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Table of Abbreviations

APA	Advance Pricing Arrangements
ATAD	Anti Tax Avoidance Directive
BEPS	Base Erosion and Profit Shifting
CbC	Country by Country
CbC MCAA	Mutual Competent Authority Agreement on the Exchange of CbCR
CCA	Cost Contribution Arrangement
CCCTB	Common Consolidated Tax Base
CFA	Committee on Fiscal Affairs
CFC	Controlled Foreign Company
CIT	Corporate Income Tax
EBITDA	Earnings Before Interest, Taxes, Depreciation and Amortisation
EC	European Commission
ECOFIN	Economic and Fiscal Affair Council
EU	European Union
FDI	Foreign Direct Investment
FHTP	Forum on Harmful Tax Practices
GAAR	General Anti-Avoidance Rules
GDP	Gross Domestic Product
GST	Goods and Services Tax
G20	Group of 20
HTVI	Hard-to-Value Intangibles
ICT	Information and Communication Technology
IP	Intellectual Property
IT	Information Technology

JTPF	Joint Transfer Pricing Forum
LOB	Limitation-on-Benefits
LTPTA	Law on Tax Procedure and Tax Administration
MAP	Mutual Agreement Procedure
MCMAA	Multilateral Convention on Mutual Administrative Assistance
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
MNE	Multinational Enterprise
OECD	Organisation for Economic Co-operation and Development
PE	Permanent Establishment
PPT	Principle Purpose Test
R&D	Research and Development
SAAR	Specific Anti-Avoidance Rules
TFEU	Treaty on the Functioning of the European Union
TP	Transfer Pricing
UN	United Nations
VAT	Value Added Tax

Introduction

The international tax landscape has changed dramatically in recent years because of economic challenges. The trend of globalization[1] has impacted significant increase of foreign direct investments in the countries, consequently influencing regimes of corporate income tax in many economies[2] and focusing on deeper international tax planning.[3] Thus, more and more governments have been concerned of losing substantial corporate tax revenues because of planning aimed at shifting profits.[4] Highly profitable multinational companies worldwide, among them pioneers in digital economy and social networks, can drastically reduce their tax burden by shifting profits from high to low-tax countries.[5] Therefore, the OECD and G20 countries have taken joint action to address the weaknesses within the international tax system that creates opportunities for BEPS.[6] Additionally, the OECD work in the field of tax always seeks eliminate double taxation. An international tax system that aims to prevent double taxation is not sustainable if the same system generates double non-taxation. This is the driving principle that led the OECD and G20 countries to embark on the ambitious BEPS Project.[7]

The abbreviation BEPS means: Base Erosion and Profit Shifting (BEPS). It refers to tax avoidance (tax planning) strategies which exploit gaps and mismatches in tax rules from one country to another to artificially shift profits to low or no-tax locations, even with very little or no economic activity.[8] Such corporate tax planning strategies are technically legal in a nutshell and they are usually based on carefully planned interactions between a number of various tax rules and principles. The overall effect of this type of tax planning is to erode the corporate tax base in a manner that is not intended by domestic tax policy.[9] Point that must not be overlooked is that BEPS affects everyone. It harms governments because it reduces their tax revenues and raises the cost of ensuring compliance. It harms people because, when some multinationals pay lower or no tax, individual taxpayers have

[1] OECD (2017), *Background Brief – Inclusive Framework on BEPS*, OECD Publishing <www.oecd.org/tax/beps/background-brief-inclusive-framework-for-beps-implementation.pdf> accessed 14 November 2018

[2] OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing <http://dx.doi.org/10.1787/9789264202719-en> accessed 14 November 2018

[3] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione, *Fundamentals of International Tax Planning*, Amsterdam: IBFD Publications BV, 2007, 63.

[4] OECD (2013), *Addressing Base Erosion and Profit Shifting*, OECD Publishing <http://dx.doi.org/10.1787/9789264192744-en> accessed 14 November 2018

[5] Clemens Fuest, Christoph Spengel, Katharina Finke, Jost H. Heckemeyer, and Hannah Nusser, *Profit Shifting and 'Aggressive' Tax Planning by Multinational Firms: Issues and Options for Reform***,** ZEW - Centre for European Economic Research Discussion Paper No. 13-078, October 15, 2013 <http://ftp.zew.de/pub/zew-docs/dp/dp13078.pdf> accessed 14 November 2018

[6] OECD (2017), *Background Brief – Inclusive Framework on BEPS* (n 1)

[7] OECD (2015), *Policy Brief - BEPS Update No.3, Taxing Multinational Enterprises* <www.oecd.org/ctp/policy-brief-beps-2015.pdf> accessed 14 Nov 2018

[8] OECD (2017), *Background Brief – Inclusive Framework on BEPS* (n 1)

[9] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4)

to bear a greater share of the tax burden. And finally, it harms businesses themselves: such multinationals face significant reputational risk from the public focus on their tax affairs while domestic companies face an unfair playing field when competing with multinationals. Finally, BEPS undermines the tax system's integrity and the trust of citizens.

Therefore, the goal of the BEPS Project is to restore trust and to ensure fair competition among all actors, while maintaining the ability to eliminate double taxation. [10] Furthermore, the European Union (EU) has actively and continuously participated in the entire OECD BEPS process.[11] Over the past few years, the European Commission (EC) launched consultations and proposed new legislation and guidance in many areas that overlap with the OECD's Action Plan items.[12]

The goal of this master thesis is to understand the way how anti-BEPS mechanisms, both from the OECD and the EU, function including the way how they can impact the business activities in Serbia, once anti-BEPS measures are implemented there.

To get a deeper understanding of the main topic, it is necessary to start with the observation of the multinational enterprises as the main users of tax planning techniques. Afterwards the attention will be redirected to tax avoidance (tax planning) because this phenomenon is standing behind the idea of the OECD to make a BEPS Action Plan. Furthermore, the focus of a thesis will be moved to a counter-reaction coming from a state, where the anti-abusive legislation will be under review. Also, there will be a deeper research of Actions and measures from the BEPS Projects. The main topic will be elaborated in the last part – Chapter IV, since it is necessary to get first an insight into the overall picture of the BEPS phenomenon. At the end, there will be a focus on the forthcoming BEPS Regulations in the legislation in Serbia.

[10] OECD (2015), *Policy Brief - BEPS Update No.3, Taxing Multinational Enterprises* (n 7)
[11] Jurjan Wouda Kuipers, Klaus von Brocke, 'How BEPS fits in the EU's tax agenda?' (2016) EU Perspective<www.ey.com/Publication/vwLUAssets/How_BEPS_fits_in_with_the_EU%E2%80%99s_tax_agenda/$FILE/How%20BEPS%20fits%20in%20with%20the%20EU's%20tax%20agenda_March%202016_Jurjan%20Wuidakuipers-Klaus%20von%20Brocke.pdf> accessed 14 November 2018
[12] KPMG International (2016), 'OECD BEPS Action Plan: moving from talk to action in the European region', Publication number: 133617-G <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2016/09/2016-beps-taking-the-pulse-in-the-European-region.pdf> accessed 14 November 2018

Chapter I

Multinational enterprises – main users of tax planning strategies

After the adoption of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations in 1995, the importance of multinational enterprises (MNEs) – as taxpayers interested in tax planning, dramatically increased in a world trade.[13]A multinational corporation or enterprise is any corporation that is registered and operates in more than one country in a way that its headquarters are in one country and the corporation operates through subsidiaries in other countries.[14] It is certain that modern economy environment builds a framework for business activities and management of multinational enterprises. Furthermore, modern economies are based on the free movement of capital and workers, gradual removal of trade barriers and opening of markets, reallocation of production of goods and services from high-cost to low-cost locations, technological and telecommunications developments including more and more digitalization worldwide, and increasing importance of managing risks and protecting intellectual property. Accordingly, those circumstances impact businesses of MNEs that have resulted in matrix organization operating models and integrated supply chain[15] as well as new opportunities for those enterprises to additionally optimize their profits by minimizing their own tax burdens.[16] Consequently, mentioned increased importance of MNEs presents very complex taxation issue not only for tax administrations but for MNEs too, since taxation of MNEs must be addressed in a broad international context and not only through particular country's taxation rules.[17]

Regarding the issue of how to tax MNEs, generally speaking, taxation of corporate income depends on the connection with the jurisdiction in question i.e. whether the taxpayer is resident of the country or whether he has permanent establishment there.[18] Bearing in mind the nature of MNEs, taxation is based on two principles:

- The first principle is the one where each company is taxed as a separate taxpayer. However, since the modern business is more and more globalized, there is a question is this principle still appropriate to apply. In practice, the companies included in a group will often operate as a single enterprise following a single overall business strategy.[19]

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[13] OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris <http://dx.doi.org/10.1787/tpg-2017-en> accessed 14 November 2018

[14] 'Multinational Corporations', *Encyclopedia Britannica* (2012) <www.britannica.com/topic/multinational-corporation> accessed 14 November 2018

[15] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4)

[16] OECD (2013), *Action Plan on Base Erosion and Profit Shifting* (n2)

[17] OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017* (n 13)

[18] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4)

[19] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 33.

- The second principle defines the territorial scope of country's right to tax profits of foreign companies. Namely, the companies, which are not residents in one country, are subject to that country's corporate income tax only if they are sourced in that country.[20]

However, the problem is how to consider the relationship among different companies located worldwide but belonging to the same group for tax purposes, when different tax legislations are applied. One of the possible answers is the internationally accepted principle known as "arm's length principle", which will be observed in the following parts of this thesis.[21] Nevertheless, the design of corporate tax systems influences the behavior of multinational enterprises.[22] As it was noted, in today's economic environment characterized by global taxpayers, importance of intellectual property and technological developments, contemporary MNEs are able to create global strategies aimed at maximizing profits and minimizing expenses. Those changes in business strategies have raised questions among countries about adequacy of existing rules on taxation of cross-border profits, since those rules – domestic and international standards, are created in an economic environment with a lower degree of economic integration across borders. Consequently, MNEs exploit those outdated rules, as well as differences in domestic and international rules, in order to eliminate or reduce taxation. Additionally, because MNEs are businesses that operate cross-borders and have access to BEPS opportunities, domestic enterprises are facing with competitive disadvantages. This furthermore means that the integrity of the corporate income tax is at the stake.[23]

Some data on tax planning activities by large MNEs show that those structures reduce the effective tax rate of the enterprises by 4-8,5% on average. This reduction is even greater for very large companies and companies involved in the use of intangible assets. It is understood that small MNEs can also be engaged in tax planning. Mentioning this, two categories of MNEs, which are engaged in tax planning practices, can be envisaged. Firstly, there are large MNE groups that are involved in complex tax planning schemes in order to reduce the effective corporate tax rates by using techniques like - exploitation of mismatches between tax systems, preferential tax treatment, abuse of bilateral tax treaties and profit shifting to low-or-no-tax countries. On another side there is a category of smaller MNEs that shift profit via manipulation of the price of intra-group transactions and the location of debt.[24] Markedly, beyond cases of illegal tax abuses, MNEs engaged in BEPS activities comply with tax laws of the countries involved. Consequently, the OECD and G20 countries adopted a 15-point Action Plan in order to address base erosion

[20] ibid 34.
[21] ibid 33.
[22] OECD (2015), *Measuring and Monitoring BEPS, Action 11 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <http://dx.doi.org/10.1787/9789264241343-en> accessed 14 November 2018
[23] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4)
[24] OECD (2015), *Measuring and Monitoring BEPS, Action 11 - 2015 Final Report* (n 22)

and profit shifting issues.[25]

Because of the BEPS Project, companies must reconsider their business models especially their supply chain, finance, treasury functions and in their cross-border business - a broad range of factors, such as tax impact, market and competitive dynamics, intellectual property strategy, legal entity structure, relationships with tax policy makers and administrators, planning for acquisitions and other important areas[26] since the project will impact the overall business and not only tax compliance. In short term, companies need to analyze how specific new provisions and prohibitions would affect their current businesses and over the longer period of time, companies need to establish the most efficient BEPS - compliant way of operating in the future.[27] Finally, it is certain that in order to analyze BEPS phenomenon, there is a must to collect more information about global MNE activity.[28]

There is general belief that the application of BEPS measures will impact the profit of MNEs to be reported where economic activity takes place and where value is created. With that regard, according to the recent OECD Interim report 2018 on Tax challenges arising from digitalization, some MNEs have already taken steps at aligning corporate structures with real economic activity in jurisdictions where economic activity takes place through reconsideration of transfer pricing or by relocating value assets.[29]

[25] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4)
[26] 'BEPS is broader than tax - Practical Business Implications of BEPS' (2016) International Tax Review <www.ey.com/Publication/vwLUAssets/EY-beps-is-broader-than-tax-2016/$FILE/EY-beps-is-broader-than-tax-2016.pdf> accessed 14 November 2018
[27] KPMG International (2016), *OECD BEPS Action Plan: moving from talk to action in the European region* (n 12)
[28] OECD (2015), *Measuring and Monitoring BEPS, Action 11 - 2015 Final Report* (n 22)
[29] OECD (2018), *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <http://dx.doi.org/10.1787/9789264293038-en> accessed 14 November 2018

Chapter II

Tax planning – a phenomenon behind base erosion and profit shifting

In the constantly changing world and economic challenges, tax laws are unable to tackle every situation, which might be eligible to tax and consequently gaps and loopholes in tax laws are commonly used as benefits by taxpayers.[30] However, jurisdictions recognize the right of taxpayers to arrange their operations in a way to reduce tax obligations using different tax planning techniques.[31] It should be mentioned that tax planning is broader than BEPS behaviors identified in the OECD/G20 BEPS Action Plan.[32] In addition, the line between terms "tax planning", "tax avoidance" and "tax evasion" could be unclear and for this reason the difference between those terms will be elaborated. Even though a tax evasion is not covered by the BEPS Project - as a topic of this thesis, it is worth mentioning because of the need to make a differentiation between tax evasion and other types of avoiding paying taxes.

1. Tax evasion

Tax evasion is a term for efforts by taxpayer to avoid the payment of tax obligation through use of some illegal techniques. Accordingly, it can be concluded that tax evasion is something illegal. What can be defined as legal or illegal depends on national laws and thus it varies from one state to another and in a cross-border scenario, it is very difficult to identify a transaction that is illegal from international point of view. Here a taxpayer escapes the payment of tax that is his obligation according to the rule of law of the taxing jurisdiction. Consequences of tax evasion can be corrected by tax administration, but in addition taxpayers may be liable to criminal sanction since they break the letter of law.[33] Heaving in mind the financial effects of evasion and avoidance, those two may be similar since in both cases state will not receive taxes, as it was expected by policy makers.[34]

2. Tax avoidance and tax planning

On the contrary to tax evasion as an illegal tax phenomenon, there are terms of tax planning and tax avoidance. Distinction between those terms is difficult to precise. The first thing to keep in mind is that taxpayers do not abuse their right to minimize tax burden. According to the principle of freedom of contract, taxpayers are free to arrange their affairs as they wish in order to save taxes. Further, there is a principle of legal

[30] Dejan Popović: *Tax Law* (Faculty of Law, University of Belgrade, 2014) 48.
[31] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 49.
[32] OECD (2015), *Measuring and Monitoring BEPS, Action 11 - 2015 Final Report* (n 22)
[33] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 50.
[34] Chris Morgan, 'Avoidance and evasion: different phenomena with different solutions?' (*KPMG Website – The Global Responsible Tax Project*, 14 September 2017) <https://responsibletax.kpmg.com/page/avoidance-and-evasion-different-phenomena-with-different-solutions-> accessed 14 November 2018

certainty under which taxpayers should trust that the transactions, they have legally entered into, will be respected by the authorities. However, the line between use and abuse is unclear, as much as the distinction between tax planning and tax avoidance.[35] Avoidance is not illegal, it is true that avoidance may be blocked by anti-avoidance rules or found not to work by a court; but it is not a criminal offence to have undertaken it, like it is a case with above mentioned tax evasion. It is certain that there are some measures, which can be taken in order to address tax avoidance – for example through voluntary reporting such as the filing of tax returns, mandatory disclosure regimes, Country-by-Country reporting and similar.[36]

Tax planning techniques – It is understood that many methods exist to channel profits from high-tax jurisdiction to lower taxed group entities such as debt financing, transfer pricing, licensing of IP and usage of intangibles, reduction of source or residence country taxation of dividends and interest through investment phase and the taxation of capital gains upon exit.[37] In addition, MNEs will use low-taxed branch of a foreign company, hybrid entities, hybrid financial instruments and other financial transactions, conduit companies or derivatives. Low-taxed branch of a foreign company means that company from a high-tax jurisdiction can have a lower tax rate on corporate income by providing loans through a foreign branch from a lower-tax jurisdiction. When hybrid entities are used as tax planning techniques, it is about creating an entity that is a taxable in one country but "transparent" in another. Moreover, hybrid financial instruments are instruments that present features connected with debt or equity and other financial transactions can give rise of payments being deductible in one country, but not being taxed in another.[38] Because of the impact of digital economy, new business models and new technology developments, such as 3D printing, companies are not limited by national boundaries and can easily escape their tax liabilities by shifting their royalty payments towards a tax haven.[39]

Typical example of tax planning is when MNEs have shifted manufacturing from high-tax jurisdictions to countries with low-tax jurisdiction, accessing lower labour costs, a large domestic market and tax holidays. Another trend is the shift from country-specific operating models to more centralized models that centralize functions and risks at either a regional or global level. Thus, it can be seen that profit migration (i.e. when profits currently generated in high-tax jurisdiction and seeks to move them to lower-tax jurisdiction) applies to various profit shifting techniques, whether through the effective use of transfer pricing, base erosion financial techniques or through approaches that may

[35] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 52.
[36] Chris Morgan (n 34)
[37] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4); Clemens Fuest, Christoph Spengel, Katharina Finke, Jost H. Heckemeyer, and Hannah Nusser (n 5)
[38] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4)
[39] Eli Hadzhieva, 'Tax challenges in the digital economy; Study for the TAXE 2 Committee' (2016), European Parliament, Directorate - General for Internal Policies, Policy Department A: Economic and Scientific Policy <www.europarl.europa.eu/RegData/etudes/STUD/2016/579002/IPOL_STU%282016%29579002_EN.pdf> accessed 14 November 2018

involve a physical move of people, plant and equipment, or a retooling and shifting of intangible assets and business risks whit a goal to benefit from tax favored locations and structures.[40]

It is possible to identify different types of tax planning techniques depending on whether it has a temporary (i.e. an effort to pay tax later in time) or permanent effect (i.e. an effect to avoid the payment of tax altogether). Furthermore, substantive tax planning can be found in a situation where the effective corporate tax rate is relatively high in a certain jurisdiction and as a result multinational company may either leave the jurisdiction or it may not start operations in the high-tax jurisdiction in the first place. In contrast to this technique, formal tax planning retains the substance of the activity though having the possibility of achieving the same result in the most tax-efficient manner. The reduction of taxable income is typical form of formal tax planning.[41]

Overall, in any tax planning situation some strategies such as minimization of taxation in a foreign operating or source country, low or no withholding tax at source, low or no taxation at the level of recipient or no current taxation of the low-taxed profits are typical results.[42] Those findings show that tax planning is recognized among countries as a phenomenon through which taxpayers can organize their business in a way to avoid their tax obligations.[43] MNEs may be able to do so without a corresponding material change in the way they operate, including where products and services are produced, sales and distribution occur, research and development is undertaken, and how the taxpayer's capital and labour are used.[44] Therefore, some measures can be taken in order to address those practices since they reduce tax revenues in a manner that is not intended by tax policy. Even though anti-abuse measures did and do exist, one of the main challenges for tax authorities worldwide is the lack of timely, comprehensive and relevant information on aggressive tax planning strategies because such an information provides the opportunity for governments to quickly respond to tax risks.[45] Consequently, international organizations - as OECD with G20 reacted and as a result the anti-BEPS Project was born. In addition, the EU has taken several steps in this area, including adoption of the Anti-Tax Avoidance Directive (ATAD) and some other measures to tackle aggressive tax planning.[46]

[40] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 76-77.
[41] ibid 65-66.
[42] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4)
[43] OECD (2015), *Explanatory Statement*, OECD/G20 Base Erosion and Profit Shifting Project, OECD <www.oecd.org/tax/beps-explanatory-statement-2015.pdf> accessed 14 November 2018
[44] OECD (2015), *Measuring and Monitoring BEPS, Action 11 - 2015 Final Report* (n 22)
[45] OECD (2015), *Explanatory Statement* (n 43)
[46] 'Curbing Aggressive Tax Planning' (*European Commission website, European Semester Thematic Factsheet*, 20 November 2017) <https://ec.europa.eu/info/sites/info/files/file_import/european-semester_thematic-factsheet_curbing-agressive-tax-planning_en.pdf> accessed 14 November 2018

3. Tax planning indicators and counter reactions coming from states

Aggressive tax planning indicators can be derived from certain tax rules or from their absence. In the absence of general and specific anti-avoidance rules, it would be easier for MNEs to be involved into tax planning. Countries use anti-avoidance rules not only to counter tax avoidance but also to ensure that fairness and integrity of their corporate tax system really exists.[47] Regarding tax planning indicators, worth mentioning are those ones that refer to tax rules which do not promote any tax planning structure, but which are necessary for this structure to work. The typical example for such an indicator would be withholding taxes. Then, some tax regimes can by themselves encourage or facilitate aggressive tax planning structures. Finally, there are a number of economic indicators that may be used to detect evidence of tax planning practices, such as total foreign direct investments (FDIs), FDIs held by special purpose entities and specific financial income flows, such as dividends, interest and/or royalty flows, expressed as a share of GDP.[48] Given these points, those counter rules on tax planning, indicators which show such a practice and regimes coming from countries, will be elaborated below, before the main part of the thesis that will tackle the OECD and the EU Anti-BEPS measures.

3.1. General anti-avoidance rules

General anti-avoidance rules (GAAR) are domestic rules that allow the tax authorities to recognize transactions that have been entered with the purpose of obtaining tax benefits.[49] A transaction will be subject to the GAAR if the taxpayer's purpose in using the transaction was to avoid tax.[50] It is understood that many domestic tax systems contain such rules, either in the form of an express provision incorporated into the tax code or in the form of a general principle of abuse of law, developed by local judges in domestic case law.[51] Overall, reliance on GAAR can be expressed in countries where, due to a principle of the division of powers, the court cannot replace the legislator in cases when tax law does not tax certain situations. Thus, the court will refrain from collecting taxes.[52] Several countries such as Germany, France, Serbia, etc. have some forms of GAARs. While some tax concepts – for example, transfer pricing, thin capitalization and permanent establishment – have similar meanings across jurisdictions and tax systems, there is no universal understanding of what constitutes a GAAR or what constitutes tax avoidance as the main target of a GAAR.[53] Even though the countries develop and implement their GAARs differently, there are some common characteristics found in GAARs among countries, including: identification of a tax advantage scheme;

[47] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4)
[48] 'Curbing Aggressive Tax Planning' (*European Commission website, European Semester Thematic Factsheet*, 20 November 2017) (n 46)
[49] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 207.
[50] Michael Lang, Jeffrey Owens, Pasquale Pistone, Alexander Rust, Josef Schuch and Claus Staringe: *GAARs - A Key Element of Tax Systems in the Post-BEPS World* (IBFD Publications BV, 2016) 7.
[51] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 207.
[52] Dejan Popović (n 30) 54.
[53] Michael Lang, Jeffrey Owens, Pasquale Pistone, Alexander Rust, Josef Schuch and Claus Staringe (n 50) 1.

quantification of tax benefit or tax advantage associated with that scheme; purpose test to assess if the company achieves a tax advantage through the scheme.[54]

Regarding the pros and cons for introducing GAAR in the legal system of one country, it should be noted that GAAR creates uncertainty for taxpayers in terms of tax implications on various businesses and non-businesses transactions and unfairness resulting from selective application. A negative environment for investment can be created since GAAR is only applied post factum and consequently, taxpayers cannot make investments predicting particular after-tax rates of return. As mentioned, GAAR applies differently for each case, i.e. equal applying to all taxpayers is not possible.[55] Therefore it is crucial to ensure that after GAAR's introduction, the tax system does not fall into disrepute. Therefore, GAAR must be administered transparently.[56]

At this point, for purpose of this thesis, it would be interested to briefly consider GAAR in Serbia. As in many other jurisdictions, taxpayers in Serbia can seek to reduce their tax obligations through tax planning practices, but at the same time these practices must comply with the Serbian Corporate Income Tax Law and the General Anti-Avoidance Rule of substance over form. This rule is incorporated in Article 9 of the Law on Tax Procedure and Tax Administration[57] and it contains three principles:

- Tax facts are determined in accordance with their economic substance. For example, the sale of assets of the company to the shareholder at a price below the market price is considered as dividing the dividend;
- If one legal transaction is dissembled by the simulated legal transaction, the basis for determining the tax liability is the dissimulated legal transaction, and
- The tax authority is obliged to determine the tax liability in case when income is realized or the property is acquired in a way opposite to regulations.[58]

3.2. Specific anti-avoidance rules

As it was noted above not only in the absence of general anti-avoidance rules, but also in the absence of specific anti-avoidance rules MNEs can be active in aggressive tax planning strategies. Notably, alongside a GAAR, tax jurisdictions have SAARs in order

[54] Åsa Johansson, Øystein Bieltvedt Skeie and Stéphane Sorbe,'Anti-avoidance rules against international tax planning: A Classification' (2016) Economics Departments, OECD Working Papers No. 1356 <www.oecd.org/eco/Anti-avoidance-rules-against-international-tax-planning-A-classification.pdf> accessed 14 November 2018

[55] Michael Lang, Jeffrey Owens, Pasquale Pistone, Alexander Rust, Josef Schuch and Claus Staringe (n 50) 2.

[56] 'General Anti-Avoidance Rule' *(PWC website, Tax Policy alert, 2012)* <www.pwc.com/cz/cs/danove-sluzby/danova-politika/assets/gaar-general-anti-avoidance-rule-en.pdf> accessed 14 November 2018

[57] Sagianni A. (Eurofast Serbia), 'Transfer pricing in Serbia: overview*'* (*Thomson Reuters Practical Law*, 1 April 2017) <https://uk.practicallaw.thomsonreuters.com/w-007-3427?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1> accessed 14 November 2018

[58] Article 9 of the Law on Tax Procedure and Tax Administration [*Zakon o poreskom postupku i poreskoj administraciji*] (*Official Gazette of the Republic of Serbia*, no. 80/02, 84/02, 23/03, 70/03, 55/04, 61/05, 85/05, 62/06, 61/07, 20/09, 72/09, 53/10, 101/11, 2/12, 93/12, 47/13, 108/13, 68/14, 105/14, 91/15, 112/15, 15/16, 108/16). See also Dejan Popović (n 30) 54.

to protect their taxing rights and those specific rules are quite compatible.[59] Specific anti-avoidance rules (SAAR) do not concern the application or interpretation of the law but the mechanical deferent of certain tax benefits under certain circumstances.[60] In particular, SAAR includes controlled foreign companies (CFC), thin capitalization, transfer pricing, anti-debt creation, anti-dual resident, anti-hybrid and anti-tax heaven rules.[61] The reason why those rules are part of SAAR is that the mostly common methods for base erosion and profit shifting are indeed preferential tax regimes, artificial internal trading of intangibles, thin capitalization, transfer pricing, artificial contractual agreements or circumvention of CFC rules themselves.[62] In order to understand major BEPS risks in the area of direct taxation, further elaboration of some of those rules is given below.

3.2.1. Controlled foreign company rules (CFC)

Main purpose of CFC rules is that state can tax its resident taxpayer on income derived by foreign entities that are controlled by that taxpayer. A controlled foreign company is an entity or permanent establishment in which the parent directly or indirectly holds at least 50 percent of the voting rights, capital, or profit rights, and the corporate tax paid on its profits is less than 50 percent of the corporate tax that would be paid in the parent's member state.[63] Namely, the resident taxpayer channels income to the foreign entity, that is likely to be a subject of a favorable tax treatment on the received income. Then he defers the distribution of the profits derived by the non-resident entity and consequently obtains a tax deferral.[64] A good example is a common scheme of the first transferring, within a group, the ownership of intangible assets (e.g. IP) to the foreign entity and as a second step, shifting of income in the form of royalty payments in consideration for the right to use the assets owned and managed by that entity. In the European Union the functioning of the internal market is affected by those practices of profit shifting. As mentioned above, one method to address this difficulty are CFC rules as specific anti-avoidance rules contained in domestic tax systems. The final effects of any CFC rules are that parent company is obliged to pay a tax on income of non-resident but controlled company, in state of residence of that parent company as a resident taxpayer.[65] While those rules lead to inclusion in the residence country of a parent company, they also have a positive effect in source countries because taxpayers have no incentive to shift profits

[59] Michael Lang, Jeffrey Owens, Pasquale Pistone, Alexander Rust, Josef Schuch and Claus Staringe (n 50) 13.
[60] Dejan Popović (n 30) 54.
[61] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 207.
[62] Eli Hadzhieva (n 39) 25.
[63] Michel Alves de Matos, Dmitri Semenov, Jurjan Wouda Kuipers, 'European Holding and Financing Companies, the OECD MLI, and EU Anti-Tax-Avoidance Directive' (15 January 2018) Reprinted from Tax Notes Int'l, p. 237 <www.ey.com/Publication/vwLUAssets/ey-the-oecd-mli-and-eu-anti-tax-avoidance-directive/$FILE/ey-the-oecd-mli-and-eu-anti-tax-avoidance-directive.pdf> accessed 14 November 2018
[64] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 212.
[65] 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 - 2016/011 (CNS)

into a low-tax jurisdictions.[66] In addition, the OECD anti-BEPS Action 3 gives recommendations on CFC rules, which aim is to ensure jurisdictions with CFC regimes that those rules will effectively prevent taxpayers from shifting income into foreign subsidiaries.[67]

3.2.2. Thin capitalisation

Thin capitalisation is a situation when the level of debt of a company is much greater than its equity capital. The ratio between debt and equity can crate some credit risks or tax issues.[68] Namely, excessive debt loading, i.e. second name of thin capitalisation, is another technique used by MNEs for reducing their overall tax liability. Since money is easy to mobilize, a multinational enterprise can simply shift debt into high tax jurisdictions to ensure that a tax deduction is received for the interest paid. This furthermore reduces the overall profits in the high tax country while at the same time reduces their tax liability. Consequently, as a counter reaction, the thin capitalisation rules, as type of SAAR, are designed to tackle this practice.

Thin capitalisation rules operate by disallowing a proportion of the deductible interest expense at the level of payer when the debt to equity ratio of the debtor exceeds certain limits.[69] In other words, those rules do not prevent investors from funding subsidiaries by way of debt rather than equity, but here is about establishing a limit on the interest deductions that will be available in respect to the debt.[70] The limits are determined by reference to what is known as the "safe harbour" debt amount, an "arm's length" debt amount, and a "worldwide gearing" debt amount[71], i.e. taxpayer can avoid the operation of the SAAR completely by remaining inside the safe harbour boundaries, if it is established.[72] Markedly, those thin capitalisation rules tend to apply only to loans made by shareholders of the company, with the effect of disallowing the deduction of interest payments on debt financing deemed to be excessive for tax purposes.[73]

The OECD has also recognized this practice as a serious global problem and consequently Action 4 of the BEPS Project addresses this BEPS risk in order to provide the best practice for domestic law.[74] Regarding thin capitalisation rules in Serbia, according to the Corporate Income Tax Law in the case of a loan between associated legal entities, the amount of interest and other expenses related to the loan that is deductible for tax purposes must not exceed a debt-to-equity ratio of 4:1. For banks and

[66] OECD (2013), *Action Plan on Base Erosion and Profit Shifting* (n 2)
[67] OECD (2015), *Explanatory Statement* (n 43)
[68] Dejan Popović (n 30) 378.
[69] 'Thin capitalisation' (*Australian Taxation Office website*, 9 March 2016) <www.ato.gov.au/business/thin-capitalisation/> accessed 14 November 2018
[70] Michael Lang, Jeffrey Owens, Pasquale Pistone, Alexander Rust, Josef Schuch and Claus Staringe (n 50) 13.
[71] 'Thin capitalisation' (*Australian Taxation Office website*) (n 69)
[72] Michael Lang, Jeffrey Owens, Pasquale Pistone, Alexander Rust, Josef Schuch and Claus Staringe (n 50) 13.
[73] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 221.
[74] 'Thin capitalisation' (*Australian Taxation Office website*) (n 69)

financial leasing companies, the applicable debt-to-equity ratio is 10:1.[75]

3.2.3. Transfer pricing

Another possibility to prevent companies from manipulating for tax purposes are rules on transfer pricing because companies may use transfer pricing as a technique to avoid taxes and export capital to more favorable destinations.[76] According to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, transfer prices are prices at which an enterprise transfers physical goods, intangible property or provides services to associated enterprises. Two enterprises are associated if one of the enterprises or the same person participates directly or indirectly in the management, control, or capital of the other.[77] In order to determine first – income and expenses of associated enterprises in different tax jurisdictions and then – taxable profits, transfer prices are very important area for both - taxpayers and tax administrations.[78]

The underlying international principle for setting prices for related-party transactions is the arm's length principle, and detailed instructions on how to apply this principle are issued by the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter: the Guidelines). This principle requires that prices for goods and services exchanged between related parties should be the same as if the parties were independent, acting in the same or similar circumstances. The base of the arm's length principle is "comparability analysis". There are two aspects in this analysis – the first one is about recognizing the commercial and financial relations between associated enterprises (requiring a broad understanding of the industry sector in which the MNE group operates) and economic circumstances in those relations, while the second aspect is comparison between conditions and those circumstances of controlled transaction with the relevant conditions and circumstances of comparable transactions between independent enterprises. It should be noted that comparability factors that need to be identified are: contractual terms of transactions, functions performed by each of the parties, characteristics of property transferred or services provided, economic circumstances of parties and of the market in which parties operate as well as the business strategies of those parties. If conditions of the transaction are different to those between independent parties in comparable circumstances, adjustments to the profits may be needed for tax purposes.[79] According to the Guidelines, the arm's length principle character of tested transactions must be determined in accordance with the transfer

[75] 'Transfer pricing in Serbia: overview' (n 57)
[76] Åsa Johansson, Øystein Bieltvedt Skeie and Stéphane Sorbe (n 54) 6.
[77] Article 9, subparagraphs 1a) and 1b) of the *OECD Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD Publishing, Paris <https://doi.org/10.1787/mtc_cond-2017-en> accessed 14 November 2018
[78] OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017* (n 13)
[79] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <https://doi.org/10.1787/9789264241244-en> accessed 14 November 2018

pricing method, which is the most appropriate one for the transactions under review.[80] There are traditional transaction methods and transactional profit methods. Traditional methods – Comparable Uncontrolled Price, Resale Price and Cost-Plus methods are based on particular comparable uncontrolled transactions involving identical or broadly comparable products. On the other hand, transactional profit methods – Transactional Net Margin and Transactional Profit Split methods are based on the net return realized by various companies engaged in a particular line of business.[81] Briefly, the generally accepted transfer pricing methods are:

- Comparable uncontrolled price method which compares the price charged for property or services transferred in a controlled transaction with the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances[82], while respected transactions are performed under particular comparable factors such as similarity of the subject of the transaction, comparability of contractual conditions, comparability of economic or market conditions etc.[83] Any difference between those two prices would mean that conditions of the commercial and financial relations of the associated enterprises are not arm's length. Consequently, the price in the uncontrolled transaction may need to be substituted with the price in the controlled transaction.[84]

- Resale price method which starts with a product purchased price from an associated enterprise that is resold to an independent enterprise. After this, the resale price is reduced by an appropriate gross margin on this price. This margin is known as the "resale price margin" and represents the amount out of which the reseller would seek to cover its selling and operating expenses and make a profit. What is left after subtracting the gross margin can be regarded, after adjustment for other costs associated with the purchase of the product, as an arm's length price for the original transfer of property between the associated enterprises.

- Cost-plus method which begins with the costs realized by the supplier of property or services in a controlled transaction for property transferred or services provided to an associated purchaser. In order to make the profit appropriate to the functions performed and the market conditions, the cost plus mark-up is added to those costs. The outcome may be regarded as an arm's length price of the original controlled transaction. Situations where this transfer pricing method is most useful are those where semi finished goods are sold between associated parties, in the

[80] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 34.
[81] United Nations Practical Manual on Transfer Pricing for Developing Countries (2017), Department of Economic and Social Affairs <www.un.org/esa/ffd/wp-content/uploads/2017/04/Manual-TP-2017.pdf> accessed 14 November 2018
[82] OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017* (n 13)
[83] Dejan Popović (n 30) 373.
[84] OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017* (n 13)

case of joint facility agreements between them or long-term buy-and-supply arrangements, or where the controlled transaction is the provision of services.

- Transactional net margin method, which examines the net profit relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realizes from a controlled transaction. This method operates in a similar way to the cost plus and resale price methods. The net profit indicator of the taxpayer from the controlled transaction should be compared with the net profit that the same taxpayer earns in comparable uncontrolled transactions, i.e. by reference to "internal comparables". Where this is not possible, the net margin that would have been earned in comparable transactions by an independent enterprise ("external comparables") may serve as a guide.[85]

- Transactional Profit Split Method is applied when both parties of a transaction contribute significant intangible property, but also in situations involving tangible property, trading activities or financial services. Moreover, this method is applicable in cases where the associated enterprises are so interdependent that they cannot be evaluated independently using a traditional transaction method.[86] The Profit Split Method eliminates the effect on profits coming from special conditions made in a controlled transaction by determining the division of profits that independent enterprises would have expected to realize from engaging in transaction(s).[87] Precisely, the first step in applying this method is to identify the profits to be divided between the associated enterprises from the controlled transactions. These profits are divided based on the value of each enterprise's contribution and external market data that will secure that the division of profits between the associated enterprises is in accordance with that between independent enterprises performing comparable functions.[88] In order to allocate or split the profits between associated parties, contribution analysis and residual analysis are commonly used methods. It must be noted that the Action 10 of the BEPS Project revised the application of the Profit Spit Method in the context of global value chains in order to make this method improved especially regarding the question when it is appropriate to apply.[89]

The Guidelines are widely used by OECD member states but also by an increasing number of non-OECD countries like Serbia.[90] According to the Serbian legislator, taxpayers are obliged to separately disclose in transfer pricing documentations transactions with related parties. The net positive difference between the price determined

[85] ibid
[86] United Nations Practical Manual on Transfer Pricing for Developing Countries (2017) (n 81)
[87] OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017* (n 13)
[88] United Nations Practical Manual on Transfer Pricing fro Developing Countries (2017) (n 81)
[89] OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017* (n 13)
[90] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 34.

in applying arm's length principle and taxpayer's transfer price is included in the tax base.[91] Overall, in the next part of the thesis, special attention will be put on the transfer pricing phenomenon since one of the main goal of the BEPS project is improvement in this field.

3.2.4 Anti-hybrid rules

Another type of the anti-avoidance rules in domestic tax systems in the OECD and G20 economies are anti-hybrid rules. Anti-hybrid rules connect domestic tax treatment of instruments or entities with a tax treatment in the foreign country, thus eliminating the mismatch between tax systems. Those rules may deny the deduction of interest if treated as non-taxable dividend in the recipient country.[92]

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It should be noted that in Serbia, except thin capitalisation and transfer pricing rules, there are no other specific anti-avoidance rules applicable in a cross-border context.[93] Notably, some countries have anti-debt creation rules, anti-dual resident rules, the above mentioned anti-hybrid rules or anti-tax heaven rules in order to preserve their tax revenues. Along with them, there are countries, which as an example impose higher withholding taxes when payments are made to entities located in tax heavens.[94] Withholding taxes are necessary for tax avoidance structures to work. With that regard, those taxes will be briefly elaborated below.

3.3. Withholding taxes

As mentioned, withholding taxes are not anti-avoidance rules but the reason why they are observed at this point is that they can influence the tax planning. Withholding taxes are taxes levied on payments such as interests, royalties, dividends or service fees when they are destined to non-resident entities.[95] In other words, those taxes are paid by a non-resident company in a country, where that company generates income via payments such as interest or royalties.[96] That company i.e. non-resident entity can be eligible for a tax credit in the destination country. Most countries also grant reduced withholding tax rates through bilateral tax treaties.[97] Markedly, bilateral tax treaties may be abused by treaty shopping to avoid the payment of withholding taxes in the high-tax jurisdiction via establishing shell companies in low tax jurisdictions. Furthermore, usage of tax havens or special tax regulations is a common practice of MNEs for this purpose. When tax

[91] 'Serbia Country profile' (*KPMG Global website*, 27 June 2017) <https://home.kpmg.com/xx/en/home/insights/2016/07/european-tax-serbia-country-profile.html> accessed 14 November 2018
[92] OECD (2015), *Measuring and Monitoring BEPS, Action 11 - 2015 Final Report* (n 22)
[93] 'Serbia Country profile' (*KPMG Global website*) (n 91)
[94] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 228.
[95] Åsa Johansson, Øystein Bieltvedt Skeie and Stéphane Sorbe (n 54) 9.
[96] Eli Hadzhieva (n 39) 23.
[97] Åsa Johansson, Øystein Bieltvedt Skeie and Stéphane Sorbe (n 54) 9.

collection occurs in a tax haven, it is possible that companies will pay close to zero tax on profits.[98] Consequently, in order to combat with those practices, countries impose higher withholding tax rate.

With that regard, a special withholding tax regime has applied in Serbia since 26 December 2012. In the absence of a double tax treaty, Serbia normally imposes a withholding tax rate of 20% to non-resident entities, but there is also a 25% withholding tax rate that applies to certain income payable to non-resident companies established or having their seat or place of effective management in tax havens.[99]

3.4. Jurisdiction to tax

Finally, there is a jurisdiction to tax rule as additional indicator used by countries when there is an intention for examining issue related to BEPS. A low-taxed branch of a foreign company or hybrid entities are some of examples that show how jurisdiction to tax rules can be applied in a way to achieve low or no-taxation. One can find this principle in domestic tax law rules, double tax treaties and other international law instruments.[100] It is understood, jurisdiction to tax means that if one country wants to tax the income of one legal entity, there must be a connection between them. In most cases, connection factors are the place of incorporation or the place of effective management. This type of right to tax is known as "residence jurisdiction", but also state can base its right on the source on the income being situated within its territory.[101] Generally speaking, tax systems can be worldwide, that tax their residents on their worldwide income and non-residents on the income derived from its territory, and territorial ones, that tax both residents and non-residents only on the income derived from sources located in their territory.[102] When there is a non-resident taxpayer, the concept of permanent establishment is used for determining whether country has taxing rights in this particular case. However, some profits may be taxed in a country even though there is no permanent establishment therein such as: i) profits derived from immovable property, which may be taxed by the country of source where the immovable property is located; ii) profits that include dividends, interest, royalties or technical fees, on which the treaty allows the country of source to levy a limited tax based on the gross amount of the payment; iii) under some treaties, profits derived from collecting insurance premiums or insuring risks in the source country; iv) under some treaties, profits derived from the provision of services if the presence of the provider in the country of source meets certain conditions. And finally, when domestic tax systems are interacted, a possibility of double taxation or double non-taxation to occur is higher. Liability to a country's tax first depends on whether the legal entity as a taxpayer is a resident of that country.[103]

[98] Eli Hadzhieva (n 39) 23-24.
[99] 'Transfer pricing in Serbia: overview' (n 57)
[100] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4) 33-40.
[101] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 5.
[102] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4) 33.
[103] ibid 35.

* * *

Having all previously observed points in mind, it is evident that strict anti-avoidance rules such as GAARs, transfer pricing, CFCs or other rules reduce tax planning and consequently reduce profit shifting. In other words, countries with higher statutory corporate tax rates do not necessarily have higher fiscal losses from base erosion and profit shifting if they have strict anti-avoidance rules. However, those rules generate compliance costs for all firms as well as administrative and enforcement costs for tax authorities. One of the solutions to reduce those costs is international co-ordination.[104] Finally, the OECD recognized that governments do not take extensive steps in addressing the BEPS issue and as a result the Anti-BEPS Project is brought.

Chapter III

The OECD and the EU measures to counter base erosion and profit shifting

1. Setting the problem

In the past few years tax planning by multinational enterprises through base erosion and profit shifting strategies was recognized as a serious risk to tax revenues, tax sovereignty and tax fairness for the OECD Member and non-Member countries. It is important to bear in mind that corporate income tax raises revenues equivalent to around 3% of GDP or about 10% of total tax revenues. Although revenue losses through BEPS strategies may not be extremely large in relation to tax revenues as a whole, the issue is still relevant in the monetary terms and for the integrity of the tax system.[105] According to the OECD research on BEPS, those practices cost countries 100-240 billion USD in lost revenues annually, which is the equivalent to 4-10% of the global corporate income tax revenue.[106] Regarding the EU data on the issue it can be seen that because of Lux Leaks, Swiss Leaks and Panama Leaks scandals, there is a need to stop tax avoidance. Available data show that as a result of those schemes EUR 50-70 billion of tax revenue is being annually lost by the Member States of the European Union (EU).[107] With this regard, it seems admirable that measures to address BEPS will provide countries with instruments, domestic and international, in order to better align taxation rights with real economic activity.[108]

Although national governments already have a wide variety of legal instruments to

[104] OECD (2015), *Measuring and Monitoring BEPS, Action 11 - 2015 Final Report* (n 22)
[105] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4) 5-15.
[106] OECD (2018), *Inclusive Framework on BEPS – A global answer to a global issue* (OECD Website, July 2018) <www.oecd.org/tax/flyer-inclusive-framework-on-beps.pdf> accessed 14 November 2018
[107] Eli Hadzhieva (n 39) 10.
[108] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4) 8.

counter aggressive tax planning, as it was mentioned in the previous part, the OECD stated that governments are unable to take more extensive steps regarding this issue since tax laws of different jurisdictions are not coordinated and as a result there are opportunities for firms to reduce tax liabilities or even MNEs may generate income that is not taxable under the laws of any jurisdiction, known as double non-taxation. Furthermore, BEPS represents a problem not only to governments, but also to other taxpayers, including domestic firms that lack the access to BEPS opportunities - that are open to MNEs.[109] Simply, BEPS practice undermines voluntary compliance by all taxpayers[110], so domestic and international rules on the taxation of cross-border profits are in danger.[111] Therefore in a world where businesses operate internationally, governments must take a joint action to tackle BEPS practices and to restore the trust in domestic and international tax systems.[112]

2. Anti-BEPS Projects

2.1. The OECD Anti-BEPS Project - When it was recognized that base erosion and profit shifting practices represent a serious problem in international tax system, G20 Leaders requested the OECD to bring a report on the key issues that lead to BEPS.[113] The report *Addressing Base Erosion and Profit Shifting* (OECD, 2013) concluded that it is the interaction among different factors that makes opportunities for taxpayers to undertake BEPS strategies, such as domestic laws and rules that are not coordinated across borders, international tax standards that did not always keep pace with the changing global business environment and a lack of relevant information at the level of tax administrations about a tax planning practices.[114] This Report became basis for the 15-point anti-BEPS Action Plan.[115] Moreover, the Action Plan has three pillars around which those 15 Actions can be identified. The first pillar is about introducing the coherence in the domestic rules that affect cross-border activities, another one reinforces substance requirements in the existing international standards and the third pillar improves transparency and certainty. Besides precise explanation of Actions, this plan sets deadlines and identifies the resources and methodology needed to implement these soft-law measures[116] since timely implementation of the BEPS package is urged as well as the involvement of all interested countries i.e. the OECD members and non-members in the process.[117] To these ends, the decision making body for the OECD's tax work - the OECD Committee on Fiscal Affairs (CFA) – developed an Inclusive Framework on

[109] Dhammika Dharmapala, 'Base Erosion and Profit Shifting: A Simple Conceptual Framework' (2014) University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 703. <https://ssrn.com/abstract=2497770> accessed 14 November 2018
[110] OECD (2017), *Background Brief – Inclusive Framework on BEPS* (n 1)
[111] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4) 13.
[112] OECD (2018), *Inclusive Framework on BEPS – A global answer to a global issue* (n 106)
[113] OECD Secretariat, *Inclusive Framework on BEPS - Progress Report, July 2016 – June 2017* <www.oecd.org/tax/beps/inclusive-framework-on-BEPS-progress-report-july-2016-june-2017.pdf> accessed 14 November 2018
[114] OECD (2015), *Explanatory Statement* (n 43) 5.
[115] OECD Secretariat, *Inclusive Framework on BEPS - Progress Report* (n 113)
[116] OECD (2013), *Action Plan on Base Erosion and Profit Shifting* (n 2)
[117] OECD (2018), *Inclusive Framework on BEPS – A global answer to a global issue* (n 106)

BEPS. Many developing countries are part of the Inclusive Framework[118], because those countries suffer from significantly higher BEPS concerns than developed countries. The reason is that in developing countries the reliance on corporate income tax is higher and tax administrative capacity to stop BEPS practices is lower.[119] Moreover, since BEPS strategies take advantage of interplay between tax rules of different jurisdictions, it is difficult of a single country to tackle this practice by itself. That was the reason why anti-BEPS measures focus on different forms of coordination and collaboration between countries. As a result, countries can enhance global welfare.[120] Due to the fact that BEPS anti-avoidance measures already started to be implemented by countries, available data show that measures have been found to be effective in reducing aggressive tax planning.[121]

2.2. The EU Anti-BEPS Project - The European Union has actively participated in the entire OECD anti-BEPS process.[122] With the aim to show how anti-BEPS measures can be implemented within the EU, the Commission has published a Communication on a Fair and Efficient Corporate Tax System in the European Union.[123] In order to address some profit-shifting situations, the amendment from 2015 on the 'Parent-Subsidiary Directive' (2011/96/EU) includes elements such as dividend payments between the EU subsidiaries and parent companies. Furthermore, this amendment allowed Member States to use unilateral measures against profit-participating loans introducing a 'common minimum anti-abuse rule' for situations that fall under the Parent-Subsidiary Directive.

In June 2015, the joint initiative to reform corporate tax law system in the European Union started after the Commission released an action plan on the revised EU Common Consolidated Corporate Tax Base (CCCTB) proposal. It was believed that the CCCTB would eliminate mismatches among national tax systems and reduce the scope for harmful tax competition. However, the Economic and Financial Affairs Council (ECOFIN), the legislative body of the European Union handling taxation, has suggested to the Commission to deliver two packages of proposals. One is legislative proposal for a re-launch of the mentioned – the CCCTB Project and another is a separate anti-BEPS package of legislative and non-legislative measures.[124] As a result, the Anti-Tax Avoidance (ATA) Directive was proposed to offer rules against tax avoidance and aggressive tax planning practices that directly affect the functioning of the Internal Market through implementation of the OECD BEPS recommednations form Actions 2,3,4 and 6.[125] Furthermore, the Council adopted this Directive on 12 July 2016.[126]

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[118] OECD (2017), *Background Brief – Inclusive Framework on BEPS* (n 1)
[119] OECD (2018), *Inclusive Framework on BEPS – A global answer to a global issue* (n 106); OECD (2015), *Measuring and Monitoring BEPS, Action 11 - 2015 Final Report* (n 22)
[120] Dhammika Dharmapala (n 109)
[121] OECD (2015), *Measuring and Monitoring BEPS, Action 11 - 2015 Final Report* (n 22)
[122] Jurjan Wouda Kuipers, Klaus von Brocke (n 11)
[123] OECD (2015), *Explanatory Statement* (n 43) 10.
[124] Jurjan Wouda Kuipers, Klaus von Brocke (n 11)
[125] 'The outlook for global tax policy 2018' (*EY website, Global tax alert*) <ey.com/2018taxpolicyoutlook> accessed…
[126] 'Anti tax avoidance package' (*Council of the European Union website*)

The ATA Directive addresses situations where corporate taxpayers take an advantage of differences in national tax systems with the goal to reduce their overall tax obligation.[127] As a matter of fact this Directive is broadly inclusive and it aims to capture all taxpayers which are subject to corporate tax in the EU Member States, and also it tackles permanent establishments, situated in the Union but that belongs to corporate taxpayers which are not themselves subject to the Directive.[128] It can be seen that this Directive sets out minimum standards such as definition of permanent establishment, an interest deduction limitation rule, CFC rules, as well as GAAR and a hybrid mismatch rule. Specifically, this Directive goes beyond the OECD recommendations by including provisions on an exit taxation rule and a switchover clause allowing countries to deny exemption of a foreign income from permanent establishments under certain circumstances.[129] The Member States will have to incorporate the ATA Directive into their national laws and regulations until 31 December 2018 and the Directive should apply as from 1 January 2019, but the part about the exit taxation rules should be transposed due to 31 December 2019. Regarding part on hybrid mismatches, Member States will have to incorporate the rules into national laws and regulations until 1 January 2020.[130]

Notably, the EU has already taken an active role in respect to 10 out of 15 BEPS Actions. It will be seen that in respect to the Action 1, the European Commission issued two proposals for new Directives on digital economy. The above mentioned Anti-Tax Avoidance Directive addresses the recommendations contained in BEPS Actions 2, 3, 4 and 6. Furthermore, the Action 5 and its transparency part is covered in the Directive on exchange of information on tax rulings according to which, Member States are obliged, as of 1 January 2017, to automatically exchange information on all new cross-border tax rulings that they issue. On 28 January 2016, the European Commission brought an anti-tax avoidance package offering a recommendation on the implementation of measures in accordance to the OECD BEPS Actions 6 and 7 against tax treaty abuse through covering GAAR rules in tax treaties and the revised definition on PE. Regarding the Action 12, the Directive on new mandatory transparency rules for intermediaries and taxpayers broadly reflects its objectives, and the Action 13 is introduced via the CbyC Directive 2016/881. In accordance with recommendations set out under the Action 14, the EU has adopted the Tax Dispute Resolution Directive.[131]

To sum up, in order to tackle BEPS practices in the most coordinated and effective way, the European Commission's idea is to apply the EU State aid provisions from the Treaty on the Functioning of the European Union (TFEU); to work on implementation of the Anti–Tax Avoidance (ATA) Directive; to expand the automatic exchange of information

<www.consilium.europa.eu/en/policies/anti-tax-avoidance-package/> accessed 14 November 2018

[127] 'Corporate tax avoidance: Council agrees its stance on anti-avoidance rules' (*Council of the European Union, Press release 370/16*, 21 June 2016) <www.consilium.europa.eu/en/press/press-releases/2016/06/21/corporate-tax-avoidance/pdf> accessed 14 November 2018

[128] Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (n 65)

[129] Jurjan Wouda Kuipers, Klaus von Brocke (n 11)

[130] 'Anti tax avoidance package' (*Council of the European Union website*) (n 126)

[131] 'The outlook for global tax policy 2018' (*EY website, Global tax alert*) (n 125)

on cross-border tax rulings; to require greater corporate transparency through Country-by-Country (CbC) Reporting; to establish a platform on good tax governance to deal with issues such as aggressive tax planning and tax havens and finally to recommend to the EU Member States to implement the BEPS Action 6 (Treaty Abuse) and 7 (Artificial Avoidance of PE Status) proposals in their tax treaties.[132] Finally, all EU Member States have already signed the MLI.[133]

3. Actions to tackle BEPS

Regarding the OECD BEPS Actions, these measures range from new minimum standards to revision of existing standards, common approaches which will facilitate the convergence of national practices and guidance drawing on best practices.[134] Minimum standards Actions, i.e. the Action 5 that recommends measures against harmful tax practices, the Action 6 that prevents tax treaty abuse, including treaty shopping, the Action 13 that will improve transparency through Country-by-Country Reporting and the Action 14 that will make dispute resolution mechanisms more effective, will be implemented by all members of the Inclusive Framework.[135] Furthermore, there is an agreement for countries to be subject to targeted monitoring, especially for the implementation of the minimum standards.[136] Since the Action Plan's pillars are already mentioned, it should be noted that coherence actions – which are Actions 2, 3, 4 and 5, combat harmful or inappropriate use of international tax legislation to obtain unintended tax benefits. Substance actions or Actions 6, 7, 8, 9 and 10 are tackling mismatches where profits are being taxed versus where people responsible for generating these profits are located. And finally, transparency actions - Actions 11, 12, 13 and 14, provide tax authorities information to carry out audits better. However, actions 1 and 15 are horizontal measures.[137]

When the question is on the EU measures to tackle BEPS, most Member States have committed to implement in a coherent and coordinated manner measures contained in the OECD BEPS Final Reports because it is essential for the good functioning of the Internal Market.[138] Recommendations from the OECD anti-BEPS package that are not covered in the EU anti-BEPS Directive, will be left to the Member States to decide about its implementation.[139] In this part of the thesis both the OECD and the EU anti-BEPS measures will be taken into consideration.

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[132] KPMG International (2016), *OECD BEPS Action Plan: moving from talk to action in the European region* (n 12) 4.
[133] 'The outlook for global tax policy 2018' (*EY website, Global tax alert*) (n 125)
[134] OECD (2015), *Explanatory Statement* (n 43) 6.
[135] OECD Secretariat, *Inclusive Framework on BEPS - Progress Report* (n 113)
[136] OECD (2015), *Explanatory Statement* (n 43) 6.
[137] 'Global Focus on BEPS - BEPS by Action' (*EY global website*) <www.ey.com/gl/en/services/tax/ey-oecd-base-erosion-and-profit-shifting-project-by-action> accessed 14 November 2018
[138] Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (n 65)
[139] Jurjan Wouda Kuipers, Klaus von Brocke (n 11)

3.1. The BEPS Action 1 – Address the tax challenges of the digital economy

The first OECD BEPS Action is about addressing tax challenges of digital economy because this new economy can exacerbate BEPS risks, i.e. digital economy is challenging because there is a question whether existing international tax standards are able to ensure that profits are taxed where economic activities are ongoing and where value is created.[140] The digital economy is the result of a transformative process brought by information and communication technology (ICT), which has made technologies cheaper, more powerful and standardized while improving business processes and innovation across all sectors of the economy.[141] Main characteristics of digitalized businesses - intangible assets, the massive use of data, the spread of multi-sided business models, re-allocation of business functions, user participation, network effects and user-generated content, give a possibility for those businesses to be involved in low or no-taxation arrangements.[142] Namely, operations of MNEs are highly integrated across borders – i.e. customers are in one country and corporation (i.e. non-resident company) is doing business via the Internet even without any presence in that country and since tax rules often have gaps, loopholes and remain uncoordinated, corporations know how to use structures (that are legal too) in order to take advantage of those tax rules.[143] It is important to point out again that the general rule of domestic laws in most countries is that there must be certain degree of physical presence before business profits are subject to taxation. In addition, according to the OECD Model Tax Convention, a company is subject to tax on its business profits in a non-resident country only if it has a permanent establishment (PE) in that country. As a result of those rules, the previously mentioned non-resident company may not be subject to tax in the country in which it has only customers.[144] The importance to address those challenges of digital economy in the context where BEPS is recognized and consequently the key features of this new economy have been taken into account across the whole project.[145] Moreover, some countries believe that data and user participation in digitalized world represent a contribution of value creation in enterprise because user participation is necessary for building up the brand, reputation of digital business and can affect on the raise of user network. In contrast, others believe that those characteristics represent interaction between users and digital business, where business for exchange of data, provides financial or non-financial (ex. data hosting) compensation to the users. Differences in the

[140] Cécile Remeur, 'Understanding the OECD tax plan to address 'base erosion and profit shifting' – BEPS' (2017), European Parliamentary Research Service PE 607.288 <www.europarl.europa.eu/RegData/etudes/BRIE/2017/607288/EPRS_BRI(2017)607288_EN.pdf> accessed 14 November 2018

[141] OECD (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <http://dx.doi.org/10.1787/9789264241046-en> accessed 14 November 2018

[142] OECD (2013), *Action Plan on Base Erosion and Profit Shifting* (n 2) 10.

[143] OECD (2013), *Addressing Base Erosion and Profit Shifting* (n 4)

[144] OECD (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report* (n 141) 79.

[145] OECD (2015), *Explanatory Statement* (n 43) 8.

above mentioned views are important for the question whether there are any tax challenges arising from this changing business environment.[146]

Accordingly, regarding this digital phenomenon there is a question how to treat and allocate the income generated from cross-border activities in the digital age. The BEPS Action 1 divided challenges raised by the digital economy into next categories:

- **Nexus**: Companies have a physical presence or a nexus in a given jurisdiction, where they are obliged to pay their taxes.[147] However, the spread of digital technologies and the fact that increasing number of companies are doing business in different countries without physical presence there, combined with the increasing role of network effects generated by customer interactions, can bring the questions whether the current rules to determine nexus with a jurisdiction for tax purposes are still appropriate. It is about difficulty to define tax jurisdiction.
- **Data**: In the digital economy it is questionable how to attribute value created from the generation of data through digital products and services, and how to characterise for tax purposes a person or entity that gives data in one transaction. Values generated by using personal data in online digital giants such as Google and Facebook are very profitable since profits are made through advertising as those companies have access to data of their users.[148]
- **Characterisation:** The development of new digital products or means of delivering services creates uncertainties in relation to the proper characterization of income made in the context of new business models, particularly in relation to cloud computing. Simply, the problem is whether e-commerce transaction falls under the category of royalties.[149]

As mentioned above, all of the elements of the BEPS Action Plan will have an impact on BEPS in the digital economy since – to clarify it again, BEPS in the digital sector mainly occurs to avoid permanent establishment status in the market country, to escape withholding tax and to eliminate tax in various jurisdictions.[150] Some actions were identified as particularly relevant for this issue. Thus, the Action 7 which prevents artificial avoidance of permanent establishment is taken into account in this area because of the issue whether certain activities that were treated as preparatory or auxiliary for the purposes of exceptions under Art.5 (4) of the OECD Model Convention may be treated as significant components of businesses in the digital economy, and if so, under what circumstances such activities may represent core activities. With this regard, the Action 7 is important for the Action 1 too and for a digital environment due to the modifications of the PE definition and the list of exceptions as well as due to the introduction of anti-

[146] OECD (2018), *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS* (n 29) 26.
[147] Eli Hadzhieva (n 39)
[148] ibid
[149] ibid; OECD (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report* (n 141) 99.
[150] Eli Hadzhieva (n 39) 18.

fragmentation rules to deny benefits from these exceptions through the fragmentation of business activities. Also, Actions 8-10 and the update to Transfer Pricing Guidelines are important in this field in order to secure that transfer pricing results are in line with value creation, while it was noted that income from digital goods and services may be particularly mobile due to the importance of intangibles in today's world. Moreover the Action 3, which makes changes to the CFC rules and the Action 6, which prevents treaty abuse have their impact on addressing identified challenges of the digital economy.[151] The next beneficial anti-BEPS measure for this field is substantial activity requirement from the Action 5 that addresses harmful tax practices. It should be kept in mind that techniques used for BEPS by digitalized businesses are not significantly different from the ones used in other parts of the economy. Consequently, measures designed to tackle BEPS practices in the 14 other actions of the BEPS Action Plan should be used to address taxation challenges of the digital economy.[152]

Even though indirect taxes such as value-added tax (VAT) and goods and services tax (GST) are outside of the BEPS process, the Action 1 on digital economy tackles indirect taxation because of the issue on how to treat indirect taxes in the era when goods and services are increasingly purchased online from foreign suppliers. In other words, it is about the question how to ensure the effective collection of indirect tax with the respect to the cross-border supply of digital goods and services.[153] With this regard, there is an OECD recommendation to consult the OECD's International VAT/GST Guidelines and implementation mechanisms that were agreed under the Action 1.[154] Furthermore, the main idea under the BEPS Project regarding indirect taxation is that this tax should be paid in the country where the customer of the digitalized service is located.[155]

Regarding this phenomenon in the EU, the fact that big tech giants are involved in tax avoidance practices, in the abuse of dominant position and state aid under the guise of tax rulings or transfer pricing, demonstrate that this issue is common in the digital sector. Motivated by the OECD BEPS Project, the EU has developed its own instruments, such as the Anti-Tax Avoidance Directive to fight against tax challenges raised by digitalization, sometimes taking a step further than the OECD. The European Commission Expert Group on Taxation of the Digital Economy highlights three priority areas in the context of BEPS that are harmful tax practices, transfer pricing rules and taxable nexus provisions. Notably, one way in which the European Commission is tackling aggressive tax planning, is its active participation in state aid investigations

[151] OECD (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report* (n 141) 87.
[152] Pascal Saint-Amans, 'Tax challenges, disruption and the digital economy' (2016) OECD Observer No 307 Q3 <http://oecdobserver.org/news/fullstory.php/aid/5600/Tax_challenges,_disruption_and_the_digital_economy.html > accessed 14 November 2018
[153] OECD (2013), *Action Plan on Base Erosion and Profit Shifting* (n 2) 15.
[154] OECD (2018), *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS* (n 29) 19-90.
[155] Cécile Remeur (n 140)

targeting the largest tech companies, what is a courageous step towards MNEs.[156] Moreover, in order to ensure that the digital business is taxed in a fair way and that those businesses contribute to public revenues at the same level as traditional businesses, in March 2018, the European Commission proposed new rules - a common reform of the EU's corporate tax rules for digital activities and an interim tax on certain revenue from digital activities. Regarding first proposal, if such a business fulfills proposed requirements, a digital platform will be treated as the one that has a taxable 'digital presence' or a virtual permanent establishment, consequently securing a real link between where digital profits are made and where they are taxed. The new rules will also change how profits are allocated to Member States. Additionally, the measure could be integrated into the scope of the Common Consolidated Corporate Tax Base (CCCTB). Regarding the second proposal on interim tax, it is about the idea to secure that those activities, which are currently not effectively taxed, would begin to generate immediate revenues for Member States. Precisely, this tax will apply to revenues created from selling online advertising space, digital intermediary activities which allow users to interact with other users and which can facilitate the sale of goods and services between them or to revenues created from the sale of data generated from user-provided information.[157]

Having in mind both the OECD and the EU Actions that tackle tax challenges in the era of digitalization, it should be noted that both are willing to continue to actively contribute to the global discussions on digital taxation and to go forward with the ambitious international solutions. Despite the existence of new ideas and proposals for addressing mentioned issues, the reality is that taxation of such an economy still represents uncertainty for MNEs that operate on the global market.

3.2. The BEPS Action 2 – Neutralise the effects of hybrid mismatch arrangements

The concept of hybrid mismatch arrangements has many forms and it happens when two legal systems interact with each other and consequently different characterization of an entity, payment or business activities is possible by two of those countries.[158] Precisely, hybrid mismatch arrangements use one or more of the following elements: hybrid entities (that are treated as transparent for tax purposes in one country and as non-transparent in another country), dual residence entities (that are residents in two different countries for tax purposes), hybrid instruments (which are treated differently for tax purposes in the countries involved in order to make taxable income disappear) or hybrid transfers (i.e. arrangements that are treated as transfer of ownership of an asset for one country's tax

[156] Eli Hadzhieva (n 39) 18-50.
[157] 'Digital Taxation: Commission proposes new measures to ensure that all companies pay fair tax in' (*European Commission website, Press release,* 21 March 2018) <http://europa.eu/rapid/press-release_IP-18-2041_en.htm> accessed 14 November 2018
[158] 'ATAD 2 Hybrid mismatch arrangements*' (European Commission Website, Presentation)* <https://ec.europa.eu/taxation_customs/sites/taxation/files/platfrom_presentation_atad2.pdf> accessed 14 November 2018. See also Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (n 65)

purposes but not for tax purposes of another country).[159] Hybrid mismatch can result in base erosion because it may lead to deduction of the income i.e. it exploits differences in tax systems in order to achieve double-non taxation, including long-term deferral, double deduction, deduction without inclusion and non-taxation without inclusion. An example for such a mismatch is the situation when there is a payment by country A to country B when A treats this payment as dividend that is not taxable i.e. it benefits from tax exemption, but in contrary B sees it as interest that is deductible. The result is a deduction in country B without taxation in country A.[160] Furthermore, it might be difficult to recognize which country is the one that has lost tax revenues, because the laws of both involved countries have been followed. Consequently, there is a reduction of the overall tax paid by all involved parties, which furthermore destroy competition, efficiency, transparency and fairness.[161]

Since those arrangements are common practice used by taxpayers - in order to reduce their overall tax liability, the OECD BEPS Project tries to develop instruments that will neutralize their effects. By doing so, the OECD proposed development of model treaty provisions and recommendations regarding design of domestic rules. Consequently, because of the proposed changes to the OECD Model Tax Convention, it will be possible to ensure that hybrids are not used to obtain treaty benefits inappropriately. Changes in domestic law provisions will prevent exemption or non-recognition for payments that are deductible by the payer, will deny a deduction for a payment that is not includible in income by the recipient and a deduction for a payment that is also deductible in another jurisdiction. Finally, there is guidance on coordination of tie-breaker rules – as rules that resolve the dual resident status of companies for treaty purposes. Since those rules are tightened, taxpayers cannot use them for inappropriate tax benefits. Once implemented into domestic and treaty law, these recommendations will prevent these hybrid mismatches arrangements from being used as an aggressive tax planning tool for BEPS.[162]

In similar manner the EU recognized the importance to address hybrid mismatches and the introduction of a common anti-hybrid rule was necessary for implementing the BEPS Action Plan in a uniform and coordinated way within the EU.[163] Precisely, because the independent actions of the EU Member States would increase fragmentation in the single market and result in the persistence of mismatches, the Commission proposed the

[159] OECD (2012), *Hybrid mismatch arrangements – Tax Policy and Compliance Issues*, OECD <www.oecd.org/tax/aggressive/HYBRIDS_ENG_Final_October2012.pdf> accessed 14 November 2018

[160] 'ATAD 2 Hybrid mismatch arrangements' (*European Commission Website*) (n 158). See also Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (n 65)

[161] OECD (2013), *Action Plan on Base Erosion and Profit Shifting* (n 2) 15.

[162] OECD (2015), *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <http://dx.doi.org/10.1787/9789264241138-en> accessed 14 November 2018

[163] Guglielmo Ginevra, 'The EU Anti-Tax Avoidance Directive and the Base Erosion and Profit Shifting (BEPS) Action Plan: Necessity and Adequacy of the Measures at EU level' (2017) *Intertax*, Volume 45, Issue 2, pp. 120–137, Kluwer Law International BV, The Netherlands

amendment on hybrid mismatches to the Anti-Tax Avoidance Directive on 25 October 2016. Precisely, this proposal for the ATAD II Directive contains anti-abuse rules that concern hybrid mismatch arrangements involving third countries. It seeks to neutralize mismatches by obliging Member States to deny the deduction of payments by taxpayers or by requiring taxpayers to include a payment or a profit in their taxable income.[164]

3.3. The BEPS Action 3 – Strengthen Control Foreign Company rules

As shown in previous part of this thesis, CFC rules are types of specific anti-avoidance rules and the OECD Action 3 focuses on developing recommendations in the form of six building blocks regarding design of those rules in order to tackle challenges faced by existing CFC rules. These recommendations are not minimum standards and not obligatory for countries, but dozens of countries have implemented CFC rules. Because more and more countries are interested in implementation of such rules, previously mentioned building blocks would allow countries without them to implement CFC rules directly and countries that already have the rules - to modify their rules in order to align more closely with the recommendations. Namely, six building blocks are:

- Rules for defining a CFC – besides definition of CFC rules, this block provides definition of control. In addition, there are recommendations on how to identify when shareholders have sufficient influence over a foreign company in order to treat that company as a controlled foreign company, as well as advices on how non-corporate entities and their income should be brought within CFC regimes.
- CFC exemptions and threshold requirements – this is used in order to limit the scope of CFC rules by excluding entities that will probably pose a little risk for base erosion and profit shifting. In the fact, the focus is on higher-risk cases. CFC rules apply after the application of provisions such as tax rate exemptions, anti-avoidance requirements and de minimis thresholds. In addition, those rules will only apply to controlled foreign companies that are subject to effective tax rates that are lower than those applied in the parent jurisdiction.
- Definition of CFC income – or attributable income that is linked to shareholders in the parent jurisdiction. However, many CFC rules only apply to certain types of income.
- Rules for computing income – there are recommendations that CFC rules use rules of the parent jurisdiction to count the CFC income to be attributed to shareholders. It also recommends that CFC losses should only be offset against the profits of the same CFC or other CFCs in the same jurisdiction.
- Rules for attributing income – to the appropriate shareholders can be broken into five steps: (i) determining which taxpayers should have income attributed to them;

[164] Cécile Remeur, 'Hybrid mismatches with third countries EU Legislation in Progress' (2017), European Parliamentary Research Service PE 599.354 <www.europarl.europa.eu/RegData/etudes/BRIE/2017/599354/EPRS_BRI(2017)599354_EN.pdf> accessed 14 November 2018

(ii) determining how much income should be attributed; (iii) determining when the income should be included in the returns of the taxpayers; (iv) determining how the income should be treated; and (v) determining what tax rate should apply to the income.

- Rules to prevent or eliminate double taxation – are one of the fundamental policy issues to consider when designing effective CFC rules. It should be noted that CFC could pose an obstacle to international competitiveness, growth and economic development as a result of posing a double taxation risk. Consequently, via foreign tax credit or dividend exemptions this risk can be addressed.

Another key point is that BEPS Action 3 starts with addressing the policy framework that has to be considered in the context of the Action. The design and objectives of CFC rules can differ from one jurisdiction to another and with this regard jurisdictions prioritize their policy objectives differently depending on whether they have worldwide or territorial tax systems and whether they are Member States of the European Union. However, all CFC rules have some general policy considerations, including (i) their role as a deterrent measure; (ii) how they complement transfer pricing rules; (iii) the need to balance effectiveness with reducing administrative and compliance burdens; and (iv) the need to balance effectiveness with preventing or eliminating double taxation.[165] Worth mentioning is that this Action has developed recommendations that should help to address the issue of interest income in controlled companies in low tax jurisdictions.[166]

The EU Member States need to ensure that they make choices that are consistent with EU law.[167] CFC rules, as rules that impact taxation of undistributed income of controlled low-taxed entities, must be implemented by all EU member states by January 1, 2019 since those rules are ones out of five legally-binding anti-abuse measures of ATA Directive.[168] With CFC rules in place, companies are still able to shift their profits in low-tax jurisdiction where their dependent companies are, but this time those profits will be taxable in the EU. Consequently, tax avoidance will be combated in a more promising way since the new European CFC rule will guarantee the implementation of CFC provisions in all Member States. Even though some characteristics of CFC provisions create uncertainties, it is believed that they will substantially reduce unfair competition among the same Member States.[169]

[165] OECD (2015), *Designing Effective Controlled Foreign Company Rules, Action 3 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <https://doi.org/10.1787/9789264241152-en> accessed 14 November 2018
[166] OECD (2017), *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2016 Update: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <http://dx.doi.org/10.1787/9789264268333-en> accessed 14 November 2018
[167] OECD (2015), *Designing Effective Controlled Foreign Company Rules, Action 3 - 2015 Final Report* (n 165)
[168] Michel Alves de Matos, Dmitri Semenov, Jurjan Wouda Kuipers (n 63)
[169] Guglielmo Ginevra (n 163)

3.4. The BEPS Action 4 – Limiting base erosion via interest deductions and other financial payments

This Action recognized that deductible payments such as interest and other financial payments could bring to BEPS. Briefly, interest, as a cost of borrowing money, is treated as tax deductible expense in most countries. Regarding other financial payments in deciding whether they are equivalent to interest, deciding factor is their economic substance. Examples for those payments are financial guarantees, derivatives, insurance arrangements etc.

It is known that MNE as a group of companies can reduce tax base for the whole group by adjusting the amount of debt in a group entity. In other words, through using the intra-group financing, MNE can multiply the level of debt at the level of individual group entities and finally they can achieve excessive interest deduction. Namely, situations that can indicate the existence of BEPS risks are when groups placing higher levels of third party debt in high tax countries, when groups using intra-group loans to generate interest deductions in excess of the group's actual third party interest expense, or when groups using third party or intra-group financing to fund the generation of tax exempt income.[170] Consequently, BEPS Action 4 gives recommendations for states to build best rules in preventing those BEPS practices via deductible payments.

In order to ensure that an entity's interest deductions are directly linked to its economic activity, the best approach recommended under the BEPS Project is a fixed ratio rule. This rule limits an entity's net interest deductions to a fixed percentage of its profit - measured using earnings before interest, taxes, depreciation and amortization (EBITDA) based on tax numbers. This approach includes the rate for deductibility of between 10% and 30%. Since this fixed ratio rule links previously mentioned deductions to an entity's taxable income, it can be seen that the rule as such is compatible against planning.[171] If country applies a fixed ratio that is low, possibility to be involved in BEPS is lower.

However, a fixed ratio rule does not take into account the fact that groups in different sectors may be leveraged differently. Therefore, if there is only a fixed ratio rule, groups which have a net third party interest/ EBITDA ratio above the benchmark fixed ratio would be unable to deduct all of their net third party interest expense. For this reason there is a group ratio rule that is combined with a fixed ratio rule in order to allow an entity to deduct more interest expense in certain circumstances.[172] If a group ratio rule is not used, country in question should apply the fixed ratio rule to entities in multinational and domestic groups equally.

Those Action 4 recommendations should provide an effective framework to tackle most

[170] OECD (2017), *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2016 Update: Inclusive Framework on BEPS* (n 166) 13.
[171] ibid 29.
[172] Vladimir Deljanin, 'Legal weapon against tax avoidance' *Biznis&Finansije* (2 December 2015) <http://bif.rs/2015/12/pravno-oruzje-protiv-poreskih-izbeglica/> accessed 14 November 2018

base erosion and profit shifting situations involving interest and other financial payments.[173] This what was recognized in the European Union is a practice that the EU based company with a subsidiary in a low-tax country can have high interest, tax-deductible payments back after that subsidiary provides a loan to the company or another subsidiary based in the EU. Within the EU, the ATA Directive includes provisions that limit the amount of interest that the taxpayer can deduct in a tax year. Net interest expenses will only be deductible up to a fixed ratio based on the taxpayer's gross operating profit. Accordingly, this will increase the amount of tax that taxpayer is obliged to pay. In addition, Member States are free to introduce stricter rules.[174] Finally, Article 10 of the Directive calls on the Commission to evaluate the impact of the interest limitation rule by the 9 August 2020.[175]

3.5. The BEPS Action 5 – Countering harmful tax practices more effectively, taking into account transparency and substance

Action 5 develops a minimum standard measures in order to address the issue raised by harmful tax practices with respect to geographically mobile activities and mobile business income, such as financial and services income and income from intellectual property, since profit shifting is very easy in those circumstances. In addition, harmful tax practices can also cause shifts of part of the tax burden to less mobile tax bases, such as labour, property, consumption and increase administrative costs and compliance burdens on tax authorities and taxpayers. Main concerns of harmful tax practices are preferential regimes and the lack of transparency. As it was mentioned, preferential regimes are common tax planning technique that brings to BEPS. In 2014, the Forum on Harmful Tax Practices (FHTP) delivered a report, which is incorporated into final report of the BEPS Action 5 and which focus on the requirement for substantial activity for any preferential regime. Regarding transparency issue the idea is to improve it through the compulsory spontaneous exchange of information that could give rise to BEPS concerns. In order to evaluate those main concerns properly in the Action 5 of the OECD BEPS Project, there is an initiative to be engaged with non-OECD members too.

The preferential tax regime is such because it gives to taxpayer some form of tax benefit in comparison with the general principles of taxation in the relevant country. It is important to note that many jurisdictions offer preferential tax regimes with the aim to attract more foreign investment or for similar reasons, and these regimes are not harmful per se. However, under the Action 5 there is a possibility to recognize harmful features of those regimes such as the feature when the regime provides benefits only for transactions with non-residents or the feature when there is no requirement that the taxpayer

[173] OECD (2017), *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2016 Update: Inclusive Framework on BEPS* (n 166)
[174] Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (n 65)
[175] Guglielmo Ginevra G (n 163)

benefitting from the regime is engaged in substantial activities.[176] In addition, the indicators that one regime does not impose any or low effective tax rates on income, that there is lack of transparency and no effective exchange of information with respect to the regime, show that such a regime is potentially harmful. Other indicators, under the FHTP's work, are used to determine whether a regime is potentially harmful. Those factors are: an artificial definition of the tax base, failure to adhere to international transfer pricing principles, the fact that foreign source income is exempt from residence country taxation, negotiable tax rate or tax base, existence of secrecy provisions, access to a wide network of tax treaties, the regime is promoted as a tax minimization vehicle. Surely, if the regime is recognized as being potentially harmful there is a chance not to treat it like that if it does not create any harmful economic effects. Of course, if it turns out that the regime is a harmful one, the relevant country can take defensive measures.[177]

As it was noted, the Action 5 on BEPS is persistent in substantial activity requirement to make it sure that taxable profits can no longer be shifted away from the countries where value is created. For this requirement, a nexus approach was developed in the context of IP regimes i.e. regimes such as patent boxes, which allow benefits for income from intellectual property ("IP regimes") and which are the subject of increased attention in the Action 5 Report. In other words, IP regimes can be very beneficial for taxpayers since taxpayers incurred research and development (R&D) expenditures that gave rise to IP income.[178] Nexus approach uses those expenditures in the country as a proxy for substantial activity and ensures that taxpayers benefiting from these regimes did in the fact engage in research and development and incurred actual expenditures on such activities.[179] When applied to other regimes, such as headquarters regimes, distribution and service center regimes, financial or leasing regimes, fund management regimes, banking and insurance regimes, shipping regimes, holding company regimes, the substantial activity requirement should represent a link between the income qualifying for tax benefits and the core activities necessary to earn the income.[180]

In the area of transparency, there is an obligation for mandatory exchange information, since tax administration's lack of knowledge on the tax treatment of a taxpayer in another jurisdiction can impact the transactions or arrangements undertaken with a related taxpayer resident in their own jurisdiction and thus lead to BEPS concerns. Consequently, in order to quickly identify risk areas, the availability of timely and targeted information

[176] OECD (2017), *Progress Report on BEPS Action 5 – Minimum standard to combat harmful tax practices*, OECD Publishing <www.oecd.org/tax/beps/background-harmful-tax-practices-2017-progress-report-on-preferential-regimes.pdf> accessed 14 November 2018
[177] OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <http://dx.doi.org/10.1787/9789264241190-en> accessed 14 November 2018
[178] ibid
[179] OECD (2015), *Explanatory Statement* (n 43) 14.
[180] OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report* (n 177)

about such rulings, as agreed under Action 5, will be beneficial.[181] The term of rulings means any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and on which they are entitled to rely. Those information (i.e. rulings) are: rulings related to preferential regimes; cross border unilateral advance pricing arrangements (APAs) or other unilateral transfer pricing rulings; rulings giving a downward adjustment to profits; permanent establishment (PE) rulings; conduit rulings; and any other type of ruling that would give rise to BEPS concerns.[182]

When it comes to the effect of this Action in the EU, it should be noted that regarding preferential regimes, Member States agreed to ensure that everything is in line with the nexus approach.[183] In addition, regarding transparency all Member States adopted Directive according to which there is a mandatory automatic exchange of information on all cross-border rulings from 2017.[184]

3.6. The BEPS Action 6 – Prevent treaty abuse

Treaty abuse may have an impact on double non-taxation and it may grant treaty benefits in situations where these benefits - were not supposed to be granted, while taking away tax revenues of countries. A typical case of treaty abuse is treaty shopping where a person who is not a resident of a country wants to obtain benefits that a tax treaty concluded by that country grants to residents of that country, for example by establishing a letterbox company.[185] This Action as a minimum standard Action, gives recommendations on creating anti-abuse rules to counter those practices as well as tax policy considerations that country should take into account before entering into a tax treaty with certain low or no-tax jurisdictions.[186]

In order to address treaty shopping, the Action 6 proposes that country, that is a party of the tax treaty, must provide a statement about intention not to be involved in tax avoidance practices. Also, in prevention of treaty shopping, the limitation-on-benefits (LOB) rule, that limits the availability of treaty benefits to entities that meet certain conditions (which show the link between the entity and its country of residence) will be

[181] OECD (2017), *Harmful Tax Practices – Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <http://dx.doi.org/10.1787/9789264285675-en> accessed 14 November 2018
[182] OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report* (n 177)
[183] Eli Hadzhieva (n 39)
[184] Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation OJ L 332/1
[185] OECD (2015), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <https://doi.org/10.1787/9789264241695-en> accessed 14 November 2018
[186] OECD (2013), *Action Plan on Base Erosion and Profit Shifting* (n 2) 19.

included in the OECD Model Tax Convention.[187] In other words, the aim of such a rule is the deprivation of tax benefits for a company, which is a resident of one of the contracting parties, but in fact serves as a conduit company of a resident of a third state. This clause distinguishes qualified from non-qualified persons. With this regard, any resident of a contracting party that is involved in doing business in that jurisdiction, and the income derived in another jurisdiction is earned from that business, is entitled to the benefits of the covered tax agreement. If the resident person is not qualified, then it shall not be entitled to this benefit unless at least half a day of the twelve-month period, the persons enjoying the right to this benefit, possess at least 75% of the shares of that resident.[188] Next to LOB, a more general anti-abuse rule is the principal purpose test. This test evaluates the question whether the principal purpose of transactions or arrangements is to obtain treaty benefits. If it turns out that these benefits were the main or only intention, they will be denied. However, this will not be the case if it is recognized that benefits would be in accordance with object the transactions. In addition to LOB, this PPT rule will be added to the OECD Model Tax Convention.[189]

Since BEPS Action 6 is the minimum standard, countries have committed to ensure a minimum level of protection against treaty shopping and that their common intention is to eliminate double taxation without creating opportunities for low or non-taxation. This common intention can be achieved by including the combined approach of an LOB and PPT rule or those rules alone, in their treaties.

In addition to treaty shopping, the Action 6 addresses dividend transfer transactions that are intended to lower artificially withholding taxes payable on dividends; transactions that circumvent the application of the treaty rule that allows source taxation of shares of companies that derive their value primarily from immovable property; situations where an entity is resident of two Contracting States, and situations where the State of residence exempts the income of permanent establishments situated in third States and where shares, debt-claims, rights or property are transferred to permanent establishments, which are set up in countries that do not tax such income or that offer preferential treatment to such an income.

Finally, the EU Member States are advised via The Recommendation on Tax Treaties, to introduce general anti-abuse rule in their treaties in EU-compliant way. Because of the good functioning of the internal market, the EU recognized that tax treaties should not create opportunities for no or reduced taxation through treaty shopping or other abusive

[187] OECD (2015), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report* (n 185)
[188] Dejan Popović, Gordana Ilić-Popov, 'The importance and effects of BEPS Multilateral Convention in International Tax Law' (2017) Collection of Papers, Faculty of Law, Nis <www.prafak.ni.ac.rs/files/zbornik/sadrzaj/ZFull/PF_Zbornik_2017_75_lat.pdf> accessed 14 November 2018
[189] OECD (2015), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report* (n 185); Dejan Popović, Gordana Ilić-Popov (n 188)

strategies. [190] Consequently, the Anti-Tax Avoidance Directive addresses the recommendations contained in BEPS Action 6.[191]

3.7. The BEPS Action 7 – Prevent the artificial avoidance of PE status

For the purpose of better understanding of BEPS Action 7, it would be good to elaborate the concept of permanent establishment (PE). The first thing to remember about this concept is that some states do not have it and as a consequence, those states will tax non-residents on the basis of a very weak connection with the state. On another hand, when a country has the permanent establishment concept in its domestic law, such concept can be understood as a threshold when a non-resident taxpayer becomes taxable in another country, or as a sourcing rule when profits attributable to a permanent establishment located in one country are considered to arise from sources located in that country. This PE concept should be taken into account in both countries and not only there, where the permanent establishment is located. The reasoning is that the country of residence of enterprise will be obliged to grant tax relief in the form of a foreign tax credit or an exemption for the tax paid by its resident taxpayer in country of a PE.[192]

The OECD Model Tax Convention defines a permanent establishment as a fixed place of business through which the business of an enterprise is fully or partly carried on. Another key point is that the Model Convention contains a list of permanent establishment examples that are: a place of management, a branch, an office, a factory, a workshop, a mine, an oil or gas well, a quarry or any other place of origin of natural resources. A building site, construction or installation project constitutes a permanent establishment only if it lasts at least 12 months.[193] In addition, a dependent agent of a foreign company, to which profits are attributable, is treated as permanent establishment as well. Furthermore, the OECD Model contains a list of activities that do not constitute permanent establishments even if conducted through a fixed place of business. As stated, the main characteristic of these activities is their preparatory and auxiliary character.[194]

In the OECD Anti-BEPS Project, the definition of permanent establishment from the Article 5 of the OECD Model Tax Convention was the object of changes because of the need to prevent artificial avoidance of permanent establishment status – which is an often practice of MNEs. Precisely, the Action addresses techniques used to inappropriately avoid the tax nexus (that shows a taxable presence) through use of commissionaire arrangements or via the artificial fragmentation of business activities.[195]

[190] Commission Recommendation (EU) 2016/136 of 28 January 2016 on the implementation of measures against tax treaty abuse (notified under document C(2016) 271) [2016] OJ L25/67
[191] 'The outlook for global tax policy 2018' (*EY website, Global tax alert*) (n 125)
[192] Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 38-39.
[193] ibid 39-41.
[194] OECD (2017), *Model Tax Convention on Income and on Capital: Condensed Version 2017* (n 77); Raffaele Russo, Chris Finnerty, Paulus Merks and Mario Petriccione (n 3) 42.
[195] OECD (2015), *Explanatory Statement* (n 43) 15.

Commissionaire arrangements are agreements through which a person sells products in a country in the own name but on behalf of a foreign enterprise that is the owner of these products. Thus, a foreign enterprise is able to sell its products in that country without having a permanent establishment over there, thus not be liable to pay taxes on profits earned from selling the products. The person that operates as an agent (i.e. does not own the products), cannot be taxed on the profits derived from such sales, but may only be taxed on the remuneration that it receives for its services (usually a commission). The technique through which is possible to have those commissionaire arrangements is avoidance of the application of Art.5 (5) of the OECD Model Tax Convention, since that article relies on the formal conclusion of contracts in the name of the foreign enterprise. Markedly, commissionaire arrangements (even though fundamentally non abusive) shift profits out of the country where the sales take place without a substantive change in the functions performed in that country.[196] In order to address this BEPS scenario, the new definition of a PE, as the OECD suggested through Action 7, is the inclusion of situations in which an agent works on the conclusion of contracts that are then routinely concluded without material modification by the enterprise. In other words, where a person acts on behalf of enterprise(s) to which it is closely related (means more then 50% of company's share or control), that person shall be considered as a dependent agent and that enterprise shall be treated as the one that have a permanent establishment in that country in respect of any activities which that person undertakes for the enterprise.[197] This is one of the key changes of the definition of a PE,[198] through which the agency PE rules are tightened and requirements for independent agent are narrowed.

Also, the artificial fragmentation of business activities can impact the BEPS opportunities. The Action 7 will prevent the exploitation of exceptions to the PE definition provided in Art. 5 of the OECD Model Tax Convention, which relate to activities of a preparatory and auxiliary character, in order to ensure that profits derived from core activities performed in a country can be taxed in that country.[199] According to this Art.5, a permanent establishment will not exist in a situation when a place of business is engaged only in some small operations such as delivering, processing, purchasing of goods, collecting of information and similar. However, with the revised regulations, the exception will apply only when these operations are preparatory or auxiliary in relation to the business as a whole. Namely, MNEs artificially fragment operations among group entities with goal to qualify for the exceptions to PE status for preparatory and ancillary activities. In order to address those BEPS concerns, there is the anti-fragmentation rule, according to which it is not possible to avoid PE status by fragmenting operating business

[196] OECD (2015), *Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <http://dx.doi.org/10.1787/9789264241220-en> accessed 14 November 2018
[197] OECD (2017), *Model Tax Convention on Income and on Capital: Condensed Version 2017* (n 77)
[198] Susann Van der Ham, Robert Halat, 'Implications of the new permanent establishment definition on retail and consumer multinationals',Transfer Pricing Perspectives – PWC Germany Publications <www.pwc.com/gx/en/tax/publications/transfer-pricing/perspectives/assets/tp-16-implications.pdf> accessed 14 November 2018
[199] OECD (2015), *Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report* (n 196)

into several small operations - in order to argue that each part is hardly engaged in preparatory or auxiliary activities that benefit from the exceptions of Art.5 (4) of the OECD Model Convention.[200] Because of those new provisions, operations done by several related parties will be combined when deciding whether they can be considered as being of a preparatory or auxiliary nature.[201] What cannot be overlooked is when this BEPS issue is raising in regard with business in the digital economy. Accordingly, again, after modifications, activities considered to be preparatory or auxiliary for the purposes of the exceptions of PE, in today's world of the digital economy may be considered as core business activities of an enterprise. Therefore, those novelties will impact supply chain activities, warehousing and similar activities of digital economies.[202]

Regarding a PE on construction sites, a general rule, already mentioned from the OECD Model Tax Convention, is that it will exist if a construction site lasts at least 12 months. However, in order to avoid paying taxes - splitting up contracts into shorter periods has been commonly used technique. Since this technique was recognized among the OECD countries, they addressed it through the Action 7 with a principal purposes test (hereinafter PPT). For countries that are not able to address this problem through PPT, a more automatic rule will be included as a provision that allows for combining the activities of the related enterprises carried out at one construction site during different periods of time, each exceeding 30 days, when determining the duration of work.[203] In addition, such a rule is used in Serbia.[204]

Finally, the OECD Report on PE mandated the guidance on how existing rules of Art.7 on attribution of profits would apply to PEs after changes to Art.5 of the Modal Convention. Overall, the OECD works a lot to attract more countries to adopt those changes of the definition of a PE and accordingly to prevent artificial avoidance of a permanent establishment status in relation to BEPS. In the EU, ATA Recommendation encourages Member States to use the amended OECD approach for permanent establishment,[205] and moreover - the proposal for a CCCTB already includes an agency PE concept adhering to the definition included in the MLI.[206] However, important to mention is that the EU ATA Directive goes beyond the OECD recommendations by including provisions on exit taxation rule and switchover clause allowing countries to

[200] ibid
[201] Susann Van der Ham, Robert Halat (n 198)
[202] OECD (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report* (n 141)
[203] OECD (2015), *Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report* (n 196)
[204] Draft of the Law on Confirmation of the Agreement between the Government of the Republic of Serbia and the Government of the Republic of San Marino on the Avoidance of Double Taxation and Prevention of a Tax Evasion in relation to Income Taxes <www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/2018/2302-18%20lat.pdf> accessed 14 November 2018
[205] Eli Hadzhieva (n 39)
[206] Susann Van der Ham, Robert Halat (n 198)

deny exemption of foreign income from permanent establishments under certain circumstances.[207]

3.7.1. Exit taxation

Identifying that that taxpayers may try to reduce their tax obligation by moving their tax residence and/or assets to a low-tax jurisdiction, it can be seen that the country of origin will be unable to collect tax revenues of these taxpayers. Consequently, exit taxation serves the purpose of preventing tax base erosion in the country of origin when assets are transferred, without a change of ownership, out of the taxing jurisdiction of that country. As the application of exit taxation within the Union shall be in line with the fundamental freedoms and in line with the case law of the Court of Justice of the European Union, the EU ATA Directive addresses the EU law angle of exit taxation by giving taxpayers the option for deferring the payment of the amount of tax over a certain number of years and settling through staggered payments.[208]

3.7.2. A switch-over clause

Since giving the credit relief for taxes paid abroad might not be easy to handle with, countries tend to exempt foreign income from taxation. The unintended negative effect of this approach is the encourage of untaxed or low-taxed income which will enter the Internal Market and then, circulate untaxed - within the Union, making use of available instruments within the Union law. In order to stop those practices, switch-over clauses are commonly used tools. Namely, the taxpayer is subjected to taxation and given a credit for tax paid abroad. Finally, companies are discouraged from shifting profits out of high-tax jurisdictions towards low-tax territories, unless there is sufficient business justification for these transfers.[209]

3.8. The BEPS Action 11 – Establish methodologies to collect and analyse data on BEPS and actions to address it

In the Action 11, the OECD tries to improve instruments and available data on BEPS practices in order to make possible measuring and monitoring of BEPS. Additionally, this Action evaluates the impact of the countermeasures developed under the BEPS Project and it recommends a cooperative work between the OECD and governments regarding reporting and analyzing of corporate tax statistics. The Report on the Action 11 has several approaches on how to estimate the annual revenue losses from BEPS practices. One of them is an estimate of the loss, which results from tax rate mismatches in tax systems. Having this in mind, one of the key components of the Action 11 is development of indicators that assist with measurement and monitoring of BEPS. Namely, indicators

[207] Jurjan Wouda Kuipers, Klaus von Brocke (n 11)
[208] 'Corporate tax avoidance: Council agrees its stance on anti-avoidance rules' (*Council of the European Union, Press release 370/16*, 21 June 2016) (n 127); 'Anti tax avoidance package' (*Council of the European Union website*) (n 126)
[209] ibid

taken together, recognize BEPS behaviors using different data sources and examining different BEPS channels.

Currently available data on BEPS ranged from macro aggregate statistics to micro firm/group level statistics, tax return data, financial account statistics and detailed reports of individual MNEs. Precisely, it is about data on national accounts, balance of payments, FDI, trade, CIT revenue, customs data, company financial information from public / proprietary databases, company financial information from government databases, tax return information, tax audit information, detailed specific company tax information. The use of Country-by-Country data contributes to improving data available for the future analysis of BEPS. The reason why the Action 11 is all about data on BEPS is a belief that the better data are, the better economic analyses on BEPS issue will be and in like manner, the development of actions to address it - is possible. The identification of those data, including data that have to be provided by taxpayers, is necessary as well as the methodologies that can be used in order to analyze available data. It is important that all stakeholders have appropriate understanding of the fiscal and economic effects of BEPS, and the impact of its countermeasures and their effectiveness over time. These data and analysis will be helpful for policy makers and for all taxpayers since they will build trust in the effectiveness of the international tax rules.[210]

3.9. The BEPS Action 12 – Require taxpayers to disclose their aggressive tax planning arrangements

It is certain that transparency on tax planning is necessary because if tax administrations have information on tax planning schemes on time, it will be possible for them to identify risk areas and to take appropriate measures to tackle the risk. Along with this idea, the Action 12 develops recommendations on creating mandatory disclosure rules in order to obtain early information on aggressive tax planning arrangements.[211] The additional objective of mandatory disclosure rules is deterrence - i.e. reduced promotion and use of avoidance schemes, because taxpayers may think more deeply about entering into a scheme, since they are aware of the fact that tax authorities may take a different position on the tax consequences of that scheme or arrangement since it has to be disclosed.[212] Finally, this action sets out rules for the development and implementation of more effective information exchange mechanisms and cooperation between tax administrations.[213]

According to the OECD Report on Action 12, taxpayers will disclosure only those regimes that fall under the definition of a reportable scheme set out under that regime. In order to trigger a requirement for disclosure, the Action 12 advises countries to introduce

[210] OECD (2015), *Measuring and Monitoring BEPS, Action 11 - 2015 Final Report* (n 22)
[211] OECD (2013), *Action Plan on Base Erosion and Profit Shifting* (n 2) 22.
[212] OECD (2015), *Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris <https://doi.org/10.1787/9789264241442-en> accessed 14 November 2018
[213] OECD (2015), *Explanatory Statement* (n 43) 16.

specific and generic hallmarks - as tools for identifying features of schemes that tax administrations are interested in. When designing mandatory disclosure rules of aggressive or abusive transactions, structures or arrangements, features about who reports, what information they report and when - are obliged to be taken into account. Mandatory disclosure rules should be clear and easy to understand, should balance additional compliance costs to taxpayers with the benefits obtained by the tax administration, should be effective in achieving the intended policy objectives and accurately identify relevant schemes, and finally information collected under this regime should be used effectively.[214]

Recommendations from the Action 12 are not a minimum standard, and consequently countries are free to decide on introducing of those regimes, and if country decides to do so, the design of a mandatory disclosure regime is flexible to the needs and risks in that country. In addition, for countries that already have mandatory disclosure regimes, the Action 12 can be used in order to enhance the effectiveness of existing regimes.[215]

Regarding this question in the EU, in order to improve the functioning of the internal market by discouraging the use of aggressive cross-border tax-planning arrangements, the European Union Directive on Administration Cooperation introduces a mandatory reporting regime through which intermediaries (such as tax advisors, accountants and lawyers that design and/or promote tax planning arrangements[216]) and taxpayers are obliged to automatically report to local tax authorities certain reportable cross-border arrangements, which concern taxes imposed by an EU Member State and which involve one or more of a list of specified hallmarks. In addition, this information will be automatically exchanged between all EU tax authorities. Those provisions shall apply from 1 July 2020.[217]

3.10. The BEPS Action 14 - Making Dispute Resolution Mechanisms More Effective

The work on addressing BEPS must include efficient dispute resolution mechanisms because it is believed that introduction of anti-BEPS measures may lead to uncertainty for taxpayers and to unintended double taxation that may occur in the case of cross-border trade and investments. BEPS Action 14 is about making the mutual agreement procedure (MAP) more effective, timely and efficient in resolving treaty-related disputes. Regarding this procedure, it should be noted that the Article 25 of the OECD Model Tax Convention has it, which main aim is the proper application and interpretation of tax treaties, since it is a good way to minimize risks of uncertainty and unintended double taxation issues. MAP secures that taxpayers entitled to the benefits of the treaty are not subject to taxation

[214] OECD (2015), *Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project* (n 212)
[215] OECD (2015), *Explanatory Statement* (n 43) 16.
[216] 'The outlook for global tax policy 2018' (*EY website, Global tax alert*) (n 125)
[217] Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements [2018] OJ L 139/1

by any of the Contracting States, which is not in accordance with the terms of the treaty.[218] Overall, the Action 14 contains a minimum standard which goal is to secure that cross-border tax disputes over the interpretation or application of tax treaties are resolved in a more effective and timely manner. In addition, an effective monitoring mechanism is established to ensure that the minimum standard is met and that countries make further progress to resolve their disputes. Consequently, lots of countries have already committed to adopt mandatory and binding arbitration in their bilateral tax treaties in order to guarantee that treaty-related disputes will be resolved within a specified timeframe.[219]

Thus, mentioned minimum standard will ensure that treaty obligations related to the MAP are fully implemented in good faith and that MAP cases are resolved in a timely manner; that administrative processes which promote the prevention and timely resolution of treaty-related disputes are implemented and finally minimum standard will ensure that taxpayers can access the MAP when meeting the requirements of paragraph 1 of the Article 25.[220]

In the EU, in 2016 the Commission proposed to make dispute resolution more efficient.[221] Consequently, the Directive on Tax Dispute Resolution Mechanisms was adopted in October 2017 and with this Directive - tax treaty and elimination of double taxation disputes among EU member states are addressed via an uniform mechanism. The Directive is in accordance with the BEPS Action 14 minimum standard.[222] Until 30 June 2019, the Member States will have to transpose the Directive into national laws and regulations. It will apply to complaints submitted after that date regarding questions relating to a tax year starting on or after 1 January 2018.[223]

3.11. The BEPS Action 15 - Developing a Multilateral Instrument to Modify Bilateral Tax Treaties

A double taxation situation exists when domestic tax systems interact and overlap in the exercise of taxing rights. In order to eliminate this situation, bilateral tax treaties are developed. It is known that more then 3000 bilateral tax treaties are based on Model Tax Conventions of the OECD and the UN. However, because of challenges in today's world, this bilateral tax treaties network is not well synchronized and consequently some characteristic of those treaties can impact BEPS. In order to address these BEPS issues and to eliminate double taxation opportunities, modifying of this bilateral treaty network

[218] OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <https://doi.org/10.1787/9789264241633-en> accessed 14 November 2018
[219] OECD (2015), *Explanatory Statement* (n 43) 7-17.
[220] OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report* (n 218)
[221] Eli Hadzhieva (n 39)
[222] 'Directive on Tax Dispute Resolution Mechanisms' (*EU TAX Blog*, 2 October 2017) <https://eutaxblog.com/2017/10/02/directive-on-tax-dispute-resolution-mechanisms/> accessed 14 November 2018
[223] 'The outlook for global tax policy 2018' (*EY website, Global tax alert*) (n 125)

can be a good solution. In order to be more practical, governments have agreed to explore whether a multilateral instrument that would have the same effects as a renegotiation of thousands of bilateral tax treaties, is possible to have, since by creating a single text, instead of thousands of similar texts, it would be possible to produce consistent interpretation across the world.[224]

This being said, the BEPS Action 15 provides opportunities for interested countries to modify double tax treaties through multilateral instrument that will provide an innovative approach to international tax matters in a way that it can tackle treaty-based BEPS issues while respecting sovereign autonomy in tax matters. It should be noted that the content of report on the Action 15 is about identifying issues arising from the development of such an instrument and providing an analysis of the international tax, public international law, as well as political issues that arise from such an approach. In addition, the ad hoc Group for a development of this Multilateral Instrument was formed. This Group was open for participation for all interested countries and it begun with the work in May 2015. As of 31 December 2016 the multilateral instrument was open for signature.

In November 2016, over 100 jurisdictions concluded negotiations on the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument" or "MLI"). Signatories are countries from all continents and all levels of development. In addition, the MLI is still open for signing. Because of the nature of this thesis, it should be noted that Serbia signed the MLI on 6 June 2017 and it entered into force on 1 October 2018.[225]

By adopting this instrument, jurisdictions will be able to strengthen their double tax treaties in order to protect governments against tax avoidance strategies that exploit tax treaties. To make it clear, the MLI will not modify every or any existing double tax treaty, but only those that the signatory has listed as covered agreements and only in case both signatories have listed it as such. Consequently, the signatories to the MLI are obliged to notify the OECD about their list of covered agreements and about provisions they do or they do not want to apply to the covered agreements. Also, jurisdictions will include tools, which secure that tax treaties are used in accordance with their object and purpose, all in order to address treaty abuse and treaty shopping. The Instrument has provisions against hybrid mismatch arrangements; permanent establishment definition and it will have impact on more efficient dispute resolution mechanisms.[226]

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[224] OECD (2015), *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <https://doi.org/10.1787/9789264241688-en> accessed 14 November 2018

[225] OECD Secretariat (2016), *The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, OECD Publications <www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm> accessed 14 November 2018

[226] OECD (2015), *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 - 2015 Final Report* (n 224); 'A Guide for the Application of the MLI '(2017) CMS Law <https://cms.law/en/content/download/.../1/.../A_Guide_for_the_application_MLI.pdf> accessed 14 November 2018

The Multilateral Instrument is legally binding for all the parties and it coexists with the existing bilateral tax treaty network. Also, flexibility and clarity have to be ensured, so that the interaction between the multilateral instrument and bilateral tax treaties is clear. Furthermore, it should be noted that regarding anti-BEPS measures, some of them have multilateral nature in a way that these provisions can be directly implemented. Examples for multilateral provisions are multilateral MAP, addressing dual-residence structures, addressing transparent entities in the context of hybrid mismatch arrangements, addressing "triangular" cases involving PEs in third states, addressing treaty abuse. On the other hand some provisions, like arbitrary provisions, would be much more effective if being implemented through a multilateral instrument.[227]

Finally, on its website, the OECD has published tools for taxpayers and authorities regarding covered agreements and applicability of the MLI. Those tools are the MLI Database about options and reservations and the MLI Matching Database, which provides information whether a specific double taxation treaty is a covered agreement and to what extent it shall be modified by the MLI.[228]

Regarding this instrument in the EU, it should be noted that the EU is participating in ad hoc Group as observer. When the question comes on the EU Member States as signatures of the MLI, all of them signed it, i.e. 27 member states signed the instrument on 7 June 2017 and Estonia did so on 29 July 2018.[229]

3.12. BEPS Actions on transfer pricing

BEPS Actions 8, 9, 10 – Assure that transfer pricing outcomes are in line with value creation

Even though rules on transfer pricing, as it was mentioned, successfully allocate the income of multinational enterprises among taxing jurisdictions, MNEs are able to misuse those rules in a way to shift their income to low-tax jurisdictions. Since transfer pricing is seen as something that can lead to the BEPS, in particular through intangible assets, risk and over-capitalization of low-taxed group companies, the OECD BEPS Action Plan offers actions that address base erosion and profit shifting opportunities. To tackle BEPS behavior in the most convenient way, the Action 13 pays attention on transparency requirements since analysis on transfer pricing depends on access to the relevant

[227] OECD (2015), *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 - 2015 Final Report* (n 224)
[228] OECD Website, *Toolkit for Application of the Multilateral Instrument for BEPS Tax Treaty Related Measures* <www.oecd.org/ctp/treaties/application-toolkit-multilateral-instrument-for-beps-tax-treaty-measures.htm> accessed 14 November 2018
'A Guide for the Application of the MLI '(2017) CMS Law <https://cms.law/en/content/download/.../1/.../A_Guide_for_the_application_MLI.pdf> accessed 14 November 2018
[229] OECD Secretariat (2016), *The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (n 225)

information.[230] The BEPS Project makes changes to the Transfer Pricing Guidelines in order to secure that the transfer pricing of MNEs better aligns to its value creation[231] and generally to address BEPS challenges. With this revision, it will be possible to identify business transactions, which are undertaken by related parties via analyzing the contractual relation between parties with their conduct. Also, in situations with a cash box company (i.e. capital-rich entities without relevant economic activities) it should be noted that capital without functionality would generate no more than a risk-free return. Moreover, contractual allocation of the risk is respected only when it is supported by actual decision-making. Consequently, new changes have guidance on recognizing risks and which party assumes risk for transfer pricing purposes (i.e. that party needs to control the risk and has to have financial capacity to assume it). Finally, tax administrations will be able to disregard transactions when the exceptional circumstances of commercial irrationality apply. Thus, these revised Guidelines will secure that analysis on transfer pricing is based on accurate delineation of what parties actually contribute in the transaction.[232] In the coming rows, those changes will be under observation.

3.12.1. Action 8 – Intangibles

Transfer pricing concerned not only transactions with physical products and services, but also transactions of intangible goods, since it can be seen that in digitalized world, intangibles represent one of the main drivers of the economy. However, intangibles can be hard to value, and consequently multinational companies are able to structure their transactions with intangibles in an opportunistic way. Misallocation of the profits generated by valuable intangibles can have impact on base erosion and profit shifting. As a reaction to the issue, the BEPS Action 8 looked at transfer pricing issues relating to controlled transactions involving intangibles.[233] With the aim to determine arm's length conditions in such a transaction, it is important to do a functional and comparability analysis based on identifying the intangibles and associated risks in contractual arrangements. After that, the next step is supplementing the analysis through examination of the actual conduct of the parties.[234] Under this Action, associated enterprises have to be compensated based on the value they create. With this regard, definition of intangibles is necessary as well as development of rules that will secure that profits in this situation are allocated in accordance with value creation, following that there are appropriate measures for hard-to-value intangibles and finally that there is the update of the guidance on cost contribution arrangements. Also those rules on intangibles tackle situations on how business synergies and features of local markets are to be treated in transfer pricing

[230] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports* (n 79)
[231] OECD (2015), *Explanatory Statement* (n 43) 7.
[232] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports* (n 79)
[233] OECD (2015), *Explanatory Statement* (n 43) 16.
[234] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports* (n 79)

analyses.[235] Consequently, those aspects are covered in this BEPS Action 8.

Different countries have different definition and different tax treatment of intangibles, what furthermore gives a rise to loopholes and easy transfer across borders.[236] Shortly, an intangible asset is patent, trademark, trade names and brands, copyright, significant value like know-how and trade secrets, relationships with customers and distributors or even human capital. According to the OECD Guidelines, the term intangible is something that is not physical nor financial asset which is capable of being owned or controlled for use in commercial activities, and finally whose use or transfer would be compensated had it occurred between independent parties in comparable transactions.[237] For transfer pricing purpose it is important to know what the intangible is since a separate remuneration may be required for its transfer or rights to use them.[238]

Next to the need to identify the intangibles involved in a particular transfer pricing issue, it is necessary to identify the owner of such intangibles (legal ownership), as well as the entities that contribute to the value of intangibles (economic ownership). It should be noted that this Action secures that legal ownership of the intangible by one associated enterprise does not mean a right of returns from exploitation of intangibles. Consequently, companies of the group, which perform important functions, i.e. the development, maintenance, enhancement, protection and exploitation of the intangibles, will be entitled to an appropriate return in accordance with their contribution under the arm's length principle. It can be concluded that economic ownership gains increased importance since it shows how the economic reality really looks like in the MNE group under review. However, since intangibles can be challenging when it comes to comparability, selection of transfer pricing methods and determination of arm's length conditions, this Action provides guidance on those questions in connection with the transactions involving intangibles.[239]

The BEPS Actions on transfer pricing give new provisions on hard-to-value intangibles and cost contribution arrangements (CCAs). In order to evaluate intangibles, especially hard-to-value types, specialized knowledge is required about developments and events relevant for intangibles that are in connection with business environment in which the intangible is developed. There is a difference between ex ante and ex post value of intangible that would be claimed by taxpayer to be attributable to beneficial developments and the issue is rising when tax administrations lack appropriate information for examining taxpayer's claim. Consequently, this can give rise to transfer pricing risk.[240] According to the Transfer Pricing Guidelines, the term hard-to-value

[235] ibid
[236] Erik Pinetz, Erich Schaffer (eds.), *Limiting Base Erosion*, (Series on International Tax Law, Univ.-Prof. Dr. Dr. h.c. Michael Lang (Editor), Volume 104, Linde 2017) ISBN 978-3-7073-3758-7, 470.
[237] OECD (2017), *OECD Transfer Pricing Guidelines* (n 13) ch VI para 6.6.
[238] Erik Pinetz, Erich Schaffer (eds.), *Limiting Base Erosion* (n 236) 504.
[239] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports* (n 79)
[240] ibid

intangibles (HTVI) covers intangibles or rights in intangibles for which, at the time of their transfer between associated enterprises, (i) no reliable comparables exist, and (ii) at the time the transactions was entered into, the projections of future cash flows or income expected to be derived from the transferred intangible, or the assumptions used in valuing the intangible are highly uncertain, making it difficult to predict the level of ultimate success of the intangible at the time of the transfer.[241] In order to secure appropriate pricing of hard-to-value intangibles, this Action 8 proposes measures to address the use of information asymmetry between taxpayers and tax authorities.[242] In this way it is possible for taxpayers to demonstrate that their pricing is based on a transfer pricing analysis and leads to an arm's length outcome, while the approach at the same time protects the tax administrations from the negative effects of information asymmetry. Precisely, tax administrations are allowed to rely on post-transfer results of the transferee of an intangible to value the intangible at the date of the transfer.[243] In 2018, the new guidance (incorporated in Transfer Pricing Guidelines) for tax administration on the application of the approach to hard-to-value intangibles was issued and it presents the principles that should underlie the application of the HTVI approach by tax administrations, with the aim of improving consistency and reduce the risk of economic double taxation. This guidance includes examples of clarification the application of the HTVI approach in different scenarios, then addressing the interaction between the HTVI approaches, as well as the access to the mutual agreement procedure under the applicable tax treaty.[244]

Another issue covered in the Action 8 of anti-BEPS Project is cost contribution arrangements (CCAs). Those are arrangements between enterprises for sharing contributions and risks involved in the development, production or obtaining of tangible, intangible assets or services, while it is expected that each of the enterprises will get some benefits for its individual businesses. The reason why this Action provides changes to the provisions of Chapter VIII of the OECD Guidelines on CCAs is because in the case of inappropriately valued contributions and benefits, profits can be shifted away from the locations where value is created.[245] This guidance is about determining whether conditions for transactions covered by those arrangements are in accordance with arm's length principle, i.e. whether the same rules on arm's-length compensation for control of risk, reward of contributions and compensation for services as apply to non-CCA transfer, are applying to CCA transfer in order to ensure that CCAs produce outcomes that are consistent with how and where value is created. Thus, opportunities for entities to claim high returns for a cash contribution to a CCA is restricted, and the importance of

[241] OECD (2017), *OECD Transfer Pricing* (n 13)
[242] OECD (2015), *Explanatory Statement* (n 43) 7.
[243] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports* (n 79)
[244] OECD (2018), *Guidance for Tax Administration on the Application of the Approach to Hard-to-Value Intangibles – BEPS Actions 8-10*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris <www.oecd.org/tax/beps/guidance-for-tax-administrations-on-the-application-of-the-approach-to- hard-to-value-intangibles-BEPS-action-8.pdf> accessed 14 November 2018
[245] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports* (n 79)

functions that control risk and contribute directly to intangible value is emphasized.[246]

3.12.2. Action 9 – Risk and capital

The allocation of risk to low tax destination through tax planning strategies is the common practice in order to claim that tax-advantaged entities (from the MNE) are entitled to significant income as compensation for bearing risk.[247] Consequently, this BEPS Action develops measures to address such tax planning issue. The point, which must not be overlooked, is that every time a company plans to take a step forward in its businesses – the risk is assumed. The assumption of risk in relation to development, maintenance, enhancement, protection and exploitation of intangibles, can affect pricing of the transaction under review at arm's length. Revised Transfer Pricing Guidelines determines which related party enterprise assumes risk for transfer pricing purposes,[248] and also it should be noted that before BEPS Project, there was little guidance on this question. Accordingly, the BEPS Action establishes three categories to describe the levels of risk undertaken by a funding entity and the resulting returns to which the funding entity is entitled.[249] Firstly, it was determined that risks assumed by a party that cannot exercise control over the risks or does not have financial capacity to do so, will be allocated to the party that can exercise this control and has such capacity.[250] Notably, to assign risk to a tax-advantaged jurisdiction, there must be some modest portion of the control function related to that risk in such a jurisdiction.[251] Furthermore, in situation when an associated enterprise provides funding and assumes the related financial risks, but does not perform any functions relating to the intangible, it could generally expect only a risk-adjusted return on its funding.[252] Determination of such a risk-adjusted return is not clearly explained in the BEPS Action, but it is indicated that reference to the entity's cost of capital and reference to other reasonably available alternative investments provide a guide to the determination of such a return.[253]And finally, if the associated enterprise providing funding does not exercise control over the financial risks associated with the funding, then it is entitled to no more than a risk-free return.[254] Precisely, such a low-function cash-box entity does not bear any risk for transfer pricing purposes. Regarding a risk-free return, the report does not define its meaning, however that term should be interpreted as being the return an independent investor would receive for an

[246] Joe Andrus and Paul Oosterhuis, 'Transfer Pricing After BEPS: Where Are We and Where Should We Be Going' (2017) Wolters Kluwer
[247] ibid
[248] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports* (n 79)
[249] Joe Andrus and Paul Oosterhuis (n 246)
[250] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports* (n 79)
[251] Joe Andrus and Paul Oosterhuis (n 246)
[252] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports* (n 79)
[253] Joe Andrus and Paul Oosterhuis (n 246)
[254] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports* (n 79)

investment in which it runs no risk of losing its invested capital.[255]

3.12.3. Action 10 – High-risk transactions

In order to stop BEPS, this Action adopts transfer pricing rules that will clarify the application of transfer pricing methods, with the attention on the transactional profit split method. Furthermore, this Action adopts rules regarding the issue in which circumstances the transaction can be recognized and deals with details of low value-adding intra-group services as well as commodity transactions.[256]

In 2018, the OECD did the revision of the Guidance on the profit split method, developed as part of this Action 10, and the main change is the guidance on the issue - when a profit split method may be the most appropriate method to apply. Consequently, following indicators should be present in order to choose this transfer pricing method - that parties make unique and valuable contributions; that business operations are highly integrated; and that parties share the assumption of economically significant risks, or separately assume closely related risks. Also, the revised text expands the guidance on how the profit split method should be applied, including determination of the relevant profits to be split and appropriate profit splitting factors.[257]

Furthermore, as it was mentioned above, in Action 10, the OECD discussed on transfer pricing aspects of low-value adding intra-group services and cross-border commodity transactions. Once the intra-group service, as administrative, technical, financial or commercial service provided by one member of the MNE group to other members has been rendered, it is a must to determine the amount of the charge in accordance with arm's length principle. The question is whether the charge for an intra-group service is in line with charges that would have been agreed between independent companies in similar circumstances. The OECD report of Actions 8-10, introduces a new approach to determine arm's length charges for low value-adding intra-group services (i.e. supportive services, not part of the core business of the group). The new simplified approach specifies a wide category of intra-group services, which command a very limited profit mark-up on costs. This approach applies a consistent allocation key for recipients of those services while transparency is secured because of the reporting requirement. The OECD states in the Final Report that the mark-up under the simplified approach does not need to be benchmarked or justified with a study.[258] In order to reduce the overall transfer pricing compliance of intra-group services, countries are advised to introduce the threshold, i.e. if the payments for intra-group services exceed the threshold, tax administrations are able to

[255] Joe Andrus and Paul Oosterhuis (n 246)
[256] OECD (2013), *Action Plan on Base Erosion and Profit Shifting* (n 2) 20.
[257] OECD (2018), *Revised Guidance on the Application of the Transactional Profit Split Method: Inclusive Framework on BEPS: Action 10,* OECD/G20 Base Erosion and Profit Shifting Project, OECD Paris <www.oecd.org/tax/beps/revised-guidance-on-the-application-of-the-transactional-profit- split-method-beps-action-10.pdf> accessed 14 November 2018
[258] 'BEPS Action 10 – Transfer Pricing: Other High Risk Transactions' (*Rödl & Partner website*) <www.roedl.com/insights/beps/beps-action-10-transfer-pricing-other-high-risk- transactions> accessed 14 November 2018

perform the transfer pricing analysis in which received benefits will be included. This way it will be possible to achieve the balance between allocation of intra-group services charges to MNE group with the arm's length principle on one hand and the need to protect the tax base on another hand. Companies that do not use this simplified approach should address transfer pricing issues related to low-value-adding services under provisions for determining general intra-group services. Finally, this Action is examining transfer pricing aspects of cross-border commodity transactions between associated enterprises. Consequently, there is a new guidance applicable to commodity transactions in which the application comparable uncontrolled price method is clarified and where new provision on determination of the pricing data (i.e. specific date to determine the price of the transaction) for commodity transactions is added.[259] Where the taxpayer can interfere reliable evidence of the pricing date agreed by the associated companies and this is not in accordance with the actual conduct, tax administrations shall accept the price for the commodity transaction by reference to the pricing date. If this date is inconsistent with the actual conduct, if this date does not exist or if the taxpayer does not provide reliable evidence of the pricing date, the tax administrations may consider the date of delivery or other equivalent document as substantiated.[260]

3.12.4. Action 13 – Re-examine transfer pricing documentations

It was already mentioned that transparency is very important in the field of transfer pricing. The Action 13 tries to influence MNEs to provide all relevant information to government on their global allocation of the income, economic activity and taxes paid among countries, because tax administrations do not have enough capacity to know about the global value chain of their taxpayers. In addition, this Action take into account the compliance costs for business.[261] The Action 13 has a three-tiered approach to transfer pricing documentation, including a minimum standard on Country-by-Country Reporting.[262] Obligations on multinational enterprises to provide Country-by-Country reporting to their parent entity's tax administration mean that tax administrations will have a better picture on MNE's global operations[263] i.e. where MNE profits, tax and economic activities are reported, and consequently - tax administrations will be able to use this information to assess transfer pricing and other BEPS risks, in order to focus audit resources where they will be most effective.[264]

The first approach is that MNEs will report information regarding their global business operations and transfer pricing policies in a "master file" that has to be available to all

[259] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports* (n 79)
[260] 'BEPS Action 10 – Transfer Pricing: Other High Risk Transactions' (*Rödl & Partner website*) (n 258)
[261] OECD (2013), *Action Plan on Base Erosion and Profit Shifting* (n 2) 23.
[262] OECD (2015), *Explanatory Statement* (n 43) 17.
[263] OECD Secretariat, *Inclusive Framework on BEPS - Progress Report, July 2016 – June 2017* (n 113)
[264] OECD (2015), *Explanatory Statement* (n 43) 6.

relevant tax administrations.[265] This file has five parts: organizational structure (i.e. legal and ownership structure followed by the geographical locations of MNE's operating entities), description of MNE's businesses (means showing the most important business profit drivers and providing an information about the company's supply chain and its geographical markets), intangibles of the enterprise, its intercompany financial activities and its financial and tax position. Moreover all important service arrangements between members of the group, restructurings, acquisitions, and similar information have to be disclosed in this master file.[266]

Contrary to the master file, there is the local file that has to be prepared for a specific country. It has data prepared by the local entity of the MNE about local entity's transactions, any related-party agreements, descriptions about organizational structure, its activities etc.[267]

Thirdly, large MNEs with a revenue of EUR 750 million or higher are required to file a Country-by-Country Report that will provide annually and for each tax jurisdiction in which they operate. To make it clear, Country-by-Country Reports should be filed in the parent entity's jurisdiction and shared automatically through government-to-government automatic exchange of information.[268] Important to realize is that the Action 13 includes the template on CbC Reporting that contains three types of tables dealing with company's global financial and business information. Information listed in the first table are revenues, profit before income tax, paid tax, income tax accrued, stated capital, accumulated earnings, number of employees, tangible assets, royalties, interest, premiums (excluding dividends). This is followed by information about all entities aggregated to tax jurisdiction as well as residence information or place of incorporation, business activities, internal group finance and other. The last table of information can contain additional comments to make easier the understanding of previously given data. The OECD in this Action provides information on reporting entity, constituent entity and tackles permanent establishment as well. Significantly, the parent company as the reporting entity should prepare CbC Report, but in the case that the headquarter is in the country without CbC reporting requirements, surrogate parent company will prepare it. With the goal to make implementation of CbC Reporting easier, countries that participate in this BEPS Project have been agreed the CbC Reporting Implementation Package.[269]

According to OECD data, an anticipation of reporting system from the Action 13 has already discouraged aggressive tax planning, since it makes it easier for tax

[265] ibid 17.
[266] Erik Pinetz, Erich Schaffer (eds.), *Limiting Base Erosion* (n 236) 413.
[267] Ibid. See also OECD (2015), *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <https://doi.org/10.1787/9789264241480-en> accessed 14 November 2018
[268] OECD (2015), *Explanatory Statement* (n 43) 17.
[269] OECD (2015), *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <https://doi.org/10.1787/9789264241480-en> accessed 14 November 2018

administrations to identify whether the company is involved in transfer pricing practices that artificially shift income into low-tax environments.[270]

Regarding the impact of those transfer pricing actions in the EU, the Joint Transfer Pricing Forum (JTPF) which operates within the framework of the OECD Transfer Pricing Guidelines works on the EU approach to review and update transfer pricing. This work includes looking at more economic analysis in TP, better use of companies' internal systems, and improving TP administration.[271] The work of the JTPF is divided into 2 main areas: the Arbitration Convention (AC) - a specific dispute resolution mechanism for transfer pricing cases and other transfer pricing issues. In June 2015 the JTPF adopted its Rules of Procedure for the mandate 2015 – 2019.[272]

As mentioned above, the Action 13 is one of the OECD BEPS Actions introduced into EU law through the Directive 2016/881, adopted on 25 May 2016, which sets up an automatic information exchange system. This CbC Directive has already been implemented by all Member States and transposed into their domestic laws. Also, regarding a step further in tax transparency issues, the European Commission proposed in 2016 amendment to the Accounting Directive (Directive 2013/34/EU) in order to introduce the "public CbCR" rules.[273]

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This overview of all OECD anti-BEPS actions with notions on EU measures regarding this complex and important issue shows that it will become more and more difficult for MNEs to enter into aggressive tax planning structures. Namely measures such as the one about limiting excessive interest deductibility (Action 4) and neutralizing hybrid mismatches (Action 2), as well as guidance based on best practice for jurisdictions intending to limit BEPS through controlled foreign company rules (Action 3) can be incorporated through each country's domestic law. In addition, even in situations where groups seek to identify new opportunities for BEPS practices, increased transparency through mandatory disclosure rules will make it easier for countries to identify and respond to these schemes in a timely manner.[274] Even though countries are sovereign and it is up to them to implement these changes in a suitable manner, the explained anti-BEPS projects require coordinated responses and consequently it is expected that countries will implement their commitments.[275]

[270] OECD (2015), *Explanatory Statement* (n 43) 6.
[271] Eli Hadzhieva (n 39)
[272] 'The EU Joint Transfer Pricing Forum' (*European Commission Website*) <https://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context/joint-transfer-pricing-forum_en> accessed 14 November 2018
[273] 'The outlook for global tax policy 2018' (*EY website*) (n 125)
[274] OECD Secretariat, *Inclusive Framework on BEPS - Progress Report, July 2016 – June 2017* (n 113)
[275] OECD (2015), *Explanatory Statement* (n 43) 9.

Chapter IV

The impact of the OECD and the EU workings on Anti-BEPS Regulations on the legislation in Serbia

The anti-BEPS instruments will affect business activities worldwide and thus it is beneficial for each country - the OECD, the EU Member States and non-member countries to understand this phenomenon. Therefore, and because of the purpose of this thesis, it is important to tackle the impact of anti-BEPS measures on legislation in the Republic of Serbia, as a non-OECD and non-EU, but the EU candidate Member State, since those measures will certainly affect the activities of multinational companies that are present in the Serbian market.[276] Because of the economic reforms, political stability, commitment to European integration and regional cooperation, as well as its ideal geographical position between East and West, in the heart of the Southeast Europe – for production, service and logistics, Serbia becomes an attractive place for multinational companies and foreign direct investments.[277] Figures from the Foreign Investors Council in Serbia confirm that foreign investors from 30 different sectors (such as food and agriculture sector, energy, electronics sectors, the automotive industry, telecommunications and IT, financial services etc.) have a long-term interest in developing their businesses in Serbia while helping the Serbian economy and society to become more developed.[278] As an additional argument, the favorable tax system with lower tax rates then in competing investment destinations, then the electronic payment system, implementation of double taxation agreements with other countries and similar tax characteristics make this area as one of the premier investment locations in Central and Eastern Europe.[279]

In June 2017, Serbia signed the Multilateral Convention on Implement Tax Treaty Related Measures to Prevent BEPS (herewith the MLI) and consequently has promised to adopt minimum standards on international taxation, including rules preventing treaty shopping, abolishing harmful tax regimes and agreeing to collect and exchange Country-by-Country Reports of MNEs. In like manner Serbia will improve its cross-border tax dispute resolution system.[280] On 29 December 2017 the Government of the Republic of Serbia proposed to the National Assembly the adoption of the law on ratifying the MLI and accordingly this law was adopted in April 2018.[281] Consequently, on 5 June 2018,

[276] Dejan Popović (n 30) 30.
[277] Chamber of Commerce and Industry of Serbia, 'Business Friendly Serbia' (2014) PKS Documents <www.pks.rs/Documents/Centar%20za%20komunikacije/Business%20Friendly%20Serbia.pdf> accessed 14 November 2018
[278] *White Book – Proposals for improvement of the business environment in Serbia*, Foreign Investors Council, 2017
[279] Chamber of Commerce and Industry of Serbia, 'Business Friendly Serbia' (n 277)
[280] 'Serbia joins "Inclusive Framework on BEPS" to fight tax avoidance' (*MNE Tax – Multinational Tax and Transfer Pricing Rules*, February 19, 2018) <https://mnetax.com/serbia-joins-inclusive-framework-beps-fight-tax-avoidance-26149> accessed 14 November 2018
[281] 'Implementation of BEPS regulation in Serbia' (*WTS CEE website*, March 2018)

Serbia was one of six countries, which the OECD added to the list of countries that have deposited the instrument to ratification, acceptance or approval of the MLI. Notably, Serbia has confirmed its MLI position and this instrument entered into force on 1 October 2018.[282] Next to mentioned minimum standards, this adoption means some changes in double tax treaties signed by the Republic of Serbia and states that have already ratified the MLI.[283] As one of the first 68 signatories to the MLI, the Republic of Serbia was obliged to notify the OECD which of its double tax treaties it intends to cover. In this respect, Serbia has put all of its double tax treaties on the list of covered agreements, those which are in force and those that are only signed, but not yet in force.[284] Furthermore, the adoption of this instrument will influence changes in the Law on Corporate Income Tax, especially in permanent establishment, transfer pricing regulations and thin capitalization rules. The aim of all those novelties is to harmonize Serbian tax system with anti-BEPS measures as measures that address weaknesses within international tax system.[285] In addition, the OECD announced on 19 February 2018 that Serbia joined the Inclusive Framework on BEPS and consequently became a country that is participating on an equal footing in this anti-base erosion and profit shifting Project.[286]

However, in order to have a better understanding on how BEPS Actions will impact changes in domestic law in Serbia, it is necessary to briefly elaborate Serbian tax system with the special attention on corporate income taxation, because most of the changes are expected to occur in the field of CIT.

* * *

1. Serbian corporate income tax law - overview

It is clear that taxes are one of the most important types of public revenues and by collecting taxes countries are able to achieve their economic and social plans. Consequently, corporate income tax takes a significant place in the tax systems of countries with a developed market economy.[287] According to the Law on Corporate Income Tax, a resident of the Republic of Serbia, as a legal entity established or has a place of effective management and control in the territory of Serbia, is subject to an unlimited tax liability - both for profits gained in Serbia, and for those earned abroad. On the other hand, non-resident legal entities are taxed for profits earned through a permanent establishment located on the territory of Serbia.[288] Definition of a permanent

<https://wtsklient.hu/2018/03/14/implementation-of-beps-regulation-in-serbia/> accessed 14 November 2018

[282] 'The Latest on BEPS - 18 June 2018' (EY Website, Global Tax Alert, 18 June 2018) <www.ey.com/Publication/vwLUAssets/The_Latest_on_BEPS_-_18_June_2018/$FILE/2018G_03682-181Gbl_The%20Latest%20on%20BEPS%20-%2018%20June%202018.pdf> accessed 14 November 2018

[283] 'Implementation of BEPS regulation in Serbia' (n 281)

[284] 'A Guide for the Application of the MLI '(2017) CMS Law (n 226)

[285] 'Implementation of BEPS regulation in Serbia' (n 281)

[286] 'Serbia' (*OECD Website*) <www.oecd.org/countries/serbia/> accessed 14 November 2018

[287] Dejan Popović (n 30)

[288] Article 3 of the Corporate Income Tax Law [*Zakon o porezu na dobit pravnih lica*] (*Official Gazette*

establishment in Serbian Corporate Income Tax Law, article 4, differs, but not significantly, from a definition contained in the OECD Model Convention, and this definition will be applicable only in situations when non-resident taxpayer comes from a country that does not have double tax treaty with Serbia.[289]

According to the Corporate Income Tax Law, the starting point for calculation of corporate income tax is the accounting profit as stated in the profit and loss statement, which is then adjusted by certain corrections prescribed by the law, i.e. by non-deductible and non-taxable items. It should be noted that non-deductible items are costs that cannot be documented, gifts and contributions to political organizations, all penalties and fines, etc. An example for non-taxable item is the corporate income tax paid in another country by a non-resident subsidiary of a Serbian taxpayer.[290] One of the corrections is the cost of depreciation of fixed assets.[291] Precisely, subjects of the tax depreciation are tangible and intangible assets as non-current assets with a useful life longer than one year, and which are divided into five depreciation groups (with depreciation rates prescribed for each group). Depreciation method for the first group (which includes real estate) is the straight-line depreciation method, while the declining-balance method is applicable for assets in the other groups. As from year 2018, tax depreciation of intangible assets will be equal to their accounting depreciation, while movable and immovable assets will be classified into tax depreciation groups pursuant to the manner in which they are recognized in the taxpayer's statutory financials.[292] Important to mention at this point are capital gains and other types of income. Capital gains, generated by the sale or other transfer of real estate, industrial property rights, shares, stocks, securities, certain bonds, and investment units, are determined as the difference between the sale and purchase price of the asset concerned. Consequently, if this amount is negative, a capital loss is realized. Capital gains minus capital losses are included in a company's tax base. Regarding dividends, interest and royalties, there is a must to bear in mind that those incomes received by a Serbian company from another Serbian company are not subject to CIT in comparing with same incomes received from a non-resident that will be treated as taxable. [293] After applying all mentioned necessary corrections, a taxable profit is determined and it represents the basis for the corporate income tax.

The profit of a non-resident taxpayer with a permanent establishment in Serbia will be taxed at a rate of 15%, and the same applies in the case of legal persons that are residents

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of the Republic of Serbia, no. 25/01, 80/02, 80/02, 43/03, 84/04, 18/10, 101/11, 119/12, 47/13, 108/13, 68/14, 142/14, 91/15, 112/15, 113/17)

[289] Dejan Popović (n 30)

[290] WTS Serbia, 'Tax and Investment Facts – A Glimpse at Taxation and Investment in Serbia' (2017) <www.wtsserbia.com/wp-content/uploads/2017/11/wts-tax-facts-serbia-2017-web.pdf> accessed 14 November 2018

[291] Corporate Income Tax Law (n 288)

[292] 'Serbia Corporate Deductions' (*PWC Worldwide tax summaries*, 2018) <http://taxsummaries.pwc.com/ID/Serbia-Corporate-Deductions> accessed 14 November 2018

[293] 'Serbia Corporate Income determination' (*PWC Worldwide tax summaries*, 2018) <http://taxsummaries.pwc.com/ID/Serbia-Corporate-Income-determination> accessed 14 November 2018

of Serbia, while a non-resident without permanent establishment will be taxed with withholding taxes at a rate of 20%, only in relation to revenues such as interest, capital gains, royalties and dividends.[294] Where the non-resident is located in a low-tax jurisdiction, the withholding rate is 25% on interest and royalties.[295]

Regarding assessment procedure for corporate income tax in Serbia, it is characterized by a system of self-assessment, i.e. taxpayer is obliged to submit a tax return to the tax administration within 180 days from the expiration date of the period for which the tax liability is determined. In addition to the tax return, all other documentation required by the competent tax authority must be submitted.[296] It must not be overlooked that according to the Law of Tax Procedure and Tax Administration (hereafter: LTPTA), Serbian authorities have broad powers in collecting information relevant for determination of tax obligations.[297] The taxation period for corporate income tax is generally a calendar year. During the year, taxpayer calculates corporate income tax in the form of monthly advance payments - the amount determined on the basis of tax profit, which is shown on the tax return for the previous year.[298]

Other characteristics of the corporate income taxation in Serbia that are important in the context of this thesis, are that tax authorities require arm's length principle to be applied in respect of transactions between Serbian companies with related companies. Additionally, in order to establish a limit on deduction of interest that will be available in respect of the debt, Serbia uses thin capitalization rules. Also, there are tax consolidations rules where parent and subsidiary companies are recognized as a group for tax consolidations purposes if the parent has direct or indirect control at least 75% of the subsidiary's share capital. In respect to these rules, there is a requirement that all members of the group must be resident companies in Serbia and once approved, tax consolidation must be applied for the next five years.[299] Finally, as mentioned above, because of the BEPS Project some changes might take place in different fields of the Serbian tax law, especially in this field of CIT.

2. The importance of the MLI in Serbia

As mentioned above, the MLI will help to signatories to modify their double tax treaties (i.e. covered tax agreements) in order to address tax avoidance practices that exploit those treaties. Some of novelties brought with the adoption of the MLI (or the Convention),

[294] Gordana Ilić Popov, Svetislav Kostić: *The Construction Permanent Establishment under Serbian Domestic and Tax Treaty Law* (European Taxation, International Bureau of Fiscal Documentation, June 2013)
[295] Moore Stephens Europe Ltd, 'Doing business in Serbia 2017' (2018) on behalf of Moore Stephens International Ltd <www.moorestephens.com/MediaLibsAndFiles/media/MooreStephens/Documents/DBI-Serbia.pdf?ext=.pdf> accessed 14 November 2018
[296] Dejan Popović (n 30)
[297] Svetislav Kostić, *Tax transparency – Serbia* (2018) <www.eatlp.org/uploads/public/2018/National%20Report_Serbia.pdf> accessed 14 November 2018
[298] Dejan Popović (n 30)
[299] ibid

which are important for Serbia, can be noticed. Thus, the term "covered tax agreement" will cover all different names of bilateral tax treaties. Also, there are changes regarding differences from the fact that some BEPS measures provide solutions for issues arising from certain provisions of the OECD Model Convention. For example, when determining conditions under which a resident company of one jurisdiction can benefit from a reduced tax rate after deduction of dividends paid to a resident of another jurisdiction, so far Art. 10 of The OECD Model Convention required only that the recipient of dividends is a company that has at least 25% of the capital of the company that pays dividends. Due to tax planning, a company, which owns less than 25% of capital on the day when dividends are paid, is able to increase its stake primarily to ensure the benefit of applying a reduced tax rate on deduction. Consequently, Art. 8 of the MLI contains a measure against this misuse of the tax treaty, which prescribes that the holding period must last at least 365 days. Since Serbia does not have a minimum holding period in any of its tax treaties, the country decided to incorporate this provision to 43 valid and 2 signed tax treaties.[300] Or, another novelty is that in 29 valid tax treaties, Serbia incorporated Art.9 of the Convention, which will eliminate or make it hard to avoid taxation of capital gains in Serbia. Namely, the MLI introduces a holding period of 365 days before the sale of shares, during which the value of real assets shall in no one moment exceed 50% of total assets of the Serbian company. If the value of real assets at any time during 365 days is above 50% of the total value of assets of the Serbian company, the capital gain from sale of shares in the Serbian company shall be taxed at the rate of 20% according to the Serbian Corporate Income Tax Act.[301]

Even though the MLI has minimum standards for addressing BEPS, which will be adopted by all members of Inclusive Framework, including Serbia, this instrument has to be flexible in order to match positions of different parties and to remain consistent with its purpose. This flexibility is expressed through opting-out. Regarding material, non-minimum standard provisions, the party can opt out from such provision, wholly or partially. Opting out is realized through reservations, and accordingly Serbia has made notable reservations regarding Art.3 (Transparent Entities), Art.5 (Application of Methods for Elimination of Double Taxation), Art.10 (Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions), Art.11 (Application of Tax Agreements to Restrict a Party's Right to Tax its Own Residents), as well as the first sentences in paragraph 1, Art.16 (Mutual Agreement Procedure). Serbia will not apply Art.17 (Corresponding Adjustments) to 17 tax agreements, since they already contain the appropriate provision. However, in 16 of its tax treaties, Serbia does not have a provision from article 9 of the OECD Model Convention, which provides a correction in the case when a contracting party, in accordance with the arm's length principle, incorporates into the tax base of that country - profits for which the enterprise of another contracting party is taxed to that other country, and accordingly is doing taxation. Hence it has not made any reservation in respect of the tax treaties covered by these countries, and consequently

[300] Dejan Popović, Gordana Ilić-Popov (n 188)
[301] 'A Guide for the Application of the MLI '(2017) CMS Law (n 226)

in the absence of the norm, provision of Art.17 of the BEPS Multilateral Convention will be included in the tax treaties with those 16 countries and with Lithuania.[302] Finally, in the coming rows, implementation of the BEPS minimum standards from Actions 5, 6 and 14 in Serbia will be under review.

2.1. The BEPS Action 5 in Serbia - Main concerns of countering harmful tax practices, as initiative under the Action 5, are issues of preferential tax regimes and the question of transparency. Since this minimum standard is something that will be incorporated in the tax legislation of Serbia, it is necessary to tackle the question how Serbia is treating those preferential regimes as well as the concept of tax transparency.

In 2012 the first SAAR targeting tax havens was introduced[303] in order to address aggressive tax planning practices through founding of companies in countries with a status of tax havens, where via different tax planning techniques profit earned in Serbia is shifted into. Notably, in a jurisdiction with preferential tax regime, there is a possibility to significantly reduce a tax burden of the corporate income, i.e. it is possible to impede determination of tax facts that would be important for establishing tax liabilities according to the regulations of Serbia.[304] These SAARs are focused on "non-resident legal entities from jurisdictions with preferential tax systems" and accordingly - law says that those entities are: non-resident legal entities incorporated in a jurisdiction with a preferential tax system, or non-resident legal entities whose registered seat is in a jurisdiction with a preferential tax system, or non-resident legal entities whose place of management (seat) is in a jurisdiction with a preferential tax system, or non-resident legal entities whose place of effective management is in a jurisdiction with a preferential tax system.[305] The reason why this term of non-resident entities is so broad is the idea to tackle as many relevant connecting factors as possible in order to avoid dealing with the peculiarities of foreign tax legislations. However, the place of incorporation has always been the decisive factor for determining corporate tax residence in Serbian legislation.[306] Regarding the issue which jurisdictions should be treated as those with preferential tax systems, the Serbian Minister of Finance publishes list of those jurisdictions that contains 51 territories with tax sovereignty.[307]

The BEPS Action 5 reviews the way in which preferential tax regimes are designed to assess whether they contain "harmful features", using an agreed set of criteria. According to the available OECD data, there is no information on existing harmful tax practices in

[302] The Law on the Confirmation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (*Official Gazette of the Republic of Serbia – Int. Agreements*, no. 3 / 23 April 2018); Dejan Popović, Gordana Ilić-Popov (n 188)
[303] Svetislav Kostić, 'Corporate Tax Residence and Mobility – Serbia' (EATLP Congress 2017) <www.eatlp.org/uploads/public/2017/National%20Report%20Serbia.pdf> accessed 14 November 2018
[304] Dejan Popović (n 30)
[305] Art.3a(2) of the Corporate Income Tax Law (n 288)
[306] Svetislav Kostić (n 303) 7-10.
[307] The Rulebook on the list of jurisdictions with a preferential tax system [*Pravilnik o listi jurisdikcija sa preferencijalnim poreskim sistemom*] (*Official Gazette of the Republic of Serbia*, no.122 / 12)

the context of preferential regimes - in Serbia.[308] However, since – once again this Action is a minimum standard and the main requirement under it is the substantial activity requirement in the case of preferential tax regimes, this furthermore means that in the future Serbia, as a member of Inclusive Framework, will incorporate such a requirement in its legislation. If it turns out that there is no substantial activity requirement in the concrete case, this country will be able to take defensive measures.

On the other side, the tax transparency is highly discussed topic within international tax framework and consequently the BEPS Action 5 proposed in this area - mandatory exchange of information as a measure to address harmful tax practices, i.e. it is believed that this exchange is a practical tool for jurisdictions and their tax administrations to combat international tax avoidance and tax evasion. However, most international tax transparency developments have so far avoided the Serbian tax authorities[309] and in addition, according to the OECD website, there are no available data on the exchange of information on tax rulings in the country.[310] Furthermore, on 5 December 2017 the European Council brought the EU list of non-cooperative jurisdictions for tax purposes in which Serbia is listed, since the EC recognized that the Serbian main problem is the failure to participate in global tax forums. In order to resolve this, Serbia became a member of the Global Forum on Transparency and Exchange of Information for Tax Purposes and committed to implement the international standards on transparency and exchange of financial account information with other members of the organization. Accordingly, the country will sign and ratify the OECD Multilateral Convention on Mutual Administrative Assistance (MCMAA) in Tax Matters or will have in place a network of agreements covering all EU Member States, and again Serbia, as a member of Inclusive Framework, will implement BEPS minimum standards, bearing in mind that some of them are connected with the question of transparency.[311]

Regarding the concept of transparency itself, after introduction of amendments into the tax legislation in 2011, the Serbian Tax Administration is obliged to disclose names of debtor taxpayers on its website. Even though the digitalization of tax compliance process gives some improvements in the area of tax transparency in Serbia, the country is still struggling with this phenomenon. This being said, those expectations of the public were not met until January 2018, when media raised the issue that Administration has failed to publish those information, despite legal obligation to do so.[312] Consequently, and because of the BEPS minimum standards, Serbia will work on the strengthen its transparency framework in accordance with the initiative under the Action 5 – i.e. the compulsory spontaneous exchange of information on tax rulings which provides tax administrations with timely information on rulings that have been granted to a foreign related party of their resident taxpayer or a permanent establishment, which can be used in conducting

[308] 'Compare your country, Serbia – Summary' *(OECD website*) <http://compareyourcountry.org/tax-cooperation?cr=oecd&lg=en&page=0> accessed 14 November 2018
[309] Svetislav Kostić (n 297)
[310] 'Compare your country, Serbia – Summary' *(OECD website*) (n 308)
[311] Svetislav Kostić (n 297)
[312] ibid

risk assessments and which, in the absence of exchange, could give rise to BEPS concerns. Accordingly, the next OECD analysis of individual country progress on implementing the transparency framework will cover all members of the Inclusive Framework and consequently – Serbia as a new member country.[313]

And finally, for the purpose of the better understanding of tax transparency framework in Serbia, it should be noted that in the field of tax assistance among jurisdictions, under the Article 157 of the LTPTA (2002), within tax proceedings, the Serbian Tax Administration has the right to address foreign tax authorities for legal assistance, while it has the obligation to provide such aid. Although priority is given to exchanging information on double tax treaties or other international agreements, in case that such an agreement does not exist with the state whose tax authority requests the legal aid from the Serbian Tax Authority, it can be enabled if the respective state commits to use the received information only for the purpose of tax procedure, misdemeanor and criminal procedure. Moreover, such information can be given only to authorities, which are in charge for the specific subject in the course of those procedures, so that in any way this all cannot be treated as a breach of confidentiality.[314]

2.2. The BEPS Action 6 in Serbia – This Action addresses treaty abuse and with this regard treaty shopping – as a situation when companies use a letter box company based in a third jurisdiction in order to seek a benefit of tax treaties between two contracting states. Members of the Inclusive Framework on BEPS, as well Serbia, have committed to implement this BEPS minimum standard, contained in the Art.6 of the MLI. In order to do it swiftly, they have to include in their tax treaties a statement of their intention to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or tax avoidance. Such an intention can be achieved, as already explained under the Action 6, through applying the Principal Purposes Test (PPT) or the Principal Purposes Test (PPT) rule in combination with the Limitation-on-benefits (LOB) rule or through the detailed version of the Limitation-on-benefits (LOB) rule. Regarding treaty abuse in Serbia, there are no available information of such an abuse on the OECD website.[315] However, as a member of Inclusive Framework in the area of this Action, Serbia opted for the Principal Purpose Test in showing the intention, in the preamble of its tax treaties, to eliminate double taxation. However, Serbia has informed the depositary (i.e. the OECD) that tax treaties with Kazakhstan, the Republic of Korea and Norway already contain standards with a specific formulation of the PPT. If those countries give the reciprocal notice (as it has been done so far by the Republic of Korea), the existing provision from the tax treaty will be replaced with the provision of the PPT from the MLI. If this in not a case, provisions of the tax treaty which are not contrary to Art. 7 of the MLI will be in force.[316]

[313] 'Compare your country, Serbia – Summary' *(OECD website*) (n 308)
[314] Svetislav Kostić (n 297)
[315] 'Compare your country, Serbia – Summary' *(OECD website*) (n 308)
[316] Dejan Popović, Gordana Ilić-Popov (n 188)

2.3. The BEPS Action 14 in Serbia – As it was explained above, this Action is about making dispute resolution process more effective by strengthening the mutual agreement procedure. The MAP, as independent mechanism from legal remedies available under the domestic law, allows to the competent authorities of the Contracting Parties to resolve tax treaty difficulties on a mutually agreed basis. Notably, the MAP is included in bilateral tax treaties. Generally speaking, issues that might be covered within the scope of MAP are transfer pricing cases, issues relating to the application of treaty as well as domestic anti-abuse provisions, issues that can arise when an audit settlement between the tax authority and the taxpayer already exists, as well as double taxation cases resulting from bona fide taxpayer initiated foreign adjustments.[317] Since this Action is another minimum standard of the BEPS Project, it is expected, that all Inclusive Framework members are and will be under peer reviews, but developing countries can obtain, under certain conditions, a deferral of such a review. The first analysis of the implementation of this BEPS Action was done in 2017 and in order to determine the performance of the MAPs - preventing disputes, availability and access to MAP, resolution of MAP cases and implementation of MAP agreements - were areas under review. With this regard, dispute resolution mechanism in Serbia was investigated.[318] Markedly, there are not so many MAP cases in Serbia, just few of them in last 43 years (since a first tax treaty was concluded in 1975), and there are not even publically available information on mutual agreement procedures that could be helpful for a more in-depth analysis. However, it should be noted that the Ministry of Finance of the Republic of Serbia makes available official rulings on preventing tax treaty-related disputes.[319]

Moreover, it is worth mentioning that the MLI minimum standard is offered in two variants. The first one is covered under Art. 16 para.1 according to which the taxpayer could present his case to the competent authority of one or other Contracting State, and not exclusively to the authority of the Contracting State of which he is a resident.[320] Serbia opted for the second variant. Accordingly, since Serbia does not have those provisions which would allow to a person - who considers that measures of one or both of the contracting parties may bring to non-taxation in accordance with that tax treaty - to present his case to the competent authority of any of those two parties, Serbia opted for the provision that if the covered tax agreement permits the request for a mutual agreement procedure to be submitted only to the jurisdiction of which that person is a resident, that jurisdiction is able to make the reservation on applying the bilateral disclosure or consultation with other jurisdiction in cases when the competent authority to which the request is addressed does not consider the claimant's objection as justified. However, Serbia accepted the provision that the case must be brought in front of the competent authority within three years period starting from the first notification that the

[317] 'Serbia Dispute Resolution Profile' (*OECD website*, 9 May 2018) <https://www.oecd.org/tax/dispute/Serbia-Dispute-Resolution-Profile.pdf> accessed 14 November 2018

[318] 'Compare your country, Serbia – Summary' *(OECD website*) (n 308)

[319] 'Serbia Dispute Resolution Profile' (*OECD website*) (n 317)

[320] Dejan Popović, Gordana Ilić Popov, 'Arbitration in international tax law: Legal obstacles to agreeing' (2018) Annals of the Faculty of Law in Belgrade, Belgrade Law Review, Vol 66, No 2 <http://ojs.ius.bg.ac.rs/index.php/anali/article/view/329> accessed 14 November 2018

action has been taken. In addition, the country has informed the depositary (i.e. the OECD) that in the treaty with Italy (as well as with Indonesia, which has not yet entered into force) provided time limit is shorter than three years period. Also, Serbia submitted a list of 52 tax treaties in which the deadline requirement is fulfilled. Notably, the minimum standard from Art.16, para.2 of the Convention requires that a mutual arrangement through which a dispute between two contractual parties is resolved, should be applicable irrespectively to time limits in domestic laws of those parties. However, in several Serbian tax treaties (ex. with France and the United Kingdom), there is no provision on "time limit", and since the depositary is informed of it, it will be replaced with mentioned norm from the Convention (i.e. the MLI).[321]

Finally, since a lot of countries – signatories of the MLI, already adopted arbitration provisions in their tax treaties in order to guarantee that treaty-related disputes will be resolved in a timely manner, it must be recognized that this arbitration clause is not a mechanism available for the resolution of tax treaty related disputes in Serbian tax treaties.[322] However, such an adoption might be a good novelty in Serbian tax legislation. If Serbia adopts this clause, it will be easier for the country to accept the EU Arbitration Convention during its accession negotiations. This EU Convention proposes that in the disputes on the arm's length principle or in disputes on attribution of profit to a permanent establishments, the case will be submitted to the Advisory Commission, if no agreement can be reached through the MAP within two years period. Overall, in this tax context, the arbitration represents an additional tool in the mutual agreement procedure of competent authorities, which is enacted only if the dispute is not solved within planned deadline. It should be expected that those points will impact Serbia, probably in some of the forthcoming negotiations on a tax treaties with a countries whose residents want an increased degree of legal certainty when investing in the Serbian economy.[323]

3. Transfer pricing phenomenon under Anti-BEPS Project and its impact in Serbia

Another minimum standard is the BEPS Action 13 on transfer pricing documentation. However, its impact in Serbia, as a member of the Inclusive Framework, will be observed under the phenomenon of transfer pricing. As already mentioned the OECD BEPS package revised the OECD Transfer Pricing Guidelines in order to ensure that the transfer pricing of MNEs better aligns the taxation of profits with economic activity.[324] Even though, Serbia is at the end of the line regarding international taxation and transfer pricing,[325] because of the fact that transfer pricing is one of the most important question for multinational enterprises that are present on the Serbian market, the country recognized the importance of this project and consequently signed the MLI while

[321] Dejan Popović, Gordana Ilić-Popov (n 188)
[322] 'Serbia Dispute Resolution Profile' (*OECD website*) (n 317)
[323] Dejan Popović, Gordana Ilić Popov (n 320)
[324] OECD (2015), *Explanatory Statement* (n 43) 7.
[325] Svetislav Kostić (n 297)

demonstrating an effort to impose stricter transfer pricing rules.[326] However, like in previous parts, in order to elaborate BEPS Project developments in this field, it is important to tackle the concept of transfer pricing in Serbia as such.

Even though, Serbia introduced specific transfer pricing legislation and the arm's length principle (in accordance to the Art. 9(1) of the OECD Model Tax Convention), as early as in 1991, it was not used in practice until the end of the first decade of the new century. The reason can be found in the Serbian economic policy to attract as much foreign investment as possible by having the lowest corporate income tax rates in Europe. Since in this way a lot of MNEs started conducting businesses in Serbia, the country was faced with higher volume of related party transactions. In a case that Serbia did not begin to apply transfer pricing rules, the country would be faced with situation that taxpayers shift profits between related parties in a way to make their overall group tax obligations lower. Thus, there is a need for transfer pricing norms in order to protect country's revenues, to prevent abusive tax avoidance and to ensure that cross-border transactions between related parties are consistent with the arm's length principle. However, in 2007, the Foreign Investors Council in Serbia has warned on the poor quality of the Serbian transfer pricing legislation and consequently, in 2012 the Working Group for Amending the Corporate Income Tax Law, which was formed by the Ministry of Finance, worked on improving the Serbian transfer pricing normative framework. Accordingly, the concept of transfer pricing was introduced into Corporate Income Tax Law in 2012. Because of those transfer pricing amendments, taxpayers are subjected to stringent reporting obligations in Serbia and taxpayers are liable to disclose their transactions with related parties in transfer pricing documentations. However, this regulation has not caused any notable controversy during the period it has been in force and taxpayers, particularly foreign investors, seems to be content with the current transfer pricing environment. Consequently, public revenues have increased and the business community is confident in the adopted provisions.[327] Besides the Corporate Income Tax Law, the important legislative source on transfer pricing is the Serbian Transfer Pricing Rulebook as a secondary legislation in this field.[328] In addition, it should be noted that since Serbia is not an OECD member, it was decided not to give to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations official status under Serbian law. Instead, the Guidelines have some form of a soft-law role.[329] However, in order to determine arm's length price Serbian legislator uses the OECD Transfer Pricing Guidelines, which furthermore means that all previously observed transfer pricing methods can be invoked in Serbia.[330]

Several changes in the field of transfer pricing are introduced under BEPS Actions 8-10 and 13, since it was recognized that companies are able to manipulate with transfer

[326] 'Transfer pricing in Serbia: overview' (*Thomson Reuters Practical Law*) (n 57)
[327] Svetislav Kostić (n 297)
[328] 'Transfer pricing in Serbia: overview' (*Thomson Reuters Practical Law*) (n 57)
[329] Svetislav Kostić (n 297)
[330] Art.61(1) of the Corporate Income Tax Law (n 288)

pricing in order to avoid or to pay lower taxes. Because the Republic of Serbia has transfer pricing rules, as previously explained, and treats them as type of specific anti-avoidance rules in a cross-border circumstances, it is believed that the country will make this type of SAARs stricter i.e. in accordance with the BEPS changes as internationally accepted Project. Thus, as observed, the BEPS report on transfer pricing starts with notion that for analyzing related party transactions, one must start with terms, conditions, risk allocations that are contained in contracts of the transactions under review. However, if this determination is not possible, the transaction will be set based on the conduct of the parties.[331] It was seen that the new chapter of the Guidelines on intangibles covers a lot of doubtful questions that can arise, since in today's digitalized world transfer pricing transactions with intangibles are frequent phenomenon. While contributing to the value of intangibles, entities of the MNE will be rewarded by the owner of the intangibles. In addition, there are new provisions in the field of CCAs and hard-to-value intangibles. Regarding allocation of risk, the BEPS Action gives special recommendations on how to recognized the party that assumes the risk. If proposed requirements are hard to fulfill, the risk will be borne by entities of the MNE, which do control and do have financial capacity to assume the risk. Changes brought by the Action 10 adopt rules on clarification of transactional profit split method, simplified approach regarding intra-group services and transfer pricing aspects of commodity transactions. Finally, the Action 13 on obligatory transfer pricing documentation will have a lot of impact on domestic laws since this Action is one of the BEPS minimum standards. The OECD plans to achieve widespread adoption of those novelties even though not all countries that have participated in the Project have endorsed changes on transfer pricing. Consequently, in the coming rows the potential impact of the transfer pricing minimum standard in Serbia will be under review, since at the time of writing of this thesis, there are not available and relevant information on other transfer pricing Actions.

3.1. The BEPS Action 13 in Serbia - This Action as a minimum standard requires multinational enterprises to report through Country-by-Country (CbC) reporting certain business information in order to provide tax administrations with an overview of the operations and tax risk. However, to have this requirement within domestic legislation, Serbia, must have laws that require the ultimate parent entity of an MNE Group headquartered in the jurisdiction to file the group's CbC report with the tax administration. Also, this report has to be exchanged with tax authorities in other jurisdictions where the MNE group is operating. However, for this exchange, jurisdictions must have an international agreement that permits automatic exchange of taxpayer information and competent authority agreement (CAA) that sets out the terms of the exchange.[332] It should be noted that Serbia is not a signatory of the Multilateral Competent Authority Agreement on the Exchange of CbCR (the "CbC MCAA") yet.[333]

[331] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports* (n 79)
[332] 'Compare your country, Serbia – Summary' *(OECD website*) (n 308)
[333] OECD (2018), *Signatories of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA) and Signing Dates* <www.oecd.org/tax/automatic-

As a member of the Inclusive Framework, it is expected that Serbia will implement BEPS Action 13 on CbC reporting, and according to the currently available data on the OECD website, in the field of the CbC in Serbian domestic law, there is a pending on status and when it comes to the question on information exchange network in Serbia – it is not activated yet.[334]

Regarding the current concept of transfer pricing documentation in Serbia, in order to demonstrate that transactions were undertaken in accordance with the arm's length principle, a taxpayer is faced with very if not the most demanding compliance obligations in the world.[335] The taxpayer is obliged to submit the local transfer pricing documentation file to the tax administration, which can include full-scope transfer pricing report (i.e. analysis of the group of related entities, business activity analysis, functional analysis, selection of transfer pricing method, benchmarking analysis and conclusion of the transfer pricing analysis) or simplified, short form transfer pricing report (only with basic data about intercompany transactions of a taxpayer). According to the domestic law, the transfer pricing documentation file should be submitted annually, together with corporate income tax return, within 6 months from the end of a fiscal period.[336] Having these characteristics in mind, it can be seen that in comparison with the OECD BEPS Action 13, Serbia does not have Master File documentations and CbC reporting obligations, but only obligation on submitting Local File documentations. Consequently, it is expected that in the near future the transfer pricing regulations in Serbia, including regulations on transfer pricing documentations, will be developed in accordance with the OECD reports related to this matter and more information with this regard will be available.

4. The impact of other important Anti-BEPS measures in Serbian law

4.1. The BEPS Action 1 in Serbia - As seen under the Action 1 of the Anti-BEPS Project, in today's world, the digital economy is a priority among countries since digitalization brings a lot of challenges in all aspects of life. In order to join economically developed countries, this phenomenon is recognized by the Government of the Republic of Serbia and thus the country will work on strengthening the IT sector, entrepreneurship and raising the start-up and innovation activities.[337] The main reason why digitalized business are in expansion is that they can quickly increase their scale in operations, they have low marginal cost and the global reach of the Internet, i.e. they can quickly get a global base of customers, users and suppliers while establishing user networks across different

exchange/about-automatic-exchange/CbC-MCAA-Signatories.pdf> accessed 14 November 2018

[334] 'Compare your country, Serbia – Summary' *(OECD website*) (n 308)

[335] Svetislav Kostić, 'Transfer Pricing in Serbia – Facing a Sobering Reality' (2017) Annals of the Faculty of Law in Belgrade, Belgrade Law Review < https://scindeks-clanci.ceon.rs/data/pdf/0003-2565/2017/0003-25651704075K.pdf > accessed 14 November 2018

[336] The Rulebook on Transfer Pricing and Methods, based on the arm's length principle, which is applying when determining the price of transactions between related parties (*Official Gazette of the Republic of Serbia*, No. 61/2013 and 8/2014)

[337] 'Digital economy as the development opportunity of Serbia and the region' (*Government of the Republic of Serbia website - news*, 26 August 2017) <www.srbija.gov.rs/vesti/vest.php?id=123833> accessed 14 November 2018

countries via websites, online platforms and mobile applications. These opportunities of digitalization impact the increased value creation, economy transformation and evolve new business modals.[338] Importantly, as stated in the Action 1, the digital economy will significantly impact taxation. In other words, digitalization of a business operations together with liberalization of trade policy and reduction of transportation costs, gave the ability to certain business models such as electronic commerce, online advertising and cloud computing, to take advantage of BEPS opportunities.[339] However, it is important to bear in mind that taxation of digital economy is still a new challenge for countries all over the world and consequently it can be expected that this field will be under increased attention in the coming years – not only in Serbia, but in other countries too.

4.2. The BEPS Action 2 in Serbia - Since the MLI in its Part II contains provisions on hybrid mismatches that are covered under the BEPS Action 2, it is believed that those provisions will have the impact on domestic Serbian laws in order to address this technique for base erosion. Findings of the study showed that hybrid mismatch arrangements such as hybrid entities, dual residence entities, hybrid instruments or hybrid transfers are widely used by companies with aim to manipulate for tax purposes. Regarding provisions of the MLI on transparent entities, the Republic of Serbia reserves the right for the Art.3 not to apply to its Covered Tax Agreements.[340] The same was done with the Art.5 on application of methods for elimination of double taxation.[341] In resolving the issue of persons with dual residence other than physical, Serbia has opted for Art.4 of the MLI, which means that the competent authorities will put endeavors to reach a common agreement and the criteria of the place of actual administration will not be accepted automatically.[342] Accordingly, Serbian tax treaty with San Marino is a great example of country's will to incorporate a number of treaty-based recommendations from the BEPS Project. With this regard measure contained in the Action 2, neutralizing hybrid mismatches is implemented in Art.4 (3) of the mentioned treaty.[343]

4.3. The BEPS Action 3 in Serbia - Regarding the BEPS Action 3, a lot of countries use CFC rules in order to stop possible BEPS opportunities of their taxpayers. Namely, because of CFC rules profits of foreign legal entities from jurisdictions with a favorable tax system will be distributed to the owner for each taxing period, regardless of whether it is really distributed or not. As it was seen, the Action 3 proposed recommendations to make CFC rules more tighten. However, when the question is on the impact of this BEPS

[338] OECD (2018), *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS* (n 29) 25-27.
[339] Pascal Saint-Amans, 'Tax challenges, disruption and the digital economy' (2016) OECD Observer No 307 Q3 (n 152)
[340] Article 3 of The Law on the Confirmation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (n 302)
[341] Article 5 of The Law on the Confirmation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (n 302)
[342] Dejan Popović, Gordana Ilić-Popov (n 188)
[343] Draft of the Law on Confirmation of the Agreement between the Government of the Republic of Serbia and the Government of the Republic of San Marino on the Avoidance of Double Taxation and Prevention of a Tax Evasion in relation to Income Taxes (n 204)

Action in Serbia, it should be noted that Serbia does not have those rules in its legislative framework. Having in mind that tax evasion and tax avoidance are still possible in Serbia, it would be useful for Serbian competent authorities to consider whether there is a place for CFC in the Serbian legislation in the future. If such rules exist, those types of tax planning practices could be addressed in cases when it is not possible to determine whether a foreign company is a resident of Serbia, based on the place of effective management and control indicators.[344]

4.4. The BEPS Action 4 in Serbia – This Action on limiting tax deductions for interest expense and other financial payments has a purpose to ensure that companies' deductions are aligned with their economic activity. This Action is not a minimum standard and consequently, countries are not obliged to implement it. However, regarding the main subject covered under this Action, it can be seen that Serbia has thin capitalization rules and it is believed that those rules are sufficient to prevent unreasonable interest deductions. The Serbian rule says that the amount of interest and other expenses (related to loan between associated entities) must not exceed a fixed debt-to-equity ratio of 4:1, i.e. 10:1 in the case of banks or leasing companies. It is not yet known whether some additional measures from the BEPS Project will be introduced to those existing domestic rules. As mentioned above, in the field of the EU, all Member States are subjects to the ATA Directive, which includes an interest limitation provision to address artificial debt arrangements designed to minimize taxes. Since Serbia is the EU candidate country, it can be expected that those provisions will have the impact on its domestic legislation in the future.[345]

4.5. The BEPS Action 7 in Serbia – As it was seen in the Chapter III, this Action is one of the most important Actions on BEPS. Regarding its impact on preventing the artificial avoidance of permanent establishment status, the first thing to note in order to tax income of a foreign enterprise in Serbia is that the enterprise must have a substantial physical presence or a dependent agent as the permanent establishment to which profits are attributable. This principle from the Law of Corporate Income Tax (Article 4) exists in Serbian tax treaties and the definition of the PE is the crucial part of those treaties. As shown above, with an idea to make it easier for jurisdictions to claim the existence of a PE, the concept of the permanent establishment was under review in the BEPS Project. The MLI addresses in a Part IV the definition of PE for tax treaty purposes, while providing recommendations from the final report on BEPS Action 7. Consequently, as a country that has the MLI in force from 1 October 2018, Serbia incorporated and will incorporate respected provisions in its tax treaties. It can be seen that in the new tax treaty with San Marino signed on 16 April 2018, countries adopted number of the BEPS Project

[344] Dejan Popović, Svetislav Kostić, '(Ab)use of foreign legal entities for the purposes of avoiding taxation in Serbia', Annals of the Faculty of Law in Belgrade, Belgrade Law Review <anali.ius.bg.ac.rs/A2010-2/Anali%202010-2%20str.%20036-059.pdf> accessed 14 November 2018

[345] 'BEPS Actions implementation by country; Action 4 – Interest deductions' (*Deloitte Website*, 2017) <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax- beps-action-4-interest-deductions-implementation-matrix.pdf> accessed 14 November 2018

novelties including those from Action 7 on preventing the artificial avoidance of permanent establishment status via anti-fragmentation rule, the expanded definition of agency PE, the splitting-up of contracts as well as making all the specific activities exceptions subject to the preparatory or auxiliary requirement. However, for the MLI to have effect on this particular treaty with San Marino, both jurisdictions need to include this treaty in their list of CTAs. As an example, the expanded definition of a PE – because of the increased importance of digital economy, can be seen in the Article 5 Paragraph 2(7) of the Law on Confirmation of the Agreement between the Government of the Republic of Serbia and the Government of the Republic of San Marino on the Avoidance of Double Taxation and Prevention of a Tax Evasion in Relation to Income Tax, according to which the permanent establishment will exist in situations when server or other type of electronic device of one contracting country performs in another contracting country if following conditions are applying: (1) a server or other type of electronic device is fixed in the other contracting country; (2) a server or other type of electronic device, as well as their location are at the disposal of the enterprise; (3) the business operations of the enterprise of the first contracting country shall be wholly or partly performed by a server or other type of electronic device; while activity or activities of the enterprise of the first contracting country which is carried out in the other contracting country by means of a server or other type of electronic equipment are not of a preparatory or auxiliary character.[346] According to what is mentioned above, once provisions on PE became clear and complete, it can be expected that the Serbian national PE concept will be in accordance with the BEPS Action 7 recommendations since it is believed that the post-BEPS OECD Model Convention is likely to become a basis for negotiation of all future tax treaties.

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Next to the Action 13 on transfer pricing documentation and Action 14 on dispute resolution mechanisms, other transparency Actions of the BEPS Project are Actions 11 and 12. Due to lack of relevant resources in the field of methodologies of collecting and analyzing data on BEPS as well in the field of disclosure of aggressive tax planning, Actions 11 and 12 will not be elaborated in this thesis furthermore. However, it should be noted that important Anti-BEPS changes and amendments to Serbian tax law are expected starting from 2019. Markedly despite the fact that Action 12 is not a minimum standard, countries are advised to introduce a mandatory disclosure regime and moreover, within the EU because of this regime intermediaries and taxpayers are obliged to automatically report certain cross-border arrangements. Thus, it is believed that recommendations from this Action will be seen in the coming years as parts of the Serbian legislative.

[346] Draft of the Law on Confirmation of the Agreement between the Government of the Republic of Serbia and the Government of the Republic of San Marino on the Avoidance of Double Taxation and Prevention of a Tax Evasion in relation to Income Taxes (n 204)

5. Serbia and the European Union - impact of the EU Anti-BEPS measures?

Through this thesis, the EU Anti-BEPS measures are taken into consideration as a result of Serbian integration in the European Union. Generally speaking, even though collecting taxes is connected with the question of national sovereignty of countries that impose taxing rights, the European Union is actively working on harmonization of tax systems with the aim to keep functioning of the Internal Market and the EU freedoms – movement of goods, persons, capital, services and establishments - effective. Consequently, the EU rules on taxation cover not only value added tax and excise duties but also some aspects of corporate taxation, cooperation between tax administrations and as expected - the exchange of information obligations to prevent tax evasion.[347] Furthermore, regarding the harmonization of direct taxes in the EU, according to the Art.115 of the Treaty of Functioning of the European Union, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, 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.[348] Markedly, Directives are the most used tools in the EU for harmonizing national tax regulations in order to ensure a coordinated and uniform application of the BEPS Action Plan rules - which substantially affect the single market.[349]

Regarding the BEPS phenomenon, it was possible to see that the EU has taken significant steps in addressing tax planning strategies that result in base erosion and profit shifting. Since those measures will have a lot of impacts on domestic legislation of Member States, the question is what would be their potential impacts on the Serbian legislation. It is important to keep in mind is that the EU tax law is of special interest for the EU associated countries, because of the European Association Agreements that contain obligation for harmonizing the national legislation of associated country with the legal framework of the Union. In 2008, Serbia concluded the Stabilization and Compliance Agreement, which came into force on 1 September 2013. Consequently, in the context of joining the Union, the Serbian tax law will be exposed to the strong effects of European law. It is important to note that on 1 March 2012, the status of candidate for membership in the EU was granted to Serbia, and on 21 January 2014, accession negotiations started.[350] Furthermore, the European Commission's 2018 Report on Serbia recognized in Chapter 16 that the country was prepared in the area of taxation since progress had been made in legislative alignment. However, it was recognized that the reform of the tax

[347] Commission staff working document, 'Serbia 2018 Report' Accompanying the document - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (2018) Communication on EU Enlargement Policy, Strasbourg, 17 April 2018 SWD(2018) 152 final <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf> accessed 14 November 2018

[348] Article 15 of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union ‧OJ C 326, 26/10/2012 P. 0001 – 0390; Dejan Popović (n 30)

[349] Guglielmo Ginevra (n 163)

[350] Dejan Popović (n 30)

administration, particularly simplification of tax procedures, streamline the administration's activities while making sure there were enough human and IT resources - has slowed down. However, the EU noticed Serbian progress in the field of administrative cooperation and mutual assistance, after becoming a member of the Inclusive Framework on BEPS and the Global Forum on Transparency of Information for Tax Purposes. As mentioned, Serbia will ratify the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters by the end of 2019.[351] Having in mind all previously mentioned facts, it can be expected that once Serbia becomes a member of the Union, the country will follow the EU Member States in implementing the EU Anti-BEPS measures such as implementation of Anti–Tax Avoidance (ATA) Directive or the automatic exchange of information on cross-border tax rulings while taking care of corporate transparency through Country-by-Country (CbC) Reporting since it is believed that a regional implementation of the Anti-BEPS measures is much more efficient, than the unilateral measures that might been taken by the EU Member States.[352]

Conclusions

The Base Erosion and Profit Shifting practices represent a serious threat for countries' tax revenues. Consequently, the OECD as well as the EU brought instruments that are capable to address this issue once they are implemented in countries' tax law. It is believed that no country will be isolated from this global initiative. This Master Thesis aims to emphasize the impact of Anti-BEPS measures in Serbia. Since in the time of writing, the BEPS phenomenon is recent in even more developed countries, this research seemed to be very challenging. As a result, the first three chapters offered the theoretical overview of the most important characteristics connected with the BEPS phenomenon, with the purpose to build a good base for the next chapter, which contains the main topic. Following the above-mentioned disclosures, it can be concluded that the true focus on the BEPS initiative in Serbia will prevail in the coming years. However, it cannot be underestimated that Serbia is following the OECD standards in this field. Namely, the fact that the MNEs are ready to take part into sophisticated tax schemes despite the existence of variety of anti-avoidance rules and mechanisms is not unknown to Serbia. Moreover, the arguments that Serbia has the MLI into force and that it is a Member of the Inclusive Framework on BEPS, represent proofs of country's willingness to strengthen its own tax legislation and to accept these Anti-BEPS global tax trends. In addition, as soon as Serbia enters the EU, the EU Anti-BEPS measures will be incorporated into Serbian legislation. However, to establish legal certainty and trust in tax administration, these

[351] Commission staff working document, 'Serbia 2018 Report' (n 347)
[352] Ana Paula Dourado, 'The EU Anti Tax Avoidance Package: Moving Ahead of BEPS?' (2016) *Intertax*, Volume 44, Issue 6 & 7, Kluwer Law International BV, The Netherlands

internationally accepted initiatives must be implemented in the Serbian law with the highest carefulness and taking into account the BEPS implementation practices in countries that are at the same level of development as Serbia.

This Thesis tackled the constantly growing focus on IT industry, which additionally sets the need for better regulation and control of tax systems. Since Serbia is putting significant efforts to position itself in this sector, it is expected that tax rules in the IT area will be regulated appropriately. Furthermore, because of its geostrategic position and human resources, Serbia has become an attractive place for foreign investors and multinational enterprises. To save operating costs and increased efficiency, MNEs which operate on the Serbian market will perform only a part of their activities in the country and other parts will be done through outsourcing and off-shoring activities. Therefore, these global trends in the functioning of MNEs cannot bypass Serbia and consequently - the tax system reform is inevitable. Moreover, Serbia is pursuing a complete liberalization of capital flows, opening its borders for free inflows and outflows of capital. This means that residents from Serbia, both physical persons and legal entities will be able to invest abroad more freely and to create returns on invested capital. Finally, digitalization and digitalized business models take advantage from BEPS opportunities, thus motivating tax policy makers worldwide to improve tax laws in accordance with global challenges. Despite of all above mentioned, the reform of the Serbian tax system is a complex process, which requires broad understanding of main issues as well as tools to address them. Consequently, capable and well-trained tax authorities with enough administrative capacity are crucial both for applying new tax provisions in the field and even more important for implementing those provisions properly. It must not be overlooked, that business entities operating in Serbia must also be familiar with the way how the BEPS measures are implemented in the country, since the lack of clarity in this area can lead to different interpretations by taxpayers and furthermore can cause problems in practice. Consequently, the proper communication with business community and exchange of views are important for qualitative functioning of tax system.

As a conclusion, bearing in mind that the goal of the Serbian Government for the year 2019 is to reform the Tax Administration and tax system[353], Serbia should start with introducing BEPS measures, meaning that it would not be late for the international practice. However, this Thesis aimed to prove that because of the MLI and its minimum standards, Serbia is already actively working on strengthening the concept of transparency with the initiative from the Action 5. Consequently, the next OECD analysis of individual country progress on transparency will include Serbia as well. Regarding the initiative under the Action 6, to eliminate double taxation, Serbia accepted the Principle Purpose Test. Even though there are not so many mutual agreements procedure cases in Serbia and even no information on MAP is publically available, due to the BEPS Action 14, the Serbian dispute resolution mechanism was under review. As an additional tool in MAP, a lot of countries adopted arbitration provisions in their tax treaties, which has not

[353] Serbian Minister of Finance Sinisa Mali, 'Tax Administration and Taxation System Reform Next Year' *Executive Newsletter,* Issue No. 4156 Published by Ninamedia (Belgrade, 8 November 2018)

been available in Serbian tax treaties yet. Consequently, introduction of this clause might be a good novelty in the Serbian tax legislation. The Action on transfer pricing documentation or the Action 13 is another minimum standard Action from the BEPS Project, so it is expected that Serbia will make its transfer pricing documentation stricter to provide more legal certainty in transfer pricing. According to the OECD, there is a pending status on the CbC in the Serbian domestic law while information exchange network is still not activated. Even though the Action 7 is not a minimum standard Action, as mentioned above, novelties on the expanded definition of permanent establishment, on preventing the artificial avoidance on PE status and other recommendations under the Action 7 can be seen in Serbian law. However, it is still believed that provisions on PE are incomplete and unclear[354]. Finally, it remains to be seen in practice how Serbia would incorporate those minimum standard Actions, how the country will accept other Anti-BEPS measures as well as to consider whether there is a place in the Serbian legislation for some of them, such as CFC rules, in order to close possibilities for tax avoidance practices that have harmful effects on the fiscal interest of the Republic of Serbia. Perhaps the opening of Chapter 16 "Taxes" in Serbia's accession negotiations with the European Union will be a step forward with this regard. Nevertheless, modernization and progress of the Serbian tax system is inevitable.

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Abstract

In recent years due to economic challenges, tax planning practices that shift profits from high to low-tax countries have been strongly applied by multinational companies thus affecting not only corporate tax revenues of governments worldwide but also harming people as taxpayers and businesses themselves. Consequently, the OECD and G20 countries decided to take a joint action in addressing the issue of tax avoidance which uses gaps and mismatches in tax rules with aim to pay less or no tax. Additionally, the European Union Member States and other interested countries have joined that global initiative. Therefore, as in case of each country that is interested in developing domestic legislation and strengthens the economy by incorporating internationally accepted initiatives, it is expected that Serbia will follow this Anti-Base-Erosion-Profit-Shifting trend. Once Anti-BEPS measures are implemented in the country, they will influence the businesses in Serbia. Moreover, as a country that has been awarded with the EU Candidate Status, the EU Anti-BEPS measures will impact the Serbian tax legislation, especially after Serbia becomes a Member State.

Since the OECD and the EU Anti-BEPS Projects are recent, broad and complex, the aim of this Thesis is firstly to understand phenomenon of base erosion and profit shifting - i.e. to answer who are the main users, what is tax planning in general and what are potential counter tools that could be used by countries. After those points are emphasized, the Anti-BEPS instruments and particularly the OECD Actions against BEPS are in-depth analyzed in order to built a base for the main part of this Thesis. Moreover, it was necessary to underline the domestic Corporate Income Tax framework before elaboration of the expected impacts of BEPS Project(s) in Serbia. Finally, this Thesis confirms that by having the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting in force from 1 October 2018 in the country and becoming the Member of the Inclusive Framework on BEPS, Serbia will align its tax legislation with these overall global tax trends.

Abstract (German)

Dank der wirtschaftlichen Bewegungen, wurde in den letzten Jahren die Steuerplanierungpraxtis, die den Profit von einem Land mit hohen Steuern nach der Niedrigsteuerländern zieht, bei dem multinationaler Kompanien intensiv angewendet, was nicht nur die Einwirkung auf die staatlichen Körperschaftssteuereinnahmen weltweit hat, sondern auch auf die Steuerzahlern und die Wirtschaft selbst einflußreich ist. Daraufhin haben sich OECD und G20 Länder eine gemeinsame Aktion zu unternehmen entschlossen, damit sie das Thema der Steuervermeindung durch die Benutzung der Unterschieden und Unstimmigkeiten in Steuervorschriften mit dem Ziel weniger zu gar

keine Steuern zu zahlen, addressieren wollten. Zusätzlich dazu haben sich die Mitgliedstaaten der Europäischen Union und andere interessierte Länder dieser globalen Initiative angeschlossen. Deshalb, als im Falle jedes Landes, das an der Entwicklung der inneren Gesetzgebung interessiert ist und das eigene Wirtschaft durch die Einbindung international aufgenommenen Initiativen stärkt, es wird erwartet daß Serbien diesem Anti-Base-Erosion-Profit-Shifting Trend folgen wird. Sobald Anti-BEPS-Maßnahmen im Land umgesetzt werden, werden sie die Unternehmen in Serbien beeinflussen. Darüber hinaus, da dies ein Land ist, das mit dem EU-Beitrittskandidatenstatus ausgezeichnet wurde, werden die Anti-BEPS-Maßnahmen, besondere Auswirkungen auf die serbische Steuergesetzgebung haben, gerade nachdem Serbien ein Mitgliedstaat geworden sein wird.

Da die OECD- und die EU-Anti-BEPS-Projekte neu, ausführlich und komplex sind, besteht das Ziel dieser Thesis in erster Linie darin, das Phänomen der Erosion der Basis und der Profitverlagerung zu verstehen, d.h. die Antwort darauf zu geben wer der Hauptbenutzer ist, was die Steuerplanierung allgemein ist und was die potentiellen Gegenmaßnahmen sind, die von den Ländern verwendet werden könnten.Nachdem diese Punkte herausgestellt worden sind, werden die Anti-BEPS-Instrumente und insbesondere die OECD-Maßnahmen gegen BEPS tiefgreifend analysiert, um eine Grundlage für den Hauptteil dieser Thesis aufzubauen. Darüber hinaus war es notwendig, den inländischen Körperschaftsteuersatz zu erklären, bevor die erwarteten Einflüsse des BEPS-Projekts in Serbien zu unterstreichen.

Schließlich bestätigt diese Thesis, dass die multilaterale Konvention die sich auf das Steuerabkommen beziehenden Maßnahmen gegen Erosion der Basis und Profitverlagerung, die seit dem 1. Oktober 2018 in Kraft in Serbien ist, und auch durch den Beitritt zur Mitgliedschaft im Inklusiven Rahmenwerk in Bezug auf BEPS, wird Serbien eigene Steuergesetzgebung mit diesen globalen Steuertrends anzugleichen.