論　説

Implementation of BEPS in European Union hard law*

Prof. dr. Sigrid J. C. Hemels†

The Base Erosion and Profit Shifting (BEPS) project of the G20 and the Organisation for Economic Co-operation and Development (OECD) has found a big response in the European Union (EU). Many BEPS measures have been or will be implemented soon in European Union hard law. This paper focusses on the EU-wide legislative implementation of direct tax measures regarding corporate income taxation and transparency. The other BEPS measures are not discussed. Furthermore, the paper tries to explain why the BEPS measures have found such a resonance in the EU, making it a front runner in the implementation of these measure.

1 The impact of the financial and economic crisis on the EU

The global financial crisis (also called 'the credit crunch') started in 2007 with troubles of various US and European banks and mortgage providers such as the US New Century Financial Corporation, the French BNP Paribas and the UK Northern Rock.[1] These troubles worsened in 2008 with the failure of US bank Bear Stearns, the bail out of US Fannie Mae and Freddie Mac and culminated in the bankruptcy of investment bank Lehman Brothers on 15 September 2008, the largest bankruptcy in history. This marked the start of a global financial crisis that hit many more banks (such as Royal Bank of Scotland, Lloyds TSB, and HBOS) and even lead to the collapse of the whole Icelandic financial sector. By the end of 2008, the financial crisis lead to an economic crisis starting with Ireland becoming

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† Professor of Tax Law at Erasmus University Rotterdam School of Law (Netherlands), Visiting professor in Tax Law at Lund University School of Economics and Management (Sweden) and professional support lawyer Allen & Overy LLP, Amsterdam (Netherlands).

one of the first countries to officially enter recession, followed by a shrinking US economy and the UK entering in a recession. In 2010 the Eurozone entered a debt crisis starting with the bail out of Greece in 2010, followed by Ireland and Portugal in 2011. The crisis was no longer a financial crisis, but a true economic crisis. In March 2012 the number of unemployed Europeans reached its highest level ever.

The financial and economic crisis thus weighed heavily on national budgets: public money was used to bail out banks and other European countries, tax income decreased because of the crisis (less corporate income tax because company profits dropped and less income tax because people lost their job or were faced with wage cuts) and expenditures for unemployment benefits increased. In short: revenues decreased sharply and expenditures increased, thus increasing the budget deficit of countries.

Within the Eurozone, very strict rules apply regarding the budget deficit and the government debt. The Eurozone (officially: the euro area) is a monetary union of 19 of the 28 European Union (EU) Member States which have adopted the euro as their common currency (Economic and Monetary Union, in short: EMU). The deficit of these countries may not exceed 3% of the gross domestic product (GDP). The government debt may not be higher than 60 percent of GDP. If a country exceeds these norms, it is deemed to have an excessive government deficit which may lead to recommendations to reduce the deficit within a given period.[2)] At first, these recommendations are not public, but if the Member State does not take a timely and effective action in response to the recommendations, these may be made public. If the Member State persists in failing to put into practice the recommendations, it may be given notice to take, within a specified time limit, measures for deficit reduction. As long as the Member State fails to comply, one or more of the following measures may be imposed: the Member State may be required to publish additional information before issuing bonds and securities; the European Investment Bank may be invited to reconsider its lending policy towards the Member State; the Member State may be required to make a non-interest-bearing deposit of an appropriate size with the EU until the excessive deficit has been corrected; and a fine can be imposed on the Member State. Thus, exceeding the EMU norms may have serious repercussions. During the crisis many EU Member States (including the Netherlands) did not meet those norms and were, upon recommendation of the EU, obliged to cut back on expenses and to raise taxes.

During the crisis, many countries did not want to raise taxes on labor and capital (income and profit tax) as this might have even further increased unemployment and decreased investments.[3)] As the demand for many goods and services is relatively price-inelastic, many EU countries opted for an increase of consumption taxes, more specifically to raise the value added tax (VAT) rate. This was a way to quickly raise money for the government budget, but was a serious additional burden for citizens in many Member States. For example, Hungary and Romania increased the regular VAT rate from 20% to

25% and from 19% to 24% respectively during the crisis, and Greece and Latvia saw an increase of 4 percent points during the crisis.[4)] But also more affluent countries, such as the Netherlands, saw themselves obliged to, amongst others, raise the VAT rate (in the Netherlands from 19% to 21%) in order to redress the situation of an excessive deficit. The VAT increases specifically hit lower income groups. The VAT has a regressive effect: as lower income groups consume a greater part of their income than higher income groups, the burden of an increase in the VAT is mainly born by lower income groups.[5)]

2 Impact of the financial crisis on tax systems: the BEPS project

Citizens increasingly felt that the burden of the crisis fell on them. This lead to a call for more transparency in tax matters and closing of loopholes that enabled tax evasion and tax avoidance. In 2009, the Global Forum on Transparency and Exchange of Information for Tax Purposes[6)] was established to ensure a consistent and effective implementation of international transparency standards. In the same year, the European Commission started a 'good governance' offensive, which in the tax area focused on the principles of transparency, exchange of information and fair tax competition.[7)] The European Commission pointed out that the crisis exacerbated concerns about the sustainability of tax systems in the face of globalization,[8)] the increasing economic integration of markets that is being driven by rapid technological change and policy liberalization. The Commission acknowledged that on the one hand, globalisation provides opportunities in the world, but that it also has social and economic downsides. The Commission mentioned that countries can become more vulnerable to economic turmoil, as was evident in the financial and economic crisis and to tax avoidance and evasion. "In a world where money moves freely, "tax havens", and insufficiently regulated international financial centers that refuse to accept the principles of transparency and information exchange can facilitate or even encourage tax fraud and avoidance, negatively affecting the tax sovereignty of other countries and undermining their revenues. (…) With national budgets and, therefore, social and other policies under severe strain this is an extremely serious problem."[9)] Good governance in the tax area (mainly direct taxation) on as broad a geographical basis as possible, effective and administrative cooperation, both by Member States and third countries was seen as the best way to fight tax fraud.

On 6 December 2012, the European Commission published an Action Plan with concrete proposals to strengthen the fight against tax fraud and tax evasion.[10)] The Commission was of the opinion that tax fraud and tax evasion can only be tackled if the administrative cooperation between tax administrations was improved. The Commission highlighted the need to promote vigorously the automatic exchange of information as the future European and international standard for transparency and exchange of information in tax matters. Furthermore, the European Commission considered in this Action Plan that there was a need to ensure that the burden of taxation is shared fairly in line with the choices made by individual governments. It pointed out that some taxpayers may use complex, sometimes artificial, arrangements which have the effect of relocating their tax base to other jurisdictions within or outside the EU. Taking advantage of mismatches in national laws to ensure that certain items of income remain untaxed anywhere or to exploit differences in tax rates was considered to be contrary to the principles of Corporate Social Responsibility. Therefore, the European Commission was of the opinion that concrete steps were needed to address the problem of aggressive tax planning. Mismatches should be tackled and anti abuse provisions should be strengthened.

At the same time, the OECD developed, at the request of the G20, an Action Plan to tackle Base Erosion and Profit Shifting (BEPS) in a comprehensive manner.[11)] 'BEPS' refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity. The BEPS Action Plan was published on 19 July 2013 and formed the starting point of the BEPS project.[12)] As the European Commission had done before, the OECD highlighted that globalization on the one hand boosted trade and increased foreign direct investments in many countries, but that it also has drawbacks. It provides for tax planning opportunities for Multi-national enterprises (MNEs) to minimize their tax burden.[13)] According to the OECD this lead to a tense situation in which citizens have become more sensitive to tax fairness issues. BEPS was regarded as undermining the integrity of the tax system, as the public and the media deem reported low corporate taxes to be unfair. Furthermore, the OECD pointed out that when tax rules permit businesses to reduce their tax burden by shifting their income away from jurisdictions where income producing activities are conducted, other taxpayers in that jurisdiction bear a greater share of the burden. Also, BEPS could harm fair competition and lead to reputational risks for MNEs.[14)] The Action Plan identified 15 actions needed to address BEPS, set deadlines to implement these actions and identified the resources needed and the methodology to implement these actions. The actions were aimed at preventing double taxation, no or low taxation, tackling harmful tax practices and aggressive tax planning and a realignment of taxation and relevant substance (including improvement of transfer pricing rules) on the one hand and increasing transparency on the other hand.

The BEPS project, in which all OECD, G20 and several developing countries cooperated, delivered its 15 final outputs in October 2015. The participating countries (which included all EU Member States, Japan and the USA) agreed upon a comprehensive package of measures ranging from new minimum standards to a revision of existing standards. The BEPS Package[15)] consisted of the following 15 reports and actions to equip governments with domestic and international instruments to address tax avoidance:

Action 1 Address the Tax Challenges of the Digital Economy

Action 2 Neutralise the Effects of Hybrid Mismatch Arrangements

Action 3 Strengthen CFC Rules

Action 4 Limit Base Erosion via Interest Deductions and Other Financial Payments

Action 5 Counter Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance

Action 6 Prevent Treaty Abuse

Action 7 Prevent the Artificial Avoidance of PE Status

Actions 8-10 Assure that Transfer Pricing Outcomes are in Line with Value Creation

Action 11 Measuring and Monitoring BEPS

Action 12 Require Taxpayers to Disclose their Aggressive Tax Planning Arrangements

Action 13 Re-examine Transfer Pricing Documentation

Action 14 Make Dispute Resolution Mechanisms More Effective

Action 15 Develop a Multilateral Instrument

This output of the BEPS project was formally welcomed by the Council of the EU on 8 December 2015.[16] The Council conclusions stressed the need to find common, yet flexible, solutions at the EU level consistent with OECD BEPS conclusions. In addition, the conclusions supported an effective and swift coordinated implementation of the anti-BEPS measures at the EU level and considered that EU directives should be, where appropriate, the preferred vehicle for implementing OECD BEPS conclusions at the EU level.

Subsequently, the EU acted relatively quickly on action 2, 3, 4, 5, 12 and 13. These regard on the one hand measures to establish international coherence of corporate income taxation (Action 2, 3, 4 and 5) and on the other hand measures to enhance transparency (Action 5, 12 and 13). The implementation of these actions into legislation by the EU will be discussed below except for the recommendation on preferential intellectual property regimes included in BEPS Action 5.[17] The EU has not dealt with this recommendation through hard law (a directive), but through soft law: assessment by the Code of Conduct Group (Business Taxation) on harmful tax competition. The Code of Conduct is not a legally binding instrument but it does have political force. Already in 2014, the Code of Conduct Group agreed, in co-ordination with the OECD BEPS project on Action 5, that all patent box regimes in the EU should be put in line with the modified nexus approach to ensure that they present sufficient economic substance with the Member State concerned. At the time, none of the EU patent box regimes was compatible with the modified nexus approach. Member States with patent boxes had to begin the legal processes to close the regimes to new entrants from the end of June 2016 and end all benefits for existing claimants by June 2021.[18]

Even though it was not part of the BEPS project, the EU wide implementation of the global transparency initiative on exchange of financial account information will be discussed below as well. The reason is that even though this initiative preceded the BEPS project, it also directly resulted from the financial crisis, is aimed to address transparency issues leading to tax evasion and was quickly implemented by the EU.

Action 6, 7, 14 and 15 regard BEPS measures that require changes to tax treaties. The Court of Justice of the EU has ruled that, in the absence of an EU-wide measure to eliminate double taxation, EU countries retain the power to define by double taxation treaty, or unilaterally, the criteria for allocating their power of taxation between them, particularly with a view to eliminating double taxation.[19] On 28 January 2016 the European Commission published a recommendation on the implementation of measures against tax treaty abuse.[20] This encourages EU Member States to include a principal purpose test based general anti-avoidance rule in their tax treaties. Furthermore, they are encouraged to implement and make use of the proposed new provisions to Art. 5 of the OECD Model Tax Convention to address artificial avoidance of permanent establishment (PE) status as drawn up in the final report on Action 7 of the BEPS Action Plan. However, these are recommendations, not obligations. As tax treaties remain within the sovereign power of the EU Member States, no EU legislation was initiated on these actions, for which reason these will not be discussed in this paper.

Action 8, 9 and 10 regard transfer pricing. Similarly to tax treaties, transfer pricing legislation is not harmonized in the EU by way of legislative acts in the form of directives. However, the EU Joint Transfer Pricing Forum (JTPF) assists and advises the European Commission on transfer pricing tax matters. It works within the framework of the OECD transfer pricing guidelines and operates on the basis of consensus to propose to the Commission pragmatic, non-legislative solutions to practical problems posed by transfer pricing practices in the EU. The JTPF has one representative from each Member State's tax administrations and 18 non-government organization members. It is chaired by an independent chairperson. It gives non-binding guidance in line with the BEPS transfer pricing recommendations. Furthermore, upon a recommendation of the Code of Conduct Group the European Council adopted conclusions endorsing the Actions 8-10 reports in November 2016.[21] Furthermore, the Council invited the European Commission, through the EU JTPF, to investigate whether EU guidelines on transfer pricing need revision so they are consistent with the OECD guidance by the end of 2019. The Council supported further work by the OECD on transfer pricing, including the transactional profit split method. The Code of Conduct Group will develop more guidelines on the use of internationally accepted principles, assessing the Commentary to the OECD Model Tax Convention, OECD principles for profit attribution to PEs and OECD BEPS minimum standards.

Action 1 focused on the digital economy. The question on how to tax the digital economy is still very much in discussion in the EU.[22] For that reason this is not included in this paper. Action 11 on collecting and analyzing data on BEPS and the actions to redress it has also, as such, not been taken up by the EU and will, therefore, also not be addressed here.

3 Changes to corporate income taxation in the EU as a result of BEPS

Until the financial crisis, EU hard law in the field of corporate taxation had a very small scope. It was included in three Directives:

1. The EU Parent Subsidiary Directive[23] which was designed to eliminate tax obstacles in the area of profit distributions between groups of companies in the EU by (i) abolishing withholding taxes on payments of dividends between associated companies of different Member States and (ii) preventing double taxation of parent companies on the profits of their subsidiaries.
2. The EU Merger Directive[24] that aims to remove fiscal obstacles to cross-border reorganizations involving companies liable to corporate income tax with certain legal forms and situated in two or more Member States.
3. The EU Interest and Royalty Directive[25] that was designed to eliminate withholding tax obstacles in the area of cross-border interest and royalty payments within a group of companies by abolishing (i) withholding taxes on royalty payments arising in a Member State; and (ii) withholding taxes on interest payments arising in a Member State.

This changed as a result of the financial crisis.[26] Parallel to the work on the BEPS project in which the EU was very much engaged through its Member States, the European Commission adopted an Action plan for fair and efficient corporate taxation in the EU on 17 June 2015.[27] According to the Commission, Europe needed a framework for fair and efficient taxation of corporate profits, in order to distribute the tax burden equitably, to promote sustainable growth and investment, to diversify funding sources of the European economy, and to strengthen the competitiveness of Europe's economy. The Commission was of the opinion that the corporate taxation rules no longer fitted the modern context as corporate income is taxed at a national level, whereas the economic environment has become more globalized, mobile and digital opening possibilities for profit shifting. Again, the Commission mentions that the fact that certain profitable multinationals appear to pay very little tax in relation to their income, while many citizens are heavily impacted by fiscal adjustment efforts, has caused public discontent. According to the Commission this perceived lack of fairness threatens the social contract between governments and their citizens and may even impact overall tax compliance. For that reason the Commission saw an urgent need to challenge corporate tax abuse and to review corporate tax rules in order to better tackle aggressive tax planning.[28] An important element of the Action Plan was introducing a revised proposal for a Common Consolidated Corporate Tax Base (CCCTB), an EU wide corporate income tax which would probably be the most effective way to tackle BEPS in the EU. However, this proposal is highly controversial in the EU. It is regarded as mainly benefitting the large, old industrial countries over small countries with a focus on service industries. This will not be discussed further in this paper. The Commission regarded the outcomes of the OECD BEPS initiative as one of the elements to take into account when working on corporate tax policy based on the Action Plan.[29)]

In January 2016, the European Commission presented a tax good governance package called the Anti Tax Avoidance Package (ATAP)[30)]. The ATAP consisted of four documents: (1) a Proposal for an Anti Tax Avoidance Directive (ATAD); (2) a Communication on an External Strategy for Effective Taxation[31)] in which the European Commission set out a new EU black listing process to identify and address third country jurisdictions that fail to comply with tax good governance standards. It requires a minimum level of taxation in third countries in order for these countries not to be included on the EU black list of tax havens that should be ready by the end of 2017; (3) an amendment on the Directive on Administrative Cooperation on automatic exchange of country by country reporting information (see 4.3 below); and (4) the recommendation on the implementation of measures against tax treaty abuse mentioned in 2 above. Dourado characterized the ATAP as an acknowledgment that there is no single international standard, but rather coexisting national or regional interests on policies attracting investment, tax competition and tax protectionism.[32)]

The aim of the ATAD was to establish rules applicable to all taxpayers (including PEs, but excluding transparent entities) that are subject to corporate tax in a Member State. The rules of the ATAD are minimum standards: the ATAD does not preclude the application of domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases (Art. 3).

The ATAD includes rules on limitations to the deductibility of interest, exit taxation, a general anti-abuse rule (GAAR), controlled foreign company rules and rules to tackle hybrid mismatches. Therefore, it went further than only implementing BEPS measures (exit taxation and a GAAR are not part of the BEPS recommendations but are related to the CCCTB initiative). Below only the measures which implemented BEPS Actions will be discussed.[33)] The ATAD[34)] was adopted on 20 June 2016 and obliges Member States to implement several BEPS Actions as of 1 January 2019. Furthermore, the ATAD was amended by the so called ATAD2.[35)] ATAD2 was adopted on 29 May 2017. It extends the scope of ATAD to hybrid mismatches involving non-EU countries, so called 'third countries'.

3. 1 Hybrid Mismatch Arrangements

BEPS Action 2 proposes, amongst others, a common approach to facilitate the convergence of national practices through domestic rules to neutralise hybrid arrangements. Hybrid mismatches exploit differences in the tax treatment of an entity or an instrument under the laws of two or more jurisdictions. These can lead to multiple deductions for a single expense (double deduction: "DD"), deductions in one country without corresponding taxation in another (deduction-no inclusion: "D/NI"), and the generation of multiple foreign tax credits for one amount of foreign tax paid. The idea is that by denying the tax benefit, but not otherwise interfering with the use of such instruments or entities, the rules will inhibit the use of these arrangements as a tool for BEPS without adversely impacting cross-border trade and investment. BEPS Action 2 recommends aligning the tax treatment of an instrument or an entity in one jurisdiction with the tax treatment in the counterparty jurisdiction in order to neutralise hybrid mismatch arrangements. The recommended rules are divided into a primary response and a defensive rule, in the event that the primary response is not applied by the parent or payer jurisdiction according to the case. For D/NI outcomes the primary response consists in denying deduction of the income at the level of the payer, while the defensive rule would be to include hybrid payments in the ordinary income of the payee. For DD outcomes the primary response is to deny either the parent or the resident company deduction of the income. The proposed defensive rule denies the payer deduction of the income in the case of deductible payment made by a hybrid.

The Code of Conduct Group (Business Taxation), which was set up in 1998 to address harmful tax competition within the EU, started examining anti-abuse issues related to hybrid mismatches in 2009. It first concentrated its work on hybrid entities and hybrid PEs. Guidance on hybrid entities mismatches was agreed in December 2014, on the basis of the fixed alignment approach. It would compel Member States to change their qualification of the hybrid entity from transparent to non-transparent in double deduction situations, or from non-transparent to transparent in deduction/no inclusion cases. Guidance was agreed on in June 2015 for hybrid PEs, and in December 2015 for hybrid entities in situations involving third countries (based on a modified fixed alignment approach). However, it was felt that this soft law was not enough. Before the implementation of ATAD, 25 out of 28 Member States did not have any domestic rules on mismatches in the qualification of partnerships and only a few specifically addressed hybrid financial instruments mismatches.[36]

In 2014, hard law action was taken in the context of the EU Parent Subsidiary Directive (PSD)[37]. that was amended as a result of the BEPS project. As of 1 January 2015, the aim of the PSD is not only to prevent economic double taxation of profits distributed within an EU group of companies, but also to counter undesired tax planning within the EU by tackling hybrid loan mismatches and introducing a general anti-abuse rule.

As of 1 January 2015, Member States only have to refrain from taxing profits that a subsidiary distributes to its parent to the extent that such profits are not deductible by the subsidiary, and tax such profits to the extent that such profits are deductible by the subsidiary (Art. 4(1)(a)). In short: where distributed profits are deductible for the subsidiary, the residence state has an obligation to tax these profits. This rule differs from the BEPS Action 2 approach where the primary rule is that the deduction of the income is denied at the level of the payer. Instead, the EU PSD applies the defensive rule of BEPS Action 2 by including hybrid payments in the ordinary income of the payee .

The amendment to the EU PSD had a relatively limited scope, as it only regarded profit distributions from subsidiaries to parents. Art. 9 ATAD addresses hybrid mismatches in a more comprehensive way. Furthermore, unlike the rule in the EU PSD, Art. 9 ATAD is compliant with the BEPS Action 2 approach. In ATAD2, Art. 9 was completely rewritten as ATAD 1 only covered hybrid mismatches that arise in the interaction between the corporate tax systems of Member States. Furthermore, it did not address hybrid mismatches involving PEs, hybrid transfers, imported mismatches and reverse mismatches. ATAD2 extended the scope of the Directive to those mismatches as well. Preamble 28 of ATAD2 explicitly states that in implementing ATAD2, Member States must use the applicable explanations and examples in the OECD BEPS report on Action 2 as a source of illustration or interpretation to the extent that they are consistent with the provisions of ATAD2 and with EU law.

Preamble 13 of the ATAD describes hybrid mismatches as the consequence of differences in the legal characterization of payments (financial instruments) or entities which differences surface in the interaction between the legal systems of two jurisdictions. Art. 2(9) and preamble 15 of ATAD2 distinguish four categories of hybrid mismatches: (1) payments under a financial instruments that give rise to a D/NI outcome which is not included within a reasonable period of time (12 months of the end of the payer's tax period or as determined under the arm's length principle); (2) a payment to a hybrid entity that gives rise to a D/NI outcome and that is the consequence of differences in the allocation of payments made to a hybrid entity or PE, including as a result of payments to a disregarded PE; (3) payments made by a hybrid entity to its owner, or deemed payments between the head office and PE or between two or more PEs that give rise to D/NI outcomes that is the result of the fact that the payment is disregarded under the laws of the payee jurisdiction; (4) double deduction outcomes resulting from payments made by a hybrid entity or PE.

The definition of hybrid mismatch included in Art. 2(9) only applies where the mismatch outcome is a result of differences in the rules governing the allocation of payments under the laws of the two jurisdictions. A payment does not give rise to a hybrid mismatch if it would have arisen in any event due to the tax exempt status of the payee under the laws of any payee jurisdiction. Differences in tax outcomes that are solely attributable to differences in the value ascribed to a payment, including through the application of transfer pricing, do not fall within the scope of a hybrid mismatch. Furthermore, timing differences should not generally be treated as giving rise to mismatches in tax outcomes. Where the provisions of another directive, such as those in the PSD, lead to the neutralisation of the mismatch in tax outcomes, the ATAD hybrid mismatch rules do not apply.

To neutralise the effects of hybrid mismatch arrangements, in DD situations the investor jurisdiction must deny deduction and if this is not the case, the payer jurisdiction must deny deduction (Art. 9(1)). In D/NI situations the payer jurisdiction must deny the deduction and if this does not happen, the payee jurisdiction must include the payment (Art. 9 (2)). Both rules are largely consistent with BEPS Action 2.

Regarding hybrid entities mismatches, the ATAD only addresses mismatches between so called 'associated enterprises'. An associated enterprise is held by, or holds, the taxpayer or another associated enterprise through a participation in terms of voting rights, capital ownership or entitlement to received profits of 25% (50% in case of the anti-hybrid rule involving a hybrid entity) or more. The ownership, or rights of persons who are acting together, are aggregated for the purposes of applying this requirement. Furthermore, it also comprises an entity that is part of the same consolidated group for accounting purposes, an enterprise in which the taxpayer has a significant influence in the management and, conversely, an enterprise that has a significant influence in the management of the taxpayer (Art. 2(4)).

To avoid unintended outcomes in the interaction between the hybrid financial instrument rule and the loss-absorbing capacity requirements imposed on banks, Member States are allowed to exclude intra-group instruments that have been issued with the sole purpose of meeting the issuer's loss-absorbing capacity requirements and not for the purposes of avoiding tax (Art. 9(4)). However, this exemption mat not be designed such that it is state aid.

Art 9a regards reverse hybrid mismatches. It only applies if one or more associated non-resident entities hold in aggregate a direct or indirect interest in 50% or more of the voting rights, capital interests or rights to a share of profit in a hybrid entity that is incorporated or established in a Member State. If the hybrid entity is located in a jurisdiction or jurisdictions that regard it as a taxable person, it is regarded as a resident of that Member State and taxed on its income to the extent that that income is not otherwise taxed under the laws of the other Member State or any other jurisdiction. This provision does not apply to a collective investment vehicle: an investment fund or vehicle that is widely held, holds a diversified portfolio of securities and is subject to investor-protection regulation in the country in which it is established.

Art 9b regards tax residency mismatches. To the extent that a deduction for payment, expenses or losses of a taxpayer who is resident for tax purposes in two or more jurisdictions is deductible from the tax base in both jurisdictions, the Member State of the taxpayer denies the deduction to the extent that the other jurisdiction allows the duplicate deduction to be set off against income that is not dual-inclusion income. If both jurisdictions are Member States, the Member State where the taxpayer is not deemed to be a resident according to the double taxation treaty between the two Member States concerned denies the deduction.

EU Member States must implement the provisions on hybrid mismatches in their legislation by 31 December 2019 and apply those provisions from 1 January 2020. Only the provision on reverse hybrid mismatches has a later date as of which it must be implemented (31 December 2021) and applied (1 January 2022).

3. 2 CFC rules

BEPS Action 3 gives recommendations on Controlled Foreign Company (CFC) rules. These rules respond to the risk that taxpayers with a controlling interest in a foreign low taxed subsidiary can strip the high taxed base of their country of residence and, in some cases, other countries by shifting income into a CFC in a low tax jurisdiction. CFC rules re-attribute the income of the low-taxed controlled subsidiary to its parent company. Then, the parent company becomes taxable on this attributed income in the State where it is resident for tax purposes. Many jurisdictions already had such rules before the start of the BEPS project, but the scope and application varied. Furthermore, half of the EU Member States did not have CFC rules.[38] The aim of BEPS Action 3 was to help countries in designing CFC rules that effectively prevent taxpayers from shifting income into foreign subsidiaries. It did not set minimum standards, but provided flexibility by six building blocks for the design of effective CFC rules. These include the definition of CFC; exemptions and threshold requirements; definition, computation and attribution of income; prevention and elimination of double taxation. BEPS Action 3 also set out possible design options that would be in line with EU law, more specifically the fundamental freedoms in the Treaty on the Functioning of the EU (TFEU) and fundamental rights as enshrined in the EU Charter of Fundamental Rights, and thus could be implemented by EU Member States.

The ATAD includes CFC rules in Art. 7 and 8 which EU Member States have to implement before 1 January 2019 and apply as of that date. Both third country situations and intra EU situations are addressed. An entity, or a PE of which the profits are not subject to tax or are exempt from tax in that Member State, is regarded a CFC if the following conditions are met (Art 7(1)): (a) in the case of an entity, the taxpayer by itself, or together with its associated enterprises[39] holds a direct or indirect participation of more than 50 percent of the voting rights, or owns directly or indirectly more than 50 percent of capital or is entitled to receive more than 50 percent of the profits of that entity; and (b) the actual corporate tax paid on its profits in the CFC country is 50% or less of the tax that would have been due in the parent State. A PE of a CFC that is not subject to tax or is exempt from tax in the jurisdiction of the CFC is excluded from this calculation. Ginevra observes that several authors have pointed out that this is an extremely subjective criterion that, although it is consistent with BEPS Action 3, could lead to inequalities in the implementation of the CFC rules in different Member States.[40)]

Member States are allowed to reduce the control threshold, or employ a higher threshold in comparing the actual corporate tax paid with the corporate tax that would have been charged in the Member State of the taxpayer. Member States can, in transposing CFC rules into their national law, use a sufficiently high tax rate fractional threshold. Member States may use white, grey or black lists of third countries, which are compiled on the basis of certain criteria set out in the ATAD and may include the corporate tax rate level, or use white lists of Member States compiled on that basis.

ATAD gives countries an option to choose between two approaches regarding the income of the CFC which is included in the tax base of the parent/head office:

1 the categorical approach (Art 7(2)(a)): inclusion of non-distributed specific types of (passive) income ('tainted income'). This includes interest, dividends, income from the disposal of shares, royalties, income from financial leasing, income from banking, insurance and other financial activities and income from invoicing associated enterprises as regards goods and services where there is no or little economic value added. The income is not included if the CFC carries on a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances. The substance carve-out is included to comply with the fundamental freedoms and aims to limit, within the EU, the impact of the CFC rules to cases where the CFC does not carry on a substantive economic activity. In relation to third countries, Member States are not obliged to include this substance carve out. By including income from financial leasing and banking and other financial activities, the list of income categories is broader that the categories suggested in BEPS Action 3. However, Member States may opt not to treat financial undertakings as CFCs if one third or less of the entity's income from these income categories comes from transactions with the taxpayer or its associated enterprises (Art 7(3)). Furthermore, Member States may opt not to treat an entity or PE as a CFC if one third or less of the income accruing to the entity or PE falls within the categories of tainted income. The income to be included in the tax base of the taxpayer is calculated in accordance with the rules of the corporate tax law of the tax payer's resident Member State. Losses of the entity or PE are not included in the tax base but may be carried forward, according to national law, and taken into account in subsequent tax periods (Art. 8(1)).

2 the substantive approach (Art 7(2)(b)): an arm's length approach with inclusion of non-distributed income arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage. The idea is that the substantive approach reduces the administrative burden and compliance costs of the application of the CFC rules. An arrangement is regarded as non-genuine to the extent that the CFC would not own assets or would not have undertaken risks if it were not controlled by a

company where the significant people functions, which are relevant to those assets and risks, are carried out and are instrumental in generating the controlled company's income. The attribution of income is limited to the income attributable to the significant people functions carried out by the controlling company. The attribution of CFC income is calculated in accordance with the arm's length principle (Art. 8(2)). Member States may exclude (Art 7(4)) an entity or PE (a) with accounting profits of no more than EUR 750,000, and non-trading income of no more than EUR 75,000; or (b) of which the accounting profits amount to no more than 10% of its operating costs for the tax period. These operating costs may not include the cost of goods sold outside the country where the entity is resident or the PE is situated for tax purposes and payments to associated enterprises.

Under both approaches, the income to be included in the tax base is calculated in proportion to the taxpayer's participation in the entity (Art. 8(3)) in the tax period of the taxpayer in which the tax year of the entity ends (Art. 8(4)). In order to ensure there is no double taxation, several additional measures have to be implemented. First of all, if the CFC entity distributes profits that were included in the taxable income of the taxpayer, these are deducted from the tax base when calculating the amount of tax due on the distributed profits, in order to ensure there is no double taxation (Art. 8(5)). Furthermore, if the taxpayer disposes of its participation in the CFC entity or of the business carried out by the CFC PE, any part of the proceeds from the disposal that was previously included in the tax base is deducted from the tax base when calculating the amount of tax due on those proceeds (Art. 8(6)). Also, the Member State of the taxpayer must allow a deduction of the tax paid by the CFC entity or PE from the tax liability of the taxpayer in its residence state. The deduction is calculated in accordance with national law (Art. 8(7)).[41)]

The CFC rules of the ATAD are generally in line with BEPS Action 3. After implementation, the ATAD CFC rules take precedence over pre-existing domestic CFC rules, because of the primacy of EU law over domestic law. However, Art 3 of the ATAD preserves the right of Member States to apply domestic or agreement based provisions which grant a higher level of protection. Furthermore, according to preamble 14 of the ATAD, the implementation of the rules against tax avoidance do not affect the obligation of taxpayers to comply with the arm's length principle or the Member State's right to adjust a tax liability upwards in accordance with the arm's length principle, where applicable. For the application of CFC rules this means that first transfer pricing adjustments should be made. If the subsidiary is not sufficiently taxed after such adjustments, the CFC rules can be applied.[42)]

3. 3 Limitations to the deductibility of interest

BEPS Action 4 analyses several best practices and recommends an approach which directly addresses BEPS risks related to intra group financing. These BEPS risks are categorized in three basic scenarios: (1) Groups placing higher levels of third party debt in high tax countries; (2) Groups using intragroup loans to generate interest deductions in excess of the group's actual third party interest expense; (3) Groups using third party or intra-group financing to fund the generation of tax exempt income.[43] The recommended approach is based on a fixed ratio rule between 10% and 30% that limits an entity's net deductions for interest and payments economically equivalent to interest to a percentage of its earnings before interest, taxes, depreciation and amortisation ("EBITDA"). As a minimum this should apply to entities in multinational groups. The approach can be supplemented by a worldwide group ratio rule which allows an entity to exceed the fixed ratio limit in certain circumstances. The earnings-based worldwide group ratio rule can also be replaced by different group ratio rules, such as an equity escape rule. The equity escape rule compares an entity's level of equity and assets to those held by its group. A country may also choose not to introduce any group ratio rule. In that case it must apply the fixed ratio rule to entities in multinational and domestic groups without improper discrimination.

The interest limitation rule is included in Art. 4 of the ATAD and must be implemented before 1 January 2019.[44] Preamble 6 to the ATAD states that the interest limitation rule is necessary to discourage BEPS through excessive interest payments within groups of companies by limiting the deductibility of exceeding borrowing costs. The EU interest limitation rule limits the deduction of net interest expenses to 30% of taxable earnings before interest, taxes, depreciation and amortisation ("EBITDA") (Art. 4(1)). If the interest received exceeds the interest paid, the interest limitation rule does not apply. Tax exempt revenues cannot be set off against deductible borrowing costs, because only taxable income is taken into account in determining how much interest may be deducted (Art. 4(2)).

Member States are allowed (but not obliged) to provide for a safe harbor rule so that net interest is always deductible up to a fixed amount of EUR 3 million, when this leads to a higher deduction than the EBITDA-based ratio (Art. 4(3)(a)). The idea is that such threshold reduces the administrative and compliance burden of the rules without significantly diminishing their tax effect. The interest limitation rule of the ATAD is a minimum standard. Member States are allowed to set a lower ratio than 30% , or reduce the threshold (preamble 6).

Member states are allowed (but not obliged) to exclude standalone entities from the scope of the interest limitation rule (Art. 4(3)(b)). A "standalone entity" is defined as a taxpayer that is not part of a consolidated group for financial accounting purposes and has no associated enterprise[45] or PE (Art. 4(3)). The idea is that as BEPS, in principle, takes place through excessive interest payments among associated enterprises, the risks of tax avoidance are limited in standalone situations (preamble 8). Where in Art. 4 the term "consolidated group for financial accounting purposes" is used, this means (Art. 4(7)) a group consisting of all entities which are fully included in consolidated financial statements drawn up in accordance with the International Financial Reporting Standards or the national financial reporting system of a Member State. Member States may allow to use consolidated financial statements prepared under other accounting standards.

Furthermore, Member States may apply the interest limitation rule at the level of a group (as defined according to national law) and comprise the results of all group members (Art. 4(1)). In that case, the threshold of EUR 3 million also applies for the whole group (Art. 4(3)).

The interest limitation rule applies in relation to exceeding borrowing costs without distinction of whether the costs originate in debt taken out nationally, cross-border within the Union or with a third country, or whether they originate from third parties, associated enterprises or intra-group. Where a group includes more than one entity in a Member State, the Member State may consider the overall position of all group entities in the same State when applying rules that limit the deductibility of interest (preamble 7). This may include a separate entity taxation system to allow the transfer of profits or interest capacity between entities within a group.

It is allowed-but not obligatory for Member States-to apply a group ratio as escape for taxpayers that are part of a consolidated group for financial accounting purposes (Art. 4(5)(b)). The group escape is calculated in two steps: first, the group ratio is determined by dividing the exceeding borrowing costs of the group vis-à-vis third-parties over the EBITDA of the group. Second, the group ratio is multiplied by the EBITDA of the taxpayer.

It is also allowed to apply an equity escape provision, where the interest limitation rule does not apply if the company can demonstrate that its equity over total assets ratio is broadly equal to or higher than the equivalent group ratio (Art. 4(5)(a)). In applying this equity escape, all assets and liabilities must be valued using the same method as in the consolidated financial statements The ratio of the taxpayer's equity over its total assets is considered to be equal to the equivalent ratio of the group if the ratio of the taxpayer's equity over its total assets is lower by up to two percent points.

Member States may provide for rules either (Art. 4(6)): (a) to carry forward, without time limitation, exceeding borrowing costs which cannot be deducted in the current tax period; (b) to carry forward, without time limitation, and back, for a maximum of three years, exceeding borrowing costs which cannot be deducted in the current tax period; or (c) to carry forward, without time limitation, exceeding borrowing costs and, for a maximum of five years, unused interest capacity, which cannot be deducted in the current tax period. Member States may apply time limits or restrict the amount of unrelieved borrowing costs that can be carried forward or back.

It is also possible to adopt an alternative measure referring to a taxpayer's earnings before interest and tax (EBIT) fixed in a way that it is equivalent to the EBITDA-based ratio. Member States are also allowed to use targeted rules against intra-group debt financing, such as thin capitalisation rules, in addition to the EBITDA rule.

Member States are allowed (but not obliged) to exclude exceeding borrowing costs incurred on loans used to fund long-term public infrastructure projects where the project operator, borrowing costs, assets and income are all in the EU. This exclusion does not infringe the EU State aid rules (Art. 4(4)(b)). A long-term public infrastructure project is defined as a project to provide, upgrade, operate and/or maintain a large-scale asset that is considered in the general public interest by a Member State (Art. 4(4)). Any income arising from the long-term public infrastructure project must be excluded from the EBITDA of the taxpayer as well. Any excluded exceeding borrowing cost may not be included in the exceeding borrowing costs of the group vis-à-vis third parties. The reason the ATAD allows for this exclusion is that such financing arrangements present little or no BEPS risks (preamble 8). In this context, Member States must properly demonstrate that financing arrangements for public infrastructure projects present special features which justify such treatment vis-à-vis other financing arrangements subject to the restrictive rule. Member States may also exclude financial institutions and insurance undertakings (together: "financial undertakings") from the scope of the interest limitation rule including where such financial undertakings are part of a consolidated group for financial accounting purposes (Art. 4(7)). The reason for this is, according to preamble 9, that these two sectors present special features which call for a more customized approach. According to the ATAD the discussions in this field are not yet sufficiently conclusive in the international and EU context for which reason it was not yet possible to provide specific rules in the financial and insurance sectors. Therefore, it is allowed (but not obligatory) to exclude these financial undertakings.

Member States imposing national targeted rules for preventing BEPS risks at 8 August 2016 may apply these targeted rules until 1 January 2024 if these are equally effective to the interest limitation rule in the ATAD (Art. 11(6)). It is not clear how "equally effective to" must be interpreted. The Court of Justice of the EU will have to solve any disagreements about this interpretation between the European Commission and Member States. Furthermore, Member States are allowed to provide for a grandfathering clause that covers loans existing on 17 June 2016 to the extent that their terms are not subsequently modified (Art. 4(4)(a)). In case of a subsequent modification, the grandfathering does not apply to any increase in the amount or duration of the loan but is limited to the original terms of the loan. It is not obligatory for Member States to provide for such grandfathering rule.

The EU interest limitation rule follows the best practice included in the OECD's Action 4 report.[46] However, as Member States are allowed many choices in relation to the interest limitation rule, it is possible that this rule is implemented differently in different Member States.

4 Tax transparency changes in the EU as a result of BEPS

Exchange of tax information has been nicely characterized by Brodzka as a non-fiscal measure aimed at curbing tax base erosion.[47] Especially automatic exchange of tax information has become very important in the aftermath of the financial crisis. In 2009, the Global Forum on Transparency and Exchange of Information for Tax Purposes was established to ensure a consistent and effective implementation of international transparency standards. In the same year, the European Commission started a 'good governance' offensive, which in the tax area focused on the principles of transparency, exchange of information and fair tax competition.[48] In 2010, the US introduced FATCA to enforce filing of foreign accounts by putting information obligations on foreign financial institutions and certain other non-financial foreign entities.[49] Following the introduction of FATCA, the G20 mandated the OECD to develop a single global standard for automatic exchange of financial account information in tax matters.

In the EU, automatic exchange of information is regarded an important instrument to fight BEPS. For that reason, the information on which automatic exchange takes place, has been extended significantly in the course of the BEPS project. In addition to the already existing exchange obligations included in Directive on Administrative Cooperation 2011/16/EU[50] (hereinafter: DAC) on available information on specific categories of income and capital, several new provisions were included in the past years as a direct result of the discussions on BEPS.

In Art. 8 (3a) DAC automatic exchange of information obtained from financial institutions under the so called Common Reporting Standards (CRS) was included. These measures had to be applied as of 1 January 2016 (Austria: 1 January 2017). Based on BEPS Action 5, the automatic exchange of advance cross-border rulings and advance pricing agreements was included in Art. 8a DAC. This provision had to be applied as of 1 January 2017. Action 13 'Transfer pricing documentation and country-by-country reporting' aimed to enhance transparency by revised guidance on transfer pricing documentation, including country-by-country reporting. This lead to the inclusion of Art. 8aa in the DAC on the automatic exchange of information on country-by-country reports of multinational entities. This provision had to be applied as of 5 June 2017. Action 12 'Mandatory disclosure rules' included recommendations on the design of mandatory disclosure rules for aggressive tax planning schemes. On 25 May 2018 the European Council adopted Council Directive (EU) 2018/822 to change the DAC according to this recommendation. The Member States must implement it by 31 December 2019 and apply it from 1 July 2020, with material retro-active effect to 25 June 2018. These changes will all be discussed below.

4. 1 Information on foreign account holders and their accounts to be reported by financial institutions under the Common Reporting Standard[51)]

All over the world, tax evasion by not including (income on) foreign accounts and other assets in one's tax return, has been regarded problematic for years. In 2010, the US forced a breakthrough by introducing a rather unconventional-not to mention: controversial-measure. The Foreign Account Tax Compliance Act ("FATCA") aimed to enforce filing of foreign accounts by putting obligations on foreign financial institutions and certain other non-financial foreign entities. FATCA requires these to report on foreign assets held by their US account holders or face 30% withholding on all US income. To reduce the burden on their financial institutions, various countries, including all EU Member States, negotiated with the US on bilateral automatic exchange agreements to implement FATCA.

Following this development, the OECD was mandated by the G20 to build on these intergovernmental agreements (IGA's) to develop a single global standard for automatic exchange of financial account information in tax matters. This global standard was released in 2014 in the form of a package: a Model Competent Authority Agreement, a Common Reporting Standard (CRS), Commentaries on the Model Competent Authority Agreement and Common Reporting Standard and the Information Technology Modalities for implementing the global standard.[52)] The influence of FATCA is clear: even though there are differences (most importantly, FATCA's 30% withholding tax obligation is not included), these are basically very similar.[53)]

On 29 October 2014, 51 jurisdictions signed the OECD's Multilateral Competent Authority Agreement for the Common Reporting Standard (CRS MCAA)[54)] to automatically exchange this information. This agreement specifies the details of what information will be exchanged and when, as set out in the Standard. The CRS MCAA is based on Art. 6 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. A total of 95 jurisdictions had signed the agreement by August 2017.[55)] The US is not one of these countries as it relies on the bilateral IGA's.

Subsequently, it was agreed to extend the scope of Art. 8 of the DAC to include the same information covered by the OECD Model Competent Authority Agreement and Common Reporting Standard.[56)] These extensive measures are included in Art 8 (3a), (6)(7)(7a) and Annex I and II of the DAC and had to be implemented before 1 January 2016 (Austria: 1 January 2017). The OECD Commentaries on the Model Competent Authority Agreement and Common Reporting Standard are a source of illustration or interpretation of the Directive.[57)] Given the much wider scope of the obligations under the Cooperative Directive, the EU Savings Directive[58)] became obsolete and was repealed as of 1 January 2016.[59)]

As of 2016, financial institutions (which includes certain insurance companies) must report certain information on their non-resident account holders and their accounts to the tax authorities in the financial institution's Member State of residence. The scope of this reporting obligation is rather broad. First of all "financial institutions" is defined broadly.[60] However, not all financial institutions have to report under the CRS as certain exemptions apply for institutions which are regarded to be low risk, such as governmental entities, certain pension funds and certain investment vehicles.[61] Also, "financial account" is broadly defined.[62] It does not only include depository accounts and custodial accounts, but also certain equity or debt interests in a financial institution and cash value insurance contracts and annuity insurance contracts. Furthermore, the reporting obligations of the financial institutions have a broad scope. Information must be provided on the holder of the account, the amount on the account or its value and the interest, dividends and other income which were received in relation to the account.[63] The Member State must electronically (Art. 20(4), using the common communication network (CCN), a secure central directory developed by the EU for all transmissions by electronic means between EU Member States in the area of customs and taxation) annually (Art. 8(6)(b)) and automatically exchange this information with the tax administration of the residence country of the account holders (Art. 8 (3a)) within nine months following the end of the calendar year or other appropriate reporting period to which the information relates (Art. 8(6)(b)).

The Directive only regards exchange of financial account information between Member States. However, the EU has also signed agreements on the automatic exchange of financial account information with Switzerland,[64] Liechtenstein,[65] San Marino,[66] Andorra,[67] Monaco[68] and Saint-Barthelemy.[69] These provide for the implementation of the OECD global standard for automatic exchange of financial account information, the CRS and include similar provisions to those included in the DAC. These jurisdictions will automatically exchange the information which is also included in Section I of Annex I to the DAC. At the moment of writing (October 2017), only the agreement with Monaco was in force.

Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data imposes certain data protection obligations on the financial institutions. Member States must ensure that financial institutions inform their clients that their information is collected and transferred in accordance with the DAC. Furthermore, they must be obliged to provide to their clients all information they are entitled to under the domestic legislation which implements Directive 95/46/EC in sufficient time for the client to exercise his data protection rights (Art. 25(3)DAC). This is, in any case, before the information is reported to the clients' state of residence. Just as is the case for any information exchanged under the DAC, financial institutions and Member States may not retain the information on the foreign account holders and their accounts for longer than necessary to achieve the purposes of the DAC, and in any case in accordance with each data controller's domestic rules on statute of limitations (Art. 25(4)DAC).

4. 2 Mandatory Automatic Exchange of Information on Advance Cross-Border Rulings and Advance Pricing Arrangements

Under OECD BEPS Action 5 on countering harmful tax practices a framework was agreed on for the compulsory spontaneous exchange of information on rulings that could give rise to BEPS concerns in the absence of such exchange.[70)] The fight against cross-border tax avoidance, aggressive tax planning and harmful tax competition also inspired the introduction of Art. 8a DAC on the automatic exchange of information on Advance Cross-Border Rulings (ACRs) and Advance Pricing Arrangements (APAs). Member States had to implement the provisions on this form of automatic exchange of information before 1 January 2017. The amendments to the DAC are not aimed at prohibiting rulings, but at increasing transparency. However, the new rules seem to have had a negative effect on the appetite to request a ruling in some jurisdictions.

Member States must automatically exchange information on cross-border tax rulings and transfer pricing arrangements with other EU Member States (Art. 8a(1) DAC). The scope of this automatic exchange is very broad. ACR and APA are defined broadly and in general terms and not limited to what tax lawyers in certain jurisdictions might use the word 'ruling' for. Furthermore, the definitions are broader than the ones used in the BEPS Action 5 report, which gives a more precise definition of ruling, ACR and APA. Because of the difference in definitions, based on the DAC more information will have to be exchanged than under BEPS Action 5. Furthermore, tax administrations and tax payers struggle with the interpretation of the concepts, as the guidance regarding the DAC is rather limited.

It is important to notice that not the ACRs and APAs themselves are exchanged, but information on these ACRs and APAs. Exchange of the ACRs and APAs is possible upon request. The exchange takes place through recording information in a standard form in a secure Member State central directory on administrative cooperation in the field of taxation (Arts 20(5) and 21(5) DAC) to which all Member States have access. The information on ACRs or APAs issued, amended or renewed after 31 December 2016, must be exchanged within three months following the end of the half of the calendar year during which the ACRs or APAs have been issued, amended or renewed (Arts. 8a(1), 8a(5)(a) DAC). Information on rulings which were issued, amended or renewed on or after 1 January 2012 and before 1 January 2017, had to be exchanged before 1 January 2018 (Arts. 8a(1), 8a(5)(b) DAC). No information will be exchanged on rulings which were not valid any more on 1 January 2014 (Art. 8a(2) DAC). Furthermore, no information will be exchanged on rulings issued, amended or renewed before 1 April 2016 to a particular person or a group of persons, excluding those conducting mainly financial or investment activities, with a group-wide annual net turnover of less than EUR 40 million (Art. 8a(2) DAC). If a ACR or APA exclusively concerns and involves the tax affairs of one or more natural persons, no information will be exchanged (Art. 8a(4) DAC). Also, bilateral or multilateral advance pricing arrangements with third countries are excluded where the international tax agreement under which the advance pricing arrangement was negotiated does not permit its disclosure to third parties. These APAs will be exchanged under Art. 9 DAC (spontaneous exchange) where the international tax agreement under which the APA was negotiated permits its disclosure, and the competent authority of the third country gives permission for the information to be disclosed (Art. 8a(3) DAC).

4. 3 Country-by-Country Reporting[71)]

One of the ways the OECD introduced to tackle BEPS by enhancing transparency for tax administrations, was to introduce revised standards for transfer pricing documentation and a template for Country-by-Country (CbC) reporting of income, taxes paid and certain measures of economic activity. This is included in the BEPS Action 13 Report.[72)] It provides for a three-tiered standardised approach to transfer pricing documentation which obliges MNEs to provide for (1) a master file with high-level information on their global business operations and transfer pricing policies which has to be available to all relevant tax administrations; (2) a local file with detailed transactional transfer pricing documentation specific to a country; and for large MNEs (3) a CbC Report that provides for certain information annually and for each tax jurisdiction in which the MNE does business. The CbC report must be filed in the residence country of the ultimate parent and be shared between countries through automatic exchange of information. The aim of these three documents is to require tax payers to articulate consistent transfer pricing positions and to provide tax administrations with useful information to assess transfer pricing risks.

The 2006 Code of Conduct on transfer pricing documentation in the EU (EU TPD)[73)], initiated by the EU JTPF already set out an EU-wide common approach to transfer pricing documentation requirements. The EU TPD includes a master file available to all Member States involved and a local file available to the specific Member State concerned. The EU TPD is soft law and does not impose obligations on Member States. The EU TPD did not provide for a mechanism for the provision of a CbC report. Directive 2016/881/EU[74)] introduced this CbC report and the mandatory automatic exchange thereof as hard law in the DAC (most importantly: Art. 8aa and Annex III). The CbC provisions had to be implemented by 4 June 2017 and applied as of 5 June 2017. The first CbC report would have to be filed over fiscal years starting on or after 1 January 2016. However, Member States were allowed to postpone this to 1 January 2017 (Art. 2(1)(third paragraph) of Annex III). The EU CbC provisions closely follow the standards developed by the OECD in Action 13 in order to minimise costs and administrative burdens both for tax administrations and for MNE groups (Preamble 13 and 14 of Directive 2016/881/EU). Member States must use the 2015 Action 13 Report as a source of illustration or interpretation when implementing the Directive.[75)] This means that the Action 13 Report is an important source of information when interpreting the EU CbC rules.

Preamble 3 of Directive 2016/881/EU emphasises the need of Member States' tax authorities to have comprehensive and relevant information on MNE groups regarding their structure, transfer-pricing policy and internal transactions in and outside the EU. This is deemed necessary to react on harmful practices by making changes in legislation, undertaking risk assessments and tax audits and to identify whether companies have artificially shifted profits to low tax countries. Furthermore, the idea is that increased tax transparency could induce MNEs to abandon BEPS practices (preamble 4). The amendments to the DAC included the inclusion of filing rules for MNE groups in Annex III, of mandatory automatic exchange of information on the CbC report in Art 8aa and of penalties for MNEs failing to comply with the CbC reporting obligations in Art. 25aa.

A group, which, based on its consolidated financial statements, has a total consolidated group revenue of less than EUR 750 million during the preceding fiscal year, is exempt from the CbC reporting obligation (Art. 1(4) of Annex III). If the ultimate parent entity is not obliged to file a CbC report in its tax residence jurisdiction or if this report is or cannot be exchanged[76)] each entity which is tax resident in an Member State must, in principle, file the CbC report in its tax jurisdiction (Art 2(1) of Annex III). This could, for example, be the case if the ultimate parent company is tax resident outside the EU in a tax haven. When there are more entities tax resident in the EU, the MNE group may designate one of those entities to file the CbC report (Art 2(1) (fifth paragraph) of Annex III). If the MNE group has appointed a "surrogate parent entity" (as defined in Art 1(8) of Annex III) which files the CbC report in its jurisdiction of tax residence on behalf of the MNE group, the other entities do not have to file a CbC report. The surrogate parent entity may be resident of a non-EU Member State provided that this country requires filing of CbC-reports, information can be exchanged with this jurisdiction, it does not systematically fail to do so and notification requirements have been met (Art. 2(2) of Annex III).

Art. 8aa(3) states which information the CbC report must provide for. The CbC report must contain aggregate information relating to the amount of revenue, profit or loss before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the MNE group operates. Furthermore, it must identify each entity of the group: the jurisdiction of tax residence and, where different from such jurisdiction, the jurisdiction under the laws of which it is organised and the nature of the main business activity or activities of such entities. Section III (A) of Annex III provides for a template for the CbC report which consists of three tables. Table 1 gives an overview of allocation of income, taxes and business activities by tax jurisdiction. Table 2 lists all entities and table 3 must include any further brief information or explanation which is considered necessary or that would facilitate the understanding of the compulsory information provided in the CbC report. Section III (B) and (C) of Annex III provide for general and specific (for each column of the template) instructions for filling in the CbC report.

In order to ensure the timely compliance with the CbC reporting obligations, Art. 25a obliges Member States to provide for penalties for non-compliance. The DAC does not give any specifications regarding these penalties other than that these must be effective, proportionate and dissuasive (Art. 25a, last sentence). This might lead to huge differences between Member States. For example, the penalty for intentional non-compliance with CbC obligations has been set at a maximum of € 820.000 in the Netherlands,[77] whereas the maximum penalty in Belgium is € 25.000.[78]

The Member State which receives the CbC report from the ultimate parent entity or any other reporting entity must communicate this by way of automatic exchange to any other Member State in which, on the basis of the information in the CbC report, one or more entities of the MNE group are tax resident or subject to tax with respect to a business carried out through a PE (Art. 8aa(2)). The information must be provided by electronic means, using the CCN network (Arts. 20(6) and 21(6)). This has to take place within 15 months after the fiscal year to which the CbC report relates (for 2016: 18 months) (Art. 8aa(4)).

Receiving tax administrations may use CbC reports for purposes of assessing high-level transfer pricing and other BEPS-related risks, including assessing the risk of non-compliance with transfer pricing rules and, where appropriate, for economic and statistical analysis (Art. 16(6)). However, transfer pricing adjustments by the receiving tax administration are not to be based on the CbC report. However, the information may be used 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, may be used to make appropriate adjustments to the taxable income of an entity (Art. 16(6) (last two sentences).

4. 4 Mandatory Disclosure

BEPS Action 12[79] recommended-without defining a minimum standard-that countries introduce a regime for the mandatory disclosure of aggressive tax planning arrangements. Such mandatory disclosure rules already existed in, for example, the USA, the United Kingdom (Disclosure of Tax Avoidance Schemes regime (DOTAS)), Ireland and Portugal. Following the momentum created by the Lux leaks and the Panama Papers, the European Commission proposed a further amendment to the DAC[80] on 21 June 2017 ("DAC6"). On 25 May 2018 the EU Council adopted DAC6.[81] This includes a new Art. 8ab which obliges Member States to implement transparency rules for intermediaries who design and promote potentially aggressive tax planning arrangements for their clients. The obligation is limited to cross-border situations. Member States must give intermediaries which are entitled to a legal professional privilege the right to a waiver from filing information on a reportable cross-border arrangement (Art. 8ab(5)). If there is no intermediary with a reporting obligation the disclosure obligation is shifted to the tax payer who uses the reportable cross-border arrangement (Art. 3(22) and Art. 8ab(7) and (7)). The Proposal has some retro-active effect as information on reportable cross-border arrangements that were implemented between 25 June 2018 (20 days after 5 June 2018, the date the proposal was published in the Official Journal of the EU and thus entered into force) and 1 July 2020, the date as of which the changes in DAC6 must be applied, must be filed by 31 August 2020 (Art. 8ab (12)). Member States must implement penalties for not reporting (on time) that are effective, proportionate and dissuasive (Art. 25a). The ultimate objective of the new reporting obligation is to have a deterrent effect: to dissuade intermediaries from designing and marketing such arrangements.

The information would be exchanged automatically by submitting information on the disclosed arrangements through a standard form using the CCN (Art. 20(5)). This must happen within one month from the end of the quarter in which the information was filed. (Art. 8ab(18)). The first information must be communicated by 31 October 2020. Member States must submit the following information (Art. 8ab(14)): (a) the identification of intermediaries and taxpayers, including their name, residence for tax purposes, and taxpayer identification number (TIN) and, where appropriate, the persons who are associated enterprises to the intermediary or taxpayer; (b) details of the hallmarks that make the cross-border arrangement(s) reportable; (c) a summary of the content of the reportable cross-border arrangement or series of such arrangements, including a reference to the name by which they are commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy; (d) the date that the implementation of the reportable cross-border arrangement or of the first step in a series of such arrangements is to start or started; (e) details of the national tax provisions the application of which creates a tax advantage, if applicable; (f) the value of the reportable cross-border arrangement; (g) the identification of the Member State of the relevant taxpayer(s) and any other Member States which are likely to be concerned by the reportable cross-border arrangement; (h) the identification of any other person in a Member State likely to be affected by the reportable cross-border arrangement, indicating to which Member States such person is linked. The European Commission will only have limited access to this information, as it will not have access to the information referred to in point (a), (c) and (h) above (Art. 8ab (17)). A similar limitation of Commission access applies to the information on ACRs.

4. 5 Critique: lack of tax payer protection and information overload

Giusy De Flora observes that European (just as international) legislation on the exchange of information does not have a specific provision governing the relations between tax payers and tax authorities.[82] Persons (potentially) affected by an exchange of tax information can thus rely only on domestic legislation for:

(i) a possible right to be notified prior to an intended transmission of information;

(ii) a right to be heard before information is transmitted (consultation right), in such case the decision to transmit information remains at the discretion of the requested tax authority;

(iii) a possible injunction against an intention to transmit information (intervention right), which gives the tax payer the right block the transmission of the information in cases where there are formal or substantive defects; and

(iv) a possible claim of damages in case of unlawful exchange of information or violation of confidentiality or data protection.

Only if tax payers are informed in advance, legal protection may be effective. However, this might delay the transmission of information or make it ineffective. The level of domestic legal protection varies considerably between Member States, especially as regards prior notification and the possibilities for (timely) obtaining judicial interim decisions such as a provisional injunction.[83] Therefore, Giusy De Flora is of the opinion that referral to the domestic legislation of the Member States is not sufficient to achieve a full balance between the interests of the requesting state and those of the tax payer. Furthermore, according to Giusy De Flora, this legislation has limited or no consideration of the legal position of the tax payer. In her view states are more interested in obtaining the required information rather than ensuring the procedural rights of tax payers in the phase of exchange of information.[84] Also other authors have argued that more attention for tax payer's rights are needed due to the increase of automatic exchange of information which may lead to less control over the accuracy and use of the information by the requesting and the requested state.[85] but at the moment this does not seem to be the case.

In 2001, Vording and Caminada suggested that "Meaningful international tax co-operation may well require that in the near future, a substantial part of national tax administrations' efforts is to provide services to other national tax administrations."[86] The subsequent amendments of the DAC have definitely increased the obligation on Member States' tax administrations to collect information and make it available to other Member States. However, information exchange is not a purpose in itself, but should be a means to support a better tax compliance. As Steward observed: "obtaining tax information is only one step towards the real goal of collection of adequate tax revenues and effective and fair division of the global tax base."[87] Therefore, in order for information exchange to be effective for that purpose, tax administrations must have enough resources to examine all information received at put it to use. This regards both sufficient-both in the quantitative and qualitative sense-human resources and the necessary IT tools to handle big data and to perform effective searches which provide useful results. Brodzka observes that the main barriers to the effective functioning of the EU system of tax information exchange seem to be the capabilities and resources required to handle the whole process of data exchange for tax purposes.[88] If Member States get overwhelmed by all information they have to send out and that they receive, there may not be enough resources left to effectively analyze the information received and to put it into use. Brodzka reports that in the past only a few Member States asked for the password needed to make the data readable which was automatically shared on encrypted discs on the basis of the Savings Directive.[89] The effective use of the information exchanged should, therefore, be carefully monitored: it should be avoided that all efforts have to be spent on sending out information but that nothing is actually being done with information received, as that would be a waste of economic resources. Because, as Mariano observed: "behind DAC implementation in each Member State, there are going to be huge investments in information technology, the costs of which will probably be shifted to society".[90]

5 Conclusion

The financial and economic crisis hit Europe, and especially the EMU countries, hard. Consumers felt that they had to bear the burden of the crisis which was caused by banks. Eventually, this lead to a call for more transparency in tax matters and closing of loopholes leading to tax evasion and tax avoidance. The BEPS project coincided with developments which were already happening within the EU and was, therefore, embraced quickly. The BEPS project has had a huge impact on EU hard law. This regards both substantive provisions that must be included in EU Member States' corporate income tax laws over the coming years and increased automatic exchange of information obligations. Regarding the latter there are concerns on tax payer protection. It remains to be seen whether tax administrations will be able to cope with all information they have to send out and receive.

Notes

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2) Art. 126 of the Treaty on the Functioning of the European Union (TFEU).

3) Mara Eugenia Ramona, Cuceu Ionut and Mara Cristian, Value Added Tax in the Economic Crisis Context, *Annals of the University of Oradea: Economic Science* (*Analele Universităţii din Oradea: Ştiinţe economice*), 2011, no. 1, p. 389-395.

4) Mara Eugenia Ramona, Cuceu Ionut and Mara Cristian, Value Added Tax in the Economic

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7) Communication from the Commission to the Council, the EP and the ESC of 28 April 2009, 'Promoting Good Governance in Tax Matters', COM (2009) 201 final, http://aei.pitt.edu/37902/1/COM_(2009)_201.pdf (Accessed 4 July 2018). See, on the global and EU tax governance movement Gemma Martinez Bárbara, 'The Role of Good Governance in the Tax Systems of the European Union,' *Bulletin for International Fiscal Documentation* April/May 2011.

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13) OECD, Action Plan on Base Erosion and Profit Shifting, 2013, https://www.oecd.org/ctp/BEPSActionPlan.pdf (Accessed 4 July 2018), p. 7-8.

14) OECD, Action Plan on Base Erosion and Profit Shifting, 2013, https://www.oecd.org/ctp/BEPSActionPlan.pdf (Accessed 4 July 2018), p. 8.

15) http://www.oecd.org/tax/beps/beps-actions.htm.

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17) See for a comprehensive discussion: Howard M. Liebman, Werner Heyvaert and Valerie Oyen, Countering Harmful Tax Practices: BEOS Action 5 and EU Initiatives-Past Progress, Current Status and Prospects, *European Taxation,* February/March 2016, p. 102-105.

18) General Secretariat of the Council, Report by the Code of Conduct Group (Business Taxation) to ECOFIN-Patent boxes: state of play and the way forward, 3 November 2016, 13924/16, http://data.consilium.europa.eu/doc/document/ST-13924-2016-INIT/en/pdf (Accessed 4 July 2018).

19) ECJ 21 September 1999, Case C-307/97 (*Compagnie de Saint-Gobain*), para 56.

20) Commission Recommendation of 28. 1. 2016 on the implementation of measures against tax treaty abuse, C (2016) 271 final, https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/anti_tax_avoidance/c_2016_271_en.pdf (Accessed 4 July

2018).

21) http://data.consilium.europa.eu/doc/document/ST-14566-2016-INIT/en/pdf (Accessed 4 July 2018).

22) See for example the Presidency Issues Note for the informal ECOFIN Tallinn, 16 September 2017 Discussion on corporate taxation challenges of the digital economy, https://www.eu2017.ee/sites/default/files/2017-09/Ecofin%20Informal_WS%20II_digital%20economy_15-16.Sept_.17.pdf (Accessed 4 July 2018) which suggests as quick fixes to introduce an online advertisement tax, a levy on video-streaming and a introduction of a withholding tax or an equalisation levy on digital services and as a long term solution modifying the concept of permanent establishment and enhancing the rules for attribution of profits to the newly modified permanent establishment reflecting the value created by it. Under this approach, even without physical presence, a business with significant digital presence would be deemed to have a (virtual) permanent establishment in a jurisdiction of operation and therefore be liable to its corporate tax regulations, including adapted attribution of profit rules. However, at the same time France, backed by Germany, Italy and Spain, proposed to impose an "equalisation tax" which could be set between 2 % and 5% on turnover, so digital companies pay tax where they make money rather than where they registered (a report on this proposal was brought amongst others by Natasha Lomas, France, Germany, Spain, Italy call for turnover tax for tech giants, 11 September 2017, techcrunch.com, https://techcrunch.com/2017/09/11/france-germany-spain-italy-call-for-turnover-tax-for-tech-giants/?ncid=mobilenavtrend). This proposal was supported by six other Member States. This tax based on revenues is different from the tax based on profits which is the basis of the Estonian proposal. The French proposal would be beneficial for large Member States, but would have serious implications for smaller Member States such as Ireland, Malta, Luxembourg and Estonia which managed to attract many (mainly American) tech companies by their low corporate income tax rates. On 21 September 2009 the European Commission published the Communication from the Commission to the European Parliament and the Council, A Fair and Efficient Tax System in the European Union for the Digital Single Market, COM (2017) 547 final, https://ec.europa.eu/taxation_customs/sites/taxation/files/1_en_act_part1_v10_en.pdf (Accessed 4 July 2018). This Communication calls for a strong and ambitious EU position on taxing the digital economy, which should feed into ongoing international work on the issue.

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28) Communication from the Commission to the European Parliament and the Council, A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM (2015) 302 final https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/fairer_corporate_taxation/com_2015_302_en.pdf (Accessed 4 July 2018), p. 2.

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39) The definition of 'associated enterprise' is included in Art. 2(4) ATAD and is discussed in Section 3.1 above.

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43) OECD, Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Updated report, 2016, http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/limiting-base-erosion-involving-interest-deductions-and-other-financial-payments-action-4-2016-update_9789264268333-en#.Wb5sNbIjGpp#page16, p. 13.

44) Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market as to be amended by ATAD 2.

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plementation Handbook 2017, p. 87-101 https://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf（Accessed 4 July 2018）.

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61） Section VIII B of Annex I of the Directive.

62） Section VIII C of Annex I of the Directive.

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