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OECD Multilateral Instrument and Ukraine. Analysis, novelties and challenges

Master Thesis

Supervisor –

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Doctor

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INTRODUCTION

'The most significant re-write

of international tax rules in a century'

OECD/ G20, Base Erosion and Profit Shifting Project Information Brief, 2015

The relevance of the master thesis. International business relations have taken their place for centuries. Once the income is earned, the state has its monopoly to levy taxes, thereby increasing the tax revenue. The before-mentioned public control meets peculiarities for global profits when the company registered in one country conducts its business in another country. Moreover, as every state has its tax system, the tax approach differs. Different definitions of what constitutes tax residence, different interpretations of the source principle and may have adopted different systems of giving double tax relief. It follows that state authorities of both countries are willing to execute their obligation with respect to taxes, which leads to a company finding themselves considered tax residents in both states[1]. The other possible form of double taxation may occur when income is taxed at both the corporate level and personal level. Shareholders of corporations, including individual investors and corporate executives, pay taxes on dividends they receive—representing a share of the corporation's earnings—after the corporation has already paid tax on its profits or earnings[2]. The solution to companies' unfortunate situation is recognised in double tax treaties (DTT). The latter aims to resolve double taxation of passive and active income to respective residents of parties to the treaty. For that purpose, tax treaties may follow one of the following models: The Organisation for Economic Cooperation and Development (OECD) Model, the United Nations (UN) Model Convention, United States (US) Model.

While deciding which camp to join, a comparison should be made. One can notice many UN Model Convention provisions and the OECD Model Convention are similar or identical at a glimpse. There is divergence in the areas of membership and other priorities of these two organisations. First of all, the difference is in whether the import or export is sought to be favoured. While the OECD Tax Convention on Income and on Capital is about enhancing the

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[1] Oats, L., Miller, A., Mulligan, E. *"Principles of International Taxation"*. Sixth Edition – London: Bloomsbury Publishing Plc., 2017 p..143

[2] Digital Media Law Project. "Double Taxation. https://www.dmlp.org/legal-guide/double-taxation " (Accessed 5 May, 2021.

export relationship, the United Nations Model Double Taxation Convention between Developed and Developing Countries favours imports and investments.

At the same time, the US Model drafting was influenced and grounded on the OECD Convention. While following the OECD Model framework, US Model remained consistent with the United States tax law and policy.[3]

As the world is constantly evolving, these changes concern tax relations as well. Model tax treaties (MTT) adapt to new challenges by being constantly revised. Thus, the OECD released the tenth edition of its Model Treaty in 2017[4]; also, the UN did[5]. The latest US Model was released in 2016[6]. It is also remarkable that the latter is reluctant towards changes due to the sophisticated revision procedure. Thus there are only three releases dated 1996, 2006 and 2016. These changes are consequences of the outcomes of the BEPS Action Plan and represent a new phase in the international tax system.

Scientific research problem. Different MTTs provide different provisions regarding double taxation avoidance. Double tax treaties (DTTs), most of which are exclusively based in OECD and UN MTTs, are the main sources of international tax law. By implementing one of the templates, States should resolve the crucial moment, the application of the tax treaties. Some countries have no rules in their domestic law with respect to the application of tax treaties. The absence of any application of rules is understandable because, when a country first decides to enter into tax treaties with other countries, it is usually preoccupied with developing its negotiating positions on the provisions of either the UN or the OECD Model.[7] If a country has rules for the application of tax treaties in its domestic law, several general issues must be considered. First, do those rules apply to all tax treaties or are different rules adopted for.

Although double taxation is not a new phenomenon, there are still issues to be addressed. For instance, DTTs enabled abuses such as treaty shopping, round-tripping, tax avoidance and tax evasion that divest countries from reasonable tax revenues. It leads to a lack of revenue

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[3] Robert J. Patrick Jr., *A Comparison of the United States and OECD Model Income Tax Conventions*, 10 LAW & POL'y INT'l Bus. 613 (1978).

[4] Model Tax Convention on Income and on Capital: Condensed Version 2017, Available at :https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.html

[5]United Nations Model Double Taxation Convention between Developed and Developing Countries-2017, https://www.un.org/esa/ffd/publications/model-double-taxation-update-2017.html

[6] United States Model Income Tax Convention, https://www.irs.gov/businesses/international-businesses/united-states-model-tax-treaty-documents

[7] Brian J. Arnold, *Overview of Major Issues in the Application of Tax Treaties*, (May, 2013), https://www.un.org/esa/ffd/wp-content/uploads/2013/05/20130530_Paper1A_Arnold.pdf , p.12

influencing the countries' ability to invest in development and prosperity. At the same time, it affects the reputational status of a state.

As a remedy to imperfections of the bilateral relationship, a substantial number of jurisdictions decided to adopt the following document: Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). It aims to update international tax rules to decrease the possibility of tax avoidance by multinational companies. That is one of 15 steps formulated in the BEPS Action Plan strategy that deals with artificial profit shifting to low or no-tax jurisdictions with little or no economic activity.

The most appealing point is that DDTs embody a series of different rules, and some of them were affected by the BEPS project. Thus MLI updates the world's 3,400 DTTs to allow them to take into account the BEPS modifications. The pending outcome is the increased scrutiny of previously accepted transactions and structures. But these rules may be regarded as controversial and risky.

In the light of the adoption of the MLI, the important questions arise: **does Ukraine benefit from the MLI adoption, and what are the implications in terms of investment inflow?**

Level of the analysis. A plethora of scholars studied the topic to which the present master thesis is dedicated. To address the issues in this field of study, one should invoke the following authors whose works are devoted to exploring the BEPS Action Plan and MLI in particular. Among them are Alexander Bosman[8], Annet Wanyana Oguttu[9], Volodymyr Korol[10], Zamaslo Olha and Kozak Diana[11], Owens Jeffrey[12], Joseph Morley[13].

Scientific novelty of the master thesis. Since DTTs address double taxation, to avoid high host-country withholding taxes on outgoing passive income, many multinational companies

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[8] Alexander Bosman, *General Aspects of the Multilateral Instrument*, Intertax 45, no. 10 (October 2017): 642-659

[9] Annet Wanyana Oguttu, *Should Developing Countries Sign the OECD Multilateral Instrument to Address Treaty-Related Base Erosion and Profit Shifting Measures?* (2018) CGD Policy Paper. Washington, DC: Center for Global Development. https://www.cgdev.org/publication/shoulddeveloping-countries-sign-oecd-multilateral-instrument-address-treaty-related

[10] Volodymyr Korol, *International treaty novelties of counteraction to artificial avoidance of the status of permanent representation by means of the commission agreement,* (2020) http://pgp-journal.kiev.ua/archive/2020/6/47.pdf

[11] Zamaslo, Olha T., and Kozak, Diana A., *Laundering Black Money by Means of Offshore Zones: The Negative Impact and Ways to Resolve*, (2021), *Business Inform* 8:140–150. https://doi.org/10.32983/2222-4459-2021-8-140-150

[12] Jeffrey Owens, *BEPS Implementation: The Role of a Multilateral Instrument,* International Tax Review 26, no. 9 (November 2015): 18-21

[13] Joseph Morley, *Why the MLI Will Have Limited Direct Impact on Base Erosion Profit Shifting*, Northwestern Journal of International Law & Business 39, no. 2 (Winter 2019): 225-248

divert foreign direct investments (FDI) via a third country with a more favourable tax treaty, a practice that has been labelled treaty shopping in the literature[14].

Drafting the DTT States may desire to include provisions and conditions that will enhance the FDI to the particular country. As mentioned[15], the vast majority of the existing literature treats DTTs as a binary variable, thereby ignoring their complexity and their domestic and international interactions. Thus, the present master thesis is devoted to covering the issues of the influence of DTT on the likelihood of FDI and estimating which template of the treaty is more advantageous for these purposes. Since the phenomenon of treaty shopping still exists and is addressed in the OECD's base erosion and profit shifting (BEPS) initiative, this issue is relevant. In such a situation, the necessity for additional research on the current problem seems to be useful. The fact that the results of the BEPS project are not yet seen as satisfactory (not solving critical problems in international taxation) is exacerbated by the pandemic of COVID-19, due to the fact that more than years ago, States are in search of more tax revenues and for the attraction of more investments. The wish for bigger international tax cooperation is opposed by the growing competition between jurisdictions.

The BEPS Action Plan is regarded as indeed a successful instrument to address transfer pricing issues, still, its shortcomings are lasting. The Action 15 of the BEPS Action Plan considers inventing a mechanism for a smooth and effective implementation process of the minimum standard. Since the emergence of the MLI is relevantly recent, the most appealing topic for this paper is the MLI adoption in Ukraine. Since Ukraine is on its way to implementing mechanisms combating the base erosion and profit shifting it is considered to discover what was already done and what to anticipate from the Ukrainian side.

The aim of the master thesis is to discover MLI characteristics, provide an evaluation of the effectiveness of various provisions and clauses, and discover Ukraine's experience and success in adopting and implementing the BEPS Action Plan and MLI in particular.

The objectives of the master thesis. In order to achieve the established aim of this master thesis, the following tasks have to be carried out:

1) to analyse the BEPS Action Plan to identify the main problems in the context of its implementation and to analyse the MLI, to examine issues that may arise in connection with applying DTTs;

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[14] Dyreng, S. D., Lindsey, B. P., Markle, K. S., & Shackelford, D. A., *The effect of tax and nontaxcountry characteristics on the global equity supply chain of U.S. multinationals. Journal of Accounting and Economics*, (2015), 59 (2), 182–202

[15]Kunka Petkova, Andrzej Stasio, Martin Zagler, *On the relevance of double tax treaties*, (2019), International Tax and Public Finance , 2020 (27:575–605).

2) to analyse the BEPS Action Plan and the MLI adoption in Ukraine, to discover their implications on the current DTTs;
3) to explore the need to improve the tax legislation of Ukraine to bring it in line with international regulations and recommendations for the avoidance of double taxation, the erosion of the tax base for the purpose of corporate income tax.

The practical significance of the master thesis. The current research will be useful for scholars and practitioners in the field of tax law who deal with the issues of double taxation in cross-border issues. The master thesis can also be useful for the students studying the company and business law who want to deepen their knowledge in sophisticated issues of cross-border business and investments. The master thesis can also be useful for the students studying tax and business law who want to deepen their knowledge in such sophisticated issues as eliminating double taxation, drafting the DTTs, treaty shopping and related issues.

The defended statements. Ukrainian level of commitment to the international tax-related rules improves Ukraine’s positioning for foreign investors and recent national regulations in taxation and financial fields bring prominent changes in terms of the reliability of Ukraine. Changes to DTTs should follow the aim of leaving revenues in Ukraine.

Methods used in the master thesis. For research purposes, the following methods will be used.

First, the data collection and data analysis shall be appreciated. Due to many legal texts and scholarly articles, the data will be analysed and structured, and some conclusions will be inferred.

Second, as it stems from the title of the master thesis, one of the purposes of the current research is to analyse the MLI. Therefore, a comparative method will be used to analyse and compare MLI provisions, regarding the effectiveness of their approach toward the regulation of the issues that are subject to the current research.

Another essential scientific method is a linguistic one that is crucial when determining the significant concepts used by the legislative authorities in different jurisdictions when regulating some specific issues related to the current research topic. It allows to avoid unnecessary misunderstanding when analysing various legal concepts implemented in the text of legislative acts of different jurisdictions and brings additional clarity while interpreting the intention of a legislator.

Another used method is a historical one that allows us to understand and correctly interpret the dynamic of legislative changes while analysing the need for the adoption of the BEPS Action Plan and MLI.

Another critical method worth mentioning is a logical method that can be seen as an interconnector between all the methods mentioned above and allows us to make a complete vision of a complex subject to the current analysis and elaborate on some reasonable solutions.[16]

The structure of the master thesis. It consists of four main parts.

In the first part of the master thesis, where there is a general description of the BEPS Action Plan and MLI, their drafting, aim, historical background as well as characteristics.

During the second part of the research, the Ukrainian experience in terms of the implementation of the BEPS Action Plan and the MLI, in particular, is described. Analysis of the influence of the MLI on the Ukrainian reality in terms of dealing with avoidance of taxation and the risk of double non-taxation.

The third part reveals what shortcomings the MLI entails in general and in relation to Ukraine.

The last part is devoted to the harsh circumstances of the war in Ukraine. The recent publications were examined in terms of changes in Ukraine's taxation system and challenges for the international community.

Moreover, recommendations and proposed solutions for the more effective regulation in Ukraine in relation to the BEPS Action Plan will be provided.

[16] Brian J. Arnold, *Overview of Major Issues in the Application of Tax Treaties,* (May, 2013), *https://www.un.org/esa/ffd/wp-content/uploads/2013/05/20130530_Paper1A_Arnold.pdf* (Accessed: 25 April 2021), p.12

LIST OF ABBREVIATIONS

MTT — Model Tax Treaty

DTT – Double Tax Treaty

MLI — Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

BEPS — Base Erosion and Profit Shifting

PPT - Principal Purpose Test

OECD - Organisation for Economic Cooperation and Development

1. MULTILATERAL INSTRUMENT: ORIGIN AND EVOLVING

In this chapter both the background and formation of the MLI will be described. The chapter is broken down into several subchapters. Firstly, the OECD's need and cooperation to develop an instrument to address BEPS are described. Further, the BEPS Action Plan is represented and the main features and new approaches are described. Then this chapter concludes with the MLI, where its main characteristics are elaborated.

1.1. OECD and BEPS

The Organisation for Economic Co-operation and Development (OECD) is an international organisation that seeks ways to improve the well-being of the whole world. In 2012 the OECD has announced[17] the BEPS Action Plan that seeks to eliminate instances of what is often referred to as "double non-taxation": circumstances in which income is connected with two (or potentially more) jurisdictions, neither of which impose a tax on it.[18] BEPS as a phenomenon existed for decades however the efforts to combat that were made relatively in recent times. The OECD is deemed to be an organisation for governing international tax matters and thus it covered the BEPS issues: the impact of BEPS, its occurrence, and the possible ways of addressing the BEPS. “After justifying its efforts to reduce BEPS, the report identified six "key pressure areas" that needed to be addressed in order to reduce the prevalence of BEPS:

(1) jurisdictional differences in the treatment of entities and instruments,

(2) the application of ideas from treaties to digital goods and services,

(3) tax treatment of financial transactions between related parties,

(4) transfer pricing,

(5) treaty provisions intended to thwart efforts to use other treaty provisions to avoid tax (anti-avoidance measures), and

(6) the presence of tax jurisdictions that tax income at a lower rate than other jurisdictions.”[19]

Thus the OECD’s further development in those areas was sought to elaborate the mechanism that addresses the BEPS. OECD believes that this BEPS Action Plan which is

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[17] OECD, “Action Plan on Base Erosion and Profit Shifting”, OECD PUBLISHING (2013), https://www.oecd.org/ctp/BEPSActionPlan.pdf

[18] Ibidem p. 10

[19] OECD, “*Addressing Base Erosion and Profit Shifting”*, (2013), OECD Publishing, Paris, https://doi.org/10.1787/9789264192744-en. P. 47-48

described below should be aimed predominantly at developing recommendations for domestic tax laws and developing the model treaty provisions.

1.2. BEPS Action Plan as a prerequisite for the MLI

The primary aim of the BEPS Action Plan is to combat the nonpayment of corporate tax (either little or overall). Such nonpayment resulted from the exploitation of gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations. It is all caused by DTTs that enabled tax planning strategies where treaty shopping became desirable and possible.

Going back to 2013, the G20 Leaders endorsed “the ambitious and comprehensive BEPS Action Plan”, developed with OECD members. For two years both OECD and G20 countries were developing a complete package of measures. The latter is thought to be implemented in the country's legal system by enforcing them in tax treaty provisions so that the domestic taxation system is to be amended. The implementation process should be coordinated as well as monitored from the OECD side. On the other side, countries should ensure transparency of that process.

The BEPS Action Plan consists of reports on 15 actions. Among them, there are measures on minimum standards, as well as measures on revising existing standards. It also includes common approaches which are thought to facilitate the convergence of national practices. The guidance outlining best practices should ensure better implementation.

According to an OECD publication, implementation through joint action means that an inclusive implementation process is required. Several factors should be considered for effective and consistent implementation. To begin with, the BEPS Action Plan implementation should not lead to conflicts between domestic systems. Another aspect to consider is that the increased disputes due to the implementation of standards are not desirable. On top of that, countries and jurisdictions should be ensured to have equal treatment in the fight against tax avoidance.[20]

As it was mentioned, the implementation process should be monitored. The OECD members and G20 countries have developed an Inclusive Framework which consists of 141 countries[21] and that allows interested countries and jurisdictions to work with OECD and G20 members on developing standards on BEPS related issues, and to review and monitor the implementation of the whole BEPS package.

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[20]OECD, “Background brief. Inclusive framework for BEPS Implementation”, (2017), https://www.oecd.org/tax/beps/background-brief-inclusive-framework-for-beps-implementation.pdf

[21]OECD, “Members of the OECD/G20 Inclusive Framework on BEPS”, as for November 2021, https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf

Thus the OECD and G20 Inclusive Framework on BEPS is working "on consensus based, long-term solutions to the tax challenges arising from the digitalisation of the economy"[22]. There was a meeting of the Inclusive Framework in January 2020 where the decision was made to move ahead with a two-pillar approach, including:

- under the first pillar, solutions for determining the allocation of taxing rights ("nexus and profit allocation"),
- under the second pillar, the design of a system to ensure that multinational enterprises pay a minimum level of tax on profits. This is intended to address the remaining issues identified by the OECD/G20 BEPS Project.[23]

As was mentioned above, the BEPS Action Plan contains 15 Actions. There is an obligation to implement (minimum standards) with regard to combating harmful tax practices and the spontaneous exchange of information on advance tax rulings (Action 5), the inclusion of abuse clauses in double taxation agreements (Action 6), country-by-country reporting (Action 13) and the dispute resolution mechanisms (Action 14).[24]

The most recent Inclusive Framework report (July 2020 - September 2021) presents its groundwork for the BEPS Action Plan implementation. Thus taking into account aggravating circumstances of the pandemic, the implementation of the four BEPS Action Plan minimum standards has continued apace, despite the complications posed by the COVID-19 crisis. "The the year 2021 marks a full five years since the implementation of the four BEPS minimum standards began, and it is clear that the BEPS project has resulted in tangible progress, irrefutably moving the needle in the direction of a world less susceptible to tax avoidance. Thanks to the efforts made by all OECD and G20 Inclusive Framework countries and jurisdictions to comply with the requirements imposed by the BEPS Action Plan minimum standards, there is more coherence and transparency, and taxation is better aligned with substance. The minimum standards were designed to be re-evaluated five years down the road. That point has been reached and a rigorous, methodical approach is being taken by the members of the Inclusive Framework for each minimum standard to see whether adjustments to the standards need to be made. The fight against BEPS is never static. The 2020 reviews of the

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[22] OECD, "Background brief. Inclusive framework for BEPS Implementation", (2017), https://www.oecd.org/tax/beps/background-brief-inclusive-framework-for-beps-implementation.pdf

[23] OECD, "G20 Inclusive Framework on BEPS: Progress Report July 2019-July 2020", (2020), https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2019-july-2020.pdf

[24] "BEPS Minimum standards", https://www.sif.admin.ch/sif/en/home/multilateral-relations/company-taxation-beps/beps-minimum-standards.html

BEPS minimum standards recognise this, and the minimum standards will be adapted appropriately by members of the OECD and G20 Inclusive Framework".[25]

Report provides for the achievements so far with regards to tackling tax base erosion and profit shifting. Hence, minimum standards are being described in their implementation progress.

1) Action 5 on Harmful Tax Practices - the Forum on Harmful Tax Practices examines hundreds of preferential regimes to assure that there are no harmful elements associated with the activities they are intended to attract. All that was spotted as harmful are amended or abolished. According to the Report, 51 jurisdictions did not receive any recommendations for improvement, as they have met all the terms of reference. A further 29 jurisdictions received only one recommendation. As of January 2022, 9 new preferential regimes were examined.[26] Among them, for instance, the Lithuanian preferential regime on large scale investment projects was concluded as non-harmful. Two regimes from Mauritius were abolished.

2) Action 6 on Tax Treaty Abuse - is believed to be implemented by means of the MLI and aims at preventing treaty shopping. "In April 2021, the third peer review report on the implementation of the Action 6 minimum standard on treaty shopping was released and it reveals that a large majority of members of the OECD/G20 Inclusive Framework are translating their commitment to treaty shopping into tangible action and modifying their tax treaty network to comply with the Action 6 minimum standard"[27]. Thus, the level of implementation is increasing as compared to previous periods.

3) Action 13 on Country-by-country Reporting - made to improve the transparency by exchange of information. In this report, it is mentioned that around 1 750 recommendations have been made, which jurisdictions are working to address in advance of the next Action 13 peer review report. To ensure effective assessment of risks since 2017, the OECD has supported this through the release of the Country-by-country Reporting: Handbook on Effective Tax Risk Assessment, through workshops to gather and discuss tax administrations' practices and experience in the use of Country-by-country reports and, in February 2021, by the release of a Country-by-country reporting Tax Risk Evaluation and Assessment Tool (TREAT). The latter assists tax administrations with information: "information on potential errors in a multinational enterprises group's Country-by-country report; and on jurisdictions where a multinational enterprises group

[25] OECD, "OECD/G20 Inclusive Framework on BEPS Progress report July 2020 – September 2021", (2021), https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2020-september-2021.pdf

[26] OECD "Harmful Tax Practices 2018 Progress Report on Preferential Regimes" (January 2022) n.d. OECD, https://www.oecd.org/tax/beps/harmful-tax-practices-peer-review-results-on-preferential-regimes.pdf

[27] OECD, "OECD/G20 Inclusive Framework on BEPS Progress report July 2020 – September 2021", (2021), https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2020-september-2021.pdf

may pose a potential BEPS risk, or where no risk is found and the multinational enterprise group may be de-selected from further review".[28]

4) Action 14 on Mutual Agreement Procedure - expects the timely, efficient and effective manner of tax disputes resolution; cases are being resolved and the access to the Mutual Agreement Procedure becomes streamlined. Still, timeliness of resolving cases was still noted to be a concern, there is support to deal with that and thus to improve timely and efficient resolution and Mutual Agreement Procedure implementation.

Moreover, successful implementation relates not only to the minimum standard. Progress on other BEPS Action Plan actions has been observed as well.

Action 1 which is aimed at addressing the tax challenges in the digital economy applies to direct (corporate tax) and indirect (value-added tax) taxes. As the Inclusive Framework report emphasizes that digital challenges are the main priority issue and still are not being resolved. To address the issues that arise and specifically with value-added tax, the OECD developed and published in April 2021, a new report on "The impact of the growth of the sharing and gig economy on VAT/GST policy and administration". This research outlines the key components of a comprehensive value-added tax strategy for tax authorities in response to the expansion of the sharing and gig economy. It emphasizes the critical role that digital platforms may play in collecting value-added taxes on gig economy activities, as well as in giving information to tax authorities to assist an appropriate legislative response.

The group of Actions that are devoted to transfer pricing issues are Actions 8, 9, and 10. They clarify and strengthen current norms in the respect of aligning the multinational enterprises' value creation with transfer pricing outcomes, including guidelines on the use of the arm's length principle and a strategy for proper pricing of hard-to-value intangibles within the arm's length principle. As for the recent progress in that regard, it is adequate to invoke the Inclusive Framework on BEPS Progress report July 2020 – September 2021. As it states "to date, the hard-to-value intangibles approach can be applied by tax administrations in almost half of the jurisdictions for which information is available. While some of these jurisdictions have adopted specific domestic legislation governing the transfer pricing aspects of transactions involving hard-to-value intangibles, most of them can apply directly the hard-to-value intangibles approach as described in the OECD Transfer Pricing Guidelines. However, a significant number of jurisdictions have not yet adopted the hard-to-value intangibles approach that would apply the general transfer pricing rules to determine the pricing of controlled transactions involving hard-

[28] OECD, "OECD/G20 Inclusive Framework on BEPS Progress report July 2020 – September 2021", (2021), https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2020-september-2021.pdf, p. 11

to-value intangibles”. [29] The reasons for the non-adoption are thus interesting to discover and are going to be addressed in further OECD reports.

Action 11 is dedicated to establishing the process of collecting accurate data on the economic and fiscal consequences of tax avoidance approaches as well as on the BEPS Action Plan's impact due to the imposed measures. To evaluate that fairly, the quality data on the corporate income should be gathered. The work on the Action 11 implies the databases and assessment tools to be developed and implemented in the monitoring process. In January 2019, the Corporate Tax Statistics was initiated to deliver the report on an annual basis, which is believed to be “a significant step towards Action 11 implementation”.[30] This database was being improved in the following years so that different editions were released. Thus to date, the database includes and implies anonymise statistics based on Country-by-country reports on the corporate tax income as well as points out the new indicators on tax incentives related to innovation.

1.2.1 DTT’s implications of COVID

None of the topics can be described without mentioning the impact of the COVID-19 crisis. It had its influence in both economic and fiscal fields. To address the detrimental effect, governments utilised the targeted fiscal policies. According to the OECD study[31], among the measures imposed by states are those that mitigate the detrimental impact by establishing tax filing extensions, tax waivers, and tax rate reductions, those that aim at investment increment by providing tax incentives for investment, reduced corporate taxes and tax incentives for employment, and those that aimed at financing the government; response by increasing tax rates in different spheres, namely in health, environment, business spheres.

The issues raised in the relation to DTTs were addressed in the OECD Guidance[32]. The COVID-19 created circumstances when the travel restrictions were imposed and employees could either be located in another jurisdiction or switched to remote work. The Guidance

[29] OECD, “OECD/G20 Inclusive Framework on BEPS Progress report July 2020 – September 2021”, (2021), https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2020-september-2021.pdf

[30] Ibidem, p.18

[31] OECD, “Tax Policy Reform Questionnaire”. OECD (2021), Tax Policy Reforms 2021: Special Edition on Tax Policy during the COVID-19 Pandemic, https://doi.org/10.1787/427d2616-en

[32] OECD, “Updated guidance on tax treaties and the impact of the COVID-19 crisis”, (2021), https://www.oecd.org/tax/treaties/guidance-tax-treaties-and-the-impact-of-the-covid-19-crisis.htm

provides the interpretation of DTTs articles on the creation of permanent establishments, tax residence of companies and individuals, and taxation of income from employment.

The Guidance considers PE peculiarities in new circumstances. The implication in the COVID-19 existence is that employees thus could create a new PE that entails new tax and filing obligations for the businesses. It is pointed out that due to the fact that employees are staying at home due to health measures imposed it does not create a PE, but it could be otherwise if the employee was required to work from home under the employer's direction. As well for the agency PE - if the work from home was necessitated by public health measures, the activity is not considered habitual. The OECD MTT provides the timeframe for a construction site to be regarded as a PE. Any temporarily work suspension period should be included in the total timeframe. However, the Guidance in this regard reminds us that the assessment of the temporality should be considered by each country, and thus the regulation is different.

On the corporate residence, the Guidance provides "all relevant facts and circumstances should be examined to determine the "usual" and "ordinary" place of effective management, and not only those that pertain to an exceptional period such as the COVID-19 pandemic. An entity's place of residence under the tie-breaker provision included in a tax treaty is unlikely to be impacted by the fact that the individuals participating in the management and decision-making of an entity cannot travel as a public health measure imposed or recommended by at least one of the governments of the jurisdictions involved".[33] Also, the Guidance emphasizes that the individual tax residence should not be affected by their change of location due to the COVID-19 implications. "The determination of habitual abode must cover a sufficient length of time for it to be possible to ascertain the frequency, duration and regularity of stays that are part of the settled routine of the individual's life". [34]

Under Article 15 of the OECD MTT it is stated that "salaries, wages and other similar remuneration" are taxable only in the person's jurisdiction of residence unless the "employment is exercised" in the other jurisdiction. As well the threshold for minimum days of presence in other jurisdictions constitutes 183 days. For that to be considered as such the employee should perform activities for which the income is paid. That means the other jurisdiction where the employee stays for more than 183 days will exercise its powers to levy taxes. The Guidance provides that when travel restrictions are imposed due to public health measures counting of days maybe not be necessary. Still, it is emphasised that some jurisdictions may count

[33] OECD, "Updated guidance on tax treaties and the impact of the COVID-19 crisis", (2021), https://www.oecd.org/tax/treaties/guidance-tax-treaties-and-the-impact-of-the-covid-19-crisis.htm, para 35-36

[34] Ibidem, para 44

themselves and have a different view. Thus, for the purposes of proper understanding, businesses should check with tax authorities. In cases where cross-border workers receive income (such as a wage subsidy) from the government of the country in which they normally work, the payment would be attributable to the work country under the Employment Income article of the OECD Model Tax Convention. Some jurisdictions have unique treaty provisions with neighbouring countries where employees often commute for employment, and these provisions may utilise taxation rights differently from the OECD MTT. According to the Guidance, certain jurisdictions have agreed that time spent by an employee working from their home country would be deemed *force majeure* or extraordinary situation and will not be included in workday calculations for the purposes of the treaty.

As for the Ukrainian regulation on the matter of COVID-19 substances, until the relevant amendments to the tax legislation are made in 2022, there is an established COVID-19 moratorium on several activities mentioned below. It means that the following should not be performed:

(i) unscheduled inspections of taxpayers;

(ii) imposition of financial sanctions (fines and penalties) for violations of tax legislation will continue. The moratorium still does not apply to tax audits and violations related to value-added tax liability, credit and budget reimbursement and other indirect taxes (including excise and rent).

1.2.2 The historical perspective

As the need for implementing the BEPS Action Plan has been elaborated on above, it is worth emphasising that BEPS Action Plan is a ‘soft law’ instrument. From that follows the BEPS Action Plan does not bring out the binding provisions. The recommendations that are envisaged should be taken into consideration and implemented in the domestic law and consequently in tax treaties.

As European Parliament in the Briefing on Understanding BEPS states that “the measures to implement the actions are a mix of:

- minimum standards, some of which are made up of twin rules, i.e. a general or primary rule and a defensive rule (to address issues arising from a situation where another tax jurisdiction decides not to apply the rule);
- best practices for cases when minimum standards are not set out, which provides a means for the tax jurisdiction to develop instruments tackling a tax situation;

- common approaches, which describe general tax -policy direction s with a view to converging over time through the implementation of the agreed common approaches. A further step enabled by common approaches would be the consideration of whether such measures should become minimum standards in the future; and
- the development of a multilateral instrument to modify bilateral tax treaties (a multilateral convention).

Not all the actions are equally implemented. Some are ready to be used as they are set out in the reports, whereas others do require multilateral instruments. In some cases, the actions envisage primary and defensive rules".[35]

Nonetheless, the BEPS Action Plan implementation has already exceeded expectations in terms of the extent to which several of the optional suggestions are being accepted and expedited by major economies throughout the world. The impact of these legislative changes on financial and operational structures, as well as effective tax rates, is expected to be significant. Simultaneously, several of the BEPS Actions that were supposed to be uniformly and consistently executed have stopped due to a lack of political will or international agreement on how they should be implemented.

Some aspects of the BEPS Action Plan are still undergoing international discussions to determine how they should be implemented. Part of the reason for the delay is the technical difficulty of certain of the metrics, such as intangible resources that are difficult to evaluate. In critical areas of transfer pricing for Permanent Establishments, such as how revenues should be credited to foreign branches, there is still a lack of clear advice.

To evaluate the level of perception of the MLI the statistics of its adoption should be shown. According to the OECD Report, 2022, "the number of agreements that became compliant with the MLI increased from 60 to over 350 between 2019 and 2020. In 2021, this number has surpassed 650. Over the past year, 21 jurisdictions have ratified the MLI: Albania, Andorra, Barbados, Bosnia-Herzegovina, Burkina Faso, Chile, Costa Rica, Croatia, Egypt, Estonia, Germany, Greece, Hungary, Jordan, Kazakhstan, Malaysia, Oman, Pakistan, Panama, Seychelles and Spain".[36]

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[35] Cécile Remeur, "Understanding BEPS", (2019), European Parliament https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642258/EPRS_BRI(2019)642258_EN.pdf

[36] OECD , "Ukraine", in *Prevention of Tax Treaty Abuse – Fourth Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6*, (2022) OECD Publishing, Paris, p. 18

1.3. Multilateral Instrument, its characteristics

It may be recalled, that implementation of the BEPS Action Plan demands changes to be made to MTTs. Accordingly, DTTs, as a result of bilateral negotiations, should be renegotiated. That "would make bilateral updates to the treaty network burdensome and time-consuming, limiting the effectiveness of multilateral efforts". There is a solution to that concern as Action 15 "Developing a Multilateral Instrument to Modify Bilateral Tax Treaties". The latter provided for an analysis of the possible development of a multilateral instrument to implement tax treaty-related BEPS measures "to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties". [37]

The Action 15 figured that a multilateral instrument, providing an innovative approach should make it possible for countries to swiftly modify their DTTs to implement measures developed in the course of the work on BEPS. The Action 15 Report was developed with the assistance of a group of experts in public international law and international tax law. [38]

The so-called Ad Hoc Group completed its MLI discussion on November 24, 2016, and endorsed the final text of the international agreement, along with an explanatory statement. More than 100 states, other authorities, and international organizations made comprised the Ad Hoc Group. The substantive content of the MLI is not new in and of itself, as it was already agreed upon as part of BEPS Action 2 on neutralizing the effects of hybrid mismatch arrangements, Action 6 on preventing the granting of treaty benefits in inappropriate circumstances, Action 7 on preventing the artificial avoidance of permanent establishment status, and Action 14 on improving dispute resolution mechanisms. The new aspect of these measures is the manner in which they are executed.[39]

Countries, that have signed the MLI automatically make changes to their tax agreements, the so-called "minimum standard", which is based on Step 6 "Prevention of abuse of tax provisions" and Step 14 "Improving the dispute resolution procedure" of the BEPS plan. Thus, Step 6 includes a preamble where the purpose of prevention of abuse is enshrined, as for Step 14 - the mutual agreement procedure and corresponding adjustments are established.

The MLI is a multilateral treaty for it was concluded by three or more parties. The MLI can be described as a multilateral implementation agreement. That is so because the MLI is a

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[37] OECD, " EXPLANATORY STATEMENT TO THE MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING", (24 November, 2016), https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf

[38] Ibidem

[39] Alexander Bosman, *General Aspects of the Multilateral Instrument*, Intertax 45, no. 10 (October 2017): 642-659

later agreement to the DTTs and is concluded by some or all of the parties to the original treaty which is DTT. There is specific purpose is to adjust DTTs rules to those in the MLI and thus improve the effectiveness of the DTT. It should be noted that there is no direct connection between DTTs and MLI since the MLI was not anticipated by bilateral tax treaties. The MLI merely exists alongside and in addition to existing DTTs, changing the application of those. The modifications of DTTs are conducted in accordance with the recommendations of BEPS Actions 2, 6, 7 and 14. Countries, that have signed the MLI automatically make changes to their DTTs, the minimum standard, which is based on Action 6 "Prevention of abuse of tax provisions" and Action 14 "Improving the dispute resolution procedure" of the BEPS Action Plan. The MLI complements existing treaties by adding new clauses and changing or altering the functioning of existing clauses. This implies that the MLI is not a protocol for amending an existing treaty, as it does not change the actual wording of the treaty.

1.3.1 Substance of the MLI

According to Article 1 of the MLI[40], the MLI modifies all tax treaties which have been designated as a 'Covered Tax Agreement' (CTA). The latter will include agreements for the avoidance of double taxation with respect to taxes on income that are in force between two or more parties to the Convention or jurisdictions for whose international relations a party is responsible. This would include agreements that cover capital taxes, or taxes on capital gains, in addition to income taxes. The Convention is not, however, intended to apply to agreements applying solely to shipping and air transport or social security.[41] Any agreement for the avoidance of double taxation with respect to taxes on income can qualify as a CTA provided it meets a twofold test:

1) the agreement must be made between two (or more) states or other jurisdictions which are parties to the MLI meaning which have ratified the MLI;
2) each of those parties must notify the treaty concerned to the OECD as a treaty that it wishes to bring within the scope of the MLI.

Thus, where one of the contracting states is not a party to the MLI or if the treaty has not been notified by both contracting states, the treaty does not fall within the MLI. The MLI in

[40] OECD, “Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting”,https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf

[41]“Explanatory statement to the MLI Convention” https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf para25

principle complements all CTAs which have been notified as such. MLI is known as a flexible instrument for states to be free to keep certain treaties outside the scope of the MLI. In this case, for example, states would like to renegotiate a specific treaty in order to implement BEPS Actions.[42] This flexibility feature is reasonable for countries that have different tax policy goals. So that, each country may show their level of commitment with regards to restrains.

Once the bilateral relationship is determined as such to be affected by MLI, the scope of MLI is in line with CTA. It should be noted that MLI does not affect:

- the personal scope of CTA (Article 1 of OECD MTT)
- the treaties to which CTA applies (Article 2 of OECD MTT)
- the geographical scope of CTA (Art 29 of OECD MTT)
- temporal scope of existing CTA (Article 30 and Article 31of OECD MTT)

If one of the contracting states terminates a CTA, the MLI also loses its effect in the bilateral relationship between these states.[43] The parties have to notify the OECD of their treaties designated as CTAs and inform the OECD of their choices and reservations on the basis of para 7 of Article 28 of the MLI and para 4 of Article 29 of the MLI.

The Convention's goal is to quickly put the tax treaty-related BEPS measures into effect. In line with that goal, the Ad hoc Group thought the Convention should make it possible for all Parties to meet the treaty-related minimum standards that were agreed upon as part of the Final BEPS package, such as the minimum standard for preventing treaty abuse under Action 6 and the minimum standard for improving dispute resolution under Action 14. Given that each of those minimum standards can be fulfiled in a variety of ways, and given the diverse range of countries and jurisdictions involved in the Convention's development, the Convention needed to be flexible enough to accommodate the positions of various countries and jurisdictions while remaining true to its purpose. The Convention also required to provide for flexibility when it came to provisions that did not represent minimal requirements, especially when it came to how such provisions interacted with provisions in Covered Tax Agreements. [44]

The minimum standard requires jurisdictions to do two things in their tax treaties: to include an express statement on non-taxation (generally in the preamble) and to adopt one of three methods of addressing treaty shopping. The MLI has proven to be an effective way of implementing the minimum standard. However, a jurisdiction that prefers to implement the

[42] Alexander Bosman, *General Aspects of the Multilateral Instrument*, Intertax 45, no. 10 (October 2017): 642-659, p. 644

[43] Ibidem p. 645

[44] "Explanatory statement to the MLI Convention" https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf para25, p. 3

minimum standard through a detailed limitation on benefits provision cannot use the MLI to do so.[45]

Throughout the 2020 peer review, gaps in the coverage of the MLI were identified. These gaps exist because the MLI is a flexible instrument that allows each signatory to decide which of its agreements it wishes to cover under the MLI. Thus, at the time of signature, signatories are required to deposit lists of agreements they want to modify. The MLI only modifies bilateral agreements listed by both treaty partners.

"The MLI has proven to be an effective way of implementing the minimum standard. However, a jurisdiction that prefers to implement the minimum standard through the detailed limitation on benefits provision cannot use the MLI to do so. Ninety-four jurisdictions have joined the MLI, 54 have ratified it, and the MLI would, once fully in effect, implement the minimum standard in about 1, 700 bilateral agreements (this modifying the majority of agreements concluded between members of the Inclusive Framework)".[46] In addition to saving jurisdictions from the burden of bilaterally renegotiating these treaties, the "MLI" results in more certainty and predictability for businesses, and a better functioning international tax system for the benefit of our citizens.

1.3.2 Application of the MLI

In a way of recalling, the Ad hoc Group was employed to negotiate and adopt the Convention. Therefore parties to the MLI cover questions on application and interpretation by themselves. According to the Opinion of the Conference of the Parties of the MLI as of May 3, 2021[47], "the MLI explicitly provides for a mechanism by which the Parties can determine questions of the interpretation and implementation of

i) the provisions of a CTA as modified by the Convention; and

ii) the provisions of the Convention itself".

Considering the first type, para 1 Article 32 of the MLI establishes that "questions of interpretation or implementation of the provisions of a Covered Tax Agreement as modified by the MLI should be settled in accordance with the provisions of the Agreement that govern the resolution of such questions". From that follows that countries should utilise the mutual agreement procedure under their CTA. That would endeavour to resolve the questions of

[45] OECD, "*Implementation issues, the minimum standard and the MLI*", in *Prevention of Tax Treaty Abuse – Third Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6*, OECD Publishing, (2021), Paris, https://doi.org/10.1787/f411e0a8-en. https://read.oecd-ilibrary.org/taxation/prevention-of-tax-treaty-abuse-third-peer-review-report-on-treaty-shopping_f411e0a8-en#page3

[46] Ibidem

[47] OECD, "CoP Opinion - Interpretation and Implementation Questions", (2021), https://www.oecd.org/tax/treaties/beps-mli-cop-opinion-interpretation-and-implementation-questions.pdf

implementation and interpretation of CTA provisions being modified by the Convention. The other type is governed under para 2 Article 32 of the MLI, where it is stipulated that "questions on the interpretation or implementation of the MLI itself may be addressed by a Conference of the Parties convened in accordance with the procedure set out in Article 31(3) of the MLI". The questions about the way of modifying the CTA by MLI are also governed by the latter procedure.

Before that, the mere application of MLI should be elaborated in steps as follows. To begin with, the Convention should be in force, it is done through that five jurisdictions have to deposit the instrument of ratification, acceptance or approval. Having that done, in order to invoke to MLI application it should be in force for both Contacting Jurisdictions to the tax agreement. After the verification of whether the MLI is in force as well as whether the tax agreement is considered as a CTA, the identification of which specific MLI provisions apply to a CTA must follow.

Each Contracting Jurisdiction is allowed to make a reservation unilaterally: according to Article 28 of the MLI reservations are prohibited except those expressly permitted in the specific articles of the MLI, while the effect of reservation applied symmetrically: "the reservation modify for the reserving Party in its relations with another Party the provisions to which the reservation relates to the extent of the reservation and modify those provisions to the same extent for the other Party in its relation with the reserving Party".[48] Accordingly, a reservation made by a Contracting Jurisdiction with respect to a provision generally blocks the application of the provision, whether or not the other Contracting Jurisdiction has also made the reservation.

The other feature of the Convention to be addressed with respect to an application is the optional provisions. The question to be raised is whether both Contracting Jurisdictions to the CTA choose to apply an optional provision of the MLI. Contrary to the reservations, both Contracting Jurisdictions are required to choose to apply the same optional provision in order to apply the provision. There are exceptions to the latter rule. Article 5 specifies different methods for the elimination of double taxation that is envisaged in several options for choice. It is stated that "Where each Contracting Jurisdiction to a Covered Tax Agreement chooses a different Option (or where one Contracting Jurisdiction chooses to apply an Option and the other chooses to apply none of the Options), the Option chosen by each

[48] OECD, "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting",https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf , p. 38

Contracting Jurisdiction shall apply with respect to its own residents". [49]

To ensure clarity and transparency with regards to the MLI application, the MLI requires Parties to notify which existing provisions are to be modified by the MLI. Further, each Article contains provisions describing details on how the applicable MLI provision modifies a CTA. The MLI employs so-called 'compatibility clauses': specific rules which explicitly regulate the relation between the MLI and existing CTAs. Under the general rules of treaty interpretation, a subsequent treaty takes precedence over an earlier treaty concerning the same subject matter. This rule, also referred to as *lex posterior derogat legi priori*, can be considered customary international law and has been codified in Article 30(3) of the Vienna Convention on Law of Treaties[50]. Accordingly, the provisions of an earlier treaty between parties that are also parties to a later treaty apply only to the extent that its provisions are compatible with those of the later treaty.[51]

"The effect of notifications depends on the type of compatibility clause which could provide that the MLI provision applies "in place of", "applies to" or "modifies", "in the absence of", or "in place of or in the absence of".[52] To ensure clarity and transparency about the application of the Convention, where a provision supersedes or modifies specific types of existing provisions of a CTA, Parties are generally required to make a notification specifying which CTA contain provisions of that type. It is expected that Parties would use their best efforts to identify all provisions that are within the objective scope of the compatibility clause. It is therefore not intended that Parties would choose to omit some relevant provisions while listing others. The effect of these notifications varies depending on the type of compatibility clause that applies to that provision"[53]. The further uncovering is inspired by Alexandr Bosman's paper. The types of compatibility clauses are, as foolows:

1) '*In place of*': the MLI provision replaces an existing CTA provision, provided the CTA contains such a provision. No modifications are made if a CTA does not contain the

[49] OECD, "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting",https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf , p. 38
[50] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: https://www.refworld.org/docid/3ae6b3a10.html
[51] Alexander Bosman, *General Aspects of the Multilateral Instrument*, Intertax 45, no. 10 (October 2017): 642-659
[52]OECD, "Applying the MULTILATERAL INSTRUMENT Step-by-Step", https://www.oecd.org/tax/treaties/step-by-step-tool-on-the-application-of-the-MLI.pdf
[53] Alexander Bosman, *General Aspects of the Multilateral Instrument*, Intertax 45, no. 10 (October 2017): 642-659, p. 649

described provision. For example Article 12(3) of the MLI, which refers to the definition of dependent agent PE in CTAs.

2) *'Applies to'* or *'modifies'*: the MLI provision changes the application of an existing CTA provision without replacing it, and therefore only applies if there is an existing provision. For example Article 5(3) of the MLI, which modifies the scope of the method article concerning the elimination of double taxation.
3) '*In the absence of*': the MLI provision supplements CTAs lacking a described provision. For example Article 16(4)(b), under (i) and (ii), of the MLI, which applies in the absence of a provision similar to Article 25(2), first sentence, of the OECD Model.
4) *'In place of or in the absence of'*: the MLI provision applies in all cases. For example, Article 3(4) of the MLI, which refers to existing CTA provisions concerning income derived by or through hybrid entities or instruments. Accordingly, the MLI provision replaces any existing CTA provision, and where none exists, the MLI provision is effectively added to the CTA. This type of compatibility clause is by far the most used in the MLI.[54]

What comes to the MLI interpretation, according to para 315 of Explanatory Statement, if there are any questions about the interpretation and implementation of CTA it shall be determined in accordance with the relevant provision of that CTA itself. Therefore, the usual mechanisms envisioned by the CTA should be used to determine the interpretation and implementation of the provisions of the CTA which have been modified by the MLI. This would include questions as to how the latter has modified a specific CTA pursuant to the compatibility clauses and other provisions set out in MLI. Countries can thus agree on the application of the MLI to their CTAs, as long as the agreement reached is consistent with the provisions of the Convention. [55]

The Explanatory Statement seems to disregard the fact that persons interpreting and applying a tax treaty, such as taxpayers, tax authorities and judges, may have different views on the role of Article 3(2) of the OECD Model in the interpretation of tax treaties, the latter states that "[...] any term not defined therein shall, unless the context otherwise requires or the competent authorities agree to a different meaning pursuant to the provisions of Article 25, have the meaning that it has at that time under the law of that State for the purposes of the taxes for

[54] Alexander Bosman, *General Aspects of the Multilateral Instrument*, Intertax 45, no. 10 (October 2017): 642-659, p. 649

[55] "Explanatory statement to the MLI Convention" https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf para25, p 75

which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State”. [56]

Alexandr Bosman made an issue emphasizing that in various countries, such as Germany[57], judges seem to have a certain preference for autonomous treaty interpretation (possibly on the basis of the interpretation rules of the Vienna Convention on Law of Treaties, 1960). In this approach, Article 3(2) and the domestic law meaning of undefined terms are hardly significant. Where two states apply a different interpretation method, this may give rise to interpretation conflicts under Article 2 of the MLI, as it would under DTTs[58].

Because of such conflict and the absence of a solution to it from the MLI side, it, therefore, leads to that taxpayer facing double taxation should resort to the Mutual Agreement Procedure (MAP) under the applicable CTA. As comes from Article 25 of the OECD Model: “[...] person may, irrespective of remedies provided by the domestic law of Contracting States, present his case to the competent authority of either Contracting State”. This approach is confirmed by Article 32(1) of the MLI, according to which any question as to the interpretation or implementation of provisions of a CTA, as modified by the MLI, has to be resolved in accordance with the MAP under the relevant CTA. A potential source of disputes could be the interaction between the MLI and CTAs under the compatibility clauses.

Since the MLI does not create the highest international judicial body dealing with MLI matters, conflicts regarding the interpretation of the MLI will ultimately be resolved by the highest courts in each participating state. As Alexander Bosman asserts “it poses a significant threat of diverging and possibly conflicting interpretations of the MLI provisions, such as the anti-abuse provisions of Article 7 of the MLI”. As well Alexander Bosman is judgmental on the interpretation of the MLI Convention. Pursuant to Article 32(2) of the MLI, questions regarding the interpretation or implementation of the MLI may be addressed by a Conference of the Parties. As he states 'an interpretation conference' could be a very effective instrument in ensuring a uniform application of the MLI, but the actual usefulness of this option is doubtful. Only a party to the MLI can initiate such a conference so this alternative is not a means of recourse open to taxpayers or judges. Moreover, an interpretation conference seems to be a drastic remedy, which in any case requires broad support. Therefore, it will in practice probably be reserved for compelling interpretation issues relevant to many parties to the MLI.

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[56] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD Publishing, Paris, https://doi.org/10.1787/mtc_cond-2017-en.
[57] E. Reimer, *Interpretation of Tax Treaties*, Euro. Tax'n 458 et seq. (1999), Germany
[58] Alexander Bosman, *General Aspects of the Multilateral Instrument*, Intertax 45, no. 10 (October 2017): 642-659, p.646

The last step of the Convention adoption to be described is an entry of the MLI into effect. Article 35 of the MLI sets out when the provisions of the MLI shall have effect in each Contracting Jurisdiction with respect to specific taxes which fall within the scope of a CTA, and at the different moments with respect to taxes withheld at source and with respect to all other taxes levied by a Contracting Jurisdiction.[59] Thus,

- with respect to taxes withheld at source, the first taxes for which the provisions of the Convention will enter into effect are those for which the event giving rise to the tax occurs on or after the first day of the next calendar year that begins on or after the latest of the dates on which the Convention enters into force for each of the Contracting Jurisdictions to a CTA. For example, if the Convention enters into force for the first Contracting Jurisdiction on 1 March 2018 and for the second Contracting Jurisdiction on 1 March 2019, the Convention will take effect with respect to all taxes which relate to an event occurring from 1 January 2020 onwards;

- with respect to all other taxes levied by a Contracting Jurisdiction, the first taxes for which provisions of the Convention will enter into effect are those which are levied with respect to taxable periods beginning on or after the expiration of a period of six calendar months (or a shorter period, if all Contracting Jurisdictions notify the Depositary that they intend to apply such shorter period) from the latest of the dates on which the Convention enters into force for each of the Contracting Jurisdictions to a CTA. For example, where the Contracting Jurisdictions do not agree to apply a shorter period: where for instance 1 September 2018 is the latest date of entry into force of the Convention for each of the Contracting Jurisdictions to a CTA and then in 6 months on the 1 March 2019 the provisions of the Convention will have effect with respect to all non-withholding taxes levied in respect of taxable periods beginning on or after this date. In the case of a taxable year that follows the calendar year, the provisions of the Convention would have effect with respect to the taxable period beginning 1 January 2020. [60]

[59]OECD, "Applying the MULTILATERAL INSTRUMENT Step-by-Step", https://www.oecd.org/tax/treaties/step-by-step-tool-on-the-application-of-the-MLI.pdf
[60]OECD "Explanatory statement to the MLI Convention" https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf para25, p76-77

2. MULTILATERAL INSTRUMENT IN THE UKRAINIAN CONTEXT

In this chapter, the need for MLI adoption is elaborated. In the first part of it, attention is paid to the genuine need to adopt a binding document to enhance the BEPS Action Plan implementation. The second part is devoted to the Ukrainian background of MLI adoption. It is divided into three parts. Firstly, the anti-tax avoidance pathway is elaborated through the chronological steps that were taken by Ukraine. A description of the chosen MLI provisions is provided. Secondly, attention is paid to what reservations were made and to which provisions Ukraine has utilised the right to opt-out. Lastly, the economic situation of Ukraine is described in terms of tax avoidance. As well as the current and the most recent condition in terms of transfer pricing in the Ukrainian context is being described. Thus, due to the negative consequences, that tax avoidance brings to Ukraine, the need of adopting MLI and following the BEPS Action Plan recommendations are represented.

2.1 Actions taken besides the MLI adoption in Ukraine

As the MLI is an instrument for the implementation of the minimum standard of the BEPS Action Plan, prior to the adoption of the Convention the adoption of the BEPS Action Plan should be illustrated as well as other initiatives related to offshore fighting. Ukraine is not a member of the OECD, so it has not acceded to OECD MTT, but it is on the basis of this Convention that the vast majority of existing DTTs on the elimination of double taxation have been concluded. As well, should be noted that Ukraine acceded to the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters in 2004. The Convention entered into force in 2009. Ukraine, as a party to the Convention, will be able to obtain comprehensive information about companies and their owners even from those jurisdictions with which it does not have separate bilateral agreements. In addition, Ukrainian tax authorities will have the opportunity to conduct tax audits abroad. In 2013, Ukraine joined the Global Forum on Transparency and Information Exchange for Tax Purposes within the OECD and committed itself to adhering to international transparency standards.

In 2014, Ukraine, taking into account the recommendations of the FATF (Financial Action Task Force on Money Laundering), adopted a package of laws on mandatory disclosure of beneficial owners of legal entities in order to increase the transparency of information about the structure. Hence, Ukraine takes part in the international exchange of information of ultimate beneficial owners.

The procedure for adopting BEPS in Ukraine began on January 1, 2017. As Ukraine is not an OECD member there is a possibility that by joining the OECD Enhanced Cooperation

Program, Ukraine commits itself to implement the minimum standard of the BEPS Action Plan. Ukraine's enhanced cooperation program is a platform for exchanging developments, and it allows the Non-OECD States to join the Plan implementation process.[61] Minimum standards are the basis of the BEPS Action Plan, as the lack of such actions, have negative consequences in other jurisdictions because this interstate inconsistency creates opportunities for tax evasion.

The BEPS Action Plan implementation process is a cumbersome process that needs steps to be abided. The steps of the Ukrainian experience are as follows.

There was the Ministry of Finance of Ukraine and the National Bank of Ukraine presentation on the "Roadmap for the BEPS Plan implementation"[62] in Ukraine; the document contains recommendations and guidelines for each step of the implementation process. It is important to note that based on this Roadmap, the first draft law related to BEPS was developed.

The latter was registered under No. 1185 of August 29, 2019, and was called the Draft Law "On Amendments to the Tax Code of Ukraine on the Introduction of Withdrawn Capital Tax and Implementation of Standards for Counteracting Erosion of Tax Base and Withdrawal of Profits Abroad"[63]. Draft Law 1185 focuses on eight Actions, not four, as required by the Minimum Standard, namely: the third, fourth, sixth, seventh, eighth to tenth, and thirteenth. According to the Opinion of the Committee on Integration of Ukraine with the European Union as of March 11, 2020[64], the Draft Law provides for the replacement of the corporate income tax with the tax on withdrawn capital. It also stipulates that the number of dividends paid in the previous year will not be taxed on withheld capital within the amount of taxable income from which corporate income tax was previously paid. The draft law prevents the abuse of the provisions of tax conventions by applying fixed or zero tax rates for certain types of income of non-residents, as the tax on withdrawn capital is paid exclusively by taxpayers.

It was stated by the Committee, that there is a compliance analysis of the Draft Law with EU law. As it is in line with the provisions of the Association Agreement[65] regarding the application of the principles of transparency in the field of taxation (Article 350). At the same time, it is noted that the Draft Law provides for the regulation of mechanisms for calculating direct tax, which, in turn, is not covered by the Association Agreement. Given the above, the

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[61] Official visnyk on taxes, "*Ukraine's accession to the BEPS Plan*", (2017), Issue № 941 (45), http://www.visnuk.com.ua/uk/publication/100006198-priyednannya-ukrayini-do-planu-beps

[62]Ministry of Finance, "*Roadmap BEPS*", (2017), https://www.minfin.gov.ua/uploads/redactor/files/2017_Roadmap_BEPS_UKRAINE_ua.pdf

[63] Verhovna Rada Ukrayiny, *"Draft Law on Amendments to the Tax Code of Ukraine on Introduction of Withdrawn Capital Tax and Implementation of Standards for Counteracting Erosion of Tax Base and Withdrawal of Profits Abroad"*, (2019), http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66488

[64] Ibidem

[65] "Association Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part" - https://zakon.rada.gov.ua/laws/show/984_011#Text

Draft Law does not contradict Ukraine's international legal obligations with regard to European integration. Due to political will, the Draft Law is still a draft and was not adopted yet as it is not in priority for the legislative body.

In September 2017 there was the first joint program of Ukraine with OECD representatives to implement international standards for information exchange and BEPS activities. The program will help Ukraine implement new international tax standards, focusing on country reports and other BEPS minimum standards, as well as standards for the exchange of information on request and the automatic exchange of information on financial accounts - the Common Reporting Standard.

Another step displayed in Ukraine is the adoption of the Law of Ukraine "Implementation of amendments to the Tax Code of Ukraine to improve tax administration, eliminate technical and logical inconsistencies in tax legislation" No. 466 of May, 23, 2020.[66] Thus, the first major development is the rules that govern the Controlled foreign corporation (CFC), which came into force on January 1, 2021. According to that, Ukrainian controlling entities (both legal and natural) will be taxed in relation to the profits of their CFCs. Accordingly, the rules of the CFC will apply to individuals and legal entities that own shares in foreign legal entities in the following amounts:

(-) more than 50%;

(-) more than 10% (25% - for 2021 and 2022), provided that several individuals and/or legal entities jointly own 50% or more of such foreign legal entity,

(-) exercise actual control over the foreign company.

That proceeds with the next element of consideration. It is the amount of interest to be paid by such persons. For individuals who control the CFCs:

(i) not distribute CFC dividends and pay personal income tax at the rate of 18% + 1.5% military tax;

(ii) distribute CFC dividends and pay personal income tax at the rate of 9% + 1.5% military tax;

(iii) own a CFC through a Ukrainian legal entity and pay personal income tax on dividends distributed by a Ukrainian legal entity at the rate of 5% + 1.5% military tax.

According to that Law, for legal entities controlling the CFC, there is an 18% of income tax, fewer taxes paid in foreign jurisdictions, and dividends are excluded from the taxable

[66] Law of Ukraine "*On Amendments to the Tax Code of Ukraine to Improve Tax Administration, Eliminate Technical and Logical Inconsistencies in Tax Legislation*" No. 466 of 16.01.2020 Bulletin of the Verkhovna Rada of Ukraine (VVR), (2020), No. 32, Article 227, https://zakon.rada.gov.ua/laws/show/466-20#Text

income of the Ukrainian legal entity controlling the CIC. I believe that regulation aligns persons whose companies are registered in Ukraine and those whose companies are registered in other countries, thus realising the goal of the BEPS Action Plan, which is to eliminate the desire to register a company not in Ukraine, as there will be no benefits, before the implementation of the Plan. The other legislative modification is the establishment of a minimum income threshold of all CFCs of one person for taxation in Ukraine, in the amount of two million euros. I believe that threshold is sufficient to relieve the tax authorities of unnecessary administrative work and will enable tax authorities to focus on more essential entities.

However, an International Monetary Fund Report provides with the opinion that newly enacted CFC rules in Ukraine, though comprehensive and generally well designed, have a few shortcomings. "Thus, the CFC legislation will require some amendments. For example, the "active" passive income exemption should be narrowed and the exceptions applicable to a settlor or founder of a foreign trust should be repealed. Further, the lower tax rate on CFC distributions made on a timely basis should be repealed as it creates an incentive for residents to invest outside Ukraine. As an incentive for Ukraine residents to wind-up existing CFCs prior to the commencement of the CFC rules, Law 466 provides that gains on the disposal of an interest in a foreign entity are exempt from tax. This incentive should be incorporated into the Voluntary Disclosure Program so that the exemption applies only if the relevant Voluntary Disclosure Program fee has been paid". [67] And taking account the Voluntary Disclosure Program, it has already been implemented in Ukraine and allows tax evaders to reveal their real wealth and income while avoiding punishment by declaring assets. It is envisaged to conduct a one-time voluntary declaration of assets of individuals in the period from September 1, 2021, to September 1, 2022. So-called, the tax amnesty is not so much about money as about reaching a new level in the interaction of regulatory authorities and taxpayers. This is one of the steps toward building a new reality in the future, a reality with an inevitably higher level of state control over residents' incomes, cash turnover, and asset transactions. This is exactly the path taken by the civilized world. Under such conditions, a balanced and professional approach is important in the earliest stages.

Under Law 466 Ukraine made the commitment to implement the BEPS Action Plan from the perspective of the rules of transfer pricing as well. Accordingly, there are three main changes:

[67] International Monetary Fund. Fiscal Affairs Dept., "*Ukraine: Technical Assistance Report—A Follow-Up on Distributed Profit Tax, BEPS Implementation, Voluntary Disclosure Program, and Indirect Methods for Determining Taxable Income*", IMF Staff Country Reports, (2020), https://www.elibrary.imf.org/view/journals/002/2020/302/002.2020.issue-302-en.xml

(i) control over the distribution of functions, intangible assets and risks within the group of companies;

(ii) introduction of rules for transactions with commodities by removing restrictions on the use of only exchange quotations of specific exchanges and creating opportunities to apply quotation prices for this group of goods;

(iii) introduction of a three-level documentation structure for international groups of companies, including transfer pricing documentation (Local file), global documentation (Master file) and country-by-country-reporting.

The issue of distribution control is that there must be a business purpose, a specific operation, to establish that the goal is not to create a tax benefit. The same rule is established by MLI in PPT, where the real purpose of the transaction is tested, but in this case, it is aimed at situations that arise not from bilateral double taxation agreements, but from transactions within international groups of companies. Also, now the business transactions of single taxpayers of the fourth group with non-residents will be considered controlled and transfer pricing rules will be applied accordingly.

As for the new documentation structure, prior to Law 466, Ukrainian companies submitted reports explaining the compliance of prices with related non-residents only local files in accordance with the “arm's length principle". Two more were added to this report to meet the requirements of Step 13 of the BEPS Plan, namely country-by-country reporting in 2021 and a master file in 2022. As for the methods of submitting and filling in these two reports, in Law 466 they fully comply with the instructions and recommendations provided by the OECD in Action 13.

It is thus believed that these changes will have a strong impact on multinational enterprises, as the changes require the involvement of additional professional resources to comply with these rules. Due to the introduction of these novelties, tax authorities will receive deeper and broader information about the activities of such groups, and if properly performed by tax authorities, tax evasion will be more difficult by means of transfer pricing.

Another new implementation is the additional regulation of the concept of PE, in addition to that provided for in the MLI. Namely, Law 466 additionally stipulates that permanent resident intermediaries for tax purposes are now equated with a resident intermediary who acts only or almost exclusively in the interests, for the benefit and at the expense of several or one non-residents. This approach is designated to not allow foreign companies to avoid the obligation to pay taxes by operating in Ukraine, indirectly through intermediaries.

The last but not the least innovation I would like to describe is the taxation of income from non-resident operations on the sale of corporate rights to non-residents. According to Law

466, income from the sale of corporate rights in non-resident companies will be subject to taxation if their value of 50 per cent or more consists of real estate located in Ukraine, such non-resident buyer is obliged to register with the supervisory tax authority and pay a tax of 15% of investment income. That is for tax purposes for the buyer, is the profit that was received by the seller. And another important detail is that the seller must provide the buyer with documents proving his purchase costs. Law 466 also establishes a sanction for non-compliance with the above obligations, namely the seizure of property of the non-resident.

In conclusion, Ukraine was obliged to undertake the implementation of the BEPS Action Plan. This was due to the fact that in the case of non-acceptance, Ukraine would be significantly inferior to other participants in the international market in terms of business. In addition, the adoption of the BEPS Action Plan improves Ukraine's positioning for foreign investors, since with its adoption investors will consider Ukraine reliable, and not include it in the list of risky countries for investment purposes. Another important detail is the fact that, according to the OECD, the Action 5 of the BEPS Action Plan has already been implemented in Ukraine, as there is no harmful tax regime in Ukrainian legislation. I believe, this is already a profound statement of Ukraine's eagerness to combat tax evasion. The adoption of the MLI and Law 466, which result in the implementation of twelve Actions, namely: 2 Action, 3 Action, 4 Action, 5 Action, 6 Action, 7 Action, 8-10 Actions, 13 Action, 14 Action, and 15 Action. An examination of Ukraine's DTTs leads to the conclusion that such agreements are the primary means of combating double taxation, as they contain all of the key provisions that assist taxpayers in fulfilling their tax obligations without incurring an excessive tax burden. Thus, the MLI implementation is needed to ensure the smooth functioning of the BEPS Action Plan within bilateral relationships related to taxation.

Ukraine joins international projects including mutual administrative assistance in tax affairs, fighting corruption and terrorist financing, expediting investigations on financial matters, developing transparency for tax information exchange, and collective control over financial flows. Furthermore, domestic tax legislation is being improved, as are the number of taxes, and their rates. Ukraine is not considered an offshore zone and is not a member of the OECD but efforts are being made to participate in prominent international initiatives. As for the BEPS Action Plan, its smooth implementation is needed, thus Ukraine became a signatory to the MLI along with numerous other jurisdictions.

2.2 The MLI adoption in Ukraine

National Bank of Ukraine provided the reasoning for the MLI adoption in Ukraine from its financial point of view. In the light of the transition to the free movement of capital in

Ukraine, the introduction of more effective tax regulation is one of the preconditions for the final transition to the free movement of capital. According to the National Bank, it is possible to effectively implement all steps towards the free movement of capital only under the condition of cooperation between the tax authorities of Ukraine and other states. First Deputy Chairman of the National Bank of Ukraine Kateryna Rozhkova reasoned that due to the delay in joining the system of automatic exchange of financial information, Ukraine can be recognized as a country that does not cooperate on tax issues. This will make it more difficult for national companies to expand their presence in European markets. KYC (know your client) principles in recent years, Ukrainian banks seeking to establish cooperation with foreign partners must also work according to international standards.[68]

The illustration of the steps of adoption and ratification of the MLI by Ukraine are as follows:

- on July 23, 2018 - the signing of the MLI Convention in London[69];
- on February 28, 2019, the Verkhovna Rada (legislative body) approved the Law "On Ratification of the Multilateral Convention on the Implementation of Measures Concerning Tax Agreements to Counteract Erosion of the Tax Base and Withdrawal of Profits from Taxation"[70] No. 2692-VIII, submitted by the Ministry of Finance. It entered into force on April 2, 2019, and by that ratified MLI;
- on August 8, 2019, Ukraine submitted its official position on MLI to the OECD Depository for the deposition of the instrument of ratification;[71]
- on December 1, 2019 - entry into force of MLI in Ukraine.

Thus accordingly to the last step, it follows that Ukraine is going to make changes to its DTTs through the mechanism of the flexible modifying instrument.

For sake of recalling, the MLI Convention provides for

[68] National Bank of Ukraine, "*The National Bank supports an important step of Ukraine towards the world standards of combating the outflow of capital*", (2018), https://bank.gov.ua/ua/news/all/natsionalniy-bank-pidtrimuye-vajliviy-krok-ukrayini-nazustrich-svitovim-standartam-borotbi-z-vidtokom-kapitalu

[69] OECD, "*Ukraine signs landmark agreement to strengthen its tax treaties*", (2018), https://www.oecd.org/tax/beps/ukraine-signs-landmark-agreement-to-strengthen-its-tax-treaties.htm

[70] Law of Ukraine "*On Ratification of the Multilateral Convention on the Implementation of Measures Concerning Tax Agreements to Combat the Erosion of the Tax Base and Withdrawal of Profits from Taxation*" No. 2692-VIII of April 2, 2019 Vedomosti Verkhovnoi Rady (VVR), (2019) , No. 12, Article 64, https://zakon.rada.gov.ua/laws/show/2692-19#Text

[71] OECD, "*UKRAINE Status of List of Reservations and Notifications upon Deposit of the Instrument of Ratification", (*2019*)*, https://www.oecd.org/tax/treaties/beps-mli-position-ukraine-instrument-deposit.pdf

- a "minimum standard" that must be ratified by States (in particular, Articles 6, 7 and 16 of the MLI Convention, described below), and

- additional articles to be adopted at the discretion of each State.

In general, the are two main novelties for Ukrainian reference:

(i) the principal purpose test at the time of transfer of royalties or interest (but not dividends to non-residents), and

(ii) the introduction of standards for the duration of activities in Ukraine to recognize non-resident business as a permanent establishment.

Those novelties will be elaborated on further in this paper.

On the occasion of the signing ceremony, the signatories submit their provisional lists of reservations and notifications to the OECD. Thus, according to that list, it is possible to display what Ukraine has chosen as a set of rules to be applied under the MLI. That is as follows:

1. Purpose (Article 6 of the MLI).

The purpose is an essential part of any treaty for it sets out a genuine intention of parties as well as assists in the interpretation of matters. The MLI sets out the alternative options for preambles to be chosen for the relevant CTAs serving as a purpose of the bilateral relationship. Ukraine opted for para 3 Article 6 of MLI, which stipulates that both Contracting Jurisdictions "desiring to further develop their economic relationship and to enhance their cooperation in tax matters" intend to eliminate treaty abuse.

Paragraph 3 stipulates that the preamble in this wording is included only in those CTAs that do not already manifest the desire to develop an economic relationship or enhance cooperation in tax matters in their preamble. It should be noted that this paragraph does not constitute the minimum standard and is optional in its essence. Nevertheless, such a statement is not utilised in CTAs with 23 out of 76 Contracting Jurisdictions that desired their agreements to be covered by the MLI.

These changes to the DTT preamble are necessary for the correct interpretation of the provisions of DTTs because according to the Vienna Convention on the Law of Treaties of 1969, an international agreement must be interpreted in accordance with its purpose and objectives.

2. Introduction of the Principal Purpose Test (hereinafter - PPT) (Article 7 of the MLI).

The essential purpose of MLI is to implement the suggestions of Action 6 of the BEPS Plan that deals with treaty abuse prevention. According to Action 6, it is stated that DTTs should include either:

(-) a PPT only; or

(-) a PPT + simplified or detailed limitation on benefits test; or

(-) a detailed limitation on benefits test supplemented by a mechanism that would deal with conduit arrangements.

Paragraph 1 Article 7 of the MLI provides the compatibility clause, where it is stated that the PPT will operate notwithstanding any provision contained in the CTA. It means that PPT shall surpass other provisions that are contrary to the meaning of this one. As PPT alone is sufficient enough, Ukraine chooses to apply para 4 Art 7 of MLI that corresponds to the requirements of Action 6 under the BEPS Plan. The PPT means an explanation that the main purpose of an operation is not to obtain tax benefits. And under operation, it is meant a specific right to create such a non-resident company, which receives income from such a transaction. If the result of such an analysis, it will be apparent that the operation was carried out only to withdraw interest to an advantageous state. That is, for the tax, such an operation will not make economic substance, and as a result, in accordance with Law 2692 [72], the company will receive a notification-decision on the accrual of fifteen per cent of the repatriation tax. Thus, companies will be required to provide proof that the transaction was not intended solely to obtain tax relief. An exception to this rule is when it is established that the granting of such a benefit in these circumstances would be consistent with the purposes and objectives of the CTA covered by the MLI.

For the analysis of the meaning of the benefit under PPT, the tax liabilities that may be eliminated by utilising the provision of the DTTs or in case CTAs should be considered. For instance, the following is regarded as a tax benefit. The concessional withholding tax of 5% is applied under the CTA rather than the domestic tax rate of 20% for the interest taxation.

3. Income from the alienation of shares or participation of a person, the value of which is derived mainly from immovable property (Article 9 of the MLI).

Article 9 of the MLI is aiming to modify paragraph 4 of Article 13 of the OECD and UN MTTs. Ukraine chooses to apply paragraph 4 Article 9 of MLI and thus agrees to deter non-taxation of sale of corporate rights of a legal entity that owns real estate in a country where such real estate is located. Thus, according to MLI income from the sale of shares and comparable interest, the value of which is more than 50% directly / indirectly derived from real estate (any day for 365 days before the sale), is taxed in the jurisdiction where such real estate is located.

[72] Law of Ukraine "*On Ratification of the Multilateral Convention on the Implementation of Measures Concerning Tax Agreements to Combat the Erosion of the Tax Base and Withdrawal of Profits from Taxation*" No. 2692-VIII of April 2, 2019 Vedomosti Verkhovnoi Rady (VVR), (2019) , No. 12, Article 64, https://zakon.rada.gov.ua/laws/show/2692-19#Text

For instance, if a non-resident sells shares or similar rights of the company, the value of which on any day for 365 days before the sale is formed from real estate in Ukraine, the income from the sale of such shares or similar rights should be taxed in Ukraine.

Changes that are developed by Article 9 of the MLI are to make broader the definition of comparable interest to be replaced by “other rights of participation”. As well the threshold of 50 per cent is replaced by a more vague definition of “more than a certain part”. Now the immovable property is accompanied by a real property so that the application of Article 13 of the OECD and UN MTT is addressed.

4. Combating abuse through permanent establishments located in third jurisdictions (Article 10 of the MLI): establishing the conditions under which the income of legal persons remains taxable under the national law of the Contracting Jurisdiction in which the enterprise receives its income.

Provisions provide for a rule on the application of preferential rates to the income of non-residents received by its permanent establishments located in third jurisdictions. It is assumed that the preferential rate under the double taxation agreement will not apply if the income of a non-resident is transferred to a permanent establishment in another state, and such income will be exempt from taxation or will be taxed at a much lower rate at the level of permanent representation. at the same time, such income will be exempt from taxation in the country of the non-resident.

5. Artificial avoidance of permanent establishment through *commissionnaire* arrangements and similar strategies (Article 12 of the MLI): establishing rules that, if a legal entity operates in a Contracting Jurisdiction and systematically enters into contracts or systematically plays a key role, leads to the conclusion contracts, that undertaking shall be deemed to have a permanent establishment in this Contracting Jurisdiction.

To put it in practical perspective the following example of a structure using *commissionnaire* agreements should be illustrated. Company A located in State 1 provides software products and services through its websites. To maintain its activities, Company A engages Company B located in State 2. Company A's customers are requested to accept the standard terms of agreements with Company A in State 2. Thus, if Company B employees will operate primarily for the benefit of Company A, which will lead prior to the conclusion of agreements between Company A and counterparties or consumers in State 2, based on the analysis of Article 12 of MLI, Company A will be considered to have a permanent establishment in State 2. However, no permanent establishment will be deemed if Company B’s employees will act independently and be independent in their status.

It is quite obvious that in many cases the *commissionnaire* arrangements are concluded mainly for the purpose of erosion the tax base of the state where the goods are sold. The essence of such arrangements is to allow non-residents in the past (and residents of countries with which Ukraine has not reached a common legal decision to amend DTTs, will continue to pretend the absence of permanent establishment.

6. Artificial avoidance of permanent establishment status by exceptions provided for specific activities (Article 13 of the MLI): a rule that the term "permanent establishment" does not cover the cases listed in the agreements, and if the activity does not have a permanent character. In para 4 Article 13, the rule of anti-fragmentation was added to the joint activities carried out by closely related enterprises in order to determine the existence of a permanent establishment. Ukraine chooses option “A” under para 1 Article 14, where a potential permanent establishment carries out ancillary or preparatory activities, but such activities are one of the key factors influencing the profit, such activities can be considered as leading to the emergence of a permanent establishment.

The activities mentioned below or the overall activity of a fixed place of business is excluded from the definition of the PE if it is of preparatory or auxiliary character. Namely, those are activities that are explicitly mentioned in the CTA and do not constitute the PE despite the fact they are auxiliary or preparatory activities.

7. Separation of contracts (Article 14 of the MLI): rules for calculating the periods after which specific projects or activities are considered permanent representation. Under certain conditions, these different periods are added. The rules apply to activities on a site that is a construction site, a construction project, or an installation project (including supervision or consultation on such projects).

According to Article 5 of the OECD Model Convention[73], a building site or construction or installation project related to such a site or project, is deemed as a permanent establishment only if they last for more than 12 months. But in practice, taxpayers often avoid permanent establishment by joining into such projects with various non-residents for periods of less than 12 months (or another period established by the domestic law of a particular jurisdiction). Article 14 of the MLI is combatting such practices. It sets out that the period or periods during which a project is carried out by one or more related undertakings is counted as the total time period of such project.

To illustrate, suppose that under the law of State 1, a permanent establishment arises if the duration of the construction works lasts 6 months. Company A in State 2 entered into a 5-

[73] OECD, “ARTICLES OF THE MODEL CONVENTION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL”, (2017), https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf

month agreement with Company B in State 1, under which Company A will build a factory for Company B. However, a subsidiary of Company A entered into a similar agreement with Company B for 1 month to avoid permanent agency status for Company A in State 1. Subject to the provisions of Article 14 of the MLI, factory construction periods under both agreements will be counted and Company A will be deemed to have a permanent establishment in State 1.

Following Law 2692[74], criteria are introduced to assess the regularity, ie the number of transactions implemented through controlled enterprises, as well as the duration of such non-resident, and therefore work lasting more than thirty days will be considered a permanent establishment.

8. Mutual agreement procedure (Article 16 of the MLI): taxpayers may bring an action before the competent authority of the relevant MLI jurisdiction if they consider that the contractual jurisdiction violates the rules of taxation established by CTA. The statute of limitations is three years from the date of the first notification of actions that lead to taxation that is not compliant. At the same time, if a Contractual Jurisdiction cannot resolve the issue on its own, it must take steps to reconcile the dispute with another Contractual Jurisdiction. To ensure the mutual agreement procedure is effective in its practical implementation the relevant national legislation must follow, as in Ukraine the Order of the Ministry of Finance of Ukraine on the Procedure for consideration of the application (case) under the procedure of mutual agreement and requirements for the application. December 30, 2020 was adopted.[75]

Accordingly, if Ukrainians or non-residents suppose that certain acts or decisions of the Ukrainian or a foreign tax office may result in taxation in violation of the appropriate DTT, they may request the Ukrainian Ministry of Finance to commence a mutual agreement procedure. If the application is accepted, the Ukrainian Ministry of Finance will contact the foreign responsible authority under the relevant DTT to negotiate the specific tax matter and seek a joint resolution. The tax office itself may also commence a mutual agreement procedure. In this case, it is to be used to address uncertainty or disagreements in the interpretation or implementation of DTTs, or to conduct double taxation discussions in circumstances not immediately covered by the treaties. However, Ukraine has made a reservation that the application must be submitted within a defined period of time, which is less than 3 years from the date of the first notification

[74]Law of Ukraine "*On Ratification of the Multilateral Convention on the Implementation of Measures Concerning Tax Agreements to Combat the Erosion of the Tax Base and Withdrawal of Profits from Taxation*" No. 2692-VIII of April 2, 2019 Vedomosti Verkhovnoi Rady (VVR), (2019) , No. 12, Article 64, https://zakon.rada.gov.ua/laws/show/2692-19#Text

[75] Ministry of Finance of Ukraine, Order "On approval of the Procedure for consideration of the application (case) under the procedure of mutual agreement and requirements for the application", (2020), https://zakon.rada.gov.ua/laws/show/z0305-21#Text

of non-compliance, in respect of DTTs with Canada, Indonesia, Italy, and Lebanon. It is also established that the agreement reached will be implemented regardless of any timeframes provided by the national legislation of the contracting states.

From my perspective, the mentioned possibility of interpretation would be indeed advantageous in the Ukrainian context. Take for instance the following case.

The State Tax Agency of Ukraine published its decision[76] on individual tax consultations on the matter of non-residents taxation. The taxpayer in Cyprus asked the tax authority whether the acquisition by the non-resident of a share of the authorized capital of the Company is equated to "investing in the acquisition of shares or other rights of the company" in the sense of p. "A" paragraph 2 of Article 10 of the DTT between Ukraine and Cyprus, which allows a reduced rate of repatriation tax of 5%.

The tax authority in its opinion notes that the conditions established by subparagraph "A" paragraph 2 of Article 10 of the DTT, concerning the minimum size of the share of the participant of the company in the authorized capital of this company. Accordingly, in order to apply a reduced rate of 5% to the payment of dividends to a resident of the Republic of Cyprus, such non-resident must own a share of at least 100,000 euros and purchase a share of 2,780 hryvnyas per 100,000 euros may mean that in this case, the requirements of the Convention on the application of a reduced tax rate are not met. According to the case, the share of the non-resident in the authorized capital of the Company is 20%, and its nominal value is UAH 2,780. The share was purchased by the non-resident from the previous member of the Company for more than 100,000 euros. The tax authority took a conservative approach to defining what constitutes an "investment in the purchase of shares", noting that the DTT requires the value of the investment in share capital rather than the value of the investment in the acquisition of shares in general. Accordingly, only the purchase of shares on the primary market as a result of their issue (direct investment) should be considered an investment for the purposes of this DTT. It should also be noted that the Government of Cyprus in its conventions, where there is a requirement for the amount of investment, has already agreed with the governments of the countries concerned to include in the definition of investment acquisition of corporate rights in the secondary market. Delloite Ukraine makes a statement in one of its publications[77] that there is a high risk for taxpayers that the tax authorities in Ukraine will not recognize an investment through secondary purchases sufficient for the application of this Convention. In the meantime, it

[76] State tax service of Ukraine, "Unified register of individual tax consultations", https://cabinet.tax.gov.ua/registers/ipk

[77] Deloitte, "*Review of key clarifications and consultations of non - resident tax authorities Deloitte in Ukraine*", https://www2.deloitte.com/ua/uk/pages/press-room/tax-and-legal-alerts/2021/international-tax-clarifications/26-08.html

is also expected a counter-action from the Government of Cyprus in view of several contentious issues concerning the application of this Convention (for example, Article 13 and the "most favoured nation" provision). Thus, from my perspective, the joint assessment under the mutual agreement procedure could interpret the provisions in a fair way and eliminate the negative outcomes of that.

2.2.1 Ukraine’s choice of reservations

In the sake of recalling, Pursuant to Article 28(3) of the MLI, a reservation "shall modify for the reserving Party in its relations with another Party the provision of the Convention to which the reservation relates and to the extent of the reservation, and shall modify those provisions to the same extent for the other Party in its relations with the reserving Party." With a few exceptions, the principle of reciprocity applies to the Contracting Jurisdictions making the reservations (i.e. the opt-out clauses). A Party to the MLI may make reservations for (opt-out of) the MLI provisions in order to limit the degree to which the MLI affects its covered tax agreements in its contacts with another Party, and vice versa.

According to the International Monetary Fund[78], Ukraine is on the list of developing countries. For sake of recalling, there are two main MTTs exist: UN and OECD. The OECD MTT is more favourable for developed countries and became the standard for bilateral treaty negotiations for years to come starting from 1977. In parallel, the UN developed its own MTT in 1980. Given that the interest of developing countries was not served by OECD MTT, UN MTT is called to better reflect the interests of capital-importing countries. Thus, the UN Model provides an example of a treaty that better balances residence and source taxation. The treaty-related outcomes from the BEPS Action Plan are now reflected in 2017 updates to the both OECD and UN MTTs.

Ukraine as a developing country probably has a motivation for concluding DTTs to promote itself and reduce barriers to international trade and investment. Ways of providing that are lying in double taxation elimination and strengthening source-country taxation. Unquestionably, DTTs are increasing the stability and predictability of the taxation system due to its nature as well as the mechanism of monitoring and transparency. The MLI is created so that it is applicable to DTTs based either on UN or OECD Models. The MLI is reinforcing source taxation by way of managing the treaty shopping and handling the PE definition.

[78] International Monetary Fund, "*World Economic Outlook*”, (October,2018), pp.134–135", https://www.google.com/url?q=https://www.imf.org/~/media/Files/Publications/WEO/2018/October/English/main-report/Text.ashx&sa=D&source=docs&ust=1651683629572857&usg=AOvVaw0y2IXiSwR-hlt9MZVXsmqa (PDF)

To analyse Ukraine's manner of the MLI adoption, the paper of Annet Wanyana Oguttu[79] should be taken into account and the collation should be made. According to the Annet Wanyana Oguttu's opinion the Articles of MLI that cover hybrid mismatches and relate to Action 2 of BEPS Action Plan, namely Articles 3, 4 and 5 of MLI, are recommended to be adopted. Specifically, this would assist in protecting the source country's taxation rights. As it was figured out Ukraine made reservations to those provisions related to a hybrid mismatch. In relation to transparent entities, it is recommended to adopt Article 3 of the MLI by developing countries to protect their taxation rights. Addressing the dual tax residency and thus claiming to receive tax benefits is also recommended. "The UN subcommittee on BEPS recommended that developing countries adopt this provision, with an option for states which wish to do so, to keep the place of effective management as the sole criterion". The tax credit method is desirable for developing countries.

Ukraine reserved "the right for the entirety of Article 17 not to apply to its Covered Tax Agreements on the basis that in the absence of a provision referred to in Article 17(2) in its Covered Tax Agreement:

(i) it shall make the appropriate adjustment referred to in Article 17(1); or

(ii) its competent authority shall endeavour to resolve the case under the provisions of a Covered Tax Agreement relating to mutual agreement procedure".[80]

Annet Wanyana Oguttu emphasises that developing countries should use their right to reservation with regards to Article 17 of the MLI. It is thus recommended that developing countries rather choose that their competent authorities shall endeavour to resolve the case under the mutual agreement procedure in their CTAs.

The List of Reservations and Notifications of Ukraine concludes with Article 17, it gives the assumption that Ukraine made reservations with regard to Article 18 through Article 26. Those articles aim to implement mandatory binding arbitration, demonstrating the undertaking by some countries to provide for mandatory binding arbitration in their DTTs. Annet Wanyana Oguttu provides the recommendation for developing countries that "it is advised that developing countries should not opt for mandatory binding arbitration when they sign the MLI until the process is opened up to full transparency with reasoned decisions based on principles that can

[79] Annet Wanyana Oguttu, "*Should Developing Countries Sign the OECD Multilateral Instrument to Address Treaty-Related Base Erosion and Profit Shifting Measures?*", (2018), CGD Policy Paper. Washington, DC: Center for Global Development

[80] OECD, "*UKRAINE Status of List of Reservations and Notifications upon Deposit of the Instrument of Ratification*", https://www.oecd.org/tax/treaties/beps-mli-position-ukraine-instrument-deposit.pdf

guide other taxpayers and tax authorities”.[81]

By ratifying the MLI Convention, Ukraine has extended its scope to 76 CTAs. However, to date, according to the Third Peer review Report[82] there are 75 CTAs are listed. Twenty of which comply with the minimum standard, namely the agreements with Belgium, Canada, Denmark, Finland, France, Iceland, India, Ireland, Israel, Japan, Lithuania, Luxembourg, Malta, Poland, Serbia, Singapore, the Slovak Republic, Slovenia, the United Arab Emirates and the United Kingdom. Today, however, only half of these agreements are subject to change after the Convention enters into force for Ukraine. Among the agreements listed by Ukraine as CTA and covered by the MLI are the following types of agreements:

(i) To which the MLI applies as they are listed in both Ukraine and Contracting Jurisdiction the as the CTA to which the MLI applies - Canada, Cyprus, Israel, Russia, Great Britain, Jordan, Morocco, Thailand, Japan, Malta, Saudi Arabia, United Arab Emirates, etc;

(ii) To which the MLI does not apply, as the Contracting Jurisdiction has not signed the MLI at all - USA, Algeria, Azerbaijan, Belarus, Brazil, Cuba, Iran, Kyrgyzstan, Lebanon, Libya, Macedonia, Moldova, Mongolia, Montenegro, Syria, Tajikistan, Turkmenistan, Uzbekistan;

(iii) Which is not covered by the MLI, as the relevant Contracting Jurisdictions have not included the agreements with Ukraine in the list of CTA covered by the MLI - Albania, Austria, Georgia, Germany, Indonesia, Kuwait, Malaysia, the Netherlands, Norway, Spain and Switzerland.

Volodymyr Korol[83] provides with the classification on reservations and opting-out provisions of the Contracting Jurisdictions as follows. Hence, according to the analysis of the legal positions of foreign states, they can be differentiated into several groups on the basis of convergence of interests in the field of international taxation in terms of combating artificial avoidance of permanent missions through *commissionaire* arrangements, namely states:

1) conditionally "Finnish group", which (as well as Finland) have expressed their intention to extend the Multilateral Convention to bilateral agreements with Ukraine - Belgium, Denmark, France, Turkey, Romania, Slovakia, Slovenia, Saudi Arabia, Japan;

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[81] Annet Wanyana Oguttu, “*Should Developing Countries Sign the OECD Multilateral Instrument to Address Treaty-Related Base Erosion and Profit Shifting Measures?*”, (2018), CGD Policy Paper. Washington, DC: Center for Global Development

[82]OECD, “*Prevention of Tax Treaty Abuse – Third Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6”*, OECD/G20 Base Erosion and Profit Shifting Project, (2021), OECD Publishing, Paris, https://doi.org/10.1787/d6cecbb8-en.

[83] Volodymyr Korol, “*International treaty novelties of counteraction to artificial avoidance of the status of permanent representation by means of the commission agreement*”, (2020), http://pgp-journal.kiev.ua/archive/2020/6/47.pdf

2) conditionally "Cypriot group", which (as well as Cyprus) made reservations and excluded the stagnation of Art. 12 of the Multilateral Convention on Bilateral Agreements with Ukraine - China, Canada, Sweden, Lithuania, Latvia, Korea;

3) made reservations and ruled out a stalemate in the Multilateral Convention on bilateral agreements with Ukraine (this group includes both individual EU member states (Netherlands, Germany) and well-known offshore companies - Panama, Seychelles, etc.).

2.2.2 Some observations of the need to adopt the MLI in Ukraine

Initially, the political rhetoric in Ukraine was against combating base erosion and profit shifting implications. Later the political intentions changed, and Ukraine without any political resistance decided to join the BEPS Action Plan considering the prospects for the elimination of offshores, due to the fact the reputation of Ukrainian business in the international arena is currently at a fairly low level. This leads us to believe that foreign counterparties will cooperate much more actively with Ukrainian companies with the introduction of stricter rules of tax avoidance in Ukraine. Thus, Ukrainian businesses need to learn to work according to transparent rules, which will help attract foreign investors and develop even more actively than before the BEPS Plan was implemented. Zamaslo Olha emphasises that “offshoring is a very controversial process, because on the one hand, cooperation with offshore zones allows companies to optimise the level of taxation, and on the other, it is the cause of uncontrolled outflow of capital from the country, which adversely affects Ukraine's economy. Therefore, the implementation of measures to minimise the negative impact of money laundering in offshore areas should be a priority of public policy in the financial and tax area”[84]. Ukraine has been ranked 64th as of 2020 in the World Bank's "Doing Business" assessment, which measures the ease of doing business.[85] Zamaslo Olha believes that “it shows that Ukrainian companies are very likely to move to offshore jurisdictions”.[86]

There are some observations of the Ukrainian economic position as follows. The level of the tax burden in Ukraine is lower than in Eastern and Western Europe, the problem of the tax

[84] Zamaslo, Olha T., and Kozak, Diana A., *Laundering Black Money by Means of Offshore Zones: The Negative Impact and Ways to Resolve*, (2021), *Business Inform* 8:140–150. https://doi.org/10.32983/2222-4459-2021-8-140-150

[85] Doing Business, “Economy profile: Ukraine”, (2020), https://www.doingbusiness.org/content/dam/doingBusiness/country/u/ukraine/UKR.pdf

[86] Zamaslo, Olha T., and Kozak, Diana A., *Laundering Black Money by Means of Offshore Zones: The Negative Impact and Ways to Resolve*, (2021), *Business Inform* 8:140–150. https://doi.org/10.32983/2222-4459-2021-8-140-150 p. 141

burden on businesses is exacerbated by the fact that about half of the economically active businesses are in the shadows, and as a result, half of the taxpayers hide their tax revenues. The tax burden is only carried by a small part of the economically active population of the state. Thus, the real tax burden in Ukraine, carried by law-abiding taxpayers, is much higher than the one officially stated[87].

Base erosion and profit shifting schemes in Ukraine have their own peculiarities. As the Center for Socio-Economic Research "CASE Ukraine" notices, unlike most other countries, the vast majority of tax revenues in Ukraine are lost due to large-scale tax evasion instruments such as the transfer of profits to "tax havens", the violation of customs rules, the theft of value-added tax, and counterfeiting, which are widely used by large and extra-large enterprises that dominate the domestic economy and at the same time have great opportunities to avoid paying taxes due to their informal connections[88]. According to the research “CASE Ukraine” convened, Ukraine lost 28-46 billion hryvnyas in 2020 due to schemes of avoiding income and withholding taxes. It is notable that according to the same research the number of budget losses in 2017 was much higher - 50-65 billion hryvnyas.

Another organization “Tax Justice Network”[89], an international justice group dedicated to preventing tax evasion and transfer of assets to tax havens, calculates the annual losses faced by countries. According to its data, Ukraine ranks 65th out of 100 for vulnerability to illicit financial flows. It is more vulnerable to outward trade and its trading partners that are responsible for that position are named - Thailand, Saudi Arabia, and China. The data presented by “Tax Justice Network” provides information that for inward investments there are 3 main countries in Ukraine - the Netherlands, Cyprus, and Switzerland, which are scored as tax heavens as 80, 85, and 89 out of 100 respectively. At the same time, among the main countries for outward investments are Cyprus, Hungary, and Estonia, which are scored as tax heavens as 85, 72, and 70 respectively.

Capital outflows are routed through countries known as tax havens. It's worth noting that Ukraine is hostile to offshore centres, which are seen as a way to "launder" dirty money and transfer capital in the grey zone because certain schemes allow for tax avoidance in the offshore zone, the intermediary country where the Ukrainian company is actually registered, and in

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[87] Brehov. S.S., Matviychuk M.O., “Брехов С. С., Матвійчук М. О., “Optimizing the level of tax burden on businesses in Ukraine”, Molodyi vchenyi, (2018), № 1. pp. 926–929. URL: http://molodyvcheny.in.ua/files/jour�nal/2018/1/215.pdf p. 927

[88] Dubrovskyi V., Cherkashin V,. Hetman O., “*Comparative analysis of the fiscal effect of the use of tax evasion / avoidance instruments in Ukraine: new challenges*”, Institute of Socio-Economic Transformation . Center for Socio-Economic Research "CASE Ukraine". Kyiv, (2019), URL:http://iset-ua.org/images/Porivnyalniy-analiz-shem-Podatky-final333.pdf p 7

[89] Illicit Financial Flows Vulnerability Tracker: Ukraine, https://iff.taxjustice.net/#/profile/UKR

Ukraine, where profits are later returned.

At this point, I would like to research the nature of the foreign direct investment. In this regard nowadays the concept is somehow altered. The working paper of the World Bank Group[90] made it clear how foreign direct investments maybe not be direct investments. It may be a case when multinational enterprises make investments in third countries not directly but through intermediaries. It constitutes the foreign direct investment in an indirect form. A role of intermediaries can be performed either by a special purpose vehicle (an entity established for a specific purpose and usually in tax havens) or other permanently established foreign subsidiary company in third countries.

Additionally, foreign direct investment can be distorted in the form of a round-tripping investment. By its nature, this type of investment does not have a foreign source but has a domestic origin. These funds are routed to the domestic economy in the form of direct investment through offshore countries. In such cases, the domestic resources are classified as foreign investments and thus do not constitute the actual inward. The main factors in the use of round-tripping operations are: the protection of property rights; tax and financial benefits; the existence of currency control and exchange rate changes (to ensure flexibility in the management of assets denominated in foreign currency); gaining access to better financial services. [91] A round-tripping in turn leads to tax revenue losses as well as losses of expected inflow of technologies and innovations that would be in case of genuine foreign direct investment.

Dilek Aykut explains additional reasons for the round-tripping occurrence. According to that "the essential motivation might be to circumvent the institutional and financial shortcomings of their country of origin rather than just tax avoidance or illegal activities". [92] In addition, companies might invoke round-tripping investments to get away from assumed inefficiencies in governmental regulation and other uncertainties in one's own country. In this case, companies select the more stable regulatory environment to conduct their business. A prominent example of that is an ArcelorMittal Steel company, "whose founders were born in India but resided in London, registered their firm in the Netherlands to circumvent the heavy and bureaucratic Indian regulations and they have expanded their operations both in India and

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90 Aykut, Dilek; Sanghi, Apurva; Kosmidou, Gina, "*What to Do When Foreign Direct Investment Is Not Direct or Foreign : FDI Round Tripping. Policy Research Working Paper*" ;No. 8046. World Bank, Washington, DC. © World Bank, (2017), https://openknowledge.worldbank.org/handle/10986/26498 License: CC BY 3.0 IGO.

91 National Bank of Ukraine, "Estimation of the Volume of Foreign Direct Investment, in Which the Final Controlling Investor Is a Resident (Round Tripping) for 2010-2020", Departament statystyky ta zvitnosti, Kyiv, (2021), https://bank.gov.ua/admin_uploads/article/FDI_round_tripping_pr_2021-03-31.pdf?v=4

92 Aykut, Dilek; Sanghi, Apurva; Kosmidou, Gina, "*What to Do When Foreign Direct Investment Is Not Direct or Foreign : FDI Round Tripping. Policy Research Working Paper*" ;No. 8046. World Bank, Washington, DC. © World Bank, (2017), https://openknowledge.worldbank.org/handle/10986/26498 License: CC BY 3.0 IGO. p 11

globally. Mittal Steel acquired the European steel company Arcelor in 2006, and the merged company, ArcelorMittal, chose Luxembourg for its official headquarters and is now the world's largest steel producer”. [93]

Zamaslo Olha describes the numbers and percentage of round-tripping investments in Ukraine. According to the data, “the largest volumes of round-tripping investments were observed in 2010–2013, being at the level of 32.7% of the total FDI”. 2014 and 2015 years were witnessed as years without round-tripping investments due to the territorial invasions. After that the numbers gained momentum gradually leading to that “in 2016, FDI inflows, in which the ultimate controlling investor is a resident, amounted to 170 million USD and provided 4.1% of all FDI to Ukraine. In 2017, round-tripping operations provided 10.4%, and in 2018 – 20,6% of FDI inflows to Ukraine. In 2019, round-tripping operations are estimated at 1 billion USD, which is 34.1% of FDI inflows to Ukraine (88.9% of their volume is an investment in the real sector of the economy)”.[94]

Cyprus, the Netherlands, Switzerland, and Austria were the countries through which the most round-tripping operations were made in 2020. Cyprus, the Netherlands, the United Kingdom, Germany, Switzerland, Austria, and the Virgin Islands are the leading investor countries in Ukraine in 2020 (including round-tripping operations)[95].

Considering Cyprus, the following should be characterised. Cyprus was the biggest investor in Ukraine in 2020, holding 31% of all the investments.[96] This is due to the fact, but not limited to, that there is a favourable DTT in place between Cyprus and the USSR since 1983. Certainly, much has changed since then, but the benefits afforded by the Cyprus treaty for investors in Ukraine remain quite beneficial, with no withholding tax on dividends, interest, or royalty payments from Ukraine to Cyprus, and capital gains not taxed in Ukraine. Even Though Cyprus is not regarded as an offshore zone officially, with its advantageous tax policy, common-law traditions, and offshore services (such as trusts to protect beneficial owners' identity), it is seen as a close and appealing country to route earnings through.

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[93] Ibidem

[94] Zamaslo, Olha T., and Kozak, Diana A., *Laundering Black Money by Means of Offshore Zones: The Negative Impact and Ways to Resolve*, (2021), *Business Inform* 8:140–150. https://doi.org/10.32983/2222-4459-2021-8-140-150

[95] National Bank of Ukraine, “Estimation of the Volume of Foreign Direct Investment, in Which the Final Controlling Investor Is a Resident (Round Tripping) for 2010-2020”, Departament statystyky ta zvitnosti, Kyiv, (2021), https://bank.gov.ua/admin_uploads/article/FDI_round_tripping_pr_2021-03-31.pdf?v=4

[96] Official website of State Statistics Committee of Ukraine (2020), «Statistical information» available at: http://www.ukrstat.gov.ua

Rychka Maryna has explained the reasons for round-tripping investments occurrence in Ukraine as follows. The majority of the investments received in Ukraine are made up of Ukrainian capital, which is "reinvested" in Ukraine through enterprises based in offshore zones. High levels of corruption, imperfection of the legal framework, lack of proper support for the development of the investment market by the authorities, shortage of highly educated and qualified specialists, a large percentage of the shadow economy, military conflict; unsatisfactory level of socio-economic development of the economy are some of the negative factors that cause only the "reinvestment" of previously laundered "dirty" money rather than a net inflow of FDI into Ukraine.[97] At the same time, undoubtedly, ungenuine investment transactions, tax evasion, and possible and purposeful violations of national tax regulations all have a detrimental influence on Ukraine's economic development and financial stability, as well as lowering the country's financial security.

Money laundering has a variety of negative implications, according to the conclusions of the National Risk Assessment 2020 of the State Financial Monitoring Service of Ukraine, including the following[98]:

(-)reduction in state and local budget revenue, which makes it difficult to fund various state and local development programs and forces the state to rely on external borrowing: as a result, foreign exchange reserves and internal sources of paying external debts have decreased; -reduction in funding public-private partnerships;

(-)due to transfer transactions, a drop in the balance of payments indicators;

(-)a decrease in output and a decrease in GDP growth.

Considering all the detrimental impact described above the round-tripping investments and money laundering causes to the overall economy and in fact, the investment attractiveness, the appropriate and adequate reaction should be made to combat the origins of negative consequences. There are different ways to deal with that, as follows. International organisations such as the OECD, UN, FATF, and IMF are established to set up recommendations and directions with regard to combating money laundering and numerous tax avoidance strategies. Those organisations form out global level. The anti-offshore regulation is also performed on a regional level when a group of countries decide on the common regulations and rules applicable

[97] Rychka, M. A., and Ilchenko, A. O. “Analysis of Foreign Investment Ukraine in Globalization Processes”.Infrastruktura rynku, no. 42 (2020): 46-53. DOI: https://doi.org/10.32843/infrastruct42-8

[98]State Financial Monitoring Service of Ukraine, “ Typological study 2020 "Laundering of income from tax crimes", (2020), https://fiu.gov.ua/pages/dijalnist/tipologi/tipologi-derzhfinmonitoringu/tipologichne-doslidzhennya-vidmivannya-doxodiv-vid-podatkovix-zlochiniv-2020-rik.html

to that number of countries (i.e. EU countries). As this paper is inspired by DDTs it is impossible not to mention what role they play as well. The level of governance is thus bilateral and plays a major role since it is an established rule by countries. Countries use their sovereignty and lawmaking power to regulate tax avoidance issues by adopting domestic laws, so-called internal or domestic level.

Undoubtedly, all levels are correlated with each other and thus are a sort of "check and balances" system. From my point of view, the most influential and effective is the first mentioned level. One of the most significant initiatives implemented on the global level is the BEPS Action Plan, which is described throughout this paper. The BEPS Action Plan impacts all countries, but it has a particularly big impact on emerging economies, such as Ukraine, because of their high reliance on corporate income tax.

Ukraine as it was elaborated above does not stand aside from adopting BEPS Action Plan and taking into account recommended measures to improve its both economic situation and reputation. It might be claimed that the adoption of the BEPS Action Plan's Minimum Standard in Ukraine, as well as all of its subsequent Actions and steps, will set in motion an effective framework for high-quality international taxation and anti-offshore combat. However, in order to execute the BEPS Action Plan in Ukraine, a digit of demanding tasks must be completed. Ukraine should proceed and strengthen the bilateral relationship with other countries taking into account the distinguished recommendations and in particular, as Zamaslo Olha suggests[99], in the field of mutual disclosure of tax information.

The rest of this subchapter is devoted to the investment climate in Ukraine. It is unquestionably that business is spending lots of their income on taxation. That tax burden on cross-border transactions is an obstacle for investments, mainly it may be due to the double taxation. Thus, the tax certainty that is embodied in the DTTs is the solution due to the allocation of tax rights between jurisdictions. DTTs lead to the emergence of tax benefits that are harmful to the overall taxation system but may be advantageous for a particular country or business.

Investments are not always as useful as they should be. The round-tripping investments that are not genuine ones were already covered in this paper. Also, the Ukrainian investment background has its own peculiarities. The bulk of the revenue has been accounted for by a small number of countries for many years. This indicates a slight geographical diversification of FDI exporting countries to Ukraine. Most of the investors in the Ukrainian market are willing to invest in the processing industry, as well as in the wholesale and retail trade. There are new

[99] Zamaslo, Olha T., and Kozak, Diana A., *Laundering Black Money by Means of Offshore Zones: The Negative Impact and Ways to Resolve*, (2021), *Business Inform* 8:140–150. https://doi.org/10.32983/2222-4459-2021-8-140-150 p.. 147

products that appear quickly, the range changes, costs and low commercial risks pay off quickly. Also popular are industries that do not require long-term investment and development of new technologies, including the financial sector and the real estate sector.

According to the publication of Reytynh[100], despite the fact that investments are attracted to highly profitable sectors of the economy, they do not strengthen the country's competitive position in world markets. Excessive FDI in the financial sector, on the one hand, fills the financial system with working capital, which contributes to the stable liquidity of the country's financial system, on the other - creates the basis for extensive development of the national economy.

On December 17, 2020, the Law of Ukraine № 1116-IX "On state support of investment projects with significant investments", was adopted and on March 28, 2021, the Law of Ukraine of 02.03.2021 № 1293-IX [101]"On Amendments to the Tax Code of Ukraine on Tax Peculiarities" entered into force and covers business entities that implement investment projects with significant investments in Ukraine. This law is an important tool for state support of relevant investment projects, as it establishes tax incentives for significant investors. According to Article 5 criteria of an investment project with significant investments, for the implementation of which state support may be provided, are as follows: (i) the amount of investment must exceed 20 million euros; (ii) the term of realization of the investment project to 5 years; (iii) creation of at least 80 jobs with a minimum wage of more than 15% than the average in the region.

From the financial perspective, the problem of useless outflow of capital from Ukraine is a significant risk to financial stability and, as a result, hinders more active liberalization of currency regulation, especially in relation to the operations of individuals. Therefore, the introduction of more effective tax regulation in Ukraine through the implementation of the BEPS Action Plan is one of the prerequisites for the final transition to the free movement of capital, in accordance with the domestic law in Ukraine that covers currency and foreign exchange transactions.

There is an undoubtful advantage within the MLI instrument. Despite significant limitations imposed by the MLI, it should be noted that MLI involves improving the procedure for resolving tax disputes. Thus, if a taxpayer considers that the tax authorities of one country misinterpret the provisions of international conventions, the taxpayer will have the opportunity to

[100]Reytynh, "Why Cyprus is bigger than Germany", (2019), https://rating.zone/chomu-kipr-bilshyj-za-nimechchynu/

[101]LAW OF UKRAINE, "On Amendments to the Tax Code of Ukraine Concerning the Peculiarities of Taxation of Business Entities Implementing Investment Projects with Significant Investments in Ukraine", (Vidomosti Verkhovnoi Rady (VVR), (2021), № 21, p.193), https://zakon.rada.gov.ua/go/1293-20

apply to the tax authority of any country to justify his/her position and request a uniform approach to be applied between the tax authorities of the two countries.

2.2.3 How BEPS is operating in the Ukrainian context

One of the main and popular ways of tax avoidance is tax avoidance through offshore schemes, and Ukraine is not an exemption from that rule. Offshore schemes mean the use of taxpayers of the following arrangement. The use of all legally permitted means of reducing the tax burden, for instance, the legal minimization of tax liabilities, including cross-border aggressive tax planning, tax optimization, use of unfair practices, including the use of differences, conflicts and gaps between different national tax systems (double deductions or exemptions), as well as preferential taxation of certain activities or income, manipulation of residency status through which the transfer of Ukrainian income without a proper corporate income tax to countries with lower or zero tax rates. Thus, there are reasons for offshore schemes as follows. They provide the possibility of avoidance of taxation within the country by the cross-border movement of profits, and export of financial results of political corruption. Also, it is considered a tool for the protection of savings and investments of companies, because not paying taxes in Ukraine, unfortunately, leads to the reduction of raiding risks and simplification of judicial protection of property interests. That is due to the notorious image of the Ukrainian judicial system which is considered unreliable due to political dependence and corruption. Capital is leaving Ukraine in particular due to the instability of tax legislation and unfavourable investment climate. Another reason for offshore schemes in the Ukrainian context is that they are the insurance against currency risks and unreliable banking system, that in turn may grant in particular access to better financial services.

The following analysis is taken from the paper of the Center for Socio-Economic Research “CASE Ukraine”[102]. Control over transfer prices remains uncertain due to the completeness of control, and weak due to the budgetary effect. It has a rather preventive effect given the massive self-adjustment by taxpayers of adjustments to transfer prices and tax bases. Long-term coverage of inspections of companies engaged in controlled operations does not exceed 0.6% and generates almost simulated results. The results of the State Tax Service in this area in 2020 can be considered as not having achieved significant results. At the same time,

[102] Dubrovskyi V., Cherkashin V,. Hetman O., “*Comparative analysis of the fiscal effect of the use of tax evasion / avoidance instruments in Ukraine: 2021*”, Institute of Socio-Economic Transformation . Center for Socio-Economic Research "CASE Ukraine". Kyiv, (2021), URL:https://case-ukraine.com.ua/publications/porivnyalnyj-analiz-fiskalnogo-efektu-vid-zastosuvannya-instrumentiv-uhylennya-unyknennya-opodatkuvannya-v-ukrayini-2021/

according to the results of the year, there is a decrease in the volume of offshore schemes in general, in particular, due to the crisis caused by COVID-19 and its psychological effects. The existence of problems with the use of transfer pricing control as a mechanism to stop tax evasion is underlined by studies on the most common export items of Ukrainian origin (iron ore and agricultural products), which came under the scheme *en masse:*

(-) exports of iron ore were at least 20% underestimated, which, given the extrapolation of mining data to national exports, suggests that the transfer of profits abroad to low-tax jurisdictions costs Ukraine about 3 billion euros a year, and tax shortfalls reach 750 million euros;

(-) the discrepancy between the declared and market prices for wheat and corn is 10.4% and 7.6%, respectively, which indicates the movement of profits abroad in the amount of about 1.5 billion US dollars, resulting in a budget loss of up to 270 million US dollars every year.

However, the data of the past and current years, sometimes drastically, have changed in light of the unprecedented uncertainty and serious economic consequences of the COVID-19 pandemic, which has affected the economy so much that the assessment of tax avoidance instruments should be analyzed from two perspectives: “before COVID-19” and "after COVID-19". In general, in 2020 the fall in GDP amounted to 4.2% of GDP, and the decrease in exports of goods and services amounted to 1.7% and 28.5%, respectively (compared to 2019). Another major manifestation of the pandemic was the "flight" of investment - last year set a five-year anti-record for attracting foreign direct investment to the country - minus 117 million US dollars.

According to the data provided in the research of “CASE Ukraine”, the transfer of income abroad to low-tax jurisdictions in the period of existence of the so-called “pandemic economy" namely in 2020-2021 can be estimated at 120-200 billion hryvnyas per year, resulting in a shortfall in taxes to the budget in the amount of 15 to 35 billion hryvnyas per year.

Today in Ukraine there is a possibility of a radical break in the long-term dominance of “offshore structures” in the economy. That is due to the fact that the country has intensified cooperation with the OECD. For sake of recalling: in 2017, it joined the BEPS Action Plan, in February 2019 ratified the MLI, in 2020 "Anti-offshore" Law № 466-IX was adopted, and this year took steps to implement (potentially from 2023) the international standard for automatic exchange of information on financial accounts for tax purposes (the so-called OECD Common Reporting Standard (CRS Standard). At the same time, the MLI ratification and the provisions of Law 466 transferred not only the so-called Minimum Standard of the BEPS Action Plan to the national regulatory field but also introduced new mechanisms to combat offshore, first of all, tax rules of controlled foreign companies (from 2022), prevention of avoidance of the status of permanent establishment (from May 23, 2020).

In such circumstances, the main threat is not the lack of proper regulatory tools to combat offshore schemes, and the low institutional capacity of regulatory authorities to work with it sufficiently. For instance among them within the Ukrainian background are the corruption risks persist as well as no sufficient financial resources. Given that Ukraine implemented anti-offshore mechanisms as transfer pricing control back in 2013, the issue with that is the lack of level of its properly mastering by Ukrainian authority. Currently, new no less intellectually and cost-effective weighting mechanisms are being introduced to combat the movement of profits abroad and are in question of their proper implementation and execution in terms of the proper regulatory process.

What should be also added, that according to the International Monetary Fund Report[103], tax authorities in Ukraine have few instruments to assess what portion of the income is being hidden abroad out of reach to the domestic tax authorities. It is thus concluded that the biggest weakness in the Ukrainian tax authorities with regard to the enforcement measures is that the burden of proof is on regulatory body to reveal that the taxpayer has omitted to report earned income. Thus, it does little to challenge the taxpayer's expected argument that the unrecorded income was received in a financial year that is outside the reach of the tax authorities and that can either be 3 years old or fall within the period when there were meagre records in Ukraine.

2.2.4. DTTs between Ukraine and other countries, analysis

This subchapter is devoted to analysing DTTs that were signed between Ukraine and some other jurisdictions. The MLI implications on the taxation relationship are to be indicated as well. The determination of the jurisdictions is not accidental. Both Cyprus and the Netherlands are known, according to the data provided in this paper above, to be popular investors in Ukraine, and their investments contain notorious side - round-tripping investments. Thus it is considered to examine Ukraine and Cyprus DTT, and Ukraine and the Netherlands DTT. As well Finland as a country with an example of excellent management and administration in relation to governmental matters is analysed in this subchapter with regard to the DTT with Ukraine.

DTTs are considered to be an instrument for developing countries to compete in attracting investments. As a result of international or non-intentional negotiations that led developing countries to the contrary.

Ukraine and Cyprus DTT

[103] International Monetary Fund. Fiscal Affairs Dept., "*Ukraine: Technical Assistance Report—A Follow-Up on Distributed Profit Tax, BEPS Implementation, Voluntary Disclosure Program, and Indirect Methods for Determining Taxable Income*", IMF Staff Country Reports, (2020), https://www.elibrary.imf.org/view/journals/002/2020/302/002.2020.issue-302-en.xml

Cyprus is of interest not only to offshore Ukrainian businesses but also to legal scholars, given the wide range of issues related to the national economic security of Ukraine, among which one of the priorities is to consider the total amount of non-residents and residents profit shifting from taxation.

The relationship relating to tax matters between countries is obviously not stable. That concerns the Ukraine-Cyprus relationship as well. The DTT between those jurisdictions was amended several times. The Republic of Cyprus still remains one of Ukraine's most important financial partners. According to the National Bank of Ukraine[104], in 2019 the main source of foreign direct investment in Ukraine was Cyprus with more than 16 billion dollars, which is almost 3 billion dollars more than in 2018 and is about a third of all revenues. For the first time since 2014, this figure crossed the $ 16 billion mark and is approaching the record high of 2013, when direct investment in capital from Cyprus exceeded 17.7 billion dollars. Economists explain that this investment is actually a return of Ukrainian money that was withdrawn in the form of dividends or repayable financing from the parent Cypriot companies - the round-tripping investment as it was elaborated above.

To replace the Cyprus-USSR Treaty of 1982, Ukraine and Cyprus signed the agreement on the avoidance of double taxation dated November 8, 2012. OECD MTT is a template for this bilateral taxation related relationship. It is then agreed that Cyprus levies the following taxes: the income tax, the corporate income tax, special contribution for the defence, and the capital gains tax. At the same time, Ukraine executes its right on taxation on the following: tax on profits of enterprises and income tax on individuals. Also, it should be noted that it was agreed to utilise a most favoured nation clause for taxation of interest, dividends, royalties, and capital gains so that Cyprus is treated no less favourable than other countries concluded DTT with Ukraine.

Later the amendment protocol was adopted on December 11, 2015, which covers taxes on income and on capital, increases the tax rate on certain types of passive income, and amends the previous treaty; it came into force in 2019. The amended DTT will comply with the recommendations of the OECD and will include the following changes.

It is expected that the purpose of these changes is to increase state budget revenues from the expansion of the tax base, combat tax evasion and reduce tax pressure on fair taxpayers. Thus it was agreed as follows. Income received by a resident of Cyprus will be exempted from taxation in Ukraine if that income comes from the alienation of shares and other corporate rights, more than 50% of the value of which is directly or indirectly related to real estate located in Ukraine. Previously the only requirement for the exemption was the location of the property in

[104] National Bank of Ukraine, "External sector statistics", https://bank.gov.ua/ua/statistic/sector-external#1

Ukraine. For the application of a reduced tax rate of 5% dividend income tax in Cyprus two conditions must be met simultaneously as follows: the presence of 20% owned by a Ukrainian company and a minimum investment of 100 thousand euros in the authorised capital of a Ukrainian company. Thus the amended DTT provides that all the conditions should be met by utilising “and” in the text of the Article. Previously it was enough to meet one of the two conditions above, to apply a reduced tax rate of 5%. Also, the amount of tax for the circumstances not mentioned above was reduced from 15% to 10%. It is agreed that the interest tax rate will be levied at 5% compared to 2% in the previous version of the DTT.

Cyprus has ratified the MLI which significantly affects the corporate structuring between Ukraine and Cyprus, starting from January 1, 2021. From that date, a Ukrainian resident company that pays dividends, royalties, interest, lease payments and other income originating in Ukraine in favour of a company resident in Cyprus for the application of a preferential tax rate or tax exemption for interest to Ukraine, must prove that obtaining tax benefits under Ukraine-Cyprus DTT is not the sole purpose of the existence of a Cypriot company receiving such income. Accordingly, Accordingly, companies that are structured through Cyprus and / o pay income to companies with Cyrpus residence will be affected by the limitation of the possibility to obtain tax benefits under Ukraine-Cyprus DTT. Those companies should consider restructuring.

Both Ukraine and Cyprus made notifications on the MLI. Hence, I would like to study their taxation relationship given the modification of the MLI. Article 12 of the MLI as was mentioned above addresses the artificial avoidance of the status of permanent establishment by means of *commissionnaire* arrangements. In relation to the application of Article 12 of the MLI Ukraine decided not to use the right for reservations, in contrast, Cyprus excluded the Article 12 application to its CTAs. In this context, it should be noted that such an official position of Cyprus to Ukraine with regards to the taxation relationship should not be considered purposefully unfriendly to Ukraine. It is merely a general approach to state policy in the field of international taxation. Indeed, based on Art. 4 of the Multilateral Convention, Cyprus excluded the application of Art. 12 to bilateral double taxation agreements with both the EU Member States and other offshores, including the Isle of Man.

Thus, even though the Ukrainian-Cyprus DTT is included in the list of CTA to be covered by the MLI paragraph 5 of Article 5 of the DTT remains in the original version. Considering the implications of that, it means that if a person acts in Ukraine in the interests of a Cyprus company, has and usually uses the authority to enter into contracts on behalf of this company, it is considered to have a permanent establishment.

Ukraine and the Netherlands DTT

The existing taxes under the DTT are income tax, the wages tax, the dividend tax, the company tax, and the property tax that are charged in the Netherlands. There are the tax on the income of enterprises and the income tax on the individuals in Ukraine. The DTT between Ukraine and the Netherlands would not be regarded as a CTA under the MLI because the Netherlands has not included it in its notification. Taking into consideration the latest standards of the OECD, on June 15, 2021, the Ukrainian parliament ratified the Protocol amending the DTT between Ukraine and the Kingdom of the Netherlands. Thus, according to the changes, new rates of income tax on non-residents are applied as follows. Dividends will be charged at 5% if the beneficial owner of the dividends is a company (other than a partnership) that directly owns at least 20% of the capital of the company paying the dividends, and at 15% in any other cases. Notably, the previous tax base was the gross amount of the dividends. The provisions on the possibility of tax dividends at 0% were eliminated by the amending Protocol. The tax rate on interest was increased from 2% to 5%. As well, there is an increase in the rate of taxation of royalties paid for intellectual property rights from 0% to 5%. The exchange of information provides a significant increase in the capacity of competent authorities of both Ukraine and the Netherlands to exchange tax information. Moreover, the amended DTT provides PPT, where tax benefits will not be supplied as long as if taking into account all relevant facts and circumstances, it can be reasonably concluded that obtaining such a benefit was one of the main purposes of the agreement or transaction.

The procedure for assisting in the collection of tax claims in another state has been supplemented. In this case, the other Contracting State shall take measures to ensure the payment of taxes in respect of such tax claim in accordance with the provisions of its law as if the tax claim were a tax claim of that other State. Thus, the tax authorities of Ukraine may be more effective in collecting taxes if they have information that residents of Ukraine have income or property in the Netherlands, but have not declared or paid taxes on such income or property in Ukraine.

Ukraine and Finland DTT

The other representative jurisdiction to be analysed is Finland which is contrary to Cyprus in terms of its legal position against DTTs. Finland is a country with outstanding government management which leads Finland to be economically strong and several years in a row achieves first place in the World's Happiness Report[105]. Tax relating relationship between Ukraine and Finland began back in 1998.

According to the Ukraine-Finland DTT, the scope of taxes is defined as follows. So-called Finnish taxes are the state income taxes, the corporate income tax, the communal tax, the church tax, the tax withheld at source from interest, the tax withheld at source from non-residents' income, and the state capital tax. Taxes to which the DTT shall apply in Ukraine are the tax on income of enterprises, the income tax on citizens, and the local taxes on income imposed under the Decree on local taxes.

In accordance with paragraph 1 of Article 7 of Ukraine-Finland DTT, the income of Finnish companies firstly is taxed only in the states of which they are residents, and secondly, may be partially taxed in Ukraine at the same time under one condition, namely if the business activities of such companies in Ukraine carried out through a permanent establishment.

For comparative purposes, I would like to come back to the Ukraine-Cyprus DTT to paragraph 5 of Article 5. The same wording had the Ukraine-Finland DTT which entered into force for Ukraine back in 1998. The difference is that both Ukraine and Finland made positive reports, as a result of which, paragraph 5 of Article 5 of the DTT between them, will be applied in accordance with paragraph 1 of Article 12 of the MLI. Thus, the intentions of jurisdictions to the extent of the BEPS Action Plan adoption can be seen.

According to the research carried out by the World's Bank[106], some DTTs create drawbacks for the Ukrainian economy in terms of that "there are important revenue losses linked to reduced withholding tax rates on dividend, interest and royalty payments". The result of the research points out that "that income flows to a specific country tend to decrease following an increase in the relevant withholding tax rate with the country; this effect reduces the simple mechanical revenue gain one can expect from renegotiating a withholding rate at a higher level".

Thus, Ukraine in the bilateral taxation relationship with Cyprus and the Netherlands in particular should consider the revenues losses it assumes. The round-tripping investment described earlier in this paper should be addressed in a way of its elimination.

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105 World Hapiness Report , "Happiness, Benevolent, and Trust During COVID-19 and Beyond", 2021, https://worldhappiness.report/ed/2022/happiness-benevolence-and-trust-during-covid-19-and-beyond/#ranking-of-happiness-2019-2021

106 Balabushko O., Beer S., Loeprick J., and Vallad F., "The Direct and Indirect Costs of Tax Treaty Policy. Evidence from Ukraine", Policy Research Working Paper, 7982, (2017), https://documents1.worldbank.org/curated/en/534391488205311904/pdf/WPS7982.pdf

3. MLI AND CHALLENGES

This chapter covers the shortcomings and setbacks of the MLI at this stage. Some characteristics of the MLI are described as flexibility of the instrument and what disadvantages it entails, the MLI in terms of its effectiveness is examined by scholars and described in this chapter. The last subchapter examines what challenges MLI entails in the Ukraine framework.

3.1 What derives from the flexibility

MLI as the most recent step of the BEPS Action Plan to combat base erosion and profit shifting still has shortcomings in its nature. To begin with, its main feature - "flexible document" - which is deemed to be an advantageous one is seen as a weakness at the same time. The mere possibility of opting out of the provisions provides jurisdictions with an opportunity to refuse the entire MLI provisions. Also, once one jurisdiction desires the MLI provision to apply, the other jurisdictions can discard it and which means it will not apply to the CTA between those jurisdictions. In fact, it may offset the very destination of the BEPS Action Plan. Even though there are provisions deemed to be a minimum standard but there are few of them. From my perspective, the minimum standard is not sufficient enough to address the BEPS thus the question arises about the point of opting for only a minimum standard.

Thus as for minimum standards, they are within it as follows. Article 6 of the MLI merely provides for including the desire to eliminate double-taxation and double non-taxation. As it was clarified above Article 7 of the MLI considered the Simplified Limitation on Benefits as an optional provision leaving only the introduction of the principal purpose test to be sufficient enough. That is to be noted that Simplified Limitation on Benefits is a more strict provision and makes it more difficult for businesses to obtain treaty benefits. Nonetheless, some states have decided to include the combination of PPT and a simplified LOB provision. As of April 25, 2022, sixteen states have opted for the combination of a PPT and a simplified LOB provision: Argentina, Armenia, Bulgaria, Chile, Colombia, India, Indonesia, Kazakhstan, Kenya, Mexico, Namibia, Pakistan, Russia, Senegal, Slovakia and Uruguay. Article 9 also provides an opting-out provision with regards to para 1, which provides for the taxing of gain on the alienation of interests an entity holds in another entity that derives a certain amount of its value from real property in another contracting jurisdiction. As of April 25, 2022, fifty-three of the signing jurisdictions have indicated that they do not intend to fully apply Article 8; at least forty-nine have indicated that they do not intend to fully apply Article 9; seventy have indicated that they do not intend to fully apply Article 10, and seventy-one have indicated that they do not intend to fully apply the provisions of Article 11 to their CTAs. [107] As a result, joining the MLI does not imply that tax jurisdictions are agreeing to follow all, or even most, of the MLI's provisions.

Take for example Part II of the Convention which addresses the “hybrid mismatches” and is indiscretion for signing parties. Accordingly, the mere signing of the MLI does not necessarily bind a tax jurisdiction to classify transparent entity income as that of a resident, take measures to prevent double non-taxation, or do anything to address Action 2 of the BEPS Action Plan. Indeed, of the seventy-eight tax jurisdictions that have signed the MLI as of the date of this writing, fifty-nine have indicated that they do not intend to apply Article 3 in its entirety, fifty-six have indicated that they do not intend to apply Article 4 in its entirety, and forty-three have indicated that they do not intend to apply one of the options in Article 5 to their CTAs. As well the same is for the measures limiting the tax exemption of international dividends, the provisions limiting the ability of entities to avoid tax by conducting business through entities in third jurisdictions, and the provisions limiting the exceptions to a tax jurisdiction's ability to tax its own residents as the Article 6, Article 7, Article 9 of the MLI are optional as well.

The various perspectives taken by signatories — whether on optional provisions or in the form of reservations – demonstrate a divide among them. The whole discussion about addressing BEPS collectively fades away out because the countries frequently fail to collaborate. From my perspective, it is a matter of time to achieve that level of bargain and agreement that is desirable.

Jeffrey Owens[108] has thought about issues of the MLI back in 2015. He was wondering if it might be possible that a number of countries would adopt some of the provisions but not the others. He suggested that the Ad hoc Group might elaborate on the case when there is no common agreement between the two countries. In contrast to other areas of law where it is resolved by unilateral application of the adopted provision by each country, the issue with the MLI involves two jurisdictions. Jeffrey Owens brought an example of PTT and limitation of benefits clause, where some countries may desire to apply their preferred option, and others disagreeing with that approach may desire other countries to apply their preferred option.

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[107] OECD, “ Matching database”, https://onedrive.live.com/View.aspx?resid=1F1E5CF1F8AAA36E!641&authkey=!AG2npWJwvkrO-pA

[108] Jeffrey Owens, *BEPS Implementation: The Role of a Multilateral Instrument,* International Tax Review 26, no. 9 (November 2015): 18-21, https://heinonline.org/HOL/P?h=hein.journals/intaxr26&i=519 p. 21

3.2 What derives from the qualities of the MLI

According to Joseph Morley[109], the MLI provisions do not address many of the OECD's primary concerns about BEPS. As was stated above BEPS Action Plan tackles BEPS by implementing amendments to domestic tax laws along with the treaty provisions. As the BEPS Project actions indicate, many of the primary opportunities for BEPS are really the result of domestic laws rather than provisions in treaties.[110] Thus, domestic law must address issues such as characterizing income to reflect what the OECD sees as economic reality, adjusting taxation of controlled foreign corporations (Action 3), and changing domestic law on transfer pricing (Action 13).[111] Joseph Morley believes that "although this issue is not unique to the particular text of the MLI, the need for domestic laws to change in order to comprehensively reduce BEPS severely limits the effectiveness of the MLI at reducing BEPS. Thus, there are relatively few binding obligations that signing the MLI inherently entails. Binding provisions include the requirement to express a desire to avoid double-taxation without providing opportunities for double nontaxation, adopt the principal purpose test, and commit to trying to reach an agreement with the other contracting tax jurisdiction on certain tax disputes arising under a CTA. However, the enforcement of these commitments is largely left to the individual tax jurisdictions. The mere fact that a tax jurisdiction ratifies the MLI does not inherently mean that it has committed to taking significant substantive measures to reduce BEPS".

The Convention provides for Mutual Agreement Procedure and arbitration (Part V and VI of the MLI) meaning that Jurisdictions should avoid reaching an agreement on tax treaty provisions. That is an example of how Jurisdictions should surrender their power of control on tax matters. As taxes are the primary means by which the taxing entities raise revenue, tax jurisdictions tend to strongly avoid giving up control of them.[112]

It is also important to mention that some jurisdictions such as the USA and Brazil decided not to sign the MLI. For that, the reasons should be elaborated. The USA is considered a country with substantial world business impact and it has a dominant position on international

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[109] Joseph Morley, *Why the MLI Will Have Limited Direct Impact on Base Erosion Profit Shifting*, Northwestern Journal of International Law & Business 39, no. 2 (Winter 2019): 225-248

[110] OECD, "Action Plan on Base Erosion and Profit Shifting", OECD PUBLISHING (2013), https://www.oecd.org/ctp/BEPSActionPlan.pdf

[111] Ibidem

[112] Joseph Morley, "*Why the MLI Will Have Limited Direct Impact on Base Erosion Profit Shifting*," Northwestern Journal of International Law & Business 39, no. 2 (Winter 2019): 225-248, p.245

tax policies. The USA claimed that the Convention targets North American firms in a disproportionate way thus the USA abides in its influence. [113] At the same time, Brazil expressed its desire not to sign the MLI but to make changes to DTTs on a bilateral basis.[114] That is contrary to the principle of developing the MLI, namely, to accelerate the negotiations between countries through a single instrument and save valuable time and resources spent in bilateral negotiations. The mere fact that as soon as such big jurisdictions do not take the MLI into consideration makes it possible to conclude that the MLI's impact is limited.

As Convention provides for reservations to its provisions, there are rules with respect to them. Countries may make reservations and they will be applied to all CTAs, it is not possible to pick and choose reservations for each CTAs separately. This approach eliminates the bilateral nature of DTTs by stipulating a single multilateral regime. Yariv Brauner's observation should be noted that "this scheme further shatters the myth that tax treaties are fully negotiated contracts among two countries based solely on their relative economic positions".[115]

As well there are gaps in coverage of the MLI. As the OECD Third Peer Review on Treaty shopping highlights as follows "throughout the 2020 peer review, gaps in the coverage of the MLI were identified. These gaps exist because the MLI is a flexible instrument that allows each signatory to decide which of its agreements it wishes to cover under the MLI. Thus, at the time of signature, signatories are required to deposit lists of agreements they want to modify. The MLI only modifies bilateral agreements listed by both treaty partners".[116] Those gaps lead to the

(-) 'one-way agreements', there is a case when Contracting Jurisdiction chose the particular DTT to be modified by MLI but the other Contracting Jurisdiction had not. Thus, it means DDT will not be affected by the MLI.

Interestingly that the reason for 'one-way agreements' is as follows. It is an acknowledgement that "in the course of the peer review, the OECD Secretariat liaised with some of the jurisdictions that are parties to those "one-way agreements" and asked why they had not been listed. In general, those agreements had not been listed under the MLI because their parties were planning renegotiations beyond the implementation of the

[113] Ramon Tomazela, "*Brazil's Absence from the Multilateral BEPS Convention and the New Amending Protocol Signed between Brazil and Argentina*", Kluwer International Tax Blog (Sep. 5, 2017)

[114] Ibidem

[115] Yariv Brauner, "McBEPS: The MLI - The First Multilateral Tax Treaty That Has Never Been," Intertax 46, no. 1 (January 2018): 6-17

[116] OECD (2021), *Prevention of Tax Treaty Abuse – Third Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/d6cecbb8-en Note 35

BEPS treaty-related measures".[117]

(-) 'waiting agreements', that is occurring when both Jurisdictions are members of the Inclusive Framework, but one of them did not sign the MLI. Under these circumstances there are no bilateral negotiations are expected. Those agreements will not be compliant unless they are listed under the MLI. Consequently, the other Jurisdiction should sign the MLI and list that agreement to be covered under the MLI, then it would become a CTA. From this perspective - the signing of the MLI by jurisdictions with large treaty networks would materially improve the coverage of the MLI.

The gaps in data should be illustrated. The OECD Matching database[118] makes it convenient to discover the current condition of the MLI adoption. The data as follows is taken from the database. As of April 21, 2022, there are 239 "one-way" agreements and 837 "waiting" agreements. Matched agreements count 3 642 out of 4 718 which are notified agreements. Consequently, those agreements will be either renegotiated on a bilateral basis (for "one-way" agreements) or the MLI signing will take place for the other Jurisdiction as well and agreements should be agreed to be a CTA (for "waiting" agreements).

3.3 Challenges in relation to Ukraine

As a way of reminding, the main novelties for Ukrainian tax policy are the introduction of the PPT and the introduction of standards for the duration of activities in Ukraine to recognize non-resident businesses as permanent establishments. These novelties correspond to Article 7 and Article 12 of the MLI, respectively.

So far the result of tackling BEPS is far from desirable. Businesses still can look for and use shortcomings and gaps not to pay taxes. Notably, Malta, Switzerland, and the Netherlands, known as popular countries actively used to build corporate structures with preferential tax regimes, did not take into account the MLI provisions to modify their DTTs with Ukraine. There is a reason behind that is that countries do not want to lose their sovereignty where sovereignty seems to be under increasing threat on many levels, beyond tax, and less cooperation threatens to

[117] OECD (2021), *Prevention of Tax Treaty Abuse – Third Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/d6cecbb8-en note 36

[118] OECD, " Matching database", https://onedrive.live.com/View.aspx?resid=1F1E5CF1F8AAA36E!641&authkey=!AG2npWJwvkrO-pA

result in a loss for all nations, especially the less powerful.[119] By way of derogation opting out from MLI the part of the business that will continue to operate by chance has been randomly eliminated, i.e. the changes introduced by the MLI will not be affected. Nevertheless, it is a matter of time and/or other more strict instruments.

The PPT is considered to be an obstacle for many usual tax evasion schemes. For instance, a large amount of investment in Ukraine came through controlled companies that did not carry out real activities but was used only for aggressive tax planning and minimization of tax deductions. A clear example of this is Cyprus, through which only in 2017 did Ukraine receive 27% of its investments. The PPT has already been used in Ukraine, as it was previously included in some DDTs. The essence of this test is to prove to the relevant state authorities that the tax benefit received in a transaction from one legal entity to another legal entity is not the main purpose of this transaction. The negative outcome may be that businesses can suffer from national regulatory authorities' manipulations. In the pursuit of tax deductions, the real sector of the economy may also suffer, which in turn will make Ukraine economically unattractive to foreign investors.

The numerous criteria of the PPT make it visible in what areas the labour input from the business side should be elaborated. Among them, a business shall check the powers of directors of foreign companies in terms of independence in making decisions on company management, revenue management, confirmation of operations in the country of registration (availability of office, qualified staff, business expenses), the presence of risks in doing business, the activity of the group as a whole, etc. Thus, the elaborating of a business strategy to confirm the activity and the presence of the office of a non-resident company should be performed.

[119] Sergio André Rocha, Allison Christians, *"Tax Sovereignty in the BEPS Era*", Kluwer Law International, ISBN-9789041167071,(2017), http://www.sarocha.com.br/wp-content/uploads/2017/06/Andre-Rocha_SOIT-60_Sergio-Andre-Rocha.pdf

4. WAR IN UKRAINE, TAXATION IMPLICATION

Undoubtedly, after the COVID-19 crisis, on the way to economic and social life recovery, the full-scale war that started on February 24, 2022, Ukraine encounters another crisis not only in terms of humanitarian matters but rigorous economic implications. In this chapter, I would like to discover what is predicted for the Ukrainian taxation system and its investment climate so far due to the circumstances.

There are, according to Valeria Tarasenko in the interview for Forbes[120], "major changes to the Ukrainian tax system during the war, including large reductions in the corporate income tax rate and value-added tax, and excise taxes on fuel". Valeria also mentioned "a relatively new tax regime created by the Ukrainian government to encourage the success of the IT services sector in Ukraine. It's been a boon for the IT industry during a war in which most sectors have been hit very hard economically".

In view of the economic decline, the Ukrainian government provided for the reduced rate for both corporate income tax and value-added tax. Currently, for the period of the martial law status, there is only one tax rate and one single tax - 2% in comparison with 18% and 20% respectively. The tax base for those is the revenue the company had in the previous quarter. The condition for businesses to pay taxes under this special regime is to pay taxes in advance. Also, in fact, it allows the exemption from value-added tax so that importing companies will not pay 20% as earlier. Before wat petroleum and petroleum-related goods were subject to excise tax in Ukraine, which has now on is eliminated. As well the value-added tax for those goods was reduced from 20% to 7%. There is also an advantage in terms of the administration of taxes - the repotting system was significantly simplified - for submitting tax returns and for paying taxes. As well as for this war period no tax audits are permitted.

There is a before-war governmental initiative to promote the growth of the IT sector in Ukraine. The Law "On stimulating the development of the digital economy in Ukraine", so-called Diia City Law[121], which provides much of tax privileges and legal privileges to companies which are working in the IT sector. Now, this field is considered the most survivable among others. Thus, the governmental support does not stay still.

According to this Law, incomes paid to employees or specialists engaged in the IT sector are taxed at the rate of 5%. There is also a permanent tax so-called military tax which counts at

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120 Forbes, "Examining The Ukrainian Tax Implications Of Russia's Invasion", (2022), https://www.forbes.com/sites/taxnotes/2022/04/26/examining-the-ukrainian-tax-implications-of-russias-invasion/?sh=183aa5ff363e

121 LAW OF UKRAINE, "On stimulating the development of the digital economy in Ukraine", (2021), 1667-IX, https://zakon.rada.gov.ua/laws/show/1667-20#Text

1.5%. Another benefit is the social contributions are to be paid around 55 USA dollars in a month. It provides very low taxes on incomes paid to employees or IT specialists engaged by IT companies. It's only 5 per cent personal income tax, 1.5 per cent military tax, and a very insignificant social contribution, which is around $55 per month, which is nothing. In substance, taxation of the IT industry is performed at very low tax rates. In comparison, other benefits encountered above are temporary, and the benefits related to this particular IT sector will probably last even after the war ends. Thus, it is extremely attractive for IT specialists to work and stay and become tax residents in Ukraine, because of low taxes. To become eligible to be taxed by preferential taxes company must be registered in Ukraine and its activities must relate to IT activities. It means that at least 90 per cent of revenues have to e received due to IT activities, where the range of those is broad. It may be either design or cybersecurity or programming, etc. Also, there are requirements of the number of employees - no less than 9 employees, and the average monthly salary is also stipulated, it should be approximately 1 200 euros.

It is thus an excellent way to support the economy by encouraging the field of business that is not suffering and there are expectations that it will stay in Ukraine. For international IT companies, it is a way to register a legal entity in Ukraine to optimise their taxation as well.

The international community also responded to the war in Ukraine in terms of change in taxation. A number of European countries implemented the tax rates decrease for fuel to reduce energy costs. As Josh White brings an example that "seventeen EU countries are pushing for value-added tax cuts to bring down the price of oil and gas over concerns of runaway inflation. These countries include Belgium, Cyprus, Greece, Italy, Ireland, the Netherlands, Portugal and Spain"[122].

Jared Johnson made some analysis about tax areas to be affected due to the matter this chapter is about. Thus, in relation to DTTs, "Senate Foreign Relations Committee (USA) is proposing a review of the current U.S.-Russia tax treaty. As the lists of Russian sympathizers—such as Belarus—and neutrals—such as India—grow, similar calls may be issued for their respective tax treaties. As a side note, the U.S.-Belarus tax treaty continues to be the old U.S.-USSR tax treaty. The committee isn't clear on what action will or can be taken, but the purpose remains consistent to target "oligarchs and their ill-gotten gains, identifying them, and then

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[122] International Tax Review, "*The UK joins the rest of Europe in cutting fuel duty*", (2022), https://www.internationaltaxreview.com/article/b1x96vmh574p1j/the-uk-joins-the-rest-of-europe-in-cutting-fuel-duty

seizing them." [123] What is captivating is that according to Jared Johnson: "Many of the actions already being taken serve this objective, so if the committee proposes action resulting from the review, it is likely to be innovative, contribute to developing precedent in international law, or both".[124] It entails that the international community will face new challenges and ways to the current situation.

For international businesses, it is a time to once again consider their transfer pricing arrangements. For instance, due to the trade restrictions namely sanctions imposed on the relationship with Russia and Belarus, the multinational enterprises face the problem. Citing the paper of Simmons-Simmons: "By doing business in Russia or Belarus through associated enterprises will undoubtedly question how to deal with the underlying contractual obligations that they have in place with their associated enterprises in those jurisdictions. Compliance with these rules is proving to be challenging largely because the scope of the sanctions is not seen as unequivocally clear".[125] Thus, the following adjustments to the transfer pricing arrangements should be performed in the near future, as to revise contracts and transfer pricing policies and restructure operations.

123 Bloomberg Tax , "*Seven Takes on the Tax Impacts of the War in Ukraine",* (2022), https://news.bloombergtax.com/financial-accounting/seven-takes-on-the-tax-impacts-of-the-war-in-ukraine

124 Bloomberg Tax , "*Seven Takes on the Tax Impacts of the War in Ukraine",* (2022), https://news.bloombergtax.com/financial-accounting/seven-takes-on-the-tax-impacts-of-the-war-in-ukraine

125 Simmons+Simmons, "*Implications from sanctions: blocked income*", (2022),https://www.simmons-simmons.com/en/publications/cl16bje7k17fz0a279jtkoshp/implications-from-sanctions-blocked-income

CONCLUSIONS

1. With the adoption of treaty-related recommendations by the BEPS Action Plan, which deals with hybrid mismatch arrangements, granting treaty benefits in inappropriate circumstances, the artificial avoidance of PE, and the dispute resolution mechanism, the issue arises with the implementation of those recommendations into the treaty network. It was already elaborated in this paper, that the MLI was developed to take the implementation role. This multilateral instrument is regarded as a solution for a swift transfer of the BEPS Action Plan into domestic law, such as in the case of Ukraine, where international law prevails over the national one. Domestic law amendments should also follow, Ukraine suffice that necessity, as recent adopted Laws correspond to the requirements set by recommendations of the BEPS Action Plan.

2. Political will predetermines the country's positioning in the international arena. Currently, Ukraine shows its readiness to make commitments on taxation and financial matters to be in line with developed countries. Ukraine cannot disregard the choice of developed countries to join the BEPS Action Plan and adopt the MLI in particular. Thus, Ukraine is on its way to accomplishing all the Actions under the BEPS Action Plan, and an analysis of both the economic side and the political will demonstrates that the benefits are undisputed and are desirable to achieve. The MLI makes it possible to drive the necessary changes to most DTTs in Ukraine, thus reducing the movement of the Ukrainian capital to low-tax jurisdictions in order to minimize tax liabilities, which, in turn, will increase budget revenues. Thus, the adoption of the MLI helps Ukraine to simultaneously implement Action 6 and 14 of the minimum standard of the BEPS Action Plan.

3. Part of the foreign direct investment flow in Ukraine is not genuine investment, and comes primary from the Jurisdictions with favourable tax rates and so-called offshore centers. From the bilateral taxation relationship perspective, those jurisdictions should eliminate the feature of more favourable countries in terms of tax rates and regime. The mere fact that, for instance, Cyprus does not stand outside the BEPS Action Plan recommendations and adopts the MLI, indicates that the advantages of profit shifting will be reduced. Thus, it is anticipated that the Ukrainian companies will not have an inventive to pay taxes abroad rather than in Ukraine, that narrative should be strengthened with the transparent and well-functioning domestic tax system.

RECOMMENDATIONS

1. Tax evasion is no longer a trend today. Leading countries are now fighting for business transparency and the right to collect taxes. The fact that Ukraine has joined this struggle is a positive signal. At the same time, it has a twofold influence. Ukraine should not impose strict tax rules, as developed countries do, otherwise, there is a risk businesses will cease operating in Ukraine. Consequently, the already weak economy will not stand that. Strict taxation also makes it more difficult to attract investors. On the one hand, Ukraine must ensure that taxpayers do not evade taxes by aggressive methods. On the other hand, Ukraine should lower domestic tax rates, simplifying the rules of tax administration. That should create a vision that paying taxes in Ukraine is profitable and desirable.

2. The BEPS Action Plan will primarily affect those who conduct transactions or create a company abroad with the sole purpose of tax evasion. Therefore, it is necessary for companies to analyze their international financial transactions and subsidiaries as they can be recognized as due to tax. It is necessary to modify them or prepare arguments for disputes with government agencies. The crucial is to prove that the recipient of the profit is the beneficial owner and that the beneficial owner has the real status of a tax resident abroad. In addition, PE provides that transactions must be economically justified, i.e. in the interests of real business, and not just to reduce taxes. In short, the essence and form of transactions must match.

3. The effectiveness of anti-offshore measures directly depends on the effectiveness of the legal system as a whole, financial discipline and the social responsibility of the residents and businesses in the country. Therefore I suggest bringing a clear understanding to the society of what offshore is. The peculiarity of that lays also in the absence of the definition of the offshore as well the list of the offshore countries should be revised on the regular basis. Thus, the updating of the Ukrainian list of offshore zones should be ensured taking into account EU legal rules and data from the Global Forum on Transparency and Exchange of Information for Tax Purposes and the OECD.

4. The automatic international exchange of information - Common Reporting Standard is to be introduced into Ukraine by 2023. From that follows that financial institutions will communicate taxpayers' sensitive information to the tax authorities. Currently, the Ukrainian government is labouring on the draft laws to adopt the grounds for further Common Reporting Standard implementation. The system must operate in a way to ensure bank secrecy is not an obstacle for tax authorities, and at the same time exclude the arbitrability of the access to the information by elaborating the precise steps and algorithm of the tax authorities. As the

Ukrainian legislative path to anti-tax avoidance policy was elaborated on above, its effectiveness relies not only on the legislation but the administrative side. The weak regulatory tools are at the stake for effective implementation of the anti-avoidance taxation rules, thus it is recommended to improve the knowledge and legal conscience of those who are concerned. It is also recommended to shift the burden of proof from the tax authorities.

6. To eliminate the tax base erosion, the approximation of the rules of the Ukrainian tax legislation on the income to the provisions of the European legislation in terms of the formation of the tax base should be made. By that, I suggest broadening the scope of expenditures that do not decrease the tax base applicable to all taxpayers, as well as introducing the boundaries for financial expenses to pay for debts.

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ABSTRACT

This paper outlines the measures developed to address issues created by DTTs. Those measures are Actions of the BEPS Action Plan that were taken into account by Ukraine in order to cooperate against BEPS. Master Thesis aims at Action 15 of the BEPS Action Plan and covers the MLI adoption in the Ukrainian context. The research provides the analysis of the efforts taken to implement the BEPS Action Plan recommendations as well as the process of the MLI adoption. The paper questions the need and benefits for Ukraine of taken endeavours in the light of the analysis of the investment environment. The provided analysis brings to the conclusion that the Ukrainian economy will benefit from adopted measures and the amount of profit shifted out of Ukraine will be reduced. The paper envisages what is left to be implemented in Ukraine to correspond to the international standards.

Keywords: base erosion and profit shifting, the BEPS Action Plan, the MLI, investments, Ukraine.

SUMMARY

This Master Thesis named "OECD Multilateral Instrument and Ukraine. Analysis, novelties and challenges" aims to elaborate the MLI necessity in general and its adoption in Ukraine. The need for the adoption was analysed through the economic perspective, and the benefits that the MLI brings were seen from the investments opportunities.

The Master Thesis is structures as follows:

1. The Multilateral Instrument is described in general, where the issues of the DTTs were illustrated, the benefits of the swift implementing mechanism were defined, and the main features of the Multilateral Instrument were characterised.
2. The Ukrainian experience in terms of the BEPS Action Plan recommendations adoption is described in the second chapter. In relation to the MLI adoption the reservations taken by Ukraine are described. This chapter also reveals how profit shifting operates in Ukraine, by what means it is done, and illustrates that possible changes should occur due to the MLI adoption.
3. The third chapter covers the peculiarities of the MLI, whereas the forth - shortly introduces to the harsh economic and tax shift due to the large-scale war.

Objectives set in this Master Thesis are (1) to analyse the BEPS Action Plan to identify the main problems in the context of its implementation and to analyse the MLI, to examine issues that may arise in connection with applying DTTs; (2) to analyse the BEPS Action Plan and the MLI adoption in Ukraine, to discover their implications on the current DTTs; (3) to explore the need to improve the tax legislation of Ukraine to bring it in line with international regulations and recommendations for the avoidance of double taxation, the erosion of the tax base for the purpose of corporate income tax.

On the basis of the conducted research, the Master Thesis concludes that adopted measures in Ukraine are aiming at combating the base erosion and profit shifting aspects of the business activities. The MLI adoption is regarded as a benefit for the Ukrainian tax bilateral relationship and its international positioning. In the course of the further research some recommendations are made for the further improvements.