Tax professionals under societal pressure: a Dutch case study on responses to BEPS

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4 The BEPS discussion

This chapter contains a description of the BEPS-related developments in the field of corporate taxation (i.e., the BEPS discussion). The first part of this chapter will provide a description of the regime of international taxation (pre-BEPS) including its sources and fundamental concepts and principles. The second section will describe corporate base erosion and profit shifting and the corporate tax regime's vulnerability to tax planning, focusing on the pre-BEPS situation. The BEPS-related developments in international corporate taxation are discussed as well as their ability to address the issues identified in the previous section. Afterwards, the chapter will explore to what degree international corporate tax planning remains possible in a post-BEPS era. The chapter will finish with a conclusion.

4.1 Fundamentals of international corporate taxation

4.1.1 Sources of international tax law

The international corporate tax regime is made up of domestic tax law, bilateral tax treaties and soft law (Avi-Yonah, 2007; Devereux et al., 2021; Rixen, 2011). Given these sources, the international corporate tax regime is not necessarily built on a coherent set of principles and is generally not regarded a 'system' as such. Rather, the international tax regime is basically a network of (predominantly)[1] bilateral tax treaties (Avi-Yonah, 2007) with domestic tax law as its primary building block (Brauner, 2014). Most jurisdictions tax income based on both the residence and source principle of taxation (Pinto, 2007). In such a tax system, residents are taxed on their worldwide income and non-residents are taxed on the income generated in the source jurisdiction. As a result, income associated with international investment can lead to double taxation when it triggers a tax liability in both the residence and source country (Lang & Owens, 2014). To remove such fiscal barriers to international trade and investment, countries have concluded bilateral tax treaties that (among other things) aim to eliminate double taxation. Bilateral tax treaties are agreements between two jurisdictions on how taxing rights are allocated. Hence, the international tax system emerged in an effort to eliminate double taxation (Rixen, 2011).

1 The Multilateral Instrument (MLI) is an exception.

Despite the fact that the international tax regime is made up of domestic tax law and bilateral tax treaties, coordination through international institutions occurs as well. In the case of European Union (EU) member states, the European Commission (EC) influences domestic tax systems through primary (in particular through the fundamental freedoms as set out in the Treaty of the Functioning of the European Union)[2] and secondary (e.g., directives and guidelines)[3] EU law. Another important institution in international taxation is the Organisation for Economic Cooperation and Development (OECD). As opposed to the EC – which is concerned with developing 'hard law', the primary mechanism through which the OECD exercises influence is the development and promotion of international norms (i.e., 'soft law'; Porter & Webb, 2004). Lacking the power to enforce compliance, the OECD relies on voluntary compliance by countries that wish to conform to internationally agreed upon norms for behavior (Webb, 2004).

Despite the fact that the OECD is unable to impose its norms on countries, it is considered a key actor in international taxation (Christians, 2007; Webb, 2004). This is evidenced by the fact that countries comply with OECD norms, even against their own self-interest (Christians, 2007) and international tax practices have been argued to generally converge in the direction of the norms developed by the OECD (Brauner, 2014). As a result, "international tax professionals all speak the same "language"" (p. 62). One example of successful tax coordination by the OECD is its work on setting norms for bilateral tax treaties. It is estimated that the majority of tax treaties (approximately 3,000) reflect the OECD Model Tax Convention (Brauner, 2014; Christians, 2017). As such, the OECD is an important source for international consensus on the tax treaty practice (Ash & Marian, 2019).

The OECD is not the only international institution that influences international (corporate) taxation through soft law. In the realm of bilateral tax treaties, the United Nations (UN) and the United States (US) have developed alternatives to the OECD Model Convention. Although both alternatives are very similar to the OECD Model Convention, there are some important differences. For example, the UN Model tends to impose fewer restrictions on the taxing rights of source countries.[4] Of the three Model Conventions, the OECD Model is most influential. The OECD's leading position as a standard setter has been attributed to the fact that it is able to devote more resources and expertise to tax affairs as compared to rival institutions such as the United Nations (Christians, 2017; Rixen, 2011).

2 Domestic tax systems are influenced by the fundamental freedoms through jurisprudence of the Court of Justice of the European Union (CJEU). When CJEU finds that features of EU member states' tax systems are incompatible with the fundamental freedoms, such features require dismantling. The Cadbury Schweppes case is an influential example.

3 For example through the Interest and Royalties Directive.

4 Developing countries are generally source countries. Hence, by allocating more taxing rights to source countries, the UN Model provides developing countries with a stronger position.

4.1.2 Features of international corporate taxation

Although the regime of international corporate taxation is not necessarily a coherent, principled system, three central features can be observed: a distinction between residence and source, a distinction between active and passive income, and the separate entity approach (Devereux et al., 2021). As aforementioned, corporate income can be subject to tax both in the country of residence and the source country. The international corporate tax regime (i.e., domestic tax law overlaid with bilateral tax treaties) attributes the taxing rights of such corporate income between the source and residence country.

To understand how corporate income is generally allocated between source and residence countries, it is important to distinguish between two types of corporate income: active and passive income. In the context of corporate taxation, active income derives from participation in business activities (i.e., business profit) and passive income derives from investments (i.e., interest, dividends, royalties and capital gains). Broadly speaking, treaties allocate the right to tax active income to the source country and the right to tax passive income to the country of residence (Avi-Yonah, 2006; Devereux et al., 2021).

A third feature of the international tax regime is the separate entity approach (Devereux et al., 2021). According to the OECD (2022), this is "the approach of treating the members of an MNE group as operating as separate entities rather than as inseparable parts of a single unified business". Consequently, transactions between members of a group have real tax consequences.

4.2 International corporate tax planning

4.2.1 Vulnerability to tax planning

Some characteristics of the international corporate tax regime make it vulnerable to corporate base erosion and profit shifting (Ault, 2013; Avi-Yonah & Xu, 2017; Devereux et al., 2021). The first element is the fact that the international tax regime is generally unharmonized and provides opportunities for tax arbitrage. Tax arbitrage refers to "transactions that are designed to take advantage of differences between national tax systems" (Avi-Yonah, 2007, p. 137). For example, such transactions exploit laws of corporate residency, classification differences and tax ownership (Avi-Yonah, 2007; Rosenzweig, 2006). Tax sovereignty allows countries to unilaterally design their tax system (Li, 2003; Rixen, 2011). Resulting differences in the tax treatment of corporate transactions or differences in tax rates between countries incentivize MNEs to exploit such mismatches and loopholes.

The second element – tax competition – is a related characteristic. Globalization and the removal of (fiscal) trade barriers have increased capital

mobility and allow MNEs to move investments across borders more efficiently (OECD, 1998). Consequently, globalization increased competitive pressure on corporate tax policy and motivated countries to engage in tax competition by making "adjustments where appropriate to improve the "fiscal climate"" (p. 13). Well-known examples of tax competition include lowering the statutory tax rate and providing specific facilities such as patent boxes. By introducing tax incentives for MNEs, tax competition between countries has created an environment that encourages corporate tax planning (Durst, 2014).

Third, territorial tax systems and worldwide tax systems with deferral provide companies the opportunity to shift profits to low-tax jurisdictions because company profits earned outside of the company's country of residence are not (currently) taxed by the country of residence (Ault, 2013).[5] This as opposed to a 'pure' worldwide tax system which would limit MNEs' ability to benefit from profit shifting because foreign-earned income is included in the domestic tax base (Keightly & Stupak, 2015). The fourth element – the separate entity approach – is closely related to the previous element and also creates opportunities for corporate tax planning (Avi-Yonah & Xu, 2017). By strategically allocating risk, assets and functions, companies can shift profits to entities in low-tax jurisdictions. Although the arm's-length principle limits MNEs' ability to misprice intra-company transactions and consequently shift profits (Devereux et al., 2021), it is flawed. The 'arm's-length price' is open to subjective interpretation and might not exist when there is no comparable third-party transaction (Beer et al., 2020; Mason, 2020). For example, determining a fair market value for IP is especially challenging due to the lack of a market in which the transaction can be compared (Barket et al., 2017). Hence, the corporate tax regime allows MNEs to shift profits to group entities (the separate entity approach) located in low-tax jurisdictions (territorial tax systems or worldwide tax systems with deferral).

The fifth element of international corporate taxation that is vulnerable to tax planning is the concept of residency. Corporate residency is generally established using either the company's formal legal connection (e.g., location of incorporation) or the company's economic connection (e.g., place where the board of directors meet; Ault & Arnold, 2004; Avi-Yonah, 2003;

5 Worldwide and territorial tax systems are the two major alternatives that are generally distinguished. In a 'pure' worldwide tax systems, residents' entire foreign income is subject to the income tax of the country of residence and double taxation is relieved through a foreign tax credit (the foreign tax credit is usually limited to the amount of the residence tax on the foreign income). In a 'pure' territorial tax system, residents' foreign income is not taxed in the residence country. This is usually accomplished through an exemption. However, most countries do not operate a 'pure' worldwide or territorial system. For example, countries that can be characterized as operating on a worldwide system usually permit deferral of residence tax on foreign income until repatriation (Fleming et al., 2008). Hence, the residence tax consequences of a worldwide system with deferral are very similar to those under a territorial system when the deferral period is lengthy.

Hastings & Cremers, 2017). An important criticism of the residence concept is that companies can manipulate their residency rather easily (Desai, 2009; Elkins, 2017; Hastings & Cremers, 2017). In particular the location-of-incorporation approach is vulnerable to manipulation and allows companies to operate in a low-tax jurisdiction with minimal substance (e.g., letterbox companies; Avi-Yonah, 2003; Hastings & Cremers, 2017). Furthermore, as globalization has caused companies to become truly multinational firms, residency indicators can point towards different locations (Desai, 2009). Hence, the manipulability opens up avenues for tax planning such as profit shifting and treaty shopping.

The final element is the permanent establishment (PE) concept. This concept is relevant when it comes to allocating taxing rights of business profits taxable both in the country of residence and the country of source. As a general rule, source countries are granted the right to tax business profits of non-residents if these are attributable to a permanent establishment.[6] Broadly speaking, the threshold of a permanent establishment is reached when there is sufficient physical presence.[7] One issue concerning the permanent establishment concept is that its suitability as a threshold for taxation in modern digitalized economies is questionable (Dos Santos & Lopes, 2016; Hebous, 2021). As companies have developed into global firms that rely increasingly on intellectual property, they can earn substantial profits in a country without having a taxable (i.e., physical) presence (Hebous, 2021). Furthermore, the permanent establishment concept is vulnerable to tax planning because companies can artificially prevent triggering a taxable presence in countries where they generate business profits (Dos Santos & Lopes, 2016).

4.2.2 Corporate BEPS

The previous section provided an explanation of the elements of the international corporate tax regime that make it vulnerable to corporate tax planning. This section will elaborate on the manifestations of corporate tax planning and base erosion and profit shifting in particular. The literature on corporate tax planning has identified the main channels through which MNEs achieve BEPS. Note that this list is not exhaustive, but aims to provide an overview of the most important channels. First, MNEs can engage in strategic transfer pricing to reduce their tax burden by inflating prices of exports from low-tax jurisdictions or artificially lowering of prices for exports from high-tax jurisdictions (Beer et al., 2020; Hassett & Newmark, 2008; Riedel, 2018). Second, MNEs can strategically locate assets, risk and intellectual property to reduce their tax burden (Beer et al., 2020; Riedel, 2018). For example, the income associated with valuable IP can be subject

6 Article 5 of the OECD Model Tax Convention.
7 Idem.

to lower levels of taxation by transferring the IP to an affiliate located in a low-tax jurisdiction. Third, MNEs can reduce their tax bill by using intracompany debt (Beer et al., 2020; Møen et al., 2011; Riedel, 2018). MNEs can benefit from differences in statutory tax rates by lending to affiliates in high-tax jurisdictions from affiliates in low-tax jurisdictions. Fourth, MNEs can achieve a reduction of withholding taxes under favorable tax treaties by diverting intra-company transactions through a third country (Beer et al., 2020; Riedel, 2018). Through such treaty shopping, MNEs obtain a benefit that otherwise wouldn't have been granted (Weyzig, 2013). Finally, companies can achieve a reduction of their tax burden by using hybrid mismatch arrangements (Riedel, 2018). For example, MNEs could achieve double deductions, a deduction without the corresponding income inclusion or a foreign tax credit by exploiting qualification differences of hybrid financial instruments (Riedel, 2018).

The OECD (2013) identifies four elements that are characteristic of BEPS structures. The CV/BV structure is a well-known tax planning structure that was very common among US MNEs (Figure 2).[8] The structure is basically a hybrid mismatch arrangement that depends on the use of a hybrid entity (a Dutch limited partnership referred to as a CV) to achieve a tax reduction. The first element of corporate BEPS is minimization of the tax burden in a foreign operating or source country that can be characterized as a medium or high tax jurisdictions. Such minimization can be achieved through profit shifting (i.e., shifting the gross profits to a low tax jurisdiction using trading structures) or base erosion (i.e., minimizing net profits). For example, the CV might license IP rights to the foreign operating companies which results in a deductible royalty payment at the level of the operating companies.[9] A second element identified by the OECD is the low or no withholding tax at the source. Through the Dutch BV, the MNE gains access to the treaty benefits – a rate reduction or exemption of withholding taxes – associated with the tax treaty between the Netherlands and the foreign operating country. The third element of a characteristic BEPS structure is no or low taxation at the level of the recipient with entitlement to substantial non-routine profits. In our example, this third element is achieved by using a hybrid mismatch arrangement. For Dutch tax purposes, the CV (i.e., the level of the recipient) is considered fiscally transparent. As a consequence, the CV's income is not liable to corporate income tax in the Netherlands. The CV's income is not taxed in the US as well as long as profits are not distributed because the CV is considered non-transparent for US tax purposes. The fourth element is that there should be no current taxation at the level of the ultimate parent.

8 The American Chamber of Commerce (AmCham) estimates that 80% of US investments in the Netherlands are done through the CV/BV or similar structures. This information is derived from documents obtained under the Freedom of Information Act.

9 In reality, the IP rights are sublicensed to the foreign operating companies through the Dutch BV. Consequently, a small profit is subject to corporate income tax at the level of the BV.

At least prior to the 2018 US tax reform, the MNE could achieve deferral of taxation at the level of the US until repatriation due to the check-the-box rules.

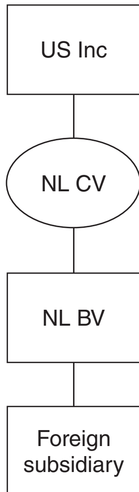

Figure 2 Schematic representation of the CV/BV structure.

4.3 BEPS-related developments

The economic, political and societal developments that gave rise to the BEPS project appear to have been the perfect storm that enabled the OECD to challenge tax practices associated with tax planning (Brauner, 2014). In the aftermath of the global financial crisis, public criticism of corporate tax planning began to emerge. Though not confined to the UK, the public debate on corporate tax planning that took place in this country is often used to illustrate the public discourse. Exemplar is the alleged little amount of taxes paid by Starbucks in the UK that was widely reported by the British media. Starbucks' tax bill caught the attention of the media as its low taxable profits were seemingly at odds with the high profitability it presented during investor calls. In other words, "You could think of Starbucks' differing versions of its experience in the UK as two different coffees. To its investors, it sells an espresso – strong and vibrant. The UK taxman gets a watered-down Americano".[10] Such media reports were followed by public discontent and made the company subject of customer boycotts. The concerns of corporate tax planning were not confined to the public but shared by politicians. This is evidenced by the now well-known quote by Margaret Hodge during the public hearing of MNEs in the British House of Com-

10 Cited from a media report by Tom Bergin for Reuters. Retrieved from: https://www.reuters.com/article/us-britain-starbucks-tax-idUSBRE89E0EX20121015.

mons: “We are not accusing you of being illegal, we are accusing you of being immoral”.[11]

That fact that tax planning had become an established topic of interest to investigative journalists globally is further evidenced by the LuxLeaks, the Panama Papers, the Paradise Papers, and the Pandora Papers.[12] These investigative projects by the International Consortium of Investigative Journalists have brought to light the apparent widespread use of avenues for tax planning (and evasion) by MNEs and high-net-worth-individuals. Furthermore, the European Commission announced investigations of tax rulings and regimes in the context of prohibited fiscal state aid.[13] Similarly, non-governmental organizations (NGOs), such as Oxfam Novib and the Tax Justice Network, have also paid attention to allegedly unfair corporate tax practices (Seabrooke & Wigan, 2018). Their reports often stress the consequences of corporate tax planning on society[14] and call on governments to create more fair and equal tax systems. A related development concerns growing attention for tax strategy in the context of corporate social responsibility (CSR). As scholars increasingly explored the relationship between responsible tax behavior and CSR (e.g., Doyle & Bendell, 2009; Hoi et al., 2013), and business and investors were increasingly addressing tax strategy as part of responsible citizenship[15], tax became a theme of CSR.

These global societal concerns of corporate tax planning[16] and the budgetary deficits that countries were struggling with as a result of the global financial crisis[17], motivated governments to address corporate tax

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11 Several media reports on this hearing have been published. For example, ‘Starbucks, Google and Amazon grilled over tax avoidance’ (BBC, 2012): https://www.bbc.com/news/business-20288077.

12 LuxLeaks is a journalistic investigation published in 2014 based on leaked confidential documents of Luxembourgish tax rulings. The Panama Papers were published in 2015 and covered confidential documents by service provider Mossack Fonseca. The Paradise Papers covered leaked documents by several organizations (including law firms and trust offices) with respect to international tax avoidance published in 2017. The Pandora Papers cover confidential documents associated with different service providers published in 2021.

13 For example, the EC announced an investigation of the alleged state aid by the Netherlands to Starbucks.

14 For example, see an Oxfam report on revenue losses in Africa. Retrieved from: https://www.oxfam.org/en/press-releases/africa-losing-billions-due-offshore-deals-governments-must-do-more-stop-tax-abuse.

15 For example, KPMG published a discussion paper in 2007 entitled ‘Tax and Corporate Social Responsibility. Another example includes the fact that tax is incorporated in the Principles for Responsible Investment.

16 As mentioned, criticism of corporate tax planning was not confined to the UK. For instance, Jesse Drucker, an investigative reporter working in the U.S., has also reported on corporate tax planning. E.g., see https://www.bloomberg.com/news/articles/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.

17 For example, see a paper by the European Central Bank from 2010 that investigates how countries in the European Union respond to the global financial crisis. Retrieved from: https://www.ecb.europa.eu/pub/pdf/scpops/ecbocp109.pdf.

planning. It seemed that "tax evasion and avoidance are issues whose time has come. After years of abuse people across the planet are rightly calling for action".[18] Hence, the G20 charged the OECD with the task of developing a plan to address corporate base erosion and profit shifting. These efforts by the OECD have resulted in the initiation of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project in 2013.

4.3.1 The OECD/G20 BEPS project

4.3.1.1 General structure of the BEPS project

In 2013, the OECD published the Action Plan on Base Erosion and Profit Shifting which illustrates the consequences and issues associated with BEPS and provides the outline of a plan to tackle it. Two years later, the OECD published the final BEPS-reports which "provide countries with instruments, domestic and international, aiming at better aligning rights to tax with real economic activity" (OECD, 2013, p. 11). The final BEPS reports contain 15 Actions that aim to modernize international corporate income taxation and to address corporate tax planning (OECD, 2015a).[19] Although each Action addresses a different issue, the Actions can generally be clustered around three major themes: coherence, substance, and transparency.

The BEPS project has resulted in a variety of outcomes ranging from minimum standards to recommendations and best practices (Christians & Shay, 2017). The minimum standards are aspects of tax policy on which participating jurisdictions were able to reach consensus. The four minimum standards are related to harmful tax practices (Action 5), treaty abuse (Action 6), country-by-country reporting (Action 13) and cross-border dispute resolution (Acton 14). The recommendations (e.g., Action 2) are outcomes on which participating countries were able to reach agreement in principle, and on which convergence is expected over time. The best practices (e.g., Action 4) are outcomes with "a subjective or qualitative character that could not readily be monitored or evaluated or because not all OECD and G20 countries are willing to commit to them at this stage" (OECD, 2015b, p 12). Hence, best practices are not part of the minimum standards and member of the Inclusive Framework are not obligated to implement them.

However, some issues did not yet result in any recommendations and were developed further. This concerned Action 1, the tax challenges of the digital economy, and Action 15, the multilateral instrument. The negotiations

18 This is a quote obtained from a factsheet prepared by the UK. During the UK's Presidency of G8 in 2013, tax issues were prioritized as a matter of concern. Retrieved from: https://www.gov.uk/government/publications/g8-factsheet-tax.

19 An overview of the 15 Actions can be found on the OECD website: https://www.oecd.org/tax/beps/beps-actions/. The OECD refers to such corporate tax planning as 'base erosion and profit shifting' (BEPS).

on the multilateral instrument (Action 15) were concluded in November 2016 and the MLI entered into force in July 2018. As of December 2022, 100 jurisdictions have signed the convention. Action 1 was developed further by the Inclusive Framework and resulted in the two-pillar approach (section 4.3.2).

4.3.1.2 Implementation

To facilitate the implementation of the Actions, the BEPS Inclusive Framework was introduced in 2016. The Inclusive Framework is a network that enables participating states (both OECD and non-OECD member countries) to collaborate "on developing standards on BEPS related issues and review and monitor the implementation of the BEPS Package".[20] Countries that become a member of the Inclusive Framework commit themselves to the implementation of the minimum standards either unilaterally or bilaterally. To date, 141[21] countries and jurisdictions have become member of the Inclusive Framework. The OECD reports substantial progress on the implementation of both the minimum standards and the other Actions supporting the fact that the BEPS project has been able to alter international corporate taxation.[22] Furthermore, in response to the BEPS project, the European Commission presented an anti-tax avoidance package on 28th of January 2016. As part of the package, the EC adopted two anti-Tax Avoidance Directives (ATAD I and ATAD II on June 2016 and May 2017 respectively) which are (partly) related to some of the BEPS actions and address earnings-stripping, hybrid mismatches and introduce CFC rules among other things. Hence, the EC has transformed some of the OECD's 'soft law' into 'hard law'.

The level of international coordination achieved by the OECD through its BEPS project is remarkable and unprecedented in the international tax order. Not merely due to the breadth of the tax issues covered, but also as a consequence of its reach. Namely, the OECD has explicitly aimed to incorporate non-member countries in the process. The substantial number of non-member countries that have become members of the Inclusive Framework illustrates the OECD's success in achieving this goal. The opening sentence of a paper written by De Graaf and Visser (2018) illustrates the BEPS project's remarkable success: "Had anyone asked a tax specialist [in 2011], say, whether countries could ever have agreed on anything like the Base Erosion and Profit Shifting (BEPS) package, and whether some of what they had agreed would also be implemented through a multilateral instrument (MLI), the reactions would most certainly have been extremely pitying."

20 Retrieved from the OECD website: https://www.oecd.org/tax/beps/about/.

21 As of January 2022.

22 The OECD progress report lists several results such as the abolishment or amendment of "virtually all harmful preferential regimes" (Action 5), "over 100 jurisdictions have already introduced legislation to impose a filing obligation on MNEs" (Action 13). Retrieved from: https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2020-september-2021.pdf.

4.3.1.3 Evaluation of the BEPS project

The BEPS project has been argued to reflect and contribute to "major changes in the participants, agenda, institutions, norms, and legal instruments of international tax" (Mason, 2020, p. 354). Although the BEPS project is generally believed to be a remarkable achievement, the key question that remains is whether it has effectively reduced the international tax regime's vulnerability to corporate tax planning. As discussed, certain elements of the international corporate tax regime enable and incentivize corporate BEPS. Hence, for the BEPS project to adequately address the issue, these elements have to be reconsidered.

Considering the first (i.e., lack of harmonization) and second (i.e., competition-based paradigm) element described in section 4.2.1, it becomes clear that the BEPS project has not aimed to put an end to this. That the OECD does not aim to achieve harmonization in general is explicitly expressed in Action 5: *"The work on harmful tax practices is not intended to promote the harmonization of income taxes […] nor is it about […] the appropriate level of tax rates"*. Nevertheless, the BEPS project aims to address a particular form of misalignment between tax systems such as hybrid mismatch arrangements. Generally speaking, Action 2 aims to neutralize the tax savings resulting from the use of hybrid financial instruments and entities.[23]

Further, the BEPS project does not aim to address tax competition. Rather, the OECD explicitly legitimates tax competition as evidenced by the fact that Action 5 aims to encourage *"an environment in which free and fair tax competition can take place"*. Nevertheless, the proposed measures will limit governments' ability to engage in tax competition (Gadžo & Jozipović, 2020; Herzfeld, 2017). Although this is particularly evident in Action 5 which aims to put an end to a particular type of tax competition (i.e., harmful preferential regimes), it will effectively limit governments' ability to engage in tax competition through the other proposed measures as well (Gadžo & Jozipović, 2020; Herzfeld, 2017). However, tax competition over real economic activities through the tax rate might actually intensify as economic activity and taxation become more closely aligned in response to the BEPS measures[24] (Devereux et al., 2021; Gadžo & Jozipović, 2020). Further, the BEPS project's efforts to address tax arbitrage are limited in scope and address only the instances described in the BEPS Actions. Hence, tax competition is likely to continue and opportunities for corporate BEPS will continue to exist in the international tax regime.

23 Although the proposed measures are limited to the use of the two types of hybrid mismatches mentioned and does not address the mismatches' root cause but its symptoms (i.e., tax savings), they are generally considered effective (De Boer & Marres, 2015; Fibbe & Stevens, 2017; Mason, 2020).

24 Consistent with the BEPS project's main objective.

Some tax scholars have pointed towards the separate-entity approach (see section 4.2.1) and the arm's length principle as fundamental flaws of the corporate tax regime because they enable corporate BEPS (Avi-Yonah & Xu, 2017; Blum, 2018; de Graaf et al., 2014; Devereux et al., 2021). While the OECD recognizes the issues associated with the separate-entity approach, it has chosen to strengthen this framework with new rules rather than replace it with an alternative (such as a unitary approach; de Graaf et al., 2014). Such 'patch up' work is particularly evident in Action 8-10 which aim to reduce the arm's length principle's vulnerability to manipulation.[25] The CFC rules proposed in Action 3 have also been called a 'patch-up' solution to the fundamental flaws of the corporate tax regime (de Graaf et al., 2014). CFC rules are anti-abuse rules that are often used to tackle profit shifting or long-term deferral in territorial or worldwide tax systems. By including income from CFCs in the tax base of the parent company in the country of residence, CFC rules have the potential to pierce both the separate-entity approach and territorial tax systems or worldwide tax systems with deferral. Although strong CFC rules can significantly impact the efficiency of corporate BEPS by functioning as a 'fiscal fail-safe' (i.e., ensuring full taxation; Mason, 2020), it is still too early to understand the impact of BEPS-related strengthening of CFC rules on MNE tax planning (Christians & Shay, 2017). However, some scholars have expressed doubts with regard to the effectiveness of the proposed CFC rules[26] – even going as far as calling them 'weak' (Blum, 2018; de Graaf et al., 2014; Hey, 2021). Furthermore, Action 3 is not one of the BEPS minimum standards. Hence, the IF members are arguably less committed to its implementation.

Other elements that were argued to increase the international tax regime's vulnerability to tax planning are the permanent establishment and residency concept. Issues regarding the PE status are twofold: 1) digital companies can generate substantial income in a jurisdiction without a taxable presence, and 2) the PE status can be artificially avoided (Dos Santos & Lopez, 2016; Hebous, 2021). Regarding the first issue, the BEPS project has clearly not been able to reach consensus on how to adequately address the tax challenges of the digital economy (Action 1). The fact that the BEPS project has been unable to tackle the digital economy is generally regarded as an important – if not the most important – shortcoming of the BEPS

25 Strictly speaking, the modification of the transfer pricing guidelines which aim to focus more on economic reality (i.e., functional analysis) instead of the legal, contractual reality between entities could be regarded as a deviation from the separate-entity approach (Avi-Yonah & Xu, 2017; Lankhorst et al., x). However, from Action 8-10 is becomes clear that the OECD has not meant to move away from the separate entity approach by reiterating the relevance of the arm's length principle.

26 Besides implementation issues (such as the fact that the CFC regime included in ATAD I might violate the EU's fundamental freedoms; Nyström, 2021), the details of the application conditions – in particular the included income categories – have been identified as a potential weakness of CFC rules (Hertzfeld, 2019; Hey, 2021). Illustreren aan de hand van ATAD?

project (Herzfeld, 2017). The second issue associated with the PE status is addressed in Action 7. Although it is too early to establish whether Action 7 will effectively lower the threshold for a PE, de Wilde (2017) does expect that the number PEs in market jurisdictions will increase. Finally, the issues associated with the residency concept remain. Although residency as such is not addressed by the BEPS project, the risk of treaty shopping is (Action 6).

Taken together, the analysis reveals that the international corporate tax regime will continue to be vulnerable to corporate BEPS. Although the BEPS project has reformulated principles of taxation – alignment with economic activity and arguably the single tax principle (i.e., "that income should be taxed once- not more and not less"; Avi-Yonah, 2007, p.1)[27] – it has not abolished the old principles that are considered the root cause of corporate BEPS (Ault, 2013; Avi-Yonah & Xu, 2017; de Graaf et al., 2014; Devereux et al., 2021; Gadžo & Jozipović, 2020). Rather, it has layered its new principles and corresponding rules – innovative and transformative as they might be (Mason, 2020) – over the pre-existing principles (e.g., the separate entity approach). Consequentially, the excesses in corporate BEPS as identified by the OECD are addressed but the opportunities and incentives for corporate BEPS are not tackled in a fundamental manner and are likely to persist. In this regard, the BEPS project has been called a "patch up of existing rules" (Avi-Yonah & Hu, 2016, p. 208). Other scholars have criticized the BEPS project for being "vague and ultimately anaemic" (Cooper, 2017, p. 6) and "watered down as to be meaningless" (Herzfeld, 2017, p. 52), reflecting participating countries' struggle to reach consensus. Furthermore, it remains uncertain to what degree the proposed BEPS measures will actually be implemented by the Inclusive Framework member countries given the OECD's lack of regulatory power (Christians, 2017).

4.3.2 Pillar One and Two

4.3.2.1 General structure and implementation

As aforementioned, the BEPS project was unable to reach consensus on solutions to the tax challenges of the digital economy (Action 1). Hence, the OECD/G20 Inclusive Framework continued to work on this issue after the BEPS project was finalized. As of October 2021, members of the Inclusive Framework reached agreement over a two-pillar approach that aims to modernize international taxation in the context of the digitalization of the economy (OECD, 2020; OECD, 2021). In July 2021, the European Commission announced that it aims to incorporate Pillar One and Pillar Two in EU law through directives. On 12 December 2022, EU Member States reached

27 Some authors have argued that the BEPS project demonstrates a commitment to the single tax principle (Avi-Yonah & Xu, 2017; Mason, 2020). This principle is particularly evident in Action 2 on hybrid mismatch arrangements.

agreement to implement the Pillar Two Directive. The Directive must be implemented by 31 December 2023 at the latest.[28] Member states reaffirmed their commitment to Pillar One as well on the 12 December. Work in this area is still ongoing.

Pillar One aims to address issues with respect to the nexus approach that arise from the fact that MNEs are able to generate substantial profits in jurisdiction without having a taxable, physical presence.[29] To address the issue, the Inclusive Framework proposes an alternative approach to the nexus concept and the allocation of taxing rights among jurisdictions. Pillar One redefines nexus by making a taxable presence contingent on the amount of revenue a MNE has in a jurisdiction.[30] Furthermore, its profit allocation rules will result in a re-allocation of a proportion of the taxing rights to companies' market jurisdictions. Broadly, the approach adds a formulaic approach to relocating taxing rights on the residual profits[31] of MNEs with a minimum of 20 billion in revenues and a minimum profitability of 10%.

Pillar Two – or the 'Global Anti-Base Erosion Proposal' (GloBE) – aims to address the BEPS challenges that remained after the BEPS project and ensures that MNEs pay an effective tax rate of minimal 15%.[32] Hence, Pillar Two is also known as the minimum tax. GloBE's primary building blocks are an income inclusion rule (IIR) which is a top-up tax at the level of the parent company that resembles CFC rules, an undertaxed payments rule (UTPR) that functions as a backstop if low taxed income is not charged under an IIR, and a qualified domestic minimum top-up tax (QDMTT) which refers to a minimum top-up tax included in domestic law which operates consistent with the GloBE rules. This top-up tax can be credited against any liability under the GloBE rules thereby giving source countries the primary right to tax.[33] Hence, additional tax revenues are collected first through the QDMTT, followed by the IIR, and finally the UTPR. The GloBE rules will be applicable to MNEs with a revenue of at least 750 million. Furthermore, the rules contain a substance-based income exclusion which is deducted from the MNE's GloBE profit.

28 The Netherlands submitted the draft legislative proposal "Minimum Tax Act 2024 (Pillar 2)" to public consultation on 24 October 2022.

29 Public consultation document on Pillar One. This document can be obtained via https://www.oecd.org/tax/beps/oecd-invites-public-input-on-the-draft-rules-for-nexus-and-revenue-sourcing-under-pillar-one-amount-a.htm.

30 This alternative nexus approach applies to Amount A only.

31 Residual profits refer to income exceeding an agreed level of profitability in percentages. No agreement has been reached yet when it comes to establishing this percentage.

32 Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two). Retrieved from: https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two.htm. https://www.oecd.org/tax/beps/pillar-two-model-GloBE-rules-faqs.pdf.

33 As opposed to countries where MNEs are headquartered.

4.3.2.2 Evaluation of the two-pillar approach

In order to understand how corporate tax planning might develop after the implementation of the OECD's two-pillar approach, this section will examine to what degree these developments might affect the international tax regime's vulnerability to corporate tax planning. Considering the elements identified in section 4.2.1, it is clear that the two-pillar approach will likely influence the prominence of some of these elements.

The formulary apportionment incorporated in Pillar One marks the beginning of a break with the independent-entity and arm's length principle (Elliffe, 2020) because the tax base for Pillar One's amount A (i.e., residual profits) is determined at the group level instead of on an entity basis. While Pillar One's formulaic approach is limited to the allocation of the residual profits of large and highly profitable MNEs, it does pierce the 'corporate veil' to a certain extent. Although the two-pillar approach (partially) deviates from the separate entity approach and reduces a territorial tax system's vulnerability to BEPS, risk of corporate tax planning that is not affected by the two-pillar approach remains (e.g., BEPS by MNEs that are not within the scope).

Further, Pillar One addresses issues with respect to the PE concept as well by redefining nexus and making a taxable presence contingent on the revenues arising in that jurisdiction. Effectively, Pillar One addresses the issue associated with the fact that digitalization has made it possible for corporations to generate substantial revenue in a jurisdiction without having a physical presence by re-allocating of taxing rights to market jurisdictions (Elliffe, 2020).

Although the BEPS project did not aim to address tax competition, Pillar Two does challenge the competition-based paradigm of the international tax regime. First, Pillar Two has the objective "to affect the behaviour of taxpayers and jurisdictions [and] to stop a harmful race to the bottom on corporate taxes"[34]. Although it is not clear from these objectives that Pillar Two aims to delegitimate tax competition entirely, it clearly aims to put an end to its excesses (i.e., the race to the bottom). While Pillar Two will not eliminate tax competition entirely, by ensuring that MNEs pay a minimum effective tax rate, Pillar Two effectively establishes a floor to tax competition (Vella et al., 2022). However, the substance-based carve-out allows countries to engage in tax competition over economic activity (Devereux et al., 2021; Hey, 2021) and undermines Pillar Two's objective of a global minimum level of taxation (Perdelwitz & Turina, 2021). Further, Pillar Two is still confined to a relatively limited number of MNEs (Hey, 2021). Hence, countries can continue to compete over the favor of smaller MNEs through tax competition. However, the fact that the MNEs covered by Pillar Two account for

34 Pillar Two consultation document. Retrieved from: https://www.oecd.org/tax/beps/public-consultation-document-global-anti-base-erosion-proposal-pillar-two.pdf.pdf.

over 90% of the global corporate income tax base[35], the magnitude of this problem is likely to be limited (Dourado, 2022).

In conclusion, the OECD's two-pillar approach is an extraordinary achievement, especially in light of the difficulty of reaching consensus between states (Cooper, 2017; Herzfeld, 2017). However, the aforementioned analysis has revealed that the international corporate tax regime will remain vulnerable to corporate BEPS, even if Pillars One and Two are implemented. Although Pillar Two represents a revolutionary step towards a global minimum level of corporate taxation, tax competition and corporate BEPS will remain possible outside the agreed upon minimum level.

4.4 Tax planning post-BEPS

Since its inception, numerous tax scholars have studied different aspects of BEPS project. As aforementioned, several researchers have investigated the effectiveness of the BEPS project in tackling corporate planning (e.g., Avi-Yonah, 2017; Avi-Yonah & Xu, 2016). Other researchers have zoomed in on specific BEPS Actions and critically assessed their merit (e.g., de Broe & Luts, 2015; Moreno, 2017). Some scholars have expressed concerns with regard to the legitimacy of the BEPS project, arguing that the voices of weaker, developing countries have not sufficiently been taken into account and that the BEPS project is predominantly influenced by the larger and powerful OECD member countries (Fung, 2017; LeSage, 2014; Mosquera Valderrama, 2018). Finally, scholars have raised awareness to the challenges that arise when the BEPS measures interact with European law (e.g., Schön, 2015) or with domestic legal culture and domestic tax systems (e.g., Mosquera Valderrama, 2015).

Despite the growing attention for the BEPS project in legal research, little attention has been paid to the tax profession's response to the BEPS-related developments. However, investigating the tax profession is important if one wants to understand how corporate tax planning has developed in response to the BEPS-related developments. As section 4.3 makes clear, the BEPS-related developments in the field of international corporate taxation have been a remarkable and unprecedented achievement. Yet, the international tax regime's vulnerability to corporate tax planning is unlikely to have been resolved. Although exploitation of the fundamental weaknesses of the regime (such as the separate entity approach and tax competition) by MNEs has become more difficult and the excesses of corporate BEPS have been addressed, opportunities for corporate tax planning remain. Furthermore, the complexity of international corporate taxation is likely to have increased in response to the BEPS-related developments because new – and in themselves complex – rules are being layered over the preexisting regime.

35 Retrieved from: https://www.oecd.org/tax/beps/pillar-two-model-GloBE-rules-faqs.pdf.

While these BEPS-related developments are unlikely to put an end to the professional practice of corporate tax planning, it might nonetheless be able to affect it. First, despite the fact that the BEPS project clearly aims to have a regulatory impact, it can be seen as an attempt to alter existing norms of appropriate corporate tax planning (Radcliffe et al., 2018). It is through this objective that the BEPS project becomes directly relevant to tax professionals because it challenges the legitimacy of their corporate tax practice. Notable examples are the principle purpose test (PPT; Action 6) and the DEMPE approach (Actions 8-10). The subjective element of the PPT denies treaty benefits when "obtaining the benefit was one of the principle purposes of any arrangement or transaction that resulted directly or indirectly in that benefit" (OECD, 2015c, p. 55). The PPT thus introduces taxpayers' motives as a norm to distinguish between appropriate and inappropriate tax planning practices. The DEMPE approach aims to align transfer pricing outcomes with value creation by requiring that members of the MNE groups are compensated "for functions performed, assets used, and risks assumed in the development, enhancement, maintenance, protection and exploitation of intangibles" (OECD, 2015d, p. 73-74). The DEMPE approach, thus, introduces a new norm for allocating profits. This raises the question to what degree tax professionals adopt such norms in their professional practice. Furthermore, the complexity of international corporate taxation is likely to have increased in response to the BEPS-related developments because new – and in themselves complex – rules are being layered over the preexisting regime. This increased complexity of the international corporate tax rules might increase the costs of tax planning thereby making it less economically advantageous.

4.5 Conclusion

The global concerns of corporate tax planning have triggered unprecedented tax coordination. In an effort to address corporate BEPS, countries are engaged in substantial reform of the international corporate tax regime. Although these efforts are likely to effectively curb excessive corporate tax planning – either by combatting specific tax planning practices (in particular through the BEPS project) or by putting a floor on tax competition (Pillar Two) – the international tax regime will remain vulnerable to corporate tax planning. As corporate BEPS is likely to endure for the foreseeable future, tax professionals' responses to the BEPS-related developments become particularly relevant.