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Global Developments and Trends in International Anti-Avoidance

This article is based on the keynote speech which Stef van Weeghel delivered at the Asia–Pacific Regional Tax Conference on 2 April 2013 in Singapore, organized by the IFA Singapore Branch and the Tax Academy of Singapore. The speech started with a video, the viewing of which is recommended before reading the article.

1. Introduction[1]

This article addresses a massive topic: global developments and trends in international anti-avoidance. It is difficult even to decide where to start. It is a multi-dimensional theme. It is about tax evasion, tax planning versus tax avoidance, tax competition, public outrage, fair shares and hypocrisy. At a different level, it is about bank secrecy, exchange of information, enforcement and inter-governmental agreements, cooperation, and base erosion and profit shifting (BEPS). And yet, at another level, it is about the application of general anti-avoidance rules (GAARs), the introduction of specific anti-avoidance rules (SAARs), and the interplay of anti-abuse rules in domestic law and treaty obligations. It is also about abuse of tax treaties.

The topic involves economic, legal and policy aspects, emotion and cultural differences, and is currently in complete flux. The article starts with tax evasion.

2. Tax Evasion

2.1. Pressure on states with bank secrecy

Exchange of information has been a cornerstone of international tax policy and tax treaties for many years, but, in all those years, it has proven to be a fairly harmless instrument with regard to countering international tax evasion. Most countries have a serious issue with tax evasion undertaken by their own residents, but quite a few see, or at least until recently saw, no problem in being a friendly home for the undeclared money of non-residents. Such countries include Liechtenstein and Switzerland.

In 2006, the German tax administration paid EUR 5 million for a CD with data on bank accounts held with the LGT bank in Liechtenstein.[2] These bank accounts belonged to residents of various European countries, including Germany. The ensuing conviction of the former CEO of Deutsche Post is well known, but many others, in Germany and in Europe generally, were (and are) concealing their bank accounts in Liechtenstein from the tax authorities in their home country.

Then, there is Swiss bank secrecy. In 2009, the United States initiated a criminal case against UBS and argued that UBS was assisting US clients to evade tax. UBS agreed to a deferred prosecution agreement and paid a very large amount in settlement.[3]

The UBS case led the United States to introduce the Foreign Account Tax Compliance Act (FATCA). FATCA requires foreign financial institutions worldwide to report foreign accounts owned, either directly or indirectly, by US persons to the Internal Revenue Service (IRS). In order to encourage foreign financial institutions to enter into information exchange agreements with the IRS that meet the requirements of the legislation, a 30% withholding tax must be applied on any withholdable US-source payment made to non-compliant institutions. FATCA is being introduced on a phased basis from 1 January 2013.

In order to support the fundamentals of FATCA, the United States is pursuing a policy of signing inter-governmental agreements. These agreements may provide for leniency in respect of the financial institutions that are resident in a state that is a party to an agreement. The agreements also provide for a more effective cooperation on the part of the United States with regard to exchange of information. At the time of the writing of this article, six agreements had been signed with the United Kingdom, Denmark, Mexico, Ireland, Switzerland and Norway.[4] In addition, the United States has issued joint statements with France, Germany, Italy, Japan, Spain and the United Kingdom that deal with the implementation of FATCA and the improvement of international tax compliance. In addition, at the time of the writing of this article, further negotiations were in progress with over 50 countries.

However, it is not only the United States that has put pressure on Switzerland. The United Kingdom and Austria

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** Tax Advisor, PwC, Amsterdam. The author can be contacted at frank.emmerink@nl.pwc.com. This text was submitted for publication on 10 May 2013 and does not cover developments since then.

1. The video compilation can be viewed at www.youtube.com/watch?v=4H3ELUUUI9M.

2. Reuters, *Liechtenstein tax scandal hits banks*, The Australian (19 Feb. 2008), available at www.theaustralian.com.au/archive/business-old/ liechtenstein-tax-scandal-hits-banks/story-e6frg96f-1111115587424.

3. The US Department of Justice, *UBS Enters into Deferred Prosecution Agreement* (18 Feb. 2009), available at www.justice.gov/opa/pr/2009/February/09-tax-136.html.

4. *See* Treaties, IBFD, under Country "United States" and Treaty Subject "FATCA".

have concluded agreements with Switzerland that provide for anonymity of Swiss account holders.[5] In exchange, the Swiss banks are obliged to collect tax from these customers on behalf of the UK and the Austrian tax authorities. Both of these "Rubik" agreements came into force on 1 January 2013.A third Rubik agreement between Germany and Switzerland[6] was rejected by the German Upper House (*Bundesrat*).[7]

Within the European Union, a related and relevant development was the adoption of the Savings Directive (2003/48).[8] The Savings Directive (2003/48) provides for the effective and complete exchange of information in respect of interest payments within the European Union. Before the Savings Directive (2003/48) could become effective, several steps had to be taken. Some Member States with bank secrecy laws, such as Austria, Belgium and Luxembourg, were only ready to adopt the Savings Directive (2003/48) if other States outside the European Union, such as Andorra, Liechtenstein, Monaco, San Marino and Switzerland, as well as the dependent or associated territories of Member States, implemented similar or transitional arrangements. The transitional arrangements did not provide for the effective exchange of information, but, instead, provided for a compulsory withholding tax on interest payments. After these agreements were concluded, the Savings Directive (2003/48) entered into force on 1 July 2005 (six months after originally planned due to hard negotiations with Switzerland).

Another notable development in this field is the new Mutual Assistance Directive (2011/16).[9] Under the Mutual Assistance Directive (2011/16), which became effective on 1 January 2013, Member States are required to automatically exchange "available information" in respect of certain categories of income and capital as from 1 January 2015. These categories are: income from employment, directors' fees, pensions and ownership of and income from immovable property. It is, however, important to note that article 19 of the Mutual Assistance Directive (2011/16) includes a "most-favoured nation" clause. Under this clause, a Member State cannot refuse to provide wider cooperation to any other Member State if it provides wider cooperation to a third country than that provided for under the Mutual Assistance Directive (2011/16). By concluding FATCA intra-governmental agreements, Member States could, therefore, expand the scope of the Mutual Assistance Directive (2011/16).[10]

2.2. OECD Global Forum on Transparency and Exchange of Information for Tax Purposes

Long before LGT and UBS, the effective exchange of information was encouraged by an initiative that started with the Lyon G7 summit in 1996, which had as its focus harmful tax competition, rather than tax evasion.

The relevant conclusions of the 1996 Lyon G7 summit were as follows:

> 16. Finally, globalization is creating new challenges in the field of tax policy. Tax schemes aimed at attracting financial and other geographically mobile activities can create harmful tax competition between States, carrying risks of distorting trade and investment and could lead to the erosion of national tax bases. We strongly urge the OECD to vigorously pursue its work in this field, aimed at establishing a multilateral approach under which countries could operate individually and collectively to limit the extent of these practices. We will follow closely the progress on work by the OECD, which is due to produce a report by 1998.[11]

The progress was first made in 1998, when the OECD published its report entitled "Harmful Tax Competition. An Emerging Global Issue".[12] In this report, the OECD formulates a definition of what is a "tax haven". The minimum criterion is that the jurisdiction in question should have "no or only nominal taxation". The report also provides for the following three other "key factors" that are relevant: (1) "lack of effective exchange of information"; (2) "lack of transparency"; and (3) "no substantial activities". In addition, the report includes a proposal for an approach to deal with harmful tax competition. The OECD proposes that OECD member countries make use of instruments, such as "self-review" and "peer review". With regard to OECD non-member countries, the report proposes to seek dialogue and to use "naming and shaming" by way of a blacklist of jurisdictions that meet the definition of tax haven, thereby increasing the pressure on such countries. A follow-up report, entitled "Towards Global Tax Co-

5. *Agreement between the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland on Cooperation in the Area of Taxation* (6 Oct. 2011), Treaties IBFD, which was supplemented by *Protocol Amending the Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation on Cooperation in the Area of Taxation, Signed at London on 6 October 2011* (20 Mar. 2012), Treaties IBFD, also available at www.hmrc.gov.uk/taxtreaties/swiss.pdf, and *Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Republik Österreich über die Zusammenarbeit in den Bereichen Steuern und Finanzmarkt* (13 Apr. 2012), Treaties IBFD, also available at www.admin.ch/ch/d/ff/2012/5335.pdf.
6. *Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Bundesrepublik Deutschland über Zusammenarbeit in den Bereichen Steuern und Finanzmarkt* (21 Sept. 2011), Treaties IBFD, which was supplemented by *Protokoll zur Änderung des Abkommens zwischen der Bundesrepublik Deutschland und Schweizerischen Eidgenossenschaft über Zusammenarbeit in den Bereichen Steuern und Finanzmarkt* (5 Apr. 2012), Treaties IBFD, also available at www.news.admin.ch/NSBSubscriber/message/attachments/24360.pdf.
7. For "Rubik" agreements, in general, *see* P. Pistone, *Exchange of Information and Rubik Agreements: The Perspective of an EU Academic*, 67 Bull. Intl. Taxn. 4/5 (2013), Journals IBFD. For the agreement between Germany and Switzerland, *see* A. Perdelwitz, *The New Tax Agreement between Germany and Switzerland – Milestone or Selling of Indulgences*, 51 Eur. Taxn. 12 (2011), Journals IBFD.
8. EU Savings Directive (2003): Council Directive 2003/48/EC of 3 June 2003 on Taxation of Savings Income in the Form of Interest Payments, OJ L157 (2003), EU Law IBFD, as amended by Council Directive 2006/98/EC of 20 November 2006, OJ L363 (2006), EU Law IBFD.
9. EU Mutual Assistance Directive: Council Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, OJ L64 (2011), EU Law IBFD.
10. *See* Letter from Pierre Moscovici (France), Wolfgang Schäuble (Germany), Vittorio Grilli (Italy), Cristóbal Montoro Romero (Spain) and George Osborne (United Kingdom) to Commissioner Šemeta (9 Apr. 2013), available at www.hm-treasury.gov.uk/d/g5_letter_to_european_commission_090413.pdf.
11. G7 Summit, *Economic Communiqué: Making a Success of Globalization for the Benefit of All*, pt. 16 (28 June 1996), available at www.g8.utoronto.ca/summit/1996lyon/communique.html.
12. OECD, *Harmful Tax Competition. An Emerging Global Issue* (OECD 1998), available at www.oecd.org/tax/transparency/44430243.pdf.

operation", was published in 2000.[13] This report includes two lists, one of "potentially harmful tax practices" and a second of "tax havens".

It was also in 1998 that the OECD established a working group to develop a legal instrument that could be used to establish effective exchange of information. This working group later evolved into the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes (the "Global Forum"). The first milestone achieved by this group was the presentation of the Agreement on Exchange of Information on Tax Matters (2002).[14] This agreement contained a multilateral instrument and a model for bilateral tax information exchange agreements (TIEAs).

Not much progress was made in the first few years after 2002. Only a few agreements were signed. The G20 meeting in London in 2009, however, gave significant encouragement to this process. Following that meeting, the Global Forum was restructured. If the OECD's current tax agenda[15] is considered, it is clear that the Global Forum, which now has more than 100 member jurisdictions, has a key role in pursuing exchange of information. The Global Forum performs two-phase peer reviews: examination of each jurisdiction's legal and regulatory framework (Phase 1) and practical implementation of the standards on transparency and exchange of information for tax purposes (Phase 2). A peer review group, consisting of 30 Global Forum members, oversees the process. At the time of the writing of this article, the Global Forum had reviewed 96 jurisdictions. It had completed the Phase 1 review of almost all of its members and had completed Phase 2 reviews for 30 jurisdictions.[16]

The current tax agenda of the OECD explicitly states that over the past two years there has been a "sea change" in the level of tax cooperation throughout the world. In response to the G20 summit in Washington in November 2008, there has been a widespread commitment by many jurisdictions worldwide to eliminating obstacles to information exchange in tax matters. The G20 leaders continue to pay very close attention to this issue. Notable improvements in domestic legislation that have been referred to in this respect are: a change in law in Belgium to allow for access to bank information in the field of direct taxation, a reform of domestic law in San Marino with regard to the availability of ownership information and the expansion of the TIEA network by Barbados. Another milestone mentioned by the OECD is a recent amendment to the Convention on Mutual Administrative Assistance in Tax Matters (1988), which is a multilateral agreement for international cooperation, including exchange of information and assistance in the recovery of taxes.[17] The amended Convention entered into force in 2011 and, by 2012, 35 countries had signed it.

2.3. OECD Forum on Tax Administration and Joint International Tax Shelter Information Centre (JITSIC)

It should also be noted that the OECD Forum on Tax Administration is increasingly active. In this group, tax commissioners from 44 countries meet on a regular basis to discuss how they can enhance cooperation in their work field. The press release following their meeting in Buenos Aires in 2012 is quite clear regarding this:

> The 7th meeting of the Forum on Tax Administration, which brought together the heads of tax administrations from 43 countries, concluded with a unified and strengthened commitment to combat offshore tax abuse. Our strategy includes unprecedented sharing and exchange of information and coordinated action to better identify and tirelessly pursue the promoters and users of abusive offshore schemes. Those who once felt safe concealing their money and assets overseas are now in an increasingly risky position. We also focused on the need to work smarter in times of shrinking budgets, and how to strengthen our relationship with large corporations through efficient and effective strategies that benefit both the taxpayer and taxing authority. Our discussion was enriched by the presence of business leaders and we are very grateful for the contribution they made to our meeting.
>
> *Offshore Compliance*
>
> Although there have been some high-profile successes in the fight against offshore tax abuse, resulting in significant additional tax revenues and real improvements in transparency and exchange of information, it is far too soon to declare victory. When promoters and facilitators feel that we are tightening the net, they may simply move to a new location. We will be relentless in our pursuit of them – no matter where they may be. Our Offshore Compliance Network is building on the achievements of individual countries to improve our collective ability to deter, detect, and deal with offshore tax evasion. An early priority is to better understand the structures used to hide offshore wealth. We further agreed that collaboration must now include coordinated actions by countries to finally put an end to offshore non-compliance.[18]

In addition to the OECD Forum on Tax Administration, there is also the Joint International Tax Shelter Information Centre (JITSIC), which was formed in 2004 by Australia, Canada, the United Kingdom and the United States.[19] Since 2004, other countries have joined, notably China and Japan. In JITSIC, the countries work together to identify, understand and exchange information on abusive tax schemes and similar matters.

13. OECD, *Towards Global Tax Co-operation* (OECD 2000), available at www.oecd.org/tax/transparency/44430257.pdf.
14. OECD, *OECD Model Agreement on Exchange of Information on Tax Matters* (18 Apr. 2002), Models IBFD. *See also* OECD Global Forum Working Group on Effective Exchange of Information, *Agreement on Exchange of Information on Tax Matters* (OECD 2002), available at www.oecd.org/ctp/exchange-of-tax-information/2082215.pdf.
15. OECD, *OECD's Current Tax Agenda* pp. 56-70 (OECD 2012), available at www.oecd.org/ctp/OECDCurrentTaxAgenda2012.pdf.
16. For more information on the latest work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, *see* www.oecd.org/tax/transparency/globalforumontaxtransparencyshiftsfocustoeffectivenessofinformationexchange.htm.
17. OECD & Council of Europe, *The Convention on Mutual Administrative Assistance in Tax Matters* (2010), Treaties IBFD. For more information on the amendments that entered into force in 2011, *see* A. Pross & R. Russo, *The Amended Convention on Mutual Administrative Assistance in Tax Matters: A Powerful Tool To Counter Tax Avoidance and Evasion*, 66 Bull. Intl. Taxn. 7 (2012), Journals IBFD.
18. OECD Forum on Tax Administration, *7th meeting of the Forum on Tax Administration "Strengthening Tax Compliance through Cooperation"* (19 Jan. 2012), available at www.oecd.org/newsroom/tax7thmeetingoftheforumontaxadministrationstrengtheningtaxcompliancethroughcooperation.htm.
19. Joint International Tax Shelter Information Center (JITSIC), *Memorandum of understanding* (2004), available at www.irs.gov/pub/irs-utl/jitsic-finalmou.pdf.

3. Tax Avoidance

3.1. Tax evasion versus tax avoidance

So far in this article, tax evasion has been the main topic of discussion. A remarkable phenomenon is that, whereas historically there was thought to be a fairly clear line between tax evasion and tax avoidance in the international activities of the OECD and latterly of the European Commission, this fine line between tax evasion and tax avoidance appears to be becoming blurred, in that tax evasion and tax avoidance are almost addressed on equal footing. The Report on Harmful Tax Competition (OECD 1998) did this, as do the more recent work and reports by the OECD, the European Commission and smaller organizations, such as JITSIC.

It is, of course, very important to continue to clearly differentiate between tax evasion and tax avoidance. Tax avoidance could be said to be the more daring version of tax planning. Tax evasion is a criminal offence. Denis Healy, the former UK Chancellor of the Exchequer said some years ago:

> [t]he difference between tax avoidance and tax evasion is the thickness of a prison wall.[20]

As a starting point, there is nothing wrong with tax planning. In the words of Judge Learned Hand in *Gregory v. Helvering* (1934):

> [a]nyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the treasury; there is not even a patriotic duty to increase one's taxes.[21]

Similarly, Lord Tomlin in *Duke of Westminster* (1936) stated that:

> [e]very man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate acts is less than it otherwise would be.[22]

This is clearly a very thorny question. The cat and mouse game between taxpayer and tax administration is as old as the hills. Case law around the world from the days of *Gregory v. Helvering* (1934) and *Duke of Westminster* (1936) cases reveals that, in a domestic context, statutory or court-based general anti-avoidance rules have resulted in successes and failures for tax administrations. As Zimmer (2002) in the General Report for International Fiscal Association (IFA) on Substance and Form in Tax Matters demonstrated,[23] two key elements in most GAARs are: (1) the artificial nature of a transaction; and (2) the presence of a tax avoidance motive. If both are present, chances are that, in many cases, the tax administration will prevail and be able to levy the tax in accordance with the economic substance. But what is new in the current globalized world is the international component in many tax avoidance schemes, the magnitude of the tax planning devices and the methods used to avoid tax, the enormous base erosion, and the use of tax treaties to limit source state taxation in respect of dividends, interest, royalties and capital gains.

3.2. Subpart F

US multinational enterprises (MNEs) operate from a country that, at 35%, has one of the highest corporate income tax rates in the world. The United States also applies a system of worldwide taxation that, based on the principle of capital export neutrality, uses foreign tax credits to avoid double taxation. Nevertheless, the effective tax rate in respect of worldwide income for many very large US MNEs ranges between 0% and 15%. Why is this? It is because US MNEs keep their foreign earnings offshore, assisted by controlled foreign corporation (CFC) rules that are completely obsolete. In March 2013, the Wall Street Journal reported as follows on offshore retained earnings by Apple, Google, etc.:

> U.S. companies are making record profits. And more of the money is staying offshore, and lightly taxed.
>
> A Wall Street Journal analysis of 60 big U.S. companies found that, together, they parked a total of $166 billion offshore last year. That shielded more than 40% of their annual profits from U.S. taxes, though it left the money off-limits for paying dividends, buying back shares or making investments in the U.S.
>
> A Senate committee last year found that many tech and health-care companies have shifted intellectual property–such as patent and marketing rights–to subsidiaries in low-tax countries. The companies then record sales and profits from these lower-tax countries, which reduces their tax payments. [24]

But it is not just US MNEs that are involved. MNEs worldwide use hybrid entities and instruments, commissionaire structures, central IP and group financing companies in low-tax jurisdictions, and engage in treaty shopping to reduce taxes.

No judgement, either legal or moral, is here passed on these tax planning structures. They feature in a world where MNEs face enormous pressure from their shareholders and they must be competitive. MNEs also operate in a legal and tax regulatory environment that provides the framework for these tax planning structures, a framework that is often endorsed by the countries from and in which they operate and by international organizations, such as the OECD.

While many regard MNEs as the culprit, it should not be forgotten that much of the tax planning that is going on would not be possible without the existing framework and without the role that some countries play. It was no coincidence that the UK Exchequer Secretary to the Treasury Minister, David Gauke, and the UK Prime Minister, David Cameron, were put back-to-back in the introductory video, one expressing the UK policy that the United Kingdom wants to have the most competitive tax system in the G20[25]

20. 354 *The Economist* 8152-8163, p. 186 (2000).
21. US: SC, 1934, *Gregory v.Helvering*, 69 F.2d 809, 810-11 (2d Cir. 1934).
22. UK: HL, 1936, *Inland Revenue Commissioners v. Duke of Westminster*, 19 TC 490, [1936] AC 1.
23. F. Zimmer, *General Report*, in *Cahiers de droit fiscal international: Form and Substance in Tax Law* vol. LXXXVIIa (Kluwer L. Intl. 2002), Online Books IBFD.
24. S. Thurm & K. Linebaugh, *More U.S. Profits Parked Abroad, Saving on Taxes*, The Wall Street J. (10 Mar. 2013), available at http://online.wsj.com/article/SB10001424127887324034804578348131432634740.html.
25. D. Gauke, *UK tax reform, a model for the US?* [transcript of speech] (11 Oct. 2012), available at www.gov.uk/government/speeches/speech-by-

and the other criticizing tax avoidance and evasion.[26] It is tax competition between states, a good tax treaty network, countries that are willing to provide themselves as stepping stones in treaty shopping structures and even capital importing countries that condone treaty shopping which create the environment where all this is possible.

3.3. Domestic anti-avoidance trends

So what are the current anti-avoidance trends? First, there is activity in the progressive development of anti-abuse rules in domestic law. Countries have introduced or are thinking about introducing both GAARs and SAARs. Countries that have implemented GAARs include: Australia, Belgium, China and the United Kingdom. India has recently proposed to introduce a GAAR in its domestic legislation. The implementation of that GAAR was scheduled for April 2014. However, it has now been deferred to April 2016. These GAARs have a general application and, as stated in section 3.1., may operate if there is a tax avoidance scheme that violates the spirit and purpose of the law. Sometimes there is discretion on the part of the tax inspector, sometimes special permission is required before a GAAR can be applied and, in all cases, the application of a GAAR is subject to judicial appeal.[27]

SAARs are also increasingly fashionable. Examples include: CFC legislation to avoid the offshoring of passive income, thin capitalization rules to avoid base erosion and exit charges. More recently, SAARs have been targeted at hybrid entities and hybrid instruments. One country that could be mentioned is Denmark, which, following the extremely leveraged takeover of their national telecom company, introduced, in addition to stringent anti-base erosion rules, a rule that would deny deductibility of interest if that interest would be exempt in another country in the hands of the recipient. The Netherlands has introduced a rule that includes the denial of the deduction of interest if the monies borrowed are used to fund hybrid structures that would result in tax-exempt income in the Netherlands. In resource-rich countries and some other countries, particularly in Asia, indirect transfer rules are being introduced which target foreign investors that would wish to employ a foreign holding company to own their interests in the target country.

3.4. Treaty anti-avoidance trends

Another trend is that an increasing number of tax treaties contain comprehensive and specific anti-abuse rules. Both the OECD Model[28] and the UN Model,[29] in their related Commentaries,[30] contain comprehensive limitation on benefits clauses and other anti-avoidance rules. These are increasingly followed by countries when they negotiate tax treaties and, as a result of this, more and more tax treaties address specific avoidance cases, for example, where hybrid entities are involved.

The effectiveness of these rules is not guaranteed, both from a technical and a policy point of view. First, it is necessary to consider the technical side. Attempts to counter tax avoidance are not always successful. For instance, although a recent high profile US case involving foreign tax credit resulted in victory for the IRS (*Hewlett-Packard* (2012)),[31] taxpayers were successful in: Canada (*GlaxoSmithKline* (2010)),[32] Norway (*Dell* (2011)),[33] France (*Zimmer* (2010))[34] and Italy (*Boston Scientific* (2012)).[35] In Spain, a commissionaire structure was successfully contested by the tax authorities (*Roche* (2012)),[36] albeit on reasoning that is perceived to be somewhat unclear. Several high profile treaty cases have had mixed results, with the well-known *A Holding* (2005) case[37] in Switzerland, ending with victory for the tax authorities, and the recent *Sanofi* (2013) case[38] in India, ending with a victory for the taxpayer.

In 2010, at the IFA Congress in Rome, the topic of the General Report was "Tax Treaties and Tax Avoidance: Application of Anti-avoidance Provisions".[39] The report contained branch reports from 44 countries on their anti-avoidance provisions, the relationship between those provisions and their tax treaties, and treaty abuse itself. The overall conclusion of that report may well be quite confrontational for the international tax community. The effective-

exchequer-secretary-to-the-treasury-david-gauke-mp-uk-tax-reform-a-model-for-the-us.

26. D. Cameron, *Prime Minister David Cameron's speech to the World Economic Forum in Davos.* [transcript of speech] (24 Jan. 2013), available at www.gov.uk/government/speeches/prime-minister-david-camerons-speech-to-the-world-economic-forum-in-davos.
27. For more information on GAARs, *see* PwC, *Tax Controversy and Dispute Resolution Alert* (4 June 2012) , available at www.pwc.com/en_GX/gx/tax/newsletters/tax-controversy-dispute-resolution/assets/pwc-general-anti-avoidance-rules.pdf, which not only describes the key elements of a balanced GAAR, but also contains an overview of the features of the GAARs of 17 countries.
28. Most recently, *OECD Model Tax Convention on Income and on Capital* (22 July 2010), Models IBFD.
29. Most recently, *UN Model Tax Convention on Income and on Capital* (1 Jan. 2011), Models IBFD.
30. Most recently, *OECD Model Tax Convention on Income and on Capital: Commentaries* (22 July 2010), Models IBFD, and *UN Model Tax Convention on Income and on Capital: Commentaries* (1 Jan. 2011), Models IBFD.
31. US: TC, 14 May 2012, *Hewlett-Packard Company and Consolidated Subsidiaries v. Commissioner of Internal Revenue*, Nos. 21976-07, 10075-08, Tax Treaty Case Law IBFD.
32. CA: FCA, 26 July 2010, *GlaxoSmithKline Inc. v. Her Majesty the Queen*, No A-345-08.
33. NO: SC, 2 Dec. 2011, *Dell Products v. Tax East*, HR-2011-02245-A, (sak nr. 2011/755), Tax Treaty Case Law IBFD.
34. FR: CE, 31 Mar. 2010, *Zimmer Ltd v. Ministre de l'Économie, des Finances et de l'Industries*, Cases 304715 and 308525, Tax Treaty Case Law IBFD.
35. IT: CC, 9 Mar. 2012, *Boston Scientific*, No. 3769.
36. ES: TS, 12 Jan. 2012, *Roche*, Case 1626/2008, Tax Treaty Case Law IBFD.
37. CH: BG, 28 Nov. 2005, *A Holding Aps*, No. 2A.239/2005, Tax Treaty Case Law IBFD.
38. IN: APHC, 15 Feb. 2013, *Sanofi Pasteur Holding SA v. Department of Revenue*, Nos 14212/2010, 3339 & 3358/2012. *See also* R. Jain, *Sanofi case clears haze on indirect share transfer tax,* The Economic Times (India Times)(28 Feb. 2013), available at http://articles.economictimes.indiatimes.com/2013-02-28/news/37352220_1_vodafone-controversy-shanh-sanofi-case.
39. S. van Weeghel, *General Report*, in *Cahiers de droit fiscal international; Tax Treaties and Tax Avoidance: Application of Anti-avoidance Provisions*, vol. 95a (Sdu Uitgevers 2010), Online Books IBFD.

ness of anti-abuse rules is often doubtful, domestic anti-avoidance rules cannot always be reconciled with treaty obligations, and treaty abuse cases, even when these cases internationally have largely similar fact patterns, result in completely different outcomes, depending on the appreciation of these facts by the domestic courts and the legal culture of the countries involved. For example, CFC legislation was held to be compatible with treaty obligations in Brazil,[40] Finland[41] and Japan,[42] but not in Brazil[43] (in an earlier decision) and France.[44] Clear and substance-light treaty shopping structures remained successful following litigation to the highest courts in Canada,[45] India[46] and the Netherlands,[47] but were completely denied in Israel[48] and Switzerland.[49]

From a policy perspective, these developments are worrisome. Internationally, there is no level playing field and the increasing number of uncoordinated anti-abuse rules increases the potential for double taxation. There is no guarantee that the denial of interest deductions under anti-base erosion rules in one country will result in an exemption of that interest in the country of the recipient. On the contrary, there is rarely any international coordination. This, in and of itself, will result in additional and inefficient structuring, just to alleviate double taxation.

4. The OECD and Base Erosion and Profit Shifting (BEPS)

Following the financial crisis that started in 2008, the OECD has stepped up its work on aggressive tax planning. It has issued publications on bank losses,[50] corporate loss utilization,[51] tackling aggressive tax planning,[52] hybrid mismatch arrangements[53] and, very recently, aggressive tax planning based on after-tax hedging.[54] The OECD has also set up a steering group, the Aggressive Tax Planning Steering Group, which is a subgroup of Working Party No. 10 on Exchange of Information and Tax Compliance. For OECD member countries that actively contribute to the OECD aggressive tax planning directory, the OECD has opened access to the directory, which, based on the OECD's own claims, has contributed significantly to the detection of aggressive tax planning structures.

In 2012, the G20 leaders expressed the need to prevent base erosion and profit shifting,[55] and the OECD has started a project on base erosion and profit shifting, now better known as BEPS. Earlier in 2013, the OECD published its report addressing BEPS.[56] This report builds on available studies and data on BEPS and concludes that the tax practices of some MNEs have become more aggressive over time, thereby raising, according to the OECD, serious compliance and fairness issues. The key pressure areas identified are:

- international mismatches in entity and instrument characterization, including hybrid mismatch arrangement and arbitrage;
- the application of treaty concepts to profits derived from the delivery of digital goods and services;
- the tax treatment of related party debt financing, captive insurance and other intra-group financial transactions;
- transfer pricing, in particular, in relation to the shifting of risks and intangibles, the artificial splitting of ownership of assets between legal entities within a group, and transactions between these entities that would rarely take place between independents;
- the effectiveness of anti-avoidance measures, in particular, GAARs, CFC regimes, thin capitalization rules and rules to prevent tax treaty abuse; and
- the availability of harmful preferential regimes.

The report concludes that the OECD should develop a global action plan to address BEPS. The OECD has, therefore, undertaken the incredibly ambitious task to derive an initial comprehensive action plan that was to be discussed at the meeting of the Committee on Fiscal Affairs in June 2013; a plan that should identify actions needed to address BEPS, set deadlines to implement these actions, and identify the resources needed and the technology to implement the actions. At the time of the writing of this article, the OECD was working with interested parties to deliver on this ambitious task.

According to the OECD, the different components of the action plan will address: hybrid mismatch arrangements, improvement on transfer pricing rules, updated solutions to the issues related to jurisdiction to tax, in particular, in the area of digital goods and services, more effective anti-avoidance measures, rules on the treatment of intra-group financial transactions, and solutions to counter harmful regimes by more effectively taking into account factors such as transparency and substance.

40. BR: CARF, 17 Sept. 2008, *Case 101-97,070*.
41. FI: KHO, 20 Mar. 2002, *Case 2002:26*, Tax Treaty Case Law IBFD.
42. JP: SC, 29 Oct. 2009, *Glaxo Kabushiki Kaisha v. Director of Kojimachi Tax Office*, No. 2008 (Gyo-Hi) No. 91, Tax Treaty Case Law IBFD.
43. BR: CARF, 19 Oct. 2006, *Case 101-95,802*.
44. FR: CE, 28 Jun. 2002, *Schneider Electric v. Ministre de l'Économie, des Finances et de l'Industries*, Case 232 276, Tax Treaty Case Law IBFD.
45. CA: FCA, 13 Jun. 2007, *Mil (Investments) S.A. v. Her Majesty the Queen*, no. A-416-06, Tax Treaty Case Law IBFD.
46. IN: SC, 7 Oct. 2003, *Azadi Bachao Andolan v. Union of India*, Tax Treaty Case Law IBFD.
47. NL: HR, 18 May 1994, *Interposed Antilles company case*, no. 28.296, Tax Treaty Case Law IBFD.
48. IR: DC, 30 Dec. 2007, *Yanko-Weiss Holdings (1996) Ltd v. Hulon Assessment Officer*, no. 5663/07, Tax Treaty Case Law IBFD.
49. CH: BG. 28 Nov. 2005, *Denmark case*, no. 2A.239/2005, Tax Treaty Case Law IBFD.
50. OECD, *Addressing Tax Risks Involving Bank Losses* (OECD 2010), available at www.oecd.org/tax/aggressive/46023583.pdf.
51. OECD, *Corporate Loss Utilisation through Aggressive Tax Planning* (OECD 2011), available at http://dx.doi.org/10.1787/9789264119222-en.
52. OECD, *Tackling Aggressive Tax Planning through Improved Transparency and Disclosure* (OECD 2011), available at www.oecd.org/tax/exchange-of-tax-information/48322860.pdf.
53. OECD, *Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues* (OECD 2012), International Organizations' Documentation IBFD, also available at www.oecd.org/ctp/aggressive/HYBRIDS_ENG_Final_October2012.pdf.
54. OECD, *Aggressive Tax Planning based on After-Tax Hedging* (OECD 2013), available at http://www.oecd.org/tax/aggressive/after-tax-hedging.htm.
55. G20, *Communiqué from G20 leaders meeting(Los Cabos, Mexico)* pt. 48 (18-19 June 2012), available at www.g20.org/load/780987820.
56. OECD, *Addressing Base Erosion and Profit Shifting* (OECD 2013), available at http://dx.doi.org/10.1787/9789264192744-en.

It is easy to see why the OECD has produced such an ambitious agenda. The available data suggests that base erosion and profit shifting through the use of hybrid instruments, transfer pricing, tax treaties, etc. have increased significantly, that the existing tax rules that were developed in the 1920s are not adequate to allocate tax jurisdiction in today's world, and that this results in discomfort at all levels. There is enormous political pressure on the OECD to come up with a comprehensive solution. The political pressure, of course, is caused in part by the public outrage that can be seen in the introductory video. Politically, it is just not sustainable for governments that banks are bailed out, budget deficits rise from these bailouts, and that all of this is paid for by the public at large, while the notion exists that big business can avoid tax by clever structuring.

The task that the OECD has undertaken is not only very large but also very challenging. At a conceptual level, it is easy to agree on an action plan addressing the pressure areas identified by the OECD. The big question is how realistic it is to expect that a sufficient consensus will be reached to implement the action plan. As the video compilation illustrates, there is inherent tension in the international system and interests of the countries involved are conflicting. It should again be noted that David Gauke, UK Exchequer Secretary to the Treasury Minister, expressed in the video the view that the United Kingdom should have the most competitive tax system of the G20 almost at the same time that David Cameron, UK Prime Minister, was declaring war on tax avoidance. However, the features of the most competitive tax system that Mr Gauke has in mind are features that directly contribute to the type of base erosion and profit shifting that the OECD is trying to address in its BEPS project. And it is not just tax havens that are under consideration here. Large and economically powerful countries are worried about base erosion and profit shifting when their own tax base is at stake, but go the extra mile to incorporate features into their tax laws that make them attractive places for the head offices of MNEs, and these features include the modest taxation of the income from intangibles and group financing income. If the example of the United States is considered, the conclusion is that its complicated CFC rules combined with the check-the-box rules allow US-based MNEs to defer their tax on foreign-earned income forever. And it does not take a genius to understand that this situation gives US MNEs a clear competitive advantage.

Again, no moral judgement is made, but, rather, it is concluded as a fact that there are significant forces that may stand in the way of consensus. Consensus is needed, either to move ahead with the BEPS agenda through hard law or through peer pressure very much like the peer review undertaken by the Global Forum.

5. The Work of the European Commission

Another institution that is increasingly active in the same area as the OECD is the European Commission. On 2 March 2012, the European Council called on the European Commission "to rapidly develop concrete ways to improve the fight against tax fraud and tax evasion, including in relation to third countries and to report by June 2012".[57] One month later, the European Parliament adopted a resolution that also calls for concrete ways to counter tax fraud and tax evasion.[58]

In the meantime, the European Commission has commenced its work. In February 2012, it launched a public consultation in which it requested contributors for factual examples and possible ways to deal with double non-taxation cases.[59]

On 27 June 2012, in response to a request made by the Council, the Commission released a Communication to the European Parliament and the Council.[60] In the Communication, the European Commission briefly set out how existing instruments and the adoption of pending proposals could be used to improve tax compliance and reduce fraud and evasion. More importantly, it also identified areas where the European Union and Member States could benefit from further legislative action or coordination. The June 2012 Communication was followed on 6 December 2012 by the presentation of the European Commission's Action Plan to strengthen the fight against tax fraud and tax evasion.[61] Together with the Action Plan, the European Commission presented two recommendations to the Member States.

The first recommendation concerns measures that Member States could take to encourage third countries to meet a minimum standard of good governance in tax matters.[62] The European Commission has recommended to the Member States that they should set out criteria to identify third countries that do not meet certain minimum standards of good governance in tax matters. It has also recommended the Member States develop a "tool box" containing measures that they could take to put pressure on third countries that not meet those criteria, for example, blacklisting and avoiding the promotion of business with blacklisted countries.

57. European Council, *Conclusions of the meeting in Brussels* pt. 9 (1-2 Mar. 2012), available at http://europa.eu/rapid/press-release_DOC-12-4_en.pdf.
58. European Parliament, *Resolution of 19 April 2012 on the call for concrete ways to combat tax fraud and tax evasion* (19 Apr. 2012), available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-137.
59. European Commission, *Consultation Document, The internal market: factual examples of double non-taxation cases* (29 Feb. 2012), available at http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/double_non_tax/consultation_paper_en.pdf.
60. European Commission, *Communication from the Commission to the European Parliament and the Council on concrete ways to reinforce the fight against tax fraud evasion and tax evasion including in relation to third countries*, COM(2012) 351 final (27 June 2012), available at http://ec.europa.eu/taxation_customs/resources/documents/common/publications/com_reports/taxation/com%282012%29351_en.pdf.
61. European Commission, *An Action Plan to strengthen the fight against tax fraud and tax evasion*, COM(2012) 722 final (6 Dec. 2012), available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_fraud_evasion/com_2012_722_en.pdf.
62. European Commission, *Commission recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters*, C(2012) 8805 final (6 Dec. 2012), available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_fraud_evasion/c_2012_8805_en.pdf.

The second recommendation that the European Commission made is on aggressive tax planning.[63] The European Commission has encouraged the Member States to include a clause in their tax treaties to resolve a specifically identified type of double non-taxation. It has also recommended the use of a common GAAR.

6. Public Outrage

This leads us back to the start, i.e. to public outrage. The video contains just a small sample of expressions of public outrage and political activism regarding tax planning by MNEs. Included in it are two fragments from the hearings of the UK Parliament's Public Accounts Committee chaired by Margaret Hodge, where she stated that:

> We are not accusing you of being illegal. We are accusing you of being immoral.

It is clear from the reactions of the representatives of the MNEs and the "Big Four" accountancy firms that these bodies are in a state of bewilderment and denial. It is also clear that the interest of the public and the politicians in this topic is here to stay. There are many non-governmental organizations, such as the Tax Justice Network, that, in a very consistent manner, arouse interest, investigate and exercise influence, and they are here to stay. Politicians, under pressure from their constituencies and the media, will also remain interested in this topic. The balanced response must come from international organizations, such as the OECD and the United Nations, governments, MNEs and the tax advising community. In addition, it is clearly in the interest of MNEs to understand the dynamics of this movement. As Owens (2004) stated, tax is today where the environment was ten years ago.[64] The awareness of the public perception of tax planning must be part of decision making in corporate structuring. This is not just a corporate and social responsibility; it also goes to the heart of the business of some MNEs. When the managing director of Starbucks UK announced that it would voluntarily pay tax in the United Kingdom,[65] he did not do that because all of a sudden he became very fond of Margaret Hodge, but, rather, because he was afraid of losing coffee drinkers. In short, a bad reputation when it comes to tax planning, deserved or not, may be bad for business.

7. Conclusions: Some Predictions for the Future

What the near future will bring has a number of certainties. The certainties are that, in spite of enhanced relationships, more and intense collaboration between enterprises and the tax authorities, there will be an increase in litigation regarding aggressive tax planning structures, more anti-avoidance rules, both GAARs and SAARs, unilaterally adopted, and more SAARs, including limitation on benefits clauses in tax treaties. As a result, there will also be more unresolved double taxation. This is bad. Hopefully governments will take their responsibility seriously and act concertedly and continue to be aware of not only tax avoidance but also the avoidance of double taxation, as a playing field unobstructed by double taxation results in more international trade and economic activity in general.

In the short to medium term, MNEs should ask themselves how to address best the dynamics of this new world. There is also a significant cultural component to this. Some MNEs have a significantly higher appetite for risk and are more driven by the effective tax rate than others. But all MNEs could contribute by explaining to the public the important role that they play in today's world, and how beneficial they can be in terms of innovation contributing to public wellbeing, employment and revenue. While it is important to reflect on possibilities of letting taxation follow economic activity, to be transparent as to the geographical distribution of taxation and to adopt a proactive attitude in this respect, it is unrealistic to expect that MNEs will be guided by some vague notion, such as a "fair share". After all, what is a "fair share" of taxation lies in the eye of the beholder. Business must be able to rely on clear rules and should then act responsibly. Finally, as it is often forgotten, MNEs are not kingdoms in their own right. There are always shareholders behind them and, through pension funds, charities, endowments, mutual funds and the like, it is often ultimately the same protestor in the street who is a stakeholder in big business.

63. European Commission, *Commission recommendation on aggressive tax planning*, C(2012) 8806 final (6 Dec. 2012), available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_fraud_evasion/c_2012_8806_en.pdf.
64. *See* V. Houlder, *The tax avoidance story as a morality tale*, The Fin. Times(22 Nov. 2004), available at www.ft.com/intl/cms/s/0/a6fee81c-3c2a-11d9-8b17-00000e2511c8.html#axzz2Sm9V0pL7 (paywall).
65. S. Neville & J. Treanor, *Starbucks to pay £20m in tax over next two years after customer revolt*, The Guardian (6 Dec. 2012), available at www.guardian.co.uk/business/2012/dec/06/starbucks-to-pay-10m-corporation-tax.