Implementing BEPS in the European Union: the prohibition of abuse as a new thriving force of EU tax intregation[1]

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I. Introduction

In 2013, the OECD, on request by the G20, adopted a 15-point Action Plan to tackle base erosion and profit shifting (BEPS). The BEPS project is a comprehensive package of measures aiming at better coordinating domestic tax systems, at promoting transparency and exchange of information in order to ultimately realign taxation with economic substance and value creation. It targets harmful international tax arrangements taking advantage of the differences between several states legislation (two or more). The outcome of the BEPS action plan, contained in final reports published in October 2015, consists in measures that are of a soft law nature,[3] taking the form of "minimum standards," "best practices" or "recommendations".[4]

Whilst BEPS is not an EU initiative, 21 of the 28 EU Member States are also OECD members. The EU and its Member States have since the beginning played a leading role in the BEPS initiative and it is crucial for the global effectiveness of the process that the EU continues to exercise this leadership as regards the most delicate step, i.e. the adoption of hard law rules.[5] Nevertheless, considering that the implementation of BEPS has to be done consistently with the current EU legal framework, the EU and its Member States face a particular challenge in respect of the BEPS implementation. The objective of the EU being mostly to ensure mobility of undertakings and other factors of production within the Internal market, it could potentially clash with measures aimed at limiting tax evasion opportunities by making certain cross-border operations more difficult.[6] The present contribution aims at highlighting potential points of friction between the OECD BEPS recommendations and the EU rules applicable to direct taxation such as the freedoms of movements enshrined in the Treaty and the harmonization directives. Among the topics covered, specific attention will be devoted to the proposals and recommendations forming the EU Anti-Tax Evasion Package issued by the European Commission on 28 January 2016,[7] in particular as regards abuse of tax treaties, EU and domestic law.[8]

II. The OECD Final Report on BEPS Action 6

In its final Report on Action 6 of the BEPS project, the OECD recommends changes to the OECD model tax convention in order to attribute double tax treaties (DTT) benefits only in "appropriate circumstances". It proposes measures to combat treaty shopping, in particular the inclusion of targeted anti-avoidance provisions in DTT, called

(1) Reproduit de Nueva Fiscalidad. Estudios en homenaje a Jacques Malherbe, 1185 pages, C. Hoyos Jiménez, C. García Novoa et J.A. Fernández Cartagena, dir., Instituto colombiano de Derecho tributario, Bogotá (2017).

(2) UC Louvain.

(3) The measures, by their nature, are not legally binding, but it is expected that they will be applied according to the consensus.

(4) OECD (2015), Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, p. 6. www.oecd.org/tax/beps-explanatory-statement-2015.pdf.

(5) Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2015 Final Report, p. 22.

(6) In respect of the obligation of MS to abide by EU law, the CJEU in several cases made it clear that "*it should be recalled that, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law*". See Case C-80/94, *Wielockx v Inspecteur der directe belastingen*, [1995] ECLI:EU:C:1995:271, para. 16, Case C-264/96, *Imperial Chemical Industries v Colmer*, [1998] ECLI:EU:C:1998:370, para. 19, C-268/03, *De Baeck*, [2004] ECLI:EU:C:2004:342, para. 19.

(7) Among others, see Commission Communication of 28 January 2016 "Anti-avoidance Tax Package: Next steps towards delivering effective taxation and greater tax transparency in the EU", COM/2016/023; Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, COM(2016) 26 final.

(8) Other Actions of the BEPS initiative raise important issues of compatibility with EU law. This is in particular the case of the nexus approach applied to tax incentives in favour of research and development (patent boxes) in the framework of Action 5. On this issue, see R. Danon, "Tax incentives on Research and Development (R&D) – General Report", in: *IFA Cahiers*, 2015 (Volume 100A), pp. 17-56, p. 27 *seq.*; E. Traversa, "Tax Incentives and Territoriality within the European Union: Balancing the Internal Market with the Tax Sovereignty of Member States", in: *World Tax Journal*, 2014 (Volume 6), No 3, pp. 315-340.

limitation-on benefits rules (LOB) and of a general anti-abuse provision based on the principal purposes of transactions or arrangements (PPT).[9] The OECD also suggests a clarification of the objectives of DTT, by making more explicit reference in the title and preamble, as well as in the Introduction to the OECD Model Tax Convention that "*tax treaties are not intended to be used to generate double non-taxation*".[10] Such an objective would be relevant for the interpretation of all the provisions of the double taxation convention.[11] It would also serve – among others, and in particular the prevention of double taxation – as a guiding principle of the international tax policy of OECD Member States that, in general, countries should consider before embarking on DTT negotiations with another country.[12]

From an EU law perspective, DTT are part of national law of the Member States and are consequently subject to the control of their compatibility with EU law. At the level of the principles, the goal of Action 6 to combat double non-taxation is similar to the one pursued by the European Commission in several Communications and Proposals aiming at fighting against aggressive tax planning and tax avoidance.[13]

However, as mentioned supra, it should be recalled that in the eyes of the CJEU, the mere loss of tax revenue, whether caused by double non-taxation or not, cannot alone be used as a justification to domestic anti-avoidance measures that would specifically target cross-border payments or structures.[14]

III. Limitation on benefits rules and EU law

The LOB model treaty provisions proposed by the OECD have the purpose of countering the practice of structuring a business to benefit from more favorable tax treaty networks available in certain jurisdictions.[15] These provisions consist of a series of tests designed to limit treaty benefits to qualified persons based on legal form, ownership and activities. The OECD in its Final report on Action 6 also recommends the inclusion of a 'derivative benefits' provision that would enter into play when a payee would fail to qualify under the LOB provision.[16] Such a rule would allow to consider indirect ownership of the income to assess the entitlement of a company to benefits under a treaty, in the case where the foreign owner of the payee would be a resident in a country with which the state of the payer also has a tax treaty (known as "equivalent beneficiary"). The test would then be whether the shareholders of the company requesting treaty benefits would have been entitled to not less than the same benefit if they would be the one directly under scrutiny. This test exhibits that the establishment of the payee does not grant benefits which the owners of the payee could not otherwise obtain.

As regards EU law, the question is whether Member States can include the LOB rules as drafted in the OECD Action 6 Report in intra-EU DTT and DTT concluded with non-EU Member States.[17] In this context, the CJEU has already ruled on the compatibility of LOB with the fundamental freedoms guaranteed by EU law and its case-law is very useful to assess the EU conformity of the OECD proposals.[18]

(9) OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Final Report, OECD Publications, October 2015, pp. 20 *seq*.

(10) Changes to the Commentary of Article 1 OECD MC were already made to that end in 1977 and 2003 (see: OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Final Report, OECD Publications, October 2015, p. 91 and the references quoted).

(11) OECD Report on Action 6, p. 92.

(12) OECD Report on Action 6, pp. 95-97.

(13) See in particular Communication from the Commission of 6 December 2012 – An Action Plan to strengthen the fight against tax fraud and tax evasion, COM (2012) 722, and the annexed Commission Recommendation on Aggressive Tax Planning, C (2012) 8806 final; Commission Communication of 28 January 2016 "Anti-avoidance Tax Package: Next steps towards delivering effective taxation and greater tax transparency in the EU", COM/2016/023; Proposal for a Council directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, COM/2016/026 final.

(14) See ao CJEU, Case C-136/00, *Danner*, [2002], ECLI:EU:C:2002:558, paras 55 and 56; Case C-422/01, *Skandia and Ramstedtt*, [2003], ECLI:EU:C:2003:380, para. 51.

(15) These structuring practices are referred as to treaty shopping. For a definition of treaty shopping, see the De Broe, *International Tax Planning and Prevention of Abuse*, IBFD, 2008, pp. 5-20.

(16) OECD Report on Action 6, pp. 42 *seq*.

(17) For a general discussion, Ph. Baker, "The Beps Action Plan in the light of EU law: Treaty abuse", in: *British Tax Review*, 2015, n° 3, pp. 408-416.

(18) The subjection to EU law is based on article 307 TFEU; it has been confirmed in the CJEU case law such as Case C-298/05, *Columbus Container Services*, [2007], ECLI:EU:C:2007:754, paras 27-28: "*in the absence of unifying or harmonising measures adopted by the Community, the Member States remain competent to determine the criteria for taxation of income and wealth with a view to eliminating double taxation by means inter alia of international agreements. However, although direct taxation falls within their competence, the Member States must exercise that competence consistently with Community law.*"

There is, however, scope for criticism in respect of the arguments used by the Court.[19] Moreover, the European Commission considered in November 2015 that LOB clauses in the treaty between Netherlands and Jpana violated EU law, and therefore, the Court of justice could have to settle the matter, should the Netherlands not comply with the Comisison's request (which is likely considering that it would imply a renegociation of the treaty).[20]

The first aspect to consider is the compatibility of the LOB with the freedom of establishment. The choice to invest through a subsidiary or a permanent establishment located in a favourable tax jurisdiction belongs to the exercise of the business's freedom of establishment. As clarified by the CJEU,[21] the fact that such a business choice is motivated by tax considerations does not per se constitute abuse of that freedom of establishment. By refusing treaty benefits in such circumstances, LOB provisions are therefore restricting the freedom of establishment, at least to the extent it applies to companies who are legally operating in a Member State.[22]

The second aspect to consider is the compatibility of the LOB with the free movement of capital. The choice to invest through an intermediary located in a favourable tax jurisdiction can also be interpreted as the exercise of the freedom of capital movements. For companies that freedom notably means being able to invest in other European companies, directly and indirectly, to benefit from more favourable treaty networks for the return of their investment. The LOB provisions are disregarding the structuring choice of the company when refusing in certain circumstances treaty benefits to businesses using an intermediary for their investment. This amounts to a restriction of the freedom of capital movements.

As to the justification, the CJEU has held in the *Test Claimants in Class IV of the ACT Group Litigation* case, about a specific and limited LOB clause containing an ownership test and a derivative benefit provision, that:

"*The fact that those reciprocal rights and obligations apply only to persons resident in one of the two contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows, as regards the taxation of dividends paid by a company resident in the United Kingdom, that a company resident in a Member State which has concluded a DTC with the United Kingdom which does not provide for such a tax credit is not in the same situation as a company resident in a Member State which has concluded a DTC which does provide for one*".[23]

In other words, the CJEU seems to consider in this case LOB clauses – or at least certain of them – under the overall balance of DTT, to be justified in excluding from the benefits of a DTT residents of states that are not contracting parties. Under a more restrictive approach, the LOB restrictions should like any domestic anti-avoidance measures, in order to meet EU requirements, target wholly artificial arrangements and be proportional.[24] Under this line of case-law, LOB clauses which would be too general, i.e. which would be applicable to genuine economic activities, could be considered incompatible with the EU freedoms, because they would go beyond what is necessary to achieve the objective of combating abusive practices.[25]

From a policy viewpoint, however, things seems less clear-cut. Although LOBs are standard practice in current international tax policy of important EU Member States' treaty partners, in particular the US,[26] the Commission has expressed rather strong views on the negative effects on the Internal market of the implementation of the clauses recommended by the Final report on Action 6. According to the Anti-tax avoidance Communication of 28 January 2016, "(...) *the Commission is concerned that the G20/OECD report includes Limitation of Benefits clauses as an option, although it is acknowledged that this may not be appropriate in all regions. These clauses limit the benefits of tax treaties to entities owned by residents of only one Member State, and therefore can be seen as detrimental*

(19) See the analysis of the nature of the LOB clause and the absence of satisfactory argument of the CJEU in P. Dourado Ana, "Aggressive Tax Planning in EU Law and in the Light of BEPS: The EC Recommendation on Aggressive Tax Planning and BEPS Actions 2 and 6", in: *Intertax* 2015 (43), Issue 1, pp. 42-57.

(20) See European Commission, Press release 19 November 2015, MEMO/15/6006.

(21) CJEU, Case C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas*, [2006] ECLI:EU:C:2006:544, para. 38.

(22) In the event the intermediary entity is established out of the EU, there should be no incompatibility with EU law.

(23) CJEU Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation*, [2006], ECLI:EU:C:2006:773.

(24) CJEU Case C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas*, [2006], ECLI:EU:C:2006:544, para. 62.

(25) This view is shared by a broad section of the doctrine to the exception of those who believe an active-conduct-of-a-trade-or-business-test like the one in the Art. 22(3)(a) of the US Model Tax Convention offers an opportunity to enhance the LOB to EU requirements level. See E. C.C.M. Kemmeren, "Where is EU law in the OECD BEPS discus-sion?", in: *EC Tax Review*, 2014 (Volume 23) Issue 4, pp. 190-193.

(26) See C. Panayi, *Advanced Issues in International and European Tax Law, Bloomsbury Publishing*, Kindle, 2015: "*as the LOB is a treasured US treaty clause, the status of which has been fully endorsed and enhanced by the OECD in its BEPS project, this anti-abuse mechanism is unlikely to be challenged in the European Union in any meaningful way, any time soon*".

to the Single Market by discouraging cross border investment. These rules can be problematic for the Capital Markets Union. (…)".[27]

In any case, it appears that LOB clauses contained in DTT concluded by Member States could not be merely based on residence and should include a derivative benefits provision in favor of persons resident in other Member States. This derivative benefit provision should not be drafted too restrictively; that seems to be the case of the one contained on the OECD Final Report on Action 6, which sets extremely high thresholds to be satisfied to be granted treaty benefits. According to the model provision contained in the Report, non-qualifying taxpayers could nevertheless enjoy treaty protection if 95 % or more of the aggregate voting power and value of the shares is owned by no more than seven equivalent beneficiaries and if 50% or less of the company's gross income is paid to persons who are not equivalent beneficiaries in the form of deductible payments.[28] Therefore, to ensure legal certainty and to be in line with the objectives of the Internal market, Member States should – in line with the CJUE *Saint-Gobain* and *Open skies* case-law[29] – extend treaty benefits to all EU residents in non-abusive situations (subject to a genuine activity test),[30] or at least, to subject the application of LOB clauses to the possibility for EU taxpayers to establish that they are acting in the course of a genuine economic activity. Those extensions should ideally be mentioned in DTTs.[31]

IV. General anti-avoidance rule in the European context

Another measure recommended by the OECD in its Final report on Action 6 is the insertion of a general anti-avoidance clause based on the Principal purpose tes. The PPT rule targets transactions whose one of the main principal purpose is the obtainment of treaty benefits. Unless the taxpayer establishes that the benefit of his transaction would be "*in accordance with the object and purpose*" of the relevant DTT provision, the PPT prevents the granting of the benefit and supersedes other more specific anti-avoidance rules. As long as the administration considers it reasonable to conclude that obtaining the DTT benefit was "one of the main purposes" of the transaction, the PPT would remain applicable even where the LOB requirements would be satisfied.

As to the compatibility with EU law, it is worth remembering that the Court of justice has recognized that "*preventing possible tax evasion, avoidance and abuse is an objective recognized by EU law*".[32] On the legislative side, the European Commission has been pushing since 2012 for the adoption of General Anti-Abuse Rules (GAAR) in EU Directives, domestic tax systems and, more recently in tax treaties.[33] Moreover, the Council has committed since 2014 to consider an anti-abuse provision to be included in the Interest-Royalties Directive.[34] The Commission finally managed to persuade the

(27) Commission Communication of 28 January 2016 "Anti-avoidance Tax Package: Next steps towards delivering effective taxation and greater tax transparency in the EU », COM/2016/023, p. 6.

(28) On the notion of equivalent beneficiaries (which is also subject to criticism as its EU compatibility), see OECD Final Report on Action 6, pp. 52-53.

(29) CJUE, Case C-307/97, *Saint-Gobain v Finanzamt Aachen-Innenstadt*, [1999] ECLI:EU:C:1999:438 and Case C-466/98, *Commission v. UK Open Skies*, [2002] ECLI:EU:C:2002:624.

(30) Ph. Baker, "The Beps Action Plan in the light of EU law: Treaty abuse", in: *British Tax Review*, 2015, n° 3, pp. 408-416.

(31) For an example of a derivative benefits clause specifically mentioning residents of other EU Member States, see 1992 US-Netherlands Tax Treaty, as amended by the 2004 Protocol, article 26.

(32) CJEU, Case C-321/05, *Hans Markus Kofoed v Skatteministeriet*, ECLI:EU:C:2007:408, para. 38. The principle of non-application of EU law to abusive practices was applied for the first time in the area of VAT in the Halifax and University of Huddersfield cases (CJEU, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v HMRC*, [2006] ECLI:EU:C:2006:121, and C-223/03, *University of Huddersfield Higher Education Corporation v Commissioners of Customs & Excise* [2006] ECLI:EU:C:2006:124). On the prohibition of abuse in EU direct tax law, see in particular CJUE, Case C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas*, [2006] EU:C:2006:544; Case C-524/04, *Test Claimants in the Thin Cap Group Litigation*, [2007] EU:C:2007:161 and Case C-182/08, *Glaxo Wellcome*, [2009] EU:C:2009:559. On the principle of abuse of rights in EU tax law, see R. De la Feria, "Prohibition of Abuse (Community) Law – The Creation of a New General Principle of EC Law Through Tax", in: *Common Market Law Review*, 2008 (45), pp. 395-441; L. De Broe, *International Tax Planning and Prevention of Abuse: A Study under Domestic Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies*, IBFD, 2008, pp. 755 et *seq*. For a critical comment, see D. Weber, "Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and In-direct Tax Case Law of the ECJ", *European Taxation*, 2013 (Volume 53) No 6-7, Part 1, p. 251-264 and Part 2, pp. 313-328; K. Lenaerts, "The concept of 'abuse of law' in the case law of the European Court of justice on direct taxation", in: *Maastricht Journal of European and Comparative Law*, 2015 (Volume 22), No 3, pp. 329-351.

(33) Communication from the Commission of 6 December 2012 – An Action Plan to strengthen the fight against tax fraud and tax evasion, COM (2012) 722, and the annexed Commission Recommendation on Aggressive Tax Planning, C (2012) 8806; Commission Recommendation of 28 January 2016 on the implementation of measures against tax treaty abuse, C(2016) 271.

(34) Council of the European Union. 5 December 2014, Doc. n° 16435/14. FISC 221, ECOFIN 1157 – Interinstitutional File: 2013/0400 (CNS), point 8, b, I.

28 Member States to amend the Parent-Subsidiary directive to include a "general" anti-avoidance rule,[35] stating that:

> " (...) *Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.*
>
> *An arrangement may comprise more than one step or part.*
>
> *(...) For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality. (...)*"

The GAAR contained in the Proposal of 28th January 2016 follows the same pattern in broader terms, with some differences: the "main" purpose is replaced by the "essential" purpose, as the Commission had proposed in its 2012 Communication,[36] and the "object and purpose" has to be found in domestic law. At first sight, the wording of the PPT test in the OECD Action 6 Report appears similar to those two European GAARs, which are inspired by the CJEU *Cadbury Schweppes* case-law.[37] However, a more careful analysis shows that they are some fundamental differences due to the different legal contexts where those provisions arise, which could severely undermine the compatibility of the PPT clause under EU law.

A first issue concerns the "object and purpose" of the PPT clause itself, in the light of the nature of tax treaties. By adopting a PPT clause, contracting states send a very ambiguous message to taxpayers: the DTT benefits are accessible unless taxpayers intend to obtain the DTT benefits. In other words, there is a presumption that where the taxpayers acted so as to obtain the benefits, they are not in line with the object and purpose of the DTT provision at stake. It is the snake that bites its own tail, and this is caused by the fact that the "object and purpose" of the provisions of tax treaties, besides reducing the tax burden of cross-border activities, is not clearly defined.

A second issue in the perspective of EU law is the subjectivity and lack of clarity of the PPT clause. It relies on the "reasonable" determination and ranking by the administration of the reasons behind a transaction that directly or indirectly resulted in the obtaining of a DTT benefit. This reliance on the discretionary appreciation of the administration creates too much insecurity to be suitable to the general principle of legal certainty of EU law.[38] The CJEU in the cases *SIAT* and *Itelcar*[39] held that rules of law, especially where they may have unfavourable consequences for taxpayers, must be clear, precise and predictable. In its current wording, it is unlikely that the OECD PPT clause would meet the EU requirement of legal certainty.[40] Moreover, according to the CJEU case-law, the burden of proof imposed on the taxpayer shoulders, i.e. establishing that the granting of a benefit would be in accordance with the object and purpose of the convention, seems disproportionate to the objective of combating abuse, since the tax authority is not "*required to provide even prima facie evidence of tax evasion or avoidance*".[41] How could the taxpayer know better than the tax administration the object and purpose of the provisions he or she is in principle entitled to use? Moreover, it seems rather strange to speak of "benefits" of the convention, as if the application of mutually agreed general rules was a "favour" or a "privilege" granted to "virtuous" taxpayers. So as to enhance legal certainty and relieving taxpayers from such an *onus probandi*, the European Commission has recommended to Member States not to implement as such the OECD PPT clause,

[35] The GAAR test was included in the PSD with the EU Council adoption of Directive 2015/121 of 27 January 2015 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* L 21, 28.1.2015, pp. 1-3.

[36] Commission recommendation of 6.12.2012 on aggressive tax planning C (2012) 8806 final: "*An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored.*" The distinction between main purpose and essential purpose or even sole purpose in also to be found in the VAT case of the CJEU on abuse of rights (see CJEU, Case C-653/11, *Newey*, [2013], ECLI:EU:C:2013:409, para. 46 and the case-law quoted). For an analysis of the GAAR recommended by the Commission in 2012 and the relationship with BEPS, see Dourado, *Aggressive Tax Planning in EU Law and in the Light of BEPS: The EC Recommendation on Aggressive Tax Planning and BEPS Actions 2 and 6*, para. 3.3, *op. cit.*, pp. 42-57.

[37] CJEU, Case C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas*, [2006], ECLI:EU:C:2006:544, para. 62.

[38] See ao Case C-175/88, *Klaus Biehl v Administration des contributions du grand-duché de Luxembourg*, [1990], ECLI:EU:C:1990:186, para. 18.

[39] CJEU, Case C-318/10, *SIAT*, [2012] ECLI:EU:C:2012:415 and Case C-282/12, *Itelcar*, [2013], ECLI:EU:C:2013:629, para. 44.

[40] See Panayi, "Advanced Issues in International and European Tax Law", *op. cit.*, Kindle Location 230.

[41] CJEU, Case C-318/10, *SIAT*, [2012] ECLI:EU:C:2012:415, para. 55.

but to allow taxpayers to benefit from tax treaties whenever they would establish that they are acting in the course of a "genuine economic activity".[42] This addition is certainly welcome, but it would have been better in order to be more in line with the CJEU case-law to shift more clearly the burden of proof on the tax administrations, that should demonstrate in the light of objective factors that the taxpayers had engaged into (wholly) artificial arrangements.

V. Conclusion

As it could be expected from the outset, the BEPS Action Plan and the measures recommended by the OECD in this context raise numerous issues as regards their compatibility with EU law. Leaving aside the technical aspects – although very relevant from a practical prospective – of the EU compatibility of anti-avoidance measures contained in the final reports published by the OECD, the BEPS plan seems to have had a significant impact on the general philosophy underlying tax integration within the European Union.

The fight against tax avoidance and aggressive tax planning appears to be now the thriving force of EU tax policy. As a consequence, Internal market concerns, although still not completely out of the radar, seems to come in a second place. The best example is the CC(C)TB project, aiming at harmonizing the corporate tax base and possibly consolidating it on an EU – wide basis. After having been put on hold for years,[43] the Commission has announced that it would adopt a staged approach (first, common tax base with cross-border losses relief, then consolidation, with no clear timeline as regards the second phase).[44] But even before opening the public discussion on those common corporate tax rules, the Commission released the Anti-avoidance Tax package, which it presented as a necessary preliminary to a revised CCCTB proposal.[45] And – even if there are probably sound policy reasons to proceed like this –, one could question the relevance for the Internal market of adopting a directive which almost exclusively contain anti-avoidance measures to be implemented by Member States in order to protect their domestic tax base. Certainly, the author could agree with the Commission when it says that a EU-directive on Tax avoidance "will ensure a coherent EU approach to implementing the new international standards arising from the OECD BEPS project, providing consistency for businesses and preventing a fragmented approach in the Single Market".[46] Nevertheless, doubt can be raised as to additional domestic anti-avoidance measures – even following a common structure agreed at the EU level – would not contribute to more fragmentation, hindering (genuine) cross-border activities. The attempt to harmonize anti-avoidance rules only, without coupling it with the harmonization of substantive rules, may also raise concerns as to the competence of the European Union to do so. Indeed, article 115 TFUE confers powers to the Council to "issue directives for the approximation of such laws, regulations or administrative provisions of the Member States *as directly affect the establishment or functioning of the internal market*". Moreover, such directives should comply with the subsidiarity and proportionality principles laid down at Article 5 TEU. It appears legitimate to raise the question whether all the measures proposed in the Anti-Tax Avoidance Directive would help to attain the objective of the achievement of the Internal market, and whether their adoption at the EU level would meet the subsidiarity and proportionality criteria. Such an analysis should be distinct for each of the measures proposed. On the one hand, some measures aim at tackling problems caused by the lack of coordination (disparities) between tax systems, such as hybrid mismatches or disparities in the tax treatment of assets by companies transferring their seat from one Member State to another. The mismatches arising from such a lack of coordination are likely to encourage taxpayers to engage into purely tax-driven arrangements, which could hinder an optimal allocation of economic factors. Moreover, purely domestic measures are unlikely to offer suitable solutions to those phenomena, which would justify the intervention of the EU. On the other

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

(43) The original CCCTB proposal was presented in 2011. European Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM/2011/0121.

(44) European 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, p. 8.

(45) European 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, p. 9: "While the new proposal is being prepared, work must continue in the framework of the proposal currently on the table of the Council on some international aspects of the common base which are linked to the BEPS project (…). Consensus on these elements should be achieved in the Council within 12 months, and should be made legally binding before an agreement is reached on the revised CCCTB".

(46) *Ibidem*, p. 9.

hand, some other measures, such as rules on interest deductibility and CFC rules, are likely to increase administrative burden, as well as the probability of international double taxation, in a way that could be considered disproportionate as regards the objective of tackling tax avoidance, since they would also be applicable to genuine economic activities. Moreover, their similarity with anti-avoidance mechanisms already existing in some Member States is an argument against the fulfilment of the subsidiarity criterion.

In conclusion, the author welcome the renewed dynamism of EU institutions in the area of corporate taxation, after many disappointing years of stagnation. However, they are worried that the recent initiatives adopted in the wake of the OECD BEPS Action Plan could undermine the very reason of EU tax integration, i.e. the abolition of fiscal borders, in particular international double taxation, in order to facilitate free movement of persons and undertakings in the internal market. They sincerely hope to be proved wrong in a very near future.