INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Asset Protection – How to structure assets in an anonymous way, while meeting the international transparency requirements.

Private Clients Commission and Tax Law Commission

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General Report

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1. Introduction

1.1. Overview General Report

1.1.1 Private Clients

As the world becomes increasingly globalised, it is becoming easier for everyone to hold assets through structures and to make and manage investments through financial institutions outside of its own country of residence. International organisations such as the OECD and the FATF, institutions such as the EU and of course the USA are at the forefront when it comes to combatting tax evasion, money-laundering and terrorist financing. Due to this development, the last several years have brought a new wave of greater financial transparency.

With more than 90 countries already committed to the OECD's Common Reporting Standard (Standard for Automatic Exchange of Financial Account Information), the first stage amongst the early adopters will come into effect on 1 January 2016. The EU recently introduced its new anti-money laundering (AML) rules, namely the Fourth EU Anti-Money Laundering Directive ("4AMLD"). The main novelty of the new Directive is the introduction of a central UBO-register, a public register which identifies the ultimate beneficial owners (UBOs) of companies and trusts. EU Member States have until June 26, 2017 to transpose the requirements of the 4AMLD into national law. Then of course financial institutions are faced with the long arm of the US-legislation in the form of the Foreign Account Tax Compliance Act, known as FATCA.

At the same time, the world is becoming more and more dangerous to any wealthy individual. Unjustified law suits, invented claims, bankruptcy of whole countries, asset seizure, increasing liability risks or the risk of kidnapping, whatever the reason may be, the need for anonymous asset protection structures is bigger than ever.

When planning their individual asset protection structure, international families, high net worth individuals and their advisers are confronted with these changes in new tax and asset reporting regimes and reporting rules. Especially where anonymity is sought, these rules can have far reaching consequences. For the unwary, these new regulations are a potential minefield. Advisers are looking for ways how to lessen the impact of these rules.

Now, how are these issues dealt with in your country? In this General Report, we would like to find out what kind asset protection structuring possibilities your country offers and how these are affected by the recent international and national compliance and filing requirements.

1.1.2 Tax

Simultaneously with the introduction of more transparency regarding the structuring of privately held assets, the international developments also strive to more transparency regarding the income and tax planning. Multinationals but also privately owned companies held by the same international families and high net worth individuals who are subject to the transparency requirements as described above, are also faced with increasing transparency and compliance requirements regarding their tax position and exchange of information between states.

On 5 October 2015 the OECD published the final reports regarding the Action Plan Against Base Erosion and Profit Shifting ("BEPS"). The BEPS Action Plan is aimed to equip governments with domestic and international instruments to address tax avoidance and ensure that profits are taxed where economic activities generating the profits are performed and where value is created. The background furthermore lies in three key pillars identified by the OECD: introducing coherence in domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards, and improving transparency as well as certainty. The proposed actions by the OECD regard inter alia Country-by-Country reporting, mandatory disclosure of tax schemes and international exchange of information between states.

On 6 October 2015 unanimous agreement was reached between the EU Member States on the automatic exchange of information on cross-border tax rulings. According to the European Commission, the lack of transparency on tax rulings can be exploited by certain companies in order to artificially reduce their tax contribution. Where currently Member States have the discretion to decide whether information such as a tax ruling should be exchanged with another Member State, the proposed amendment to Directive 2011/16/EU on administrative cooperation in the field of taxation will require Member States to automatically exchange information on their tax rulings. The deadline for implementation of the amendment is the end of 2016 as the Directive will come into effect on 1 January 2017.

Most recently, on 28 January 2016, the European Commission (EC) published their Anti-Tax Avoidance Package. It was stated by the EC that under the proposed rules, national authorities will exchange tax-related information on multinational companies' activities, on a country-by-country basis, to allow Member States to have crucial information to identify risks of tax avoidance and to better target their tax audits. It was furthermore announced that the EC is also examining the separate issue of public country-by-country reporting, whereby certain accounting and tax information is to be made public by multinational firms on a country by country basis. Such reporting could in the view of the EC inter alia help to ensure that profits are effectively taxed where they are generated, reinforce public trust and add to a fairer tax system. The EC will take into account the need to protect legitimate business secrets and to promote a level playing field for globally active businesses. The legislative initiative is to be expected spring 2016.

Although the transparency requirements on tax planning aim to tackle tax avoidance and aggressive tax planning, all tax payers, "aggressive tax planners" or not, will be faced with an increased administrative burden. Their advisors operate in an ongoing changing environment and are challenged by the international developments when advising their clients on the best tax strategy and e.g. on whether it is still beneficial to obtain a tax ruling. Perhaps it can be questioned whether the key pillar of certainty is still supported.

In this general report we will discuss how these issues are dealt with in various jurisdictions.

From the research performed we can derive that the administrative burden for tax payers and the level of transparency has changed rapidly. The worldwide development is that jurisdictions strive for transparency of the worldwide income of the total MNE's group and the transfer pricing applied to all intercompany transactions, which will be enforced inter alia via exchange of information between jurisdictions. Corporate entities can be faced with the administrative burden to administrate the flow of income and transfer pricing applied within the group that they are a part of. Such information is not automatically available within such as entity, but should be provided to the tax authorities nonetheless, under the risk of penalties to be imposed.

We hope that our findings serve to help to determining in what way countries are introducing the transparency requirements proposed by the OECD and the European Commission, besides the requirements that already exist, and how these developments may affect the future tax strategy of your clients.

1.2. National Reports

We have been able to collect the following National Reports:

1. Panama (PC): *Carlos Eduardo Molino Diez*
2. England and Wales (PC and Tax): *Oliver Piper*
3. Belgium (PC and Tax): *Gertjan Verachtert*
4. Switzerland (PC and Tax): *Aliasghar Kanani*
   Switzerland (PC): *Julien Tron*
5. Austria (PC and Tax): *Franz Althuber*
6. United States (PC): *Josefina Colomar*
   United States (Tax): *Michael Parets / Matthew Cullen*
7. Spain (PC and Tax): *Gustavo Yanes*
8. France (PC): *Julia Novak*
9. Netherlands (PC): *Diane Nijkamp*
   Netherlands (Tax): *Hayo de Hartog*
10. Liechtenstein (PC): *Thomas Nigg*

11 Germany (PC and Tax): *Inga Zillmer*

12 Sri Lanka (PC and Tax): *John Wilson*

13 Cyprus (Tax): *Stavros Christou*

14 Sweden (Tax): *Filippa Andersson*

15 Luxembourg (Tax): *David Cordova Flores*

16 Brazil (Tax): *José Mauricio Abreu*

17 Italy (Tax): *Pietro Mastellone*
Italy (PC): *Alessia Paoletto*

We would like to thank all National Reporters for their contributions and hard work!

2. Private Clients

2.1. Asset Protection – structuring possibilities and other means of asset protection

2.1.1. Does your jurisdiction recognize domestic or foreign trusts? If yes, what types of domestic trusts are there and what type of trusts is usually used for asset protections purposes? Are there any restrictions in your jurisdiction as to the possibility of the settlor to be a beneficiary at the same time?

Domestic trusts
Unsurprisingly, among the countries who have submitted a National Report only the common law jurisdictions **England and Wales** and the **USA**, as well as **Sri Lanka** (whose jurisdiction is a mixture between common and civil law), recognize the concept of a domestic trust while in the majority of the civil law jurisdictions (**Belgium**, **Switzerland**, **Austria**, **Spain**, **France, Italy, Germany** and the **Netherlands**) domestic trusts are not known. Exceptions to this general rule are **Panama** and **Liechtenstein**, both civil law jurisdictions, who have own rules for domestic trusts dating back to 1925 and 1928 respectively.

Kinds of domestic trusts include:

- In **England** and **Wales**:
    - Bare trusts: the beneficiary is absolutely entitled to the income and the capital;
    - Interest in possession trusts/life interest trusts: a beneficiary (the life tenant) is entitled to the trust income as it arises but not the capital.

  - Discretionary trusts: the trustees have power to decide how to use the income and/or the capital of the trust for the benefit of a defined class of beneficiaries.

- In the USA (definitions for federal income tax purposes):
  - Grantor trusts: the settlor maintains significant powers over the trust property such that all income and deductions flow-through to the settlor.
  - Non-grantor trusts: Non-grantor trusts are divided into two categories: "simple" or those that require distributions of current income, or "complex", which includes any other type of non-grantor trusts.
- In **Panama**:
  - Guarantee trusts: the debtor party delivers the asset to the Trust for the benefit of creditors and in order to ensure its obligations with them.
  - Real Estate trusts: the owner of a property or developer or promoter or bankers or investors contracts a Trust in order to supervise the assets and investment for a construction development.
  - The Securities trusts: allows who contracts the Trust to issue bonds by means of a Trust that have a payment guarantee.
  - Investment trusts: its purpose is to invest the money or assets by instructions of the Settlor.
  - Administration trusts: the Trustee administers assets for the benefit of the Settlor or its/his/her beneficiaries.
- The Trust Ordinance of **Sri Lanka** recognizes the concept of constructive trusts. There is a restriction, however, as to the possibility to settle assets on a non-resident trustee, unless a permission from the Central Bank of Sri Lanka has been obtained.

In **England** and **Wales**, usually, discretionary trusts are the most appropriate type of trust to use for asset protection purposes because they allow trustees the flexibility to take wide-ranging decisions to protect the assets in the trust. In the **USA**, non-grantor "complex" trusts are the best vehicles for asset protection purposes as the settlor does not maintain control or power over trust property and distributions to him or der, if any, are completely discretionary by the trustees. In **Panama**, it is the administration trust that is usually used for asset protection purposes. **Liechtenstein** and **Sri Lanka** have not reported any specific types of trusts which are commonly used for asset protection purposes.

None of the countries who recognize domestic trusts have reported legal restrictions as to the possibility of the settlor to be a beneficiary at the same time, although there may be adverse tax consequences regardless of whether or not the settlor actually benefits (**England** and **Wales**) or the trust may be deemed a sham or provide less asset protection in general (**USA**). Also **Italy** reports that from the settlor's creditors point of view, the fact that the settlor reserves for himself rights, privileges on the trust or shows among the beneficiaries does not *per se* invalidate the trust, but it weakens his/her position against personal creditors wishing to attack the trust structures, who in certain circumstances may also be able to substitute themselves in the exercise of the powers/rights or benefits that are destined to the settlor (debtor).

Foreign trusts
In contrast, nearly all of the reported countries recognize foreign trusts, but to different extents and based on different sets of rules. While **England** and **Wales**, **Italy**, **Switzerland** and the **Netherlands** have ratified the Hague Trust Convention, **Belgium** has separately introduced specific provisions in its International Private Law Code as to the recognition of foreign trusts. **Panama**, the **USA** and **Liechtenstein** also report to recognize foreign trusts without stating further requirements. In **France**, when an off-shore trust is regularly set up according to local law, French courts tend to recognize its legal validity in France provided that the trust has not been constituted for fraudulent purposes and does not violate French mandatory rules such as the forced heirship rules. Similar rules apply in **Sri Lanka**, where a foreign trust should be recognized unless created for unlawful purposes. **Germany** also recognizes foreign trusts, based on a case to case assessment and not on a general rule. In **Spain**, the situation seems to be quite unclear. Under Spanish law, trusts are generally considered as a group of assets without legal personality. While Spanish civil courts have occasionally recognized a foreign trust, the Spanish tax authorities have mostly disregarded the existence of a trust. Only **Austria** reports not to recognize foreign trusts at all.

However, a significant number of the countries also report that due to uncertain or adverse tax consequences the establishment of a foreign trust is not recommended in their jurisdiction as asset protection vehicle (especially **Belgium**, **France**, **Spain** and **Germany**).

2.1.2. Does your country recognize private foundations (domestic or foreign) which are suitable for asset protection purposes (such as family foundations or similar)? If yes, what are the main characteristics of such domestic private foundation and are there any restrictions in your jurisdiction as to the possibility of the founder/donor to be a beneficiary at the same time?

Most of the reporting countries know or recognize some type of domestic or foreign private foundations. Only **England** and **Wales** and **Sri Lanka** report that private foundations are neither known nor automatically recognized in their jurisdiction, except under certain circumstances for tax purposes (**England** and **Wales**).

Among the countries that regularly use domestic private foundations, especially family foundations (possibly in combination with a charitable purpose), as asset protection or estate planning tools are **Liechtenstein**, **Panama** (whose foundation law is based on the Liechtenstein foundation law), **Austria**, the **Netherlands** and **Germany**. In all of these countries the careful set up of a foundation structure may lead to tax advantages. In **Belgium**, the institute of the private foundation is rather new (introduced in 2002), therefore, the viability of the foundation as an estate planning or asset protection tool is not clear yet. However, the Belgian Ruling Commission has recently issued some favorable tax rulings concerning the taxation of distributions to the beneficiaries of a foundation. Thus, it remains to be seen whether the Belgian private foundation will establish itself as a possible asset protection tool.

Similar to the **USA**, **Switzerland** has a well-established tradition as regards the use of private foundations for charitable or public purposes. The creation of a family foundation, however, is subject to very restrictive conditions. As a result, the family foundation is scarcely used in Switzerland as an asset protection vehicle. Much more common is the use of foreign private foundations, which are formally recognized in Switzerland. A typical structure will involve a foreign private foundation (e.g. a Liechtenstein or Panama foundation) with a Swiss bank account, with or without an underlying company. The use of such structures for the purpose of avoiding Swiss mandatory law provisions is, however, not recommended as the constitution of or endowment to such foundation may be successfully challenged before Swiss courts (although of course the choice of the jurisdiction of where the assets of the foundation are located will have an impact on the enforceability of respective Swiss judgment). Also in **Spain** and in **Italy**, foundations are not a suitable instrument for asset protection purposes as their objects must be in the general resp. public interest. It is, therefore, not possible to create a foundation with the main purpose to serve the founder's or the founder's relatives interests. **France** reports not to know a vehicle comparable to the foreign family foundation, but recognizes foreign foundations as long as they are endowed with legal personality under their domestic law.

Other than in **Panama** and **Austria**, where private foundation have to be registered in the companies register and thus will be in the public domain, a **Liechtenstein** family foundation is not registered in the commercial register but only 'deposited'. Register extracts are only available to third parties in case of registered or common-benefit foundations.

With regard to the possibility of the settlor to be a beneficiary at the same time, none of the countries report any specific restrictions. Furthermore, **Liechtenstein**, the **Netherlands** and **Panama** report that there are no restrictions as to the possibility of the founder to be a member of the foundation board. Hence, this is an effective way to retain family control. In **Austria**, beneficiaries, their spouses and persons which are related in the direct line or collateral line until the third degree are excluded from being a member of the board.

2.1.3. Are there any other asset protection vehicles which are commonly used in your jurisdiction? What are their specific characteristics?

The most commonly used asset protection structures in **Panama** are the Trust and the Private Interest Foundation. Both are regularly used by Panamanians as well as foreign persons domiciled in Panama or abroad. There are no other typical asset protection structures in Panama.

In **England** and **Wales** other possible asset protection vehicles include Family Investment Companies and Family Limited Partnerships although they are not widely used because of potential tax and practical disadvantages.

In **Belgium**, the **Belgian civil partnership** is a planning instrument that is frequently used for the transfer of movable property to the next generation while maintaining control over the proceeds and investment policy of the assets. It is as such not an asset protection vehicle (the civil partnership has no distinct legal personality). The 'shareholders' will be fully liable for the debts of the civil partnership. However, it does allow for discretion in planning a transfer of assets to the next generation, together with the privacy guaranteed under the Belgian final withholding tax rules in relation to Belgian source assets/income. The civil partnership is a regulated vehicle, though many arrangements can be left to the parties implementing the civil partnership. Further, Belgian tax residents will often make use of a **Netherlands incorporated foundation *(stichting)*** as an asset protection vehicle. Generally such foundation is set up as a **STAK *(stichting administratiekantoor)***, holding shares of family enterprises. Upon contribution of the assets to the STAK, the former holders of the assets receive depositary receipts issued by the STAK. Through this mechanism there is a clear separation of the voting rights and the beneficiary rights: the voting rights lie with the STAK, whereas the economic/beneficial ownership remains with the holders of the depositary receipts. This means that some of the features of a trust can be reached by making use of the more commonly known STAK-legal form. For Dutch tax purposes a STAK is in principle not subject to corporate income tax. In fact, the STAK is considered transparent for Dutch tax purposes so that any tax is levied at the level of the depositary receipt holders only. Also from a Belgian tax purpose, the STAK can be tax neutral (main condition to realize this is that income stemming from the shares held by the STAK is 'immediately' distributed to the holders of the depository receipts). A combination of the STAK and the above mentioned civil partnership is also possible in a tax transparent manner. The STAK also allows for greater discretion, for instance by having it issued bearer depository receipts. The latter is no longer possible in Belgium since an act of December, 14, 2005.

As already mentioned above, asset protection vehicles commonly used in **Switzerland** are foreign trusts or the Liechtenstein, Panamanian or Dutch Foundation. Apart from these, Swiss law offers various possibilities to set up structures granting some efficiency for asset protection and ring-fencing, such as:

- The creation of a **Swiss company with limited liability** (*société anynome, Aktiengesellschaft*), offering the advantage that shareholders are not public and can appoint fiduciary directors who are publicly registered with the Commercial Registry of the relevant Swiss canton. The shareholder can keep the shares without publicly disclosing his identity. He can also decide to waive his rights on the company's assets to enhance the efficiency of asset protection, *e.g.* by transferring the shares of the asset holding company into a foreign foundation or trust and appointing himself as beneficiary. However, if this is equivalent to a sham or results to be abusively detrimental to third parties such as creditors, this may be challenged before Swiss courts (see below 1.1.6.). Also, before considering such transfers of assets, tax consequences must be considered closely and carefully (a ruling with Swiss tax authorities is generally highly recommended for this kind of situation).

- Similarly, **limited liability Swiss companies** can be used to hold real estate and offer a certain ring-fencing protection, but no anonymity.
- **Family Swiss holding companies** might also be created to hold complex and valuable family assets. This can be particularly effective from a tax and family-governance point of view. Basically, Swiss holding company benefits from participation reduction (full exemption if pure holding) for qualified dividends and capital gains, full credit of Swiss withholding tax on dividend distributions for Swiss resident, access to the broad Swiss treaty network. Dividends to the shareholders are partially exempt.

Austria does not know any specific asset protection vehicles other than the private foundation, however, corporations or other legal entities may provide for a certain protection of assets, depending on the purpose of its use. Similarly, in the **USA** business entities such as corporations, partnerships and LLCs are used to protect business and/or personal assets depending on the facts of each particular situation.

In **Spain**, an appealing alternative for certain wealthy individuals moving to Spain is the investment in the financial markets through collective investment vehicles, such as, among others, the **Spanish SICAV**. These investment vehicles require a minimum investment, a certain number of investors (100) and are subject to regulatory supervision and requirements. They are subject to very low taxation (i.e. SICAVs are subject to 1% corporate tax in Spain), and, therefore, they can be suitable for a tax deferral estate planning scheme. During the last year there were 220 new SICAVS opened in Spain, so these are vehicles that are really increasing their number in Spain.
In Spain, SICAVS have to fulfill several requirements:

- Number of stockholders no less than 100.
- Restrictions on investments.
- Capital may vary between the minimum and maximum established by the articles of association.
- Minimum capital of €2,400,000.
- Oversight and supervision is carried out by the Comisión Nacional del Mercado de Valores and the Dirección General del Tesoro y Política Financiera.

As we have seen, **France** neither knows domestic trusts nor domestic family foundations. Therefore, there are a number of other asset protection vehicles, some relatively new, such as:

- **The "*fiducie*"**:

  The fiducie has been introduced into French law in 2007-2008 in order to provide a legal framework with a mechanism quite comparable to trusts, though more restricted. The fiducie is a contract by which a settlor transfers all or part of its property or rights to a fiduciary ("fiduciaire"), provided that it acts in a specific purpose (asset management for example) for the benefit of beneficiaries. The main difference between a foreign trust and a French fiducie is that the fiducie cannot be used to make irrevocable free transfers of assets. However, the fiducie may be used as asset protection vehicle, such as the management fiducie ("fiducie-gestion"). It consists in contributing assets (present or future if determinable) to the fiduciary who has to manage these either for the settlor's or the beneficiaries' benefit. There are many ways how to use a fiducie:

- Managing the assets of a vulnerable person (possibly oneself when it is needed).
- Managing the assets of a young adult.
- Managing complex assets (Family business group, large property portfolio).
- Ensuring a cash flow to the beneficiary to finance his lifestyle (to pay debts, to pay for a philanthropic cause financial).

As a consequence, the fiducie is often used as a mean of asset protection and can be an alternative to a company (civil company not subject to corporate tax or Limited Liability Company). The management fiducie is also very interesting as asset protection vehicle vis-à.vis creditors. For example, the corporate officer may transfer to the fiduciary estate his personal assets to exclude them from his seizable assets in case of an action of the company's creditors. The fiducie will be end automatically after a period of 99 years of its existence, when the goal of the fiduciary agreement is achieved or at the settlor's death.

- **The endowment fund** ("*fonds de dotation*")

The endowment fund (also created in 2008) consists in an irrevocable allocation of goods for the realization of a work or a mission of general interest. The advantages and disadvantages of this structure are:

Advantages:

- Simple creation (even though from January 2015, French law provides that the initial endowment must be at least of € 15.000 in cash).
- Operating flexibility.
- The donations made do not have to be declared to the prefecture.
- Favorable tax regime: the tax regime applicable to endowment funds is the same as the one applicable to patronage as long as it finances general interest activities eligible for the patronage regime.

Disadvantages:

- It is not possible to protect assets and transfer them to a specific beneficiary at the time of death of the founder. As a consequence, this kind of asset structure is not adequate to transfer assets to family members.
- The assets are irrevocably transferred to the fund.
- It cannot receive public subsidy.

    - It does not benefit from the label of public utility recognition.
    - 75% wealth tax reduction on the amounts given to the fund is not granted.

    In September 2014, already 1900 endowment funds had been created.

- **Civil companies not subject to corporate tax**

  The advantages of such companies are the following:

    - The shareholders can benefit from assets held by the civil company without any income tax consequences (for example, the shareholders can use freely a real estate property held by the civil company without being taxed on the allocated advantage).
    - Free organization of management powers and of voting rights by the by-laws.
    - Avoidance of joint ownership ("indivision") and easiest way to organize the management of family's assets.

  The disadvantages of such companies are the following:

    - The by-laws of French civil company must indicate the identity of the partners and are disclosed to the legal registry of businesses in France. As a consequence, no anonymity of the shareholders is ensured.
    - The shareholders are indefinitely, jointly and severally liable for the company debts. Consequently, this kind of structures is not always favorable for asset protection regarding creditors and third parties.

    Nonetheless, many French estate planning schemes use this kind of structure.

- An alternative to the French civil company is the **Monaco civil company**:

  Monaco civil companies are very efficient from two points of view. They offer the possibility to ensure anonymity of the shareholders towards third parties (but not towards French tax administration). From the point of view of inheritance taxes, when the owners of the shares is a Monaco tax resident at the time of his death, has died in Monaco and has French tax resident heirs. Indeed, in such a case, Monaco inheritance tax regime is applicable on the value of the shares but Monaco does not tax the transfer of goods to the spouse or children. The transfer of the value of the shares is, as a consequence, not subject to inheritance tax.

  Further, there are **commercial companies** liable to corporate tax with limited liability of its shareholders, **life insurance schemes** and the division of property ("***démembrement***").

In the **Netherlands**, commonly used for high net worth families are **open partnerships** (open *CV – Commanditaire Vennootschap*) for shareholding structures and **mutual funds** (*FGR Fonds voor Gemene Rekening*) for structuring other assets. Characteristics are that there are no obligations to file annual accounts with the Chamber of Commerce, resulting in company results and financial data not being publicly known, or even no mentioning of the aforementioned vehicles in the Chamber of Commerce at all. The mutual fund FGR can obtain a special tax status if collective asset management is carried out as a result of which, under conditions, a full tax exemption is available.

As an alternative to the foundation (by far the most popular vehicle in Liechtenstein), **Liechtenstein** also uses the **Liechtenstein Establishment** ("Anstalt") as an asset protection vehicle. The establishment under Liechtenstein law is a form of company under civil law with its own legal personality. There is a wide range of individual options in designing the structure of an establishment. The choice of legal structure ranges from establishments similar in nature to a foundation – being separate assets endowed for a specific purpose – to establishments similar in nature to a corporation with capital that is divided into shares. Only the establishment's assets are liable to the establishment's creditors. As a matter of principle, neither the governing bodies of the establishment nor the founder are personally liable. The establishment can be used to pursue both commercial as well as non-commercial objects. Consequently, in addition to conducting trading and financial transactions, the establishment can also be used purely for asset management and for holding participations. Non-profit organizations are also possible.

The beneficiaries are entitled to the economic benefits in the form of pecuniary rights to the establishment. The beneficiaries and/or any prospective beneficiaries are normally appointed by the founder or the supreme governing body of the establishment. If no beneficiaries are appointed, there is a presumption of law that the holder of the founder's rights is the establishment's beneficiary. The articles may specify that the rights of beneficiaries cannot be withdrawn from them by their creditors by way of levy of execution or by bankruptcy proceedings. On request, any person can obtain an extract from the commercial register. This extract does not show, however, such details as the name of the founder or, if applicable, the current holder of the founder's rights. The balance sheet will not be published in the commercial register.

Finally in **Italy**, the most relevant (direct or indirect) asset protection 'tools' are a *fondo patrimoniale*, *intestazione fiduciaria, vincolo di destinazione* and, for the purpose of segregating assets destined to a business, of course, corporations.

- *Fondo patrimoniale* is a family agreement, pursuant to which spouses (or other interested parties) may dedicate specific immovable property or other registered assets to the purpose of satisfying the needs of the family. Both the assets allocated for this purpose and the income produced by them shall be exclusively destined to support the needs of the family. The asset protection is therefore realized by separating the assets destined to the needs of the family from all other assets owned by the spouses. Indeed, in principle, creditors whose credits derive from situations not concerning the family will not be able to seize the assets included in the *fondo patrimoniale* (save what is explained in paragraph 1.1.4 below about protection of creditors under Italian law). However, Italian courts in some cases have accepted that also specific business credits can be to a certain extent linked to the needs of the family, often allowing creditors to attack the fund.

- *Intestazione fiduciaria* is an asset protection tool based on an agreement between the principal and the fiduciary (generally a fiduciary company) by which the fiduciary is responsible for managing the asset of the principal under his/her precise instructions (similar to the English nomineeship agreement). The fiduciary activity is defined by the fiduciary mandate which sets the limits intended and determined by the mandatory agent. A fiduciary arrangement of this type changes the formal ownership of the assets, but does not shift the ultimate beneficial ownership, which remains with the principal. The assets are therefore still considered included in the estate of the principal and his/her creditors will be able to seize them. The *intestazione fiduciaria*, however, allows the principal to own assets anonymously, therefore, as a matter of fact, the localization of the seizable assets will be harder for the creditor. Additionally, the fiduciary company acts as withholding agent for Italian tax purposes.
- *Vincolo di destinazione*. According to the recently introduced provision under article 2645-*ter*, it is possible to charge immovable property (and certain registered movable property) with a segregation lien. The assets subject to the lien will not be seizable by the personal creditors of their owner (save what is explained in paragraph 1.1.4 below about protection of creditors under Italian law).

Simple corporations are also still commonly used as asset protection vehicles. In fact, an individual intending to undertake a risky business usually will set up a corporation in the form of S.r.l. (*Società a responsabilità limitata*) or S.p.a. (*società per azioni*) in order to limit the liability towards the creditors of such business only to the assets held by the company.

Germany does not report on any further special purpose vehicles, but there is the possibility that the prospective donor may attribute private assets (e.g. cash or shares) to his or her company so that the assets qualify as business assets. Under certain conditions, these assets are subject to an 85% or 100% exemption from GIT (Gift and Inheritance Tax). However, the GITA (Gift and Inheritance Tax Act) is currently under review. The German legislator will introduce a new regulation for the exemption of business assets until 30 June 2016.

Also **Sri Lanka** does not report on any other special instruments which are commonly used for asset protection purposes although there are of course companies with separate legal personality which may be used as an underlying company of a trust. However, it has to be noted that the Exchange Control Act restricts the issue and transfer of shares to persons who are non-resident for the purposes of the Exchange Control Act and to their nominees who are non-resident. Nominee-arrangements involving non-residents would therefore not be advisable. Further, Sri Lanka law recognizes the Paulian action, which also limits the possibility to transfer assets for asset protection reasons.

2.1.4. Is your jurisdiction asset protection-friendly? E.g. does your jurisdiction typically respect asset protection structures or does it recognize principles such as "sham" or "piercing the corporate veil"? If yes, what are the prerequisites for a court/other administrative body to apply such principles? What is the right balance between settlor control and asset protection?

Among the countries who report to be particularly asset protection-friendly are: **Panama**, **Liechtenstein**, the **Netherlands** and specific states in the **USA** (e.g. Alaska, Delaware, New Hampshire, Nevada, South Dakota and Wyoming). "Not unfriendly" are **Belgium**, **Switzerland** and **England** and **Wales** while **Germany** and **Sri Lanka** even report to be rather unfriendly as regards asset protection purposes.

As reasons for its particular friendliness **Panama** states that it generally accepts asset protection structures as legally binding, unless created for fraudulent or other criminal purposes (such as money laundering or terrorism financing). The registered agents or trustees of asset protection structures have to keep the structures confidential; a breach is subject to strict sanctions. In the **USA**, certain states have particular short conveyance periods (i.e. the period of time within which transfers to asset protection structures are at risk of being undone under fraudulent conveyance laws). Nevada and South Dakota apply a relatively short two-year period (i.e. transfers made outside of this two-year window are generally protected from creditor claims), whereas other asset protection-friendly jurisdictions apply a more common four-year period. However, exceptions may apply.

Germany and **Sri Lan**ka report being rather asset protection-unfriendly because of particularly long grace (or conveyance) periods of 10 years e.g. for family or inheritance law purposes (Germany) and the above mentioned Exchange Control Act (that would generally hinder capital transfers out of Sri Lanka unless in connection with share purchases and land purchases where money has been remitted in and the relevant procedures have been duly complied with) and e.g. the prohibition to hold anonymous or numbered accounts (Sri Lanka).

The following countries report to have established (either statutorily or as case law) principles such as "sham" and "piercing the corporate veil" or similar principles and that these are generally (though of course to very different extents) applied by their courts: **England** and **Wales**, **Italy**, **Belgium**, **Switzerland**, the **USA**, **Spain**, **France**, **Liechtenstein** and **Germany.** However, most of the countries also report that these principles are only applied under very specific circumstances so that they are not seen as making their jurisdiction specifically asset protection- unfriendly.

E.g. in **England** and **Wales**, the fundamental hallmark of sham is that the trust documents are intended to give third parties the appearance of creating legal rights and obligations different from those the parties intend to create. Where a trust is declared by a settlor and trustees (rather than by the settlor acting alone), the trust will only be a sham if both the settlor and the trustees have a common intention to treat the trust as a sham. If a new trustee exercises his powers properly the trust will not be a sham. The ability to "pierce the corporate veil" – to ignore the separate legal status of a company and hold its shareholders to account – is only applicable in very limited circumstances in England and Wales. The court can only look beyond a company's legal personality where:

- a person who controls a company is under an existing legal obligation or restriction;

- he deliberately avoids or frustrates that obligation or restriction;
- he uses the company he controls to achieve that avoidance or frustration;
- in so doing the company or the person gain some advantage; and
- there are no other legal remedies available to someone who has suffered loss as a result of the actions of the company or its controller.

The test is very complex and comes from the relatively recent case of Petrodel Resources v Prest [2013] UKSC 34. Its application has not been well tested and it is difficult at this stage to tell in practice how it will apply.

In **Italy**, the issue of whether a trust has to be regarded as sham is mainly looked from a tax angle and not so much from a trust law angle. With guidelines released at the end of 2010, the Italian tax authorities identified some types of trust, which are held to be non-existent for Italian tax purposes (fictitiously interposed). On 27 December 2010 the Italian tax authorities issued a 'circular letter' the main purpose of which was to disregard a number of trusts in respect of which an Italian resident settlor or beneficiary have some degree of control. In very broad terms, this circular letter (which was strongly criticized by commentators and professionals) states that any trust under which a settlor or beneficiary has any degree of control is a 'fictitious interposition' (sham). The circular contains the following (non-exhaustive) list of relevant scenarios where this applies:

- trusts where the settlor has the express power to terminate the trust at any time of his own initiative for his own benefit or the benefit of third parties;
- trusts where the settlor has the express power at any time to appoint himself as beneficiary;
- trusts where the trustee cannot make decisions without the settlor's or beneficiaries consent;
- trusts where the beneficiary has an express power to compel the trustee to distribute a share of the trust assets;
- trusts where the settlor has the express power, during the life of the trust, to change the beneficiaries;
- trusts where the settlor has an express power to assign trust assets or to give out loans.

Where a trust is treated as a 'fictitious interposition' any income / gains received by the trustee should be taxed in the hands of the person who has the effective power to control and manage the trust assets as if the trust did not exist. The assets held in trust are deemed as held by the person exercising the control. As a result, in such circumstances it would be the Italian resident person to whom the power is conferred to be subject to Italian tax obligations.

In **Belgium**, while there are no rules dealing specifically with corporate veil piercing or sham, there are certain limited exceptions to the general principle of limited liability of corporations with separate legal personality. These are either derived from legal provisions of existing company and civil law (generally referred to as "legal piercing") or developed by Belgian courts, mainly in the context of the bankruptcy of a Belgian company or subsidiary (generally referred to as "judicial piercing"). This also applies for Belgian income tax purposes. Belgian tax law is governed by private law to the extent that tax law does not explicitly or implicitly provide otherwise. However, the BITC (Art. 29 (2)) expressly allows the tax authorities to disregard the legal personality of certain Belgian companies (such as the above mentioned 'civil partnership') and certain Belgian and non-Belgian legal persons for income tax purposes. As a result, the general rule that the legal personality of Belgian and foreign companies must be recognized for Belgian income tax purposes is set aside by this specific provision and the entities listed in that provision are treated as tax transparent. The scope of application of that provision is, however, very limited. Apart from that, some important rules that have to be taken into account from a tax perspective when dealing with (foreign) structures are:

- The absence of sham according to tax law: under Belgian law, sham implies a conflict between the intentions which parties outwardly express, but which are only apparent ones and conceal the parties' real intentions which they keep secret, sham involves the use of false or fraudulent acts and constitutes a form of tax fraud. On the other hand, the Belgian Supreme Court in its 1961 landmark decision in the 'Brepols-case' held that: "*There is no illegal sham, and consequently no tax fraud, where in order to enjoy a more favorable tax treatment the parties, using their freedom to contract, without however violating any legal obligation, enter into acts of which they accept all of the consequences, even if the form they give thereto is not the most usual one*". The Supreme Court has confirmed this decision in identical terms in several subsequent cases. In a second land-mark case 'Au Vieux Saint- Martin' it added that this decision also applies "*even if these acts are entered into with the sole purpose of reducing the tax burden*". These Supreme Court decisions have solidly laid down the principle generally known in Belgian tax law as "the free choice of the least taxed road".
- The respect for the (tax) residence of the company: the determination of a company's residence for Belgian tax purposes is essentially a factual discussion dealing with the determination of the place from where the company is actually managed.

Switzerland: In principle, Swiss tax authorities respect asset protection structure, as long as the structure is correctly established and its purpose is not to evade taxes. Under certain conditions, similar as in Belgium, general anti-avoidance rules may be applied by the tax authorities to pierce the corporate veil or to tax in Switzerland an offshore structure, in case the effective management of such structure is located in Switzerland. According to the practice of the Swiss Federal Tax Authorities with regard to foreign trusts, a trust qualifies as revocable trust (fiscally transparent) subject to the following indications:

- Does the settlor is a beneficiary of the trust (capital or income)?
- Does the settlor have the right to revoke the trustee and to nominate another one?
- Does the settlor have the right to designate new beneficiaries?
- Does the settlor have the right to replace the protector who has similar powers to the trustee

- Does the settlor have the right to amend the trust deed, respectively to have it amended?
- Does the settlor have the right to revoke or liquidate the trust?
- Does the settlor have a veto power against the decisions of the trustee regarding the assets?

This list shows that if the settlor keeps a certain supervision power or is a beneficiary, the tax authority may qualify the trust as a revocable trust.

In **Spain**, the doctrine of piercing the corporate veil is being vividly discussed lately. It has become part of the Spanish judicial practice. The prerequisites for a court to apply this principle have been established by the Supreme Court in its Judgment 83/2011. These are:

- Control of several companies by the same person.
- Related party transactions between these companies.
- Lack of economic and legal justification of such operations.

France reports two principles of particular importance in the context of "sham" or "piercing the corporate veil": the principle of "substance of a company or trust in France" and the general principle of "abuse of rights" in the context of French tax law. The latter is regularly applied in France, especially by a specific body called "Abuse of Rights Committee", which delivers its opinion on whether or not a tax planning scheme is abusive. The tax administration is, however, not bound by its opinion. If tax planning schemes are found to be abusive, massive tax penalties (80% of the taxes evaded) may be imposed on top of the taxes that have to be repaid.

Also in **Liechtenstein**, there is no statutory rule with regard to the possibility to pierce the corporate veil of a legal entity with a distinct legal personality, however, as in most of the reporting country, this principle has been recognized by the legal doctrine and the courts; it is, however, applied very restrictively. Finally in **Sri Lanka**, there is neither statutory nor well established case law with regards to the principles of piercing the corporate veil or sham, however, it is generally recognized in the legal doctrine that such principles must be applicable, where necessary.

2.1.5. Are there any other characteristics in your jurisdiction that make it particularly asset protection friendly, e.g. political stability, banking or other secrecy rules, favorable civil procedural rules (e.g. in relation to the (non-)recognition of foreign judgments) and have there been any changes to these principles recently?

Nearly all of the countries report to be politically and also economically stable and to have a well regulated banking sector resp. financial system. **Austria**, **Germany**, **Liechtenstein** and **Switzerland** as well as **France** highlight their banking and tax secrecy, although they simultaneously point out that these have been considerably eroded by the international automatic exchange of information treaties that have been concluded by their countries.

Similarly, **England** and **Wales** and the **Netherlands** report that it has become increasingly difficult to maintain the desired level of privacy due to the recent developments as regards international transparency agreements. Nevertheless, especially the **Netherlands**, **Switzerland** and **Liechtenstein** and also some states in the **USA** see themselves at the forefront as regards its international attractiveness as an asset protection-friendly jurisdiction.

Switzerland has undeniably an old tradition of secrecy and discretion in keeping assets and ensuring their protection and despite the recent international developments the protection of asset and secrecy is still strong thanks to ad hoc law provisions that provide protection. The infringement of banking secrecy without being authorized by the law or an official authority is a criminal offense being punished with up to three years imprisonment. Also, the infringement of professional secrecy by e-g-, a lawyer or a doctor, or the undue disclosure of state secrets by State employees, are punished in the same way. The recent condemnation of René Falciani (notorious ex-HSBC IT having stolen thousands of clients' name and having disclosed them to foreign authorities) by a federal Swiss criminal court to a 5-years imprisonment sentence shows that the practice is still very restrictive in Switzerland and that, despite recent changes occurred in the field of the banking secrecy vis-à-vis third states' tax authorities, protection for banking and business secrecy and privacy is still effectively granted. Also, Switzerland disposes of a strong legislation regarding data protection; Swiss courts a generally likely to grant strong protection against any form of abuse or undue transmission of personal data. Finally, it is also interesting to note that one of the current Swiss hot topics is a public initiative aiming at a stronger protection of tax and banking data of mainly Swiss residents. It is still unknown when Swiss population will be called to vote on this initiative. This shows that there still is a great tradition of respect of secrecy and privacy in Switzerland and that a vast portion of the population regrets the broad concessions made in favor of new transparency standards.

The **Netherlands** is reported to be very experienced in providing tailor made advice on asset structuring. The service providers are highly educated and Amsterdam and the Netherlands are often seen as the gateway to Europe. The Netherlands has concluded more bilateral tax treaties than any other country in the world and also in international private and public law, many agreements have been signed and treaties have been ratified. A combination of these factors makes the Netherlands internationally very attractive as a place for asset protection. **Liechtenstein** stresses that the Swiss franc proved to be a quality feature compared to other countries. Furthermore the banking secrecy as well as the trust secrecy have played a very important role in Liechtenstein ever since. These wide ranging secrecy laws are considered to be of high significance and are enforced by penalty.

In **Belgium**, though generally politically and economically stable, a number of recent tax reforms have rendered estate and asset protection planning more and more difficult. Interestingly, Flanders introduced a tax rate of 0% for inheritance tax purposes in family hold companies (subject to certain conditions), while withholding taxes and the taxation of private investment income has increased dramatically. Interestingly, the only National Reporter who is hesitant to attest his country political stableness nowadays is the Spanish

National Reporter. In **Spain**, the general environment for asset protection structures seems to have become less favorable in a more general sense. But also **France** reports that a general atmosphere of mistrust grew in the wake of scandals involving the discovery of undeclared foreign assets.

As regards the enforcement of foreign judgments, most of the countries report to recognize foreign judgments from a wide range of countries, unless they violate the domestic ordre public. Exceptions to this general rule are **Liechtenstein**, who has refused to ratify the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters since it found that this would have severely jeopardized its status as a particularly asset protection-friendly. As a result of the non-ratification, judgments of foreign jurisdictions cannot be enforced in Liechtenstein unless there is a bilateral agreement on enforcement. However, at this time, Liechtenstein has only entered into such bilateral agreements with Austria and Switzerland and **Sri Lanka**, where only a limited category of foreign judgments may be enforced; these are monetary judgments of a superior court from certain jurisdiction subject to the Reciprocal Enforcement of Judgments Ordinance.

2.1.6. Has there been any recent case law particularly relevant with regard to asset protection structures and what was it about?

Switzerland: In a well-known case concerning interim measures ordered in a billion-dollars divorce case (5A_259/2010, decision dated 26 April 2012, so called Ryboloviev case), opposing a Russian tycoon to his wife in a very litigious divorce, which was finally settled in 2015 through a private and confidential transaction, the Swiss Supreme Court (Tribunal fédéral, Bundesgericht) declared as valid very wide freezing injunctions issued in Geneva on assets located abroad and previously transferred to a trust created under the laws of Cyprus by a Swiss resident. The Swiss Supreme Court protected and confirmed such interim measures saying that the theory of piercing the corporate veil (*Durchgriff*) could be used as an analogy when there are good grounds to pretend that the settlor of the trust has created it only to escape his creditors and to unlawfully hide his assets. Being in the framework of interim measures where the judge has to make a decision quickly and urgently to preserve the claimant's rights, the application of general principles of Swiss law, even though the latter is not applicable to the involved trust, is justified, as long as the final results are not shocking.

This decision was much criticised as Swiss courts did not analyse the issue at hand under the applicable law of trust and on the basis of general principles of trust law, such as sham, using instead general principles of Swiss company law, regardless of the fact that Switzerland has ratified the Convention on the Law Applicable to Trusts and on their Recognition. This judgment shows that assets protection structures may be successfully be challenged before Swiss Courts when it can be argued that they are abusive. It also shows that Swiss jurisdiction is even available, under certain circumstances, to obtain judgments with effects going beyond national borders.

This being said, Swiss Courts have also recognized in other cases the validity of genuine trusts, where the settlor separated from a part of his wealth for the benefit of close persons, such as his children. In a quite recent case held before the Court of Geneva (ACJC/15.09.2011), the criminal and civil attachment of trust funds was declared as void by the competent Court for it was judged that the trust was genuine and that it was no longer possible to claim that the settlor had transferred the underlying assets into the trust to disfavor his creditors. On the contrary, the trust had been set up years before for the sake of the settlor's son, affected by a disease, with the consequence that the funds were not part of the settlor's (suitable to be seized) wealth anymore.

Austria: Austrian courts regularly publish decisions that are more or less relevant with regard to asset protection structures. For example in 2014 the Austrian Supreme Court (*Oberster Gerichtshof*) had to decide whether benefits from private foundations paid to individuals liable for child or wife support payments have to be included in these individuals' assessment basis for the payments. In this case the husband, who was the debtor, received an indexed sum of money from a private foundation once a year, the amount was set forth in the foundation charter. In its Ruling the Supreme Court decreed that this type of benefit received from a private foundation must be included in the assessment basis for child and wife support payments, if the person liable to pay holds a legal title, for instance because these benefits are provided for in the Foundation charter.

USA: In a case decided in Nevada, a law firm was sued by a creditor for helping its client set up an asset protection trust on theories of conspiracy and aiding and abetting. The court ruled in favor of the firm holding that the creditor did not show clear and convincing evidence of the firm's intent to defraud or deceive the creditor when it created the asset protection trust. Importantly, Nevada law does not recognize claims against non-transferees under theories of accessory liability. Cadle Co. v. Woods & Erickson, LLP, 345 P.3d 1049, 2015 Nev. LEXIS 19, 131 Nev. Adv. Rep. 15 (Nov. 2015).

France: The tax treatment regarding inheritance tax applicable to Monaco based company shares owned by a Monaco resident, and who owned French immovable assets, has recently been subject to an important case law. On October 2nd, 2015, the French Civil High Court judged that when the Monaco resident dies in Monaco and his heirs are French domiciled, the shares of the Monaco based company are taxable to inheritance tax in Monaco because they are considered as movable assets, and not as immovable assets. This case law is particularly relevant because of the preceding case law (2012) that judged that the shares had to be considered as immovable assets taxable subject to French inheritance tax.

Liechtenstein and **Germany** both report on decisions of German courts with regard to a Liechtenstein Establishment:
In its decision IV ZB 9/14 dated 3 December 2014, the Federal Supreme Court of Germany (FSC) ruled on the civil law recognition of a Liechtenstein establishment and foundation in Germany. In this case, the claimant filed a suit against the defendants, both daughters and the testamentary heirs of the testator who died in 2003. The testator had

recognized its paternity of the claimant in 2003. To determine the amount of his forced heirship portion, the claimant sued the two daughters to disclose information about the estate and any gifts made by the deceased testator. Prior to his death, the testator had contributed part of his foreign assets to a private establishment formed under Liechtenstein law and possessed rights to a foundation formed in Liechtenstein. According to the FSC, the testator's estate did not include the establishment, its shareholdings or its other assets. The FSC viewed the establishment as a special legal structure with its own legal personality under Liechtenstein law, and ruled that its legal capacity must thus be judged under Liechtenstein substantive law. The FSC stated that the non-registered foundation must be assessed in Germany in the same manner as a registered Liechtenstein entity (such as the establishment). In this decision, the FSC had an opportunity to conduct a very thorough examination of Liechtenstein company law. The FSC's basic assumption is that both the establishment and the non-registered foundation must in principle be recognized in Germany. The FSC emphasized the clear advantages of Liechtenstein's membership in the EEA, which benefits Liechtenstein's legal company structures. It further states that misuse of the law can only be assumed in extreme exceptional cases. In this decision, the FSC also ruled that the ordre public reservation only applies to Liechtenstein structures in very rare cases. The decision is a milestone in the unequivocal recognition of Liechtenstein foundations under German civil law in this regard. The decision thus provides valuable arguments for establishing legal entities in Liechtenstein instead of other jurisdictions.

Further, the Federal Fiscal Court (Bundesfinanzhof – BFH) had to decide whether the attribution of assets to a Liechtenstein Anstalt was subject to GIT. The settlor had mandated a lawyer to establish a Liechtenstein Anstalt. According to the statutes and the contract of mandate, the lawyer acted as trustee under his own name. However, the lawyer was bound to the settlor's instructions. The attribution of assets to a foundation is subject to GIT (i) upon the establishment of the foundation (endowment of the initial capital, Sec. 7 Par. 1 Nr. 8 GITA) and (ii) any additional contributions (Sec. 7 Par. 1 Nr. 1 GITA). Attribution means that the foundation has the assets as its own disposal while the settlor is not entitled to give instructions or dispose of the assets. The settlor has no right to demand the assets. The rights of the foundation must be clearly stated in the governing civil law, the statutes, the by-laws, and any other applicable regulation. In the aforementioned case, the settlor had the assets still at his disposal because he could decide what the Anstalt had to do with the assets. The transfer of assets to the Anstalt was not an attribution for GIT purposes and therefore not taxable. The judgment shows how a settlor can avoid GIT. On the other hand, it would have to be carefully considered whether such a structure would nevertheless make sense for asset protection purposes because the settlor remains owner of the assets (at least beneficially).

Finally, **Sri Lanka** reports that there have been a number of decision regarding the Paulian action.

2.1.7. What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed? How is the transfer of assets to trusts/foundation or other asset-holding vehicles taxed in your jurisdiction?

Transfer of assets to an asset protection structure

In **Panama**, transfers of assets to a trust or foundation that qualify as a donation are exempt from taxes as Panama does not know donation taxes. Exceptions apply with regard to the transfer of property, which triggers immovable property transfer tax. Also in the **Netherlands**, transfers of assets to a trust can be made tax-free because trusts are regarded as transparent for tax purposes. This might be useful for tax planning purposes where the Netherlands is a temporary state of residence. The same applies in **Liechtenstein**, where the transfer of assets to trusts/foundations or other asset-holding vehicles is not subject to any taxes.

In contrast, when a settlor makes a gift into a trust in **England** and **Wales**, he may incur a personal tax liability. Similarly, donation taxes may be due in **Switzerland** (regularly in the case of a foundation, although exceptions may apply if the only beneficiaries of the foundation are the spouse or descendants of the settlor, and in the case of an irrevocable, fixed interest trust) and in the **USA**, where gift taxes are generally imposed on the transfer of assets by individuals who are domiciled in the USA. A transfer by a U.S. person/settlor to a grantor trust may not be subject to gift tax if certain requirements are met (e.g. if the trust is revocable by the U.S. settlor). The USA also imposes a gift tax on transfers by individuals who are not citizens or domiciliary of the USA with respect to U.S. situs assets. Transfers by non-U.S. individuals of non-U.S. situs property are not subject to U.S. gift tax.

Also in **Germany**, the transfer of assets to a domestic foundation, foreign foundation, and a trust is subject to donation taxes if the settlor is German tax resident and/or the assets are deemed domestic. Thereby, the transfer to foreign foundations and trusts is most heavily taxed (between 30%-50% - depending on the value of the assets). The tax rate for transfers to a domestic foundation can be significantly lower. This depends on the relationship of the settlor and the beneficiaries - the closer the relationship the lower the tax rate. Full or partial tax exemption is possible if the settlor transfers business assets (participation in a partnership, a minimum of 25% in a corporation). Finally, also in **Italy**, the transfer of assets into trust is subject to the Italian succession and gift tax (under Italian tax law, broadly speaking succession tax and gift tax follow the same rules and apply the same rates and taxable base). The Italian Tax Authority stated its position vis-à-vis the application of the gift tax to trusts in its Circular letters (C.M. 48/E/2007 and C.M. 3/E/2008), notably that tax should be levied/charged when assets are brought into the trust (i.e. 'entry charge' theory) and not when distributions to beneficiaries take place. Following representations made by a number of Italian notaries and commentators (backed by the decisions of some Italian lower tax tribunals), the Italian tax authority conceded that, in certain instances, the chargeable event (giving rise to taxation) should be the one that takes place at the time of the transfer of the assets from the trustees to the beneficiaries of the trust, and not at the time of the segregation of the assets. The position is however very fluid and constantly debated. Additionally, the Italian Supreme Court (Tax department) has, in some recent decisions (2015), confirmed the position that gift tax should be charged upon the creation or funding of the trust (entry charge). However, some commentators have noted that the wording of the Supreme Court decisions has been drafted in wide terms, so that in theory it might be argued that tax is due both on the way in and on the way out.

In **Sri Lanka**, transfers and gifts of immovable property entail payment of stamp duty on the value of the property. Generally speaking, the rate is approximately 3 % of the market value for gifts and 4 % of the market value for transfers. In contrast, in **Belgium**, a transfer of movable assets into a trust is possible without triggering stamp duties. The transfer of assets to a (Belgian) private foundation during the lifetime of the settlor will generally be deemed a donation. This can be either made tax free (if the donor survives a three year grace period) or at a flat gift tax rate of 5.5% (in Flanders), if the gift is voluntarily registered (which will automatically be the case for a Belgian notarial deed).

The taxation of gratuitous endowments to private foundations in **Austria** triggers the so called initial endowment tax (Stiftungseingangssteuer) of a fixed tax rate of 2.5%. Instead of endowments, assets may be sold to the foundation (the consideration would have to be at least 50% of the market value of the transferred assets). Consequently, no initial endowment taxes due. The endowment of property to a foundation has been subject to many changes lately. Since 1 June 2016 the calculation base for the endowment taxes is the "real estate value" which is not to be confused with the market value. The applicable tax rates vary from 0.5% to 3.5%, depending on the value of the property.

Finally in **France**, the creation of a *fiducie*, be it by a corporate or individual settlor, is not a taxable event. Whether or not the transfer of assets to a trust constitutes a taxable event was not reported.

Regular taxation of asset protection structures

All of the reporting countries gave a very detailed account of the ongoing taxation of their typical asset protection structures. In very broad terms, the regular taxation may be summarized as follows:

In **Panama,** the assets that compose the asset protection structure's patrimony or the interests relating thereto may be exempted from the payment of taxes in Panama provided that the assets are located outside of the territory of the Republic of Panama; the money deposited by these entities in bank accounts located in Panama or abroad have not arisen from a Panamanian source of income or if they do not generate taxable income in the Republic of Panama; shares or securities of any type or class, issued by entities that do not receive income from a Panamanian source even if said shares or securities are deposited in bank accounts booked in Panama. In **England** and **Wales**, capital gain taxes on the gains made on the disposal of chargeable assets and income taxes on income that arises on the trust fund are due. If the settlor or his family can benefit from the trust income, it may be attributed to the settlor for tax purposes. If so, he can claim reimbursement from the trustees. Further, an annual tax on enveloped dwellings (ATED), that was introduced in April 2013, may be payable: this tax applies to residential properties valued at over £1 million (soon to be reduced to £500,000) held by UK and non-UK 'non-natural persons' (i.e. companies, collective investment vehicles, or partnerships with a corporate member). Finally, stamp duty land taxes (SDLT) are levied when the trusts buys property.

In **Belgium**, as trust can be structured as neutral from an income tax perspective (no capital gains tax, i.e. miscellaneous income). Private foundations are subject to legal entities' income tax, as opposed to corporation tax. Legal entities' income tax has a more limited tax base than corporation tax. In **Switzerland**, the assets and related income remain taxable in the hands of the settlor if the trust is regarded to be fiscally transparent (revocable trust). The Netherlands may apply corporate income tax to trusts.

Austria applies the following taxes to foundations on a regular basis:

- Interests from credits on bank accounts, interest gains from bonds, mortgage bonds, debt securities, income from realized increase in value of capital assets and income from derivatives as well as income from the sale of real property are subject to the interim tax in the amount of 25% (before 2011: 12.5%). This interim tax is credited again in connection with allocations to the beneficiaries, which are subject to a 27.5% capital gains tax (before 2016: 25%). From an economic perspective, the interim tax is therefore a pre-taxation of the later allocation tax of the beneficiaries. By the interim taxation the cumulative payment of corporate income tax and capital gains tax is avoided. No credit is made if a foreign beneficiary is credited the capital gains tax due to double tax agreements. Due to the Austrian Tax Code Amendment Act 2015 (*Abgabenänderungsgesetz 2015*) the credit is granted as from 1 January 2016 at least insofar as Austria has the right to withhold tax.
- Income from trade or business (to the extent admissible by law for foundations), income from self-employment, income from agriculture and forestry, leasing and letting, income from capital assets, other income (e.g. speculative gains) and income from the sale of real property are subject to the (ordinary) corporate income tax in the amount of 25%
- Distributions of profits of corporations are exempt from corporate income tax on the level of the private foundation.

In the **USA**, very basically speaking, a trust that is classified as a domestic trust for U.S. federal income tax purposes is subject to tax on its worldwide income regardless of whether the income is earned in the USA or elsewhere. Such income will be taxed at the trust level at a rate of 39.6% unless certain requirements are met and the trust is deemed a grantor trust. If the trust is deemed a grantor trust, all income and deductions flow-through to the settlor and is taxed at the settlor's individual tax rate (up to 39.6%). As with domestic trusts, the imposition of U.S. federal income taxation on foreign trusts depends on whether such trusts are classified as grantor or non-grantor trusts. All income and gains earned by a trust while it is a foreign grantor trust will be attributed to the grantor as long as he is alive.

The foreign grantor will be subject to U.S. income taxation with respect to such income and gains only to the extent he would be subject to taxation if he were to own the trust assets directly. Foreign non-grantor trusts are treated as separate taxpayers for U.S. federal income tax purposes and, as with nonresident aliens, will only be directly subject to certain U.S. source taxable income. It is important to note that the applicable U.S. federal income tax rules can be extremely onerous for any U.S. beneficiaries of foreign non-grantor trusts.

France levies wealth tax on trust assets that has to be paid annually. It is due on the fair market value as of 1st of January of each year of the assets and rights held by the trust and the accumulated income. Such wealth tax has to be paid by the settlor or by the beneficiary deemed as settlor (when the settlor is deceased). There is also a specific tax on trusts concerning individuals (settlors or beneficiaries of the trust). It is due by French tax residents on the assets or rights located in France or outside of France and by non-French tax residents on the assets or rights held by the trust and located in France. The rate is 1.5% of the fair market value of the assets and rights held by the trust. For the taxation of other commonly used asset protection structures please refer to the National Report of France.

Liechtenstein has a very favorable tax regime for asset protection structures: There is a special arrangement for foundations as to the "formation tax". This is reduced to 0.2 %; the minimum duty is CHF 200.-. Further, all legal persons that manage, exclusively, private assets in pursuit of their purpose and carry on no economic activity may be qualified as a Private Asset Structure (Privatvermögensstruktur, "PVS"), which guarantees a very favorable tax treatment: A legal person which has received the status of PVS is subject merely to the minimum income tax in the amount of CHF 1'200.-. This regularly applies to foundations. Liechtenstein trusts are also subject to the formation duty, as well as income tax. The formation duty is also levied at 0.2 % of the trust assets shown in the trust deed, but not less than CHF 200.–, Further, trusts in Liechtenstein are subject only to an analogous application of the minimum income tax of CHF 1'200.- a year. Moreover, there is a limited tax liability for certain domestic earnings such as, for instance, rental income from Liechtenstein real estate or a Liechtenstein permanent establishment's net income.

In **Germany,** a domestic foundation is subject to Corporate Income Tax (CIT). A foreign foundation is not subject to CIT. However, Germany attributes the assets and income of a foreign family foundation to beneficiaries who are subject to unlimited tax liability in accordance with their share – the foundation is deemed transparent for income tax purposes. It is irrelevant whether the foundation distributes the income to the beneficiaries. However, if the income is later distributed and therefore subject to (Corporate) Income Tax in the hand of the beneficiaries, there is a tax credit for the aforementioned tax. These provisions do not apply if a family foundation (i) has its management or its registered office in an EU/EEA State, and (ii) it is proven that the settlor, related individuals, and their descendants have no factual or legal control over the foundation's property, and (iii) Germany and the state in which the family foundation has its registered office provide each other – pursuant to Council Directive 77/799/EEC or a comparable bilateral or multilateral agreement – with the information that is necessary to carry out the taxation. The same rules apply to a non-transparent trust.

In **Italy**, the Italian Tax Authority (again through a series of circular letters: C.M. 48/E/2007, C.M. 3/E/2008 and C.M. 61/E/2010) set out guidelines on the imposition of direct taxation to trusts, which depends on whether a trust should be considered look-through or opaque, and on the type of activity carried out by the trust (commercial or non-commercial). Trusts are opaque when beneficiaries do not have a set right to receive the income of the trust, but rather are members of an open class of beneficiaries. In this case, for income tax purposes the trust will be treated as akin to a company and income tax would therefore be chargeable on the trust itself. IRES (the Corporate Income Tax) would apply at the current rate of 27.50%, as well as IRAP (the regional production tax) at a current 3.9% rate. As for capital gains, where trusts are opaque and do not operate activities which are commercial in nature, taxation in the hands of the trustees may benefit from specific rules that apply to private individuals. Conversely, where the beneficiaries are specifically identified in the trust deed and immediately entitled to receive a certain share of income, the income deriving from assets in trust will be attributed directly to the beneficiaries, considered as taxable in their hands (so called 'transparent trust'), and thus chargeable to IRPEF (the general individual's income tax). IRPEF is due every year and has a progressive rate that increases as the taxable base increases.

Finally, in **Sri Lanka**, a trustee is liable to income tax on the income of the trust to the extent that the shares of income are not distributed to the beneficiaries. Distributions to beneficiaries are deductible from the income in the hands of the trustees. The beneficiaries are liable to tax on the income distributed to them. The rate of tax for trustees including trustees under wills is 24%. Currently there isn't any generally applicable capital gains tax or wealth tax in Sri Lanka.

Distributions to the beneficiaries:

The **Netherlands** reports that there may be personal income tax as well as inheritance- and gift tax applicable to distributions to beneficiaries out of an asset protection structure. In **Panama**, distributions to beneficiaries that qualify as a donation are tax exempt. **England** and **Wales** report that there be a capital gains tax charge when assets standing at a gain are distributed to beneficiaries. In some circumstances beneficiaries may need to pay income tax if they receive trust income. As regards inheritance taxes, most lifetime trusts are charged to IHT on each ten year anniversary of the trust and also when assets are distributed. Some trusts have favored status for IHT purposes (e.g. certain children's trusts).

Whether or not inheritance taxes apply upon the distribution of trust or foundation assets upon the decease of a **Belgian** settlor is not clear. The Flemish tax administration recently re-confirmed an old point of view by the Federal Tax Administration, on the basis of which the beneficiaries of a discretionary trust would only be taxable upon effective distribution.

Switzerland: any distribution from a revocable trust is qualified as a donation, the tax rate is determined by the cantons. In case of liquidation, if the assets are returned to the settlor, there is no tax consequence. If the assets are transferred to the beneficiaries in case of liquidation, then it is also qualified as a donation. If an irrevocable, fixed interest trust is at questions, this is regarded as a non-transparent trust. Distributions of income realized by such trust are qualified as taxable income, as soon as the beneficiary acquires a firm right to the distribution. The beneficiary is subject to wealth tax on its part of the trust's assets. It entails that the distribution of the trust's assets is not qualified as a taxable income and distribution of capital gain (on private wealth of the beneficiary) is, in principle, not taxable. Liquidation of the trust implies similar consequences than distributions of income to the beneficiaries. Finally, in the case of an irrevocable, discretionary trust, in case the settlor is a Swiss resident at the time of establishment of the trust, then the irrevocable discretionary trust will be fiscally treated as a revocable trust. If the Settlor is not a Swiss resident at the time of establishment of the trust, then the trust will be qualified as non-transparent trust. In such a case, the beneficiary is not subject to wealth tax. Distributions of income realized by the trust are qualified as taxable income, as soon as the beneficiary acquires a firm right to the distribution, unless the beneficiary can demonstrate that the distribution consists in the distribution of the initial assets of the trust. Liquidation of the trust entails similar consequences than distributions of income to the beneficiaries.

Also **Austria** taxes distributions to beneficiaries of a private foundation with capital gains tax (*Kapitalerstragsteuer, KESt*) in the amount of 27.5% (before 2016: 25%) as income from capital assets. The KESt is withheld by the private foundation and paid to the financial authorities. Until the abolishment of the inheritance tax and donation tax in 2008, private foundations faced the tax disadvantage of being subject to KESt both for allocations to beneficiaries from the substance of the assets as well as allocations from the profits realized with the foundation's assets ("mousetrap effect"). Since 1 August 2008, payouts from the substance have been exempt from tax under certain conditions. **Spain** does not have an established practice as regards the taxation of distributions to beneficiaries. The Spanish tax legislation does not contain any provision on the taxation of trusts, the settlor, trustees or beneficiaries; and this has generated a certain legal uncertainty when dealing with trusts for Spanish tax purposes. The Spanish tax authorities' position on trusts is to disregard their existence, transactions carried out through trusts are regarded as transactions made directly between the settlors and beneficiaries, even where the trustees had discretionary powers to allocate or distribute the trust's assets to the beneficiaries. Spanish tax authorities have issued their opinion mainly on mortis causa transfers. According to this, Spanish-resident beneficiaries would be subject to IGT on the value of the assets received, and the tax liability would be calculated under the rules established by the ACs or the state default legislation, depending on where the settlor was resident when he died.

Italy: Also in respect of the taxation of distributions to beneficiaries, the Italian Tax Authority and the practitioners are not aligned, and the point is very much debated. There are two opposing theories:

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- *Gift tax approach (*distributions occur on a very irregular basis and in different amounts): from the perspective of indirect taxes (such as inheritance and gift taxes), one could argue that a one-off distribution of assets should be qualified as a "gift" for Italian tax purposes. As seen above, whether the distribution is taxed (again) in the hands of the beneficiaries is subject to debate, especially in light of the recent Supreme Court decisions.
- *Income tax approach* (distributions are made to a beneficiary on a regular basis, similarly to an income for the beneficiary): in the absence of any clear statutory provision/case law on the tax treatment of distributions to Italian resident beneficiaries, there is currently a risk that a substantial distribution might be characterised as income in the hands of the beneficiary and taxed at the beneficiary's marginal tax rate at up to 43%.

France seems to have the most complicated and onerous approach as regards the taxation of distributions to beneficiaries. It levies income tax (investment income) on the foreign trust income received by French beneficiaries at a rate up to 45% + social contributions of 15.5%. Further, gratuitous transfers of property made through a trust and qualifying as gifts or inheritances are subject to gift or inheritance tax; the tax rate depends on the family relationship between the settlor and the beneficiary but may be very high. This rule would apply to assets and rights as well as to income accumulated by the trust and transferred by gift or at settlor's death. The transfer taxes due on transfers that do not qualify as gifts or inheritances (i.e. the property remains in the Trust and does not pass directly into the estate of the settlor), will be assessed upon the settlor's death, regardless of the date of transfer and may amount to a tax duty between 45% and 60%. For the taxation of distributions from the other regularly used asset protection structures in France pls. confer the National Report.

Germany distinguishes between distributions by a domestic foundation, by a foreign foundation and by trusts. As regards distributions by a domestic foundation, there are two kinds of distributions: Fixed interest distributions and discretionary distributions in line with the foundation deed are not considered a gift because a gift is voluntary. The distributions are deemed capital income (similar to dividends) and therefore subject to 25% income tax. Distributions not in line with the statutes (voluntary distributions) should be rare because domestic foundations are under state supervision. However, if these distributions occur they are probably subject to GIT as well as Income Tax. Distributions by a foreign foundation which are subject to the foundation deed (and therefore not voluntary) are deemed capital income (similar to dividends) and therefore subject to 25% income tax. As regards voluntary distributions, the situation is unclear. The distributions are probably subject to GIT and surely subject to income tax.
Finally, distributions by a transparent trust are deemed direct distributions from the settlor to the beneficiary. The distributions to German tax residents are subject to GIT with tax rates between 7% and 50%, depending on the relationship of settlor and beneficiary as well as on the value of the distribution. The distributions of a non-transparent trust fall into the scope of Income Taxation as well as GIT. The Federal Fiscal Court ruled that *all* distributions (principal and income) are subject to GIT. At the same time, the distributions

are deemed income from capital similar to dividends so that income taxation applies. There is no tax credit so that the taxes can add up to 75%. The wording of the law allows the double taxation. The Federal Fiscal Court stated in a preliminary injunction that it is doubtful whether this double taxation is legally allowed. Unfortunately, the court did not render a final judgment as yet.

2.2. National and international transparency requirements

2.2.1. What are the developments in your country with regard to the automatic exchange of information? Will your jurisdiction implement the OECD-CRS and if yes, when and how?

Belgium (which after a long period of general refusal of transparency regulations had changed its approach beginning 2006), **Germany**, **England** and **Wales**, **France**, **Italy**, **Liechtenstein**, the **Netherlands** and **Spain** belong to the so-called "early adopters" of the OECD-CRS. Therefore, in all of these countries the OECD-CRS came into force as of 1 January 2016. The first automatic exchange of information will take place between participating states per 2017 in respect of 2016. Financial Institutions ("FI's") will have to gather relevant information in respect of their accountholders starting 1 January 2016 which they will need to disclose to their relevant Tax Authorities. The information basically consists of information of accountholders who have accounts in states other than the state where they are considered tax resident. The CRS law prescribes that FIs must obtain, upon account opening and in case of changes of circumstances, all tax residencies and all Tax Identification Numbers of a client. For Preexisting Accounts, the FI only has to approach clients that have indicia of a CRS partner jurisdiction.

OECD-CRS is based on bilateral agreements which have to be signed with each country separately.

Switzerland and **Austria** signed the CRS multilateral Competent Authority Agreement in the second row and will start with the automatic exchange of information as of 2018. **Panama** adopted the Model of Protocol for the Purpose of Allowing the Automatic and Spontaneous Exchange of Information under the Tax Information Exchange Agreement (TIEA) and signed the TIEA with the United States of America in 2010. Further, Panama also signed the CRS multilateral Competent Authority Agreement and will start exchanging information in 2018.

Further, the **EU-member states** are obliged to implement the provisions of the Directive on the administrative cooperation in the field of taxation (Directive 2011/16/EU) amended by the Directive 2014/107/EU into their national law. According to these directives, financial institutes (banks and insurances) are required to comply with a set of regulations similar to a FATCA Model 1 IGA for the automatic exchange of information regarding account details of their customers who have their tax residence in a state participating in the Common Reporting Standard as from 1 October 2016 onwards. The reporting duties vis-à-vis other EU-member states apply directly due to the implementation of the EU Directive in the individual Member States. Hence there is no need to conclude additional so-called Competent Authority Agreements (CAA) with between the EU-member states.

Switzerland and the EU also signed an agreement regarding the introduction of the global standard for the automatic exchange of information in tax matters. The automatic exchange of information between Switzerland and the 28 EU member states will begin in 2018 with data of 2017 (so retroactively for 2017 as a general rule).

The **USA** has not indicated an intention to implement the OECD-CRS but has been and will continue to undertake automatic information exchange under FATCA with the jurisdictions in which it has entered into intergovernmental agreements (IGAs).

Sri Lanka has not reported on this question. For very detailed information of the **Belgian approach** toward the exchange of information and the international transparency rules please cf. the National Report of Belgium.

2.2.2. Has your country entered into a bilateral FATCA agreement? If yes, what are the main features of such agreement?

The Foreign Account Tax Compliance Act (FATCA) is intended to detect and deter the evasion of U.S. taxes by U.S. persons who hold moneys outside the USA. FATCA aims a creating greater transparency and compliance by stipulating specific reporting duties of client account information.

The Treasury department has issued two model intergovernmental agreements ("IGAs"). The first agreement – known as the Model 1 IGA - requires foreign financial institutions (FFIs) to report all FATCA-related information to their own governmental agencies, which then report the FATCA-related information to the IRS. Some Model 1 IGAs are reciprocal, requiring the U.S. to provide certain information about residents of the Model 1 country to the Model 1 country in exchange for the information that country provides to the U.S. An FFI covered by a Model 1 IGA will not need to sign an FFI agreement, but it will need to register on the IRS's FATCA Registration Portal or file Form 8957.

The second version of the IGA – the Model 2 IGA – requires FFIs to report information directly to the IRS. Under such IGA, FFIs need to register with the IRS, and certain FFIs have to sign a version of the FFI agreement modified to reflect the IGA. In general, FATCA defines a financial institution as an entity which is in the banking business (accepts deposits) or holds financial assets for the account of others, or which engages primarily in the business of investing, reinvesting, or trading in securities, commodities, partnerships, or any interests in such assets.

Among the reporting countries, **Sri Lanka** and **Panama** are the only countries that have not entered into a bilateral FATCA agreement with the USA. However, the official website of the U.S. IRS shows that a large number of Sri Lankan financial institutions including banks, stockbrokers, finance companies and trust funds have entered into agreements with the U.S. Tax Office in order the assist the U.S. Government to help eliminate tax evasion by entering into Foreign Financial Institutions Agreements (FFIA). Panama might conclude a Model 1 IGA agreement this year 2016.

Model 1 IGA: Among the countries that have signed a Model 1 IGA are: **England** and **Wales** (signed on 12/9/2012 with effect as of 30/6/2014), **Belgium** (signed on 23/4/2014 and implemented on 16/12/2015), **Spain** (signed on 14/5/2013 and implemented in the national law as of 9/12/2013), **France** (signed 14/11/2013 and implemented in the national law as of 29/9/2014 resp. 2/1/2015), the **Netherlands** (first exchange of data took place in 2015 with respect to data of 2014), **Liechtenstein** (signed 16/5/2014), **Germany** (signed 31/5/213 and implemented into the national law as of 23/7/2014) and **Italy** (signed 10/1/2014). It is important to note that, while the Model 1 IGA provides for reciprocity, the USA have to report considerably less information on a person resident in a partner jurisdiction holding an U.S. account than vice versa.

Model 2 IGA: The USA have concluded only a few Model 2 IGAs with other jurisdictions, including **Austria** and **Switzerland**. The reason why particularly Austria chose the more complex Model 2 IGA was the protection of the banking secrecy which Austria feels obliged to comply with. It means that the Austrian and Swiss financial institutions will disclose account details directly to the US tax authority with the consent of the US clients concerned. The United States will have to request data through normal administrative assistance channels. However, the **Swiss Federal Council** approved the mandate for negotiations with the United States on switching to Model 1 on 8 October 2014. The mandate provides for the automatic exchange of information. It is still unknown at the present time (February 2016) when there will be a corresponding agreement.

2.2.3. FATF (Financial Action Task Force) recommendations and developments: What are the recent developments in your country and what are the specific due diligence obligations in your jurisdiction?

Nearly all of the participating countries report that their jurisdictions have been found by the FATF to be "compliant" or "largely compliant" with the FATF recommendations (**USA**) or that they have a "mature and sophisticated AML/CFT regime, with a correspondingly well-developed legal and institutional framework" (**Italy**), "the core elements of a sound anti-money laundering and counter-terrorist financing (AML/CFT) regime" (**Belgium**), "a strong system to combat money laundering and terrorist financing" (**Spain**) or "reached a satisfactory level of compliance with all of the core and key recommendations" (the **Netherlands**). The International Monetary Fund (IMF) and Moneyval attested high standards in combating money laundering and financing of terrorism to **Liechtenstein**. Also **Germany** has adopted high standards to combat money-laundering and terrorist financing.

While the FATF has also identified some shortcomings in certain jurisdictions (e.g. in **Italy** with regard to the risk of money laundering (ML) stemming principally from tax crimes and activities most often associated with organised crime, such as corruption, drug trafficking, and loan sharking, in **Belgium** with regard to professions such as lawyers and casinos who have not yet taken action according to the FATF and in the **USA** with regard to to "measures addressing casinos as well as identifying "beneficial owners"", these countries have or are currently assessing and implementing respective steps in order to close the identified shortcomings.

E.g. in **Italy**, now all the categories of crimes listed in the FATF Glossary are predicate offenses to ML, including a range of tax crimes. Added to the re-criminalisation of "false corporate accounting" it was a welcome step, and is particularly significant in light of the extent of tax crimes in Italy. Also **Liechtenstein** amended the Liechtenstein Criminal Code as to the extension of the list of predicate offences by tax crimes in the field of money laundering, which were included by the FATF in its recommendations in February 2012. The amendment came into force on 1 January 2016. As a result, section 165 para 1 and 2 of the Liechtenstein Criminal Code now include tax offences which are subject to criminal sanctions by court in Liechtenstein. **Switzerland** has implemented the FATF standards as from July 2015 and January 2016 into its own legislations through many ad hoc changes in its main legislation body. In addition, new provisions have been introduced into Swiss law to implement the FATF recommendations (e.g. registration of family foundations with the commercial register; introduction into Swiss criminal law of the so-called preliminary infringement of anti-money laundering provisions, esp. in tax matters; enhanced possibility to convert bearer shares into registered shares). In the **USA**, separately from the efforts that are being undertaken in order to enhance the KYC processes, on June 12, 2015, the U.S. Department of Treasury issued the National Money Laundering Risk Assessment (NMLRA) and National Terrorist Financing Risk Assessment (NTFRA). The assessments were prepared by the Department's Office of Terrorist Financing and Financial Crimes (TFFC), which leads the U.S. delegation to the FATF, to be presented during the international peer review of the U.S. anti-money laundering and the counter-financing of terrorism (AML/CFT) measures scheduled for January 2016. Importantly, the Department's ongoing efforts to address CDD rulemaking is highlighted in these assessments.

As far as tax matters are concerned, **Belgium** is quite up to date with evolutions in relation the 4th anti money laundering directive (directive 2015/849). 'Serious tax fraud' is already in scope of anti-money laundering legislation (law of January, 11, 1993), as well as from repressive criminal legislation (article 505 criminal law code). Proceeds of 'simple tax fraud' can be in scope of money laundering offences too (mainly for the taxpayer who committed the tax fraud: so called '2nd type money laundering offence' or '3th type money laundering offence'). In 2015, **France** has introduced a lot of measures aiming at combatting the financing of terrorism, e.g. the improvement of the control of physical transfer of money at the border, the strengthening of the scope of reporting requirements for transfers from and to EU member states and outside the EU, it published new due diligence and reporting of suspicion guidelines and criminalized terrorist financing as a distinct offence. Further, the French government wants to strengthen the capacities of freezing terrorists' assets and immovable property. Currently, only the bank accounts are frozen in practice). These freezing measures shall be extended to immovable and movable property (vehicles). The freezing of certain benefit payments from public bodies may also be decided.

On April 2015, The Republic of **Panama** adopted the Law 23, in which the country adopts the measures of the Prevention of Money Laundering, Terrorism Financig and Financing of Proliferation of Weapons of Mass Destruction and other provisions. The purpose of this law is to regulate the framework for the supervisory authorities, entities, natural and legal persons which have to conduct the supervision and to take measures to identify, asses and understand the risks and consequences of Money Laundering, the Financing of Terrorism and the Financing of the Proliferation of Weapons of Mass Destruction; further, the law provides for appropriate controls for the mitigation of such risks, with the purpose of protecting the integrity of the financial system and other economic sectors of the country; and it aims to facilitate international cooperation measures.

In order to comply with the FATF recommendations, **Sri Lanka** enacted three Statutes (laws):

- The Convention on the Suppression of Terrorist Financing Act no. 25 of 2005. This Act was last amended in 2013 by the Convention on the Suppression of Terrorist Financing (Amendment) Act no. 3 of 2013.
- The Prevention of Money Laundering Act no. 5 of 2006 (PMLA). This Act was amended by the Prevention of Money Laundering (Amendment) Act no. 40 of 2011.
- The Financial Transactions Reporting Act no. 6 of 2006 (FTRA).

A framework for mutual assistance in criminal matters is contained primarily in the Mutual Assistance in Criminal Matters Act no. 25 of 2002. Further, Sri Lanka established a Financial Intelligence Unit which serves as a national centre for receiving analyzing and the dissemination of Suspicious Transactions Report (STR) on information regarding money laundering and terrorist financing. Among other responsibilities, the FIU is authorized by the FTRA to disseminate financial information to domestic authorities for investigation or action when there are grounds to suspect money laundering or illegal financial transaction.

In **Germany**, the Anti Money Laundering Act (*Geldwäschegesetz GWG – **AMLA**)* has been amended several times in the last years. Failure with respect to the stipulated reporting duties can result in a criminal liability and/or administrative fines. It is important to notice that not only the usual suspects such as banks are obliged parties. Lawyers, accountants, fiduciaries, service providers that assist in establishing companies, and estate agents fall also into the scope of the AMLA. The Federal Financial Supervisory Authority *(Bundesanstalt für Finanzdienstleistungsaufsicht BaFin – **FFSA**)* regularly publishes information and recommendations related to FATF documents. The FFSA, the Federal Ministry of

Finance, and the umbrella organisation of German Banks have issued an elaborate guideline with due diligence standards.

2.2.4. Will your country be subject to the Fourth EU Anti-Money Laundering Directive ("4AMLD") including UBO-register?

Of the reporting countries all the EU member states (i.e. Spain, Belgium, Austria, France, England and Wales, the Netherlands, Germany and Italy) will have to implement the 4AMLD into their national as 26 June 2017. The implementation processes are still pending. Also **Liechtenstein**, as a member of the EEA, is obliged to adopt all the legislative acts implemented into the EEA Agreement. The implementation of the 4AMLD is currently in progress.

Switzerland, the **USA**, **Panama** and **Sri Lanka** will not be subject to the 4AMLD, however, the **USA** report that it will impact U.S. based financial institutions with global operations in European markets.

This implementation will entail important adaptations for financial institutions regarding evaluation and management of risks of money laundering and terrorism financing. One of the most important point of the 4AMDL is (i) the precisions it brings on the identifications of the effective beneficiary of legal entities and trusts and (ii) the enlarged access to information on these effective beneficiaries.

It is interesting to note that **France** already has a national register of "fiducies" (March 2nd 2010 Decree) and, from this point of view, already started "voluntarily" to comply with the 4AMDL regulation. Further, in 2014, French government created a national register of trusts. The trusts reporting requirements will be developed in question 2.2.6. Also the **Netherlands** has been working on a national shareholders register. This means that by 27 June 2016, the Netherlands will have two separate registers where UBO's should be administrated.

2.2.5. If not, does your jurisdiction know similar shareholder registers?

Most of the countries report that they do not know similar shareholders registers. This applies to **Liechtenstein**, **Spain**, **Austria**, **France**, **England** and **Wales**, **Germany** and **Italy**.

In **Switzerland**, new regulations on UBO-registers entered into force on 1 July 2015. According to these new regulations, UBO's of Swiss a company have to be identified in case of nominative shares. Moreover, if a Swiss company issued bearer shares, the company has the legal obligation to keep a shareholder's register. However, the abovementioned UBO and shareholder's registers remain fully private and are not publicly available and therefore do not impose a threat on the anonymity of asset protection structures. In the **USA**, regulatory measures with respect to CDD practices are addressed by FinCEN predominantly under the USA PATRIOT Act which is expected to be expanded under the Bank Secrecy Act during the course of 2016.

In **Belgium**, a lot of information on taxpayers' transactions is publicly released. Enterprises must register with the Crossroad Bank for Enterprises managed by the Federal Ministry of Economy. Companies deeds as well as those of Belgian private foundations must be published in the Official State Gazette and are available for the public online. Enterprises' financial statements generally are also publicly available. Small foundations do not have to deposit their accounts with the Belgian National Bank. These registers allow amongst others for a search on the basis of 'address'. It is however not possible to search on the basis of the name of a taxpayer and receive an overview of all companies/foundations to which he is connected. Furthermore, a law of December, 14, 2005 abolished (in several phases) the possibility to issue bearer shares in Belgium. Shares are now either registered in the shareholder register or 'dematerialized'; Belgian banks generally do not open bank accounts where the holder's identity can remain anonymus; major holdings in listed companies must be published and transparancy measures were introduced for certain participations (or transfers in relation thereto) in non-listed companies too.

Besides the UBO register, a **Dutch** shareholders register (CAHR *Centraal Aandeel Houders Register*) has been introduced. It is a register where only certain groups of people have access to, being public service institutions for supervision and enforcement purposes. This is better set up according to many Dutch specialists, than the EU UBO register where everyone who has an interest has access to, including e.g. journalists. The Dutch shareholders register is planned to enter into force at the same time as the UBO register in June 2016.

Finally, the Companies Act no. 7 of 2007 of **Sri Lanka** requires every company incorporated in Sri Lanka to file an annual return which provides as at the date of the annual return details *inter alia* of the shareholders and directors of the company. However, there isn't any requirement under or in terms of the Companies Act no. 7 of 2007 for a company to maintain a register of ultimate beneficial interest. Section 129(1) of the Companies Act no. 7 of 2007 provides that no notice of any trust, expressed, implied or constructive, shall be entered on the share register or be receivable by the Registrar in the case of companies registered in Sri Lanka.

2.2.6. Are there any other transparency requirements in your country that pose a threat on the anonymity of asset protection structures?

Various countries report that there are other transparency requirements that pose a threat on the anonymity of asset protection structures.

In **Switzerland**, the automatic exchange of information might also be introduced at a Swiss level, although it is still unclear whether this will indeed be the case because of recent changes in the Swiss government, leading to a politically less intrusive approach in this framework. Moreover, as in every OECD country, the trend shows that pure and full anonymity is less and less guaranteed. However, although such anonymity is not as strong as it used to be towards tax and/or official authorities, it is still very efficient in Switzerland towards third parties, *e.g.*, third parties with no official reason wanting to gather information of the shareholding structure of a company. The Swiss Company Registries still guarantee the full anonymity of the shareholder of a Swiss company with limited liability (either with registered or bearer shares; so called *société anonyme* or *Aktiengesellschaft*). The Swiss system also offers a great discretion regarding the very limited publicity of tax returns, which are not public; a citizen can only have access to other peoples' tax returns on the basis of exceptional and well justified grounds (the practice varies from one Canton to another but one can say that, a general rule, tax secrecy is well preserved in Switzerland). Given the current political climate in Switzerland, no further immediate threats to privacy are expected in the next years, although changes may occur very quickly in this framework due to an increased international pressure in Switzerland, forcing it to implement new standards. This is however not the case at present and standards should not go beyond the changes set out in the present document.

Spain reports that the Law 10/2010 against money laundering and terrorism financing established an obligation to always discover the "real owner" behind a company or corporation. This obligation affects banks, casinos, notaries and registers, electronic payment companies, lawyers and other professionals, jewelry and art traders, lotteries, etc. This includes specially persons who own or control more than 25% shares of a company. In the **USA**, there have been recent concerns with illicit money parked in U.S. luxury real estate. As a result, the U.S. Department of Treasury has recently announced an initiative requiring U.S. real estate companies to disclose the names behind all-cash purchases which will first be implemented in Manhattan and Miami.

Belgium knows specific very detailed reporting duties in connection with the income tax return for individuals: besides foreign bank accounts and foreign life insurance contract, since the tax year 2014 also so called "legal arrangements" ('*juridische constructies*') have to be reported. Belgian tax residents are thus obliged to declare in their annual tax return whether they (or their spouse or children) can be considered founders or (at that time) 'potential' beneficiaries of a "legal arrangement". The concepts 'legal arrangements', 'founders' and 'beneficiaries' are defined in a broad sense, aiming at bringing into scope of this reporting duty as much as possible taxpayers. Several legal scholars are of the view that this duty might amount to a breach with EU-law and the fundamental freedoms that only foreign bank accounts & life insurance contracts have to be explicitly declared to the tax administration.

The **Austrian** law recognizes different transparency provisions and reporting requirements connected therewith. As an example for the comprehensive tax reporting duties in this context, the reporting duties in connection with using private foundations are discussed.

Violation of reporting duties may, for example, lead to a raise of the initial endowment tax (*Stiftungseingangssteuer*), but also lead to other fiscal disadvantages. The board of directors of the private foundation is moreover obliged to immediately inform the financial authority competent for the collection of the corporate income tax of the private foundation of the beneficiaries by means of electronic communication. Changes in the beneficiaries are always and immediately to be reported to the financial authorities.

France has introduced specific trust reporting requirements. The trustee of a trust of which the settlor or at least one of the beneficiaries is French tax resident (on 1 January) or holds a property or a right that is located in France or, if he is himself French tax resident, must declare the constitution, modification or extinction of the trust, and the content of its terms, in the following month**,** failing which the trustee, the settlor or the beneficiaries will be liable to a penalty of 12.5% of the trust assets' fair market value. These information are registered into the national trusts register. He also has to declare no later than 15 June of each year the fair market value at January 1st, of the assets, rights and products held by the trust. The failure to comply with these reporting requirements is punishable with a fine of € 20'000 or an amount equal to 12.5% of assets or rights held by the trust, whatever the higher. Further, there is a 3% tax on real estate assets located in France held by French or foreign companies (such as "fiducies" or comparable organizations, trusts and investment funds). This reporting requirement allows French tax authorities to know the beneficial owner of a French real estate held through French or foreign entities. Similar as in Belgium, French tax residents must declare their foreign bank accounts and life insurance contracts in their tax returns.

In **England** and **Wales**, the Small Business Enterprise and Employment Act 2015 will require UK companies to keep a publically searchable register of 'persons with significant control' of a company. The obligations under the Act are expected to come into force later this year. In addition in July 2015, the Government announced that the Land Registry will introduce a central public registry of UK properties owned by foreign companies and will explore plans to identify the true owners of such companies.

In the **Netherlands**, the rules in relation to the commercial register stipulate filing requirements with regard to not only the name (and address) of a sole shareholder, but also to all board members and the annual accounts, e.g. for the Private Limited Liability Companies (BV *Besloten Vennootschap*), the Public Limited Liability Companies with bearer shares (NV *Naamloze Vennootschap*) and for Foundations (*Stichtingen*). This means that the assets are publicly available to anyone with access to the commercial register, which is basically everyone. Certain other vehicles do not entail these requirements, either the annual accounts do not need to be published or the vehicle is not even mentioned at all in the commercial register. Naturally, with a view on asset protection, these vehicles become more and more popular. It is in practice becoming more and more difficult to get approval in advance on these structures by the tax authorities.

3. Tax

3.1. Transparency requirements under national law

3.1.1. Current transparency obligations regarding income derived from other states (directly or by subsidiaries) and the tax treatment thereof (including the transfer pricing applied) under national law;

As a general rule for countries inside as well as outside the EU, most tax payers are already under the obligation to report their worldwide income and the transfer pricing that they, as a specific tax payer, applied to their intercompany transactions. Additional reporting obligations may apply, such as in Belgium, regarding payments made to so called tax havens. More extended transparency regulations apply in inter alia Italy and Spain, where Controlled Foreign Company (CFC) regulations stipulate reporting obligations and possible adverse tax consequences for foreign income/activities.

Below, we will discuss the transparency obligations per jurisdiction.

Austrian tax law includes a number of special reporting duties and especially general duty to disclosure, duty to cooperation and duty to tell the truth. Resident individuals or resident legal entities subject to tax are therefore obliged to have their complete global income taxed in Austria already solely due to general provisions. Possible special provisions may, however, result from applicable double tax treaties or similar legal provisions.

For **Belgium**, the most important obligation in this respect currently is a reporting duty in relation to payments to 'tax heavens'. With effect from 1 January 2010, companies must report in their corporate tax returns all direct and indirect payments made to tax havens as soon as the total of such payments exceeds EUR 100,000 during a given accounting year (article 198(1)-(10) of the ITC).[1] Due to the specific anti-avoidance rule, payments made to qualifying tax havens that are also not reported in the tax return are considered not deductible in computing profits.

In addition, under Belgium tax law, reported payments are deductible only if the taxpayer is able to prove that the payment was made for an "actual and genuine" transaction with persons other than "wholly artificial arrangements". It is important to note that another amendment of 30 September 2015 confirms that the non-reporting of the payments, as such, may not lead to the non-deductibility of these expenses in the case where the EU rules on the free movement of capital and the non-discrimination provisions included in the tax treaties apply. The reporting obligation in the corporate income tax return exists

[1] The countries deemed to be tax havens within the meaning of this reporting obligation are the following: (i) countries where the nominal tax rate is less than 10%, and (ii) countries not respecting the minimum OECD standard on transparency and information exchange (OECD standard).

irrespective of whether it concerns a real or sham transaction[2]. A fraudulent intent is not required.

The Belgium Constitutional Court clarified that the obligation for companies to report payments to persons established in blacklisted countries dovetails with the framework of the fight against tax fraud and is intended to improve the efficiency of tax audits in connection with those payments. The obligation will enable the tax authorities to concentrate on the examination of such payments rather than on identifying them.

Brazil adopts a worldwide taxation system and Brazilian taxpayers (both individuals and companies) must report their full worldwide income on tax their returns. All reported income is potentially taxable. Thus, Brazilian companies are obliged to report and recognize profits of their worldwide subsidiaries and affiliates.[3] Corporate investment abroad is generally subject to corporate income tax on a yearly basis. Credits for taxes paid abroad are usually granted and that reinforces the need to provide detailed information regarding the foreign entity.

Commercial transactions carried out between Brazilian companies and related parties domiciled abroad shall comply with local transfer pricing rules. However, there is no specific provision under Brazilian law to report the foreign transfer pricing rules applied solely over foreign subsidiaries and affiliated entities.

Please note that as a direct consequence of both the recent worldwide tendency for exchange of financial information and economic crisis, the Brazilian Government has enacted a "Law for Voluntary Disclosure and Amnesty of Crimes" (Law No. 13,254/16). Such Law provides strong incentives for taxpayers to report and legalize unreported assets either maintained offshore or previously irregularly repatriated. Law No. 13,254/16 was just recently passed on January 2016 and comprises amnesty for several tax and financial crimes such as tax-evasion, money laundering and other criminal charges. Brazilian taxpayers have 210 days to elect for the self-disclosure rules and shall pay and overall taxation of 30% (15% tax plus 15% penalties) over such unreported assets (either tangible or intangible).

Cypriot tax law does not have specific transfer pricing rules. What it does provide for, however, is the arm's length principle (section 33 of the Income Tax Law). Pursuant to the arm's length provisions in the Cyprus tax law, related party transactions should be based on purely commercial terms, meaning that transactions between related parties should be based on terms and conditions similar/comparable to those between unrelated parties.

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[2] On 21 January 2016, the Constitutional Court rendered decision No. 11/2016 on a preliminary ruling request by the lower court of Antwerp in relation to the question whether the automatic non-deductibility and reporting rules in respect of payments to tax havens violate the constitutional principle of equal treatment and non-discrimination. According to the Constitutional Court, the failure to report payments to persons established in tax havens in accordance with Article 307(1)(3) of the ITC 1992 is, in principle, a sufficient reason to reject the deduction for tax purposes.

[3] Brazilian Law provides a distinction of foreign subsidiaries and foreign affiliates. Such distinction may have relevant tax impacts. For instance, profits deriving from foreign subsidiaries are taxed on accrual/current basis while foreign affiliates are generally tax on a cash basis.

There are no specific substance requirements from an arm's length viewpoint in Cyprus' tax law.

In **England and Wales**, the nature of the income received determines the transparency obligations that apply, and the concepts of 'residence' and 'domicile' are key to determining the extent that an individual will be taxed. The remittance basis rules mean that non-UK individuals domiciled but UK resident will be taxed on foreign-source income when that income is 'remitted', or in other words brought to or received or used in, into the UK in some form. They must pay income tax on all income arising in the UK, and may lose the right to claim income tax personal allowances once they have elected to be taxed on the remittance basis. If a resident non-domiciled individual has remained in the UK for seven years or more they may have to pay a substantial annual charge in order to make use of the remittance basis.

There are proposed changes that are expected to come into force next year which will significantly impact the taxation of non-domiciled individuals. In particular it is proposed that individuals who are resident in the UK for 15 out of 20 tax years will become deemed domiciled in their 16th tax year of residence and so lose the benefit of the remittance basis Another change is where individuals are born in the UK with a UK domicile of origin but acquire a foreign domicile of choice they will be deemed domiciled when they return to the UK if they have been UK tax resident for at least one of the last two tax years.

In **Germany**, the general rule is that a taxpayer has to present all facts and circumstances that are relevant for German tax purposes. When dealing with financial institutions resident in a country that does not provide for effective exchange of information, the taxpayer has to provide a declaration in lieu of an oath regarding the accuracy and completeness of the information and authorize the tax authorities to assert on the taxpayer's behalf possible rights to obtain information against the credit institutions.

Art. 53, para. 1, of the **Italian** Constitution (IC) provides the so-called *ability to pay principle*, according to which «*every person shall contribute to public expenditure in accordance with their capability*».[4] Therefore, in practice, the Italian tax system applies the worldwide income taxation principle to taxpayers considered "resident" for tax purposes,[5] while "non-resident" persons shall pay taxes only in relation to the income produced in the national territory.[6]

In addition, Italy provides reporting duties for certain resident taxpayers that have (or transfer) assets or investments in another country, regardless if the latter is considered "cooperative" or "uncooperative jurisdiction". In particular, the law governing foreign capital and property of Italian residents imposes a duty on resident individuals, non-commercial entities and limited liability partnerships to declare any assets exported and to declare their value annually within their income tax return. According to Law Decree no.

[4] English translation proposed by the Italian Senate, available at: www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

[5] For the definition of residence of individuals, *see* Art. 2, Presidential Decree no. 917 of 22 December 1986, (Income Tax Consolidated Act, hereinafter "ITCA").

[6] *See* Art. 23 ITCA.

167 of 28 June 1990 (and subsequent amendments), these taxpayers must indicate in a particular section of their tax return (the so-called *Quadro RW*) all transfers to and from other countries – made through non-residents and without bank mediation – of cash or financial activities of a value that exceeds € 15,000.[7]

Similar reporting duties are provided for financial institutions that helped resident taxpayer in such transactions, which must also be reported to the Bank of Italy.

If these obligations are not fulfilled, the taxpayer will be subject to tax administrative penalties that range from 3% to 15% of the sums not indicated in the tax return and the corresponding value of goods can be seized. Nevertheless, if the undeclared transactions or assets involve an "uncooperative jurisdiction", the resident taxpayer shall be liable to tax administrative penalties that range from 6% to 30%. Financial institutions that helped taxpayers in such transactions or that have knowledge of foreign undeclared assets and failed to report them to the Italian tax authorities shall pay an administrative tax penalty from 10% to 25%.

Finally, the law provides that undeclared foreign activities are subject to a presumptive taxation, which considers them profitable at the official discount rate in force in the tax period when the activities should have been declared.

ThE first strong signal from the international community led the Italian Government to introduce in 2009 a so-called *Tax Shield*,[8] which was an amnesty programme allowing applicant taxpayers to regularise or repatriate, in an anonymous way, their undeclared offshore assets by paying an "extraordinary tax" of 5% of their value.[9]

Following the latest initiatives of the international community aimed at strengthening mutual administrative assistance mechanisms and combating the phenomenon of "base erosion and profit shifting" (BEPS), Italy approved a *voluntary disclosure* programme, which – similarly to the *Tax Shield* – is reserved to those resident taxpayers that failed to report and pay taxes on offshore assets or transactions.[10] Nevertheless, and this clearly expresses that the Italian tax policy is aligning to the international trend, this discipline provides that applicant taxpayers shall: 1) disclose all their offshore undeclared assets directly to the Italian tax authorities; 2) pay in full the taxes that should have been paid in the tax years "covered" by the programme (*i.e.* from 2010 to 2013 in case of false tax return or from 2009 to 2013 in case of omitted tax return); 3) benefit from a reduction of tax administrative penalties.

The *voluntary disclosure* programme represents therefore a new kind of amnesty for Italy, much more severe from the previous *Tax Shield* or other broad official tax pardons (*condono fiscale*), which strengthen the importance of reporting duties on taxpayers.

[7] This threshold has been introduced by Law no. 186 of 15 December 2014, since before it was € 10,000.

[8] *See* Art. 13-*bis* of Law Decree no. 78 of 1st July 2009.

[9] For more details, *see* P. MASTELLONE, *The new Italian Tax Shield: amnesty for undeclared offshore assets*, in *European Taxation*, vol. 50, no. 4/2010, p. 152 et seq.

[10] For the analysis of the discipline and the critical aspects, *see* P. MASTELLONE, *The Italian voluntary disclosure programme: a new era of tax amnesty?*, in *European Taxation*, vol. 55, no. 8/2015, p. 374 et seq.

Italy provides also a special anti-avoidance discipline aimed at limiting the deductibility of costs suffered by resident taxpayers for transactions made with companies resident in uncooperative jurisdictions to the measure of their "market value".[11] Before the recently introduced amendment,[12] which was necessary in order to render the discipline compatible with certain non-discrimination clauses contained in double tax conventions signed by Italy, such anti-avoidance discipline provided the general prohibition to deduct "black list" costs unless the taxpayer successfully gave evidence that those costs showed an effective economic interest and that the foreign company was not a "letter-box".

Finally, Art. 167 ITCA lays down specific duties for resident taxpayers that directly or indirectly control a foreign company (so-called *c.f.c. legislation*), also through trust companies or other subjects, with seat in a non-EU State or jurisdiction with a preferential tax regime or with a "non-cooperative" approach. Such discipline attributes profits of such non-resident entities to the controlling company proportionally to the shares held, if both the following requirements are satisfied:

- the controlled foreign company is subject to a tax burden lower than 50% of the Italian one;
- more than 50% of the controlled foreign company is composed by passive income.

If such requirements are met, the income of the controlled foreign company is taxed as it was produced by the Italian controlling company, according to the ordinary rules laid down in the ITCA. Nevertheless, the taxpayer may obtain the disapplication of such discipline through a preliminary ruling aimed at proving the existence of one of the following circumstances:

- the controlled foreign company carries out an effective industrial or commercial activity abroad; or
- from the shares held by the Italian taxpayer it does not follow the effect of fictitiously shifting the profits in low-tax jurisdictions.

The recent Legislative Decree no. 147 of 14 September 2015 has amended the c.f.c. discipline in order to render its definitions clearer and allow taxpayers to provide their counterproof more easily. Such amendment permitted such special anti-avoidance discipline to align to international best practices.[13]

Luxembourg tax law does not impose transparency obligations. For tax reporting purposes, Luxembourg companies have to report information about direct subsidiaries only. That is, Luxembourg companies must report information concerning participations held in direct subsidiaries that qualify for the participation exemption in specific annexes to the corporate income tax return.

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[11] *See* Art. 110, paras. 10-12, ITCA.

[12] *See* Art. 5, Legislative Decree no. 147 of 14 September 2015, which amended Art. 110, paras. 10-12, ITCA.

[13] In literature, *see* L. MIELE – V. RAMAGLIONI, *"CFC rules" più aderenti alle "best practices" internazionali*, in *Corriere Tributario*, vol. 38, n. 38/2015, p. 3873 et seq.

In the **Netherlands**, in general it can be stated that the combination of commercial, tax and AML laws ensure the availability of full accounting records for all relevant entities. The requirements under national tax laws ensure keeping of underlying documents by all relevant entities. Accounting records and underlying documentation must be maintained for a minimum of seven years. In addition, anti-money laundering and commercial law requirements ensure that financial institutions maintain transaction records and customer due diligence records for at least five years.

As for transparency and taxation, on basis of national tax legislation, the Dutch Tax Authorities ("DTA") could oblige the taxpayer to disclose all information which could be relevant to determine the tax position (i.e. subject to tax) of the taxpayer (resident and non-residents; individuals and companies). In this respect the DTA, could ask for specifications of income derived from other states and the taxpayer (see paragraph 2.2 for further information). Furthermore, there are many companies which work with the DTA on basis of so-called 'horizontal monitoring'. On basis of this cooperation, the companies are transparent in all processes which could be relevant to determine the Dutch tax position, which are discussed with the DTA. In such cooperation, a company provides for an overview of the processes which at the end leads to an outcome in the companies' tax return. This type of monitoring should prevent (randomly) performed audits.

In **Spain**, when a taxpayer is tax resident in Spain, and he owns property the certain tax obligations must be met. The first obligation is to present an annual basis, the informative Tax Return 720, which is used to declare all rights and assets located abroad. Besides Spain has modified recently the transfer pricing obligations of documentation, in order to relieve the paperwork for medium size companies. On the contrary, the obligation for big group of companies has increased.

In **Sri Lanka**, Section 106 of the Inland Revenue Act no. 10 of 2006 (as amended), imposes an obligation upon any person who is in receipt of income to provide information relating to such income if such information is required by the Department of Inland Revenue. This is in addition to such information that may be provided in that person's tax returns. The rules relating to international transfer pricing would require an entity to provide particulars regarding transactions with associated undertakings, (section 104 of the Inland Revenue Act no. 10 of 2006 (as amended)).

In **Sweden**, the transparency obligations are in general quite extensive. Depending on the matter at hand, the transparency obligations may rest upon the individual taxpayer and/or a third party. Employers and banks are for example obliged to report a great variety of transactions to the Swedish Tax Agency. Individual taxpayers must in principle report to the Swedish Tax Agency all his/her income regardless of the source of the income – if the income is taxable or otherwise relevant for the taxation in Sweden. Individual taxpayers must however generally speaking not report such income, assets etc. that isn't taxable or relevant for the taxation in Sweden. For example, a Swedish parent entity is in general not obliged to report income that a foreign subsidiary obtains outside of Sweden (nor the tax treatment thereof), provided that the income isn't finally credited to the Swedish parent entity.

In **Switzerland**, individuals have to declare their worldwide wealth and income. Income and capital of a Swiss based company are reported in its accounts. If the Swiss entity is not quoted, then it has no obligation to publish its accounts. Income realized through a foreign PE or real estate is exempt (taken into account for the progressive tax rate for individuals).

There is a tangled web of transparency obligations under **US** domestic law derived from the system of worldwide taxation and the complexity of that system in avoiding double taxation, preventing deferral of income in certain circumstances, and preventing use of foreign accounts or entities to evade tax (see discussion on FATCA further in this report). While it is possible in many circumstances to reduce the onerous reporting requirements (typically by analysing the requirements of ownership and control and avoiding certain thresholds), the strategies are dependent on the goals of the taxpayers involved and increase the complexity of business structures.

From a broad perspective, the various reporting obligations of US taxpayers on required tax and information returns typically include reporting income derived from other states, the source of that income, and in an indirect way the tax treatment of the income in the state. These reporting obligations vary greatly depending on the type of taxpayer (i.e., whether the taxpayer is an individual, corporation, partnership, trusts or estate. Specifically in the case of entities, the nature of the obligations depend on whether the entity is domestic or foreign, and, in the case of a foreign entity, the percentage ownership by a US person.

By way of example, in the context of the information returns required for a Controlled Foreign Corporation ("CFC"), the Form 5471 , the corporations balance sheet and income statement are required to be disclose, which includes a line item for the gross tax amount. Further detail is required on Form 5471, Schedule E (Income, War Profits, and Excess Profits Taxes Paid or Accrued) which lists the state in which the tax was paid or accrued and the amount of the tax. In these required returns, the particular disclosures relate more to ensuring compliance with the CFC regime and proper reporting of tax attributes such as, inter alia:

- "Subpart F" income (typically passive income for which deferral is not available (i.e., income required to be recognized on a current basis));
- Dividends (requiring earnings and profits calculations, in which taxes paid is a relevant line item); and
- Foreign tax credits, which are reported in detail on a separate form that notes detailed information related to the source and nature of that tax for purposes of limitation calculations.

In addition to varying reporting requirements, domestic corporations are required to report uncertain tax positions on a schedule (known as Schedule UTP) that is filed with a Form 1120 (US Corporation Income Tax Return). The Schedule UTP is required in all circumstances when the corporation has taken a position on its US federal income tax return for the current or a prior tax year, and either the corporation or a related party (including both domestic and foreign subsidiaries) has recorded a reserve with respect to that tax position for US federal income tax in audited financial statements or if they did not do so because they expect to litigate the position. It is interesting to note that there is no direct penalty associated with a failure to file Schedule UTP.

3.1.2. Regulations to report the world wide transfer pricing policy of the group under national law;

As we general rule we can conclude that most of the jurisdictions do not have national law that stipulates that the world wide transfer pricing policy of the group should be reported by a tax payer. Italy, where the first transfer pricing regulations where introduced in 1936, could be considered a forerunner that has preceded the way.

Now, following the BEPS Action Plan, Country by Country reporting is implemented worldwide. Based on the Country by Country reporting, taxpayers that are part of a multinational with a turnover exceeding EUR 750 million, need to report certain financial information (e.g. statutory profits, income before tax, tax paid, number of employees, etc.) for each jurisdiction in which the multinational is present. Taxpayers with a turnover exceeding (generally) EUR 50 million furthermore need to prepare a so called Master file and Local file. In the Master file, information about the transfer pricing methods used and the worldwide allocation of income has to be included. In the Local file, the taxpayer has to report information that is relevant for the intragroup pricing in relation with transactions performed by the taxpayer and its affiliated entities. Brazil remains an exception as companies are required to disclose profits for tax purposes by country, similar to the OECD's Country by Country tax reporting proposals but where no specific review of foreign transfer pricing rules apply.

Below, we will discuss the regulations per jurisdictions.

In **Austria**, there are no such general provisions. Yet, in individual cases there may be a duty to report or an obligation to prove the accuracy of a tax return due to general duties to disclose and to tell the truth. Furthermore, facts involving foreign countries are subject to an increased duty to cooperate following the case law.

Belgium is one of the sole countries in the EU that does not explicitly have this obligation in its income tax law. Belgium thus does not formally impose documentation requirements. As such, entities that do not prepare contemporaneous documentation are not exposed to penalties. However, in two practice notes, the Belgian tax authorities urge taxpayers to prepare contemporaneous transfer pricing documentation to support the arm's length nature of intercompany transactions.

According to the practice note of 28 June 1999, tax inspectors are to refrain from in-depth transfer pricing scrutiny in cases where the taxpayer has made efforts to determine transfer prices in accordance with the arm's length standard. By contrast, where the taxpayer only discloses vague, useless or inadequately founded information, the case must be examined more closely. Consequently, the practice note must be seen as more than just an invitation to taxpayers to compile extensive, relevant documentation based on the transfer pricing methodology adopted. It implicitly urges taxpayers to pre-pare upfront transfer pricing documentation.

A second practice note was issued on 14 November 2006. It contains an update on certain points in the previous transfer pricing practice note, particularly regarding guidance on transfer pricing audits and documentation requirements. The second practice note confirms the embedding in Belgian tax practice of the EU Code of Conduct on transfer pricing documentation and its "Masterfile concept". The Code of Conduct is added as an appendix to the practice note. In terms of the content of the documentation, reference is thus made to the EU Code of Conduct on transfer pricing documentation.

Belgium also makes reference to the OECD's September 2014 deliverable on Action 13 of the BEPS Action Plan containing revised standards for transfer pricing documentation and a template for country-by-country re-porting of income, earnings, taxes paid and certain measures of economic activity. In a response to a parliamentary question on 11 March 2015, the Belgian Minister of Finance referred to the OECD BEPS project and endorsed the recommendations in relation to transfer pricing documentation and country-by-country reporting. Following these recommendations, the Belgian government envisages introducing formal transfer pricing documentation requirements given that such measure would contribute to more transparency, efficient audits and increased legal certainty. A feasibility and benchmark study on the introduction of mandatory transfer pricing documentation rules is already in progress and included as part of the 2015 operational plan of the Belgian tax administration.

The Minister stressed that clear rules in relation to the burden of proof should be established as part of a potential implementation and also high-lighted the complexity of determining arm's length prices in a global environment. In this respect, he emphasized that transfer pricing disputes are not black or white and should not by definition be regarded as tax fraud to which specific penalties or sanctions apply. The Minister confirmed that there should also be no automatic extension of the normal statutes of limitation for transfer pricing disputes. The tax administration is thus fully aware of the potential issues in relating to transfer pricing. Of course, the income tax code also foresees in disposition to tackle (artificial) profit shifting (see higher also).

Taxpayers (companies) can apply for an advanced ruling decision on the at arm's length character of their transactions (intercompany loans, purchase prices).

Important to mention is that the tax administration embodies a separate body of tax inspectors who focus exclusively on transfer pricing issues (*'cel verrekenprijzen'* or specialist transfer pricing team (STPT)). This body has been expanded over the past years and will keep growing in the future too. They regularly initiate tax investigations on a national scale (e.g. addressing 300 enterprises at the same time with a unified questionnaire). In short, the mission statement of the STPT is inter alia to act as the central point of contact for all tax authorities dealing with transfer pricing matters, to maintain contact with the private sector and governmental bodies in the area of transfer pricing, to formulate proposals and render advice with respect to transfer pricing, to take initiatives and collaborate in the area of learning and education in view of better sharing of transfer pricing knowledge within the tax authorities and to take initiatives and collaborate with respect to publications that the tax authorities have to issue regarding transfer pricing.

Brazilian legislation does not provide for specific obligation of reporting the world wide transfer policy of an economic group. As for commercial transactions involving the Brazilian entity the Brazilian transfer pricing rules apply. In such cases a report issued by an independent company is usually sufficient to support costs incurred by the tested party abroad. Besides, the local controlling company shall have access and consolidate the foreign subsidiary/affiliate balance sheet. Brazilian companies are required to disclose profits for tax purposes by country, similar to the OECD's country-by-country tax reporting proposals. Nevertheless, no specific review of foreign transfer pricing rules apply.

The **Cypriotic** income tax legislation does not include regulations to report the world wide transfer pricing policy of the group

England and Wales is expected to implement the OECD's model template for tax reporting imminently. The new rules are likely to require multinationals to provide annual financial information and to disclose taxes paid in each country in which it has a presence. The current UK transfer pricing rules require companies to self-assess transfer pricing adjustments and pay tax by reference to arm's length terms. There are penalties for non-compliance. There are further regulations to keep sufficient documents to satisfy HMRC that companies are applying the arm's length pricing test in accordance with the rules. There are also numerous double tax treaties and arrangements which have regulations which will affect companies operating in certain jurisdictions as well as the UK.

In **Germany**, national law does not include the world wide transfer pricing policy of the group. However, Germany fully supports OECD BEPS Action Plan 13.[14]

In **Italy**, transfer pricing provisions were introduced a long time ago[15] and the first regulation entered into force in 1936.[16]

The actual transfer pricing regime provides that, in regard to international intra-group transactions, the tax authorities shall not apply the principle of valuation at historical cost. Instead, they must determine the value of goods and services on the basis of the normal value, if this leads to an increase of the taxable base.[17] The tax authorities are entitled to make such an adjustment if both of the following requirements are satisfied:

- an Italian and a foreign company exist; and
- the Italian entity controls the foreign entity or vice versa.

The rationale of this specific anti-avoidance regime is to minimize a reduction to the tax burden through the manipulation of profits, by using group companies placed in tax-privileged jurisdictions.

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[14] Naumann/Groß (senior officers with the Federal Ministry of Finance) IStR 2014, 792 (793).

[15] On this isse, *see* G. BIZIOLI, *Considerazioni critiche in merito all'orientamento giurisprudenziale in tema di* transfer pricing, in *Rivista della Guardia di Finanza*, vol. 63, n. 3/2014, p. 691 et seq.; R. CORDEIRO GUERRA, *La disciplina del* transfer price *nell'ordinamento italiano*, in *Rivista di Diritto Tributario*, vol. 10, no. 4/2000, p. 421 et seq. and G. MAISTO, *La disciplina del "transfer price" nel diritto tributario italiano e comparato*, Cedam, Padua, 1985.

[16] Art. 17, Law no. 1231 of 8 June 1936.

[17] Art. 110, para. 7, ITCA.

The onus to demonstrate the existence of such tax avoidance is on the tax authorities to the extent that they intend on making adjustments. In this respect, the Italian Supreme Court (ISC) held that, «*the taxpayer is not required to prove the correctness of the transfer prices applied, if the tax authority did not prove prima facie the infringement of the normal value principle*».[18] In doing so, it recalled its longstanding case law in the field of specific anti-avoidance provisions.[19] Since the purpose of the transfer pricing provisions is to avoid a situation where, within a group of companies, the profits are transferred for less than the normal price of the goods sold, with the specific aim of avoiding Italian taxation thereon in favour of foreign more advantageous tax regimes, the ISC believes that Art. 110, para. 7, ITCA represents «*an anti-avoidance clause rooted […] in the EU principles of abuse of law*».[20] The burden to prove the existence of the requirements of the transfer pricing provision is on the tax authorities and the taxpayer only has to prove the correctness of the prices applied after the tax authorities have *prima facie* established a divergence from the arm's length principle. Nevertheless, in practice, it is not clear what evidence the tax authorities are required to provide to demonstrate that the taxpayer has infringed the transfer pricing provision. According to some scholars, what is required is not actual proof, but argumentation based on factual elements well-known to the parties, interpreted differently. Therefore, while the tax authorities must describe a sufficiently organic argumentative scenario, free from logical defects, the taxpayer must highlight the inconsistencies and contradictions inherent in such reasoning and also facts that would reduce its tax liability (*i.e.* deductible costs sustained in the business activity).

Art. 26, Law Decree no. 78 of 31 May 2010 (converted into Law no. 122 of 30 July 2010) substantially amended the transfer pricing regime by introducing a "safe harbour" provision in regard to tax administrative penalties for taxpayers that previously prepared pre-determined documents proving the transfer prices applied.[21] This legislative amendment aims to align the Italian rules with the relevant OECD Guidelines and defines administrative penalty profiles in regard to infringement cases.[22]

The regime provides that in circumstances where a transfer price adjustment is made by the tax authorities that results in higher tax or a credit difference, the penalty for false tax return (from 100% to 200% of the higher tax or lower credit ascertained) shall not apply if:

- during the access, inspection or tax examination, the taxpayer supplies to the tax officers the Transfer Pricing Documentation (hereinafter "TPD") that has been

[18] *See* ISC, Tax Chamber, 13 October 2006, no. 22023, which has been confirmed by ISC, Tax Chamber, 16 May 2007, no. 11226.

[19] *See* ISC, Tax Chamber, 25 March 2003, no. 4317.

[20] *See* ISC, Tax Chamber, 13 October 2006, no. 22023.

[21] The Explanatory Memorandum to Law Decree No. 78/2010 explains that the new penalty protection system is guaranteed for those taxpayers that have a standardized set of documents that makes it possible to check compliance of the transfer prices applied with the normal value.

[22] *See* R. CORDEIRO GUERRA – S. DORIGO, *La documentazione dei prezzi di trasferimento*, in *Corriere Tributario*, vol. 33, no. 33/2010, p. 2732 et seq.; E. DELLA VALLE, *La documentazione sulla 'transfer pricing policy' al debutto nell'ordinamento interno*, in *Corriere Tributario*, vol. 33, no. 28/2010, p. 2252 et seq.; P. MASTELLONE, *The shift in the burden of proof in regard to transfer pricing*, in *European Taxation*, vol. 51, no. 5/2011, p. 211 et seq.

identified in a Decision of the Chief Commissioner of the Italian tax authorities, which is aimed at verifying compliance of transfer prices with the normal value; and

- the taxpayer had already informed the tax authorities that it held such documentation.[23]

The Decision of the Chief Commissioner of the Italian tax authorities was enacted on 29 September 2010 (Protocol no. 137654/2010) and specifies the TPD that is required to enable tax officers to confirm whether or not the transfer prices are consistent with the "normal value". Any discrepancies would, thus, justify tax administrative penalties. The TPD must be in line with the EU Code of Conduct and the OECD Transfer Pricing Guidelines.

A quite controversial aspect of the described discipline is that the non-application of the tax administrative sanction requires not only that the TPD be maintained, but also that the TPD be "suitable" according to the tax officers, since it should permit compliance of the transfer prices with the normal value to be determined. This aspect implies, in practice, a wide discretion of tax authorities to determine whether or not the TPD meets a certain degree of reliability, for example, in relation to information not updated or not complete.

Another critical aspect of the transfer pricing discipline was that its application did not automatically exclude criminal implications for the taxpayer involved: in this respect, the Italian system considers the false tax return punishable with tax administrative penalties and, if certain quantitative thresholds are exceeded, also with criminal penalties. In this respect, Legislative Decree no. 158 of 24 September 2015 (entered into force on 22 October 2015) has expressly excluded any criminal implication linked to transfer pricing claims by the tax authorities, which shall not inform anymore the competent public prosecutor.[24]

The **Luxembourg** income tax act was amended (with effect as from 1 January 2015) so as to include a 'transfer pricing' provision similar to Article 9 of the OECD Model Convention (Associated Enterprises); however, this provision does not include the obligation to report the world wide transfer pricing policy of the group.

In the **Netherlands**, the Dutch tax administration could request the taxpayer to provide with all relevant information to determine its tax position on basis of national tax law, but this does not necessarily imply the obligation to report the world wide transfer pricing policy unless it would seem relevant for the DTA to determine the taxpayers tax position.

As per 22 December 2015, the Dutch Senate approved a new law which entered into force 1 January 2016 containing detailed transfer pricing documentation requirements in line with Action 13 of the OECD's BEPS initiatives. This in order to enable the DTA and other tax administrations to analyse potential transfer pricing risks that relate to calculating the tax base. These requirements include a country-by-country report, a master file and a local file. A country-by-country reporting obligation applies to multinational groups with a Dutch resident parent company and a consolidated turnover of at least 750 million. The master

[23] *See* new Art. 1, para. 2-*ter*, Legislative Decree no. 471 of 18 December 1997.

[24] *See* new Art. 4, para. 1-*bis*, Legislative Decree no. 74 of 10 March 2000, as amended by Art. 4, Legislative Decree no. 158 of 24 September 2015.

file contains an overview of the business of the multinational group, including the general transfer pricing policy and the world wide allocation of income.

In the Netherlands it is also possible for a taxpayer to pro-actively arrange for an Advance Pricing Agreement. The Advance Pricing Agreement (APA) program allows the taxpayer and the tax authority to avoid future transfer pricing disputes by entering into a prospective agreement, generally covering at least five tax years, regarding the taxpayer's transfer prices. Such agreement could be unilateral or bilateral.

In **Spain**, entities or group of companies, whose turnover is over €45 Million are obliged to give information regarding their organization and structure, its activities, Information in relation with intangible assets, etc. If the turnover of the entity or group of companies exceeds €750 Million the information must be given country by country. In General, Spain´s documentation requirements established by Royal decree 634/2015, are closely aligned with the EU transfer Pricing Forum´s Code of Conduct concepts. The OECD transfer pricing guidelines also apply. The corporate tax law 27/2014 (Corporate tax rules), includes a general reference to proportionally and sufficiency principles in relation to the obligation to maintain transfer pricing documentation has been introduced.

In **Sri Lanka**, Section 104 of the Inland Revenue Act no. 10 of 2006 (as amended), specifies that the profits and income or loss from international transactions between associated undertakings must be determined by having regard to the arm's length price.

The relevant principles applicable for determining (i) the arm's length price; (ii) advance pricing agreements; and (iii) what constitutes an associated undertaking, are set out in Part I of the Transfer Pricing Regulations published in Gazette Extraordinary no. 1823/5 of 12 August 2013.

There is no automatic reporting requirement since tax is paid on a self- assessment basis. However, where the taxpayer's return is subject to scrutiny, the Department of Inland Revenue can call for information regarding the transfer pricing policy of the group prior to making an assessment.

In **Sweden**, there are no domestic laws requiring individual taxpayers to "automatically" report the world wide transfer pricing policy of the group. The transfer pricing policy must however be reported upon request by the Swedish Tax Agency. Individual taxpayers must therefore always document the relevant transfer pricing information for each tax year, so that the information quite easily may be compiled and handed over to the Swedish Tax Agency upon a request. The transfer pricing documentation must be saved and made available to the Swedish Tax Agency for at least seven year.

On the 27th January, **Switzerland** signed the multilateral agreement on the country-by-country reporting under the BEPS umbrella. The multilateral agreement will be then submitted to the comments of the Swiss economic world, after which it will follow the ordinary legislative way at the level of the Federal Parliament in order to be implemented and will be subject to facultative referendum.

The United States do not require reporting of the transfer pricing methods used or overall worldwide transfer pricing policy of taxpayer groups. Indirectly, both the information returns filed with respect to CFCs (Form 5471) and 25% foreign owned US corporations (Form 5472[25]) require disclosure of detailed information on controlled transactions with foreign entities. In the case of an audit by the IRS, the taxpayer would then be in a position to defend its transfer pricing methodology and the transactions at issue, and might be subject to penalties of 20% to 40% of the tax amount in the case of adjustments. In order to avoid such penalties, the taxpayer has the option to prepare contemporaneous documentation (i.e., prepared by the filing date of the return), update such transfer pricing documentation on an annual basis, and submit the documents within 30 days of request by the IRS.[26] With respect to cost sharing arrangements, controlled participants are required to file a Cost Sharing Statement with the IRS within 90 days after the first occurrence of intangible development costs, as well as to make specified disclosures on annual tax returns and maintain contemporaneous documentation.[27]

In addition to the above, the US Department of Treasury has released proposed regulations based on the BEPS Action 13 final recommendations requiring country-by-country documentation.[28] However, as discussed, the report will be required after publication of the final regulations.

3.1.3. Obligations to report tax schemes under national law;

In the view of the OECD, a mandatory disclosure of tax schemes, which is included in Action Plan 12 of BEPS, aims to mitigate tax avoidance. In the reports, the OECD considers that "the lack of timely, comprehensive and relevant information on aggressive tax planning strategies is one of the main challenges faced by tax authorities worldwide and that early access to information provides the opportunity to quickly respond to tax risks through informed risk assessment, audits, or changes to legislation".

The jurisdictions in which it is currently obligated to report specific tax schemes are however very limited (UK and US focussed) and it is not expected that mandatory disclosure of tax schemes is a key follow up item of the BEPS Action Plan for the jurisdictions. Italy does not provide obligations to report tax schemes but nevertheless stipulates a close cooperation and communication between taxpayers and tax authorities.

Below, we will discuss the regulations per jurisdiction.

In **Austria**, **Cyprus, Germany** or **the Netherlands** there is no obligation to report tax schemes. Yet, in Austria it is common in practice to obtain rulings in advance from the competent tax authority especially in connection with complicated transaction including fiscal consequences. In Germany, to obtain certain benefits a tax payer must disclose cross border structures.

Belgium currently does not include obligations to report tax scheme in its national law. Valuable information can be found in the annual report of the Belgian Ruling Commission

[25] https://www.irs.gov/pub/irs-pdf/f5472.pdf.

[26] *See* Treas. Reg. § 1.6662-6 and § 1.482-7(k)(2).

[27] Treas. Reg. § 1.482-7(k)(2).

[28] Prop. Treas. Reg. § 1.6038-4

though, which sometimes also mentions tax planning / strategies for which it did not wanted to grant a ruling decision.

Brazilian Law does not provide for the obligation of self-reporting tax schemes. However, it is worth noting that Brazilian Government attempted to approve a bill in 2015 (Provisional Measure no. 685, of 2015) establishing such obligation. After an intense debate in the civil society and the legal community, the Congress has decided not to approve such legislation.

England and Wales law contains obligations to report tax schemes that fall within the Disclosure of Tax Avoidance Schemes (DOTAS) rules which cover CGT, IHT, ATED, SDLT and corporation tax (separate regimes apply for VAT and national insurance contributions). The rules that govern whether these regimes will apply are complex. A tax arrangement must be disclosed to HMRC when:

- It will, or might be expected to, enable any person to obtain a tax advantage.
- That tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the arrangement, and,
- It is a tax arrangement that falls within any description or 'hallmark' prescribed in the relevant regulations.

Failure to report the scheme will trigger penalties. Disclosure is generally required to be made by the scheme 'promoter' as defined by the regulations.

The **Italian** tax system does not provide obligations to report tax schemes.

Nevertheless, thanks to the international developments, Italy has introduced several non-compulsory instruments that enhance and favour a close cooperation between taxpayers and tax authorities.

Until 2015, Italian law regulated tax avoidance through two main tools. On the one hand, there were specific provisions that prohibit the unlawful saving of taxes. On the other hand, the battle against tax avoidance was tackled through the application of Art. 37-*bis*, Presidential Decree no. 600 of 29 September 1973 (Income Tax Assessment Act, ITAA), introduced in 1997 and according to which the tax authorities were able to disregard transactions lacking a "valid economic purpose" and aimed at circumventing obligations or prohibitions or unduly obtaining tax reductions or reimbursements. Despite its wide application, such provision was not properly a general anti-avoidance rule (GAAR), since its application was limited to the specific list of transactions contained in paragraph 3.

Nevertheless, from 2006 onward – and, especially, with several decisions issued in 2008 by the Grand Chamber – the ISC started to enlarge its objective scope of application also to other transactions not specifically identified by the rule, invoking excessively the principle of "abuse of law" as defined by the Court of Justice of the European Union (CJEU) and considered rooted in the so-called *ability to pay principle* of Art. 53 IC. Such criticisable approach that *de facto* led to a judicial creation of a GAAR in the Italian tax system generated great uncertainty among taxpayers, which inevitably became scared that any transaction might have been considered abusive by tax authorities.[29]

This scenario has been finally solved with the introduction, in 2015, of a GAAR contained in Art. 10-*bis* of Law no. 212 of 27 July 2000 (the so-called *Taxpayers' Bill of Rights*, hereinafter "TBR").[30] Paragraph 5 of such new rule provide the possibility for the taxpayer to know in advance from tax authorities if a transaction will fall under the application of the GAAR.

Furthermore, Art. 2, Legislative Decree no. 147 of 14 September 2015 (in force from 7 October 2015) provides that «*companies wishing to make investments in the territory of the State for amounts not less than € 30 million and that have significant implications for employment in relation to the activity in which the investment is made and to their duration, may submit to Tax Authorities an preliminary ruling concerning the tax treatment of their investment plan and of any extraordinary transactions that shall be considered linked for its implementation*».[31]

Companies willing to do new investments with the abovementioned characteristics may also use this procedure with the aim of checking if the proposed transaction or transaction will not be considered abusive by tax authorities under the new GAAR rule.

This tool is a very positive signal that contributes to strengthen a close cooperation between taxpayers and tax authorities, in order to abandon an historical conflictual relationship and align the Italian system to the new "compliance" trend emerging in the international scenario.[32]

Luxembourg tax law does not include the obligation to report tax schemes. In the past, corporate taxpayers engaged in holding and financing activities had an incentive to voluntarily disclose tax schemes to the Luxembourg tax administration; that is, in the context of requesting an advance tax confirmation (the "ATA"), holding and financing companies had to disclose the specific structure or transaction for which they requested the tax confirmation (as well as the analysis of the Luxembourg tax implications thereof) to the Luxembourg tax administration. The process for securing an ATA was simple and relatively quick (approximately 1 moth).

However, as from 1 January 2015, ATAs are subject to the approval of a specific committee composed by officers from the LTA (which has considerably increased the time for a response) and, additionally, ATAs are subject to a government fee ranging from EUR 3.000.- to EUR 10.000.- depending on the complexity of the ATA request. In practice, the above has discouraged taxpayers from requesting ATAs and, indirectly, the voluntary disclosure of tax schemes.

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[29] For an analysis this case law, *see* R. CORDEIRO GUERRA – P. MASTELLONE, *The judicial creation of a general anti-avoidance rule rooted in the Constitution*, in *European Taxation*, vol. 49, no. 11/2009, p. 511 et seq.

[30] Introduced by Art. 1, Legislative Decree no. 128 of 5 August 2015.

[31] Author's translation.

[32] On this issue, *see* A. TOMASSINI, *L'interpello sui nuovi investimenti*, in *Corriere Tributario*, vol. 38, n. 22/2015, p. 1673 et seq.

In **Spain**, apart from the obligation regarding the Transfer Pricing, the Spanish Tax Law doesn't include any obligation for taxpayers regarding to report tax schemes. In any case the tax payer can ask for a "Tax Ruling" in connection with the Tax Scheme.

In **Sri Lanka**, there is no legal obligation to report tax schemes. However, section 103 of the Inland Revenue Act no. 10 of 2006, (as amended), contains a general anti-avoidance provision.

In **Sweden**, there is no general liability to report tax schemes. However, similar to the reporting obligations on transfer pricing policies, taxpayers must answer direct questions from the Swedish Tax Agency. Furthermore, if the tax scheme could be regarded as tax evasion or if it otherwise may impacts the taxation in Sweden, it should generally be reported to the authorities voluntarily in order to avoid tax penalty or prosecution.

United States domestic law includes provisions requiring the mandatory disclosure of reportable transaction,[33] which typically include:

- Certain listed schemes the IRS has deemed particularly aggressive tax avoidance transaction;
- Confidential transactions (where a transaction is offered under conditions of confidentiality and for which a fee is required exceeding certain thresholds);
- Transactions with contractual protection in which a full or partial refund of fees if the intended consequences of the transaction are not sustained;
- Loss transactions in which a claimed loss exceeds certain prescribed thresholds; and
- Transactions of interest listed by the IRS because they have a potential for tax avoidance or evasion.

This obligation and related penalties also exists for material advisors and promoters.[34] The required form, Form 8886 (Reportable Transaction Disclosure Statement),[35] includes detail regarding the transaction, the participants (including all entities involved that are foreign), the advisors, and the type of tax benefit along with description of the steps of the transaction and the amount of investment. In addition, as discussed in Section 2.1.1, Schedule UTP is required for US domestic corporations to report uncertain tax positions.

[33] *See* IRC Section 6111 and IRS Notice 2009-59, 2009-31 IRB 170 (https://www.irs.gov/pub/irs-irbs/irb09-31.pdf).
[34] *See* IRC Section 6112.
[35] https://www.irs.gov/pub/irs-pdf/f8886.pdf.

3.2. Exchange of information under national law

3.2.1. Current regulations regarding international tax assistance and exchange of information on the tax position of companies;

For countries within the EU, exchange of information is mainly based on EU Directives (Directive 2011/16/EU on administrative cooperation in the field of taxation, Savings Directive and the VAT Directive). In addition, Double Tax Treaties, the multilateral OECD Convention on Mutual Administrative Assistance in Tax Matters and other bilateral agreements on the exchange of information provide for possibilities for jurisdictions to request and obtain local information that is necessary for their tax administration.

Below, we will discuss the regulations per jurisdiction.

For **Austria**, the national legislation for exchange of information is based on the EU Directive (2011/16/EU).

For **Belgium**, the regulations for exchange of information that apply are based the Directive 2011/16/EU (the directive of 2011 was transposed into the Belgian domestic law by Law 52-2905 of 17 August 2013 and applies retroactively since 1 January 2013), the Savings Directive and VAT Directive. Belgium has furthermore become a signatory to the multilateral OECD Convention on Mutual Administrative Assistance in Tax Matters, which entered into force in respect of Belgium on 1 December 2000. In respect of Belgium the amending protocol entered into force on 1 April 2015 and generally applies from 1 January 2016. Exchange of information also takes place based on Double Tax treaties. Furthermore, Belgium is a party to the EU Arbitration Convention (90/436 on the Elimination of Double Taxation in connection with the Adjustment of Profits of Associated Enterprises), which provides that where the commercial or financial relations between two associated enterprises differ from those which would apply be-tween independent enterprises, the profits of those enterprises should each be adjusted as appropriate to reflect the arm's length position. The Convention provides for disputes with fiscal authorities to be referred to an advisory commission, subject to waiver of rights of appeal under domestic law provisions. The Arbitration Convention was first applicable with respect to the 15 old Member States. With respect to the 10 new Member States that acceded to the European Union on 1 May 2004, a new Accession Convention was signed on 8 December 2004 (Official Journal of the European Union, C Series, number 160 of 30 June 2005, page 1). The Convention entered into force in relation to Bulgaria and Romania on 1 July 2008.

As from 2001, **Brazilian** Law no. 104/01 established a general rule authorizing the tax authorities to sign foreign treaties, agreements or arrangements in order to exchange information with foreign countries for the benefit of assessment and collection of taxes.

On 2014, an Intergovernmental Agreement ("IGA") for information exchange was signed by Brazil and the United States in order to establish the conditions for the application of the U.S. Foreign Account Tax Compliance Act ("FATCA").

The IGA is based on the Agreement for the Exchange of Information Relating to Taxes ("TIEA"), signed by Brazil and the United States on March 2007.

On August 25th, 2015, the Brazilian Government has finally issued Decree no. 8.506 enacting the IGA "to improve international tax compliance and implementation of FATCA". Although already in effect, it is expected that IGA become fully applicable as from January 2017, when both Brazil and US have agreed to be ready to provide all the relevant information described under the agreement.[36]

On November 2015, Brazil also signed a TIEA with Switzerland. The Agreement is still expected to be approved by the National Congress.

The Ministry of Finance signed in 2011 the OECD Convention on Mutual Administrative Assistance in Tax Matters. Brazilian Congress has not yet deliberated and approved the terms. Nonetheless, it is still expected that Brazil actually starts exchanging information until September 2018.

In parallel, the Brazilian government is negotiating specific agreements to exchange tax information with countries to circumvent the absence of treaties that prevent double taxation.

The Republic of **Cyprus** signed on 29 October 2014, the Multilateral Competent Authority Agreement for the automatic exchange of financial information of financial accounts and came into effect as from 1 January 2016. This was within the context of improving international tax compliance with the common reporting standard (CRS) for the automatic exchange of financial information developed by the OECD.

To date, the **England and Wales** has signed a number of Tax Information Exchange Agreements (TIEAs) based on the OECD model and in relation to the EU directive on the taxation of savings income (Council Directive 200-34-8EC). In addition, many of the Double Taxation Agreements entered into by the UK include tax information exchange provisions. The regulations differ depending on which jurisdictions are being considered.

In **Germany**, the exchange of information is subject to the tax secret. Therefore, information exchange needs a legal basis. This legal basis can be found in bilateral tax treaties[37], tax information exchange agreements[38], FATCA agreement with the U.S.A., the implantation of the EU-directive on administrative cooperation in the field of taxation, the EU Council Regulation on the administrative cooperation in the field of VAT, the Council Directive of savings income, the Multilateral Competent Authority Agreement on automatic exchange of information and the Convention on Mutual Administrative Assistance in Tax Matters.

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[36] As from January 2017 all US financial institutions shall be obliged to required and inform to the authorities the Brazilian taxpayer number of all Brazilian bank accounting holders in US.

[37] *Vogel/Lehner* Art. 26 nr. 58. with a table of all DTTs and the implementation of Art. 26.

[38] List of contracting states as of 1 January 2016 issued by the Federal Ministry of Finance: http://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2016-01-19-stand-DBA-1-januar-2016.pdf?__blob=publicationFile&v=1

Italy is as an OECD Member State and has developed a wide and effective system for exchanging tax relevant information in compliance with the international standards of transparency in tax matters, enforced through various instruments with other EU and non-EU Countries. As a member of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, Italy participates to the Peer Review Group of the Global Forum itself and is very active in the ongoing anti-BEPS strategy.

The legal and regulatory Italian framework for transparency and exchange of information includes an extensive network of bilateral double tax conventions (hereinafter DTCs),[39] as well as 6 tax information exchange agreements (hereinafter TIEAs)[40] based on the OECD Model Tax Convention issued in 2002[41] and other 20 bilateral working arrangements under the terms of the exchange of information provisions, signed by tax authorities.[42]

Moreover, as a Contracting Party to the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (hereinafter "MAAT Convention") – which is the only multilateral instrument on exchange of information – Italy has ratified it with Law no. 19 of 10 February 2005, as well as the recent Protocol amending this Convention that entered into force on 1st June 2011. This Protocol, which aims at adapting the MAAT Convention to the new international standards, in particular with regard to bank secrecy, has been ratified with Law no. 193 of 27 October 2011. Italy has also ratified the European Convention on Mutual Assistance in Criminal Matters signed in Strasbourg in 1959, including the so-called *fiscal Protocol*.[43]

Luxembourg is signatory or otherwise subject to the following legislation regarding exchange of information:

- Agreement between the Government of the Grand Duchy of Luxembourg and the Government of the United States of America to Improve International Tax Compliance and with Respect to the United States information provisions commonly known as the Foreign Account Tax Compliance Act (FATCA), which has been implemented into Luxembourg law through the act of 24 July 2015.
- The Multilateral Convention on Administrative Mutual Assistance on Tax Matters, implemented into Luxembourg law through the act of 26 May 2014 (as amended).

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[39] Italy has signed 93 DTCs, available at *www.finanze.it/opencms/it/fiscalita-comunitaria-e-internazionale/convenzioni-e-accordi/convenzioni-per-evitare-le-doppie-imposizioni/index.html*.

[40] Available at *www.finanze.it/opencms/it/fiscalita-comunitaria-e-internazionale/convenzioni-e-accordi/tiea-tax-information-exchange-agreement/*.

[41] *See* OECD, *Agreement on exchange of information on tax matters*, Paris, 2002, available at *www.oecd.org/ctp/exchange-of-tax-information/2082215.pdf*.

[42] Available at *www.finanze.it/opencms/it/fiscalita-comunitaria-e-internazionale/convenzioni-e-accordi/accordi-amministrativi-per-lo-scambio-di-informazioni/*.

[43] Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, signed in Strasbourg on 17 March 1978, whose Art. 1 expressly provides that Contracting States «*shall not exercise the right provided for in Article 2.a of the Convention to refuse assistance solely on the ground that the request concerns an offence which the requested Party considers a fiscal offence*».

- EU Directive 2011/16/EU on Administrative Cooperation in the Field of Direct Taxation, transposed into Luxembourg law through the act of 29 March 2013 (as amended by the act of 18 December 2015).
- Luxembourg implementation of the EU Directive 2003/48/CE (the so-called EU Savings Directive), implemented into Luxembourg law through the act of 21 June 2005, as amended by the law of 25 November 2014 in order to implement, among others, an automatic exchange of information provision (instead of the original withholding tax system). The act of 21 June 2005 will be superseded by the act of 18 December 2015 (described below) as from 1 January 2016.
- Luxembourg implementation of the EU Directive 2014/107/EU (implementing the so-called Common Reporting Standards into Luxembourg law), through the act of 18 December 2015 on the Automatic Exchange of Information regarding Financial Accounts for Tax Purposes.

In the **Netherlands**, the tax administration first requests the taxpayer to provide with all relevant information in order to determine the taxpayers tax position. The DTA could even request a foreign shareholder (who holds 50% or more of the shares in the Dutch resident taxpayer) for information in cross-border/intercompany situations. In case the DTA – in their opinion- do not receive sufficient information, they could request for assistance with foreign authorities in respect of companies in the Netherlands on basis of several exchange of information mechanisms such as:

- Bilateral agreements: the Netherlands has an extensive network of bilateral exchange of information agreements either through double taxation conventions (DTC's) and taxation information exchange agreements (TIEA's) allowing to exchange information with some 120 jurisdictions. The Netherlands has signed memoranda of understanding (MOU's) with several countries providing for exchange of information Such MOU's are based on below mentioned multilateral arrangements.
- Multilateral: The Netherlands has incorporated the Directive on Mutual assistance in Tax matters (i.e. Council Directive 2011/16/EU which replaced Council Directive 77/799/EEC) in national law concerning mutual assistance by the competent authorities of EU Member States in the field of direct taxation. The Netherlands is also a signatory to the OECD Convention on Mutual Administrative Assistance in Tax Matters.

In **Spain** exists a General Tax Law that regulates all the matters in connection with the tax formal obligations, including of course the exchange of information, without the prejudice the multilateral and bilateral agreement of exchange of information, as well as the implementation of the Foreign Account Tax Compliance Act in agreement with the United States of America. There is also the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information signed by Spain the 29th of October 2014.

The Double Tax Avoidance Treaties that **Sri Lanka** has entered into with other countries have specific provisions which make it possible for State parties to resolve conflicts by mutual agreement where the matter cannot be otherwise resolved. Section 209 of the

Inland Revenue Act no. 10 of 2006, (as amended), imposes a general obligation of secrecy on the Department of Inland Revenue. Matters relating to a taxpayer's tax affairs can only be communicated to a third party in only specific and/or restricted circumstances. Section 209(4)(c) of the Inland Revenue Act no. 10 of 2006, (as amended), provides that information can be communicated to the Income Tax Authority of any territory of the Commonwealth of Nations, to such an extent as the Commissioner General of Inland Revenue may deem necessary to enable such Authority to grant relief from income tax paid in Sri Lanka.

Section 209(4)(d) of the Inland Revenue Act no. 10 of 2006, (as amended), provides that information could be provided to the Income Tax Authority of any country with which an agreement has been entered into for affording relief from double taxation.

Furthermore, information exchanged under the terms of a Double Tax Avoidance Treaty is confined to persons or authorities involved in the assessment, collection of or enforcement of or the prosecution in respect of any offence relating to the taxes which are the subject of that agreement (vide section 209(13) of the Inland Revenue Act no. 10 of 2006, (as amended).

As regard to international tax assistance and exchange of information it should initially be clarified that **Sweden** historically has been receiving information, rather than providing information to other countries. Hence, the Swedish legislation on tax assistance and exchange of information is mainly governed by double taxation treaties. During the last few decades the Nordic counties have worked together to negotiate treaties on exchange of information with regimes that historically has been regarded by Sweden as "tax havens". Treaties has been entered with inter alia Isle of Man, Jersey, Guernsey, the Cayman Islands, Bermuda, the Netherlands Antilles, the British Virgin Islands, Monaco and Liechtenstein. In addition, existing tax treaty with Switzerland, Luxembourg, Austria and Barbados has been renegotiated.

The Swedish Tax Agency has during the last few years been utilizing the said tax treaties to investigate Swedes that holds, or previously have held, assets in "tax havens". The new/renegotiated tax treaties and the Swedish Tax Agency's increasing investigations have pushed quite many Swedes to submit so called "voluntary disclosures" regarding assets held outside of Sweden.

On May 27, 2015, **Switzerland** and the EU signed an agreement regarding the introduction of the global standard for the automatic exchange of information in tax matters. On November 25, 2015, the Swiss Federal Government submitted the abovementioned agreement to the Federal Parliament. The OECD's global AEOI standard has been included in full in the new agreement. The agreement between Switzerland and the EU should come into force on 1 January 2017, and the first sets of data should be exchanged from 2018, provided the approval process is completed on time in Switzerland and in the EU.

The **United States** provides international tax assistance and exchanges information in relation to tax matters pursuant to international agreements, such as tax treaties, tax information exchange agreements ("TIEAs") and, more recently, intergovernmental agreements on the implementation of the Foreign Account Tax Compliance Act

("FATCA"). The US is also a party to the OECD Convention on Mutual Administrative Assistance in Tax Matters[44], the Convention on the Taking of Evidence Abroad in Civil[45] and mutual legal agreement treaties in criminal matters to exchange tax information and, in criminal cases, to furnish and exchange evidence.

Through these various agreements, information may be exchanged upon specific request, spontaneously and automatically. Information may also be exchanged during competent authority proceedings with respect to the prevention of double taxation of particular taxpayers or transactions, during simultaneous examinations of multinational companies and during simultaneous criminal investigations.

The exchange of tax information upon request involves coordinating incoming and outgoing requests for information about specific taxpayers. Request generally arise from the examination of a particular tax return or declaration, collection activities or criminal investigations. A spontaneous exchange of information is furnished to a treaty or TIEA partner without a prior specific request. It typically involves information discovered during a tax examination, investigation, or other procedure that suggests or establishes noncompliance with the tax laws of a treaty or TIEA partner.

In March 2010, the United States enacted the Foreign Account Tax Compliance Act ("FATCA"),[46] as part of the Hiring Incentives to Restore Employment (HIRE) Act, and set the world on course to automatic exchange of information as the new standard. The principal purpose of FATCA is to prevent US persons, including US entities, from using accounts and foreign entities outside the United States to evade US tax. FATCA requires US payers and foreign financial institutions ("FFIs") that enter into an agreement with the IRS to withhold 30 percent of certain payments from US sources to foreign entities unless the entity qualifies for an exemption or meets certain obligations under FATCA. As part of their obligations under FATCA, FFIs are required to report to the IRS information about financial accounts held by US persons or by foreign entities in which US person hold a substantial ownership interest.

For many FFIs, compliance with FATCA would result in violations of local financial privacy and bank secrecy laws. To facilitate the cooperation of foreign governments and compliance by foreign financial institutions, the United Stated entered into, and continues to negotiate, intergovernmental agreements ("IGAs") that alter the compliance burdens under FATCA. As of 2 February 2016, 112 IGA are either in force, signed or under an agreement in substance, all of which are presently treated as "in effect".[47]

All IGAs are based on one of two models, aptly named Model 1 and Model 2. Model 1 IGAs[48] establish a framework for reporting by FFIs of financial account information to their respective tax authorities, followed by automatic exchange of that information to the

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[44]http://www.oecd.org/ctp/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm

[45] https://www.hcch.net/en/instruments/conventions/full-text/?cid=82

[46] *See* IRC Sections 1471 - 1474.

[47] *See* https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

[48] *See* https://www.treasury.gov/press-center/press-releases/Documents/reciprocal.pdf (Reciprocal Model 1 IGA); https://www.treasury.gov/press-center/press-releases/Documents/nonreciprocal.pdf (Non-Reciprocal Model 1 IGA).

IRS. This framework requires the country entering into the IGA with the US ("FATCA Partner Jurisdiction") to adopt domestic laws to facilitate the necessary reporting.

Model 2 IGAs also requires the FATCA Partner Jurisdiction to adopt domestic laws to facilitate reporting. However, unlike the Model 1 IGA, Model 2 requires FFIs in the FATCA Partner Jurisdiction to enter into an agreement with the IRS and report to the IRS directly.

Model 2 IGAs and most Model 1 IGAs are "reciprocal," meaning that the United States is required to provide certain financial account information held by tax residents of the FATCA Partner Jurisdiction. However, upon closer examination, one finds that these IGAs are not reciprocal at all. Under the IGAs, the FATCA Partner Jurisdiction and its FFIs are required to report the following information to the United States:

- Account balance and gross interest paid on depository (cash) accounts held directly US persons (including US entities) or through nonfinancial foreign entities ("NFFE") with a US person as a controlling person;
- Account balance and gross interest, dividends and other income earned by assets held in custodial accounts by US persons directly or through an NFFE with a US person as a controlling person; and
- Gross proceeds from the sale or redemption of assets held in accounts held directly by US persons or through NFFEs with a US person as a controlling person.

In contrast, the United States is only obligated to report to its FATCA Partner Jurisdiction:

- Gross interest paid on depository account directly held by individuals who are tax resident in the FATCA Partner Jurisdiction; and
- Gross interest and dividends paid from US sources, but only if already subject to reporting under Chapter 3 or 61 of Subtitle A of the Internal Revenue Code and only with respect accounts directly held by individuals and entities tax resident in the FATCA Partner Jurisdiction.

The United States is not obligated to report:

- Depository accounts held by entities, even if tax resident in the FATCA Partner Jurisdiction;
- Non-cash accounts, whether held by individuals or entities, even if tax resident in the FATCA Partner Jurisdiction; or
- The controlling person of any entities, regardless of where they are formed or tax resident or whether they are owned and controlled by tax residents of the FATCA Partner Jurisdiction.

Whether valid or not, the reason why the US negotiated reciprocal IGAs that only required limited reporting by the US to its FATCA Partner Jurisdictions is because of the limited information available to the IRS for exchange under present domestic US law. The passage of legislation, requiring the cooperation of Congress and the Presidency, is likely to be required to allow the IRS to obtain the information it would need to enter into fully reciprocal arrangements with its FATCA Partner Jurisdictions. In the meantime, 97 countries around the world (as of the 27nd of January 2016)[49] have agree to participate in a multilateral system of automatic exchange of information (commonly referred to as the Common Reporting Standard or "CRS") inspired by FATCA and heavily based on the more expansive FATCA Partner Jurisdiction reporting obligations under the IGAs, but on a fully-reciprocal basis. The jurisdiction conspicuously missing from that list of committed to adopting CRS is the United States.

3.2.2. Current implementation of the Directive 2011/16/EU of 15 February 2011 and other developments regarding the automatic exchange of information on tax rulings;

The past amendments to Directive 2011/16/EU have been implemented throughout the EU countries covered in this General Report. The exchange of information on tax rulings is however still awaited. Further developments are limited. Below, we will discuss the developments per jurisdiction.

In **Austria**, Directive 2011/16/EU was completely integrated into the EU-Amtshilfegesetz (EU-AHG), the automatic exchange of Tax Rulings and APAs will also be integrated into Austrian law by an amendment of the EU-AHG. There is, however, no draft bill at the time being.

The **Belgian** Minister of Finance quite quickly stated that ruling will already start with spontaneously exchanging rulings granted as from January, 1, 2015 with respect to the automatic exchange of rulings in particular. Belgium thus did not await the European evolutions and now already commits to exchange of rulings. Belgium will also commit to the exchange of rulings as proposed by the European Commission. It is to be expected that the current unilateral initiative to spontaneously exchange rulings will also be aligned on the provision of BEPS-action 5

In **Cyprus**, information exchange provisions are introduced, in compliance with the EU Directive No. 2011/16/EU, between member states of the European Union (EU) covering all natural and legal persons of the EU. The law covers all taxes of any kind excluding VAT, customs and excise duties, consumption taxes and social insurance contributions. The Law is effective from 1 January 2013. The provisions relating to the automatic exchange of info are effective as from 1 January 2015.

Legislation implementing Directive 2011/16/EU came into force in **England and Wales** on 1 January 2013. Under the Automatic Exchange of Information rules, certain financial institutions may be subject to requirements to provide information about UK bank account holders and their residence status. This obligation also extends to public authorities. The information will be shared to OECD signatories of the multilateral competent authority agreement.

[49] *See* http://www.oecd.org/tax/transparency/AEOI-commitments.pdf.

In **Germany**, Directive 2011/16/EU has been implemented by the 'Act on the Automatic Exchange of Information on Financial Accounts (FKAustG). The Federal Central Tax Office is the competent authority to collect and distribute the data. The amendment on the automatic exchange of tax rulings is not yet implemented.

Italy has implemented Directive no. 2011/16/EU through Legislative Decree no. 29 of 4 March 2014, entered into force on 1st April 2014. Taking into account the deep changes introduced at the EU level, such enforcement clearly shows the will of the Italian Republic to make effective its commitment against international tax evasion, with particular attention to the automatic exchange of information provided by Art. 8 (*Mandatory automatic exchange of information*). Such type of information exchange has recently gained great political support in the international framework,[50] focusing on the possible benefits, such as the capacity to let tax authorities aware of non-compliance behaviours and, at the same time, to have a deterrent effect, increasing voluntary compliance and encourage taxpayers to fulfil their fiscal obligations timely and in the right way.

See above paragraph 1.2.1 for additional information.

The EU Directive 2011/16/EU on Administrative Cooperation in the Field of Direct Taxation was transposed into **Luxembourg** law through the act of 29 March 2013. The latter was recently amended by the act of 18 December 2015 (which implements the EU Directive 2014/107/EU into Luxembourg law) in order to bring interest, dividends, account balances and proceeds from the sale of financial assets within the scope of the automatic exchange of information.

As regards the exchange of tax rulings, we understand that, further to a meeting in Luxembourg on 6 October 2015, the EU Ministers of Finance and Economy have reached an agreement on an EU Directive for the exchange of tax rulings within the EU. In this respect, in practice, the Luxembourg tax administration has started requesting a summary (with the information to be exchanged) for each ATA request made as from 1 January 2016 (as it is expected that the exchange of tax rulings will have retroactive effect).

The Netherlands has incorporated the Directive 2011/16/EU in national law in the so-called International Assistance in the Levying of Taxes Act (*Wet op de internationale bijstandsverlening bij de heffing van belastingen*, "WIB"). This law provides for three forms of exchange of information in respect of direct taxes:

- Spontaneous: the Netherlands (i.e. the DTA) could provide a EU Member State or treaty partner with information about likely tax evaders if it happens to uncover such information during its own audits.
- Automatic: the Netherlands could automatically provide information to EU Member States in respect of residents of that Member States in respect of specific items of income

[50] *See* UN Committee of Experts on International Cooperation in Tax Matters, *Note on automatic exchange of information*, 9th Session, Geneva, 21-25 October 2013, where automatic exchange information procedures are clearly considered as one of the most important emerging issues in international tax and a fundamental step in tax transparency, «*comparable e.g. to the adoption of exchange on request as the international standard a few years ago*».

- On request: the Netherlands could also exchange information on request of another state (e.g. treaty partner or state which the Netherlands has another exchange of information arrangement with).

Under the WIB the DTA may only exchange information if there is an international legal obligation thereto. Requests for information by EU Member States often are send using an EU uniform E-form which are send to a regional office of the DTA which perform a legal test if information may be exchanged (e.g. if it is not a fishing expedition and whether it has sufficient relevance). In case the regional office concludes that information may be exchanged, parties concerned are informed that information is to be exchanged. Afterwards a central office receives the information. This central office of the DTA is responsible for the actual exchange of information.

The Netherlands has committed to automatically exchange tax rulings in accordance with the minimum standard of the OECD/BEPS 5. The ECOFIN Council agreed to revise the Council Directive 2011/16/EU in respect of the automatic mandatory exchange of information on tax rulings and consequently the Dutch national legislation on administrative cooperation will be amended accordingly.

In anticipation of the future regulations, the Netherlands has already agreed with Germany to spontaneously exchange tax rulings in 2015.

Spain has transposed the Directive through the Royal Decree 1558/2012 adapting the Implementing Rules of the General Tax Law (Ley General Tributaria). In first place it changes the articles about the concept of tax levy and about calculation of interests regarding tax assistance. In second place the royal decree changes the General Regulation for proceedings of tax management and inspection. These changes introduce for example new articles regarding the duty to inform about accounts in foreign countries or about shares, rights, insurances and incomes that are deposited, managed or gained abroad. It also introduces a new chapter in this General Regulation about proceedings regarding mutual tax assistance.

In **Sweden**, Directive 2011/16/EU of 15 February 2011 was introduced by inter alia a new domestic act – "Lag (2012:843) om administrativt samarbete inom Europeiska unionen i fråga om beskattning". The act entered into force on 1 January 2013. On 8 October 2015 the Swedish Government submitted its law proposals for the implementation of the amendments made by Directive 2014/107/EU. The law proposals was accepted by the legislator and entered into force on 1 January 2016.

The Ministry of Finance has been commissioned to prepare a law proposal for the implementation of the amendments regarding automatic exchange of information on cross-border tax rulings. The Ministry of Finance has not yet presented its proposal and it is therefore still too early to make any statements in this regard.

To **Brazil, Sri Lanka**, **Switzerland** and **the United States**, this question is not applicable.

3.2.3. Current developments regarding international tax assistance and exchange of information on the tax position of companies (other than the BEPS and EU action plans);

The current developments related to the international exchange of information goes beyond the reach of the EU and the OECD BEPS initiative. Various jurisdictions have entered into bilateral agreements in order to establish an mutual automatic exchange. Non EU/OECD jurisdiction Brazil has furthermore committed with the G20 and the Global Forum on Transparency and Exchange of Information for Tax Purposes. Other transparency developments are derived from the FATCA regulations issued by the United States, which are implemented by local jurisdictions under the intra governmental agreements.

Below, we will discuss the developments per jurisdiction.

Belgium traditionally prefers bilateral agreements regarding EOI. As a consequence, Belgium is party to bilateral conventions with dozens of countries. When Belgium initiates an EOI, it invokes every instrument available so that the most efficient one can be applied. In income tax matters, Belgium combines references to bilateral DTCs and Directive 2011/16/EU, when it requests a European Union country, or adds in some cases the convention of 25 January 1988 to the applicable DTC, when it requests another signatory country of this convention.

Belgium exchanges information mainly with countries with which it has substantial economic ties. The most frequently used form of exchange in Belgium is the exchange on request. Automatic exchange is of course gaining in importance (firstly via the Savings directive).

Belgium has conducted a pilot project of simultaneous audits with the Netherlands (a simultaneous examination is an arrangement between countries to examine simultaneously each in its own territory, the tax affairs of a taxpayer or taxpayers in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain). Following the success of this cooperation, a similar program has been organized with France too. Simultaneous examinations in the meanwhile have taken place with other European countries specifically to combat fraud.

In exceptional circumstances, a country may permit authorized officials of another country to enter its territory to interview taxpayers or examine books and records or to be present at such interviews or examinations carried out by its tax authorities in its territory in accordance with its procedures. The country that allows foreign officials to attend a tax audit keeps control of that audit. Belgium did participate several times in these kinds of audits. It is more reluctant to participate in investigations where it has no stake in the control of the audit.

Brazil has signed in 2011 the OECD Convention on Mutual Administrative Assistance in Tax Matters, for automatic exchanges or request for tax information with 128 member countries (pending approval in National Congress) and the standards for Automatic

Exchange of Financial Information in Tax Matters ("AEOI") for tax information exchange on bank accounts.

Brazil has also committed with the G20 and the Global Forum on Transparency and Exchange of Information for Tax Purposes that will adopt these standards on 2018.

On 2 December 2014, the **Cyprus** finance minister and the American ambassador to Cyprus signed the intergovernmental agreement between Cyprus and the USA under the Foreign Account Tax Compliance Act ("FATCA").

In **Germany**, other than the BEPS and EU action plans, there are no legislative proposals. However, some DTT's might be amended and new TIEA's may be concluded.

The **Italian** discipline on exchange of information and administrative cooperation is highly influenced by EU law, OECD guidelines and, also, by US federal legislation (FATCA).

On 21 July 2014 the OECD issued the comprehensive publication which contains the text of the Model Competent Authority Agreement and the Common Reporting Standard and the relevant Commentaries. On 29 October 2014, 51 jurisdictions signed the Multilateral Competent Authority Agreement aimed at promoting automatic exchange information under the so-called *Common Reporting Standard* based on Art. 6 of the MAAT Convention. Italy signed such Agreement and will enforce the automatic exchange of information mechanism from September 2017.

Italy – together with France, Germany, Spain and the United Kingdom – signed on 8 February 2012 the *Joint Statement regarding an intergovernmental approach to improving international tax compliance and implementing FATCA* [51], aimed at extending the FATCA mechanism of automatic exchange of information to financial information concerning citizens of these European Countries, since this is the real policy objective of FACTA itself (while collecting the withholding tax of 30% has a mere "deterrent" function). In January 2013 Italy initialled the FATCA Intergovernmental Agreement (IGA) with the US, which was signed in Rome on 10 January 2014.[52] Law no. 95 of 18 June 2015 finally ratified and enforced the FATCA legislation in Italy, as resulting from the Intergovernmental Agreement signed on 10 January 2014.

In general, **Luxembourg** has implemented the required EU and OECD requirements on tax assistance and exchange of information and is prepared to implement BEPS action plans within the required time schedules. However, we are not aware of any additional or unilateral initiative regarding tax assistance or exchange of information.

For the **Netherlands** and **Sweden**, please refer to paragraph 4.2.1 and 4.2.2.

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[51] U.S. TREASURY DEPARTMENT, *Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom regarding an intergovernmental approach to improving international tax compliance and implementing FATCA*, 8 February 2012, available at *www.treasury.gov/press-center/press-releases/Documents/020712%20Treasury%20IRS%20FATCA%20Joint%20Statement.pdf*.

[52] Agreement between the Government of the United States of America and the Government of the Republic of Italy to improve international tax compliance and to implement FATCA, Rome, 10 January 2014, available at *www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Italy-1-10-2014.pdf*.

Spain signed the 29th of October 2014 the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information. It is a result of a project started by Germany, Spain, France, Italy and United Kingdom, and follows the FATCA model. The exchangeable information contains bank deposits, securities, investment fund shares, insurances and rents and includes data on wages, charges levied on rents or transfers, and the identification of the person or entity holder and who effectively controls the account. The information will be exchanged annually and automatically.

In **Sri Lanka**, there are no specific developments in this regard because it is not regarded as a priority area. However, negotiations continue relating to Double Tax Avoidance Treaties because Sri Lanka is interested in entering into such agreements.

For **Switzerland** and **Austria**, this question is not applicable.

The **United States** has indicated that it is currently engaged in automatic exchange of information with FATCA Partner Jurisdictions in accordance to the terms of the IGAs. While it acknowledges the need to achieve an equal level of automatic exchange of information with its FATCA Partner Jurisdictions and that it is committed to pursuing this objective, it has not committed to adopting CRS.

3.3. BEPS Action Plan

3.3.1. Introduction of the BEPS Action Plan no. 5, 12 and 13 in the national tax law;

The countries covered in this General Report have committed to the BEPS Action Plan as published by the OECD. Mainly the regulations for country by county reporting are already included in the national law of jurisdictions such as the UK, Germany, Spain and Italy. As the BEPS Plan is currently debated on in local parliaments, further developments should be awaited. Below, we will discuss the developments per jurisdiction.

Austria implemented already some regulations in the meaning of BEPS in national tax law in the past (e.g. tax duty for hybrid participations in profits which are deductible at the distributing foreign company; prohibition to deduct interest for group internal purchase of shareholdings; non-deductibility of interests and royalties to low-tax group companies).

It is currently hard to anticipate when Austria will take the next steps on a national level. As regards the provisions regarding „Country by Country Reporting“ originally planned for autumn 2015, no further details are yet known. A major deviation from the proposals made by the OECD in BEPS Action 13 is, however, not to be expected.

For **Brazil**, please find below the input with regard to the BEPS action plans.

- BEPS Action Plan no. 5: Brazilian tax authorities have been adopting business purpose and substance over form tests during the past years. Authorities have also questioned corporate restructuring that took place aiming the reduction or avoidance of taxation. A general anti-avoidance tax rule was passed and included in the

Brazilian Tax Code. Nevertheless, the Brazilian Congress has not yet approved a regulation for such general rule and the subject is frequently under debate.

- BEPS Action Plan no. 12: as previously mentioned in question "2.1.3", Brazilian Government attempted to approve he obligation of self-reporting tax schemes to Brazilian Federal Revenue. Although the Congress has not approved such legislation and there is no certainty on future measures alike, it's clear that Brazilian tax authorities are committed with the application of BEPS in Brazil. Therefore, Brazilian taxpayers should expect prospect rules inspired on BEPS Action Plan no. 12, yet to come.
- BEPS Action Plan no. 15: Brazil has been considering the guidelines yet has not actually introduced measures to "Develop a multilateral instrument" to modify or amend bilateral treaties.

On 30 December 2015, the **Cypriot** Administration of the Ministry of Finance announced the upcoming amendment of the Intellectual Property tax regime. The said amendment will incorporate the recommendations of Action 5 of the Organisation for Economic Co-operation and Development (OECD), which were issued on October 5th 2015 for the Action Plan against 'Base Erosion and Profit Shifting' (BEPS) as well as the Conclusions of the ECOFIN Council adopted on December 8th 2015.

Action 5 deals with favourable tax regimes among which the Intellectual Property regime (IP regime). The approach of the Action 5 (nexus approach) requires the existence of material activity which includes the clear interconnection between the rights which create the income and the activity which contributes to that income.

Having regard the above, the Cyprus Authorities will proceed with the amendment of the Intellectual Property tax regime in order for it to be aligned to the parameters of Action 5 for the Intellectual Property tax regime and for the inclusion of persons to be possible who acquire or already acquired Intellectual Property in a competitive tax regime fully aligned as from July 1st 2016 with the Action Plan against the Base Erosion and Profit Shifting of the OECD and the applicable framework at the European Union level.

The intention of the Cyprus Authorities is for the amendment of the Intellectual Property legal framework in line with the provisions of Action 5 to provide for the maximum transitional arrangements that are included within the revised framework.

In relation to Actions 12 and 13, no legislative proposals or guidelines have yet been issued.

For **England and Wales,** please find below the input with regard to the BEPS action plans.

- BEPS Action Plan no. 5 – counter harmful tax practices more effectively taking into account transparency and substance.
- Work so far on substantial activity has focused on IP regimes and has therefore directly impacted on the UK's Patent Box. The government is now looking for a process whereby the research and development undertaken to develop an IP asset has taken place within the territory of the preferential IP regime providing the link or nexus between research and development expenditure and IP income. As of 1

January 2016 no IP assets are to be shifted, and those assets outside of the existing IP regimes may no long access the tax benefit of the 'grandfathering provision' which in turn will be abolished 20 June 2021. The so called 'nexus approach' will be enacted July 2016.

- BEPS Action Plan no. 12 – Mandatory disclosure rules: see DOTAS above.
- BEPS Action Plan no. 13 – Re-examine TP documentation and Country by Country Reporting: The new country by country report requirements apply for financial years on or after 1 January 2016.

Germany does fully support the BEPS action plans no. 5, 12 and 13. With respect to action 5, the Federal Ministry of Finance and the British HMRC developed a patent box model in 2014.[53] The proposal came as a surprise because the domestic income tax system does not provide for preferential regimes (apart from capital income with a preferential tax rate of 25% for individuals). Moreover, Germany evaluated patent boxes in other jurisdictions as rather unfair because they encourage taxpayers to shift taxable income. So the German/UK proposal asks for a nexus between the intangible assets and the jurisdiction, i.e. a "substantial economic activity". The patent box regime has not been installed as yet. It is unclear whether the Federal States will give their consent.

With respect to action 12, mandatory disclosure rules have not been introduced. There is no official document issued by the Federal Ministry of Finance that explains how the disclosure rules could be incorporated into domestic law. There are two main restrictions that the legislator has to take of: i) who shall be obliged to disclose aggressive tax planning strategies (atps)? and ii) what kind of information shall be disclosed?

With respect to action 13, Germany will introduce the Country by Country Reporting in 2016. Companies will have to file the first transfer price documentation in line with the Country-by-Country regulation for the tax year 2016 in 2017. The FTTA has not been amended as yet so the details are not clear. The amendment could be based on the OECD Implementation Package.

Italy, as an active member of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, is in the first line for the implementation of anti-BEPS initiatives.

In the view of tackling aggressive tax planning and harmful tax practices, the OECD addressed the various governments to adopt specific forms of communication and enhanced cooperation between taxpayers and tax authorities.

The Italian Parliament – with Art. 6, Law no. 23 of 11 March 2014 – has delegated the Government to regulate certain critical aspects of such relationship and, in particular: good tax governance, management of the tax risk and cooperative compliance. The same Legislative Decree no. 128 of 5 August 2015 that introduced a GAAR in the Italian tax system also regulates a special regime, according to which applicant companies may obtain

[53] Press release by the Federal Ministry of Finance 11 Nov 2014 (http://www.bundesfinanzministerium.de/Content/DE/Pressemitteilungen/Finanzpolitik/2014/11/14-11-11-PM47.html?__act=renderPdf&__iDocId=329906.

tax breaks and simplifications if they enforce a so-called *tax control framework* that ensures tax transparency.[54] Tax erosion has become, for the Italian Government, the new enemy to combat through domestic regulations and in line with the international coordination of OECD and of the European Union. Legislative Decree no. 160 of 24 September 2015 (*Estimate and monitoring of tax evasion and monitoring and reorder of provision against tax erosion, enforcing Articles 3 and 4 of Law no. 23 of 11 March 2014*) represents the most recent (but not the last) initiative in this sense.

For **Luxembourg**, the implementation of BEPS will be as follows:

- Action Plan no. 5: Following the agreement reached with the OECD and EU on the Modified Nexus Approach for IP tax regimes, Luxembourg has passed the abolishment of its IP tax regime which will be effective on 1 July 2016. During a transitory period, however, Luxembourg taxpayers currently benefiting from the IP tax regime may continue to benefit from this regime from 1 July 2016 to 30 June 2021; new entrants (entering the regime as from 1 January 2016) are allowed but are quite restricted. It is also worth noting that, in practice, the Luxembourg tax authorities require 'proper substance' for IP holding companies; that means, in general terms, that a Luxembourg IP holding company must have the resources (both in terms of personnel and infrastructure) to manage and develop the IP concerned.
- Action Plan no. 12: Luxembourg has not yet implemented Mandatory Disclosure Rules, policy or practice.
- Action Plan no. 13: While the Luxembourg Government has announced that country-by-country reporting will be implemented into national law, it has not yet been implemented.

As for the **Netherlands**, the Ministry of Finance pointed out that the Netherlands commit to the minimum standard of BEPS Action 5 to (mandatorily) spontaneously exchange tax rulings. Recently the Directive 2011/16/EU is amended on basis of which for instance member states are obliged to mandatorily automatically exchange information in respect of tax rulings. Hence, the Netherlands is forced to include these amendments in its national legislation. There is a clear overlap between BEPS Action 5 and the amendments of Directive 2011/16/EU.

BEPS Action 12 provides for recommendations to arrange for a system which would enhance control and attack aggressive tax planning strategies by mandatory disclosure of such regimes. The Dutch Ministry of Finance stipulated that the Netherlands is confident that its current system to control and prevent such strategies is already outbalanced.

As for BEPS Action 13, per 22 December 2015, the Dutch Senate approved a new law which entered into force 1 January 2016 containing detailed transfer pricing documentation requirements in line with Action 13 of the OECD's BEPS initiatives. This in order to enable the DTA and other tax administrations to analyze potential transfer pricing risks

[54] On this issue, *see* C. MELILLO, «*Regime di adempimento collaborativo*» *e monitoraggio del rischio fiscale: incentivi, semplificazioni e oneri*, in *Diritto e Pratica Tributaria Internazionale*, vol. 12, n. 6/2015, p. 963 et seq.

that relate to calculating the tax base. These requirements include a country-by-country report, a master file and a local file. A country-by-country report applies to multinational groups with a Dutch resident parent company and a consolidated turnover of at least 750 million. The master file contains an overview of the business of the multinational group, including the general transfer pricing policy and the world wide allocation of income.

As an OECD member, **Spain** played an active role in all of the debates on BEPS Action Plan items. The Spanish government aims to implement most of the BEPS recommendations in domestic law, and representatives of the Spanish tax authorities have taken opportunities to explain the potential impact of the BEPS Action Plan on domestic legislation at many public events in Spain.

Spanish tax administration has not yet produced a public reaction on how changes derived from the BEPS report will be addressed at a local level. However, it is worth noting that in April 2013, the Spanish Government established the National Office for International Taxation (Oficina Nacional de Fiscalidad International (ONFI)) an élite force that will focus on the control and coordination of matters relevant to international tax, including transfer pricing (Action 13) and the APA program, and the coordination of tax audits of cross-border structures.

With the creation of this highly specialized unit, the Spanish Government follows the global trend to tackle aggressive tax planning (increasingly aggressive audit practices) and, in particular, what is perceived as an increase in the level of sophistication in the structuring of cross-border transactions. This is evidence that the Spanish tax authorities, following the general trend, intend to increase the focus on cross-border payments and transfer pricing. While the ONFI provides the Spanish tax authorities with a highly specialized team to coordinate and concentrate the effort to control these areas, it also provides MNCs and other taxpayers the opportunity to interact with specialized tax officials. it is therefore expected that the APA program will run more efficiently going forward and be a frequently sought after alternative.

Spain is one of the first countries to modify its domestic law to introduce mandatory country by country reporting for transfer pricing documentation, and Spanish companies will need to issue their first C-by-C reports in 2016. The Spanish law meets all of the requirements imposed by OECD in terms of deadlines, implementation and sanctions for non-compliance.

Modifications to Spanish tax law have already been enacted, either as part of Spain's new Corporate Income Tax Law, which took effect on 1 January 2015, or through measures introduced earlier. Some of these new rules may be amended in line with the OECD's final package of recommendations.

In **Sri Lanka**, there are currently no developments in this area because it is not regarded as a priority area for Sri Lanka. The Budget Speech of the Minister of Finance delivered in Parliament in November 2015 did not refer to any reforms or changes to the existing statutory framework to take into account BEPS Action Plan nos. 5, 12 and 13.

As regards to BEPS Action Plan no. 5, **Sweden** is not regarded as a "preferential regime" and Sweden will therefore solely be receiving, and not providing, information on tax rulings, etc. pursuant to the plan. From a Swedish perspective there is thus no need to introduce the BEPS Action Plan no. 5 into national tax law. However, the Swedish Tax Agency will most likely set up an internal policy on how to utilize Action Plan no. 5 to obtain information from other regimes.

Both the BEPS Action Plan no. 12 and no. 13 will need to be introduced in Swedish tax law by way of new legislation. The Swedish Tax Agency has been commissioned to prepare a law proposal for the introduction of Action Plan no. 12 in Swedish tax law and a new act is expected to enter into force on 1 January 2017 – at the earliest.

The Ministry of Finance is evaluating a law proposal for the introduction of Action Plan no. 13 into Swedish tax law. The status on the Ministry of Finance's progress is however still quite unknown to the public. In general, information regarding the progress/outcome of the authorities' analysis has been quite scarce. The authorities have however several times pointed out that their work is aimed towards finding a solution that effectively ensures the purpose of the Actions Plans, while still ensuring that trade secrets, etc. are safeguarded and that not to great of an administrative burden is put on the individual taxpayers.

For **Switzerland**, no additional comments were provided.

In general the Congress of the **United States** has not been directly involved in the BEPS project, and has shown little indication that there will be legislative proposals to implement the BEPS action plan items. However, certain proposals have been made related to broad-based tax reform in general, which include international provisions, some of which incorporate various concepts of the BEPS project. Little actions is suspected on any of outstanding proposals before a new administration takes office in 2017.

- Action 5: There is a fundamental tension in the nexus/source-based approach of the Action 5 final report recommendations and the residence based approach of US tax policy. There are substantial domestic rules related to transfers of intellectual property, controlled foreign corporations, transfer pricing, etc. and without broader fundamental tax reform little is anticipated in terms of US implementation of the recommendations of the Action 5 final report.
- Action 12: In the United States, domestic law includes provisions requiring the mandatory disclosure of certain reportable transactions.[55] These disclosure obligations and related penalties also exist for advisers or promoters of transactions requiring contemporaneous disclosure of aggressive tax planning with respect to reportable transactions.
- Action 13: The IRS issued proposed regulations[56] on December 21, 2015 requiring annual country-by-country reporting for a US person that is the ultimate parent entity of a multinational group. The proposed regulations are consistent with the model template in the Action 13 final report, and require the ultimate parent entity of a US multinational group with $850 million or more of consolidated group revenue

[55] *See* IRC Sections 6011, 6012, 6111, and 6112.

[56] Prop. Treas. Reg. § 1.6038-4

to file an annual report calling for information on a country-by-country basis related to income and taxes paid, together with certain indicators of the location of economic activity. However, the proposed regulations do not implement the "master file" reporting described in the Action 13 Final Report. The reporting requirement applies to taxable years of the ultimate parent entities that begin on or after the date of publication of the final regulations—thus if the regulations are finalized in 2016 the first filing year (for companies using a calendar year taxable year) will be the year beginning on January 1, 2017, and thus the report would be due with the 2017 income tax return filed no later than September 15, 2018. Comments to the proposed regulations are due by March 22, 2016.

The United States has not signed the Multilateral Competent Authority Agreement ("MCAA") for the automatic exchange of Country-by-Country reports, which as of 16 January 2016 has been signed by 31 countries.[57] The MCAA is not before the US Senate Subcommittee on Foreign Relations for comment and recommendation and thus it is likely the US will rely on existing arrangements in bilateral tax treaties or Tax Information Exchange Agreements to exchange such information.

It is interesting to note with respect to the country-by-country reporting, that legislation, the Bad Exchange Prevention (BEPS) Act, has been introduced by Congressman Charles Boustany imposing restrictions on the power of the US Treasury Secretary to transmit country-by-country reports under the BEPS action plan. The proposed legislation prohibits the Secretary from collecting or transmitting any country-by-country report information with respect to any taxable years beginning before January 1, 2017. The legislation also requires the Secretary to suspend transmittal if the foreign jurisdiction is abusing master file documentation requirements (e.g., by seeking trade secrets, seeking consolidated financial statements not filed with the US Securities and Exchange Commission, or seeking confidential attorney-client communication).

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[57] *See* http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/a-boost-to-transparency-in-international-tax-matters-31-countries-sign-tax-co-operation-agreement.htm.

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