

Article

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The role of BEPS as an accelerator for corporate capital gains taxation reforms in the European Union

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1 Tax base as one of the driving forces for corporate capital gains taxation reforms

1.1 Introduction

In this article the authors aim to build a bridge between corporate capital gains taxation¹ and Base Erosion and Profit Shifting (BEPS). We also note how taxation is changing toward more digitalized and real-time tax procedures. First, topics concerning corporate capital gains taxation related to tax base are discussed. Second, anti-abuse topics are discussed. Third, the recent changes triggered by the BEPS project in the Nordic countries are discussed. Fourth, corporate capital gains taxation reform is discussed and accompanied by the latest BEPS targets as well as the latest developments in real-time tax models and digitalization

issues. Future development topics are also identified and discussed.

1.2 Tax base considerations in corporate capital gains taxation

In Finland, the corporate and capital gains tax reform of 2004 was related to tax base convergence. It was the consequence of an intention to enhance the international competitiveness of the tax system and the need to improve the possibility for companies to adjust their company structure to correspond to the most profitable taxation solution.²

When evaluating the tax base, attention should not only be paid to Finland's tax history, but also to the European regulations of direct investment situations. In Finland, the tax reform adopted solutions from other countries in the EU. Therefore, the tax base, in regard to the tax system of Finnish limited liability companies, cannot be characterized as having holes when compared to other tax systems. In order to remove economic double taxation in the corporate sector and to prevent chain taxation, the European solution has been to make dividend and capital gains tax exempt.³⁴

The standard tax system in use earlier has been complemented with shareholder tax exemption, which has narrowed the tax base that also included the capital gains related to direct investments before. The Finnish legislator had little choice after the other Nordic countries and Germany chose to implement shareholder tax exemption. In the background, issues related to the prohibition of chain taxation and the similarity affected the change. It would be unrealistic to evaluate the tax base without at the same time comparing the Finnish tax system to the corresponding tax systems of other European Union countries. The ability to

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1 Regarding the basic tax problems in the corporate capital gain tax systems and structures see also Torkkeli (2016); Torkkeli and Kukkonen (2017) and Kukkonen and Torkkeli (2018). If not specifically stated, the terms such as taxation, taxpayer, capital gain, and so on, have a corporate viewpoint in this article.

2 Keskitalo (2012, 129).

3 If the profit is taxed in several entities before the profit is paid to a natural person, the profit would be taxed many times, and that is called chain taxation.

4 Keskitalo (2012, 130).

choose has become significantly more difficult as political and economic integration has deepened. Therefore, a follow-up of the progression of the Common Consolidated Corporate Tax Base (CCCTB) proposal and other tax base harmonization systems and their possible implementation in the European Union is needed. For example, in the proposed CCCTB model, there are no specific requirements for the tax exemption of capital gains. This indicates that wide shareholder exemption has become part of the standard European tax system.⁵

The role of tax neutrality is important in tax avoidance⁶ cases. Tax authorities try to create neutral tax systems but financial institutions may need to serve their customers and create attractive financial products by taking advantage of, for example, the weaknesses of tax systems. International tax neutrality may be difficult to achieve if countries have differing tax bases and economic structures as well as political and social endeavors. In addition, conceptual impediments exist in domestic legislations. Before achieving tax neutrality, countries should solve their fundamental domestic issues, such as realization versus accrual taxation, capital versus revenues and debt versus equity.⁷ On the other hand, taxation solutions emphasizing efficiency and neutrality have been argued to lead into unwieldy systems from the perspective of tax administration.

2 Capital gains tax regime and anti-abuse

In some tax systems, income derived from business activity is considered business income and alienation of business assets is also considered business income. Capital gains

derived from a specific business area can be considered to be in the scope of the tax regime focused on this specific business area. Many tax systems consider only those capital gains taxable that are derived from alienation or acquisition and which have the purpose of realizing profit. Most tax systems consider alienation of long-term assets a non-speculative event, and, therefore, capital gains arising from that event do not lead to capital gains taxation. What varies between countries is the definition of long-term and short-term capital gains due to variance between the type of property and the holding period. There can be more favorable capital gains tax regimes for specific areas due to several reasons (e.g., policy). Taxation of alienation of business assets is often more favorable for the following types of property: goodwill, going concern and substantial participation.⁸

Several tax systems include provisions that have been created for tackling the abuse of capital gains taxation. One aspect that is often addressed in the anti-abuse provisions is the re-characterization of capital gains derived from the alienation of property as capital gains derived from the alienation of another property. For example, an immovable property company may be set up in such tax systems in which alienation of an asset is taxable, whereas alienation of shares is not. Re-characterization can also take place so that income from an asset is re-characterized as capital gains. This may occur if the taxation of ordinary income is more burdensome than the taxation of capital gains. This can happen in the context of dividend distribution when the company buys back its own shares in an amount equal to the dividends. Interest can also be replaced by the corresponding amount of alienation of the asset. Both of these cases lead into a situation in which the income is netted to zero with the help of the equal capital gains.⁹

Taxpayers try to optimize the tax burden. To prevent abuse, specific provisions have been created. Accrued capital loss can be realized within the alienation of capital asset to a third party but not to a related party.¹⁰ If a taxpayer alienates an asset with capital loss and then purchases back the same asset, the value of the asset in both of these transactions should be considered equal to the tax cost of the alienated asset. Many tax systems rule that capital losses can only offset taxable capital gains.¹¹ Tax exemption of sales of shares makes flexible changes in the company own-

⁵ Helminen (2004, 35); Keskitalo (2012, 130–131); OECD (2014a, 244–246).

⁶ Tax avoidance refers here to an action taken by the taxpayer (company) to avoid the payment of (excess) taxes. Tax avoidance can be considered to be the legitimate minimizing of taxes and maximizing after-tax income and profit, using all methods allowed and included in the tax regulation. Firms tend to avoid (minimize) taxes by taking all legitimate deductions and tax credits and by sheltering income from taxes by legal means. For general discussion of the implications of tax avoidance and illegal tax evasion, see Avi-Yonah (2014). Currently, many corporations have taken into consideration several corporate social responsibility limitations affecting the extent they effectively try to minimize/avoid the tax payments. In Finland, for example, there exists a general anti-tax abuse paragraph in the law, which (through interpretation and case law practice) sets a boundary between legitimate tax planning and tax evasion (Tax Procedure Act 28 §).

⁷ Laukkanen (2007, 61).

⁸ Simontacchi (2007, 129–130).

⁹ Simontacchi (2007, 135–136).

¹⁰ Entities or people who have a relationship with the company. For more information, see IAS 24 — Related Party Disclosures.

¹¹ Simontacchi (2007, 136–137).

ership structures possible. As a side effect of tax exemption, tax planning is reinforced. If capital gains and losses are not treated symmetrically in taxation, it increases the chance for tax arbitrage. Tax exemption of share sales also includes problems. It encourages incorporation and realization of share ownership instead of substance sales. Differences between various forms of company sales arise. Tax exemption of shares also means that there is no neutrality in direct and indirect ownership situations.

Copying a tax system from another country without making changes to it is seldom enough to prevent tax arbitrage or tax planning. That is because the tax system most often also depends on other economic system structures.¹² Tax arbitrage can be considered the main concept or the umbrella term for actions that aim to gain by taking advantage of the differences between tax systems. Tax avoidance, tax planning and tax evasion¹³ can all be considered methods of tax arbitrage.¹⁴ These tax arbitrage actions reduce the tax base and tax profits. Therefore, it is important to consider which of these activities are such that should be legislated. In addition, the international considerations of this topic should also be acknowledged.

The European Union has considered interfering and laying down rules against the erosion of tax bases in the internal market and the shifting of profits out of the internal market. The European Union set out an anti-tax avoidance directive in 2016 (ATAD).¹⁵ It lays down anti-tax avoidance rules for situations that may arise in five specific fields:

- *Interest limitation rules*
- *Exit taxation rules, to prevent tax base erosion in the state of origin. Corporate taxpayers may try to reduce their tax bills by moving their tax residence and/or assets, merely for aggressive tax planning purposes.*
- *A general anti-abuse rule*
- *Controlled foreign company (CFC) rules*
- *Rules on hybrid mismatches*

Based on these rules, a tax is levied on the transfer of assets if:

1. *Assets are transferred from the taxpayer's head office to its permanent establishment (PE) in another Member State or third country in so far as the Member State of the head office no longer has the right to tax the transferred assets due to the transfer;*
2. *Assets are transferred from a PE in a Member State to the head office or another PE in another Member State or in a third country in so far as the Member State of the PE no longer has the right to tax the transferred assets due to the transfer;*
3. *The tax residence is transferred to another Member State or to a third country, but not with respect to assets that remain effectively connected with a PE in the first Member State;*
4. *A business carried out by a PE is transferred out of a Member State to another Member State or third country in so far as the Member State of the PE no longer has the right to tax the transferred assets due to the transfer.*

In corporate capital gains taxation, this may lead (in effect) to an accrual tax on capital appreciation. If assets are transferred to another Member State, those Member States are obliged to allow taxpayers to value the assets at market value. In such cases, taxpayers also have the right to defer tax claims arising from exit taxation by paying installments for five years. This means that there is a postponement possibility for the actual payment of capital gains tax. If a taxpayer chooses to defer a tax claim, interest may be charged and, if there is an actual risk of non-recovery, securities may be demanded by the Member State involved. EU member States should apply this provision by January 1st, 2020.¹⁶

ATAD has been a move toward an accrual-based taxation of value accumulation. The old main rule, the realization principle, clearly creates tension between the form and content. In the tax policy of the United States, the realization requirement is seen as the linchpin of the policy.¹⁷ In practice, the United States tax deferrals and artificial losses have generated anti-abuse provisions for the tax law.¹⁸ Tax planning and tax avoidance also exist most in situations in which tensions between the form and content are most visible. The tensions between the “normal” definition of capital gains and Haig-Simons’ concept of income¹⁹ have been the most significant reasons for tax planning and tax avoid-

¹² See more International Monetary Fund (2014).

¹³ Tax evasion is here defined as using illegal means to avoid paying taxes. Tax evasion can be hiding or misrepresenting income, for example, by underreporting income, inflating deductions without proof, hiding or not reporting cash transactions, or hiding money in offshore accounts. See also Avi-Yonah (2014).

¹⁴ See European Union (2016).

¹⁵ COUNCIL DIRECTIVE EU of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

¹⁶ See also Torkkeli and Kukkonen (2017).

¹⁷ Guerin (1985, 907); Knuutinen (2009, 93).

¹⁸ See Laukkanen (2009, 102).

¹⁹ See Torkkeli (2016, 35). Haig-Simons’ concept of income also includes unrealized gains and losses in taxable income.

Table 1

Rule	Implementation status
Interest limitation rule (EBITDA rule)	Not all Member States have implemented ATAD's EBITDA rule, and there are Member States that instead apply their domestic EBITDA rule. Austria, Ireland and Slovenia do not apply EBITDA rule. Slovakia, Germany and Spain apply a domestic EBITDA rule.
Exit taxation	Member States had to introduce exit taxation rules or amend their existing ones in line with ATAD's exit taxation rules by December 31 st , 2019. As per authors' understanding, there are no deviations to the fulfillment of this deadline requirement.
General Anti-Abuse Rule	Member States had to implement a GAAR by December 31 st , 2018. As per authors' understanding, there are no deviations to the fulfillment of this deadline requirement.
Controlled foreign company rules	Member States shall implement ATAD's CFC rules by December 31 st , 2018. Member States that do not apply CFC rules have to introduce ATAD's CFC rules in their tax legislation. France, Spain and Germany did not implement ATAD's CFC rules.
Hybrid mismatches	Member States have to implement ATAD II, in principle , by December 31 st , 2019. The following Member States have adopted hybrid mismatches: • Draft ATAD II bill: Austria, Croatia, Czech Republic, France, Ireland, Luxembourg, Poland, Portugal, Slovenia, Sweden • Adopted ATAD II bill (application per January 1st, 2020): Belgium, Bulgaria, Denmark, Estonia, Italy, Netherlands, Slovakia

ance participants to operate in the area of capital gains taxation in particular. In this area of taxation, the term tax avoidance is most in use.²⁰

The status of the implementation of the ATAD rules in the EU member is as follows as of December 2019 (Table 1)²¹

In the realization principle, the taxpayer may utilize their right to decide on the alienation actions and their timing. The taxpayer can realize or not realize depending on the tax impacts. Tax law cannot regulate these decisions for the taxpayer. Applying formal realization events may also lead taxpayers to realize such transactions that they would not carry out without those formal tax rules. This makes taxpayers approach tax avoidance situations. The realization principle has also been considered to affect various efficiency issues because of its effect on the decisions of investors. One of those efficiency effects is the lock-in effect. Kukkonen (2000) notes in his empirical tax dissertation that investors are unwilling to sell such shares that include a lot of accrued gain, and the realization principle

can help investors avoid taxation. The lower tax rate has been justified for capital gains because of the lock-in effect. But the lower tax rate may trigger other efficiency issues and increase items disturbing justice, even though the lock-in effect may be reduced.²² The realization principle fulfills the requirement of legal certainty, but it partly dismisses justice and efficiency. Justice can also arise horizontally by favoring capital income over earned income.²³

The BEPS project with common regulations can enhance corporate capital gains taxation by minimizing tax competition between countries and the possibility to utilize differences between tax systems of individual countries.²⁴ Generally tax competition leads to the decrease of the total tax income of countries. The implementation of the BEPS recommendations leads to more uniform taxation. This minimizes international situations in which the income is

²⁰ Brooks and Head (1997, 61); Knuutinen (2009, 93); Staveley (2005, 609).

²¹ PwC (2019).

²² Kornhauser (1985, 869).

²³ The real-time taxation procedure (see later in this paper) may help control the value changes and transactions regarding taxing capital accumulation.

²⁴ OECD (2015a). See also Malmgrén (2015).

not taxed at all. This also increases the predictability of taxation.

EU member states have committed to reducing adverse tax competition by following the Code of Conduct for Business Taxation. In addition, the Forum on Harmful Tax Practices organized by the OECD member representatives is looking into whether the tax systems of the OECD member states are adverse. Adverse tax competition is evaluated from the following perspectives:

- Effective tax rate is low or does not exist
- Limitation of regulations to a certain area or certain situations
- Lack of transparency
- Lack of effective exchange of information

In addition, the following items are evaluated regarding whether the tax system is adverse:

- Artificial definition of the tax base
- Unfollowing the international transfer pricing principles
- In the country of residence, tax exemption of the income received from a foreign source
- Option to negotiate the tax base or tax rate
- Existence of confidentiality rules
- Existence of a wide tax contract network
- Marketing of the regulation as the means to minimize taxes
- Regulations to encourage fully tax-driven actions or arrangements

If tax regulation is considered to be adverse, the state can remove the regulation or its adverse features. If the state does not do that, other countries can launch actions to prevent the adverse impacts of the regulation and support the state in removing the adverse features. Global Forum as OECD's partner has created minimum requirements for following the exchange of information regarding taxation matters and transparency of ownership. Global Forum is making country reviews to see whether minimum requirements are being followed.²⁵

3 Beps considerations from the corporate capital gains taxation perspective

In the BEPS project, certain action points have been agreed to in order to amend bilateral tax treaties and to avoid double taxation. The project was launched by the Organisation for Economic Co-operation and Development (OECD) together with G20 member countries. OECD has approved the BEPS Action Plan, which includes 15 planned actions. In June 2017, all Nordic countries signed a tax treaty to prevent base erosion and profit shifting. On August 29th, 2018, the Nordic countries signed a minutes to change the Nordic Tax Treaty, which was approved by the President of Finland on November 23rd, 2018.²⁶ This was triggered by the international cooperation that was carried out in order to prevent double taxation. The decision to change the Nordic Tax Treaty was made in an attempt to avoid handing out opportunities for non-taxation or reduced taxation through tax avoidance. A general anti-abuse rule, the so-called main purpose test, will be added. In addition, a mutual agreement procedure may be initiated in a Contracting State other than the State of Residence.

The objective of the BEPS project is to secure tax revenue and to combine taxation with economic activity and value creation. The basic idea is that revenue should be taxed in the place where revenue arises. However, this is not straightforward because countries may have differing opinions concerning where the added value is created. The BEPS project is future-oriented as it aims to prevent tax base erosion and profit shifting in the future. In addition, harmonized taxation regulations aim for better tax predictability for taxpayers.²⁷ The success of the BEPS project could be evaluated by analyzing how substantial impact tax base erosion and profit shifts have on tax profits²⁸.

The key objective of the BEPS project is to produce recommendations for national legislation or for the changes to the OECD Model Tax Convention. The OECD's recommendations should not contradict those of the European Union.

A benefit should not be earned if it can reasonably be assumed that one of the principal purposes²⁹ of the arrangement or transaction that directly or indirectly resulted in

²⁵ Malmgrén (2014).

²⁶ Valtiovarainministeriö (2018). See also Edilex (2019a).

²⁷ OECD (2014a). See also Malmgrén (2015, 40).

²⁸ Malmgrén (2015, 41).

²⁹ A test under BEPS to prevent treaty abuse. The benefits of a treaty may be denied if the principal purpose of a structure is to benefit from the treaty.

the benefit was the receipt of such benefit. However, this will not be adhered to if it is established that the benefit under these circumstances is compatible with the goal and purpose of the contract. The principal purpose test is one of the methods generated by the BEPS project to avoid the abuse of contracts.³⁰

The details of the corporate tax systems of EU member states are very different, and there are differences, for example, in the tax bases and tax rates. This leads to a situation where companies operating in more than one Member State must take into account the differences of the tax systems in their business and tax planning. The differences in tax systems can cause a huge amount of work and efficiency loss to companies engaged in cross-border business. The differences in corporate tax systems may also lead to double taxation, double non-taxation, overly tax-driven arrangements and substantial extra costs. Therefore, further coordination of corporate tax systems of the Member States is considered to be necessary.³¹ Negative tax harmonization based on the judgments of the EU Court in the field of corporate taxation or harmonization based on tax competition is not considered to be sufficient, and therefore, positive harmonization is needed.³² Full tax harmonization between the EU member states may be impossible, but the focus of harmonization should be in finding minor common factors in the area of corporate income taxation. Those harmonization factors could be brought together because of legislation, voluntary harmonization or pressure derived from tax competition.

As well as other planning activities in a company, tax planning activities can be divided into strategic, tactic and operative activities. However, the separation of tax planning activities into these three types is not very clear. Strategic plans have the most irreversible effect on a company. A Finnish company can avoid paying corporate capital gains tax if it makes a foreign company responsible for all of its ownerships. Another significant tax planning option is to set up a holding company in a big international group. The holding company will own the shares of the productive companies of the group. The holding company is often located in the country that meets the required tax reduction or avoidance possibilities.³³ If corporate tax rate is high in international comparison, the company must gain a significant yield over the invested capital. Otherwise it is more

profitable for the company to transfer its activity elsewhere or to skip the investments.

The changes in the level of corporate income tax rates should be thoroughly considered because the changes have a significant impact on economics. Nominal gains overstate real gains because of inflation. However, indexing can be used to reduce the gains by the amount of inflation. Incentives to undertake risky investments will be increased if the tax rates are reduced due to reduced lock-in, which will augment the supply of capital, and due to increased rewards to entrepreneurs, will spur demand. In addition, revenues will grow permanently because realizations grow.³⁴ One way of tax planning is to transfer income to other income types in order to avoid taxes. In countries that don't tax capital gains, taxpayers will try to transform taxable capital income into tax-exempt capital gains. The firms try to adjust the tax base before the change in corporate income taxation has taken place. The possibility of the adjustment reduces the jump in the value of the firms and the subsequent intergenerational welfare transfer. The benefits of adjusting are limited by the fact that the firms are restricted by the model to accommodate via profit distribution and investment decisions.

In conclusion, tax planning is one of the most important factors the EU needs to take into account in their reform preparation work when developing corporate capital gains taxation systems, that is, how many options and chances for tax planning should be allowed. This is especially true for the holding companies in groups operating in the EU area, which have posted possibilities for tax planning during the last couple of years. Another important feature to notice is the overlapping area of tax planning and tax competition in corporate capital gains taxation. In short, it can be concluded that one of the means of tax planning is to utilize the advantages gained with the help of tax competition.

Tax competition is defined as the tax-cutting influence that countries exert on one another. The influence of tax competition operates through many channels. For example, policymakers may worry that if they do not respond to foreign tax reforms, the tax base will shrink, businesses may lobby governments for tax cuts to remain competitive, and scholars may examine foreign tax reforms for workable solutions to present forward. When considering the geographical location, companies evaluate the income and wealth taxation in addition to the availability of capable workforce and the nature of the technological environment. This makes states compete in taxes as long as the states

³⁰ OECD (2015b).

³¹ Helminen (2013, 251).

³² Helminen (2013, 252).

³³ Helminen (2009, 598–599, 608).

³⁴ Slemrod (1990, 326).

cannot agree on the minimum levels and key principles of corporate taxation. Companies and related business and industry parties use the threat of moving their headquarters to another country as a means to put pressure on the tax policy.

Companies move abroad because a different country can offer an advantage to the company's operations or because the competitors there lack competence. The target country offers such valuable location benefits to the company that it is reasonable to move there. Although many theoretical economic models exist, they do not provide any clear answers to the simple question of whether international tax competition is a good or a bad thing. Much seems to depend on political rather than purely theoretical criteria.³⁵ The most striking outcome of tax competition has been that, in the main corporate income tax reforms, the decrease of corporate tax rate has been justified with a trend in the development of the corporate tax rate in the other Nordic and EU countries. However, as can be seen, tax competition may have wide consequences regarding, for example, the localization of group companies. Therefore, the EU plays a significant role in boosting positive tax harmonization and driving tax harmonization discussions forward between EU member states, with the help of which, it may be possible to keep the effects of tax competition at a reasonable level so that, from the point of view of the EU, it does not harm the economics.

4 A future European Union corporate taxation model supported by BEPS targets and advancing real-time taxation systems

Economic integration takes place most efficiently between such countries where the cultural, linguistic and social background is similar and which are located close to each other. The common Nordic market area enhances the diversification of production and export and strengthens the competitiveness of companies in the area also outside that area. To increase the EU's competitive edge in world economy, the Member States should consider general-level tax harmonization between each other. That could boost the latent entrepreneurs to implement new business activities in other EU countries. However, actual (real) tax harmonization in the EU requires skillful tax and public finance

specialists to negotiate the common future outlook and also to build the needed authorities not only to administer the EU-wide corporate taxation system but also to manage the change so that the subsidiarity of the member states is not neglected.

With the EU-level proposals on a Common Corporate Tax Base (CCTB) and a Common Consolidated Corporate Tax Base (CCCTB) published on October 25th, 2016 (Corporate Tax Reform Package), the European Commission intends to proceed with a two-stage approach: first aiming at an introduction of CCTB, and when that is achieved, the legislative process relating to the introduction of CCCTB could begin. The re-launch follows the lack of progress in the Council concerning the 2011 proposal (COM, 2011, 121). The 2011 proposal was withdrawn when the 2016 CCTB and CCCTB proposals were published. The current CCTB provides a base for the determination of a single set of rules for the calculation of a corporate tax base. Therefore, companies operating across borders in the EU would no longer have to deal with 28 different sets of national rules when calculating their taxable profits. Contrary to the 2011 CCCTB proposal, the latest proposal is mandatory for groups of companies beyond a certain size, namely those with a consolidated turnover exceeding 750 million euro. Companies that remain under this threshold would be given the possibility to opt in to the system. Under CCTB, companies will still have to file a separate calculation and tax return in all the Member States where they have a taxable presence.

The CCCTB Directive is the second phase on the way to a consolidated tax base. It will remain under the judgment of the commission until consensus has been reached regarding the CCTB.³⁶ When considering the future corporate capital gains taxation model, not only the competitive edge of each individual Member State but also the simplicity of the model should be considered.

The CCTB proposal provides a base for determining a single set of rules for the calculation of a corporate tax base. It would be mandatory for groups of companies with consolidated turnover exceeding 750 million euro during the financial year, for companies established under the laws of a Member State, including its permanent establishments (PE) in other Member States, and for the PEs of a company, established under the laws of a third country located in a EU member state. Companies that remain below the threshold would have the possibility to opt in to the system. However, under CCTB, companies would still have to file a separate calculation and tax return in all Member States where they have a taxable presence. A super-deduction for

³⁵ Patterson (2000, 76).

³⁶ Rapo and Volanen (2017).

research and development (R&D) costs aims to support innovation, while an allowance for growth and investment (AGI) addresses the problem of debt receiving more favorable tax treatment than investment by giving taxpaying entities the possibility to deduct equity from the taxable base. The introduction of an interest limitation rule means that financial costs would be deductible up to the amount of financial revenues (interest and other taxable revenues). Deduction in the tax year of borrowing costs that exceed revenues would be limited to 3 million euro or 30 per cent of earnings before interest, taxes, depreciation and amortization (EBITDA). Taxpayers would be allowed to carry losses forward indefinitely. General anti-abuse rules (GAAR) and controlled foreign companies (CFC), hybrid mismatch and tax residency mismatch provisions are foreseen. Some provisions (such as cross-border loss relief) would cease to apply when CCCTB comes into force.

The European Parliament's Committee on Economic and Monetary Affairs (ECON) adopted its report on February 21st, 2018. In particular, the report amends the proposal with the following additional points:³⁷

- Lowering the threshold of mandatory application of the directive from 750 million euro to zero over a maximum period of seven years.
- Definition of a digital permanent establishment (DPE), to allow taxing of digital multinationals without a PE in the EU by deeming that a taxpayer resident in one jurisdiction, but providing access to a digital platform or offering one in another tax jurisdiction, has a DPE in that jurisdiction.
- Definition of a non-cooperative tax jurisdiction, and exclusion of expenses paid to beneficiaries situated in these countries from deductible items.
- Deleting measures relating to anti-tax avoidance such as exit taxation, GAAR, hybrid mismatches and reverse hybrid mismatches, but insisting that the existing anti-tax avoidance rules laid down in Directive(EU) 2016/1164 be systematically taken into account as well as have switch-over, and CFC rules be strengthened. Member States should not be prevented from introducing additional anti-tax avoidance measures.
- Replacing the proposed super-deduction for R&D costs with a tax credit of 10 per cent of the costs incurred for R&D costs of less than 20 million euro relating to staff. Deleting AGI and limiting the possibility

for deducting interest paid out on loans in order to neutralize the current bias against equity financing.

- Deletion of cross-border loss relief, obsolete due to CCTB and CCCTB's simultaneous entry into force. Allowing taxpayers to carry losses forward only up to five years.
- Ensuring a level playing field in the EU and mitigating the administrative burden and costs for small and medium-sized enterprises (SMEs).
- Monitoring and publication of the effective tax contribution of SMEs and multinationals.
- Monitoring and assessment of uniform implementation and ensuring homogeneous interpretation.

From the perspective of the BEPS project, the main focus should be on setting up investigative cross-border bodies to review corporate capital gains taxation systems, to look for best practices, to study the impact corporate capital gains taxation systems have on economics and to share knowledge and information with EU member states concerning other EU member states. This would improve the quality of the possible changes in future corporate capital gains taxation systems. It is also possible that, in the future, harmonization of corporate income taxation between EU member states could be made easier with a multilateral agreement, which would make implementing changes quicker. This approach is also supported by the BEPS project because the BEPS initiatives would be most efficiently utilized with cross-country activities between several countries instead of only two.³⁸

The Multilateral Convention derived from the BEPS project was created in a way that would allow as many countries as possible to join and so that countries could implement the actions proposed by the BEPS project in their own tax contracts. The Multilateral Convention was compiled in such a manner that any country that can fulfill the minimum standards can join. The other possible changes to tax contracts can also be implemented with the help of the Multilateral Convention. The results of the BEPS project can be divided into minimum standards, recommendations and best practices. Minimum standards are not legally binding. However, the countries participating in the BEPS project are also expected to implement the minimum standards.³⁹ On February 22, 2019, the President of Finland gave his ap-

³⁷ European Parliament (2020).

³⁸ OECD (2014b).

³⁹ OECD. See also Ojala (2017).

Table 2: Comparison of the corporate capital gains taxation models in the Nordic countries (2020)

	Denmark	Finland	Iceland	Norway	Sweden
Tax rate	22	20	22	22	21.4
Capital gains tax treatment in normal case	Ordinary income	Ordinary income	Ordinary income	Ordinary income	Ordinary income
Capital gains tax exemption	Sale of subsidiary and group shares	Sale of shares	Sale of shares	Sale of shares	Sale of business-related shares

proval to joining the Multilateral Convention pending that certain conditions are met.⁴⁰

The Table 2 represents the current status of corporate capital gains taxation in the Nordic countries.

As it can be seen, corporate capital gains tax rates are reasonably equal in all Nordic countries. The corporate capital gains tax exemption treatment rules are also similar in the Nordic countries.

The taxation of corporate capital gains is one area where the Nordic and European countries could cooperate more in order to enhance entrepreneurship, to increase overall economic activity and to speed up the dynamics of the economy. The BEPS initiative also aims for increasing entrepreneurship. Here, harmonization discussions have two important aspects. First, cooperation in the area of corporate capital gains taxation inside the Nordic countries is a necessity because not all the Nordic countries are part of the EU. Second, the Nordic countries could lead the way to building cross-border corporate capital gains taxation development bodies. After being shown some results, the EU might begin to see the value in that kind of reform and be encouraged to begin building similar kinds of bodies inside the EU.

This would also mean that a more modern and multi-disciplinary approach would be used for the corporate tax reforms in Europe. More cooperation and organizational bodies working toward the common objectives of a good corporate income tax system are needed both at the level of the Nordic countries as well as the EU. Future corporate income taxation should be challenged with new cross-scientific perspectives. In addition, the focus should be on cross-border taxation issues because, in the current globalizing world, there is no way to avoid situations in which there are not only group companies in the Nordic countries

and the EU but also in third countries. Corporate income taxation should be as simple as possible so that companies could concentrate on driving their business forward in the international arena instead of paying too much money and spending too much time on administrative tax question. Overall, applying as many good tax system features as possible should diminish the amount of tax base eroding and profit shifting actions.⁴¹

A functional and realistic corporate capital gains tax system⁴² for intercorporate capital gains (share alienations) could be created, for example, by combining the current features of the Danish and the Dutch corporate capital gains taxation system. As features of a good taxation system, a new corporate capital gains tax system should utilize more efficiency and simplicity. Separation of direct investment shares and portfolio shares creates the baseline of future development as well as the identification of substantial shareholdings and business relationships. Subject (selling company) requirements could be simplified in order to make the subject company a legal person.

Object (the target company to be sold) requirements could include at least two options. As the first option, the requirement could demand that the object company is a subsidiary company, which means that the owner company owns a certain percentage of the equity and the equity is divided into shares (based on the Dutch feature). As the second option, the ownership share should be 10 per cent or more, which ensures that the object of the alienation is business-related (based on the Danish feature).

Less than 50 per cent of the total assets of the object company should be passive, which ensures that the object of alienation is business-related. The meaning of the passive assets could be defined more accurately than they

⁴⁰ Laki veropohjan rapautumisen ja voitonsiirron estämiseksi verosopimuksiin toteutettavista toimenpiteistä tehdystä monenvälisestä yleissopimuksesta. 22.2.2019. See also Edilex (2019b).

⁴¹ See more about the features of a good tax system in Torkkeli's dissertation.

⁴² See more Torkkeli's dissertation. See also Kukkonen and Torkkeli (2018).

were in the Netherlands to avoid interpretation issues. In addition to these requirements, the future corporate capital gains taxation model should refer to the definition of business income. Simplifying the corporate capital gains taxation model as proposed in Torkkeli's dissertation as well as clarifying the corporate capital gains taxation regulations from the practical perspective of the BEPS project would be encouraged. The cooperation activities proposed and discussed in Torkkeli's dissertation would also further support the goals of the BEPS project.

The changes promoted by the BEPS project are best implemented when as many countries as possible take the proposed actions in use. However, implementing changes in individual countries may be difficult. One reason can be that implementing the changes may require expansive adjustments in national taxation regulations as well, which slows down the change process.⁴³ Another issue that may arise is that the changes proposed by the BEPS project would not be seen as positive from the perspective of individual country legislation. Therefore, it is important that the positive impacts of the BEPS project are discussed more. In addition, it should be highlighted that the BEPS project enhances basic corporate taxation features, such as the features of a good taxation system. The BEPS project can also be seen as a corporate capital gains taxation system harmonization activity that could be applied in the Nordic countries or in the EU. Therefore, the BEPS project also supports corporate capital gains taxation in a future-oriented manner. In the future, the amount of effort that can be put toward analyzing different models and taxation options (to ensure that taxation takes place where the value and value creation streams arise) could be investigated further. In addition, it would be reasonable to investigate how much the BEPS project has affected both the amount of features adopted from a good taxation system as well as entrepreneurship in general in the Nordic and EU countries.

It should be noted that currently, the "big issue" trend regarding practical tax reforms (especially in the Nordic countries) is the increasing use of digital self-reporting in taxation. This means that the tax system is (slowly) moving toward a "real-time taxation model", which is based on market value appreciations and actual real-time reporting of the business transactions of companies. The digitalization of businesses and electronic business aids this development. Currently, the various business activities of companies (including realization events, transactions and value accumulations) are normally already reported digitally and in a continuous manner (not only at the end or after the

end of the current tax year) in accounting and soon also in (continuous) tax reporting. In some cases, it may occur that firms discuss unclear tax issues (is there a realization event of capital gains tax) with tax authorities in advance (that is, before the actual transaction/realization takes place).

This "new era" of the timing and functioning of businesses and individual taxation can be clearly illustrated by the reformed Finnish tax accounting and reporting procedures. The currently used partial real-time taxation procedure (My Tax – OmaVero) means (in essence) that the actual (= real) tax decision can or will be (in principle) a continuous act. Within company business taxation, this means close contact and cooperation between the tax administration and the firms. In essence, advanced tax planning also involves the government. If this becomes a basic concept with business taxation, the decisive moment (= tax decision in practice) of taxation can, in principle and also in practice, take place long before the formal or even the actual moment of taxation. This means that tax interpretation has been made in advance. In essence, the tax decisions are made continuously.⁴⁴

An income register updated in real time provides Finland with a new and reliable basis for coordinating labor income and social benefits. The project thus creates a register of citizens' incomes (income register – Tulorekisteri), which can subsequently be utilized by the tax administration and other essential parties who need the information in question. The idea is that revenue data is transferred *digitally* to the registry directly from payroll management systems and other information producing systems through the development of the new national service channel. From November 2018, Finnish corporations must file their income tax returns online. This becomes the basic model for all taxpayers in 2020 or 2021. Individual taxpayers will also normally file their tax returns via the online-system.

Real-time taxation makes it easier for tax authorities (EU countries) to control possible taxable income creating realization events. Real-time accounting and tax reporting creates a base for accrual taxation in real time based on the interpretation of the taxable event. In addition, it should be noted that if the reporting company (the seller) has a concrete Corporate Social Responsibility (CSR) policy, which also includes a tax policy document (provisions) regarding responsible corporate tax planning (the limits of active tax planning behavior of the firm), the real-time taxation system encourages and supports socially responsible tax

⁴³ Malmgrén (2015).

⁴⁴ See Kellgren *et al.* (2019, 13–14).

behavior. The importance and concept of taxable events is changing.⁴⁵

Beneficial ownership is a term in domestic and international commercial law, which refers to the natural person or persons who ultimately own or control a legal entity or arrangement, such as a company, a trust or a foundation. A Beneficial Ownership Register could enhance tax evasion avoidance in corporate capital gains taxation. It is also beneficial for avoiding double taxation.

Table 3

Country (Nordic or European Union)	Signature (x)	Entry into force (x)
Austria	x	x
Belgium	x	x
Bulgaria	x	
Croatia	x	
Cyprus	x	x
Czech Republic	x	
Denmark	x	x
Estonia	x	
Finland	x	x
France	x	x
Germany	x	
Greece	x	
Hungary	x	
Iceland	x	x
(non-EU member state)		
Ireland	x	x
Italy	x	
Latvia	x	x
Lithuania	x	x
Luxembourg	x	x
Malta	x	x
Netherlands	x	x
Norway	x	x
(non-EU member state)		
Poland	x	x
Portugal	x	x
Romania	x	
Slovakia	x	x
Slovenia	x	x
Spain	x	
Sweden	x	x

⁴⁵ See for example Hilling and Ostas, *Corporate Taxation and Social Responsibility* (2017), chapter 8. See also IFA Volumes 102a (2017) and 103b (2018).

In November 2016, over 100 jurisdictions concluded negotiations on the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral Instrument or MLI). The MLI will swiftly implement a series of tax treaty measures to update international tax rules and decrease the amount of opportunities multinational enterprises have to avoid taxes. The MLI already covers 94 jurisdictions and entered into force on July 1st, 2018. Signatories include jurisdictions from all continents and all levels of development, and other jurisdictions are actively working toward signature.

The Table 3 represents the current situation of the signatures in the Nordic and European Union countries (as of March 11th, 2020).⁴⁶

It can be concluded from the above table that the majority of the Nordic and EU countries have signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting and for the majority of the countries the contract has entered into force.

5 The challenges of reforming current EU and Nordic Corporate Tax Systems: some remarks

Taxing multinational enterprises in a global market includes the challenge of taking real economic circumstances into consideration when setting a tax base. Tax reform in the EU should consider at least all four big system issues of corporate taxation:⁴⁷

1. *Who is the tax subject (who pays)?*
2. *What is taxed (concept of taxable profit/gain)?*
3. *Where the taxable amount is taxed?*
4. *When must the tax be paid?*

⁴⁶ OECD (2020)

⁴⁷ For the great challenges of making major structural changes into the current EU corporate tax structure, see also de Wilde (2019). In this article, the author sets up a fundamental tax policy question: how should “Europe” respond to society’s calls for a sound and properly functioning corporate tax system for the internal market? Author’s solution is to re-model the current CCTB/CCCTB draft directives into a unitary tax model for taxing worldwide economic profits of multinationals and using a destination-based apportionment formula (which is called “CCCTB 2.0”) to apportion the tax base to countries, both within and outside the EU. Under this framework, it would be up to the EU member states themselves to determine the rate applying to the tax base apportioned to them.

Our article has focused mainly on the first and second aspects of building a corporate tax system, even though the taxation of intercorporate capital gains obviously includes all of the above aspects in some way.

From the perspective of BEPS' objectives, the main focus should be on setting up cross-border bodies for investigating corporate capital gains taxation systems, searching for best practices, investigating the impacts corporate capital gains taxation systems have on economics and sharing knowledge and information with EU member states regarding other EU member states. This would improve the quality of the possible changes in future corporate capital gains taxation systems.

As it can be concluded from the tables of this article, the Nordic countries are following each other in the principles of corporate capital gains taxation. However, more work could be done to lead the way to building cross-border corporate capital gains taxation development bodies. The Nordic countries could focus more on the evolution of this kind of a common development body. The cooperation activities proposed and discussed in Torkkeli's dissertation would also further support the goals of the BEPS project.

Corporate income taxation between EU member states could be made easier with a multilateral agreement, which would make implementing changes quicker. Therefore, the BEPS project serves as a significant accelerator for EU-wide corporate income taxation reforms and harmonization activities among EU member states. The Multilateral Convention derived from the BEPS project was created in a way that would allow as many countries as possible to join and so that countries could implement the actions proposed by the BEPS project in their own tax contracts. The Multilateral Convention was compiled in such a manner that any country that can fulfill the minimum standards can join. The results of the BEPS project can be divided into minimum standards, recommendations and best practices.

The BEPS initiative aims to increase entrepreneurship. Corporate income taxation should be as simple as possible so that companies can concentrate on driving their business forward in the international arena instead of paying too much money and spending too much time on administrative tax questions. Overall, applying as many good tax system features as possible should diminish the amount of tax base eroding and profit shifting actions. Understanding global economics will also become much more important for corporate capital gains taxation and for the BEPS project because, as seen during recent months, the economy can be shocked into a near standstill by an outside phenomenon, such as a pandemic.

It is important that the positive impacts of the BEPS project are discussed more in order to further escalate the

interest in common corporate income taxation activities in the Nordic and EU countries. In addition, it should be highlighted that the BEPS project enhances basic corporate taxation features, such as the features of a good taxation system. The BEPS project can also be seen as a corporate capital gains taxation system harmonization activity that could be applied in the Nordic countries or EU. Therefore, the BEPS project also supports corporate capital gains taxation in a future-oriented manner. In the future, the amount of effort that can be put toward analyzing different models and taxation options (to ensure that taxation takes place where the value and value creation streams arise) could be investigated further. In addition, it would be reasonable to investigate how much the BEPS project has affected both the amount of features adopted from a good taxation system as well as entrepreneurship in general in the Nordic and EU countries.

The overall corporate taxation environment will continue to change due to digitalization. If this becomes the basic concept of business taxation, the decisive moment (= tax decision in practice) of taxation can, in principle and also in practice, take place long before the formal or even the actual moment of taxation. This means that tax interpretation has been made in advance. In essence, tax decisions are made continuously, and, as such, corporate capital gains taxation also becomes part of continuous business planning. These taxation infrastructure system changes encourage and support socially responsible tax behavior, could enhance tax evasion avoidance in corporate capital gains taxation, update international tax rules and decrease the amount of opportunities multinational enterprises have to avoid taxes. In short, the corporate capital gains taxation framework expands even more as time passes. This means that in the future, the corporate capital gains tax rules should be able to flexibly cover the related topics in order to be ahead of relevant changes instead of reacting to the realized trends afterward.

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