

Taxing Multinationals 'Post-BEPS' – What's Next?

Maarten Floris de Wilde*

The taxation of multinational companies has been attracting a great deal of attention in recent years. Company tax planning and country tax competition have increasingly been questioned, by the general public, media, in politics and academia. Countries compete for investment, reducing tax burdens on profits. Multinationals respond, shifting profit for tax purposes to low-tax jurisdictions by legally arranging their business affairs in a certain way to optimise their effective corporation tax burdens. Globalisation speeds-up matters. The company taxation models that countries apply today originated in the 1920s. These models were of course designed to cater for interbellum societal, political, economic and business realities, and hence no longer seem 'fit-for-purpose' in today's globalised market place. Corporate tax systems are antique and now appear to be failing, in consequence putting fiscal systems under pressure. The OECD has estimated missed corporate tax revenues at a staggering $\frac{1}{4}$ of a trillion US dollars a year. To balance budgets, countries resorted to raising tax burdens on consumption and labour. Economic and financial crises that we now seem to have overcome have exacerbated matters, affecting societal trust in the integrity of the tax system. The general public considers tax bill increases unfair if they are not addressed to multinationals, but imposed on their workers and customers instead. It is often heard that moral obligations to finance expenditure apply equally to multinationals.

The cocktail of 'races to the bottom', economic and fiscal crises, austerity measures, fiscal consolidation and social hardship and public discontent lead to an unprecedented political prioritisation of corporate taxation. On 5 October 2015, the OECD published the outcomes of its Base Erosion and Profit Shifting (BEPS) Project it had undertaken at the request of G20 in 2012. This marked an unprecedented turning point in the history of international company taxation. Throughout 2016 and 2017 the European Union adopted a number of the OECD's anti-BEPS measures on an EU-wide basis with a view to addressing multinational tax avoidance practices via hard law measures. At the international level, the treaty-related aspects of the BEPS initiative are covered by the Multilateral Convention to Implement Tax Treat-

ty Related Measures to Prevent Base Erosion and Profit Shifting'. The treaty is open for ratification, and close to 70 countries have already signed it during the first signing round held on 7 June 2017 in Paris, France. However, all the measures undertaken appear to refurbish existing anti-tax avoidance approaches, thereby leaving the root causes of a failing international corporate tax framework essentially intact.

We have been pursuing the 'post-BEPS' path that we embarked on a couple of years ago, so perhaps now is a good time to take stock of where we are along the route. This special edition of *Erasmus Law Review*, comprising five contributions, addresses some pivotal topics concerning the taxation of multinationals' profits in a 'post-BEPS' globalising market environment.

Reuven Avi-Yonah and Haiyan Xu evaluate the BEPS project of the G20 and OECD and offer some alternatives for reform. They argue that the problems of base erosion and profit shifting stem from the 'benefits principle', the independent entity principle and the arm's length principle. They contend that adhering to existing tax paradigms is unlikely to help achieve the envisaged taxation at the location of value location. They advocate 'flipping' of the system and consider the possibility of taxing passive income primarily at source and active income primarily at residence.

Hans Gribnau evaluates issues in corporate taxation from an ethical perspective. Who is to be held responsible? Is it firms, their consultants, governments? Gribnau argues that the international tax system is the result of the interaction of different actors who all share the responsibility for its integrity. Both states and multinationals – and their advisors – make choices that affect its operation, and this brings moral responsibility. This means that countries should cooperate in an effort to improve the system and that companies should avoid acting irresponsibly and desist from aggressive tax planning operations, Gribnau argues.

Irene Burgers and Irma Mosquera examine differences in perceptions of 'fairness' between developed and developing countries on the issue of taxing multinationals. Does the BEPS initiative strike a fair balance between their needs and interests? Perhaps not, Burgers and Mosquera argue, pointing out fundamental legitimacy concerns in this regard, observing that the needs of developing countries differ from those of the developed countries while developing countries did not actually participate in negotiation and decision-making processes when G20 and OECD formulated their anti-

* PhD, LL.M., Erasmus University Rotterdam and Loyens & Loeff. This paper is part of the Erasmus School of Law's faculty research programme on Fiscal Autonomy and Its Boundaries.

BEPS plans. Hence, the BEPS project predominantly reflects a compromise between rich countries, as is exemplified by the absence of measures to alter the existing balance of allocation of tax rights between ‘residence’ and ‘source countries’, though a lasting point of contention for developing countries. Burgers and Mosquera, in a manner akin to Avi-Yonah and Xu, argue in favour of a more profound role to be assumed by the United Nations in the discussion on balancing global responses to base erosion and profit shifting.

Weber adopts an EU law perspective to compare anti-treaty abuse approaches in the BEPS initiative against its counterpart concepts found in EU law in the field of direct taxation. Weber contends that if the OECD abuse test is stricter than generally recognized in academic literature and that the test is in line with the EU law concept of legal certainty, it is also going beyond the scope of EU abuse of law doctrines. Contrary to EU law abuse doctrines, the OECD’s approach does not seem to resort to the artificiality of the intra-firm legal arrangements as a substantive criterion to establish the presence of abuse; indeed, a recipe for some heated discussion and future litigation.

Turning full circle, tax practitioners Harmen van Dam and Paul Lankhorst assess post-BEPS company tax environments from the advisory angle. They argue that the BEPS initiative, in attempting to align taxation and the location of value creation while maintaining the concepts of separate accounting and arm’s length pricing, stretches existing tax rules to breaking point. The OECD seems to be wanting to tax profits by reference to sales and employee locations, Van Dam and Lankhorst observe, opining that if this is so, one should then step away from traditional transfer pricing approaches. The BEPS initiative, however, does not, leaving many legal uncertainties and lots of red tape when it comes to establishing taxpayers’ tax positions.

Thus, ‘Taxing Multinationals ‘Post-BEPS’ – What’s Next?’ As said, winds of change have been blowing through the world of international company taxation. Similar to the position taken by Avi-Yonah and Xu, my own opinion is that the BEPS project is not the final destination. The BEPS initiative has left the foundation concepts of international company taxation intact, along with its key problems. I do not think that these will truly be resolved, at least not as long as the international tax framework is left unaffected. Perhaps the BEPS project will prove a first step towards a fundamental remodelling of the international corporate tax regime. Or, perhaps not; status quos tend to be pretty persistent. Nevertheless, discussions on fundamental corporate tax reform surely have not ceased since the OECD released its BEPS outcomes in October 2015. On the contrary, we have seen many ideas, suggestions, and proposals for fundamental reform brought forward, ranging from unitary models to destination-based cash flow taxation in a variety of forms. On 25 October 2016, the European Commission released proposals for a Council Directive on a Common Corporate Tax Base (CCTB) and a Council Directive on a Common Con-

solidated Corporate Tax Base (CCCTB), relaunching its envisaged formulary apportionment system for the internal market. If adopted, the CCTB/CCCTB directives would effectively introduce a single, EU-wide corporate tax system for large multinationals, thus replacing the separate national systems currently operating in the 28 Member States. Time will tell.

I would like to express my heartfelt gratitude to the authors for their truly excellent contributions, and to the peer reviewers, of course, for their outstanding reviews and feedback. The best of luck to all of you, and again, many thanks for all your work and effort to make this special issue a success. Many thanks, too, to Margaux Raynaud and Nettie Dekker for your support and assistance in putting this edition together. And thanks, finally, to Kristin Henrard from the editorial board, for giving me the opportunity to put an edition of *Erasmus Law Review* together on this fascinating subject. Dear reader, I wish you a good read.