

EU Tax Law and Policy in the 21st Century

EUCOTAX Series on European Taxation

VOLUME 55

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Introduction

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Contents/Subjects

The EUCOTAX series covers a wide range of topics in European tax law. For example tax treaties, EC case law, tax planning, exchange of information and VAT. The series is well-known for its high-quality research and practical solutions.

Objective

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Practitioners and academics dealing with European tax law.

Frequency of Publication

2-3 new volumes published each year.

The titles published in this series are listed at the end of this volume.

EU Tax Law and Policy in the 21st Century

Edited by

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Wolters Kluwer

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wolterskluwerlr.com

Sold and distributed in North, Central and South America by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:
Quadrant
Rockwood House
Haywards Heath
West Sussex
RH16 3DH
United Kingdom
Email: international-customerservice@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-90-411-8815-1

e-Book: ISBN 978-90-411-8816-8
web-PDF: ISBN 978-90-411-8817-5

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Printed in the United Kingdom.

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Preface and Acknowledgements

This book constitutes the latest volume in a series of publications by the University of Luxembourg's ATOZ Chair for European and International Taxation, which are based on annual conferences on current issues of international and European tax law and were previously published in a separate Series called '*International Tax Conferences of the University of Luxembourg*'. These conferences bring together leading tax experts from various areas of tax practice, academia, and governmental entities to facilitate high-level discussions that are both topical and that foster dialogue among the different actors.

This book is the result of two conferences held in 2015 and 2016, respectively, on 'Primary Law Limits to European Taxation' and 'EU Tax Policy in the 21st Century' and combine a unique perspective on both the law and the policy of European taxation at this time. The authors finalized their chapters over the course of several months following each conference, updating them in early 2017 to incorporate relevant points and additional information generated since the discussion at the conference, as well as addressing more recent developments in legislation and the case law. As this was particularly burdensome for those contributors who participated in the first of the two conferences, we are especially grateful to them for their continued commitment to complete their particular chapters in a timely manner. Although such a book necessarily provides a snapshot of the current state of affairs in a constantly evolving context, the analysis provided by the authors allows it to remain relevant as the law develops further over the years to come.

We would further like to express our sincere gratitude towards the moderators of each section at the conference, whose insightful perspectives significantly added to the intellectual debate both during and after the conference. In that regard, special thanks go to the First Advocate General of the Court of Justice, Melchior Wathelet, who participated in our conference in 2015, and the President of the EFTA Court, Carl Baudenbacher, who did so in 2016.

The editors are also very thankful for the cooperation with the ECJ Task Force of the *Confédération Fiscale Européenne*, as many of the contributors to this volume form part of that working group. We also wish to thank Keith O'Donnell, managing partner at ATOZ and Chairman of the ATOZ Foundation, which generously sponsors the ATOZ

Chair for European and International Taxation and its activities, including the establishment of this conference series.

We further owe thanks to our publisher Kluwer and, especially, Simon Bellamy, for their professional and kind assistance through the publication process and for assuring the timely publication of this book. We are, finally, sincerely grateful for the assistance of Suzanne M. Larsen, who edited the chapters contained in this book.

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CHAPTER 13

Recent EU Initiatives in Direct and Indirect Taxation

Georg Kofler & Michael Tumpel

The European Union has taken an active part in the OECD's project on 'Base Erosion and Profit Shifting' (BEPS) (the 'OECD-BEPS Project') and is a forerunner in its implementation and the broader 'fight' against aggressive tax planning, tax avoidance and tax evasion. This contribution aims at giving a brief overview of the recent developments in this area.¹

§13.01 INITIATIVES IN DIRECT TAXATION

The European Union has been on the forefront of the recent struggle of countries to address aggressive tax planning, tax avoidance and tax evasion, also in respect of the OECD-BEPS Project. Already in late 2012, the EU Commission issued its Action Plan (see Table 13.1) to strengthen the fight against tax fraud and tax evasion that included a number of measures also in the area of transparency and substantive direct taxation,² leading, *inter alia*, to two amendments of the Parent-Subsidiary Directive:

1. This chapter was finalized in November 2016.

2. For an overview, see, e.g., Georg Kofler, *Der EU-Aktionsplan zur Verstärkung der Bekämpfung von Steuerbetrug und Steuerhinterziehung*, 2015/1 IFF Forum für Steuerrecht 44 (2015).

Table 13.1 Action Plan to Strengthen the Fight Against Tax Fraud and Tax Evasion (December 2012)³

Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion (December 2012) with 34 concrete short-, mid-, and long-term actions, including ...	
—	Administrative Cooperation → Mandatory automatic exchange of information in the field of taxation in the Directive on Mutual Assistance – Proposal COM(2013) 348 (12 June 2013), adopted as Directive 2014/107/EU of 9 December 2014, [2014] OJ L 359/1
—	Aggressive Tax Planning → Recommendation C(2012)8806 (6 December 2012) recommending to introduce a GAAR into domestic law and to negotiate a subject-to-tax-clause in tax treaties ⁴
—	Third Countries and Good Tax Governance → Recommendation C(2012)8806 final (6 December 2012)
—	Hybrid Loans → Amendment of the Parent-Subsidiary Directive to introduce a taxing obligation for profit distributions that are deductible in the subsidiary's State ⁵ – Proposal COM(2013)814 (25 November 2013), adopted as Directive 2014/86/EU of 8 July 2014, [2014] OJ L 219/40 (in part parallel to OECD-BEPS Action 2 ⁶)
—	Anti-Abuse Provisions in EU Legislation → Amendment of the Parent-Subsidiary Directive to introduce a general anti-abuse provision as a minimum standard ⁷ – Proposal COM(2013)814 (25 November 2013), adopted as Directive (EU) 2015/121 of 27 January 2015, [2015] OJ L 21/1.

Tax transparency, mostly with regard to the automatic exchange of information was also at the core of the EU Commission's 2015 Tax Transparency Package (see Table 13.2), which included the proposal to introduce the automatic exchange of information on tax rulings between Member States.

3. Communication from the Commission to the European Parliament and the Council: An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722.

4. See, e.g., Michael Lang, 'Aggressive Steuerplanung' – eine Analyse der Empfehlung der Europäischen Kommission, 23 SWI 62 (2013).

5. For a first analysis, see, e.g., Georg Kofler, 'Hybride Finanzinstrumente' in der Mutter-Tochter-RL, 2014/137 ZFR 214 (2014); Florian Haase, Gedanken zu Art. 4 Abs. 1 lit. a) Mutter-Tochter-Richtlinie n. F., 23 IStR 650 (2014); Marc Desens, Ist die neue Korrespondenzregel in der Mutter-Tochter-Richtlinie mit dem Unionsrecht vereinbar?, 23 IStR 825 (2014); Tobias Hagemann & Christian Kahlenberg, Sekundärrechtliche Reaktionen auf aggressive Steuerplanungsaktivitäten – Änderung der Mutter-Tochter-Richtlinie, 24 IStR 840 (2014); Georg Kofler, Hybrid Loans in the Parent-Subsidiary-Directive, in *Elusione Fiscale Internazionale* 682 (Piergiorgio Valente ed., IPSOA 2014); see also Christophe Marchgraber, Tackling Deduction and Non-Inclusion Schemes – The Proposal of the European Commission, 54 Eur. Tax'n 133 (2014).

6. OECD/G20 Base Erosion and Profit Shifting Project (hereinafter 'OECD-BEPS Project'), *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report* (OECD Publishing 2015).

7. See, e.g., Romero J. Tavares & Bret N. Bogenschneider, *The New De Minimis Anti-Abuse Rule in the Parent-Subsidiary Directive: Validating EU Tax Competition and Corporate Tax Avoidance?*, 43 Intertax 484 (2015); and Dennis Weber, *The New Common Minimum Anti-Abuse Rule in the EU Parent-Subsidiary Directive: Background, Impact*, 44 Intertax 98 (2016).

Table 13.2 Tax Transparency Package (March 2015)⁸

Tax Transparency Package (March 2015)	
	Transparency on Tax Rulings → Amendment of the Directive on Mutual Assistance – Proposal COM(2015) 135 (18 March 2015), adopted as Council Directive (EU) 2015/2376 of 8 December 2015, [2015] OJ L 332/1
	Other tax transparency initiatives, such as assessing possible new transparency requirements for multinationals (specifically ‘country-by-country reporting’ (‘CBCR’), ⁹ parallel to OECD-BEPS Action 13 ¹⁰), reviewing the Code of Conduct on Business Taxation (parallel to OECD-BEPS Action 5 ¹¹), quantifying the scale of tax evasion and avoidance (‘tax gap’), and repealing the Savings Tax Directive (in light of the extended Directive on Mutual Assistance) ¹²

The alignment of taxation with profit generation was the main driver behind the 2015 Action Plan on Corporate Taxation (see Table 13.3), in which the Commission also announced its plan for a re-launch of the Common Consolidated Corporate Tax Base (CCCTB), which was already proposed in 2011.¹³ This project should not only lead to a reduction of compliance costs (no transfer pricing), an elimination of double taxation (through the base sharing mechanism), and an elimination of over-taxation (because of the automatic cross-border loss relief), but would also provide a holistic solution to profit shifting in the BEPS-context.¹⁴

8. Commission Communication of 18 Mar. 2015 on Tax Transparency to Fight Tax Evasion and Avoidance, COM(2015) 136 (hereinafter the ‘2015 Tax Transparency Communication’).

9. Subsequently proposed as COM(2016) 25 of 28 Jan. 2016, and adopted as Council Directive 2016/881/EU of 25 May 2016, OJ 2016 L146/8.

10. OECD-BEPS Project, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final Report* (OECD Publishing 2015) (hereinafter ‘OECD Transfer Pricing Report’).

11. OECD-BEPS Project, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 – 2015 Final Report* (OECD Publishing 2015) (hereinafter ‘OECD Countering Harmful Tax Practices Report’).

12. The repeal was proposed as COM(2015) 129 of 18 Mar. 2015, and adopted as Directive 2015/2060/EU, OJ 2015 L 301/1.

13. Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) of 16 Mar. 2011, COM(2011) 121 (hereinafter, ‘Original 2011 CCCTB Proposal’), subsequently withdrawn and relaunched as a Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) of 25 October 2016, COM(2016) 683 (hereinafter the ‘2016 Relaunched CCCTB Proposal’).

14. Indeed, a CCCTB may be highly effective in ‘tackling profit shifting and corporate tax abuse in the EU’, as it would (1) remove mismatches between national tax systems, (2) remove the possibility to manipulate transfer pricing, (3) address the ‘debt bias’, (4) introduce transparency as to the effective tax rate in each jurisdiction, (5) allow Member States to implement a common approach towards third countries, (6) reinforce the link between profit creation and taxation, and (7) enable a common adoption of BEPS measures (e.g., definition of permanent establishments, CFC rules)

Table 13.3 Action Plan on Corporate Taxation (June 2015)¹⁵

Action Plan on Corporate Taxation (June 2015)	
	Re-launching the Common Consolidated Corporate Tax Base (CCCTB) → CCCTB as a holistic solution to profit shifting in the BEPS context, announcement of a step-by-step approach (i.e., securing the common tax base ('CCTB')) starting with international elements related to BEPS and postponing consolidation ('CCCTB'), until after the common base has been implemented. ¹⁶
	Ensuring fair taxation where profits are generated → For example, through the CCCTB and the CoC, by addressing double non-taxation in EU legislation (i.e., in the Interest-Royalties Directive and the Parent-Subsidiary Directive), through a transfer pricing framework in the EU, by linking preferential regimes to where value is generated (i.e., for 'patent boxes').
	Creating a better business environment → Greater coordination between Member States on tax policy, along with measures to reduce administrative burden, compliance costs and tax obstacles in the internal market, specifically by (1) enabling cross border loss offset (with recapture) ¹⁷ and (2) improving double taxation dispute resolution mechanisms. ¹⁸
	Increasing transparency → For example, adopt a common approach to non-cooperative tax jurisdictions, specifically by (1) publishing an EU-wide list of third country non-cooperative tax jurisdictions and (2) coordinating possible counter-measures towards non-cooperative tax jurisdictions.
	Improving EU coordination → Specifically by (1) coordination on tax audits and (2) reforming the Code of Conduct for Business Taxation and the Platform on Tax Good Governance.

In its 2016 'Anti-Tax Avoidance Package' (see Table 13.4), the Commission explains the political and economic rationale behind the individual measures and the Commission's broader agenda against tax avoidance in a 'Chapeau Communication',¹⁹ and notes that instruments in that package aim at ensuring effective taxation in the EU through the proposed 'Anti-Tax Avoidance Directive' ('ATAD')²⁰ and a Recommendation on measures against tax-treaty abuse;²¹ increasing tax transparency through a

15. Commission Communication of 17 June 2015 'A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action', COM(2015) 302 final (hereinafter, '5 Key-Areas Communication'); see also the Commission Staff Working Document of 17 June 2015 'Corporate Income Taxation in the European Union', SWD(2015) 121.

16. Subsequently proposed as part of the Corporate Tax Reform Package (October 2016) as Proposal for a Council Directive on a Common Corporate Tax Base of 25 October 2016, COM(2016) 685 (hereinafter, the '2016 CCTB Proposal'), and as the 2016 CCCTB Proposal, *supra* n.13.

17. See Art. 42 of the 2016 CCTB Proposal, *supra* n. 16.

18. See the subsequent Proposal of 25 October 2016 for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union, COM(2016) 686 (hereinafter '2016 Dispute Resolution Proposal').

19. Commission's Communication on 'Anti-Tax Avoidance Package: Next steps Towards Delivering Effective Taxation and Greater Tax Transparency in the EU' of 28 Jan. 2016, COM(2016) 23 final (hereinafter the 'Anti-Tax Avoidance Package Communication'), accompanied by a Commission Staff Working Document (SWD(2016) 6/2) and a 'Study on Structures of Aggressive Tax Planning and Indicators' (Taxation Paper No 61, 2015).

20. Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market of 28 Jan. 2016, COM(2016) 26 [hereinafter 'ATAD Proposal'].

21. Commission Recommendation on the implementation of measures against tax treaty abuse of 28 January 2016, C(2016) 271 (hereinafter '2016 Tax Treaty Abuse Recommendation').

revision of the Administrative Cooperation Directive under which the national authorities would exchange tax-related information on multinational companies' activities on a country-by-country basis;²² and securing an international level playing field, with the Commission's approach being set out in a Communication on an External Strategy for Effective Taxation.²³

Table 13.4 Anti-tax Avoidance Package (January 2016)

Chapeau Communication (COM(2016) 23)			
Proposal for an Anti-Tax Avoidance Directive (COM(2016) 26) – Adopted as Council Directive (EU) 2016/1164, [2016] OJ L 193/1	Recommendation on Tax Treaties (C(2016) 271)	Proposal to revise the Administrative Cooperation Directive – CbC-Reporting (COM(2016) 25) – Adopted as Council Directive (EU) 2016/881, [2016] OJ L 146/8	Communication on External Strategy (COM(2016) 24)
Staff Working Document (SWD(2016) 6/2) and Study on Aggressive Tax Planning			

The Commission's ATAD Proposal is a core part of the Anti-Tax Avoidance Package and encompasses a number of legally-binding measures to tackle some of the most prevalent tax avoidance schemes. Viewing aggressive tax planning structures as a global phenomenon, the Commission tries to ensure that a common standard is developed by the Member States. The context is multifold and results from the OECD/G20 reports on the BEPS project in October 2015, recent discussions on the Commission's 2011 proposal on a 'Common Consolidated Corporate Tax Base' ('CCCTB')²⁴ and the announcements in the Commission's 2015 Action Plan on Corporate Taxation²⁵ to ensure fair taxation where profits are generated. Also, and in line with some of the EU finance ministers' call for a specific 'comprehensive anti-BEPS directive' in 2015,²⁶ the Luxembourg Presidency had focused its work in the CCCTB project on BEPS-related aspects. Acknowledging that the CCCTB has several building blocks, the Luxembourg Presidency launched a discussion on the possibility of agreeing to a split off from the pending original 2011 CCCTB proposal of certain

22. Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation of 28 January 2016, COM(2016) 25 final.

23. Commission's Communication on an External Strategy for Effective Taxation of 28 January 2016, COM(2016) 24 final.

24. The Original 2011 CCCTB Proposal, *supra* n. 13.

25. The 5 Key-Areas Communication, *supra* n. 15.

26. On 28 November 2014, Finance Ministers Schäuble, Sapin and Padoa-Schioppa co-signed a letter to Commissioner Moscovici proposing a 'comprehensive anti-BEPS directive' to be adopted by the end of 2015. In particular, the three Ministers advocated, in the context of the OECD/G20's final adoption of the BEPS conclusions, for 'a set of common, binding rules on corporate taxation to curb tax competition and fight aggressive tax planning'.

provisions on the international anti-BEPS aspects with the aim to achieve a swift, consistent and coordinated implementation of OECD/G20 BEPS recommendations in the EU.²⁷ The Commission's 2016 proposal is for a 'standalone directive' that covers those elements which can be implemented in national legislation prior to agreement and introduction of the CCCTB.²⁸ In doing so, the Commission also responds to the European Parliament's resolutions on anti-avoidance measures.²⁹ After speedy deliberations in Council, an agreement on the ATAD was reached in summer 2016, and the directive now foresees five measures that Member States have to implement (mostly until 2019):³⁰

- Limitation of interest deductions for net interest expense exceeding 30% EBITDA (Article 4);
- Exit taxation rules for the cross-border transfer of assets, permanent establishments or a company's seat with a five-year instalment option inside EU/European Economic Area (EEA) (Article 5);
- General Anti Abuse Rule (GAAR) (Article 6);
- CFC rules based on control, low tax and certain types of income with carve-outs for EU/EEA based on artificiality (Articles 7 and 8); and
- Hybrid mismatch rules for double deduction and deduction/no inclusion situations (Article 9).

The rules of the ATAD only apply to corporations (Article 1) and are structured as 'minimum level of protection' (Article 3), as they 'shall not preclude the application of domestic or agreement-based provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases'. This means that the directive would provide for minimum common anti-BEPS rules, but, more importantly, that Member States would be able to go beyond the minimum standards set out therein in their transposition of EU anti-BEPS rules and/or to continue applying their existing national anti-BEPS rules if such rules go beyond that minimum. Of course, it may be questioned if such a minimum standard would really, as the Commission suggests, 'prevent a fragmentation of the market and put an end to currently existing mismatches and

27. See Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) – State of play (Doc. 14509/15 FISC 169 ECOFIN 916 [1 December 2015]). In December 2015, the Luxembourg Presidency hence presented a consolidated text reflecting the international anti-BEPS aspects of the CCCTB (see the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), Doc. 14544/15 FISC 171 [2 December 2015], and the accompanying Explanatory notes, Doc. 14544/15 ADD 1 FISC 171 [2 December 2015]). This text includes potential rules on the definition of permanent establishment (PE), Controlled Foreign Company (CFC) rules, a switch-over clause, a general anti-abuse rule (GAAR), exit taxation rules, interest limitation rules, and (possibly) rules regarding hybrid mismatches. Those deliberations in Council clearly had influence on the Commission in drafting its ATAD Proposal. See also the Anti-Tax Avoidance Package Communication, *supra* n. 19, at 6.

28. The Anti-Tax Avoidance Package Communication, *supra* n. 19, at 6.

29. See European Parliament resolution of 16 December 2015 with recommendations to the Commission on bringing transparency, coordination and convergence to corporate tax policies in the Union (2015/2010(INL)), P8_TA(2015)0457.

30. For a more detailed analysis, see the contribution by Katarina Köszeghy in this volume.

market distortions’,³¹ as exactly such leeway for Member States to go beyond the proposed anti-tax avoidance rules leaves the danger for such fragmentation essentially unconstrained. This certainly raises issues with regard to Union’s competence and the proportionality of the measure.³²

Further measures against tax evasion and avoidance were announced and described in a Commission Communication in July 2016 (see Table 13.5), also proposing that tax authorities should have access to anti-money laundering information:

Table 13.5 Fight Against Tax Evasion and Avoidance (July 2016)³³

Fight against Tax Evasion and Avoidance (July 2016)	
	Harness the link between anti-money laundering and tax transparency rules → Proposal for a Council Directive amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities, COM(2016)452 (5 July 2016)
	Improve information exchange on beneficial ownership → Currently pilot project (launched by UK, Germany, Spain, Italy and France) to exchange information on the ultimate beneficial owners of companies and trusts
	Increase oversight of enablers and promoters of aggressive tax planning → Commission will explore the best way to increase oversight and ensure that effective disincentives apply for promoters and enablers of aggressive tax planning schemes (parallel to OECD-BEPS Action 12 ³⁴)
	Promote higher tax good governance standards worldwide → Work on the development of an ‘EU black list’ of non-cooperative jurisdictions
	Improve the protection of whistle-blowers → Commission is assessing the scope for horizontal or further sectorial action at EU level, while respecting the principle of subsidiarity.

In October 2016, the EU Commission published its ‘Corporate Tax Reform Package’ that includes two proposals for the harmonization of corporate taxation in the EU in a two-step procedure:

- First, the Commission proposes to harmonize corporate tax bases across each of the EU Member States (which would be mandatory for large groups), including a super-deduction for R&D costs and notional interest deduction for

31. See, e.g., Recital 2 of the Preamble of the ATAD Proposal, *supra* n. 20.

32. For such arguments, see Florian Oppel, *BEPS in Europa: (Schein-)Harmonisierung der Missbrauchsabwehr durch neue Richtlinie 2016/1164 mit Nebenwirkungen*, 25 IStR 797,798–799 (2016); Desens, *supra* n.5, at 827-828; see also Werner Haslehner, *Anti-Hybrid Measures in the Parent Subsidiary Directive and the EU’s Competence to Harmonise*, Kluwer International Tax Blog (31 Aug. 2015), <http://kluwertaxblog.com/2015/08/31/anti-hybrid-measures-in-the-parent-subsidiary-directive-and-the-eus-competence-to-harmonise/>. For a comprehensive analysis, see also Arnaud de Graaf & Klaas-Jan Visser, *ATA Directive: Some Observations Regarding Formal Aspects*, 25 Intertax 199, 202–.206 (2016).

33. Communication on further measures to enhance transparency and the fight against tax evasion and avoidance of 5 July 2016, COM(2016) 451 (hereinafter ‘2016 Further Transparency Communication’).

34. OECD-BEPS Project, *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, OECD (2015).

equity financing (Allowance for Growth and Investment), in the form of a Common Corporate Tax Base (CCTB) Directive.³⁵

- Second, once a common tax base is established, the Commission proposes that the results of entities in a corporate group in the EU are consolidated under a single filing and that the aggregate profits are apportioned to individual Member States according to labor, assets and sales by destination through a Common Consolidated Corporate Tax Base (CCCTB) Directive.³⁶ Until full CCCTB consolidation is introduced, the Commission’s proposal foresees that group entities should be able to offset profits and losses they make in different Member States (i.e., temporary cross-border loss relief with recapture).

The Corporate Tax Reform Package (see Table 13.6) also includes a proposal to introduce measures to address certain hybrid mismatches partly in relation to non-EU countries but partly, and more broadly, by updating the ATAD³⁷ and a proposal to introduce mandatory binding dispute resolution of double taxation cases in the European Union.³⁸

Table 13.6 Corporate Tax Reform Package (October 2016)

Chapeau Communication (COM(2016) 682)			
Proposal for a Dispute Resolution Directive (COM(2016) 686) ³⁹	C(C)CTB ⁴⁰		Proposal for a Council Directive to amend the ATAD with regard to hybrid mismatches with third countries (COM(2016) 687) ⁴¹
	Proposal for a Common Corporate Tax Base (CCTB) Directive (COM(2016) 685)	Proposal for Common Consolidated Corporate Tax Base (CCCTB) Directive (COM(2016) 683)	

Finally, one common theme of the EU Commission’s work of the past few years stands out: Tax transparency. Mutual assistance between the Member States in the

35. The 2016 CCTB Proposal, *supra* n. 16.
36. The 2016 Relaunched CCCTB Proposal, *supra* n. 13.
37. Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries of 25 October 2016 COM(2016) 687 (hereinafter the ‘Hybrid Mismatches Proposal’).
38. The 2016 Dispute Resolution Proposal, *supra* n. 18.
39. See the Commission Staff Working Document, Impact Assessment Accompanying the Documents Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanism in the European Union of 25 October 2016, SWD(2016) 343.
40. See also the Commission Staff Working Document, Executive Summary of the Impact Assessment Accompanying the Document Proposals for a Council Directive on a Common Corporate Tax Base and a Common Consolidated Corporate Tax base (CCCTB) of 25 October 2016, SWD(2016) 342.
41. See also the Commission Staff Working Document Accompanying the document Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries of 25 October 2016, SWD(2016) 345.

field of direct taxation goes back to 1977,⁴² but has quickly developed and evolved in the past few years: Parallel to the developments in the OECD, a new Mutual Assistance Directive was issued in 2011,⁴³ moving beyond the traditional concepts of exchange of information upon request or spontaneously and implementing automatic exchange of information (see Table 13.7) on certain non-financial income. In rapid succession, the mandatory automatic exchange was extended to financial information (2014),⁴⁴ information on tax rulings (2015)⁴⁵ and country-by-country reports (2016);⁴⁶ moreover, it will likely be amended to grant tax authorities access to anti-money laundering information (2017).⁴⁷ The following table gives a brief overview.

Table 13.7 Automatic Exchange of Information in the European Union

Step 1 – Certain Types of Non-Financial Income (2011)	<ul style="list-style-type: none">– Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, [2011] L 64/1 (based on Proposal COM(2009) 29 [2 February 2009])– Automatic exchange of information with effect from 1 January 2015, where information is available, in respect of five non-financial categories of income and capital, for<ul style="list-style-type: none">– income from employment,– director’s fees,– life insurance products not covered by other Directives,– pensions, and– ownership of and income from immovable property.– Implementation (computerized format) through the Commission Implementing Regulation (EU) 2015/2378, [2015] OJ L 332/19, as amended– Also: First Report of the Commission AEFI expert group on the implementation of Directive 2014/107/EU for automatic exchange of financial account information (March 2015)
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42. Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, OJ 1977 L 336/15, repealed.

43. Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ 2011 L 64/1.

44. Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ 2014 L 359/1.

45. Council Directive 2015/2376/EU of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ 2015 L 332/1 (hereinafter the ‘Mutual Assistance Directive Amendment’).

46. Council Directive 2016/881/EU of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ 2016 L 146/8.

47. Political agreement in Council was reached on 8 November 2016; see the Council’s press release 633/16 (8 November 2016).

Step 2 – Financial Information (2014)	<ul style="list-style-type: none"> – Council Directive 2014/107/EU of 9 December 2014, [2014] OJ L 359/1 (based on Proposal COM(2013) 348 [12 June 2013]) – Implementation of the OECD’s Common Reporting Standard (CRS)⁴⁸ – Automatic exchange of information (generally beginning on 30 September 2017 for taxable periods starting with 2016) without the requirement of ‘availability’ for financial information, such as, <ul style="list-style-type: none"> – interest, dividends and similar types of income, – sale proceeds from the sale of financial assets, – account balances. – Implementation (computerized format) through the Commission Implementing Regulation (EU) 2015/2378, [2015] OJ L 332/19, as amended – Repeal of the Savings Interest Directive by Council Directive (EU) 2015/2060 of 10 November 2015, [2015] OJ L 301/1 (based on Proposal COM(2015) 129 [18 March 2015]) – Amendments of the savings interest agreements with Switzerland, Liechtenstein, Monaco, Andorra and San Marino
Step 3 – Tax Rulings (2015)	<ul style="list-style-type: none"> – Council Directive (EU) 2015/2376 of 8 December 2015, [2015] OJ L 332/1 (based on Proposal COM(2015) 135 [18 March 2015]) – Part of the Tax Transparency Package (COM(2015) 136) and parallel to OECD-BEPS Action 5⁴⁹ – Exchange of basic information on advance cross-border rulings and advance pricing arrangements with effect from 1 January 2017 – Applies for cross-border rulings and advance pricing arrangements that were issued, amended or renewed <ul style="list-style-type: none"> – after 31 December 2016 or – within a period beginning five years before 1 January 2017 with the exception of those issued, amended or renewed between 1 January 2012 and 31 December 2013 if they were not still valid on 1 January 2014.⁵⁰ – Does not apply in a case where an advance cross-border ruling exclusively concerns and involves the tax affairs of one or more natural persons.

48. Standard for Automatic Exchange of Financial Account Information (Common Reporting Standard) of 13 February 2014, now included in the Standard for Automatic Exchange of Financial Information in Tax Matters of 21 July 2014; *see also* the ‘CRS Implementation Handbook’ – Implementation Handbook for the Standard for Automatic Exchange of Financial Information of 7 August 2015.

49. OECD Countering Harmful Tax Practices Report, *supra* n. 11.

50. For those issued, amended, or renewed between 1 January 2014 and 31 December 2016, the exchange shall take place irrespective of whether they are still valid. Member States may also exclude those advance cross-border rulings and advance pricing arrangements issued, amended or renewed before 1 April 2016 if they concern a particular person or a group of persons (excluding those conducting mainly financial or investment activities) with a group wide annual net turnover of less than EUR 40 million.

Step 4 – Country-by-Country Reporting (2016)	<ul style="list-style-type: none"> – Council Directive (EU) 2016/881 of 25 May 2016, [2016] OJ L 146/8 (based on Proposal COM(2016) 25 [28 January 2016]) – Part of the Anti-Tax Avoidance Package (January 2016) and parallel to OECD-BEPS Action 13⁵¹ – Exchange of country-by-country reports (CbCR) with effect from 1 January 2017 – Reports include information for every tax jurisdiction in which the multinational group does business on the amount of revenue, the profit before income tax, the income tax paid and accrued, the number of employees, the stated capital, the retained earnings and the tangible assets. – Member States must take the necessary measures to require certain taxpayers to file a country-by-country report. – The relevant competent authority shall then, by means of automatic exchange, communicate the report to any other Member State in which, on the basis of the information in the country-by-country report, one or more of the group entities are either resident for tax purposes, or are subject to tax with respect to the business carried out through a permanent establishment. – Note that the EU Commission has also proposed to change the accounting directive to introduce Public CbC-Reporting (COM(2016) 198 [12 April 2016])
Step 5 – Access to Anti-Money-Laundering Information (2017)	<ul style="list-style-type: none"> – Political agreement on a Council Directive in November 2016⁵² (based on Proposal COM(2016) 452 [5 July 2016]) – Tax authorities must be given access to the data provided under the EU's anti-money laundering rules (e.g., customer due diligence information and the information in their national beneficial ownership registries) as from 1 January 2018 – Concerns especially situations where the Account Holder is an intermediary structure (i.e., a Passive Non-Financial Entity), as the Financial Institutions shall look through that entity and identify and report its controlling persons (beneficial owners in anti-money-laundering terminology).

With regard to the automatic exchange of financial information, the savings interest agreements (see Table 13.8) between the EU and Switzerland, Liechtenstein, Monaco, Andorra and San Marino,⁵³ which were based on the – now repealed –

51. OECD Transfer Pricing Report, *supra* n. 10.

52. Political agreement in Council was reached on 8 November 2016; see the Council's press release 633/16 (8 November 2016).

53. See, e.g., the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ 2004 L 385/30 (2004).

Savings Interest Directive,⁵⁴ had to be amended to implement the new standard also with these European financial centres. These negotiations have now been finalized:

Table 13.8 EU Agreements with Third Countries

	Council Decision on Signing	Council Decision on Conclusion	Text of the Protocol in the OJ	Starting from
Switzerland	(EU) 2015/860, [2015] OJ L 136/5 — Proposal COM(2015)150	(EU) 2015/2400, [2015] OJ L 333/10 — Proposal COM(2015)151	[2015] OJ L 333/12	1 Jan. 2017
Liechtenstein	(EU) 2015/1994, [2015] OJ L 290/16 — Proposal COM(2015)394	(EU) 2015/2453, [2015] OJ L 339/1 – Proposal COM(2015)395	[2015] OJ L 339/3	1 Jan. 2016
Monaco	(EU) 2016/1392, [2016] OJ L 225/1 — Proposal COM(2016)200	(EU) 2016/1830, ABl L 280/1 (2016) – Proposal COM(2016)201	[2016] OJ L 225/3	1 Jan. 2017
Andorra	(EU) 2016/242, [2016] OJ L 45/10 – Proposal COM(2015)632	(EU) 2016/1751, [2016] OJ L 268/38 – Proposal COM(2015)631	[2016] OJ L 268/40	1 Jan. 2017
San Marino	(EU) 2015/2469, [2015] OJ L 346/1 – Proposal COM(2015)519	(EU) 2016/828, [2016] OJ L 140/1 — Proposal COM(2015)518	[2015] OJ L 346/3	1 Jan. 2016

54. Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, OJ 2003 L 157/38, repealed by Council Directive (EU) 2015/2060 of 10 November 2015 repealing Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ 2015 L 301/1.

§13.02 INITIATIVES IN INDIRECT TAXATION

On 7 April 2016, the Commission adopted an Action Plan on VAT⁵⁵ (see Table 13.9). It aims to tackle the VAT gap and adapt the VAT system to the digital economy. It lays out the Commissions approach towards a robust single European VAT area in relation to the definitive VAT system for cross-border supplies. The Commission proposes flexible EU rules governing VAT rates.

Table 13.9 Action Plan on VAT⁵⁶

Action Plan on VAT			
Recent and ongoing policy initiatives	Urgent measures to tackle the VAT gap	Towards a robust single European VAT area	Towards a modernised VAT rates policy
Removing VAT obstacles to e-commerce in the Single Market + SMEs VAT package	Improving cooperation within the EU and with non-EU countries Towards more efficient tax administrations Improving voluntary compliance Tax collection	Definitive VAT regime for cross-border trade	More freedom for Member States on rates policies

On 1 December 2016, the Commission has proposed practical new measures to support the digital economy when it comes to VAT compliance, which can currently place heavy burdens on small business operating online.⁵⁷ The new rules should help to accelerate growth for online businesses, in particular start-ups and SMEs. This proposal is part of the Strategy for the EU Digital Single Market which tries to tear down regulatory walls and moving from twenty-eight national markets to a single one. In the opinion of Commission the package of proposals will:

- Facilitate cross-border trade
- Combat VAT fraud
- Ensure fair competition for EU businesses
- Provide equal treatment for online publications.

55. Communication from the Commission to the European Parliament, the Council and the European Economic Council on an action plan on VAT Towards a single EU VAT area – Time to decide, COM(2016) 148 final (hereinafter ‘VAT Communication’).

56. See http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/images/taxation/vat/vat_action_plan_en.jpg (accessed 29 November 2016).

57. Proposal for a Council Directive amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, SWD(2016) 379 final, and SWD(2016) 382 final.

Businesses, which are selling goods online, could take care of all their VAT obligations in the EU through a digital online portal ('One-Stop Shop'),⁵⁸ hosted by their own tax administration and in their own language.⁵⁹ These rules already exist for online sellers of electronic services ('e-services') and should be extended for distance selling of tangible goods.

In order to support start-ups and micro-businesses, a yearly VAT threshold of EUR 10.000 under which cross-border sales for online companies are treated as domestic sales should be introduced and VAT paid to their own tax administration. To make trading in the single market as similar as possible to trading at home for these businesses, same invoicing and record keeping rules will be implemented.

Current exemption from VAT for imports of small consignments from outside the EU will be removed, because it leads to unfair competition and distortion for EU business. The same VAT rate should be applied for e-publications like e-books and online newspapers as for their printed equivalents.⁶⁰ The option to treat e-publications and printed publications equally removes restrictions on Member States that are unjustified.⁶¹

The Commission estimates that these new rules will have a major effect for business selling goods and services online. Business should benefit from fairer rules, lower compliance costs and reduced administrative burdens.⁶²

SMEs bear proportionally higher VAT compliance costs than large businesses due to the complexity and fragmentation of the EU VAT system. Therefore, the Commission is preparing a comprehensive simplification package for SMEs that will seek to create an environment that is conducive to their growth and favourable to cross-border trade. In particular, the special scheme for small enterprises will be introduced.

The Commissions wants to take urgent action on three fronts to tackle the VAT gap by:⁶³

- enhancing administrative cooperation with third countries;
- collectively improving the performance of European tax administrations; and
- improving voluntary compliance.

58. Proposal for a Council Regulation amending Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax, COM(2016) 755.

59. Proposal for a Council Implementing Regulation amending Implementing Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, COM(2016) 756 final.

60. Proposal for a Council Directive amending Directive 2006/112/EC, as regards rates of value added tax applied to books, newspapers and periodicals, COM(2016) 758 final.

61. Commission Staff Working Document, Impact Assessment: Accompanying the Document Proposal for a Council Directive Amending Directive 2006/112/EC as regards rates of value added tax applied to books, newspapers and periodicals, SWD(2016) 392 final.

62. Commission Staff Working Document, Impact Assessment: Accompanying the Document Proposals for a Council Directive, a Council Implementing Regulation and a Council Regulation on Modernizing VAT for cross-border B2C e-Commerce, COM(2016) 757 final; SWD(2016) 382 final.

63. See http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/tax_cooperation/vat_gap/2016-03_20_measures_en.pdf (accessed 30 November 2016).

In 2016, the Commission will present measures to improve cooperation between tax administrations including from third countries and with customs and law enforcement bodies and to strengthen tax administrations' capacity for a more efficient fight against fraud as well as an evaluation report of the Directive on the mutual assistance for the recovery of tax debts.

In 2017, the Commission will table a proposal to enhance VAT administrative cooperation and Eurofisc.

The present VAT transitional system treats domestic and cross-border transactions differently. On the one hand VAT is levied on domestic supplies of goods and services. Goods or services can be bought free of VAT within the Single Market on the other hand. The Commission will propose legislation for a definitive VAT system for cross-border trade which will be based on the principle of taxation in the country of destination of the goods, as agreed by the European Parliament and the Council.

The Commission considers that in the definitive VAT system, the taxation rules according to which the supplier of goods collects VAT from his customer should be extended to cross-border transactions. The Commission is of the opinion that this will ensure consistent treatment of domestic and cross-border supplies along the entire chain of a production and distribution, and re-establish the basic features of the VAT in cross-border trade (i.e. the fractionated payments system with its self-policing character).

In the future system, all businesses that trade in other Member States would be able to sort out their VAT in the other Member State of destination via an online portal in their home country. Otherwise, traders would have to register for VAT, file returns and make payments in every EU country where they operate. The online portal would also allow VAT to be collected by the country where the sale is made and transferred to the country where the goods are consumed.⁶⁴

However, such a system change has pros and cons.⁶⁵ Such a system change would lead to increased information and compliance costs for SMEs. Only larger businesses would benefit from such a system change. Furthermore, it is doubtful whether such a system would really contribute to closing the VAT gap. Since additional 600 billion euros VAT would be involved, there is an increased potential for Missing-Trader Fraud. Obviously, the Commission estimates that a system change will have nevertheless a positive impact because of the mark-up applied by businesses on their intra-community purchases.⁶⁶ Success of a system change also requires trust of tax authorities in each other's ability and willingness to monitor and audit VAT paid to another Member State.

The current rules of the VAT Directive include lower limits on the levels of the VAT rates and a list of the goods and services which could benefit from reduced rates. The Member States have therefore only limited autonomy for governing VAT rates. The

64. See http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/action_plan/vat_factsheet_en.pdf (accessed 30 November 2016).

65. EY, *Implementing the 'destination principle' to intra-EU B2B supplies of goods – Feasibility and economic evaluation study* – Final Report of 30 June 2015, TAXUD/2013/DE/319, 15 ('EY Report').

66. *Ibid.*, at 17.

Commission would like to grant more freedom on setting VAT rates. However, appropriate safeguards will be taken to prevent excessive complexity and distortion of competition. Operations in the Single Market should not be affected by the diversity of rates. The Commission is not very specific, how those goals will be achieved. It points out that the degree of autonomy on rates to be granted to Member States is not purely a technical matter, but requires political discussion. In 2017, detailed legislative proposals based on a mandate from the Council will be issued by the Commission.

The Commission has rejected twice in 2006⁶⁷ and 2015⁶⁸ the request of Member States for authorization to introduce the reverse charge in respect of all Business to Business (B2B) supplies of goods or services where the invoice value exceeds a certain threshold. However, in 2016 the Commission promised to present a proposal to authorize Member States to implement a hybrid VAT system for domestic supplies of goods and services. This would authorize Member States to implement a special measure as regards the application of the reverse charge mechanism in relation to all supplies of goods or services above a certain threshold with a view of combating fraud.

The reverse charge in respect of all domestic Business to Business (B2B) supplies of goods or services would eliminate missing trader fraud effectively. It would also prevent revenue losses by insolvencies of in-between traders and ensure equal tax treatment of domestic supplies and intra-community supplies of goods as well as cross-border supplies of services. Besides these advantages there are also downsides connected with such a system change. Opportunities for consumers to receive tax free goods and services would possibly increase, if they pretend to be a taxpayer above threshold ('micro fraud'). Furthermore, a higher risk of revenue losses by insolvencies of retailers can be expected. Since the system of fractioned payment would be suspended there is an increased risk of revenue losses by undeclared sales.

However, on 20 December 2016 the Commission tabled a proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards the temporary application of a generalized reverse charge mechanism (GRCM) in relation to supplies of goods and services above a certain threshold.⁶⁹ A Member state may choose to implement GRCM for domestic goods and services above the threshold of €10,000 until 30 June 2022, if it meets the following criteria:

- (a) it has a VAT gap, expressed as a percentage of the VAT Total Tax Liability, of at least 5 percentage points above the Community median VAT gap;
- (b) it has a carousel fraud level within its total VAT gap of more than 25%;

67. Communication from the Commission to the Council in accordance with Article 27(3) of Directive 77/388/EEC, COM(2006) 404 final.

68. Communication from the Commission to the Council in accordance with Article 395 of Council Directive 2006/112/EC, COM (2015) 538 final.

69. COM(2016) 811 final; *see also* Commission staff working document impact assessment, Generalised reverse charge mechanism – Accompanying the document 'Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards the temporary application of the generalised reverse charge mechanism in relation to supplies of goods and services above a certain threshold, SWD(2016) 457 final.'

- (c) it establishes that other control measures are not sufficient to combat carousel fraud on its territory.

A Member state which does not fulfil these criteria themselves could opt to implement the system until 30 June 2022, if it meets the following requirements:

- (a) has a common border with a Member State that is authorized to apply the GRCM;
- (b) establishes that a serious risk of shift of fraud towards its territory exists because of the authorization of the GRCM to that Member State;
- (c) establishes that other control measures are not sufficient to combat fraud on its territory.

If Member States meet the requirements and wish to implement the GRCM must submit a request to the Commission and the Commission then shall adopt an implementing decision confirming that the request complies with the requirements. In case of considerable negative impact on the internal market, the Commission can repeal all the implementing decisions at any time at the earliest six months after the entry into force of the first implementing decision authorizing a Member State to apply the GRCM. The five-year limitation of the implementation of the GRCM and the possibility to revoke the implementing decision by the Commission at any time as suggested in the Commission's proposal for a directive cannot provide confidence in the meaningfulness and durability of the scheme and should be rejected in the light of the associated administrative and training expenses for businesses and the tax administration.

§13.03 APPENDIX: OECD-BEPS ACTIONS AND CORRESPONDING EU MEASURES

This table should give a brief overview of the OECD-BEPS Actions and the corresponding measures in the EU (without regard to the Commission's proposal for a Common (Consolidated) Corporate Tax Base⁷⁰):⁷¹

70. See the 2016 CCTB Proposal and the 2016 Relunched CCCTB Proposal, *supra* n. 13.

71. See also the overview in the Commission Staff Working Document accompanying the document Communication from the Commission to the European Parliament and the Council – Anti Tax Avoidance Package: Next Steps towards delivering effective taxation and greater tax transparency in the EU of 28 January 2016, SWD(2016) 6, 48 et seq.

Action	OECD-BEPS	EU Measures
Action 1: Digital Economy	<ul style="list-style-type: none"> – Analytical report addressing the challenges of the digital economy, referring to the OECD-BEPS actions in general to address risks posed by digital economy – Discussion of possible special measures with regard to the digital economy (e.g., ‘digital presence’, withholding taxation, equalization taxes) 	<ul style="list-style-type: none"> – Report of the Commission Expert Group on Taxation of the Digital Economy⁷² – Action Plan on VAT⁷³ – Work of the Commission also on tax questions relating to the collaborative economy (‘sharing economy’)⁷⁴ – Situation will be monitored to see if general anti-avoidance measures are sufficient to address digital risks.
Action 2: Hybrid Mismatch Arrangements	<ul style="list-style-type: none"> – Best practice recommendations to avoid mismatches (‘tax arbitrage’) by linking the tax treatment of an instrument or entity in one country with the tax treatment in another – Avoidance of ‘double deduction’ situations (‘DD’) and mismatches where a deduction is not matched by a corresponding inclusion (‘D/NI’) – Discussion and proposal for corresponding amendments in tax treaty law (e.g., hybrid entities) 	<ul style="list-style-type: none"> – Introduction of an obligation to tax in the Parent-Subsidiary-Directive for distributions insofar as they are deductible in the country of the subsidiary (‘hybrid financial instruments’) (from 2016)⁷⁵ – ATA Directive includes a provision to address hybrid mismatches (from 2019)⁷⁶ and subsequent Commission proposal to further expand this provision,⁷⁷ previously also work of the Code of Conduct group on hybrid branches⁷⁸

72. Commission Expert Group on Taxation of the Digital Economy, Report of 28 May 2014.

73. See VAT Communication, *supra* n. 55.

74. See Commission’s Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe of 25 May 2016, COM(2016)288, the European agenda for the collaborative economy of 2 June 2016, COM(2016)356 (including the Commission staff working document in SWD(2016)184).

75. See Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ 2014 L 219/40.

76. Art. 9 of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ 2016 L 193/1 (hereinafter the ‘ATAD’).

77. The Hybrid Mismatches Proposal, *supra* n. 37; see also the Slovak Presidency Note to the High Level Working Party on Tax Issues, BEPS Roadmap on Future Work of 14 July 2016, Doc. 11071/16 FISC 121 (hereinafter the ‘2016 EU-BEPS Roadmap’) paras 18 et seq.

78. See report and appendices of the Code of Conduct group to the Council, Doc. 9912/16 FISC 97 ECOFIN 558 of 13 June 2016; see, e.g., the press release in Doc. 16603/14 PRESSE 68 of 9 December 2014, 16.

Action	OECD-BEPS	EU Measures
	<ul style="list-style-type: none"> – Currently follow-up work on branch mismatches structures⁷⁹ 	<ul style="list-style-type: none"> – Recommendation to Member States to introduce a subject-to-tax-clause in their tax treaties⁸⁰ – Proposal to introduce a comprehensive subject-to-tax-clause in the Interest-Royalties-Directive⁸¹
Action 3: Controlled Foreign Companies (CFCs)	<ul style="list-style-type: none"> – Best practice recommendations for implementing controlled foreign companies (CFC) rules 	<ul style="list-style-type: none"> – ATA Directive includes provisions on CFC rules with effect within the EU and externally (from 2019)⁸²
Action 4: Interest Limitation	<ul style="list-style-type: none"> – Best practice recommendations on limiting a company's or group's net interest deductions. 	<ul style="list-style-type: none"> – ATA Directive includes provisions to limit interest deductions with effect within the EU and externally (from 2019 or 2024, at the latest)⁸³
Action 5: Harmful Tax Practices	<ul style="list-style-type: none"> – Mandatory spontaneous exchange of relevant information on tax rulings (minimum standard⁸⁴) 	<ul style="list-style-type: none"> – Amendment of the Mutual Assistance Directive to include mandatory automatic exchange of information on all cross-border rulings and APAs (from 2017)⁸⁵

79. See OECD-BEPS Project, *Branch Mismatch Structures, BEPS Action 2 – 22 August 2016 Public Discussion Draft*, (OECD Publishing 2016).

80. Commission Recommendation of 6 December 2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters of 6 December 2012, C(2012) 8805, accompanied by an 'Impact Assessment' of 6 December 2012, SWD(2012)403 (collectively, hereinafter, the 'Third-Countries Recommendations').

81. See Art. 1(1) of the Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States of 11 November 2011, COM(2011) 714, to which the Commission refers in its 5 Key-Areas Communication, *supra* n. 15, at 11; for further analysis, see, e.g., Georg Kofler & Juan Lopez Rodriguez, *Beneficial Ownership and EU Law*, in *Beneficial Ownership: Recent Trends* 215, 222 (Michael Lang et al. eds, IBFD 2013). For the current status of this discussion, see also the EU-BEPS Roadmap, *supra* n. 77, para. 6 et seq.

82. Arts 7 and 8, ATAD, *supra* n. 76.

83. Art. 4, ATAD, *supra* n. 76.

84. See Question 4, OECD-BEPS Project, *Frequently Asked Questions – 2015 Final Reports* (OECD Publishing 2015) (hereinafter 'OECD FAQs').

85. The Mutual Assistance Directive Amendment, *supra* n. 45; see also the 2015 Tax Transparency Communication, *supra* n. 8, at 5.

Action	OECD-BEPS	EU Measures
	<ul style="list-style-type: none"> – Agreement on the ‘modified nexus approach’ for patent boxes where tax benefits from preferential regimes for IP are linked to the underlying economic activity⁸⁷ 	<ul style="list-style-type: none"> – Agreement in the Code of Conduct Group on the ‘modified nexus approach’ for patent boxes⁸⁶ (and review of its implementation by that group⁸⁸) and further work on harmful tax competition,⁸⁹ including the issuance of rulings⁹⁰ – State aid control by the Commission, also with respect to tax rulings⁹¹ – Amendment of the Mutual Assistance Directive to grant tax authorities access to anti-money laundering information⁹² – Pilot project of all EU Member States to improve the exchange of information on beneficial ownership and announcement of a Commission analysis for 2016⁹³

86. See, e.g., OECD Modified Nexus Approach; Report of the Code of Conduct Group to the Council, 13 June 2016, Doc. 9912/16 FISC 97 ECOFIN 558, paras 17 et seq.; and the 5 Key-Areas Communication, *supra* n. 15, 11 et seq.

87. For details on that agreement, see OECD-BEPS Project, *Agreement on Modified Nexus Approach for IP Regimes*, Action 5 (OECD Publishing 2015) (hereinafter ‘OECD Modified Nexus Approach’).

88. See Annex 3 (Work Package 2015) to the report of the Code of Conduct-Group, Doc. 14302/15 FISC 159 ECOFIN 883 of 23 November 2015 (hereinafter ‘Code of Conduct Group Work Package 2015’), see also, e.g., the EU-BEPS Roadmap, *supra* n. 77 paras 27 et seq.

89. See, e.g., the reports of the Code of Conduct-Group to the Council in Doc. 9912/16 FISC 97 ECOFIN 558 of 13 June 2016, and in Doc. 14566/16 FISC 198 ECOFIN 1057 of 17 November 2016.

90. Code of Conduct Group Work Package 2015, *supra* n. 88; see also, e.g., EU-BEPS Roadmap, *supra* n. 77, at 35.

91. See, specifically, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ 2016 C 262/1 (2016), paras 169 et seq.; and the DG Competition Working Paper on State Aid and Tax Rulings of 3 June 2016.

92. Political agreement in Council was reached on 8 November 2016; see the Council’s press release 633/16 (8 November 2016); see also the Proposal for a Council Directive amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities of 5 July 2016, COM(2016) 452, and for the political agreement in Council the press release 633/16 of 8 November 2016.

93. See the 2016 Further Transparency Communication, *supra* n. 33, at 6.

Action	OECD-BEPS	EU Measures
		<ul style="list-style-type: none"> – Measures to promote higher tax good governance standards worldwide⁹⁴ and development of an ‘external strategy’ (including an ‘EU black list’)⁹⁵
Action 6: Treaty Abuse	<ul style="list-style-type: none"> – Discussion and proposals for anti-abuse provisions to be included in tax treaties – Minimum standard against treaty shopping (i.e., ‘Principal Purpose Test’ (PPT) and ‘Limitation of Benefits’ (LoB) or both or a combination of LoB and anti-conduit rules)⁹⁸ – Implementation through the multilateral instrument (Action 15)¹⁰⁰ and amendment of the OECD-MC and the OECD-MC Comm. in 2017¹⁰¹ 	<ul style="list-style-type: none"> – Recommendation on Tax Treaties encourages Member States to use an EU-compatible PPT approach. (‘Principal Purpose Test’)⁹⁶ – ATAD includes a GAAR (from 2019),⁹⁷ previously recommendation that Member States include a GAAR in their domestic tax laws⁹⁹
Action 7: Permanent Establishments	<ul style="list-style-type: none"> – Amendment of the definition of permanent establishment (PE) in Article 5 OECD-MC, to prevent companies from artificially avoiding having a taxable presence (i.e., with regard to the specific activity exemptions and 	<ul style="list-style-type: none"> – Recommendation encourages Member States to use the amended OECD approach on Article 5 OECD-MC¹⁰²

94. See the Third-Countries Recommendation, *supra* n. 80 and, thereafter, e.g., the 5 Key-Areas Communication, *supra* n. 15, 14 et seq. and its appendix (compilation of a list based on the lists of the Member States).

95. See Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation of 28 January 2016, COM(2016) 24 final, and previously the 2016 Further Transparency Communication, *supra* n. 33, at 8. For further details and the methodology, see https://ec.europa.eu/taxation_customs/tax-common-eu-list (accessed 20 February 2017), and for agreement on the criteria see Doc. 14166/16 FISC 187 ECOFIN 1014 of 8 November 2016.

96. 2016 Tax Treaty Abuse Recommendation, *supra* n. 21.

97. Art. 6, ATAD, *supra* n. 76.

98. See Question 4, OECD-BEPS Project, *Frequently Asked Questions – 2015 Final Reports* (OECD Publishing 2015) (hereinafter ‘OECD FAQs’).

99. Commission Recommendation of 6 December 2012 on aggressive tax planning, C(2012) 8806.

100. See Question 46, OECD FAQs, *supra* n. 84.

101. See *ibid.*, Question 111.

102. Commission Recommendation of 28 January 2016 on the implementation of measures against tax treaty abuse, C(2016) 271.

Action	OECD-BEPS	EU Measures
	agency permanent establishments) – Implementation through the multilateral instrument (Action 15) ¹⁰³ and amendment of the OECD-MC and the OECD-MC Comm. in 2017 ¹⁰⁴ – Currently follow-up work on the attribution of profits to permanent establishments ¹⁰⁵	
Actions 8–10: Transfer Pricing – Intangibles, Risk and Capital, High Risk Transactions	– Confirmation of the arm's length principle and comparability analysis as pillars of transfer pricing. – Reinforcement of the international standards with regard to intangibles (Action 8), risk and capital (Action 9) and high risk transactions (Action 10) – Amendments or revisions of Chapters I.D, II, VI, VII und VIII of the OECD-Transfer Pricing Guidelines (TPG) ¹⁰⁸ and corresponding adjustments of Chapter IX ¹⁰⁹ – Currently follow-up work on transactional profit splits ¹¹⁰	– Work of the Joint Transfer Pricing Forum (JTPF) on an EU-approach to implementing BEPS conclusions ¹⁰⁶ – Commission will work with Member States and businesses to build on the OECD TPG and develop coordinated and more concrete implementation within the EU, reflecting the economic reality of the internal market ¹⁰⁷

103. See Question 46, OECD FAQs, *supra* n. 84.

104. See *ibid.*, Question 111.

105. OECD, *Base Erosion and Profit Shifting (BEPS) Public Discussion Draft: BEPS Action 7 – Guidance on the Attribution of Profits to Permanent Establishments*, 4 July – 5 September 2016 (OECD Publishing 2016).

106. For the Joint Transfer Pricing Forum (JTPF), see http://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context/joint-transfer-pricing-forum_en (accessed 20 February 2017), and for a brief overview of the work of the Forum see also, e.g., Georg Kofler, *Article 9*, in Klaus Vogel on *Double Taxation Conventions* m.no. 129 (Eckehart Reimer & Alexander Rust eds, 4th ed., Wolters Kluwer 2015) Wm.no. 129.

107. OECD, *Base Erosion and Profit Shifting (BEPS) Public Discussion Draft BEPS Actions 8-10 Revised Guidance on Profit Splits*, 4 July – 5 September 2016 (OECD Publishing 2016).

108. These changes of the OECD TPG were formally adopted by the OECD Council on 23 May 2016; see the press release 'OECD Council approves incorporation of BEPS amendments into the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' of 15 June 2016.

109. See the 5 Key-Areas Communication, *supra* n. 15, at 11.

110. See OECD, *Base Erosion and Profit Shifting (BEPS) Document for Public Review: Conforming Amendments to Chapter IX of the Transfer Pricing Guidelines*, 4 July – 16 August 2016 (OECD Publishing 2016).

Action	OECD-BEPS	EU Measures
Action 11: Measuring and Monitoring BEPS	<ul style="list-style-type: none"> – Analytical report on new statistics on corporate taxation and the scope and revenue impact of BEPS 	<ul style="list-style-type: none"> – Work on a better quantification of the ‘tax gap’, creation of a Fiscalis Project Group¹¹¹
Action 12: Disclosure of Aggressive Tax Planning	<ul style="list-style-type: none"> – Best practices for the introduction of rules requiring mandatory disclosure of aggressive or abusive transactions, structures or arrangements 	<ul style="list-style-type: none"> – Commission will keep the issue under review, as part of its tax transparency agenda,¹¹² Council invitation to the Commission ‘to consider legislative initiatives on Mandatory Disclosure Rules inspired by Action 12 of the OECD-BEPS project with a view to introducing more effective disincentives for intermediaries who assist in tax evasion or avoidance schemes’¹¹³ – Public consultation in late-2016 session to gather views on future rules to deter promoters of aggressive tax planning schemes¹¹⁴
Action 13: Transfer Pricing Documentation and Country-by- Country Reporting	<ul style="list-style-type: none"> – Agreement on mandatory country-by-country reporting (CbCR) by multinational enterprises to tax administrations on key financial data and automatic exchange of this information (minimum standard;¹¹⁵ no public CbCR) 	<ul style="list-style-type: none"> – Amendment of the Mutual Assistance Directive to introduce mandatory country-by-country reporting (CbCR) and the automatic exchange of these reports between the Member States (from 2017)¹¹⁶

111. See Tax Transparency Communication *supra* n. 8, at 7.

112. See the 2016 Further Transparency Communication, *supra* n. 33, at 7 et seq.

113. See Council conclusions on an external taxation strategy and measures against tax treaty abuse, Press release 281/16, 25 May 2016, and the EU-BEPS Roadmap, paras 32 et seq.

114. See the press release ‘Commission gathers views on future rules to deter promoters of aggressive tax planning schemes’, IP/16/3618 of 10 November 2016, and the previous announcement in the 2016 Further Transparency Communication, *supra* n. 33, at 7.

115. See Question 4, OECD FAQs, *supra* n. 84.

116. Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ 2016 L 146/8.

Action	OECD-BEPS	EU Measures
	<ul style="list-style-type: none"> – Amendment of Chapter V of the OECD-Transfer Pricing Guidelines (TPG)¹¹⁷ 	<ul style="list-style-type: none"> – Commission proposal to change the accounting directive to introduce Public CbCR¹¹⁸
Action 14: Dispute Resolution	<ul style="list-style-type: none"> – Agreement on measures to reduce uncertainty and unintended double taxation for businesses, along with a timely and effective resolution of disputes in this area (minimum standard¹²¹) – A number of countries have also committed to a mandatory binding arbitration process¹²³ 	<ul style="list-style-type: none"> – Multilateral Arbitration Convention for transfer pricing disputes¹¹⁹ and Code of Conduct for its effective implementation¹²⁰ – Proposal for a Directive on mandatory double taxation dispute resolution mechanisms in the European Union¹²² – Work of the expert group ‘Platform for Tax Good Governance’¹²⁴ on double taxation in the internal market¹²⁵

117. These changes of the OECD TPG were formally adopted by the OECD Council on 23 May 2016; see the press release ‘OECD Council approves incorporation of BEPS amendments into the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations’ of 15 June 2016.

118. Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches of 12 April 2016 COM(2016) 198.

119. Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of transfers of profits between associated undertakings, OJ 1990 L 225/10, as amended.

120. Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, OJ 2009 C 322/1; for a proposal to further amendment of the Code of Conduct see Joint Transfer Pricing Forum, Final Report on Improving the Functioning of the Arbitration Convention, JTPF/002/2015/EN (Mar. 2015).

121. See Question 4, OECD FAQs, *supra* n. 84.

122. The 2016 Dispute Resolution Proposal, *supra* n. 18; see also the 5 Key-Areas Communication, *supra* n. 15, at 13, and the 2016 EU-BEPS Roadmap, *supra* n. 88, para. 24.

123. See the list of countries in OECD-BEPS Project, *Making Dispute Resolution Mechanisms More Effective – Action 14* 2015 Final Report, para 62 (OECD Publishing 2015).

124. Set up by the Commission’s decision C(2013)2236 of 23 April 2013. The work of the Platform is available at https://ec.europa.eu/taxation_customs/business/company-tax/tax-good-governance/platform-tax-good-governance_en (accessed 20 February 2017).

125. See, e.g., Platform/004/2013/EN (October 2013).

Action	OECD-BEPS	EU Measures
Action 15: Multilateral Instrument to Modify Tax Treaties	<ul style="list-style-type: none"> – Analytical report on the use of a multilateral instrument to amend tax treaties in order to integrate BEPS related measures where necessary – Currently work of interested countries on the multilateral instrument 	<ul style="list-style-type: none"> – ATA Recommendation sets out the Commission's views on tax treaty related issues and their compatibility with EU law, which Member States should consider in their negotiations on the multilateral instrument¹²⁶

126. The 2016 Tax Treaty Abuse Recommendation, *supra* n. 21.