advantages the tax administrations

6 CJEU, Berlioz Case C-682/15.

have obtained thanks to the EOI and other forms of administrative cooperation enhancement.

However, loopholes continue to be closed thanks to the OECD and EU initiatives (such as the EU Directive 2018/822 of 5 June 2018 (DAC 6)) and their rapid implementation, as is the case in Luxembourg.

Since the set-up of a globalised EOI, the implementation of the widest possible AEOI was the ultimate goal. It should be stressed that if the information obtained through AEOI (or SEOI) is not sufficient with respect to the recipient state of the information, the latter could request complementary information via EOIR. In this case, the 'foreseeable relevance' criteria should be fulfilled *a priori*.

In addition, the 'foreseeable relevance' criteria had been already weakened under the scope of the EU Directive 2015/2376 of 8 December 2015 (DAC 3)[7] and the narrow scope of control of the criteria granted to tax and judicial authorities. This added to the fact in the future it may be desirable to allow more EOIR, the need for maintaining the 'foreseeable relevance' requirement may fade away.

It should be highlighted that, in particular, AEOI measures affect all taxpayers in a cross-border situation, even if the tax evaders represent a non-significant proportion of the above-mentioned taxpayers.

If the deterrent effect of these measures on "non-significant" tax evaders should be important, it is questionable whether the effect would be the same for more organised tax evaders. One could reasonably think that the latter would find other means to circumvent their tax obligations (e.g. using crypto-assets, etc.).

Hence, it appears that only global tax harmonisation could mitigate international tax fraud. This harmonisation is the aim of the OECD and G20. If this harmonisation was implemented, AEOI would lose its purpose.

[7] Since the only information available to member states is the summary of the ruling, their ability to formally demonstrate the 'foreseeable relevance' of the request is undermined.

Branch reporters
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Yamini Rangasamy[2]
Leena Doman-Brette[3]

Summary and conclusions

As an international financial centre which is actively promoted as a gateway for investment into Africa, financial services have represented a major pillar in Mauritius' diversified economy since the early 1990s. The percentage contribution of the financial sector to GDP is above 15%. There are over 20 banks in operation in Mauritius, including subsidiaries of foreign owned banks and branches of international banks. Total assets of the banking sector are in excess of EUR 3 billion.

With such a significant amount of assets flowing through its financial sector, Mauritius needs to have a transparent and compliant eco-system as this is directly linked to its reputation as an IFC.

In 2000, when the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) started its work to achieve a global level playing field in areas of transparency and effective exchange of information, Mauritius was among the six non-OECD countries to make political commitment to improve transparency and effective exchange of information. As a keen supporter of the work of the OECD, Mauritius was among the first few non-OECD countries that formed part of the Global Forum Work Group set up to draft the Model TIEA. The country has 56 bilateral and multilateral agreements on exchange of information in force and continues to develop its bilateral exchange of information (EOI) network. Currently, Mauritius has an exchange of information relationship with some 140 countries. It has been reporting financial account information under FATCA since 2015 and under the Common Reporting Standard (CRS) since 2017.

The Global Forum first reviewed Mauritius in 2014, when it achieved largely compliant status. Following the second round of reviews which took place in 2017, the overall rating for Mauritius was upgraded to compliant. In 2019, Mauritius was also cleared by the European Union and did not appear on the so-called "grey" or "black" list of non-cooperative jurisdictions published by the European Union.

The latest ratings fully support Mauritius' credibility as a robust, transparent and reliable IFC.

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[2] Recently joined PwC (Mauritius) as associate director. Prior to this, she had been working as section head at the Mauritius Revenue Authority and was in charge of the International Taxation Section within the Large Taxpayers Department.

[3] Head of licensing at the Financial Services Commission, Mauritius regulator for the non-bank financial services sector with over 19 years of experience in the financial services sector.
The authors wish to particularly thank Mr Rajesh Ramloll SC, Chairman of IFA Mauritius, who has reviewed this paper and provided his valuable input.

Along with consistently being ranked No. 1 for Ease of Doing Business in Africa, it sets the example for the African continent in terms of tax transparency. As one of the 29 African countries that have joined the Global Forum, it is one of only three African countries that have achieved AEOI status (the other two being South Africa and the Seychelles). While EOI infrastructure is slowly building up, as is capacity, on the continent, Mauritius has already met the required standards in terms of infrastructure, processes, confidentiality and data safeguards and legislation to ensure an efficient and robust exchange of information framework.

Mauritius has fully committed to adopt the minimum standards pursuant to the BEPS proposals. In particular, it has signed and ratified the Multilateral Convention (MLI) to implement tax treaty related measures to prevent base erosion and profit shifting. In particular, it has adopted the minimum standard under Action Point 5 (exchange of tax rulings) and Action Point 13 (Country-by-Country Reporting).

As regards the impact of digitalisation on exchange of information, the authors believe that commenting on the impact of digitalisation on the established framework would be premature given that the fintech industry is still in its infancy in Mauritius and AEOI reporting (particularly under CRS) has only been taking place for two years.

It is perhaps too early to tell the extent to which exchange of information has resulted in successful assessments or curtailment of tax evasion. However, there is little doubt that the various instruments in place will serve as a serious deterrent to tax evasion and illicit financial flows. As the MRA becomes more sophisticated and continues to build capacity on complex areas of international tax law (including transfer pricing), it becomes better equipped to analyse the information collected in order to determine whether there has been base erosion, tax avoidance or tax evasion.

Mexico

Branch reporters
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Summary and conclusions

Mexico arguably has one of the most extensive networks addressing cross-border exchanges of tax information within the OECD and the G20, which allows for exchange of information with over 93 jurisdictions.

It has over 61 double tax conventions, 17 tax information exchange agreements, it is a party to the Mutual Administrative Assistance in Tax Matters, the Foreign Account Tax Compliance Act (FATCA), the Common Reporting Standard (CRS) and the Multilateral Competent Authority Agreement (MCAA). Mexico has also subscribed to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI); however, this instrument has not been ratified.

Mexico has had an active role in, and commitment to, the exchange of information framework, which is consistent with the country's concerns about countering criminal organisations heavily invested in money laundering and deterring capital flight and base eroding practices.

Although no official information attests that the adoption of these instruments has led to an increase in revenue collection ability, a reduction in tax evasion, illicit financial flows, base erosion and profit shifting, there is, in our opinion, a certain increase in the taxpayers' perception of risk and their willingness to pay taxes.

Mexico's applicable framework allows not only for exchanges of information on a request, automatic and spontaneous basis, but also for simultaneous tax audits and the visit of authorised representatives of competent authorities, although there is no publicly available information or anecdotal evidence regarding whether the latter have been applied in practice.

As for administrative cooperation under the Multilateral Convention, Mexico has not participated actively in simultaneous tax audits. On the other hand, it is relevant to point out that Mexico's domestic tax framework still does not provide a joint audits proceeding.

As for assistance in collection, Mexico is still in an early phase and there is a certain conflict between the more formal requirements foreseen by Mexican domestic law and the more substantive requirements provided for by foreign domestic law. There are currently not more than five tax claims being enforced by Mexico on behalf of other states and only one tax claim being enforced by another state on behalf of Mexico.

In terms of the CRS MCAA framework, Mexico has activated exchange relationships as

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The authors appreciate the collaboration of Sebastian Ayza and Arturo Portilla in the preparation of this report. Additionally, the authors would like the thank Nadia D. Ruiz Euler, Martín Román Ramírez, and Gabriela Contreras Delgado for their time and interviews held during the preparation of this report.

sending jurisdiction with 66 jurisdictions and as receiving jurisdiction with 95 jurisdictions, as of May 2019

Mexico has implemented a solid institutional and legal framework as regards the Tax Administration Service's capacity to effectively comply with exchange of information obligations to other countries and to perform tax audits using said information. The digital infrastructure currently in place provides the Tax Administration Service with enough capacity to comply with the current standards, as well as to comply with new international standards and needs, as requested from time to time.

When comparing domestic tax examinations with cross-border EOI requests, Mexico's level of protection of taxpayer data and the standard of confidentiality remain high, with the difference in the latter case of the data being identified as exchanged under a tax information exchange agreement and being subject to the additional protections provided by the agreement (if any).

Mexico does not explicitly prohibit the use of illegally obtained information for tax purposes. That being said, there is anecdotal evidence indicating that the Tax Administration Service used information that was illegally obtained by a European country and then exchanged with Mexico.

As for whistle-blowers, Mexico does not currently prohibit or incentivise the use of information provided by whistle-blowers.

Regarding the impacts of digitalisation within the framework of international exchange of information, it is important to point out that although the initial enactment of the Mexican Fintech Act allowed the newly regulated E-Money Institutions, Crowdfunding Institutions, Credit Institutions and Regulatory Sandboxes to carry out operations with virtual assets, a secondary regulation issued on 8 March 2019 by the Mexican Central Bank rendered such provisions practically ineffective.

The result thereof is that, according to the applicable provisions, the rendering of virtual currency services in Mexico is only allowed in a financially unregulated manner, to the extent the service providers comply with the applicable anti-money laundering and counter financing of terrorism provisions.

It is our opinion that, eventually, the EOI obligations will need to be extended to the regulated financial agents who operate with and hold virtual currencies on behalf of their clients; and in order to extend these obligations to virtual asset service providers, the Central Bank's monetary and public policy (and the corresponding legal framework) will need to change.

Branch reporters
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Summary and conclusions

The Netherlands has a wide exchange of information network, which leads to EOIR with 148 jurisdictions. Treaties include article 26 of the OECD treaty model and the Netherlands is a signatory to several international agreements, including the Convention, the EU Directive on Mutual Assistance for the Exchange of Information and the CbC MCAA and CRS MCAA. Its TIEAs allow for the spontaneous exchange of information. The exchange of information takes place within the DTA's designated body: The Central Liaison Office.

CbC reporting requirements have been implemented and the Netherlands has set up a dedicated CbC team to review the CbC reports based on a centralised risk assessment approach. The obligation for MNEs to file CbC reports in the Netherlands is incorporated into the domestic legislation. The Netherlands expects to receive more than 3,000 reports, of which around 150 from Dutch MNEs.

In addition, the Netherlands has a process to exchange information on certain rulings with an international character. During the year 2019, the Netherlands has reorganised its rulings practice, including achieving more transparency by issuing anonymised versions of international rulings, a centralised issuing process for all tax rulings and additional requirements with respect to the content of a ruling. As part of this plan to reduce BEPS, the Netherlands announced that it will implement anti-base erosion measures such as strengthened withholding taxes and earning stripping measures, stricter substance rules and a principle purpose test. In addition, certain measures from the European Directives will be implemented.

The Netherlands has been reviewed in 2019 by the Global Forum on Transparency and Exchange of Information for Tax Purposes and has been rated "largely compliant". Financial information is exchanged with approximately 100 jurisdictions under CRS and FATCA. The Netherlands allows individual and group requests under the EOI standard; however, if there is no legal basis, the Netherlands refuses to exchange information. The Netherlands is currently following up on the recommendations that were issued by the Global Forum.

Furthermore, the Netherlands is engaged in several administrative cooperation programs, including joint audits and simultaneous audits, JITSIC and tax crime-related initiatives. Simultaneous audits are mainly undertaken within the EU. It is also taking part for the second consecutive year in the pilot of the OECD's International Compliance Assurance Programme. There is little to no data available as to whether these measures for exchange of information have led to additional (tax) revenue in the Netherlands.

The most important domestic adoption of these international measures in the

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Netherlands is the *Act on the International administrative assistance relating to the levying of taxes* (WIB). This act provides the legal basis for all international agreements on the exchange of information. There are specific ongoing programmes within the DTA regarding certain exchange information, including the program relating to high net worth individuals, a voluntary disclosure programme for foreign-held assets and a programme called "concealed capital" dealing with the Panama Papers and the Paradise Papers.

The DTA has a legal obligation to keep all information of taxpayers confidential. At the same time, new laws based on EU Directives and international agreements will have the result that information gathered by the DTA could be exchanged with foreign tax authorities. There is a clear lack of taxpayers' rights in this respect. It seems not possible to object to the collection of data or to the exchange of the data. This cannot be done by the taxpayer nor by the third party who is forced to provide the data. In 2014 the notification procedure was abolished, providing the third party that was asked to provide the information an opportunity to object to the decision. Objection and litigation are only possible if a penalty is imposed because the data are not provided. Most case law is to the advantage of the DTA, as taxpayers need to prove that the DTA was not acting in accordance with the tax treaty in its decision to exchange the information.

There is a landmark case pending within the Dutch Supreme Court regarding whether the DTA can make use of an anonymous informant. Based on recent case law, it seems difficult for the DTA to make use of massive collected data that were not collected for tax purposes, unless this is allowed by law.

Virtual currencies and cryptocurrencies do not yet fall within the scope of the financial regulatory framework in the Netherlands. In July 2019 new legislation was announced based on which the service providers offering services relating to cryptocurrencies (trading/wallets) will fall under the AML/CFT rules. In the Netherlands, there are no special rules for taxation of income/profits made from trading in cryptocurrencies. The profit or value will be taxed according the normal tax rules. Currently, activities in the digital markets do not fall under any AEOI.

New Zealand

Branch reporters
Ranjana Gupta[1]
Denham Martin[2]

Summary and conclusions

The New Zealand Inland Revenue (Inland Revenue) takes its exchange of information (EOI) obligations under tax conventions to which it is a party very seriously and has a very active and effective EOI policy and practice.

New Zealand's double tax conventions (DTCs) have always closely followed the OECD Model Tax Convention (OECD MTC) and accompanying OECD Commentaries. As a consequence, the EOI article contained in New Zealand's DTCs generally mirrors the evolving wording of article 26 of the OECD MTC.

New Zealand's more recently concluded DTCs contain the extended and modern OECD EOI standard in article 26 and New Zealand has also concluded several tax information exchange agreements (TIEAs) that closely follow the OECD's Model TIEA.

New Zealand is a party to and can undertake EOI under the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAAC) which came into force in New Zealand on 1 March 2014 and is effective for criminal tax matters from that date and from 1 January 2015 for all other EOI matters.

An Intergovernmental Agreement (IGA) between the United States and New Zealand was signed in June 2014 to facilitate EOI in terms of the United States legislation known as FACTA, which requires New Zealand financial institutions to undertake due diligence and to provide certain financial account information to Inland Revenue which in turn will provide the information to the Internal Revenue Service (IRS) in accordance with agreed transmission arrangements.

On 21 February 2017, New Zealand enacted legislation that adopted the OECD's Common Reporting Standard (CRS) for automatic exchange of financial account information (AEOI) into New Zealand's domestic tax laws and Inland Revenue has overseen the implementation of these new AEOI rules with the first exchanges of financial account information having been made in September 2018 with treaty partners in terms of the agreed exchange requirements under the Multilateral Competent Authority Agreement (MCAA).

New Zealand's principal approach to EOI is still largely a bilateral one and based on a specific EOI request from the competent authority of a DTC partner. However, increasingly New Zealand is providing EOI under other internationally recognised exchange mechanisms that are in conformity with OECD and other international standards, and it is working to promote greater transparency and exchange of information with all its DTC, MAAC, and MCAA partners.

In practice, Inland Revenue makes approximately twice as many EOI exchange requests with its tax treaty partners than it receives. Before making any EOI request with another

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treaty partner, New Zealand's competent authority will usually take whatever available steps that it can to obtain the relevant information in New Zealand. Inland Revenue understands that while the "foreseeably relevant" test in article 26 provides for EOI to the widest possible extent, this does not mean that any request it makes can constitute a "fishing expedition" and Inland Revenue adopts a similar approach to processing EOI requests that are sent to it. Inland Revenue is also cognizant of the rights and obligations owed to persons who are the subject of any EOI request, including in particular its obligations in respect of confidentiality.

Because New Zealand's domestic tax laws contain extensive information-gathering powers to assist Inland Revenue to obtain requested information and these laws are subject to only a few substantive limitations (e.g. relevance of request, taxpayer secrecy, and legal professional privilege), Inland Revenue usually responds to EOI requests in a prompt and complete way and within the time frames recognised in OECD standards and DTC practice.

Inland Revenue is actively participating in all aspects of the OECD's BEPS' Action Plan. For example, in accordance with Action 5 of that Plan New Zealand has provided details on 104 rulings (mostly unilateral APAs) to treaty partners and received details on 136 rulings from treaty partners. Inland Revenue has not received any follow-up requests for information from treaty partners in respect of these exchanges. First reporting of country-by-country (CbC) data has taken place but only 20 multinational enterprises that are headquartered in New Zealand are impacted in this context and during 2018 Inland Revenue received over 1,400 CbC reports from treaty partners for foreign-owned multinational enterprises.[3] These reports will provide valuable supplementary information to Inland Revenue regarding tax returns filed and records held by local units of these multinational enterprises.

By adopting and implementing AEOI standards and other EO1 reforms, New Zealand has taken a significant step forward in combatting tax evasion and avoidance.[4] In the case of tax evasion, Inland Revenue can make tax adjustments that go back many years in certain circumstances. Through mechanisms like CRS, AEOI will have a significant impact on the volume of tax-related data that moves between countries and there is now the potential for tax authorities to cross-check domestic tax compliance based on the AEOI data provided by the tax authorities of other countries. Under AEOI the information reported to the tax authorities will include both residents' and non-residents' information with the responsibility for filtering this information for EOI purposes being left to respective tax authorities.[5]

Inland Revenue, along with other regulators in New Zealand, has identified a number of issues and challenges associated with digitalisation. Inland Revenue has responded already with some technical positions on some of the relevant tax issues emerging in the financial services area as a consequence of the use of these new technologies by taxpayers both domestically and globally. However, Inland Revenue is waiting for further guidance from the OECD in respect of this evolving area of economic practice, as it believes that agreed global solutions are likely to be the most beneficial ones for New Zealand.

3 Information provided by John Nash, Manager (International Revenue Strategy), Inland Revenue.

4 IRD, 'Automatic Exchange of Information', Policy and Strategy Special Report (February 2017) https://taxpolicy.ird.govt.nz/sites/default/files/2017-sr-aeoi-v1.pdf.

5 Ibid.

Nigeria

Branch reporter
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Summary and conclusions

Through its double taxation agreements, country-by-country reporting regulations and common reporting standards, Nigeria participates in cross-border exchange of information with contracting states.

Nigeria's existing double taxation agreements (DTAs), which are increasingly based on the OECD model convention, provide for exchange of information that is foreseeably relevant from treaty partners in the determination of tax cases and enforcement of domestic tax laws.

Nigeria is not a signatory to the Model Agreement on Exchange of Information on Tax Matters.

Nigeria is a signatory to the OECD Convention on Mutual Administrative Assistance in Tax Matters which requires Nigeria to provide and exchange information which is foreseeably relevant for enforcing the domestic tax laws of contracting states.

Nigeria is a signatory to the Common Reporting Standard Multilateral Competent Authority Agreement (MCAA) under the OECD's automatic exchange of information framework. The Nigerian tax authority has issued the Income Tax (Common Reporting Standard) Regulations to give effect to the provisions of the OECD Convention on Mutual Administrative Assistance in Tax Matters, the MCAA on Automatic Exchange of Financial Account Information and the common reporting standard. The regulations, under pain of penalty, provide guidance on how reporting financial institutions should identify and make returns on reportable accounts. Reporting financial institutions include depository institutions, investment entities, custodial institutions and specified insurance companies which are resident in Nigeria.

As a member of the African Tax Administration Forum (ATAF) and the West African Tax Administration Forum (WATAF), Nigeria is committed to their exchange of information frameworks.

Nigeria has not participated in any exchange of information of tax rulings as laid down in BEPS Action 5.

Nigeria is a signatory to the Country-by-Country Multilateral Competent Authority Agreement and has revised its transfer pricing regulations in line with the OECD BEPS Actions 8-10 and 13. The regulations introduce steep administrative penalties, a revised threshold for maintaining contemporaneous transfer pricing documentation and new compliance requirements on procurement transactions and intragroup services. Nigeria also issued the Income Tax (Country-by-Country Reporting) Regulations using the OECD template, to implement the recommendations of BEPS Action 13 and detail the reporting requirements for multinational enterprises whose ultimate parent entity is tax resident in Nigeria. The objective of the regulations is to provide tax authorities with information about multinational

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enterprises' global activities, profits and taxes, thereby improving the transparency of their tax activities.

Nigeria is member of the Global Forum on Transparency and Exchange of Information for Tax Purposes. Exchanges of information are made upon request from a contracting state or spontaneously as the circumstances require.

Nigeria's federal tax authority, in July 2019, issued the Income Tax (Common Reporting Standard) Regulations which require a reporting financial institution to file an information return with the tax authority, setting out the information required to be reported, as described in the guidelines, in relation to every reportable account that is maintained by the institution at any time during the calendar year.

Nigeria does not engage in joint/simultaneous audit systems with other jurisdictions or implement any other initiatives for cross-border administrative cooperation.

Nigeria is not a party to any bilateral or multilateral agreement on exchange of information or technical corporation in tax matters other than those already discussed.

The FIRS issued guidelines for CbCR in Nigeria to provide multinational enterprises with a guide for completing the CbC report templates issued with the CbCR regulations.

The Nigerian tax authority has the power to request taxpayers to provide it with information relevant to the taxes of such taxpayer, failing which the tax authority can assess a taxpayer to tax on the basis of its opinion of what the financial position of the taxpayer is. Where this happens and the taxpayer does not object to the assessment made, such assessment becomes final and conclusive and the taxpayer shall be obliged to pay the assessed sum. Under the various DTAs to which Nigeria is a party, Nigeria has an obligation to provide a contracting state with any information which it deems relevant to the administration of taxes in that jurisdiction.

The Nigerian federal tax authority has set up an information exchange department to ensure that its information exchange obligations are closely monitored and satisfied.

Taxpayer data, though confidential, can be disclosed in proceedings before a court of law in Nigeria or where such disclosure is in the best interest of the public or Nigeria. As such, the Nigerian tax authority is able to use tax information gathered through the exchange of information frameworks for purposes other than tax which are in the best interest of Nigeria. There is no law in Nigeria preventing the use of illegally obtained information for tax purposes and Nigeria has a whistleblowing policy in place which incentivises whistle-blowers.

Amendment of the extant laws has not kept pace with changing technological advancement. Although the Nigerian authority plans to start directing banks in Nigeria to be the collecting agents for value-added tax on online transactions for the purchase of goods and services, this may be resisted where there is no clear legal framework to authorise the plan.

Nigeria is benefitting from its collaboration with the Global Forum on Transparency and Exchange of Information and other multilateral agencies on information exchange. To maximise this benefit, there is a need for continuous training of staff of the tax authority, investment in the relevant technology and the necessary update of existing laws to enable effective exchange of information.

Branch reporters
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Summary and conclusions

The field of international information exchange in tax matters has developed rapidly in the past decade. International cooperation has been high on the agenda in international politics, and this has led to cooperation and increased transparency.

International exchange of information has been a priority for Norwegian authorities for a long time. Norway has an extensive network of double tax treaties and TIEAs and is party to multilateral agreements such as the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and the Nordic Convention on Assistance in Tax Matters. Information received through these networks is a valued contribution to the Norwegian tax administration.

Norway is in the forefront when it comes to automation of the tax assessment procedure. A vital part of the system is the automatic reporting of information to the tax authorities from third parties. Specified third parties have an obligation to provide particular categories of information to the tax administration on an automatic basis. In addition to the automatic information obligations imposed on third parties and the taxpayer, the tax administration has the power to request information from the taxpayer and third parties.

As the Norwegian tax administration system is highly automated and digitalized, the exchange of information with other jurisdictions has been easily integrated into the domestic legal and practical system. Norway's international commitments to exchange information have often been implemented with minor adjustments. As international exchange of information is an integrated part of the domestic tax administration system, isolating the effects of such exchange has proved to be difficult. However, the Norwegian authorities recognize the positive effects of international exchange of information and the important contribution such exchange makes to the work of the tax administration. The international efforts to increase transparency will continue to be a priority for Norwegian authorities.

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Branch reporter
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Summary and conclusions

Peru has been applying Conventions for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on income and on capital, concluded on the basis of OECD and UN models and fully in force with Chile, Canada, Brazil, Mexico, Republic of Korea, Switzerland and Portugal; the tax information exchange agreement (TIEA) with the United States; the Decision 578 with the Andean Community (Bolivia, Colombia, Ecuador and Peru); and the agreements between the tax administrations of Argentina and Ecuador. The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAATM) and the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA) are of imminent application, pending the meeting of the security and confidentiality standard to be verified soon by the OECD.

It should be noted that, as a compelling measure to achieve the substantiation of large foreign assets belonging to Peruvian residents that had not been declared to the Tax Administration, given the imminent entry into force of multilateral information exchange agreements promoted in the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes, the Peruvian government approved at the end of 2016 a repatriation and amnesty regime known as Temporary and Substitute Income Tax Regime - Declaration, repatriation and investment of undeclared revenues. This regime resulted in the application of 7,530 taxpayers who declared a tax base of USD 3,825 million and paid an income tax of USD 350 million. Although the total declared has not been significant, this has allowed SUNAT to digitally model the behavior of those under the regime using the information gathered with the purpose of attracting new taxpayers with similar tendencies to those subject to the regime.

The government agencies – the Ministry of Economy and Finance and the Peruvian Tax Administration, SUNAT – do not have information or statistics that show the impact the exchange of information through such instruments has had on tax collection. "However, there are clear indications that SUNAT has been requesting and is being requested information under the aforementioned instruments, since it has reported that, during the past seven years, Peru has made 35 requests for exchange of information, 29 of which were approved and six rejected; and that it has also received 19 requests for exchange of information, having responded satisfactorily to 11 and rejected seven, there being one pending response.

The application of the aforementioned agreements through administrative case law has been infrequent, since only 19 decisions handed down by the Peruvian Tax Court have been identified with the United States. Those decisions show that SUNAT used the information received by the United States to support its position. Of the decisions reviewed, Decision

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No. 03483-8-2013 becomes particularly important since in it the court implies that, for the purpose of supporting an observation, SUNAT should not consider the report sent by the United States Internal Revenue Service (IRS) as sufficient, since if such information does not allow determining the origin of the revenues subject to observation, SUNAT was able to request the extension of the information included in the report sent, in order to achieve full proof.

Moreover, there has been little application of the aforementioned agreements according to case law. At Supreme Court level, the cassation filed in case No. 3576-2009 stands out, as it establishes that SUNAT is not obliged to request information through agreements, at the taxpayer's request, even more so if it has not been proven that the taxpayer was prevented from presenting the documentation requested on their own behalf.

Regarding BEPS, Peru has incorporated into its domestic legislation measures that enable it to comply with Action 13 regarding fulfillment of formal transfer pricing obligations. Thus, starting in fiscal year 2017, the three levels of informative tax returns (local, master and country-by-country) provided for by the guidelines were incorporated into Peruvian law. Although Peru signed the CbC MCAA in 2018, at the date of preparation of this report, Peru has yet to pass satisfactorily the forthcoming OECD assessment of compliance with its standard of confidentiality and security of information in order to obtain tax information under the minimum standard of BEPS Action 13. As of October 2019, the Integral System of Automatic Information Receipt and Exchange (IR AEOI System) has been implemented, which is evidence of the imminence of the full application of the exchange.

On the exchange of automatic financial information based on FATCA and CRS MCAA, the following must be noted. First, according to the Internal Revenue Service's web site, Peru has the Agreement in Substance Model 1 and is treated as having an IGA in effect since 30 June 2014, even though the text of the agreement has not been disseminated and does not appear on FATCA's web page. Peruvian government agencies do not have public information on the matter, and it remains important to emphasize that Peruvian banking institutions do apply FATCA according to public information shown on their relevant web pages. No public information on the steps, standards and deadlines is available. Second, at the date of issuance of this report, Peru has not signed the CRS MCAA even though it has stated its intention to do so.

In order to comply with the Global Forum standard, Peru incorporated a number of measures into domestic legislation, mainly in the tax code and in the Banking and Financial System Law, based on extensive explanatory statements that include interpretations to reconcile the constitutional right to banking secrecy contained in the Peruvian Constitution with the international commitments assumed in connection with the execution of the MAATM. The explanatory statements emphasize that not every constitutional right is absolute, and, this is the case of the banking secrecy, in that context, then in order to assess whether a restriction on secrecy is constitutionally admitted, such restriction must comply with the tests of suitability, necessity and proportionality, which are not affected by the exchange of information to satisfy international commitments.

It should be noted that, as a result of the amendment introduced, companies in the financial system will provide SUNAT with information on their customers' passive operations, referring to balances and/or accrued amounts, averages or higher amounts for a given period and the yields generated, including information identifying customers. Such information shall under no circumstances include the details of account movements pertaining to passive operations. It is precisely in this way that, when the CRS MCAA is executed and enters into force, the appropriate automatic information can be exchanged.

With regard to administrative cooperation measures for the detection of tax non-compliance, such as the possibility of conducting joint and simultaneous audits, it should be noted that the Peruvian Tax Code recently incorporated, in 2017 to be precise, the power to carry out concurrent and foreign audits, as a mutual assistance mechanism. Thus, Peruvian law establishes that SUNAT may agree to concurrently examine the situation of a tax subject, each in its own territory and by applying its internal regulations. However, the seven bilateral DTCs do not include the possibility of carrying out such audits, unlike the Andean Community,[2] the agreement executed with the United States and the MAATM, which do provide for the possibility of concurrent audits. The impact of the implementation of these measures on the domestic legal system is not known, nor is it known whether there has been an improvement in control and determination.

As a result of not having fully submitted the CbCR, it is not possible to know its role in the attraction of investments and the business transaction in Peru. Nor is it possible to know whether compliance with the CbCR regulation has resulted in increased transparency at the national level and whether the costs of doing business in Peru have increased.

Notwithstanding the foregoing, it is important to note that the current head of SUNAT has indicated that in 2020 they will have access to tax, financial and banking information from more than 113 countries (more than 30,000 people) and that tax collection is expected to increase by 8.9%.

In addition, SUNAT has implemented measures to ensure taxpayer protection and confidentiality. Nowadays SUNAT is working on the implementation of ISO 27001, in order to provide greater security to the information received during international information exchanges.

[2] Art. 19 of Decision 578.

Poland

Branch reporter
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Summary and conclusions

Poland made headlines globally when it introduced the domestic reporting component of the contentious Mandatory Disclosure Rules (MDR) 18 months in advance of the schedule set by the European Union (EU) and further extended its scope beyond cross-border arrangements to purely domestic schemes. Therefore, Poland went beyond the minimum standard prescribed by the Directive on Administrative Cooperation (DAC or the directive), both in terms of timing and scope. While this is the only case in which Poland exceeded the minimum standard prescribed by the directive, it demonstrates Poland's willingness to embrace the new tax transparency tools advocated by the international community.

Poland participates in all forms of exchange of tax information (EOI) mandated by the Organisation for Economic Cooperation and Development (OECD) as well as regional EU initiatives in its capacity as an EU member state. It has a wide network of bilateral agreements that can serve as a legal basis for EOI. Moreover, it is among the 119 jurisdictions that as of 3 October 2019 have ratified the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 Protocol (Multilateral Convention). Poland is also one of the 19 jurisdictions enrolled in the International Compliance Assurance Programme (ICAP).

With regard to the exchange of information on request (EOIR), Poland's practices are based on the international standard set out in article 26 of the OECD Model Tax Convention (OECD Model) and its commentary. Poland follows the OECD interpretation relating to the determination of foreseeable relevance and to that end provides for exchanges to the widest possible extent. The requests are very rarely declined and the reasons for denying a request generally align with internationally recognised legitimate grounds, such as restrictions regarding the taxes covered under the applicable international agreement. Banking secrecy is not an obstacle to EOI regardless of whether the relevant treaty includes an explicit clause to this effect. However, the somewhat unclear relationship between parallel procedures for accessing banking information for domestic and EOI purposes could in practice lead to certain delays in obtaining the requested information.

Poland is among the "early adopters" of the first widespread automatic exchange of financial account information pursuant to the Common Reporting Standard (CRS). The Polish due diligence and reporting obligations derive from the DAC. Initially, the domestic due diligence provisions were not entirely in line with the directive, as they allowed for a transitory period that relied on indicia search rather than self-certification to determine the tax residency of reportable persons. This was a result of the late transposition of the directive and an attempt to avoid imposing retroactive obligations. Poland now requires its financial institutions to contact their account holders with a view of obtaining the missing

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self-certifications. Poland follows the multilateral approach to bilateral exchanges under the CRS based on the Multilateral Competent Authority Agreement (CRS MCAA). Furthermore, Poland and the United States (US) exchange financial account information under the Model 1 intergovernmental agreement (IGA) concluded in connection with the US Foreign Account Tax Compliance Act (FATCA).

In accordance with its commitments under the minimum standards set out in the OECD/G20 Base Erosion and Profit Shifting (BEPS) Action Plans 5 and 13, Poland exchanges information on tax rulings based on its international agreements and country-by-country (CbC) reports pursuant to the CbC MCAA and the Competent Authority Agreement (CAA) with the US. The peer reviews by the Inclusive Framework on BEPS (IF) recognised that the mandatory spontaneous EOI on rulings under BEPS Action 5 was set back by the delays in identifying the relevant exchange partners. In response, Poland introduced legislative and organisational changes to streamline the process and address the deficiencies. Parallel automatic exchanges with EU member states regarding information on cross-border rulings and advance pricing arrangements (APAs) take place under the national rules transposing the DAC.

Poland's domestic CbC reporting obligations derive from the DAC for both exchanges within the EU and with jurisdictions from outside the EU. Therefore, as is necessary under the directive, Poland requires local filing where the jurisdiction of the ultimate parent entity or the surrogate parent entity cannot be expected to provide the information on the multinational enterprise group (MNE group). However, non-compliance with the local filing obligations does not result in sanctions. It might be questioned whether the failure to impose sanctions is in line with the directive. As far as the appropriate use of information is concerned, the domestic provisions are not very prescriptive, which raises practical questions. Restriction on the use of information obtained through CbC reports may, however, be inferred from Poland's commitments arising out of the CbC MCAA and the DAC as well as the peer reviews conducted by the IF. Notably, the rules seemingly narrow down the possible use of information to transfer pricing risks.

Regarding the MDR, while the Polish rules are broader than envisaged under the DAC, they include distinct measures aimed at alleviating the compliance burden imposed on the taxpayers and further removed intermediaries. The provisions are designed to ensure that in practice the primary burden in relation to the reporting of tax arrangements rests with the intermediary directly involved in the scheme. In particular, where such an intermediary is not required to report it is obliged to provide all the necessary information to be reported to the taxpayer which now bears the reporting obligation. Moreover, the concept of intermediary is split between the "promoter" and the "supporter", whereby the latter is expected to report only in exceptional cases and after both the promoter and the taxpayer. In addition, the reporting of the domestic schemes is subject to *de minimis* thresholds.

In conclusion, Poland is at the forefront of international tax transparency as is apparent from its high number of exchanges undertaken under the various EOI frameworks discussed in the report. The impact of EOI has not been measured, but it is considered to be positive from both taxpayer compliance and deterrence standpoints.

Portugal

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Summary and conclusions

Portugal is committed to the international and regional trends towards curbing tax evasion and profit shifting by adhering to the most important legal instruments. This report covers with regard to Portugal the most important EOI sources both international and domestic. Reference is made namely to double taxation treaties with their EOI clauses, tax information exchange agreements, the multilateral convention on mutual administrative assistance in tax matters, country-by-country reports, the EU Directive on Administrative Cooperation with its further amendments, BEPS related legislative initiatives, Beneficial Owner Central Register, FATCA, CRS, etc.

The adoption of these instruments at a domestic level evolved clearly in recent years following intensive law-making works at the level of the Portuguese parliament and government. These efforts resulted in the publication of a vast list of laws covering from the implementation of the most known CRS (e.g. Law no. 98/2017, of 24 August, amending and republishing the Decree-Law no. 61/2013, of 10 May, which first transposed DAC1) and FATCA (Law no. 82-B/2014, of 31 December) to the more recent EU directives on anti-money laundering and registry of ultimate beneficial owners (Laws no. 83/2017, of 18 August, and 89/2017, of 21 August), passing by the constant adoption into domestic legislation of BEPS Actions' developments (e.g. Law no. 98/2017, of 24 August).

Besides the approach to the legal conspectus of EOI from the Portuguese viewpoint, the report also mentions aspects of the implementation process of these laws in Portuguese tax administration. One may say that the commitment of Portugal to the EOI issue is not limited to the law-making process, but also extends to the law in action, which can be perceived from the growing intensity of effective exchange of information between Portugal and many other collaborative jurisdictions. Almost EUR two billion, according to 2018 official numbers, is a demonstration of the effectiveness of the measures put in place by the Portuguese tax authorities to fight against tax fraud and evasion. Improving success in this lifetime fight requires the implementation in the tax field of cutting-edge tools like data mining, big data analytics, and artificial intelligence. Now that the legislative building is almost finished, notwithstanding the permanent maintenance that is required to keep it fit and adapted to the challenging and ever-changing times we live in, the focus is now to put in place the most advanced mechanisms to improve control and inspection of fortunes and businesses. Yet this information mining increases dramatically the weightiness of compliance costs, mainly for companies and financial entities which are compelled to invest heavily in hardware and software to satisfy tax law and tax authorities' requirements.

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[3] Tax lawyer. Senior Associate. Garrigues Portugal.

Moreover, from the Portuguese tax administration institutional side, and as far as it is public, no relevant changes have been made to adapt to the new EOI needs. Albeit the empowerment emerging from the new legislative framework entitles the tax administration with essential tools to detect tax evasion practices, mainly the ones based in the opacity of cross-border investments and income. Yet the novelty of the new measures does not allow for an evaluation of their effectiveness at reinforcing tax inspection and the correspondent results in terms of tax collection. Empirically the mere announcement of this new framework may have made many taxpayers adjust their late tax returns and or modify their tax practices concerning the reporting of foreign income going forward.

Digitalisation does not seem to represent a significant threat to the EOI environment in Portugal so far.

In a nutshell, it can be concluded that Portugal is well prepared at the level of the legislative infrastructure to meet the domestic and international EOI patterns, having adapted the domestic law in a timely manner to provide the necessary platforms to enforce taxpayers and intermediaries' obligations. Together with this effort of the Portuguese government to adapt the legal landscape, the Portuguese tax administration has been preparing the logistic and technological infrastructure to utilise all the information on accounts and income compiled from domestic and foreign sources. This new era of EOI makes the future seem cloudy to resident taxpayers seeking to keep foreign income outside of the Portuguese taxation, and it probably is already prompting some changes in taxpayers' behaviour vis-à-vis previous years' tax returns.

Russia

Branch reporters
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Summary and conclusions

Currently Russia is involved in the following forms of exchange of information: on request exchanges, automatic exchange of information on income, the automatic exchange of information under the Common Reporting Standard, country-by-country reporting, and spontaneous exchange of information (including exchange of tax rulings). Russia also implements exchange of information on the basis of FATCA.

Although the competent authority for the tax treaties is the Ministry of Finance of the Russian Federation, it handed over the authority for the exchange of information for tax purposes to the Federal Tax Service (hereinafter also – FTS of Russia) back in 1998.

Currently, the key instrument for exchange of information in Russia is the Russian double taxation treaty (DTT) network; however, the role of the Convention on Mutual Administrative Assistance in Tax Matters (hereinafter – the MAC) has increased gradually especially when dealing with offshore jurisdictions. Russia has 84 effective DTTs containing exchange of information provisions. Russia joined the MAC effective from 2015, where the article on exchange of information covers periods starting from 1 January 2016. Nevertheless, Russia has adopted retrospective application of the MAC with certain states not only for criminal cases but also for civil cases. In addition, Russia has additional regional mutual assistance treaties with CIS states.

Some of Russia's DTTs have a limited scope and wording compared to the standard provisions of the OECD Model Tax Convention. Nevertheless, irrespective of the wording, it is no longer an obstacle for effective exchange, as those states are covered by the MAC as well.

In 2014 Russia adopted the model Tax Information Exchange Agreement (hereinafter – the TIEA), largely based on the OECD standards which will be used as the basis for the conclusion of relevant TIEAs with distinct states, primarily with offshore jurisdictions. Subsequently, in 2018 Russia adopted additional model TIEAs on automatic exchange of financial information and on CbCR. Irrespective of the model TIEA, the MAC remains the most efficient way for Russian tax authorities to obtain an information from non-DTT states, whereas the TIEA instrument is not effective yet.

Russia has officially adopted the BEPS minimum standard and has joined the inclusive framework exchange of rulings. However, the FTS of Russia mainly issues cross-border unilateral advance pricing arrangements (APAs) covering transfer pricing or the application of transfer pricing principles, while other types of rulings, although existing and formally falling under the determination of such, are represented by "motivated opinions" issued

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within the application of the domestic tax monitoring regime. Thus, Russia appears rather to be more a recipient of rulings than a sender.

For the purpose of incorporation of the instruments and relevant processes into Russian legislation, relevant laws and regulations have been adopted.

Russian CbCR rules have generally adopted both the concept and the technical representation of the OECD approach, except for a few points. Therefore, newly introduced CbCR requirements did not come as a surprise to taxpayers, many of whom prepared and submitted reports on a three-level format in the states of their presence outside Russia, where such requirements were introduced earlier.

Yet there is a transitional period till 2020, when no penalties apply for late submission of the reports or for their non-submission, it is expected that Russian tax authorities will use information received in the CbCR implementation course to enhance tax auditing of taxpayers.

Since 2015, Russia has implemented a domestic framework of tax inspector – taxpayer interaction (the so-called "tax monitoring regime"). Effectively the tax monitoring regime is a domestic form of exchange of information with Russian tax authorities available to certain local corporate taxpayers.

Russian tax authorities proved to have enough institutional and legal framework, human resources and infrastructure base to effectively exchange information with other states according to the obligations assumed under the MAC and DTTs.

The exchange of information network implemented by Russia does not deal with the digital financial market and cryptocurrencies, and the perspectives of their exchange of information are yet uncertain.

South Africa

Branch reporter
Graeme Saggers[1]

Summary and conclusions

Although South Africa is not an OECD member, the National Treasury and the South African Revenue Service (SARS) consider the country to be an active participant in OECD initiatives and it generally adopts a proactive approach to implementing OECD recommendations. With regard to BEPS, South Africa's policy objectives need to be carefully considered in line with an international tax policy that balances the profit shifting consequences arising from South Africa's need for foreign direct investment and the home-grown base of multinational enterprises. The approach to exchange of information, and particularly automatic exchange of information, is an example of how South Africa has shown intention to meet its obligations and utilise information obtained to increase its tax base. In the lead up to the implementation of the CRS regulations, South Africa conducted a special voluntary disclosure programme to encourage non-compliant taxpayers to regularise their affairs. This is estimated to have raised an additional $225 million in tax revenue, indicating an immediate fiscal benefit to the implementation of AEOI. Unfortunately, however, there is no publicly available data to indicate the extent to which the regularised taxpayers have contributed to an ongoing increase in tax revenue.

South Africa has regularly received compliant ratings in "peer reviews conducted by the OECD with very few recommendations. Furthermore, South Africa is an active member of the African Tax Administration Forum and has shown to have the most exchanges of information out of all of the countries in the region. There have been three significant cases decided in recent years involving the exchange of information between SARS and foreign tax authorities. All three of these cases add credence to SARS's various communique that reiterate that South Africa is committed to the EOI initiatives. Despite SARS and National Treasury's attitude towards exchange of information, there is doubt as to whether SARS has the human and information technology resource capacity to effectively utilise information obtained through the EOI standards. SARS is going through a revival after a tumultuous period under the previous commissioner. A commission of inquiry and a review committee have reported that a restructure of operations in SARS under the previous commissioner has resulted in the loss of skilled personnel and the neglect of IT systems. The new commissioner has been vocal in the media regarding the launch of a new strategy that will focus largely on improving the digital capability to effectively rebuild the revenue authority's capacity to utilise information available to it. A large strategic focus for SARS is on the utilisation of information obtained through the EOI initiatives from both an IT and training of staff perspective.

South Africa published domestic country-by-country (CbC) regulations in December 2016 and the first exchange occurred in June 2017. The domestic regulations are largely modelled on the OECD recommendations with a decreased minimum threshold in South African Rand effectively ensuring that South African based MNEs will continue to have reporting

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obligations if the currency weakens significantly. There is a general consensus amongst tax practitioners in South Africa that there is insufficient guidance on the CbC regulations and transfer pricing in general. The SARS issued practice note on transfer pricing is twenty years old and is considered no longer fit for purpose. The CbC regulations were launched with very little time to consider implementation and, with little guidance, there is a significant risk that entities are missing their reporting obligations either through lack of knowledge or misunderstanding.

The EOI mechanisms have been adopted into domestic law appropriately and domestic law generally aligns with international guidelines with respect to confidentiality and data protection. There is research to suggest that the practice followed by SARS in its AEOI reporting is not consistent with domestic administrative justice statutes, specifically in relation to adequate notification of the taxpayer of exchanges; however, this view has been untested in case law.

The various organs of state in South Africa have adopted a relatively ambivalent attitude towards the impact of digital financial markets. Whilst tax legislation has been introduced to include "cryptocurrency" in the definition of financial instruments, the word "cryptocurrency" has not been defined, which poses significant risk to taxpayers' interpretation of their consequences. Both the South African Reserve Bank and the Financial Sector Conduct Authority have repeatedly stated that digital financial services do not fall in their ambit of regulation and thus the risk is left to the consumer to understand and mitigate. This lack of oversight poses significant risk to the EOI initiatives both from the perspective of identification of unrecorded taxable income and illicit financial flows. In a response to the lack of regulation of digital assets, the Intergovernmental Fintech Working Group (IFWG) was established, comprising members from the National Treasury, the SARB, FSCA, SARS and the Financial Intelligence Centre (FIC). They are expected to release recommendations soon on how the digital financial services market can be regulated to mitigate against the risks identified.

The report set out to establish the efficacy of exchange of information in South Africa and identify challenges in this field. The lack of publicly available data on exchanges makes it difficult to establish whether EOI initiatives have contributed to the expansion of the tax base. It is clear, however, that South Africa will likely proactively fulfil its obligations to its treaty partners; however, there is a significant risk that South Africa does not have the human and IT resource capability to utilise information it receives to its full potential.

Spain

Branch reporter
Laura Soto Bernabeu[1]

Summary and conclusions

The aim of this branch report is to analyse the so-called "cooperation culture" in Spain, both from an international and European perspective. In Spain, there are three tax subsystems: the state, regional (autonomous communities) and local system. Also, there are special tax regimes in the Basque Country and Navarra. Pursuant to article 94 of the General Tax Act, all national authorities from the state, regional and local level are obliged to provide to the tax administration all relevant tax information and to give assistance in order to guarantee the effective application of the national tax system.

The Spanish competent authority for exchange of information is the Central Information Office which is part of the National Anti-Fraud Office, integrated into the Department of Financial and Tax Inspection. This Central Office is in charge of national and international exchange of information requests, being the contact point with other tax administrations.

As explained in the 2019 Global Forum Peer Review Report on Exchange of Information, the Spanish network of mechanisms allows the exchange of information with 99 partner jurisdictions.

With regard to exchange of information obligations assumed at an international level, there are some aspects that have to be considered. Firstly, according to the official data published by the Spanish Ministry of Finance, Spain has initiated 103 DTCs, 94 of which are in force and nine are under consideration. Among those DTCs in force, it is worthy to highlight that nine have been renegotiated in recent years. Secondly, Spain has six TIEAs in force and ten under consideration. Thirdly, Spain is signatory of the Convention on Mutual Administrative Assistance in Tax Matters, in force from 2010, and is also signatory of its 2010 Protocol, in force from 2013. And, lastly, Spain has signed the OECD CRS Multilateral Competent Authority Agreement and the first automatic exchange of information within this framework was in September 2017.

As member state of the European Union, Spain has transposed the Council Directive 2011/16/EU regarding administrative cooperation in the field of taxation. This directive was elaborated to replace Council Directive 77/799/EEC and it was transposed by the drafting of the Chapter VI of the Title III of the General Tax Act and Title VI of the General Regulation on Tax Application.

The abovementioned 2011 Directive has been modified on several occasions since its drafting. In response to FATCA, the Council Directive 2014/107/EU introduced an obligation to financial institutions to perform the reporting and due diligence rules of Annexes I and II and implemented an obligation to automatically exchange some information regarding financial accounts. The national implementation was carried out by the Additional Provision 22 of the General Tax Act, article 37bis of the General Regulation on Tax Application and the Royal Decree 1021/2015, of 13 November.

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In line with the OECD BEPS Action 5, the Council Directive (EU) 2015/2376 introduced the automatic exchange of information of advanced cross-border rulings and advanced pricing arrangements. Its national transposition was made by the Royal Decree 1070/2017, of 29 December.

Directive (EU) 2016/811 introduced a new obligation to the ultimate parent entity of an MNE group, which is resident for tax purposes in a member state, to file a country-by-country report in line with the standard settled in the Action 13 of the BEPS Plan. This directive also established the automatic exchange of information of these reports. Its national implementation was driven by articles 13 and 14 of the Regulation on Corporate Taxation. In 2016, there was a second modification of the 2011 Directive made by the Council Directive (EU) 2016/2258 which allowed national tax authorities to have access to mechanisms, procedures, documentation and information for the purposes of money laundering or terrorist financing within Directive (EU) 2015/849.

To date, the only modification to the 2011 Directive, which has not been transposed, is the Council Directive (EU) 2018/822. By 31 December 2019, member states should have transposed its contents into their legal systems. In Spain, there is a draft bill amending the General Tax Act in order to introduce to new Additional Provisions 24 and 25 and a draft Royal Decree to modify the General Regulation on Tax Application by introducing new articles 45 to 49bis.

Naturally, the tax administration's powers to request information domestically and internationally have resulted in an enhancement of its investigative functions. Nowadays, the Spanish Tax Administration has easier and broader access to information, which implies a better knowledge of national and international taxpayers. In contrast, this situation can produce a conflict between tax administration's obligation to apply the tax system and taxpayers' rights within this system.

At a national level, the confidential character of taxation data is recognised as a taxpayer's right in article 34.1 of the General Tax Act. This general regime is developed by article 95 of the General Tax Act which regulates the confidential nature of tax information obtained by the tax administration in the exercise of its functions. These data cannot be transferred to third parties, with the exception of specific public institutions or with the aim to guarantee the protection of defined groups of people. The confidential nature of taxpayers' data is also recognised with reference to cross-border requests under article 177ter of the General Tax Act.

Finally, due to the digitalisation of the traditional financial markets, cryptocurrencies and Initial Coin Offerings are expected to grow in the following years. The pseudo-anonymity of cryptocurrencies and their cross-border nature has made virtual currencies a potential tool for tax avoidance, tax evasion and other tax crimes. Directive (EU) 2018/843 can be considered a solution regarding the tax administration's powers to collect relevant information, but it has to be noted that these new obligations are only applied to custodian wallet providers. Thus, miners, trading platforms, wallet providers, coin inventors and offerors are out of the scope of application of this directive. This situation leaves a blind spot which has to be tackled, considering the continuous evolution of this emerging reality.

Sweden

Branch reporters
Per Gyllenstierna[1]
Ulrika Gustafsson Myslinski[2]

Summary and conclusions

In this Swedish branch report, the topic exchange of information in tax matters is explored regarding issues, use and collaboration from a Swedish perspective. The aim is to describe and investigate applicable legal instruments concerning practicality and functionality. The first section introduces the topic and describes the instruments and processes of international application. Section two investigates the incorporation of the instruments and processes into domestic law and confidentiality aspects. The question of the use of information is also analysed. Section three discusses the impacts of digitalisation on established frameworks regarding some specific issues, i.e. interaction with cryptocurrency trading and data protection.

In some situations, the experiences of the Swedish Tax Agency are analysed and described. Sweden has a long tradition of promoting exchange of information in tax matters. Though, over the last decade, the number of agreements on exchange of information in tax matters that Sweden is a party to and the opportunities for cooperation that the agreements offer have substantially increased.

The international agreements that offer the legal ground for exchange of information are article 26 of the tax treaties (approx. 90 treaties), the Multilateral Convention on Mutual Assistance in Tax Matters, the bilateral and multilateral tax information exchange agreements (approx. 42 treaties), EU Directive 2016/11/EU (DAC 1-6), BEPS related measures, FATCA and CRS. There is also a Nordic Multilateral Convention on Mutual Assistance in Tax Matters.

In general, the domestic rules to exchange information are prescribed in the Law on Mutual Assistance in Tax Matters and the Law on Administrative Cooperation within the European Union in the Field of Taxation. The laws prescribe the frameworks for cooperation procedures, both when Sweden is the requesting state and the requested state. For the determining of domestic procedure rules, the laws refer to what would apply in an internal tax assessment matter. From a confidentiality point of view, the tax assessment is characterised by the Swedish principle of public access to official records. This principle implies that all information held by the Swedish Tax Agency is public, but in fact, regarding specific information in the tax assessment absolute secrecy applies. The Swedish domestic rules on confidentiality in relation to international exchange of information in tax matters stipulates that statements received under an agreement are secret in the same manner as domestic information. Statements received from another state should be kept confidential. Confidentiality applies in relation to matters of incoming and outgoing information exchange. The use of the received information in breach of an agreement is prohibited.

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Swedish domestic law offers no right of appeal in the procedure to exchange information, hence, almost no case law exists.

During the last years, the exchange of information has developed especially in the field of automatic exchange of information. The areas have concerned especially certain fields: the automatic exchange of financial account information, automatic exchange of tax rulings and advance pricing agreements, automatic exchange of country-by-country reports, the access to beneficial ownership information collected pursuant to the anti-money laundering legislation, and automatic exchange of reportable cross-border arrangements. Instead of only focusing on revenue collection, the focus of the Swedish Tax Agency has been on building capacity to support companies in the reporting and to receive and exchange reports, analyse the content of the reports, and to improve the systems.

Nearly all agreements are applied and, to some extent, frequently used by the Swedish Tax Agency to request information from treaty partners. Overall, the treaty partners provide the requested information. However, in some situations there may seem to be difficulty receiving correct information. To some extent the reason may be that the treaty requires the taxpayer under investigation to be pointed out. Based on how the groups, companies, and ownership are structured, receiving information only regarding the taxpayer being investigated might be insufficient for understanding the potential tax avoidance. For example, it has been noticed that some statistics may be compiled differently in different states. At present, according to the Swedish Tax Agency, it appears as if there is room for different interpretations of how the CbCR form should be completed, both in the OECD guideline and in the Swedish national legislation. This is unfortunately not a question of differences between national implementation and Action 13 reporting standards regarding the definitions. The difference in application cannot be corrected easily. This affects the quality and usefulness of the information provided in the CbC reports.

In some countries, tax amnesties have enabled taxpayers to declare unreported taxable income in other countries and jurisdictions. Sweden has never had amnesty. However, the conclusion of tax information exchange agreements (TIEAs) resulted in taxpayers reporting undeclared taxable income under the usual tax procedure rules. Between 2010 and 2014, this resulted in an increase of tax revenue of SEK 1,676 million (approx. EUR 170 million).

The recently added opportunities to exchange information have not yet been applied in Sweden for enough time to calculate reliable figures on increased tax revenues. Sweden applies a worldwide tax system, which indicates that taxpayers are liable to tax on income also in other countries. From time to time, this requires support from other states to determine and control the correct tax liability. Hence, it could be assumed that an increase in cooperation between tax administrations may lead to increase in tax revenue.

The access to information in the digitalised area has not been the focus of development. This means that the Swedish Tax Agency uses the normal administrative procedures to investigate i.e. tax evasion by cryptocurrency. Development in the digitalised area could be necessary in the future.

Switzerland

Branch reporter
Eva Frehner[1]

Summary and conclusions

Switzerland exchanges cross-border information in tax matters in two ways. On the one hand, – for tax proceedings – the exchange of information (EOI) is carried out by means of administrative assistance. It may take place on request, spontaneously or automatically. On the other hand, – for criminal proceedings – information can be exchanged on request by means of mutual assistance. The former is mainly governed by bilateral agreements for the avoidance of double taxation (DTCs). As of today, Switzerland has a broad DTC network with 109 treaty partners and intends to expand it further. The overall Swiss approach to mutual assistance via EOI has dramatically changed in the last decade. On 13 March 2009, Switzerland fully adopted the EOI standard as formulated in article 26 of the OECD Model Convention (OECD Model). The country has negotiated 60 DTCs with the current version of article 26. There are already several leading decisions of the Swiss Supreme Court in relation to international EOI according to the OECD standard. Most of them deal with the interpretation of the term “foreseeably relevant” information, the exact boundary between group requests and “fishing expeditions” and the use of illegally obtained data.

In addition, Switzerland concluded ten tax information exchange agreements (TIEA) mainly with so-called tax havens. Unlike DTCs, Swiss TIEAs govern merely the EOI on request. Generally, it is easier to negotiate them due to their limited scope. In nine of ten TIEAs, their application is limited to income, capital, and inheritance and gift taxes. As a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum), Switzerland also participated in the two rounds of reviews assessing how the international standard for EOI on request has been applied in individual countries. On 26 July 2016, Switzerland received an overall rating of largely compliant. The second round started at the end of 2018 and focuses on whether the recommendations from the first round were also implemented. One of the most important measures recommended by the Financial Action Task Force (FATF) is the introduction of transparency measures concerning bearer shares. Consequently, Switzerland amended its Code of Obligations with effect from 1 July 2015. Such a step led de facto to the elimination of these securities. At the same time, tax fraud has become a predictive offence for money laundering criminal behaviour since 1 January 2016.

Next, Switzerland entered into a few other agreements on EOI. By concluding the Multinational Convention on Mutual Administrative Assistance in Tax Matters, Switzerland also introduced the spontaneous and automatic exchange of information (SEOI and AEOI) on 1 January 2017. The country has been spontaneously exchanging tax rulings since 1 January 2018. As many multinational groups have withdrawn or not renewed their rulings in the last four years, it is unclear to what extent the SEOI contributed to increased transparency. In addition, there are only predefined forms with limited data exchanged. Consequently, it could be assumed that a spontaneous exchange of a ruling will be followed by an additional

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information request according to article 26 OECD Model. By this measure, Switzerland implemented BEPS Action 5 in the domestic legislation, followed by the adoption of the country-by-country reporting (CbCR) (BEPS 13) concept. In 2018 the first CbC reports submitted to the Federal Tax Authority (FTA) were exchanged voluntarily. The presented facts and figures relate to the financial year 2016. The first obligatory exchange of CbCR will start in 2020.

In view of the introduction of the AEOI standard, the Federal Assembly signed the Multilateral Agreement on Mutual Assistance in Tax Matters that provides for the EOI collected under the rules of the common reporting and due diligence standard (CRS) for financial account information. The first automatic data exchange between Switzerland and 36 partners took place in October 2018. The international legal basis for AEOI with the 28 EU member states was the amended Savings Income Agreement on Combating the Cross-Border Tax Evasion. It is worth mentioning that especially the implementation of AEOI has led to a significant reduction of international tax avoidance and evasion in Switzerland. There was a sudden increase in the number of self-denunciations causing exemption from punishment in accordance with tax law in the last two years before the first AEOI – with neighbouring states – took place. According to media reports, there were cumulatively almost CHF 10 billion of additional assets disclosed in 40,000 self-denunciations during 2018. They should bring approximately CHF 0.5 billion of additional tax revenues every year.

Moreover, the Intergovernmental Agreement between Switzerland and the United States of America for Cooperation to Facilitate the Implementation of FATCA according to Model 2 (IGA Model 2) was concluded on 14 February 2013. Under this agreement, Swiss banks are obliged to register with the IRS, identify and document all their customers and proactively report certain account information to the IRS or levy a 30 percent FATCA withholding tax for the IRS. In contrast to AEOI, the information flow according to IGA Model 2 is only one-sided. At present, Switzerland provides data to the United States of America, but not vice versa. The only additional regional regulatory framework Switzerland participates in is the anti-fraud agreement with the EU in the area of indirect taxes that has been applied ahead of schedule since January 2009.

Generally, very few of the bilateral treaties with Switzerland contain a clause following article 27 of the OECD Model. Alternative approaches, such as Rubik agreements with Austria and the United Kingdom, became purposeless after the activation of AEOI.

Since 2016, there has been tremendous growth in the digital market for financial services that took the form of investments in cryptocurrencies or participations in initial coin offerings (ICO) in Switzerland. Despite this trend, the EOI networks do not seem to be negatively affected. As of today, there no new opportunities for tax evasion have been identified in relation to crypto-assets in Switzerland. It could be assumed that the EOI obligations will be globally extended to fintech enterprises in the future.

Branch reporter
Billur Yalti[1]

Summary and conclusions

The primary source for exchange of information (EOI) in Turkey is the double tax conventions (DTCs) signed with many countries around the world. The Turkish tax treaty network includes 85 DTCs, all of which include an exchange of information article. Since 2009, Turkey, complying with OECD standards, has begun to revise the exchange of information article in its old treaties. Turkey is of the opinion that the OECD standard on exchange of information increases the opportunity to combat tax evasion, tax avoidance and harmful tax competition. Accordingly, newly signed Turkish treaties provide the most recent version of article 26 of the OECD Model.

Turkey has signed tax information exchange agreements (TIEAs) with low-tax jurisdictions such as Bermuda, Jersey, Guernsey, Isle of Man and Gibraltar, all of which are currently in force. The Turkish treaties provide only EOI on request; thus, Turkey has not put into practice, yet the OECD Model Protocol released in 2015 for the purpose of allowing the automatic and spontaneous exchange of information. In addition, there are no DTCs concluded with the countries that are parties of the TIEAs.

Turkey has also signed and ratified the Council of Europe and OECD Convention on Mutual Administrative Assistance in Tax Matters which has been in force and effectively applied as of 1 January 2019. Furthermore, Turkey has committed to the Standard for Automatic Exchange of Financial Information in Tax Matters adopted by the OECD in 2014. For the application of the Common Reporting Standard (CRS), Turkey has signed the Multilateral Competent Authority Agreement (MCAA) which is a multilateral framework agreement that provides a standardised mechanism to facilitate the automatic exchange of information in accordance with the standard. The ratification process of this agreement has been completed on 31 December 2019. Although the commitment of Turkey for the first exchange covered the year 2018, Turkey has not started the exchange since the legal grounds (domestic and international) for such an exchange have lately been established. On the other hand, Turkish domestic legislation explicitly empowers the President to adopt country-by-country reporting (CBCR) procedures and procedures pertaining to the automatic exchange of the CBCR. However, the President has not used his authority yet. The draft communiqué which was published by the Ministry of Finance in its website on the implementation of the CBCR procedure in 2016 has been drawn back. Turkey may be expected to start automatic exchange of information in 2020.

Following the FATCA (Foreign Account Tax Compliance Act), Turkey signed on 29 July 2015 with the United States an intergovernmental agreement titled, "Agreement between the Government of the United States of America and the Government of the Republic of Turkey to Improve International Tax Compliance through Enhanced Exchange of Information" which

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has entered into force on 5 October 2016. For the automatic exchange of information between the United States and Turkey, the Competent Authority Agreement has also been signed.

As an OECD member country, Turkey complies with the international standards and tries to build up a wide network of EOI tools. However, the application and implementation of those EOI sources is not clear. No data can be found to confirm whether those instruments are effectively applied or have led to an increase in revenue collection ability. There has been no data regarding whether the wide EOI treaty network has led to a reduction in tax avoidance or evasion, or whether these transparency measures have increased taxpayer compliance or not. In the opinion of the author of this report, neither result is likely, since Turkey recently applied several tax amnesties for foreign-source assets and income.

The domestic legislation provides wide authority to the tax administration as regards information gathering. Accordingly, government administration and institutions, taxpayers and other individuals and legal entities that have a relationship with the taxpayer are obliged to provide all the information required by the Ministry of Finance or by persons authorised to carry out tax audits. Government administration and institutions, as well as individuals and legal entities must provide routine and regular information required by the Ministry of Finance. Individuals and legal entities may not refrain from providing information on the basis of secrecy provisions provided under special laws; however, exceptions for postal correspondence as well as medical and legal communications are provided. There are no exceptions regarding banking secrecy. No safeguarding measures have been provided in the domestic legislation for taxpayers whose information has been changed or collected.

The Revenue Administration of the Ministry of Finance and tax inspectors are authorised to gather information according to the exchange of information provisions under international agreements without any limitation of the scope of the Tax Procedure Law (TPL) stipulated in article 1. While this provision has expanded the scope of the information "gathering", it still lacks a domestic base, for it has not provided the authority to "exchange" the information so collected with other jurisdictions from the perspective of secrecy provisions. In other words, a special provision is still required in the tax secrecy article of the TPL stating that an exchange of information with the authorities of a foreign country will not be regarded as an infringement of the secrecy obligations. The article on tax secrecy stipulates that the public officials listed in the law are not entitled to reveal or utilise for their own or third parties' benefit secret information and other information which should be kept confidential about the taxpayer and related persons. The prohibition on the disclosure of secret information covers information regarding a taxpayer's personal, transactional and accountancy position, business, enterprise, assets and profession. Thus, the personal, commercial and professional secrets of taxpayers are protected from disclosure or utilisation by tax officials, tax judges, tax commission members and official experts. In cases where the legislator requires the disclosure of the information without infringement of tax secrecy, then the article provides specific exceptions. However, there is no such exception with respect to the information subject to exchange.

United Kingdom

Branch reporters
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Francis Fitzpatrick QC[2]

Summary and conclusions

The UK has been and continues to be a keen supporter of exchange of information (EOI) initiatives and has an extensive EOI network, covering over 150 jurisdictions. This is derived from a number of different sources, primarily the UK's 130 double tax treaties, 20 tax information and exchange agreements (TIEAs), the Multilateral Competent Authority Agreements (MCAAs) implementing the Common Reporting Standard (CRS) and the exchange of CbCR, the EU directive on mutual assistance (which has been amended in light of BEPS Actions 5 and 13 to provide for the EOI of tax rulings and CbCR respectively and subsequently also by "DAC 6" to provide for the mandatory disclosure and EOI of information on cross-border arrangements) and the UK's inter-governmental agreement with the United States in relation to FATCA, all of which have been implemented into UK domestic law. Although the EU legislation may no longer apply to the UK post-Brexit, the domestic provisions will remain and the UK has made clear its intention to maintain EOI relationships with other member states.

This network increasingly provides for automatic exchange of information, with most recent extensions to the network (notably CbCR and DAC 6) taking that format, with the necessary accompaniment of a mandatory disclosure regime. However, other kinds of information may be sought from or provided to its exchange partners by the UK upon request, subject generally to the caveat that the requested information must be foreseeably relevant to the administration or enforcement of the domestic tax laws of the requesting jurisdiction. The UK receives a large number of EOI requests and in 2018 was rated by the Global Forum's peer review process as largely compliant with its standards for EOI on request. The few areas identified by the Global Forum for possible improvement have prompted proposals for change, but not all of those have yet been implemented.

The UK's support for EOI, in particular with a view to tackling cross-border tax avoidance and evasion, can also be seen from its participation in a number of related initiatives, including the Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC), the Joint Chiefs of Global Tax Enforcement and the OECD's International Compliance Assurance Program (ICAP). The UK has also ventured (perhaps a little more tentatively) into the area of simultaneous tax investigations by multiple tax administrations.

Although the UK does not publish statistics showing the impact of EOI on its tax revenues, it is clear from the annual reports published by the UK tax authority (HMRC) that the UK views its EOI network as an important part of its toolkit for tackling and deterring tax evasion and non-compliance more generally.

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One of the key challenges in achieving this objective is the efficient and effective use of the significant amounts of information available to HMRC. The UK is perhaps better placed than most in this respect due to its award-winning "Connect" data warehousing and analysis project, which brings together and analyses a wide range of data from different sources to build up an overall picture of entities and individuals against which HMRC can corroborate tax returns. This enables instances of potential tax avoidance and evasion to be identified more easily and it is claimed that more than 80% of all investigations undertaken by HMRC now follow potential leads generated by the system.

A further possible challenge to effective EOI comes from the increasing use of digital currencies and crypto-assets. While this has been recognised by the OECD, the focus in the UK on regulation around digital financial services has so far been on financial crime rather than tax avoidance and evasion. However, that may lead to additional information reporting in this area which in turn could prove useful to HMRC in identifying potential tax evasion or avoidance.

A related objective of the increased transparency fostered by enhanced information reporting and exchange is changing taxpayer behaviour so as to reduce non-compliance. Improvements here are of course hard to measure, especially in the short term. But the significant expansion of information reporting and exchange obligations in the UK in recent years, coupled with technological advances permitting that data to be more easily analysed, are likely to mean that going forward there will be limited places for tax avoiders to hide.

Branch reporters
Sahel Ahyaie Assar[1]
Amanda Varma[2]

Summary and conclusions

Treaties and other agreements authorizing exchange of information (EOI) provide the United States with a potentially important source of data for tax enforcement and administration. The United States has a broad network of EOI partners, with its EOI relationships largely arising from bilateral agreements, namely income tax treaties, tax information exchange agreements (TIEAs), mutual legal assistance treaties (MLATs) and agreements (MLAAs), and intergovernmental agreements (IGAs) with foreign jurisdictions to implement the Foreign Account Tax Compliance Act (FATCA).

EOI articles in US treaties and TIEAs generally contain several main features. They contain a standard, generally consistent with the OECD Model, describing the circumstances in which information will be exchanged and the types of information that will be exchanged. A second usual feature of US EOI provisions is a statement regarding when information otherwise covered need not be exchanged, such as when the requested information is not obtainable under the laws or in the normal course of the administration of either country. However, US EOI provisions typically provide that a request should not be denied simply because the matter is not of interest to the requested country. Some US tax treaties also specifically address the interaction of bank secrecy and EOI and provide that a country should not decline to supply information solely because the information is held by a bank or financial institution, nominee or person acting in an agency capacity or because the request relates to ownership interests in a person. A third general feature of US EOI articles is a restriction on the use of the information exchanged. US EOI articles typically state that the country to which the information is provided must keep it secret and that information exchanged will be subject to the same disclosure constraints as information obtained under the laws of the requesting country.

The United States exchanges information through various methods, including specific EOI (also referred to as EOI on request), automatic EOI, and spontaneous EOI. The United States conducts EOI through the simultaneous examination program (SEP), the simultaneous criminal investigation program (SCIP), and industry-wide exchanges of information. In addition, the United States participates in several tax administration cooperation initiatives that may involve EOI, including the Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC) and joint audits.

When responding to a request for information under a tax treaty, the United States seeks

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to obtain the requested information in the same manner and to the same extent as if a US tax were involved. The Internal Revenue Service (IRS) may seek to obtain tax returns and return information by invoking its summons power. US courts have ruled that the IRS may use its summons authority to obtain information in response to a request made by a treaty partner even though no US interest is involved.

US law provides protections against the unauthorized disclosure of tax returns and tax return information. The law contains an exception for the disclosure of returns and/or return information to the competent authority of a foreign government under a tax treaty, TIEA, or MLAT "but only to the extent provided in, and subject to the terms and conditions of, such convention or bilateral agreement." The terms of the relevant agreements require countries to keep exchanged information confidential.

The IRS recognizes the importance of EOI and cross-border cooperation in tax administration. However, US government agencies (independent of the IRS) have recommended that the IRS improve elements of its EOI program, including making better use of information provided by other countries. The IRS has stated that it is making improvements to internal processes, including with respect to training, recordkeeping, written procedures, and communication.

The authors are not aware of publicly available studies or data specifically addressing the impact of EOI on US revenue collection. However, EOI has certainly increased transparency and flows of information with respect to cross-border transactions. One could hypothesize that information exchange has at least indirectly increased the United States' ability to enforce its tax laws by providing the IRS with additional information to pursue cases and by serving as a deterrent to would be tax-evaders. The impact of FATCA on US revenue collection also remains to be seen.

The Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) has assessed the United States as largely compliant with the OECD standards for EOI on request. The Global Forum has recommended that the United States improve the availability of ownership information under domestic law and the timeliness of its responses to EOI requests. In addition, given recent delays in ratifying tax treaties with EOI provisions as well as the 2010 Protocol to the Multilateral Convention on Mutual Assistance in Tax Matters, the Global Forum has recommended that the United States ratify its signed EOI agreements expeditiously.

The United States is undertaking several BEPS-related EOI measures, including exchange of tax ruling information and country-by-country reporting (CbCR). In its 2017 Peer Review Reports on the Exchange of Information on Tax Rulings, the OECD concluded that the United States met the Action 5 minimum standards for EOI on tax rulings. The OECD did not make any recommendations and noted that the peer input was generally positive, indicating that the United States provided complete information in a timely manner.

With respect to CbCR, the United States has the domestic law framework in place to gather and exchange CbCR data and has begun exchanging such information. The United States exchanges CbCR data pursuant to bilateral competent authority arrangements (CAAs), which rely on the EOI provisions in either tax treaties, TIEAs, or the Multilateral Convention.

With the rise of cryptocurrencies and virtual currencies, the IRS is keen to learn more about the application and uses of virtual currencies as well as ensuring that US taxpayers report and pay taxes relating to cryptocurrencies. There are still many unsettled questions regarding the tax treatment of cryptocurrency, particularly with respect to cross-border issues, but it is clear that the IRS believes that cryptocurrency presents important compliance and enforcement issues.

Uruguay

Branch reporter
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Summary and conclusions

In the last decades, exchange of information for tax purposes went through a process of unprecedented change and intensification. The global crisis of 2008 was – to a great extent – its booster and also evidenced the need, in a global economy that no longer knows about borders, to have effective international cooperation and transparency instruments to control the proper payment of taxes.

Uruguay was not at all alien to this international process and had to overcome an additional – and non-minor – obstacle: it had to make its way through convergence almost from scratch. Note that, in April 2009, when Uruguay was included for a short time in a list of non-cooperative jurisdictions, it only had two conventions ratified to avoid double taxation with an exchange of information clause under the standard of the Organisation for Economic Co-operation and Development. This, however, did not reflect – in my understanding – a deliberate unwillingness to collaborate. Since Uruguay is a country that historically based its tax system on territoriality criteria, there could have been little direct interest in negotiating such instruments. Nevertheless, the international community's requirements evidenced that this matter should be taken care of.

The process had clear challenges. Even though Uruguay quickly managed to be excluded from the list of non-cooperative jurisdictions through the commitment to converge towards the required standards, such commitment needed to be backed up with concrete actions. *Res non verba*.

This involved the prompt negotiation and conclusion of numerous conventions to avoid double taxation and exchange of information agreements. Later, Uruguay was due to meet the requirement to agree with its "relevant partners": Argentina and Brazil. This mission was accomplished in 2012.

Moreover, in order for the agreed international instruments to have a real practical use and an effective exchange of information to occur, it was necessary to promote legislative amendments and remove some legal obstacles – some of which with a long tradition – which interfered in this way.

In this sense, in late 2010 a judicial process was established for waving banking secrecy – in what is relevant for this report – to attend requests from foreign countries in the framework of the agreements signed by our country. It is important to remember that, until then, forced relief of bank secrecy regarding taxation only was applicable to cases involving the crime of tax fraud.

But Uruguay also had to find a solution to the problems generated by the "to the bearer" shares in the effective exchange of information. In a *sui generis* solution, Uruguay passed in 2012 legislation that created a registry of limited access (non-public), within the Central

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Bank of Uruguay, enabling the General Tax Administration to have access in case of requests for information from foreign states. This rule not only reached local issuers of bearer shares, but also non-resident entities having their effective management center in the country or acting through a permanent establishment. Four years later the regime was extended also to nominative shares, while a record of beneficial owners was created.

However, although it seemed that Uruguay was about to reach it, the finish line moved further away. From the exchange mainly based on the express request from a foreign state (beyond the theoretical admissibility of spontaneous or automatic exchange under article 26 of the OECD Model Convention), the standard moved to the need to share automatically certain information relevant to prevent base erosion and international tax avoidance.

In this sense, in 2016 Uruguay signed and ratified through its Congress the Convention on Mutual Administrative Assistance in Tax Matters and adopted domestic legislation to give effect to the automatic exchange of financial information. The effects of these new mechanisms will slowly begin to materialize, especially considering that Uruguay – since 2011 – has levied taxes on resident natural persons for the income generated abroad derived from capital returns and movable investment in general.

In the same year, Uruguay also entered into the BEPS inclusive framework, which imposes the adoption of Actions 5, 6, 13 and 14. In light of this commitment, Uruguay enacted legislative and regulatory reforms to amend various preferential regimes that could have been considered harmful. Among multiple adjustments, we can highlight the free trade zone regime, shared service centers, software production, research and development in biotechnology and bioinformatics, all of which no longer depend on the goods or services being used only outside Uruguay (Action 5). Today, according to the latest assessment received, none of the country's preferential regimes is considered harmful. Meanwhile, Uruguay passed in 2016 legislation to implement the country-by-country reporting regarding transfer pricing (Action 13) and joined the Multilateral Instrument (Action 15).

The journey of Uruguay from non-cooperative country to largely compliant was very intense.

The near future puts ahead of us – and not only Uruguay but the entire international community – the challenge of addressing and finding appropriate solutions to the digitalization of economy and the appearance of phenomena such as cryptocurrencies, since – if their use is extended – they will have the capacity to jeopardize the effectiveness of the information exchange system created.

Annex

CAHIERS DE DROIT FISCAL INTERNATIONAL

The Cahiers are an invaluable source of information of lasting scientific value for any specialist interested in international or comparative fiscal law. The complete list of the Cahiers published since 1939 follows below.

Vol. 1.	1939:	*The Hague (Netherlands)* Taxation with regard to the earnings of limited companies with international interests
Vol. 2.	1939:	Would the incorporation of fiscal law in a separate system independent of other branches of the law, tend to facilitate international agreement?
Vol. 3.	1947:	*The Hague (Netherlands)* Tax treaties since the outbreak of the war
Vol. 4.	1947:	Trans- and postwar tax legislation
Vol. 5.	1947:	Double taxation conventions concluded by the United States since 1939
Vol. 6.	1947:	Trans- and postwar tax legislation (France and Belgium) V. 1/6 (one combined volume)
Vol. 7.	1948:	Summary record of the 1947 Congress
Vol. 8.	1948:	Summary record of the 1947 Congress
Vol. 9.	1948:	*Rome (Italy)* Computation of taxable profits (part 1)
Vol. 10.	1948:	Computation of taxable profits (part 2)
Vol. 11.	1948:	Effects and benefits of tax conventions V. 7/11 (one combined volume)
Vol. 12.	1948:	Summary record of the 1948 Congress (has never been published)
Vol. 13.	1948:	Summary record of the 1948 Congress (has never been published)

Vol. 14. 1950: *Monaco*
The effect of fluctuations in the value of currencies upon taxable income, from the national and international viewpoint

Vol. 15. 1950: Tax obstacles to European economic integration and proposals for removing them
V. 14/15 (one combined volume)

Vol. 16. 1951: Summary record of the 1951 Congress (has never been published)

Vol. 17. 1951: *Zürich (Switzerland)*
The fiscal domicile of the physical persons as regards direct taxes

Vol. 18. 1951: Juridical interpretation of treaties concerning double taxation and necessity or advisability of establishing an international fiscal jurisdiction

Vol. 19. 1951: Experiences in the field of extraordinary property taxes

Vol. 20. 1952: Summary record of the 1951 Congress; Belgian report about 'Fiscal domicile of physical persons as regards direct taxes'; Italian report about 'Fiscal burden and production costs of industrial enterprises'

Vol. 21. 1952: *Brussels (Belgium)*
Comparison of tax provisions for reserves and depreciation allowances. The incidence of fiscal and parafiscal charges on the costs of production

Vol. 22. 1952: Tax concessions to be made by a country with a view to attracting capital and enterprise from foreign countries – including special problems of sea- and airtransport enterprises; Multilateral conventions between the countries of Western Europe in order to avoid multiple, extra-territorial and discriminatory taxes

Vol. 23. 1953: Summary record of the 1952 Congress

Vol. 24. 1953: *Paris (France)*
The reform of taxation on turnover, transactions and sales in the various countries of Western Europe, with a view to their unification.
The different conceptions, whether already accepted or possible, for defining the fiscal value of tangible goods (the subjects should deal at the same time with the valuation of immovables, of goodwill, stock and cash and of non-quoted securities).
Fiscal measures capable of facilitating international capital transfers within the European framework or world economy or of a more limited continental economy

Vol. 25. 1953: Summary record of the 1953 Congress

Vol. 26. With Annex	1954:	*Cologne (Germany)* Tax measures to facilitate international movements of capital. Tax measures likely to encourage private savings both in movable and immovable property. International companies in national and international tax law; the influence of the existing relations between undertakings established in different countries on the determination of the taxable profits in each of these countries. Double taxation resulting from the taxing of company profits as well as from the taxing of the same profits as far as they have been distributed to shareholders viewed from the standpoint of comparative law as well as from that of tax policy
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Vol. 27.	1954:	Summary record of the 1954 Congress
Vol. 28.	1955:	*Amsterdam (Netherlands)* The common assessment of income tax for members of one household. International double taxation in the field of turnover tax
Vol. 29. With Annex	1955:	Double tax burden on earned and distributed profits of limited companies
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Vol. 30.	1955:	Summary record of the 1955 Congress
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Vol. 44.	1961:	Unilateral measures for the avoidance of double taxation, especially as regards fiscal aspects of the relationship between capital-exporting countries and countries in process of development (national reports)
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Vol. 51d.	1966:	Idem (general report)
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