A THEORETICAL APPROACH ABOUT NEW PERSPECTIVES IN TAXATION AT NATIONAL AND INTERNATIONAL LEVEL – BEPS AND ITS IMPLICATIONS IN ROMANIA

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Abstract

There is a big interest about the implementation of BEPS Plan and the manner it would configurate the international and national tax systems. Mostly, any change in fiscal legislation determines the question: „ does it change the unique rate?", but some other changes may strongly influence the fiscal environment, as the BEPS Plan shows itself. The scope of this article is to present an evolution of the main changes in international legislation, as well as to clarify the BEPS objectives and to present the main changes in taxation to which we will take part in the next period. We used a descriptive methodology, namely scientific articles published in various journals, books that are relevant in the specialized domain, legislation, official documents of different tax organizations, tax documents.

Keywords: tax regulations, BEPS, tax changes, OECD

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Introduction

Developing the business environment at international level has led in time to stronger integration of national economies into the global economy. However, when different tax systems interact, the prerequisites of double international taxation are created, which results in slowdowns in the pace of global economic development and declines in prosperity reached by various countries. Therefore, at global level, the need for concerted actions on the elimination of double taxation has been understood on the basis of internationally recognized rules and brought together in bilateral treaties concluded with a view to regulating the elimination of double taxation.

Under these circumstances, the OECD created the Convention Model on the Elimination of Double Taxation and Tax Evasion, a model which had as a basic criterion the taxation of the national enterprises in the jurisdiction in which they registered their headquarters. However, due to the rapid development of the world economy in recent years, the OECD model has begun to show its limits and to create impediments in the development of both the countries that have adopted it and multinational companies.

For these reasons, the G20 Group, which brings together the world's most important economies, has asked OECD to modify this model. Therefore, the OECD has developed a Plan of Measures to Prevent the Erosion of the Tax Base and Profit Transfer, an action plan known as the BEPS Action Plan.

The BEPS Action Plan is a radical change to the principle that has long ruled the OECD's tax philosophy, namely taxes and dues should be paid either where a multinational company has its office registered or where intellectual property rights on licenses and patents are registered.

The main change was imposed by the limitations that this principle showed in terms of the development of the information society and the difficulty of adapting of the developed countries governments to this new evolution of the global economy. In international practice, this principle allowed and even encouraged company registration and the transfer of intellectual property rights to low tax jurisdictions or even to tax havens, thus substantially reducing the level of tax collection in developed economies.

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Evolution of Changes in International Taxation

In time, there have been various structural changes in the world economy, largely driven by global economic and financial crisis. If the crisis of 1930 led to the acceptance of the need for state intervention in the economy in recession periods, by increasing public spending and investment, in order to fill the aggregate demand gap (Keynesian model), the crisis of the 1970s led, on the contrary, to economic liberalization, privatization, and deregulation, that made possible the economy revitalization in the 80s and 90s (the neoliberal model inspired by Milton Friedman).

This wave of economic liberalization, coupled with the technological revolution, especially in the communications and IT sector, has also led to an increase in globalization, an exponential increase in international trade volume, and the accumulation of imbalances, both in terms of income distribution in society and in terms of tax treatment of capital relative to that of labor.

Much more dynamic and easier to move from one jurisdiction to another to seek a more favorable tax regime, capital has become more and more difficult to tax by states all over the world, which started to increasingly base on labor and consumption tax revenues.

In 2010, the United States launched the Foreign Account Tax Compliance Act (FATCA) - a law that allows the US Fiscal government to gather financial information from financial institutions around the world about the income situation of US citizens in foreign accounts. This was the beginning of a real revolution in the international tax system.

The 2013 year was extremely active, especially when OECD launched the report on tax base erosion and profit transfer (BEPS), regarding three areas: adopting new standards to ensure the coherence of direct taxation systems at international level, realignment of tax system that should take into consideration the substance elements and increasing transparency, by new reporting rules and information exchange.

In Romania, in 2014, was introduced the holding regulation, which allows the Romanian firms to establish this type of companies, with no taxes on dividends distributed and capital gains.

Also, Netherlands introduced in the domestic legislation measures through which tax authorities were informed about the economic elements on which the holding company was set up, about the final beneficiary of the dividends and the confirmation that he had paid his taxes in his residence country.

Other European countries have also taken unilateral measures in their own tax legislations to combat double non-taxation. For example, Poland introduced the regulation on foreign controlled companies (in force since January 1, 2016). It involves taxing companies outside Poland that are owned by at least 25% by Polish companies and are taxed in their jurisdiction with a lower tax of 14,25%, if the income is derived from passive activities. Another example is Austria, which introduced provisions on limiting interest deductibility if the related income is not taxed.

In parallel with the exchange of tax information and the introduction of the above measures, mechanisms for the exchange of financial information were also introduced. In July 2014, it was also published by the OECD the Common Reporting Standard (CRS). CRS is the Standard for the Automatic Exchange of Financial Information which establishes a comprehensive methodology for the exchange of information between tax authorities on financial assets.

The transparency created by CRS is desidered to represent another element in preventing taxpayers to use financial accounts from other jurisdictions to avoid paying taxes in their residence country. Tax authorities are informed, through an automatic data exchange mechanism, on the taxpayers that obtain revenues in the foreign accounts or other financial placements.

The most effective measure to implement the exchange of information was the Multilateral Convention on Mutual Administrative Assistance in Tax Matter, signed by more than 80 countries. The next step was to sign the declaration of compliance with the provisions of the Multilateral Agreement on the Exchange of Financial Information, a document signed by Romania and 51 other jurisdictions. Romania began to exchange information in September 2017 for the 2016 financial data.

Also, Switzerland, known for its banking secrecy, has introduced the White Money Strategy - a strategy that is being used by countries that have not passed in the criminal law field tax evasion in

the residence or foreign country. During 2012, the Swiss Federal Council introduced a series of measures to increase the transparency of the Swiss financial system. Swiss financial institutions need to introduce a customer risk assessment system to ensure that they comply with tax laws in their countries of residence on the reporting and taxation of assets managed through these banks.

The European Union has already introduced a number of measures through the Income from Savings Directive. This Directive implements the exchange of information on any income in the form of interest earned by a resident of an EU country from an EU paying agent. Some countries (Luxembourg, Austria, Belgium) implemented the directive with a transitional period in which they derogated from the exchange of information on the beneficial owner, in return for the 35% interest income tax, applied by the income payer.

The 16th Directive on tax administrative cooperation introduced in 2011 already provided the exchange of information on a series of incomes between EU countries, namely spontaneous, automatic and on-demand information exchange.

Starting with January 1, 2015 automatic exchange of information between EU member states applies to pension, insurance, real estate, labor income, remuneration paid to administrators and other persons assimilated to them. At the same time, the EU will continue to adapt European provisions to international developments. In this respect, the EU has already published a proposal regarding the 16 Directive amendment, by implementing automatic exchange of information on tax solutions issued by Member States.

Directive 2014/107 / EU on automatic exchange of information in the field of taxation is also in the process of implementation, and it concerns the automatic exchange of information along the lines of the common reporting standard (CSR).

The following table presents a summary of changes in international tax legislation between 2010 and 2017.

Table 1

Changes in international tax legislation

Year	Explanation
2010	-USA launches FATCA (Foreign Account Tax Compliance Act); -The first OECD report on offshore voluntary compliance
2011	-Directive 2011/16 / EU on administrative cooperation in the field of taxation (DAC) is adopted, through which Member States' authorities can exchange information, on demand, spontaneously and automatically, from 2015, on earnings, pensions, administration, insurance, real estate properties
2012	- White Money Strategy - Switzerland reforms the financial system and adopts another attitude towards banking secrecy
2013	-OECD issues the BEPS report; -Proposal to amend Directive 2013/34 / EU on the annual financial statements introducing new reporting obligations (country-by-country reporting CbC)
2014	-OECD has launched the full version of the Global Standard for Automatic Information Exchange; -New Directive extending the automatic exchange of information between EU countries on financial revenues; -EC starts investigations into groups of companies (Starbucks - Netherlands, Apple-Ireland, Fiat-Luxembourg)
2015	-EU and Switzerland signed a new agreement for automatic exchange of residents' financial information in 2018; -DAC had a number of proposed modifications; -OECD issues the final BEPS reports; -OECD issues the second report on voluntary offshore compliance
2016	-OECD has launched the standard electronic format for country-to-country reporting (CbC) between jurisdictions; -Special meeting of the OECD Committee on Fiscal Affairs; -European Commission presents the anti-tax evasion package (ATAD Directive)
2017	-European Commission will prepare the list of non-cooperative jurisdictions; -European Commission will publish the Common Consolidated Corporate Tax Base (CCCTB)

Source: PriceWaterHouse Coopers (PwC), Mihaela Mitroi, "Evolution in International Taxation"

As far as Romania is concerned, our country has made significant progress, namely:

- implemented transparency measures;

- introduced in the Tax Code the definition of the artificial transaction;

- the transposition of the Directive on the common tax regime applicable to parent companies and subsidiaries;

- introduces Common Reporting Standard (CRS);

- order the amendment of double taxation avoidance treaties.

About the BEPS Plan

BEPS is the abbreviation for Base Erosion and Profit Shifting. It is a result of globalization, a natural trend to maximize net profits of companies worldwide. It consists of a set of 15 measures developed by the OECD in order to reduce the tendency of multinational companies to transfer profits to low tax jurisdictions or where certain taxes are not applied by using tax strategies based on differences between national tax systems.

These measures mainly aim at:

- aligning the international tax system to the rapid evolution of the digital economy by streamlining the taxation of digital products and services;

- cancel the negative effects of hybrid arrangements and prevent the abusive use of double taxation conventions by eliminating double taxation;

- counteracting harmful tax practices and aggressive tax arrangements by improving transparency and information sharing;

- taxing profits in jurisdictions where value-generating activities are taking place by developing rules that prevent intangible artificial allocation, risks assumed within the group, etc.

In 2014, the following "deliverables" were prepared:

• 2 final reports: A unified understanding of the characteristics of the digital economy and of the risks related to this area and agreed to the separation of the digital economy from other economic segments is impossible. Following consultations with international tax experts, the OECD has concluded that a multilateral international instrument to incorporate BEPS measures into double taxation treaties is feasible and could soon be developed.

• 1 Interim Report: Progress towards transparency and exchange of information on specific tax solutions for certain taxpayers, namely a methodology for establishing substance criteria for intellectual property rights.

• 4 reports with recommendations (project stage):

- a set of recommendations for national legislation and the amendment of the OECD Convention on Hybrid Arrangements;

- clear and comprehensive rules to stop double non-taxation;

- establishing a minimum level of "protection" against the abusive use of double taxation conventions that countries can implement in conventions by including general and specific rules to limit benefits in certain situations;

- Developing guidelines for identifying non-incorporated items and setting trading conditions at market price, as well as allocating intangible profits;

- Developing a country-by-country transfer pricing model containing information on the location of profits, sales, employees and assets, as well as the taxes paid.

The BEPS calendar was as follows:

- June 2012 - announcement / start of the project,

- February 2013 - the first document addressing the phenomenon is issued,

- July 2013 - The Action Plan is issued with 15 measures grouped on 3 pillars (coherence, transparency, substance),

- September 2014 - Issuing final bids for 7 of the 15 actions,

- December 2015 - issuing the final reports for the remaining 8 measures,

- starting with 2016 - monitoring, introducing additional measures.

BEPS actions are explained in table 2.

Table 2

BEPS Actions

Action	Publication year	Description
Action 1. Tax challenges approach in the digital economy	September 2014	Identifies the main issues in the digital economy and desires a holistic approach to both direct and indirect taxes.
Action 2. Neutralizing the effects of artificial arrangements	September 2014	Developing models and recommendations regarding national legislation to combat the use of tools and companies for tax purposes only.
Action 3. Strengthening CFC Rules (Controlled Companies)	2015	Developing recommendations on the form of rules on foreign controlled companies. This measure will also be synchronized with other actions
Action 4. Limiting the base of erosion by deducting interest and other financial payments.	2015	It deals with the use of interest and loans to reduce the taxable base. This action is also correlated with actions directly linked to transfer prices
Action 5. Fighting harmful tax practices more effectively, given the transparency and substance of transactions.	September 2014	This action requires close collaboration with non-OECD countries, as it may also imply a spontaneous exchange of preferential rules.
Action 6. Preventing the granting of benefits through treaties	September 2014	The action aims to clarify that the signed treaties are not intended to cause double non-imposition and proper information of States before signing such a treaty.
Action 7. Prevention of artificial avoidance through the permanent establishment		This document brings changes to the definition of the permanent establishment so as to limit its artificial use.
Action 8. Transfer pricing guide for intangible assets	September 2014	Develop rules to prevent base erosion and transfer profits by moving intangible assets between group members. This will involve: (i) the adoption of a clear and comprehensive definition of intangible assets; (ii) ensuring that profits associated with the transfer and use of intangible assets are appropriately allocated in accordance with value creation; (iii) the development of transfer pricing rules or special measures for intangible transfers that are difficult to assess; (iv) updating guidance on how to contribute to the cost.
Action 9. Risks and capital	2015	Develop rules to prevent base erosion and move profits by transferring risks or allocating excessive capital between group members. This will involve the adoption of transfer pricing rules or special measures to ensure that no additional revenue is earmarked for an entity only because it has contracted or supplied capital. The rules to be developed will also require a revenue modeling based on the value created.
Action 10. Other transactions with high risk	2015	It refers to very rare transactions between third parties. This will entail the adoption of special transfer pricing rules or measures in order to: (i) clarify the circumstances of base erosion and the shift of profit in the transactions that can be reclassified; (ii) clarify the application of pricing methods, in particular the method of profit-sharing, in the context of global value chains; (iii) provide protection against common types of erosion of the tax base, such as administrative and management costs.
Action 11. Establishing methodologies for collecting and analyzing data on BEPS	2015	Develop recommendations on the indicators that will measure the effectiveness of the measures proposed in this plan.
Action 12. The duty of taxpayers to disclose aggressive tax planning arrangements	2015	Provisions on rules that will force businesses to provide information on transactions, arrangements, or structures used in as many countries as possible
Action 13. Transfer pricing documentation guide and country to country report	September 2014	New requirements are being developed in terms of the information provided by both the company in a country and the whole group as a whole
Action 14. Provide more efficient dispute settlement mechanisms	2015	Intends to include clauses on possible problems with a treaty by appealing to arbitration panels
Action 15. Development of a multilateral instrument	September 2014	The Multilateral Instrument is designed to provide an innovative approach to international tax issues, reflecting the nature of the rapid evolution of the global economy and the need for rapid adaptation to this evolution.

Source: Matei, D., Double Taxation Due to Transfer Pricing Adjustments, ABC Working Paper Collection of Financial Worlde , WP nr. 3/2015

Regarding information exchange in Romania, this has been implemented since 1 January 2015 for non-residents of EU Member States who obtained in Romania: labor income; remuneration paid to administrators and other persons assimilated to them; income from life insurance products not covered by other legal instruments of the European Union; income from pensions; income from real estate.

Spontaneous exchange of information (all taxes less VAT, customs duties, excise duties and social contributions) with other Member States occurs in certain situations: the competent authority of a Member State has evidence on the basis of assuming there may be tax losses in another Member State, artificial transfers of profits are made within groups of enterprises, etc.

In view of transparency, Romania has ratified the Convention on Mutual Administrative Assistance in Tax Matters by Law 13/2014. The subject of the Convention is administrative assistance with regard to:

- exchange of information (including simultaneous tax controls and tax controls abroad);

- recovery assistance, including conservation measures;

- submission of documents.

The taxes concerned are taxes on income or on profits and capital gains; mandatory social contributions; taxes on other categories (property, real estate, VAT, any other taxes).

Therefore, BEPS seeks to increase transparency, through international exchange of information, emphasis on the substance of transactions, implements Country by country reporting and anti-tax measures package, tax reports, new anti-abuse rules, amendments to Double Taxation Conventions, cooperates with states through bilateral agreements.

Implications of BEPS in Romania

The measures proposed by the BEPS Action Plan and presented above influence the change of Romanian tax legislation in the field of corporate income tax and withholding tax (ie tightening of rules on the abuse of double taxation avoidance treaties).

As a consequence, the BEPS Action Plan will result in changes to the Model Tax Convention for avoiding double taxation and the Transfer Pricing Guidelines. Even in May 2016, the OECD Council approved changes to the Transfer Pricelines Guidelines to reflect the measures proposed by BEPS (Actions 8-10, Action 13).

In addition, the European Council has recently reached agreement on a draft directive aimed at combating tax evasion practices. The draft directive proposes:

- rules on limiting interest deductibility - are intended to limit the amount of interest that a taxpayer is entitled to deduct in a tax year.

- rules on exit taxation - are designed to prevent the erosion of the tax base in the State of origin when assets including unrealized gains are transferred from the tax jurisdiction of that State without a transfer of ownership.

- a general anti-abusive rule - has the role of combating abusive tax practices.

- the rules on controlled foreign companies (CFCs) - have the role of reallocating the income of a foreign controlled subsidiary subject to a low tax rate to the parent company, usually subject to a higher tax.

- rules on the non-uniform treatment of hybrids - aim at standardizing the qualification of financial instruments and entities.

Nowadays, companies can take advantage of the differences between national tax systems in terms of legal classification and tax treatment of financial instruments or different types of entities in order to reduce tax liabilities. Thus, unequal treatment may lead to double deductions (deductions in both States) or a deduction of income in a State, without including them in the taxable amount in the other State.

The deadline for transposing the above provisions into national law is 31 December 2018, except for the exit tax rules for which the deadline is 31 December 2019. As Romania is a member of the EU, we will face legislative changes in the coming period in the field of corporation tax and withholding tax, in order to reflect the changes made by the draft Directive.

In addition, as a result of the development of the BEPS Action Plan, the Information Exchange Directive has been amended to extend the automatic exchange of information for cross-border tax decisions. Practically, the exchange of information will act on two levels: increasing transparency by reporting taxpayers' information to the authority, and increasing transparency by reporting information between tax authorities in different jurisdictions.

The proposed changes at international level will influence how profits are distributed between jurisdictions, the tax strategies of multinational companies, but also the approach of tax authorities and tax counselors.

Specifically, the main effects of BEPS in Romania may be:

- new definitions of permanent establishments;

- very high transparency in the field of transfer pricing and documentation required on the basis of global requirements;

- the redefinition of intangible assets and the tax impact of their transfer;

- the abolition of traditional tax structures based on any hybrid form - whether we are talking about entities, debts or asset transactions;

- modifying the double taxation treaties to create instruments that can impose taxes where there is suspicion of non-taxation;

- a higher administrative cost;

- changing the arm's length principle in setting intra-group prices to include special measures based on the authorities' concept of where the value is added;

- "Country by Country Reporting" (CbCR) – set of reporting made by multinational groups of companies with incomes over 750 million Euro - will be implemented from 2017 with reference to 2016 data;

- mandatory distribution of taxpayer data - total transparency of the entire organization chart in every tax jurisdiction where the company is doing business;

- Implementing processes that lead to the more rapid prevention or resolution of disputes related to the application of double taxation avoidance treaties;

- redefining harmful tax practices;

- the mandatory transparency of aggressive tax planning.

Conclusions

There are significant changes at international level that will define the new international tax order. We notice a tendency to increase the exchange of information and fiscal transparency, but the changes in the coherence of taxation and the new tax rules are not to be neglected. These changes will certainly affect Romania, especially since some of them are coming as European directives.

Moreover, looking at all the above changes, the BEPS plan is not just a point on the OECD agenda, its principles are essential elements in all governments fiscal policy programs. More and more, the behavior of tax authorities and groups of companies is influenced by the current and expected impact of BEPS.

Romania may be affected by the results of the BEPS report on the amendment of double taxation avoidance conventions by introducing the benefit limiting clause as well as changes to the concept of permanent establishment. Also, changes to domestic legislation can be introduced to highlight the economic substance and purpose of the transactions. We are also expecting changes to the

requirements for transfer pricing documentation in line with the recommendations issued due to the BEPS report.

The new global context therefore means more restrictive fiscal measures, more transparency, but also more bureaucratic reporting procedures to authorities, reduced tax planning and the restriction of deduction rights, as well as stricter forms of control over capital migration and profits.

According to a Deloitte survey, globally, in 2017, multinational groups' representatives consider, overwhelmingly, that the global tax model is in a process of re-establishing on other principles, and the approach of tax authorities within controls become more strictly. Similarly, additional reporting requirements in the transfer pricing area will substantially increase the administrative compliance burden and the authorities will focus, regardless of any legislative changes, on tax audits as a result of the current debate on BEPS.

The impact of 15 BEPS actions will be felt by Romanian companies on two main plans. First, the tax authorities will place more emphasis on the analysis of the economic substance of transactions to the detriment of their form. Secondly, it will increase tax transparency. For this reason, the Romanian tax authorities will have access to the financial and tax information of all entities within a group that parent companies report in their jurisdiction, including their permanent branches / headquarters in Romania. At the same time, Romanian taxpayers have to analyze the business structure to ensure that they comply with the new rules. They also have to pursue more strictly the way corporate profits are taxed, depending on the place where economic activities take place.

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