

International Fiscal Association

2017

Rio de Janeiro Congress

cahiers

de droit fiscal  
international

VOLUME 102

**A: Assessing BEPS:  
origins, standards,  
and responses**



1938-2017

## Summary

Issues of prevention of tax avoidance have always been on the agenda of the Swedish legislator. However, base erosion was not a major concern until a few years ago, when excessive interest deductions became a concern. This trend is clearly seen. In 2008, Parliament adopted five guiding principles for tax policy. Of the guiding principles, only two had somewhat remote connection to base erosion and profit shifting (BEPS) issues and one related to international conditions. After the BEPS project started, a significant shift in the government attitude was noticed, e.g. its adopting a Swedish ten-point action plan in April 2016, “Counter-acting tax evasion, tax avoidance and money laundering”. This contained e.g. items on transparency and exchange of information, mandatory disclosure rules for tax advisers, a global blacklist of non-cooperative jurisdictions, VAT fraud, reinforcing the resources of the Swedish Tax Agency, efforts to put tax issues on the agenda at company board meetings, capacity building in developing countries and continued measures against domestic tax evasion.

The Swedish government did not actively participate in the OECD work on BEPS until the publication of the Action Plan in summer 2013. Since then, Sweden has been very active in the BEPS project and participated in almost all focus groups and technical advisory groups (TAGs). A representative from Sweden is also participating in the bureau of the ad hoc group on the multilateral instrument.

Both the Ministry of Finance and the Swedish Tax Agency sent staff to the focus groups. There was no open consultation on behalf of the government on how to participate in the BEPS project.

Sweden has, following the amended EU Parent–Subsidiary Directive, amended its domestic rules so that otherwise exempt dividends will be taxed to the extent the dividends are deducted by the distributing foreign company. A tax avoidance rule for outbound dividends was also introduced. As an EU Member State Sweden will also have to implement the EU Anti-Tax Avoidance Directive, with proposals on controlled foreign company (CFC) rules, interest deduction limitation rules, etc. Most of them are compliant with the BEPS reports and Swedish legislation is

\* Professor of Fiscal Law at Karlstad and Stockholm University

\*\* Professor of Fiscal Law, Uppsala University, and director of the research foundation Uppsala Centre for Tax Law

most probably already in conformity with the directive. With respect to CFC rules the Ministry of Finance is studying whether Sweden needs to change the current legislation. A proposal can be expected soon on interest deductions.

As regards treaty-based actions, Sweden seems to have embraced the changes under Action 2. It seems also likely that Sweden will conform to the suggested new preamble.

The suggested principle purpose test in Action 6 has not been publicly discussed but the reporters assume that Sweden will also accept this provision in its future treaties. It is currently uncertain to what extent Sweden will modify the changes under Action 7.

Swedish law does not consider the OECD transfer pricing (TP) guidelines to be statutory law. It is debatable whether all the changes in the new TP guidelines can be considered to fall under the wording of the domestic legislation.

The Swedish TP documentation rules will be modified to some extent to comply with the BEPS country-by-country reporting (CbCR) standards. According to a government proposal the documentation requirements and CbCR will take effect on 1 April 2017.

The Confederation of Swedish Enterprise has submitted written comments on almost all of the BEPS proposals directly to the OECD. A few contributions to the OECD have been made from academia.

Only a few public consultations have taken place, and were primarily organized by Parliament. At these events politicians from the Ministry of Finance made presentations on BEPS, and contributions were also made from the OECD, business and academia.

At one of these events the Finance Minister made a statement which has caused considerable discussion. She underlined her view that BEPS would make Sweden relatively more competitive for investments and referred to an analysis made at the Ministry of Finance, that Sweden would be a winner on BEPS. However, the government has refused to make the study public.

Seminars on BEPS have been organized by the Swedish IFA branch, by academics and among major consultancy firms. Conferences have been organized by various research foundations, by IFA Sweden, and by the Swedish Tax Agency.

Irrespective of political colour politicians have been promoting and have been in favour of the BEPS project. A general political view is that the BEPS reports will facilitate international acceptance for the developed principles. Among the concerns are the efficiency of the dispute resolution mechanisms, risk for global non-uniform implementation and the administrative burden for companies.

Critical voices have claimed that Sweden may lose some of its tax base, but this has not been commented on or discussed by policymakers, other than in the statement by the Finance Minister mentioned above.

The Swedish Tax Agency claims that the new TP guidelines only clarify the arm's length principle. No other official statements can be depicted as guidance. The business community has expressed concerns that the guidelines may result in a shift of tax base to source countries.

There have been a number of articles, either describing the BEPS process in general terms, or focusing on specific items or issues. Issues on the constitutionality of BEPS measures have been dealt with as well as general and critical views on the impact on Swedish business.

The legal and political discussion has recently started to focus on the issue of whether the BEPS proposals will be advantageous to the Swedish economy and to what extent other countries will increase their tax claims, leading to reallocation of investment.

The Swedish government has by and large acted in accordance with the objectives and outcome of the project. Sweden has already in its treaty policy adhered to some of the BEPS changes and is of the opinion that many of the measures are already in place in Sweden. An important issue for Sweden concerns effective dispute resolution.

## 1. Overview

### 1.1. Priorities

Sweden has been a member of the OECD since its inception and a member of the European Union since 1 January 1995. As a member, Sweden has a tradition of being loyal to the different measures once they have been decided by these organizations. Sweden is also a member of the United Nations and is active on its UN Tax Committee (government official Ingela Willfors).

With respect to international tax measures, Sweden, as a small export-oriented economy, early recognized the need for domestic measures to alleviate international double taxation, as well as the need for tax treaties. Tax incentives to attract foreign investors have been rare.

Historically, the concern with respect to BEPS was concentrated on the taxation of individuals.<sup>1</sup> As a high-tax country (high income taxes, also on capital income, net wealth tax, and inheritance and gift tax) individuals were particularly inclined to move financial assets abroad. One of the main obstacles was the Swedish currency legislation which made it unlawful to move money abroad without permission. Another was the so-called Luxembourg rule,<sup>2</sup> which targeted individuals having financial assets in foreign holding companies.

The first CFC rules were introduced 1 January 1990<sup>3</sup> which to some extent were intended to counteract the abolition of the currency rules. In 2004, major changes were made in the CFC rules following the introduction of full participation exemption on dividends and capital gains on qualifying shareholdings.<sup>4</sup> Interestingly, the perceived risk was the interest arbitrage that could occur if a Swedish parent company took a loan with fully deductible interest, contributing it to the capital of a foreign low-taxed subsidiary, and receiving the after-tax dividend distribution tax exempt in Sweden.<sup>5</sup> One route was via subsidiaries in Ireland. Later, from 2009,

<sup>1</sup> For an early dissertation on international tax planning with respect to financial investments, see Gustaf Lindencrona, *Skatter och kapitalflykt*, Stockholm 1972.

<sup>2</sup> 64 §2 mom. KL and after 1 January 1985 in 3 § SIL.

<sup>3</sup> Prop. 1989/90:47 in then 53 § anvp. 10 KL., 6 §1 mom. (d) and 2 mom. SIL.

<sup>4</sup> Prop. 2003/04:10, effective 1 January 2004. See Anna Gerson, in *The taxation of foreign passive income for groups of companies*, Swedish branch report, *Cahiers de droit fiscal international*, vol. 98a 2013, pp. 703–722.

<sup>5</sup> Prop. 2003/2004:10, p. 41.

the concern was somewhat the reverse, when rules were introduced to prevent Swedish companies deducting interest payments to foreign related entities being subject to low or zero tax on the received interest (see below).

Another development during the last decade has been the large number of exchange of information agreements concluded by Sweden, to a great extent negotiated in cooperation with other Nordic countries.

As an EU member, Sweden has participated in EU discussions and decisions, and introduced the BEPS measures required under EU law (see below). The reporters also think this is important for analysing the BEPS project. There have been EU actions, for instance the Anti-Tax Avoidance Package presented on 28 January 2016 from the EU Commission, which have led to interaction between the government and other interested parties. The discussions at such interactions will of course also include or touch upon issues related to BEPS.

Even though prevention of tax avoidance, domestic and international, has always been on the agenda of the Swedish legislator, it is interesting to see that issues of base erosion were not particularly prominent, with the above-mentioned exception of interest deductions, until the BEPS project started. In 2008, Parliament adopted five guiding principles for tax policy and five associated requirements.<sup>6</sup> Of the guiding principles, only two had somewhat remote connection to BEPS issues. One stated the importance of good conditions for business and investments, both inbound and outbound, and the other that a legitimate and fair tax system among other things required that tax fraud, evasion and avoidance should be counteracted.

One of the five requirements was aimed particularly at international conditions, namely that Sweden should have sustainable and defensible tax rules with respect to EU law. The government reiterated these principles and requirements as late as September 2011 and 2012.<sup>7</sup> In 2012, when the interest deduction limitations were sharpened, it was the principle of good conditions for business that was invoked as a reason to reduce the corporate tax rate from 26.5 per cent to 22 per cent, while, at the same time, the principle of a legitimate and fair tax system justified the more severe interest limitations.<sup>8</sup> In the budget proposed for 2017 in September 2016 the measures against tax avoidance were given priority.<sup>9</sup> Reference was made to the Swedish action plan announced in April 2016 (see below).

## 1.2. Participation

The Swedish government did not actively participate in OECD work on BEPS between February 2013 until the publication of the Action Plan in summer of 2013.<sup>10</sup> However, after that very slow start, Sweden has been a very active participant in the BEPS project and participated in all focus groups, except on dispute resolution. In the general election in September 2014, the Conservative government,

<sup>6</sup> Prop. 2007/08:100, part 5.3.

<sup>7</sup> Prop. 2011/12:1, p. 231.

<sup>8</sup> Prop. 2012/13:1, pp. 179–180. The same criteria in prop. 2013/14:1, s. 203.

<sup>9</sup> Prop 2016/17:1 *Utgiftsområde* 3, p. 22.

<sup>10</sup> It is the reporters' impression that the non-participation was not an intentional result, but perhaps more that the process started quickly and other issues were more pressing.



with Finance Minister Anders Borg, was replaced by a Social Democratic/Green Party government with Magdalena Andersson as Finance Minister. In the reporters' assessment, this change did not materially affect the work on and support for the BEPS project.

Under the Committee on Fiscal Affairs (CFA) and its working party 1, Sweden participated in the focus groups on treaty abuse (6) and on artificial avoidance of permanent establishment (PE) status (7), but only followed the work on dispute resolutions (14).

Under working party 2, Sweden participated in the focus group on Action 11 on establishing methodologies to collect and analyse data on BEPS.

TP issues (8–10) were dealt with in three clusters under working party 6 (cluster 1, intangibles, recharacterization and methods; cluster 2, financial transactions and base eroding payments; cluster 3, coordination and TP documentation). Sweden participated in all three clusters and was also a member of the bureau of working party 6.

Sweden participated in the TAG under working party 9 that dealt with Action 1, Addressing the tax challenges of the digital economy.

Finally, Sweden was also represented in all the focus groups under working party 11, the focus group on hybrid mismatch arrangements (2), the focus group on CFCs (3), the focus group on interest deductions (4), and the focus group on mandatory disclosure rules (12).

Sweden also participated actively in the focus groups working on harmful tax practices, on transparency and spontaneous exchange on rulings, on the digital economy and on developing a multilateral instrument (15). A representative from Sweden is also participating in the bureau of the ad hoc group on the multilateral instrument. In a sub-group on arbitration a Swedish government official is the chair (Ingela Willfors).

The staffing of the Ministry of Finance relevant to work on tax issues in general and on international tax in particular is not sufficient. To remedy the situation, there is a cooperation between the Swedish Tax Agency and the Ministry of Finance when it comes to providing experienced staff for a project like this. Both the Ministry of Finance and the Swedish Tax Agency staffed the focus groups. One person at the Swedish Tax Agency (Margareta Nyström) was responsible for coordinating the contribution of the agency.

The government officials Ingela Willfors and Christina Rosén coordinated the work within the government. On Fridays, there were normally coordination meetings at the Ministry of Finance. There were also regular meetings with the Swedish Tax Agency staff on BEPS.

According to government officials, the Swedish participation in the BEPS project aimed overall to reach a balance between fiscal necessary measures and legitimate business interests.

There was no open consultation on behalf of the government on how best to participate in the BEPS project. However, there were a few informal discussions with invitees primarily from business and academic sector on the BEPS work.<sup>11</sup>

<sup>11</sup> E.g. the reference group for the EU Anti-Tax Avoidance Package, meeting 19 February 2016.

### 1.3. Domestic context

Sweden has no specific tax incentives to promote inbound foreign investments. There are no intellectual property (IP) boxes and no secret tax rulings. Sweden is a good location for international holding companies, having both extensive participation exemption as well as zero rate withholding tax on dividends for qualifying recipients (low-tax jurisdictions are excluded). In addition, the corporate tax rate is 22 per cent. The depreciation rules on machinery and similar assets are attractive (five-year depreciation period). There is a limited tax regime for foreign experts, to mitigate the effects of having the highest marginal tax rate on wages and salaries in the world (60 per cent plus payroll taxes).

There has been very little, if any, discussion on whether these rules are consistent with the BEPS initiative, and in the reporters' opinion correctly so.

During the 1970s the Social Democrats threatened to introduce so-called wage-earners funds in order to gradually socialize private business. Even though the proposal was watered down to more harmless measures once the Social Democrats returned to power in 1982, it was enough to drive some entrepreneurs abroad. Well-known examples are Ingvar Kamprad with IKEA and the Rausing family with Tetra Pak. Also the owner of H&M (Persson) moved out of Sweden, but later returned. However, this threat also led to other individuals hiding assets abroad. Other contributing factors were the net wealth tax, the inheritance and gift tax, and the high marginal tax on capital income. Gradually these factors decreased in importance,<sup>12</sup> but there were many Swedes with undeclared assets and income abroad. The combined effects of these legislative changes and the increased risk of detection following the extended exchange of information networks have led many individuals to voluntarily file corrected tax returns. The Swedish Tax Agency has been helpful in providing general guidance on such corrections. It is the reporters' impression that focus has been more on assisting individuals to provide correct information rather than on punishing them.

When it comes to central BEPS issues, i.e. those that affect companies, the taxpayer activities that have had the most effect on attitudes were excessive lending to Swedish related companies and the following high interest deductions. The full deductibility of interest in combination with extended participation exemption, including by and large exempting capital gains on shares in the corporate sector, resulted for instance to a number of so-called debt push-downs. As a result, limitations of the deductibility on primarily cross-border intra-group interest payments were introduced. At the outset, it was the Swedish Tax Agency that raised concerns about this issue, but the discussion was later extended to related non-tax issues as some of these companies were providing their services (e.g. health and care of elderly) to municipalities. The political issue was, and still very much is, whether companies earning income from the public sector should be able to redirect those profits to low-tax jurisdictions. It is therefore difficult to determine what caused what, but overall, interest deductions and thin capitalization affected the attitude of the government and made it more positive towards the BEPS project.

<sup>12</sup> The wage-earners funds were finally dismantled in 1991. The 1991 tax reform introduced the dual income tax system with 30 per cent flat rate tax on capital income. In 2004 the inheritance and gift tax was abolished and the same happened to the net wealth tax in 2006.

## 1.4. Taxpayers' rights and risks

BEPS will probably affect multinational company groups most, since these kinds of taxpayer are regularly more involved with TP (Actions 8–10) and are able to have more advanced tax strategies concerning intra-group loans (interest deductions, Action 4), using treaty benefits (Action 6) and may have PEs (Action 7) in other countries. CbCR (Action 13) is also limited to larger multinationals. Limitations of interest deductions will also have an impact on smaller companies with foreign owners and investors involved in private equity financing. Smaller businesses and individuals may also to some extent be affected by rules concerning hybrid mismatches and especially the increased possibilities for exchange of information.

The new rules stemming from the international coordinated BEPS project may also affect smaller and medium-sized companies and their owners, if CFC rules and PE rules are changed. However, the Swedish CFC rules are already quite extensive.

The tax authorities have also already targeted smaller companies with issues about PE and TP documentation, so the difference may not be so large in practice. It is more the general policy of targeting these kinds of issues that may increase the burden of smaller and medium-sized enterprises, especially if they also have cross-border businesses. Double taxation issues and the lack of an effective dispute resolution mechanism may be of greater importance for small and medium-sized enterprises, since they are more vulnerable to tax risks and long complicated proceedings (mutual agreement procedures and/or court proceedings), and normally do not receive compensation for costs incurred.

For individuals without substantial ownership in a company BEPS will have no or only a marginal impact other than increased transparency, since there will be more effective information exchange and increased cooperation between domestic tax authorities. This development started before BEPS.

Taxpayers' rights in Sweden are closely connected to individual rights guaranteed by the Constitution and established administrative practice. Earlier this was mainly developed by the courts and the practice of the Parliamentary Ombudsmen (*Justitieombudsmannen* (JO)) with reference to domestic administrative law and principles. At the beginning of the 1990s there was a major reform with respect to taxpayers' rights.<sup>13</sup> The European Convention on Human Rights was implemented in Sweden by statutory law in 1995. Since then the development of taxpayers' rights has been affected by the practice developed by the European Court of Human Rights (with a beginning in the Swedish Supreme Administrative Court case, RÅ 1996 ref. 97). The EU has also adopted a Charter of Fundamental Rights, which is similar to the European Convention. The Charter is primary EU law (binding and directly applicable in the Member States; however, only on tax issues subject to EU law, i.e. VAT). We will probably even see more development of taxpayers' rights stemming from case law developed by the two European Courts (ECtHR and Court of Justice of the European Union).

Most of the taxpayers' rights concerns individual integrity and procedural matters. Since BEPS will increase information exchange and cooperation between domestic tax authorities there will be an increased concern about issues relating to

<sup>13</sup> See SOU 1993:62, and prop. 1993/94:151.



the protection of secrecy, access to courts and possibilities of a fair procedure concerning collection, exchange and use of information in the future.

As discussed at the IFA Congress in Basel 2015 taxpayers' rights have not been prioritized during the BEPS work. In the BEPS reports there are, however, some concerns about tax secrecy in relation to the information exchange caused by CbCR. There is a general reference to the OECD guide (2012) "Keeping it Safe" and also some remarks concerning limitations on using the information for other purposes than tax. These kinds of issues may come into focus as the implementation of BEPS continues. No legislation has been enacted, and no proposals have yet been presented by the government.

On the other hand there has been more activity on the European level, with the EU Commission presenting BEPS-related proposals to coordinate the efforts within the EU. During the first half of 2016 the Anti-Tax Avoidance Package was delivered and discussed and led to the adoption of the Anti-Tax Avoidance Directive. The main criticism of the directive concerns its poor preparation, the vague rules as well as its scope being beyond what was agreed in the BEPS outcome. The minimum rules imply no uniform implementation and increase tax uncertainty as Member States are free to decide on stricter rules. This may accordingly lead to a variety of rules among EU Member States, even after implementation (2019).

This is also true for most of the BEPS project. As for many other states the Swedish Constitution requires statutory law (legislation) decided by the Swedish Parliament to levy taxes and decide upon taxes in tax administration and in courts. As a constitutional principle and a human rights issue this also requires a clear and precise tax legislation that provides foreseeability and prevents discretionary tax decisions by the tax authorities. Hence, certain BEPS actions will not have effect in Sweden until Parliament has decided upon the necessary legislation. Legislative proposals from the government will normally have been sent out for comments from e.g. stakeholders and academia. This may lead to other or modified rules (compared with the BEPS reports), since Parliament is not bound by promises given by the government (a political question). One very important taxpayers' right issue under these preparatory proceedings will be the right to foreseeability, why vague clauses or sets of rules may be disregarded or modified.

Another related problem is the "soft law" issue. Commentaries on the OECD model tax treaty and the TP guidelines are not statutory law in Sweden, and nor is it possible to refer to these kinds of sources as statutory law. Parliament may convert them into Swedish tax law, but so far this has not been the case (and it is unlikely to be done as a whole), but it could lead to partial reforms of the tax legislation.<sup>14</sup> Formally, the OECD TP guidelines are only guidelines and can be utilized as a source for a reasonable interpretation of the arm's length rule. They may be questioned by other arguments, which is of a certain importance since parts of the new guidelines have been questioned as deviating from the domestic standard (see more below). Also commentaries to the OECD model may have limited importance, especially if they have been changed after a bilateral treaty has been concluded (see HFD 2016 ref. 57).

<sup>14</sup> See Anders Hultqvist and Bertil Wiman, "BEPS – Implementering i svensk rätt", *Svensk skattetidning* 2015, p. 309 *et seq.*

Another taxpayer right which emerges from double tax treaties is the right not to be taxed twice on the same income. Vague rules, e.g. the revised TP guidelines, general anti-avoidance rules (GAARs) and the principal purpose test (PTT) rules in treaties will make it possible for domestic tax authorities to interpret their legislation in favour of a domestic fiscal view disregarding the fact that this view may not be shared by the other tax authority. There is accordingly an increased risk of double taxation.

Measures to resolve this problem are advanced pricing agreements (APAs), which may to some extent reduce that risk, and the mutual agreement procedure (MAP). The competent authority is an independent part of the Swedish Tax Agency. Sweden has also signed the European Arbitration Convention.

When asking the business community their greatest concerns relates to these two issues. The vague rules create uncertainty, reduce foreseeability, and offer room for domestic fiscal interpretation and double taxation as a result. To balance this more effort should have been put into dispute resolution. The latter is under continued consideration in the ongoing BEPS work where Sweden is actively involved (see above).

Another risk concerns the extended concept of a PE. There is among many states nowadays an increased ambition to qualify economic activity as establishing a PE, and as a result to allocate income and tax to their own jurisdiction. The proposed extended rules on PEs, to counteract artificial avoidance of PE status, have increased the risk of double taxation.

Even though many may agree upon the principles laid down in the BEPS reports and that tax should be levied in the state where the value is created, there are concerns about the issues mentioned above. However, since there no BEPS-related legislation has as yet been presented, it remains to be seen what will come out of this.

However, the proposal on interest limitation in BEPS Action 4 and in the EU Anti-Tax Avoidance Directive is expected to result in better legislation for Swedish taxpayers. The Swedish current legislation on interest deductions is heavily criticized as vague, leading to arbitrary decisions, and is also according to many scholars and the European Commission violating the European freedom of establishment (article 49 TFEU). The earnings before interest, tax, depreciation and amortization (EBITDA) rules will contain clearer and more precise rules which will lead to a better foreseeability. Proposed legislation can be expected in 2017 (see further below).

## 2. Responses to BEPS measures

### 2.1. Identification of priorities

Focus for the government on domestic law has been on interest deductions (see below). As regards participation in BEPS, Sweden participated very broadly. According to government officials, issues on TP and on PEs have been prioritized. This may well be the case, but the reporters have no documentation to substantiate this claim as there are no publicly available studies from the government that

reveal how the process of prioritizing has been made during the process, apart from the general guiding principles for tax policy made in the annual budget proposals and the ten-action statement made in April 2016 (see below).

Some priorities follow from Sweden being an EU member. For instance, Sweden implemented the changes in the EU Parent–Subsidiary Directive (see below in section 2.2).

## **2.2. Already compliant**

### *2.2.1. Mainly domestic actions*

Under Action 2 there are recommendations on how to deal with hybrid instruments. Sweden has implemented the amended EU Parent–Subsidiary Directive, effective 1 January 2016.<sup>15</sup> According to Chapter 24, section 19 Income Tax Act, otherwise exempt dividends will be taxed to the extent the dividends are deducted by the distributing foreign company. It can be noted that this new provision applies irrespective of where the foreign company is located, i.e. non-EU companies are also covered. A tax-avoidance rule for outbound dividends was also introduced in section 4a Withholding Tax Act, so the normal zero-rate on dividends to foreign companies does not apply in certain situations.

With respect to Action 3 and CFC legislation, the Finance Ministry is studying whether Sweden needs to change the current legislation. Currently, it seems as though the position is that Sweden already complies.

CFC legislation was first introduced on 1 January 1990.<sup>16</sup> Following the extension in 2003 of the provisions on participation exemption to capital gains, the CFC rules were redesigned and extended.<sup>17</sup> A taxpayer that directly or indirectly holds more than 25 per cent of a qualifying foreign entity is taxed on that entity's low-taxed income. The income is low taxed if the tax is less than 55 per cent of the corresponding Swedish tax. As the Swedish tax rate is 22 per cent, income will be low-taxed if the tax rate is lower than 12.1 per cent. A so-called white list addresses certain geographic areas as sufficiently taxed, with an exception for certain activities, primarily finance and insurance. As with hybrid instruments, there is an EU Directive to comply with, in this case the Anti-Tax Avoidance Directive adopted in July 2016. However, just as with the Action 3, it seems as though the government is of the position that the CFC rules already comply with the Anti-Tax Avoidance Directive.

Much more interesting are the recommendations under Action 4. From 2008 intra-group loan arrangements, so called debt push-down, have been in focus as the amount of interest payments was perceived to erode the tax base. However, the successive legislative response to interest deductions, in 2008, 2009 and 2012,<sup>18</sup> basically means that if the related company receiving the interest is not subject to a tax rate of at least 10 per cent, then the interest deduction is denied.<sup>19</sup> However, there are two exceptions. Even if the recipient is subject to 10 per cent tax rate, a

<sup>15</sup> Ch. 24, s. 19 ITA, effective 1 January 2016. Prop. 2015/16:14, SkU 2015/16:7.

<sup>16</sup> Prop. 1989/90:47.

<sup>17</sup> Prop. 2003/2004:10. Chapter 39a, Income Tax Act, contains the CFC rules.

<sup>18</sup> Legislation introduced, changed effective 1 January 2013 (prop. 2012/13:1, FiU 2012/13:1).

<sup>19</sup> Ch. 24, ss. 10a–10f.

deduction may still be denied if the main reason for the indebtedness is to obtain a “substantial tax benefit” (for the whole company group).<sup>20</sup> And conversely, even if the tax rate is less than 10 per cent, a deduction can be allowed if the debt was “mainly motivated by business reasons”. Some elements of the rules were considered by the European Commission as a breach of article 49 TFEU (the freedom of establishment).<sup>21</sup> In addition, a committee, appointed by the government in 2011<sup>22</sup> to make an overhaul of the corporate tax rules with special emphasis on financing issues, in 2014 proposed new rules for interest deductions.<sup>23</sup> In its main proposal corporations would not be allowed to make deductions for any negative interest (interest paid minus interest received). Instead an itemized deduction (*finansieringsavdrag*, “financing deduction”), amounting to 25 per cent of the taxable income, was proposed in order to have neutral rules for loan and equity. Under certain assumptions, the effective corporate tax rate would be lowered from the statutory 22 per cent to 16.5 per cent.

There was also an alternative proposal, if the main proposal should be rejected, where net interest deductions were allowed up to 20 per cent of EBIT, with some further restrictions to prevent base erosion.

The main proposal was met with substantial criticism, primarily because it was impossible in practice to separate out the interest charge component. Other developments contributed to making the situation somewhat complicated. A new government took office after the September 2014 election. In addition, the ongoing work within the OECD on BEPS spoke in favour of waiting for legislative changes until the publication of the BEPS reports. On the other hand, the fact that existing legislation might be in contradiction of EU law spoke for a speedier reaction. It can be noted that neither the existing interest deduction limitation rules, nor the main proposal by the committee was mentioned in the BEPS final report on Action 4.

So far (October 2016), no legislative proposal on interest deductions has been made, and cannot be expected to be in place until 2018.

Sweden has always been opposed to harmful tax practices (Action 5) and supportive of both OECD and EU initiatives in this regard. Thus, Sweden has no preferential tax regimes such as patent boxes. As far as the reporters understand, there are no concerns that Sweden is not compliant in this regard.

### 2.2.2. *Mainly treaty-based actions*

In the last two years four tax treaties have been concluded by Sweden, with the United Kingdom (signed March 2015), Saudi Arabia (October 2015), Azerbaijan (February 2016) and Armenia (February 2016).<sup>24</sup> Even though the negotiations of these treaties commenced before the final BEPS reports, it may be interesting to see whether issues that have been relevant in the BEPS work are addressed in the treaties.

<sup>20</sup> Ch. 24, s. 24(d), para. 3.

<sup>21</sup> C(2014)8699 final.

<sup>22</sup> *Kommittédirektiv* 2011:1.

<sup>23</sup> SOU 2014:40 “Neutral bolagsskatt – för ökad effektivitet och stabilitet”.

<sup>24</sup> The reporters would like to thank Associate Professor Jérôme Monsenego, Uppsala University, for invaluable input based on a presentation held by him at Uppsala Centre for Tax Law 12 October 2016.

Under Action 2, there are two suggested changes to the OECD model tax convention. Sweden seems by and large to have embraced these changes already before BEPS. Article 1.2 is added to cover fiscally transparent entities. Sweden has similar wording in its 2009 model tax convention (non-official) which states the following:

“1.2. In the case of an item of income derived by or through a person that is fiscally transparent under the laws of either Contracting State, such item shall be considered to be derived by a resident of a State to the extent that the item is treated for the purposes of the taxation law of such State as the income of a resident.”

The reporters note that all four recent treaties either contain this version of article 1.2,<sup>25</sup> or similar wording in article 1,<sup>26</sup> or equivalent provisions in the protocol accompanying the treaty.<sup>27</sup>

With respect to the tie-breaker, the Swedish 2009 model tax convention reads:

“4.3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavor to settle the question by mutual agreement.”

Sweden only applies the incorporation principle. That means that the issue of dual resident companies is relevant when a company incorporated in Sweden has a place of effective management in another state, but not the other way around. Swedish treaty policy has for many years been to resolve dual residency by way of mutual agreement.

All the last four treaties refer to MAPs as a means to resolve dual residency. The treaty with Saudi Arabia contains a reference to the place of effective management as a factor for the competent authorities to consider.

Action 6 provides for changes to the preamble to clarify that tax treaties are not intended to be used to generate double non-taxation. The current preamble to the Swedish model tax convention contains a reference to fiscal evasion. It seems likely that Sweden will conform to the new preamble.

The suggested PPT (see Action 6) has not been publicly discussed. The reporters assume that Sweden will accept also this provision in its future treaties. In the treaty with United Kingdom there is a variant of the principle purpose test in articles 10–12.

Sweden has a limitation of benefits article in its model tax convention. It reads:

“Article 26

Limitations of benefits

Notwithstanding any other provisions of this Convention, where

<sup>25</sup> Treaty with Armenia.

<sup>26</sup> Treaty with the United Kingdom.

<sup>27</sup> Treaties with Azerbaijan and Saudi Arabia.



- (a) a company that is a resident of a Contracting State derives its income primarily from other States
  - (i) from activities such as banking, shipping, financing or insurance or
  - (ii) from being the headquarters, co-ordination centre or similar entity providing administrative services or other support to a group of companies which carry on business primarily in other States; and
- (b) except for the application of the method of elimination of double taxation normally applied by that State, such income would bear a significantly lower tax under the laws of that State than income from similar activities carried out within that State or from being the headquarters, co-ordination centre or similar entity providing administrative services or other support to a group of companies which carry on business in that State, as the case may be, any provisions of this Convention conferring an exemption or a reduction of tax shall not apply to the income of such company and to the dividends paid by such company.”

This type of article can also be found in the treaties with Saudi Arabia, Azerbaijan and Armenia.

The current article 5.5 and 5.6 of the Swedish model tax convention conforms to the wording of the OECD model before the proposed changes in the final report on the definition of PEs. It remains to be seen whether the definition of PEs in the Swedish model tax convention and in chapter 2 section 29 of the Income Tax Act will be changed. The latter definition, used to define limited tax liability under the Income Tax Act, is largely drawn from the definition in the OECD model tax convention. However, article 5.5 of the OECD model tax convention is not exactly copied.

Another issue is the anti-fragmentation proposal in article 5.4 of the OECD model.<sup>28</sup> The current wording of article 5.4 is included in the Swedish model tax convention and it is uncertain whether there will be any changes following the BEPS proposal.

### *2.2.3. Responses to TP measures (Actions 8–10 and 13)*

The report will first offer a few comments on the existing state of law in Sweden, and then comment on changes.

The arm’s length principle is found chapter 14, sections 19 and 20 Income Tax Act. Even though the wording is old, it can be said to roughly correspond with article 9.1 of the OECD model. There are no regulations or other norms detailing how to arrive at an arm’s length price. Case law has stated that the OECD TP guidelines can serve as guidance when determining an arm’s length price (market price). Of course, such guidance can only be offered by the TP guidelines if it can be determined that is not contrary to the wording of domestic law, e.g. chapter 14, sections 19 and 20.

An important question is therefore whether the new TP guidelines can fall under a reasonable interpretation of the statute. Swedish law does not consider the

<sup>28</sup> Preventing the artificial avoidance of permanent establishment status, Action 7, final report, p. 28.

guidelines to be statutory law (tax laws must under the Constitution be adopted by Parliament (see above)). Interestingly, the Swedish Tax Agency has declared that it will apply the new TP guidelines retroactively.<sup>29</sup> This position is questioned by scholars and others. It is also debatable whether all the changes in the new TP guidelines can be considered to fall under the wording of the statute. As mentioned above, the Finance Ministry should, in the reporters' opinion, study how to deal with this issue. There may be a need for changes in the current legislation. It remains to be seen whether all or only parts of the TP guidelines will be applied in detail.

There have been TP documentation rules in Sweden since 2008. These rules may have to be modified to some extent to comply with the BEPS reports. To be able to comply with the CbCR standards there has to be new legislation. As mentioned above this is also a requirement under the Multilateral Competent Authority Agreement (MCAA). Such a proposal was delivered on 19 October to the Council on Legislation for comments,<sup>30</sup> and after considering these comments, a bill to the Parliament is expected. According to this proposal, the documentation requirements and CbCR requirements will take effect from 1 April 2017, and the affected companies must deliver CbCR for fiscal years starting after 31 December 2015.

## 2.3. OECD participation

The report has already described the participation from the Finance Ministry and the Swedish Tax Agency in the BEPS work at OECD. To that description can be added that the Confederation of Swedish Enterprise has reviewed drafts from the BEPS project and left written comments on almost all of the proposals directly to the OECD Centre on Tax and Tax Policy, and simultaneously left a notice to the Swedish government and made the comments publicly available on the organization's homepage. The Confederation have a large staff of tax experts and the then head of the Tax Policy Department, Krister Andersson, is also chairman of Tax Policy Group at BusinessEurope, vice chairman of the Business Industry Advisory Committee to the OECD (BIAC) Tax Committee and member of the EU platform for tax good governance and the European Economic and Social Committee (EESC).<sup>31</sup> BusinessEurope and the BIAC have also provided comments on almost all drafts and have participated in all public consultations.

Christina Trenta, PhD and a senior lecturer in Tax Law, Örebro University, gave her observations and views on the draft of the digital economy report. Professor Emeritus Björn Westberg, Jönköping International Business School, was one of the members of the EU Commission High Level Expert Group on Taxation of the Digital Economy, which contributed also to the OECD BEPS work.

The active participation in the OECD BEPS focus groups, etc. may have an impact on the outcomes from the work as shown in the final reports. However, only

<sup>29</sup> Swedish Tax Agency homepage: <http://www4.skatteverket.se/rattsligvagledning/edition/2016.10/331396.html>.

<sup>30</sup> *Lagrådsremiss om Dokumentation vid internprissättning och land-för-land-rapportering på skatteområdet*, överlämnad 19 October 2016.

<sup>31</sup> Krister Andersson retired 1 October 2016 as Head of the Tax Policy Department and was succeeded by Johan Fall. However, Andersson continues to represent the Confederation of Swedish Enterprise at BusinessEurope, BIAC and ICC.

some of the proposals have any sort of binding (at least politically) effect, while others are left to national discretion to consider. All changes in Swedish tax legislation have to be made by the Swedish Parliament, so in some sense the whole outcome of the BEPS project is left to the political democratic process.

## 2.4. Public consultation

The Ministry of Finance has not organized any public seminars or conferences on BEPS. The Minister of Finance and the State Secretary have, however, as is shown below, participated in seminars and hearings organized by the Swedish Parliament (*Riksdagen*). Senior officials from the Ministry of Finance have also contributed in various seminars and conferences. The report has already described the involvement by the Ministry of Finance and the Swedish Tax Agency in the BEPS work. This has from a Swedish perspective been a governmental task with involvement mainly from the Swedish Tax Agency.

Senior officials at the Ministry of Finance have with the permission of the Finance Minister held unofficial seminars on EU-related issues such as the proposal on the anti-tax avoidance measures (see above).

As the Constitution requires all tax rules to be decided by Parliament in the form of statutory law, it would seem natural for there to be close interaction between the government and Parliament, especially its Committee on Taxation (*Skatteutskottet*). The Committee on Taxation has held three open hearings (*öppna utfrågningar*). The first hearing was on the protection of the Swedish corporate tax base in a global economy, on 16 May 2013.<sup>32</sup> The second hearing on 7 June 2016, in cooperation with the Committee on Foreign Affairs, was on policy for global development and the importance of taxes for development and fight against poverty.<sup>33</sup>

Finally, the third hearing was on 16 June 2016 in cooperation with the Committee on Industry and Trade on the competitiveness of Swedish multinationals in light of new rules in international taxation. Among the speakers were Hanna Nilsson, PwC, Krister Andersson, Confederation of Swedish Enterprise, Bertil Wiman, professor at Uppsala University, Yvonne Bertlin, AstraZeneca and Joakim Fällman, Scania. Finance Minister Magdalena Andersson spoke on the government view on BEPS and the conditions for Swedish enterprises.

The Finance Minister's views conformed basically to earlier statements. However, as by this time, June 2016, the EU ATAD was coming close to being adopted. She stressed that the BEPS measures could level the playing field between multinational and domestic companies, and also between different countries. As Sweden already has tougher rules on aggressive tax planning than other countries, she thought that Sweden through the BEPS project would relatively speaking become more competitive for investments than other countries that have weaker rules against international tax planning.

The Finance Minister, referring to an analysis made at the Ministry of Finance, claimed that Sweden would be a winner on BEPS.<sup>34</sup> This has been questioned by

<sup>32</sup> *Öppen utfrågning om skyddet för den svenska bolagsskattebasen i en global ekonomi.*

<sup>33</sup> *Öppen utfrågning i samarbete med utrikesutskottet om politik för global utveckling-skatters betydelse för utveckling och fattigdomsbekämpning.*

<sup>34</sup> According to the transcript from the hearing available from the Parliamentary Committee on Taxation.

Krister Andersson, who has unsuccessfully asked for the government to make the study public.<sup>35</sup> The claim from the Finance Minister has since become ever more discussed and questioned as the government has also refused requests from researchers and a Member of Parliament to disclose the study. The Finance Minister has now been reported to the Committee on the Constitution by a Member of Parliament for not disclosing the study.

In addition, the Parliament Committee on Taxation has also held two public seminars on BEPS. On 10 December 2013, the topic was multinational enterprises and domestic tax bases and dealt with the OECD Action Plan on BEPS.<sup>36</sup> Among invited speakers were Pascal Saint-Amans, OECD. Then State Secretary Mikael Lundholm, Ministry of Finance, also participated and gave the government view.<sup>37</sup>

Lundholm stated that the following were the Swedish government views:

- to counteract tax evasion and tax avoidance is politically prioritized;
- Sweden supports the BEPS project;
- it is important that the outcome also considers the legitimate interest of small and open economies;
- it is important that solutions do not go further than necessary to correct BEPS, i.e. the issue of double non-taxation, etc.;
- the Action Plan is a well-balanced and realistic compromise;
- the measures are not directly aimed at changing the existing international standards for allocation of taxing rights.

The second seminar organized by the Committee on Taxation was held on 4 June 2015 on the topic of international cooperation against tax evasion.<sup>38</sup> From the OECD Grace Perez-Navarro participated and made a presentation. Other contributors were Anna Ryott at Swedfund, Penny Davies, Diakonia, Krister Andersson, Confederation of Swedish Enterprise and Yvonne Bertlin, AstraZeneca. Finally, the Minister for Finance Magdalena Andersson gave her views on the BEPS project. In addition to what was already stated by Lundholm in December 2013, she added a few things. She stressed the need for technical assistance to developing countries to help them counteract BEPS. She also brought up that Sweden participates in the BEPS work done by the UN Tax Committee. Finally, she highlighted the need for effective dispute resolutions.

The Swedish Tax Agency organized a seminar on 15 December 2015 with invited guests from the newspapers and the universities.<sup>39</sup> Among the issues stressed by the Swedish Tax Agency at that seminar was the increased flow of information both inbound and outbound that would allow the Swedish Tax Agency to

<sup>35</sup> See e.g. *Skattenytt* 2016, p. 653.

<sup>36</sup> *Multinationella företag och nationella skattebaser*. Seminar held by the Committee on Taxation. [http://www.riksdagen.se/sv/webb-tv/video/oppet-seminarium/oppet-seminarium-om-multinationella-foretag-och-nationella-skattebaser\\_H1C220131210se1](http://www.riksdagen.se/sv/webb-tv/video/oppet-seminarium/oppet-seminarium-om-multinationella-foretag-och-nationella-skattebaser_H1C220131210se1). For a transcript, see [https://www.riksdagen.se/sv/dokument-lagar/dokument/rapport-fran-riksdagen/skatteutskottets-seminarium-om-oecd\\_H10WRFR15/html#page\\_5](https://www.riksdagen.se/sv/dokument-lagar/dokument/rapport-fran-riksdagen/skatteutskottets-seminarium-om-oecd_H10WRFR15/html#page_5).

<sup>37</sup> The other speakers were Inga-Lill Askersjö, Swedish Tax Agency, and Jesper Barenfeld, Volvo AB.

<sup>38</sup> *Skatteutskottets seminarium om internationellt samarbete mot skatteflykt*. <https://data.riksdagen.se/fil/41C37717-5A77-49AD-A6B6-260BBAC80761>.

<sup>39</sup> <https://www.skatteverket.se/omoss/press/presseminarier/seminariumombeps.4.3810a01c150939e893f7d63.html>.

assess companies correctly. Ingemar Hansson, Head of the Swedish Tax Agency, also stressed that the companies should adopt a tax policy at the board level.

Moreover, there have been special seminars arranged by the Swedish IFA branch, by academics and among major law and consultancy firms.

The Swedish government has, during the BEPS project, had contact with a reference group arranged within the finance department with such representatives.

On the specific topic on the tone of discourse of law and policymakers it must be concluded that irrespective of political colour they have promoted and been in favour of the BEPS project. Some criticism has been noticed from officials together with the general remark that Swedish interests will be monitored and protected as far as possible. The Swedish Finance Minister publicly announced in October 2015 that it is of major importance to counteract tax avoidance and aggressive tax planning and to deal with those who pay little or no tax at all. She also stated that Sweden, despite its size, was among those countries which had participated most actively in the BEPS project. A general view is that the BEPS reports will facilitate the international acceptance of the principles developed. The concerns noted are the efficiency of the dispute resolution mechanisms, non-uniform implementation worldwide and the administrative burden for companies.

There has been criticism which has not been commented on by the policymakers, and that is that Sweden might lose some of its tax base as a result of companies adjusting their investment decisions due to the rules agreed to in the BEPS project. An increased number of PEs are expected, in particular in the BRIC countries. As mentioned above, the Swedish government claims to have analysed the consequences and states that Sweden will be a winner, a conclusion that has been questioned.

Most highlighted by officials are the increased possibilities of the exchange of information (transparency). It is also the top priority in the ten-point programme released in April 2016 by the government. Other important issues are tax penalties, disclosure rules for tax advisers, more resources to the tax authorities and promoting good corporate tax governance (see also below). Sweden also supports the efforts to strengthen the capacity to levy tax in developing countries.

One piece of policy guidance on BEPS released so far concerns mainly TP (Actions 8–10) published by the Swedish Tax Agency. Its view on this issue is that the new TP guidelines only contain a clarification of the arm's length principle. It may be hard to describe other statements as guidance, but this report has already described the official views on the BEPS project and on international tax avoidance. The business community has expressed concerns that the treatment of IP rights, the allocation of risks, etc., may result in a shift of taxation claims to source countries.

There has been some information delivered about the ongoing work and discussions during the project on some major conferences. In August 2014 a national conference, organized by Skattenytt Foundation, was held outside Stockholm for tax academics where the BEPS project was discussed and information given by government officials. In March 2015 a public conference was held in Stockholm, organized by the Skatterättsligt Forum, where many aspects of the BEPS work were in focus. Both government officials and staff from the Swedish Tax Agency participated. Both events drew a lot of attention and were well attended. The latter



conference resulted in many articles in a special issue in one of the leading tax journals (*Svensk Skattetidning*).

In October 2015 the independent non-partisan thinktank Centre for Business and Policy Studies (SNS) organized a seminar where the head of the OECD Tax Policy and Statistics Division, David Bradbury, discussed the BEPS project together with the government official Ingela Willfors and CFO/Head of Tax Yvonne Bertlin (AstraZeneca).

An international conference on the impact on business models was organized at Uppsala University 16–17 June 2016.<sup>40</sup>

There have been a number of articles in Swedish tax journals, either describing the BEPS process in general terms, or focusing on specific items or issues. Issues on the constitutionality of BEPS measures have been dealt with as well as general and critical views on the impact on Swedish business.

## 2.5. Post-BEPS processes and early assessments of progress to date

Already during 2015, when the draft reports from 2014 had been published, there were some discussions about the requirements for implementing the BEPS proposals. During the conferences in 2014 and 2015 these issues were addressed by tax academics. The government may have considered different measures of implementation, but there has been nothing or very little communicated to the public. The Swedish Tax Agency did, however, as mentioned above, announce that the new TP guidelines would become part of Swedish tax law guiding the interpretation of the arm's length rule immediately after the OECD Council had approved the incorporation of BEPS amendments into the TP guidelines (as was done in May 2016). This has been disputed by academics, with the reservation that this is true only if the guidelines contain a reasonable interpretation of the arm's length principle; otherwise they have no normative effect, since the Swedish Constitution requires statutory law for levying tax.

From the perspective of international law and Swedish constitutional law the issue of implementing the BEPS package has been analysed by Anders Hultqvist and Bertil Wiman.<sup>41</sup> All changes that constitute obligations for taxpayers or modifications of current tax law have to be transformed to statutory law. Even Swedish double tax treaties are transformed into statutory law, since Sweden has a dual system for international treaties (government binds the state by the treaty, but to be part of domestic law legislation is required). An exemption is the route through EU law, which is supreme law in relation to domestic law and has to be applied directly. Directives also have to be implemented in domestic law. There is a formal obligation under EU law to implement EU directives.

Since the EU Commission has been very active with new proposals, i.e. the Parent–Subsidiary Directive and the ATAD, some new BEPS rules have, as mentioned above, been coordinated to be similar in every Member State, i.e. CFC rules, hybrid transactions and entities, exit taxation and a GAAR. On the other hand, as these requirements are minimum standards, different Member States may have chosen other requirements, as long as the minimum standard is met.

<sup>40</sup> For some articles coming out of that conference, see *Intertax* 2016, no. 10.

<sup>41</sup> See *Svensk Skattetidning* 2015, pp. 309–324.

As mentioned above, legislation on CbCR is on its way. Furthermore, of general relevance is the bill on 13 October 2016 to the Parliament implementing the EU Directive 2015/2376 amending an earlier directive, resulting in cross-border exchange of information on pricing agreements and on certain rulings.<sup>42</sup>

Changes in Swedish tax treaties may take place when they are renegotiated.

All proposals for new or changed legislation have to pass through a public procedure for preparation of legislation. This involves public consultations and referral to the Council on Legislation (*Lagrådet*, where Supreme Court and Supreme Administrative Court justices serve), before the proposal can be handed over to the Parliament. The Parliament Committee on Taxation may, during the preparation within Parliament, also arrange hearings or other consultations. This means that every change of the Swedish legislation in the future, concerning BEPS, will have to pass through this procedure before Parliament may decide to change the Swedish tax law. Ratification of treaties also involves the approval of Parliament, but not the Council on Legislation.

As stated, legislation is underway implementing EU directives and CbCR. In 2017 we can expect a proposal concerning interest deduction limitations. Other adjustments or new legislation may be under consideration in the coming years.

As stated above, the legal and political discussion has recently started to focus on the issue of whether the BEPS proposals are favourable for the Swedish economy and to what extent other countries might increase their tax claims, leading to corporate reallocation of investments. It is uncertain what the outcome will be.

Some guidance can be found in the ten-point plan presented by the government, Counteracting tax evasion, tax avoidance and money laundering, on 28 April 2016. This contained the following items:

- (a) include more countries in the global standards for transparency and exchange of information;
- (b) introduce automatic exchange of information on beneficial owners;
- (c) introduce mandatory disclosure rules for tax advisers;
- (d) establish a global blacklist of non-cooperative jurisdictions and introduce tough defensive measures;
- (e) enhance measures against VAT fraud;
- (f) reinforce the deterrent effect of tax surcharges;
- (g) reinforce the resources of the Swedish Tax Agency;
- (h) provide for tax issues being on the agenda at company board meetings;
- (i) support capacity building in developing countries;
- (j) continue to take action against domestic tax evasion and undeclared work.

It can be noted that the government has sent a note to the Swedish Tax Agency (22 June 2016) with directives describing how the Swedish Tax Agency can encourage companies to bring issues on tax policy to the board (see Action 8 above.) As time goes by, it can probably be expected that more items on the list will result in actions from the government.

<sup>42</sup> Prop. 2016/17:19.

### 3. Conclusions

The Swedish government has participated in the OECD/G20 BEPS project with great ambition, engaging relatively many government and tax agency officials. It has by and large acted in accordance with the goals and outcome of the project. However, in general one can question the fact that the EU ATAD was accepted so early, even before any analysis of what BEPS might require was carried out. Some proposals, i.e. concerning CbCR, information exchange and interest deduction limitations, are already under preparation in the legislative process. Others are announced to start in the near future. The government has launched a ten-point programme. In the recent budget proposal the government announced its intention to continue to work with BEPS related issues and present more proposals to reach these objectives. Sweden also continues to work within the BEPS project concerning the multilateral treaty and dispute resolutions.

Since the Swedish Tax Agency considers the new TP guidelines to be in accordance with the present arm's length rule it has announced that it will also apply them with respect to previous fiscal years. There are other views on this issue and it may lead to disagreements and court procedures. The reporters are of the opinion that the government should study what changes the domestic arm's length rule may require in order to accommodate the OECD TP guidelines.

The CbCR reform will be in force as from 1 April 2017 having effect from fiscal year 2016. Proposals concerning interest deduction limitations will probably be presented in 2017 and can be in force from 1 January 2018 if there are no delays. The ATAD will be implemented at the end of 2018. The reporters do not foresee any major changes in Swedish legislation from that directive other than on interest deductions. Following the government's ten-point plan the government has given the Swedish Tax Agency the task of bringing forward a plan for encouraging corporations to develop a tax policy and to bring such issues to the board of directors. The plan is to be presented to the government on 30 October 2016.

Sweden has already in its treaty policy adhered to some of the BEPS changes. It remains to be seen to what extent the PPT and the changes on PEs will lead to changes in treaties.

By and large, Sweden seems to be of the opinion that many of the BEPS measures are already in place in Sweden. The most pressing area for change is on limitations on intra-group interest deductions.

An emerging issue concerns the constitutionality of the process as such. This is a difficult issue. On the one hand, it is of course necessary for the Ministry of Finance to be able to effectively participate in the processes within or outside the OECD. On the other hand, it is only Parliament that can decide on tax legislation in Sweden. That power cannot be delegated. Parliamentary involvement in the process therefore also seems necessary. With respect to tax treaties, where negotiations take place between Sweden and another country, the format is relatively well established, and the starting point is the OECD model tax convention as well as the Swedish model tax convention (even though the latter has not been discussed, as far as the reporters understand, in Parliament). Hence, one can say that the format is in line with what the Parliament historically has agreed to, so there will not be any surprises when Parliament has to decide on a concluded tax treaty.

However, in the BEPS-related processes, it can be debated whether parliamentary involvement has been sufficient. The hearings and seminars organized by the parliamentary Committee on Taxation have been at its own initiative. The process may be compared with the involvement by Parliament in the subsidiarity test of EU legislation, i.e. deciding whether proposed EU tax directives conform with the principle of subsidiarity. It can be noted that the Swedish National Audit Office (*Riksrevisionen*) is already reviewing the government's participation in the work against international tax planning against the background that this work has been conducted hastily and could have a big impact on the Swedish tax system.<sup>43</sup> Even though the extent of the review has not been decided at this moment, the fact that the National Audit Office is bringing the issue up already is interesting and supports the reporters' view that the current system is not satisfactory and is in need of an overhaul.

An important issue for Sweden concerns effective dispute resolution. It can be noted that Sweden is one of the countries that supported arbitration in Action 14. Sweden is also involved in a sub-group on arbitration to the ad hoc group on the multilateral instrument.

As many of the proposals in the BEPS project contain vague concepts there is an increasing area of interpretation and arbitrary application which may lead to double taxation, which will have to be resolved, and more effectively than the present rules allow. There is also a growing concern about taxpayers' rights in dispute resolution, i.e. how companies are represented in MAPs and in arbitration.

A final and summarized conclusion is that Sweden has contributed much more than can be expected from a small country to the BEPS project and also in the post-BEPS work. Sweden has also been very faithful to the principles set out in the BEPS project and takes the implementation issues seriously. There are, however, some uncertainties as there is now a political process with consultations with experts and stakeholders that will finally end up in Parliament, before the tax legislation can be reformed or new legislation introduced. Among the issues that will be discussed is to what extent the entirety of the BEPS project benefits Sweden as an economy.

<sup>43</sup> <http://www.riksrevisionen.se/sv/GRANSKNINGAR/Planering-och-uppfoljning/Pagaende-granskningar/Aktuella-forstudier/Regeringens-deltagande-i-arbetet-mot-internationell-skatteplanering/>.







International Fiscal Association

ISBN 978 90 12 40000 8



9 789012 400008

Sdu