Fixing Financial Plumbing: Tax, Leaks and BEPS in Europe

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Abstract:

Aggressive tax planning by multinational enterprises (MNEs) costs EU member states between €50-70 billion and €150-190 billion per annum through base erosion and profit shifting (BEPS). This tax gap has been blamed on ‘unethical’ companies acting legally, but inappropriately. Action to curtail this behaviour has been made possible by the confluence of two powerful movements: a popular articulation of tax morality as it relates to MNEs and the high issue salience reached as a consequence of the financial crisis and austerity in Europe, an emerging discourse around tax morality, and the efforts of prominent whistleblowers. As a result, domestic governments have removed their ‘soft’ veto and facilitated supranational bodies in innovating on corporate taxation, helping to rebalance the technical and structural superiority of MNEs in the international tax system.

Keywords: Tax, business, ethics, EU, whistleblowers.

Aggressive tax planning by multinational enterprises (MNEs) costs EU member states between €50-70 billions and €150-190 billions per annum through base erosion and profit shifting (BEPS), depending on the methodology used to calculate it.\(^1\) During the European financial crisis that began in 2007 and persists today, there has been a growing public and political awareness of the aggressive tax practices employed by MNEs. As a consequence, the public is becoming increasingly disgruntled with the privileged position of MNEs in the tax system, considering it ‘unfair’ or even ‘immoral’. There has been a public and political outcry for action against MNEs acting legally, but ‘unethically’, against what is commonly seen

\(^1\) The discrepancy between where businesses invest and where their activities are based, and where they report profits for the purposes of taxation is known as base erosion and profit shifting. The erosion element is the deliberate minimisation of a business's tax base, whilst the shifting of profit is one of the ways that businesses achieve this minimisation. Dover et al., *Bringing transparency, coordination and convergence*, 1.
as the spirit of tax policy. Thus tax reform has been driven by tax morality and the political momentum derived from issue salience. This article argues that issue salience was generated by the circumstances of the financial crisis (domestically and transnationally), and by media and political activism that was the result of high profile investigations into aggressive tax planning, and leaks from those with privileged access to aggressive tax planning processes. But, it also argues that the unethical MNE tax planning originates in the member states themselves, which have too closely guarded tax sovereignty, failed to cooperate when establishing tax rules, and failed to share tax information appropriately. This has allowed MNEs to guard the interests of their shareholders, as they should, but has caused them to fail what some have described as ‘the front page test’ or what others have described as a ‘soft-law approach’, that is a positive perception in the public eye.

In the extant literature, the issue of tax morality can nearly always be located near the rates of compliance with tax codes, and the individual and structural factors that feed into the levels of compliance. So, the tax morality argument for the BEPS reforms – by the Organisation for Economic Cooperation and Development (OECD) and in parallel by the EU – is a slight stretch of this established logic: the companies affected have not illegally evaded tax, they have legally worked with the established rules to minimise their tax obligations. Benno Torgler allows us to make this conceptual leap through his extension of the concept to suggest that tax morale is really concerned with social norms of compliance. The popular test of ‘fairness’ is therefore one where the feel or sense of equity is more important than adherence to the rules. Both Allison Christians and Judith Freeman have persuasively argued that MNEs should just be judged by legal measures, not moral interpretations, but we can see that the public has not followed this advice. Consequently, it can be concluded that public protest should rightly fall on the drafting of tax codes, rather than on the MNEs, with all the reputational damage they have faced as a consequence. There is also further work to be done by governments and researchers to analyse the social-

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2 For a lengthy discussion, see Prebble and Prebble, “The Morality of Tax Evasion”.
4 Alm and Torgler, “Do Ethics Matter?!”.
5 Torgler, “Tax Morale and Tax Compliance”, 663.
6 Wiebe, Putting tax transparency.
7 Christians, “Taxpayer Morality”.
psychology of MNEs and what drives their strategy towards taxation and compliance with both the letter and the spirit of legislation.⁸

That the tax affairs of MNEs have been judged critically since 2013 by the ‘front page test’ or ‘soft-law approach’ is self-evident. However, this increased issue salience has also led to policy action. The most significant piece of policy reform concerning such behaviour is the OECD’s Base Erosion and Profit Shifting Action Plan, which was published in October 2015. The BEPS Action Plan is a series of fifteen Action Plans to ameliorate the problem of BEPS by MNEs. Whilst the OECD’s efforts have been the most prominent international manifestation of the attack on aggressive and unethical tax planning, they must be seen in concert with the efforts made by the G20 and the EU institutions.

These coordinated policy efforts are the consequence of a series of circumstances that have coalesced into an exceptional and permissive environment for such attempts to be made. This could correctly be described as a ‘once in a lifetime opportunity’, driven by tax morality. It is one in which the networks of influence that have been exerted by MNEs since the end of the Second World War have suddenly found a natural limit, and mainstream and establishment political actors have been forced to respond to populist politics and the need to maximise income. This is known in public policy literature as ‘issue salience’.

The core questions that led to issue salience emerging as an answer concerned the relative success or otherwise of commercial lobbying in legislatures.⁹ It was found that business interests are able to use their technical and structural advantages to shape legislative and regulatory reforms at times when an issue – such as corporate tax reform – has low issue salience. The converse was found to be true when an issue is highly salient in public and political circles. Then the structural advantages can be minimised because legislators and international organisations, in particular, are keen to guard against the charge that they are unduly influenced by sectoral interests.¹⁰ This allows activists and other expert groups to acquire a much larger role in technical reforms than would be possible in times of low issue salience. Indeed, Kalyanpur Newman goes further and argues from a convincing empirical platform that, in times of high

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⁸ Alm, Sanchez and De Juan, “Economic and Noneconomic Factors”.
⁹ Jones et al., “The Destruction of Issue Monopolies”.
¹⁰ Culpepper, Quiet Politics and Business Power; Newman, “Transnational Capture or Transnational Pluralism?”; Moravcsik, “Reassessing legitimacy”.

issue salience, the structural advantages of MNEs actually serve as an active disadvantage and attempts to lever advantage result in counterproductive outcomes: he describes this as the “(Multinational Corporation) MNC Paradox”. Such a pattern can be observed in the case of aggressive MNE tax planning and the recent attempts to reform corporate tax policy.

The movement of corporation tax from low issue salience to high salience, and the creation of a permissive environment for reform emerged partly as a consequence of the 2007 global financial crisis that was felt keenly in Europe. The response of governments to the crisis in sovereign and private debt was to initiate austerity measures. For many citizens in Europe, this resulted in significant reductions in wages, pensions and government services, whilst seeing widespread unemployment. At the same time, many governments raised direct and indirect taxation rates. The political mantra of ‘we are all in this together’ was adopted, in various forms, by many European governments. This signalled to the pressed taxpaying public that, whilst they had been burdened with higher tax rates and fewer public services, the business community was also sharing in the burden of the financial crisis.

Aggressive corporate tax planning had already been on the OECD’s agenda since 1998, but active and impactful reform had been difficult to achieve, and the EU’s attempt to create a Common Consolidated Corporate Tax Base failed to gain traction in 2011 because of low issue salience and the consequent absence of political imperative. The steady emergence of increasingly prominent media stories about household-name MNEs paying very low levels of corporate tax helped to increase salience and, once conflated with tax morale, specifically a normative expectation on how much tax MNEs should be paying, brought the issue into the active political realm. Austerity brought with it insurgent and successful anti-austerity political parties, such as SYRIZA in Greece, who campaigned not only on ending the austerity measures, but also making large businesses pay what they consider to be a fair amount of tax. Public opinion and the electoral impact of these messages also forced mainstream political parties to address this issue seriously and to stop protecting the interests of MNEs nationally and allow supranational bodies to initiate policy action on these issues.

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11 Newman, Ibid.
12 OECD, Harmful Tax Competition.
There are strong political barriers to such international cooperation, as there are in policy areas such as defence and security. Control of tax policy and collection is considered an issue of core national sovereignty.\(^\text{13}\) This is because collected taxes contribute to national earnings, and earnings translate loosely into power in the international system, via directly bought military power, the ability to invest, or to provide influence via development aid. Source of income and arrangements made with MNEs are deemed to be confidential, indeed often cloaked in the same levels of secrecy as national security sovereignty.\(^\text{14}\) Tax sovereignty has also led to tax competition between states resulting in lower effective tax rates (a race to the bottom). The Republic of Ireland is often cited as the exemplar of this behaviour as it tapered its corporate tax rate down from 32 percent in 1998 to 12.5 percent in 2002. This radical reduction in the effective rate in Ireland has been given as the primary reason for the relocation of the European businesses of a large number of MNEs to Ireland. Facebook has recently promised to book some of its UK-based activity in the UK, rather than Ireland, as a result of the considerable negative publicity it has faced for these arrangements.\(^\text{15}\)

The household-name multinationals operating in Europe that became the focus of negative public and political attention because of their tax arrangements, such as Google, Apple, Starbucks and Vodafone, pursued conspicuously weak public and political strategies in the face of this criticism. The MNEs failed to identify and then adequately respond to the issue salience, removing their agency from the process of radical reform that the literature tells us is possible at the supranational level once an issue hits a threshold of salience. The MNEs’ reluctance to appear before national and European Parliamentary committees, and the perception of strongly evasive answers to the questions of parliamentarians only seemed to validate the charges of being amoral and distinct from their customer bases laid at their feet. These MNEs seem to have been caught out by the improvements in the public’s understanding of taxes, which has come about as a result of the financial crisis and increased media attention.

The use of (entirely spurious) analogies between public finance and household finance have only served to magnify the sense of grievance felt by the public when confronted with news reports concerning the

\(^{13}\) Ring, “What’s at stake in the sovereignty debate?”

\(^{14}\) This is also to protect the commercial confidentiality of businesses.

\(^{15}\) Ahmed et al., “Facebook faces profits hit”.
extent to which MNEs have managed to minimise their corporate tax. As an indication, it has been estimated that in 2015 Google had an effective tax rate of 5 percent, whilst Facebook enjoyed a rate of 3.6 percent. This is in stark contrast to the ‘household’ income tax rates for ordinary, reasonably well-paid middle class citizens of 45 percent in Italy, Germany and France, 47 percent in the UK and 55.56 percent in Denmark, and outside of the EU, 37 percent in Switzerland and 25 percent for comparative earners in the United States.

**Issue salience and the role of revelations**

It is notable that the political drivers to corporate tax reform did not originate within the governments, which would have benefited the most from increased revenues. In 2009, Richard Aldrich coined the phrase ‘regulation by revelation' in relation to government intelligence. Aldrich's phrase can be applied to corporate tax as well. The major accelerants in making these issues salient have largely come through the activities of whistleblowers and the series of leaks that have come from them. The explicit trigger for the European Parliament's investigation and legislative initiative in 2015 and 2016, for example, were the *LuxLeaks* of November 2014, in which Antoine Deltour revealed to the International Consortium of Investigative Journalists (ICIJ) the secret tax deals that the Luxembourg authorities had agreed with MNEs. Deltour’s actions were praised by the European Commission, amongst others, whilst he was prosecuted in Luxembourg and sentenced to a 12-month suspended jail sentence in June 2016.

In 2008, Heinrich Keiber, an employee of LGT Liechtenstein, sold a disk containing financial data to the German internal intelligence agency, the BND, which showed how circa 700 high-value individuals had hidden their tax affairs through contrived business arrangements. The BND passed the information on to German tax authorities who began legal proceedings against some of the protagonists. Keiber, meanwhile, lives in hiding as part of a witness protection programme. In 2013, *Offshore Leaks* was published by the ICIJ, which revealed details of 130,000 offshore trusts, which can be used legitimately, but which have

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16 Aldrich, “Regulation by revelation?”.

also been used to avoid tax. The whistleblower(s) in the *Offshore Leaks* are unknown. The *Swiss Leaks* scandal of February 2015 was triggered by an HSBC software engineer, Hervé Falciani, who had initially released to the French tax authorities in 2008 the details of alleged tax avoidance through HSBC and 20,000 offshore companies, but which became part of a further ICIJ release in 2015. Falciani was prosecuted *in absentia* in Switzerland and sentenced to five years in prison. Most recently, in April 2016, a presumed internal leak by ‘John Doe’, released to the ICIJ 11.5 million records relating to 114,488 offshore companies from the law firm Mossack Fonseca. This was the largest leak of this series, demonstrating in part, the use of offshore company structures to avoid taxes of various kinds. John Doe remains in hiding, in fear of his/her life, and almost inevitable prosecution. He or she has said in a statement on the ICIJ website:

> Legitimate whistleblowers who expose unquestionable wrongdoing, whether insiders or outsiders, deserve immunity from government retribution, full stop. Until governments codify legal protections for whistleblowers into law, enforcement agencies will simply have to depend on their own resources or on-going global media coverage for documents.\(^{18}\)

Leaks represent a significant challenge for tax authorities: whistleblowers have been demonstrably more effective than them at revealing widespread, international abuse of tax codes, and yet have done so with very little protection.\(^{19}\) This seems even starker when it is governments that stand to benefit from collecting a large proportion of the circa €150-190 billion corporate taxes eluded by means of BEPS. MNEs operating in the EU have – in effect – created a parallel financial system through shifting profits in such mechanisms as contrived royalty arrangements. The *Panama Papers* similarly highlighted a parallel financial system whereby high-value individuals or those compromised by international sanctions or political expediency can divert and hide their wealth from public view.

The next area apt for revelation are the so-called ‘freeports’. These are warehouses at international airports which technically sit in international space. Freeports were initially created to provide a place where objects could change flights without incurring taxes. They have subsequently been repurposed as a

\(^{18}\) Doe, “Panama Papers Source”.

\(^{19}\) The European Parliament is currently seeking to address this via legislation.
place to store and trade expensive objects without incurring any tax obligations. There is some evidence that freeports are also being used to stock rare commodities to manipulate prices on the international markets. Both sets of behaviour, which are currently subject to informed speculation, share similar characteristics with the behaviours and contrived mechanics shown in LuxLeaks and Panama Papers about profit shifting (in the former) and offshoring of private wealth (in the latter). Freeports are likely to be shown to be an additional element of this parallel financial system that has clearly grown up around high-value individuals and businesses. One of the more interesting conclusions we should draw from the prominence of the testimony of whistleblowers is that the public’s conception of tax morality (and the increase in salience of an issue) has been shaped, in part, by activist individuals in privileged positions.

How it works

BEPS is made possible, in part, by the way national tax codes relate and interact with each other. The gaps or frictions this creates between national tax codes has been aggressively exploited by many MNEs. Such gaps have been given amusing pet names, such as ‘the double Irish’ and ‘the Dutch sandwich’, but in essence these schemes have given rise to a situation where businesses have benefitted from double non-taxation, or less tax than would have been the case from a full single taxation. BEPS is also the shorthand for contrived tax arrangements where no or very little tax can be legally owed through shifting profits away from jurisdictions with relatively high prevailing rates of corporate tax to jurisdictions with lower rates, but where very little or no economic activity has taken place. Many of these schemes have involved an MNE dividing itself into a group of companies with those in the group in higher taxation jurisdictions paying large royalty fees to those in the group who are in low taxation jurisdictions. Such arrangements would be considerably more difficult for MNEs that present themselves as a single entity, and so part of the opprobrium heaped upon the MNEs is for the practice of employing tax planners – at great expense – to establish these essentially contrived company architectures. Moreover, these company architectures have been put in place precisely to exploit the gaps created through the interaction of

20 The Economist, “Über-warehouses”
21 OECD, Action Plan on BEPS, 10.
different tax systems. Thus, MNEs can reduce their tax liability to a single digit percentage figure, or eliminate it altogether.

There has been a stiff debate between tax specialists about where this leaves Google in terms of its effective corporate tax rate. As an indication, the corporate tax rate in the UK is 22 percent, in Germany it is 29.65 percent, whilst the estimates of Google’s effective tax rate sit between 3 percent and 8 percent, far lower than ordinary citizens paying their income tax through company payrolls or small businesses paying their corporate tax on non-divertible profits: a core issue for the version of tax morality that has prevailed in the EU since 2013.

**The BEPS Action Plan**

The OECD is a technical organisation and, in relation to international tax, aims to produce greater efficiencies and fairness. The OECD has pursued this agenda since the late 1990s, conducting many technical and policy research studies into tax avoidance and planning. The OECD has consistently advocated the introduction of general avoidance rules in individual jurisdictions, but at times of low saliency such calls have gone unheeded. In any case, general avoidance rules are contentious because they require the disclosure of aggressive tax planning schemes and thus – in effect – require companies to give up the advantages they could accrue from weak legislative drafting. What has been observed recently, however, is that the legal, but aggressive avoidance of tax by MNEs has helped to undermine confidence in the tax system, encouraging a wider segment of business and other classes of taxpayer into thinking that compliance is voluntary.

Thus, the OECD’s BEPS action plan and the EU’s Common Consolidated Corporate Tax Base (CCCTB) both aim to reduce the unfair advantages that MNEs seem to have in international and domestic tax systems. This is, in part, to secure an element of the income currently being lost to BEPS, but also to shore up other aspects of the tax system which might be potentially undermined by tax payers concluding

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22 OECD, *Tax Morale*, 50.
23 European Commission, *CCCTB*. 
that they also do not need to comply voluntarily with the tax code. Research has suggested that the compliance rate with a tax code is not determined by the effective tax rate, and so we might reasonably conclude that it is correct to want to address BEPS to protect the sanctity of the rest of the tax code.\textsuperscript{24}

As mentioned previously, the motivation for the OECD’s BEPS Action Plan comes, in part from its technical expertise in taxation affairs, but also from the individual governments of the G20 facilitating and empowering the OECD to address this issue decisively, something we would have expected to see in accordance with the issue salience literature.\textsuperscript{25} The EU’s efforts come in parallel to those of the OECD, and have emanated from both the European Commission and the European Parliament. The Parliament commissioned multiple research studies from subject experts and has consequently proposed a raft of legislative measures to address aggressive tax planning by MNEs. The European Commission, for its part, tabled the CCCTB in 2011, which aimed to provide a Europeanised platform (but not a common effective tax rate) to produce efficiencies in the tax system, drumming out an estimated €0.7 billion of compliance costs from businesses. At a time of lower issue salience in 2011, these measures did not find political support, but were re-tabled by the Commission in June 2015 as the OECD’s work was coming towards its conclusion.\textsuperscript{26} The work of both the Commission and the Parliament were informed by the OECD’s work, and essentially had the same aim: to reduce the gaps and frictions between the tax codes and thus to reduce the potential that MNEs have for aggressive tax planning using BEPS.

The OECD’s Action Plan is divided into fifteen articles. The detailing within the articles are due to appear during 2016 and this process is underway at the time of writing. The October 2015 report essentially puts in place the framework and direction of travel.

\textbf{Table 1: The OECD BEPS Action Plan}\textsuperscript{27}

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<tr>
<th>Action</th>
<th>Detail</th>
<th>Future Developments</th>
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\textsuperscript{24} Alm, McClelland, Schulze, “Why do people pay taxes?”.
\textsuperscript{25} Zhu, “G20 institutional transition”; Newman, “Transnational Capture or Transnational Pluralism?”.
\textsuperscript{26} European Commission, \textit{Questions and Answers on the CCCTB}.
\textsuperscript{27} Distilled from OECD, \textit{Action Plan on Base Erosion}. 
<table>
<thead>
<tr>
<th>Action 1: Digital Economy</th>
<th>Notes that the digital economy offers greater opportunities for BEPS. Concludes that ring-fencing the digital economy is both problematic and undesirable.</th>
<th>Unilateral actions are left open to governments.</th>
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<tr>
<td>Action 2: Hybrid Mismatch Arrangements</td>
<td>This aims to reduce the exploitation of tax gaps between two jurisdictions and within international tax treaties. It notes that this action is not aimed at eliminating tax avoidance, but eliminating any gaps between tax codes.</td>
<td>Governments are free to legislate to conform with this article, and it does not require unanimity.</td>
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<tr>
<td>Action 3: Effective Controlled Foreign Company rules</td>
<td>Provides a guide to rules that would help governments wanting to reveal the effective control of companies.</td>
<td>For individual governments to bring forward legislation. Any legislation coming from any of the action plans is likely to be in place by 2017.</td>
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<tr>
<td>Action 4: Limiting Base Erosion via interest payments and other financial deductions.</td>
<td>Recommends the introduction of a percentage limit of permissible deductions of between 10 and 30% of earnings.</td>
<td>Due to the complexities in this area, this is likely to be implemented in 2017, with some concessions to highly leveraged public sector focussed companies.</td>
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<tr>
<td>Action 5: Countering harmful tax practices: transparency and substance.</td>
<td>Concerns reconnecting the location of economic activity and R&amp;D spent in a location, with where tax is due. Also covers exchange of tax rulings between jurisdictions.</td>
<td>Introduction of the so-called nexus approach by August 2016, end of the UK Patent Box scheme to new entrants by 1 Jan 2016 and phasing out of the scheme by 2021. Likely to cause substantial compliance costs and work for R&amp;D led businesses.</td>
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<td>Action 6: Preventing the granting of treaty benefits in inappropriate circumstances.</td>
<td>Aims to curtail the problem of double non-taxation and to reduce any incentives there are for treaty shopping by MNEs.</td>
<td>Increases the complexity of claiming reliefs. May increase the number of incidences of double taxation. May disadvantage investment companies carrying investments across jurisdictions.</td>
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<td>Action 7: Preventing the artificial avoidance of Permanent Establishment Status</td>
<td>An additional measure to connect up where a business operates, stores inventory and pays its taxes: “habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise”.</td>
<td>Detailed guidance by the end of 2016. Will generate a significant number of new occurrences of permanent establishment and thus taxes due. Will increase compliance costs for businesses in tracking expenditure and filing taxes across jurisdictions.</td>
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<tr>
<td>Actions 8- 10: Assure that transfer pricing outcomes are in line with value creation</td>
<td>Looks to establish rules to mitigate the risk in price transfers across: intangibles, risks and capital, other high risk transactions.</td>
<td>Implementation depends upon the pace of individual jurisdictions. Further guidance will come from the OECD during 2016.</td>
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<td>Action 11: Measuring and</td>
<td>Estimates of loss of tax revenue</td>
<td>The OECD will still not be in</td>
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monitoring BEPS are based on incomplete information. The OECD will improve its data across six areas. The most notable of these is known as ‘country by country reporting’.

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<th>Action 12: Mandatory Disclosure Rules</th>
<th>Requires businesses to disclose their tax planning and avoidance schemes to tax authorities.</th>
<th>There is no timeline for this, but tax authorities are likely to implement this quickly.</th>
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<tr>
<td>Action 13: Transfer pricing documentation and country-by-country reporting</td>
<td>These are measures to improve the information available to tax authorities for 1) transfer pricing risk, and 2) tax risk assessment across eight vectors.</td>
<td>MNEs are expected to have adapted their practices from January 2016. The OECD has a benchmark of 2020 to assess compliance.</td>
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<tr>
<td>Action 14: Making dispute resolution mechanisms more effective</td>
<td>There will be more disputes between nations. Disputes will be resolved within 24 months. Provides resource for this.</td>
<td>Methodology and plan produced in the first half of 2016 for implementation in 2017.</td>
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<tr>
<td>Action 15: Developing a multilateral instrument to modify bilateral tax treaties</td>
<td>This modifies existing bilateral tax treaties to a multilateral platform. It has the effect of automatically re-negotiating hundreds of treaties and thus removes the need for individual actions. It aims to increase certainty and ease of dealing across jurisdictions.</td>
<td>Text is only anticipated to be available by December 2016 and then signed by mid-2017 via the consent of signatory governments.</td>
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The OECD’s Action Plan will be implemented through its various actions during 2016 and very early 2017. Implementation will occur in European member states during this timeframe, whilst the negotiations concerning the EU’s regulatory changes and the revitalised CCCTB proposal go on in parallel and complementary fashion to the OECD’s work. One of the interesting features of the European Parliament’s work has been the lack of cooperation from the MNEs in the process; this could be read as recognition that activism at times of high issue salience can be counter-productive, or that the MNEs failed to assess the impact high issue salience was going to have. Of these two leading explanations, the latter is more persuasive than the former. All of the invited MNEs initially failed to attend the European Parliament’s first evidence hearing into aggressive tax planning and were very late to accept the Parliament’s second invitation to attend, which resulted in every single MEP speaker at the session
expressing their displeasure at the disrespect they felt had been shown to the Parliament.\textsuperscript{28} The public relations effect of staying away was very negative, providing evidence for the narrative that MNEs see themselves as distinct from other sorts of taxpayers and indeed more important than parliamentarians. The legislative consequence of the disengagement is a set of measures that are ‘being done to them’ rather than co-produced with them, as would be consistent with the literature on policy salience.

**Conclusion: tax moralising in a high salience environment**

Within the developed world, the period from 2013-16 has been a permissive and perhaps unrepeateable moment for curtailing aggressive tax planning by MNEs. The perfect political storm of a painful economic contraction that began in 2007, and whose effects are still being felt today, of an equally painful period of austerity in which taxpayers have paid more and sacrificed services whilst a backdrop of elusion has emerged through high-profile leaks by whistleblowers was co-joined with a tax morality whose logic has its origin in the experience of personal taxation. Such a confluence of circumstances provided a moment of high issue salience, and electorally forced national politicians to allow supranational institutions to advance technical policy solutions to this issue. Newman’s ‘MNC-paradox’ was borne out in this case as the structural advantages of the MNEs were turned back on them as a disadvantage and proof, somehow in the public narrative, that the system had been previously rigged in favour of the MNEs. Consequently, the privileged positon of MNEs in the international tax system has begun to be rebalanced. States have also contemplated ceding some tax sovereignty, but more realistically autonomy, around corporate tax in order to eradicate the gaps between tax codes that have provided the opportunities for MNEs to find their way legally to double non-taxation, or double tax payments that are less than single ones.

The international effort to close the tax gap has occurred at every level of international politics. This collective action was given its impetus by the governments of the G20, who utilised the OECD to provide the technical backing to these measures, in the form of the BEPS Action Plan. The OECD’s Action Plan

\textsuperscript{28} European Parliament, *Tough debate with multinational companies.*
is a truly international framework to tackle the challenge of BEPS; it also forms a transnational response to a practice that is only possible for transnational business actors. The EU has acted in parallel to the OECD process to provide a European interpretation and compliance with the BEPS initiative, and individual states and tax authorities have taken their own measures to introduce anti-avoidance rules.

This international effort is viewed as exceptional since tax has been treated by governments as an issue of core national sovereignty, in which the setting of effective rates, collection practices and data to be shared across tax jurisdictions are considered core government business. This is because income broadly equates to political power in the international system, given that tax is an area in which states compete with each other to maximise their income and to attract new sources of income and inward investment. In this context, it has taken the series of revelations from whistleblowers, in combination with austerity and all that it entails for issue salience to become so significant for governments to see greater utility in international policy cooperation than in pursuing ‘sovereign’ approaches to corporate tax affairs and the protection of capital interests. Of course, in reality, all the jurisdictions are still sovereign, but they are exercising this sovereignty in a coordinated manner. Coordination generates efficiencies for these governments and also for less complicated business arrangements, but these will almost certainly result in higher effective tax rates for MNEs.

In corporate taxation, as with other competitive international environments, we can observe the civilian equivalent of an arms race. There is aggressive competition between those seeking to avoid tax, and tax authorities. This competition comprises those MNEs with transnational capital, tax lawyers, and accountancy specialists seeking to find and exploit tax gaps and weaknesses in tax legislation versus those national tax authorities with dwindling resources trying, retrospectively, to apply patches to these gaps and weaknesses. In times when corporate tax enjoys low issue salience, MNEs have more flexibility to innovate within the existing rules and to try and shape those rules. There is also another competition between sovereign governments seeking to maximise their positions and attract inward investment. This competition has produced a deflationary pressure on effective tax rates, an uneven picture on prosecutions, and a growing prevalence of bespoke tax arrangements for MNEs. Indeed, this was the
subject of the LuxLeaks scandal. Yet, while such scandals only gain traction when there is some pre-existing issue salience, they also help to make the issue more prominent.

There is also the competition between competing dogmas, which has framed the discussions about tackling the aggressive MNE tax planning. For some, MNEs are an engine room of economic activity and therefore occupy a privileged position in the economy. This is a reworking of the classic economic debate around so-called trickle-down economics: to choke off income to these businesses might suppress the general economy. For others, there is the moral and economic requirement that large businesses pay a fair contribution into government treasuries. This is a reflection of the relative positioning and (lack of) strength of the MNEs in western politics today and has resulted in widespread changes to political culture and technical regulation. Such reforms were unthinkable during the economic boom of the late 1990s and early 2000s – an era of low issue salience – and it was clear from their approach to the inquiries established by national parliaments and the European Parliament that the MNEs were not conscious of the impact that high salience would have on their positioning on the issue.

Significantly, European governments have managed to retain their core sovereignty around taxation, having used the OECD and EU institutions to affect change, and have thus marshalled sophisticated patterns of coordinated policymaking from a politically expedient distance. If this is seen to work well, then the Panama Papers revelations, which further increased but reshaped the issue salience in this sphere, should result in the EU and others bringing forward legislative solutions to the challenges springing from the misuse of offshore trust structures.

References


