Part Two

Chapter 14: Denmark

Peter Koerver Schmidt

Jakob Bundgaard

14.1. Anti-BEPS measures before the BEPS Project and policy impact of the BEPS Project

Danish tax law encompasses a significant number of specific anti-avoidance provisions (SAARs), and the extent of such legislation has increased considerably during the last decades.[1] Accordingly, Denmark had already addressed a number of the issues that later became part of the OECD/G20 Project on Base Erosion and Profit Shifting (BEPS).[2]

This development reflects that Danish policymakers for a long time have been determined to protect the Danish tax base against erosion caused by (aggressive) international tax planning, avoidance and evasion.[3] This interest has been increasing in recent years following events such as Lux Leaks and the Panama Papers, which were covered intensively by the Danish press. Thus, even though the BEPS Project itself has not gained much attention in the general media, topics such as aggressive tax planning, avoidance and evasion are often debated in the press. Moreover, the BEPS Project has gained much interest at the expert level and in Danish academic/professional literature.

The Danish government has consistently supported the BEPS Project and has actively tried to push the anti-tax avoidance agenda forward by participating in the preparation of the BEPS reports.[4] As the Danish government considers itself at the forefront of the global fight against aggressive tax planning, and as Denmark had already introduced a large number of anti-avoidance provisions prior to the BEPS Project, the latter is not expected to dramatically change the Danish corporate tax landscape.

However, the BEPS Project has already had some impact, as the transfer pricing guidelines issued by the Danish authorities have been amended (Actions 8-10) and as Denmark has introduced rules on country-by-country reporting (Action 13) in order to reflect the outcome of the BEPS Project.[5] Moreover, a general anti-avoidance rule (GAAR) applicable to Danish tax treaties has been introduced (Action 6).[6] The GAAR introduced the OECD principal-purpose test and was actually adopted before the BEPS Action 6 Final Report[7] was published. At the same time, the new GAAR of the Parent-Subsidiary Directive (2011/96/EU) was implemented.[8] This EU GAAR also applies to transactions covered by the Merger Directive (2009/133/EC) and the Interest and Royalties Directive (2003/49/EC). Even though the wordings of the GAAR in the Parent-Subsidiary Directive and the OECD principal-purpose test are not identical, it is the view of the Danish parliament that the two provisions should be interpreted in the same way.[9]

1. Parts of this national report are based on the authors' contribution to *Tax Avoidance Revisited: Exploring the Boundaries of Anti-Avoidance Rules in the EU BEPS Context* (A.P. Dourado ed., IBFD 2017), Online Books IBFD. This chapter represents the legal situation up to 21 Aug. 2017.
2. P.K. Schmidt, *Corporate Taxation and the International Challenge* , Nordic Tax Journal 2, pp. 113-131 (2014). It is difficult to conclude to what extent the Danish development has been directly influenced by prior reports issued by the OECD and the European Union. However, it seems certain that the international developments, at least indirectly, have had some influence. *See* e.g. sec. 14.5. on Denmark's response to the work of the OECD and European Union concerning harmful tax practices.
3. E.g. the recommendation issued by a committee of public civil servants established on 22 Nov. 1983. *See* DK: Recommendation 1060 (1985).
4. DK: Press releases, Ministry of Taxation, 16 Sept. 2014, 17 Apr. 2015, 12 Apr. 2016 & 23 Feb. 2017.
5. *See* sec. 14.6.
6. DK: *Ligningsloven* [Tax Assessment Act], 1942 with later amendments, sec. 3(2) [hereinafter LL 1942].
7. OECD/G20, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Action 6: 2015 Final Report* (OECD 2015), International Organizations' Documentation IBFD [hereinafter *Action 6 Final Report* (2015)].
8. Sec. 3(1) LL 1942; Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast), art. 1(2)-(4), EU Law IBFD.
9. DK: Preparatory remarks to Bill L 167 (2014/2015). *See also* J. Bundgaard, *Internationale omgåelses- og misbrugsklausuler i national skatteret* , in *Den evige udfordring – omgåelse og misbrug i skatteretten* , pp. 239-280 (J. Bundgaard et al. eds., Ex Tuto 2015).

As an EU Member State, Denmark also has to implement the rules of the Anti-Tax Avoidance Directive (2016/1164/EU) (ATAD), which was adopted in July 2016.[10] As Denmark already has a high number of specific anti-avoidance measures in place, and because the directive contains only minimum rules, it is the opinion of the Ministry of Taxation that only minor adjustments of the Danish rules will be necessary.[11] However, it will be necessary to introduce a GAAR, as no generally applicable statutory GAAR currently exists in Danish tax law.[12] It is expected that a bill introducing the GAAR and the necessary adjustments to the relevant SAARs, will be put forward in the next parliamentary year, i.e. 2017/2018.

14.2. Measures against hybrid mismatch arrangements: BEPS Action 2

Denmark already had so-called linking rules in place before the OECD initiated the BEPS Project. Accordingly, Denmark has introduced provisions on hybrid as well as reverse hybrid entities such that the domestic tax treatment in some situations depends on the tax treatment in other jurisdictions.[13] Both provisions could be seen as a reaction to tax planning based on the US check-the-box rules.[14]

Thus, if a company or association is treated as a transparent entity under the tax rules of a foreign state, with the effect that the company's income is to be included in the income of an affiliated company in this foreign state, the company must – if certain conditions apply – be reclassified as a transparent entity for Danish tax purposes. The objective of the provision is to mitigate the possibility of "creating" deductible interest expenses in Denmark in situations where the foreign recipient is not taxable for the interest payments, as these payments should be considered internal transfers within the same entity pursuant to the tax rules in the foreign state.[15]

Conversely, certain tax-transparent entities are to be reclassified as separate taxable entities if more than 50% of the shares or voting rights are held directly by foreign investors, and the tax domicile of such foreign investors is in a country in which the Danish entity is treated as a taxable entity or in a non-EU Member State that does not have a tax treaty with Denmark.[16] Here, the aim is to prevent taxpayers from exploiting different entity classifications in order to "create" double non-taxation.[17]

Cross-border tax arbitrage by way of using hybrid financial instruments has been curbed both inbound and outbound. Therefore, if a company or association, etc., is indebted or similarly obligated to an individual or company resident in another country and the claim under foreign tax rules is considered paid-in capital, the debt is also to be regarded as equity with respect to the Danish tax computation. The reclassification means that interest payments and capital losses are considered to be non-deductible dividend payments.[18] The objective of this provision is to abolish the potentially asymmetrical tax treatment of certain hybrid financial instruments.[19]

In addition, the applicability of the inbound dividend participation exemption has been limited to situations where the foreign paying company is not allowed under the tax laws of the country of its residence to deduct the payments that are considered dividends under Danish tax law.[20] The provision prevents Danish companies from receiving tax-exempt dividends in situations where the foreign paying company can deduct the payment.[21] The wording of the provision was slightly adjusted in 2015 following the amendment of article 4 of the Parent-Subsidiary Directive.[22]

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10. Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/1 (2016), EU Law IBFD [hereinafter ATAD].
11. DK: Memos to the parliament's Tax Committee, SAU annex 128 and 215 (2015/2016).
12. The GAARs mentioned above (*see* sec. 3(1)-(2) LL 1942) have a more limited scope, as they apply only to the explicitly mentioned Directives and Danish tax treaties.
13. DK: *Selskabsskatteloven* [Corporate Tax Act], 1960 with later amendments, sec. 2 A and 2 C [hereinafter SEL 1960].
14. For more on the Danish rules on hybrid entities and hybrid financial instruments, *see* J. Bundgaard, *Coordination Rules as a Weapon in the War against Tax Arbitrage* , 67 Bull. Intl. Taxn., pp. 200-204 (IBFD 2013), Journals IBFD, who demonstrates the frequent Danish use of coordination rules based on a principle of correspondence.
15. DK: Explanatory notes to Bill L 119 (2003/2004).
16. Sec. 2 C SEL 1960.
17. DK: Explanatory notes to Bill L 181 (2007/2008).
18. Sec. 2 B SEL 1960. The provision only applies if the foreign individual or company has decisive influence on the Danish company or the companies are considered to be in a group of companies; cf. the principles in sec. 2 LL 1942. *See* J. Bundgaard, *Cross-Border Tax Arbitrage Using Inbound Hybrid Financial Instruments Curbed in Denmark by Unilateral Reclassification of Debt into Equity* , 62 Bull. Intl. Taxn. 1, pp. 33-43 (2008), Journals IBFD. For a more general tax analysis of such instruments, *see* J. Bundgaard, *Hybrid Financial Instruments in International Tax Law* (Wolters Kluwer 2017).
19. DK: Explanatory notes to Bill L 110 B (2006/2007).
20. Sec. 13(1)(2) SEL 1960.
21. DK: Explanatory notes to Bill L 23 (2008/2009) and to Bill L 84 (2010/2011), where the scope of the provision was expanded to cover situations where a lower-tier foreign subsidiary obtains the deduction. Originally, this rule was introduced in 2006 as part of another provision with regard to declared dividends. *See* the former sec. 31 D(2) SEL 1960; Bill L 110 A (2006/2007).

A more general anti-double dip provision prohibits deduction of expenses which – due to foreign tax rules – may be deducted from income that is not included when calculating Danish tax. Moreover, the provision prevents double dips arising from double depreciation of leasing assets.[23]

In general, the Danish linking rules described above are not entirely the same as the rules suggested by the OECD or prescribed in article 9 of the ATAD,[24]as the effects of the Danish rules are often a reclassification of the entire entity or payment and not merely the deprivation of a deduction or an exemption. Moreover, as a main rule, the current Danish linking rules apply only to intra-group hybrid mismatches.

As stated above, it is not yet known how the Danish parliament will react to the ATAD. However, as the rules in the Directive in some ways have a broader scope (i.e. relations between independent parties are also covered), certain changes to the Danish rules must be made.[25]

In the authors' view, the BEPS Action 2 Final Report (Action 2) contains an interesting and thorough analysis of the tax challenges related to hybrid mismatch arrangements. Moreover, the authors are in general more positive towards the more limited effects of the rules proposed in Action 2 (deprivation of a deduction or an exemption) compared to the more radical legal effects of the current Danish linking rules (reclassification of the entire entity or payment).

14.3. Controlled foreign company rules: BEPS Action 3

Denmark introduced controlled foreign company (CFC) legislation in 1995. The objective behind the introduction of CFC legislation was to prevent erosion of the Danish tax base caused by the increasing openness of borders to flows of capital.[26]More specifically, the aim was to prevent Danish companies from establishing subsidiaries in low-tax countries and moving income and assets there.[27]

Under the Danish CFC regime, a Danish company is liable to tax on the income of a Danish or foreign subsidiary if (i) the subsidiary is controlled by the affiliated group of companies, (ii) the tainted income (CFC income) of the subsidiary amounts to more than 50% of the total taxable income and (iii) the financial assets of the subsidiary exceed 10% of the total assets.[28]If the CFC rules apply, the Danish parent company must include the total income of the subsidiary, provided that the income of the subsidiary is positive. A tax credit is granted for taxes paid by the subsidiary.[29]

The scope of the Danish CFC regime for companies was expanded in 2007 in order to bring the rules in line with EU law following the decision of the European Court of Justice in the *Cadbury Schweppes* case (C-196/04).[30]Accordingly, in principle, the Danish CFC regime applies to income in both foreign and Danish subsidiaries. However, it has been argued that different treatment still exists, as the application of the CFC rules entails an additional tax burden for the Danish parent company only if the subsidiary is resident in another country in which the level of taxation is lower than the Danish level of taxation.[31]

No amendments have yet been made to the Danish CFC rules following the finalization of the BEPS Action 3 Final Report (Action 3)[32]and the adoption of the ATAD.[33]The current Danish rules have similarities with the alternative mentioned in article 7(2)(a) of the ATAD, and the Danish government has openly stated that the alternative mentioned in article 7(2)

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22. DK: Bill L 98 (2014/2015).
23. Sec. 5 G LL 1942. In addition sec. 31(2) SEL 1960 contains a provision aimed at mitigating the possibility of deducting losses in a permanent establishment in Denmark twice, i.e. both in Denmark and abroad.
24. OECD/G20, *Neutralising the Effects of Hybrid Mismatch Arrangements – Action 2: 2015 Final Report* (OECD 2015), International Organizations' Documentation IBFD [hereinafter *Action 2 Final Report* (2015)].
25. Memos to the parliament's Tax Committee, *supra* n. 11 .
26. DK: Explanatory notes to Bill L 35 (1994/1995).
27. Denmark has also adopted rules on so-called "investment companies", under which shareholders are subject to taxation based on a mark-to-mark principle. DK: *Aktieavancebeskatningsloven* [Act on Taxation of Capital Gains on Sale of Shares], 2005 with later amendments, sec. 19.
28. Sec. 32 SEL 1960. Sec. 8(2) SEL 1960 contains a CFC rule for foreign permanent establishments.
29. P.K. Schmidt, *Dansk CFC-beskatning i et internationalt og komparativt perspektiv* (Karnov 2013); P.K. Schmidt, *Denmark* , in *The Taxation of Foreign Passive Income for Groups of Companies* pp. 259-277 (IFA Cahiers vol. 98A, IBFD 2013), Online Books IBFD.
30. Bill L 213 (2006/2007); DK: ECJ, 12 Sept. 2006, C-196/04 , *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue* , ECJ Case Law IBFD.
31. P.K. Schmidt, *Are the Danish CFC Rules in Conflict with the Freedom of Establishment? – An Analysis of the Danish CFC Regime for Companies in Light of ECJ Case Law* , 54 Eur. Taxn. 1, pp. 3-9 (2014), Journals IBFD.
32. OECD/G20, *Designing Effective Controlled Foreign Company Rules – Action 3: Final Report* (OECD 2015), International Organizations' Documentation IBFD.
33. ATAD, *supra* n. 10 .

(b), in the opinion of the government, is not sufficiently robust against tax avoidance.[34] However, it is not yet clear which changes will be made to the current rules. The Ministry of Taxation is of the opinion that only minor adjustments are needed concerning the definition of “tainted income”, as the current definition does not include income from so-called invoicing companies that add little or no economic value.[35]

Action 3 seeks to identify the “building blocks” of effective CFC rules. In the authors’ view, however, the need to ensure sufficient flexibility with respect to the tax systems and policy objectives of various countries has entailed that the recommendation on CFC legislation has, more or less, been reduced to a kind of catalogue which sets out different options that countries can choose between, and which do not add significant value.

14.4. Interest deductions and other financial payments: BEPS Action 4

The deductibility of financing expenses may in general be restricted under three sets of rules for corporate taxpayers:[36]

- *Thin capitalization test*: A company is thinly capitalized if the debt-to-equity ratio exceeds 4:1, provided that the controlled debt exceeds DKK 10 million. If a company is deemed to be thinly capitalized, interest expenses and capital losses, on the portion of the controlled debt that should have been converted to equity to avoid the limitation, are not deductible. However, if the company is able to substantiate that similar financing could have been obtained without security from other group companies, the company will be allowed to deduct interest expenses even though the 4:1 ratio is exceeded.
- *Asset test*: Net financing expenses may be deducted only to the extent that the expenses do not exceed a standard portion – presently 3.2% (2017) – of the tax base of certain qualifying assets.
- *EBIT test*: Net financing expenses may not exceed 80% of earnings before interest and taxes.

All three rules apply both domestically and internationally.

The aim of the thin capitalization rules, which were originally introduced in 1998, is to counter the shifting of tax revenue from Denmark caused by intra-group loans from foreign group companies to Danish subsidiaries on terms that could not have been achieved between independent parties.[37] Therefore, the thin capitalization rules apply only to controlled debt.

The asset test and the EBIT test were introduced in 2007, as the parliament found that the CFC rules and the thin capitalization rules that were in force at the time did not provide sufficient protection of the Danish tax base in situations where Danish companies were acquired by private equity funds in highly leveraged buyouts.[38] Both the asset test and the EBIT test apply only to net financing expenses exceeding DKK 21.3 million (2017). The two limitations apply to all kinds of debt – not just controlled debt.

The Danish EBIT test has some resemblance to the best-practice approach described by the OECD in the BEPS Project (Action 3), but there are also some deviations.[39] The Danish rule is based, for example, on earnings before interest and taxes (EBIT), whereas the approach described by the OECD is based on earnings before interest, taxes, depreciation and amortization (EBITDA).[40] In addition, the benchmark ratio used in the Danish EBIT test (80%) is higher than the benchmark ratio indicated by the OECD (10%-30%), but here it must be taken into consideration that the ratio used in the Danish rule is applied to a lower amount (as the amount includes depreciation and amortization). Finally, Danish law does not contain a group ratio rule.

In the same vein, it is not yet clear how Denmark will react to the adoption of the ATAD, i.e. the EBITDA-based rule in article 4 of the ATAD. The Danish Implementation Council has proposed that the current Danish rules on interest limitation be simplified.[41] This suggestion seems to entail that Denmark have only one interest limitation rule, and that this rule be

34. Memos to the parliament’s Tax Committee, *supra* n. 11 .
35. For a comparison between the Danish (and other Nordic CFC regimes) and the CFC rule in the proposal for the ATAD, *see* P.K. Schmidt, *Taxation of Controlled Foreign Companies in Context of the OECD/G20 Project on Base Erosion and Profit Shifting as well as the EU Proposal for an Anti-Tax Avoidance Directive: An Interim Nordic Assessment*, Nordic Tax J. 2, pp. 87-112 (2016).
36. Secs. 11, 11 B and 11 C SEL 1960. *See* M. Tell, *Fradragsbeskæring af selskabers finansieringsudgifter* (Jurist- og Økonomforbundets Forlag 2012).
37. DK: Explanatory notes to Bill L 101 (1997/1998).
38. DK: Explanatory notes to Bill L 213 (2006/2007).
39. OECD/G20, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments – Action 4: 2015 Final Report* (OECD 2015), International Organizations’ Documentation IBFD.
40. Even though the *Action 2 Final Report* (2015) recommends the use of a rule based on EBITDA, it is stated that the best practice allows a country the flexibility to have a rule based on EBIT.
41. Minutes of the meeting, meeting of the Implementation Council on 14 Mar. 2017.

designed in a way similar to the rule contained in the Directive. In the authors' view, this suggestion appears to be prudent, as the current Danish rules are too comprehensive and difficult to administer. Moreover, the authors find the EBITDA-based rule proposed by the OECD, and reflected in the ATAD, to be straightforward and efficient.

14.5. Countering harmful tax practices: BEPS Action 5

The review of potential harmful tax regimes and practices carried out by the OECD in connection to the BEPS Action 5 Final Report[42]did not include any Danish regimes or practices. Moreover, no current Danish special tax regimes or practices seem particularly vulnerable to being categorized as harmful.[43]

In the 1998 report from the Code of Conduct Group on Business Taxation (The Primarolo Report), Danish rules on taxation of inbound and outbound dividends were identified as measures with harmful features.[44]In short, the reason was that domestic and foreign dividends were generally exempt when received from a subsidiary in which the Danish parent company held at least 25% of the capital. In addition, dividends paid to foreign parent companies that held at least 25% of the capital in a Danish distributing company were generally exempt from Danish withholding tax on dividends.[45]Thus, it was found that the establishment of an intermediate Danish holding company could be used to circumvent (withholding) tax regimes of other countries by channelling the dividends through the Danish entity.

Even though the Danish government argued against classifying the Danish rules on dividends as harmful, an amendment to the Danish rules was adopted in 2001. Under the amended rules, a foreign non-EU parent company is to be exempt from Danish withholding tax only if taxation of the dividends is reduced or eliminated under a tax treaty between Denmark and the state in which the receiving parent company was domiciled. In the explanatory notes, the Danish parliament explicitly stated that the amendment is to be seen as a contribution to the ongoing EU and OECD efforts directed at countering harmful tax practices.[46]

With respect to corporate tax, EU State aid rules do not seem to have had any particular impact on Danish measures that could potentially be considered harmful.[47]

14.6. Implementation of transfer pricing suggestions (BEPS Actions 8-10 and 13) and mandatory disclosure rules (BEPS Action 12)

Danish transfer pricing legislation – which dates back to 1960 – was reformed in 1998, following a number of judgments by the Supreme Court in cases on "interest fixation", in which the tax authorities had lost.[48]The aim of the reform was to provide a clear legal basis for transfer pricing adjustments, in order to avoid erosion of the Danish tax base and to ensure equal tax treatment of Danish and foreign-owned companies. The regime is based on the arm's length principle which should be interpreted in line with article 9(1) of the OECD Model Tax Convention on Income and on Capital[49](OECD Model) and the OECD Transfer Pricing Guidelines (OECD Guidelines).[50]This is stated in the explanatory notes to the bill that introduced the rules back in 1998.[51]The transfer pricing rules apply to "controlled transactions" and cover both cross-border transactions and domestic transactions.[52]

42. OECD/G20, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance – Action 5: 2015 Final Report* (OECD 2015), International Organizations' Documentation IBFD.
43. Denmark has not introduced an IP regime. However, Denmark has, for example, special tax regimes for oil and gas activities and shipping activities (tonnage tax).
44. Report from the Code of Conduct Group on Business Taxation (The Primarolo Report), Annex C (1998).
45. These rules were adopted in 1998, as the previous, and stricter, rules were found to be too difficult to administer. In addition, the parliament expected that more lenient rules would make it more attractive to place parent companies in Denmark. Bill L 53 (1998/1999).
46. DK: Bill L 99 (2000/2001). The mentioning of the efforts of the OECD must be considered a reference to this report; OECD Committee on Fiscal Affairs, *Harmful Tax Competition: An Emerging Global Issue* (OECD 1998). For more on the 2001 amendment of the Danish rules, *see* N. Bjørnholm, *L 99: Forslag til lov om ændring af selskabsskatteloven* , Skat Udland, p. 299 (2000); A.K. Føgh & C. Winther, *Nye holdingregler vedtaget* , Skat Udland, p. 179 (2001).
47. The Danish shipping taxation regime, which enables shipping companies to be taxed based on the amount of tonnage instead of ordinary corporate taxation, was notified to the commission, and accepted under Aid N 563/2001-Denmark. For more on this regime and State aid, *see* S.H. Baerentzen, *Expansion of the Danish Tonnage Tax Scheme* , 44 Intertax 1, pp. 63-69 (2016).
48. DK: TfS 1996, 642 H; TfS 1998, 199 H; TfS 1998, 238 H.
49. Most recently, *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Models IBFD.
50. *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 2017), International Organizations' Documentation IBFD [hereinafter *OECD Guidelines*]. *See also* J. Wittendorff, *Armslængdeprincippet i dansk og international skatteret* , p. 262 et seq. (Thomson Reuters 2009).
51. DK: Explanatory notes to Bill L 101 (1997/1998). *See also* Wittendorff, *supra* n. 50 , at pp. 291-295.

In the literature, it has been assumed that the Danish courts are unlikely to make a strict distinction between older and newer versions of the OECD Guidelines, as long as the new Guidelines can be considered within the original scope of the arm's length principle.[53]With regard to the BEPS Final Reports on transfer pricing (Actions 8-10, which should now be considered a part of the OECD Guidelines),[54]it has been argued in the literature that new Danish legislation should be adopted in order to transpose the result into Danish law.[55]

This argument is based on the opinion that the outcome of the BEPS Final Reports on transfer pricing deviates significantly from the previous guidelines, and that these reports therefore constitute a material change to the arm's length principle. However, the Danish tax authorities do not share this point of view. Thus, the authorities argue that the result of the OECD/G20 BEPS Project merely constitutes a clarification and an elaboration of the way in which the arm's length principle is applied in practice. Accordingly, in the view of the Danish tax authorities, there is no need to amend Danish law, and therefore the tax authorities have already brought their own transfer pricing guidelines in line with the new OECD Guidelines.[56]

Denmark has introduced country-by-country reporting based on the recommendations set out in the OECD 's BEPS Action 13 Final Report.[57]The content of the requirements are specified in a statutory order, and the requirements apply to groups with a consolidated turnover exceeding DKK 5.6 billion. The new rules have effect for income years starting 1 January 2016 or later,[58]and for now the reported information will not be disclosed to the public. However, it has been politically agreed to support the current EU proposals for public country-by-country reporting.[59]The Minister of Taxation has also issued a new statutory order on transfer pricing documentation based on the updated version of chapter 5 in the OECD Transfer Pricing Guidelines.[60]

Danish tax law does not contain mandatory disclosure rules concerning tax matters, such as the rules discussed by the OECD.[61]However, recently it was politically agreed to further examine whether mandatory disclosure rules should be introduced.[62]Should the parliament wish to introduce such rules, this could very likely be done without being in breach of Denmark's Constitution.

In the authors' view, it cannot be excluded that mandatory disclosure rules could be of some benefit for the tax authorities, but the authors are concerned that, among other things, it will be more than difficult to draft rules that strike the right balance between ensuring that the right information is disclosed and keeping the administrative burdens sufficiently low. Moreover, in the authors' view, it may be difficult to reach a satisfactory level of legal certainty and protection for taxpayers.

14.7. Implementation of the multilateral instrument: BEPS Action 15

As stated in section 14.1., the Danish government has consistently supported the BEPS Project and has actively attempted to push the anti-tax avoidance agenda forward. Therefore, Denmark has also participated in the negotiation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (2017)[63](MLI), and signed it on 7 June 2017.

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52. Sec. 2 LL 1942. Danish transfer pricing practices do not seem to have been particularly influenced by the United Nations, *Practical Manual on Transfer Pricing for Developing Countries* (2017). See also J.L. Cooper et al., *Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners* (World Bank 2016).
53. Wittendorff, *supra* n. 50 , at pp. 291-295.
54. OECD/G20, *Aligning Transfer Pricing Outcomes with Value Creation – Actions 8-10 Final Reports* (OECD 2015), International Organizations' Documentation IBFD.
55. J. Wittendorff, *Nyt Armslængdeprincip* , SR-Skat, p. 34 et seq. (2016).
56. DK: *Den Juridiske Vejledening* [The Tax Authorities' Legal Guidelines], 2017, in particular sec. C.D.11.2.1.1.
57. DK: *Skattekontrolloven* [Tax Control Act], 1946 with later amendments, sec. 3 B (10-16). *See* Bill L 46 (2015/2016). *See also* OECD/G20, *Transfer Pricing Documentation and Country-by-Country Reporting – Action 13: 2015 Final Report* (OECD 2015), International Organizations' Documentation IBFD.
58. DK: Statutory Order 1133 of 27 Aug. 2017. The statutory order also implements Council Directive 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation. For more on the Danish implementation of country-by-country reporting, *see* e.g. A.S. Dalgas & M.S. Clemmensen, *Øgede krav til transfer pricing dokumentation og implementering af land-for-land rapportering* , SR-Skat, p. 241 et seq. (2016).
59. Ministry of Taxation, *Agreement on enhanced efforts against international tax avoidance and evasion* (17 May 2017).
60. DK: Statutory Order 401 of 28 Apr. 2016.
61. OECD/G20, *Mandatory Disclosure Rules – Action 12: 2015 Final Report* (OECD 2015), International Organizations' Documentation IBFD.
62. Ministry of Taxation, *supra* n. 59 .
63. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (7 June 2017), Treaties IBFD [hereinafter MLI].

The negotiation position of the Danish government was not made publicly available during the negotiations, but in connection to the signing of the MLI on 7 June 2017, it became clear that Denmark has embraced the MLI only to a limited extent. With regard to Danish tax treaties, Denmark wants 65 of these treaties to be covered by the instrument. However, apart from subscribing to the minimum standard (where Denmark chose the principal-purpose test), Denmark has decided to make use of all reservations possible.[64]Moreover, Denmark has opted not to apply the rules on mandatory arbitration – which has already been criticized in the media by a number of larger Danish business organizations.[65]

Regarding the ratification of the MLI, the standard parliamentary procedure for ratification of Danish tax treaties will be followed. Thus, the MLI, in line with all other tax treaties, must be approved by an act of parliament.[66]

Despite the fact that a number of interpretational difficulties will probably arise, the MLI, in the authors' view, seems to be a swift and expedient way to amend a very high number of international tax treaties.[67]

14.8. Specific issues regarding tax treaty provisions: BEPS Actions 2, 6, 7 and 14

Generally, Danish tax treaties follow the OECD Model with respect to both structure and content.[68]However, deviations can occur, and some Danish treaties also include elements from the UN Model.[69]Recently, Denmark has not been very active in concluding new tax treaties, and the recommendations from the BEPS Project have not yet been generally implemented.

As stated in section 14.7. , Denmark chose the principal-purpose test (instead of the limitation-on-benefits clause) when signing the MLI. This was not surprising, given that Denmark has already introduced the principal-purpose test in domestic law,[70]and that Danish tax treaties normally do not include limitation-on-benefits rules.[71]

With respect to bilateral tax treaty provisions, it is, for the time being, difficult to assess whether any specific problems will be caused by the implementation of the MLI. Obviously, there is some risk of conflict.[72]However, with respect to general anti-avoidance provisions, the risk of such difficulties does not appear particularly high, as (i) Danish tax treaties generally do not include general anti-avoidance provisions and (ii) specific treaty provisions that allow the application of domestic anti-avoidance provisions are not common in Danish treaties.[73]

It is difficult to evaluate the MLI at this early stage. However, as a point of departure, it seems to be a swift way to implement the treaty-related output of the BEPS Project. Moreover, the authors are somewhat optimistic that the instrument will strike a sensible balance between the need for common ground, in the form of minimum standards, and the need for flexibility,[74]even though the approach cannot be expected to close down all opportunities for aggressive tax planning. The end result will obviously depend on how the MLI is used and interpreted in the years to come by taxpayers as well as tax authorities. In particular, it will be interesting to see how tax authorities will handle the discretionary powers transferred to

64. OECD, *Status of List of Reservations and Notifications at the Time of Signature: The Kingdom of Denmark* (7 June 2017), available at http://www.oecd.org/tax/treaties/beps-mli-position-denmark.pdf .
65. For the time being, it is not clear whether consolidated versions of the relevant tax treaties will be prepared and what legal value such versions might have. How potential language problems will be dealt with is also not clear.
66. For more on the Danish parliamentary procedure with respect to ratification of tax treaties, *see* A. Michelsen, *Tax Treaty Interpretation in Denmark* , in *Tax Treaty Interpretation* , pp. 63-76 (M. Lang ed., Kluwer Law 2001).
67. On the interpretational issues regarding the multilateral instrument, *see* e.g. M. Lang, *The Interpretation of the Multilateral Instrument* , Skattepolitisk Oversigt, p. 1 et seq. (2017).
68. Michelsen, *supra* n. 66 ; S. Ulstrup, *Den danske modeloverenskomst* , Skat Udland, p. 69 (2001); J. Sneum, *Forhandling af dobbeltbeskatningsaftaler og visse aspekter af disse – 1. del* , Skat Udland, p. 131 (1990). *See also* The Tax Authorities' Legal Guidelines, at sec. C.F.8.1.1.
69. *United Nations Model Double Taxation Convention between Developed and Developing Countries* (2017), Models IBFD. *See also* A.N. Laursen, *OECD's Modeloverenskomst og FN's Modeloverenskomst – en sammenligning* , Skat Udland, p. 367 (2014).
70. *See* sec. 14.1.
71. Limitation-on-benefits rules can be found in a few Danish tax treaties. Accordingly, art. 26(3) of the treaty between the Danish Trade Organization's Taipei Office and the Taipei Representative Office in Denmark contains a limitation-on-benefits clause with a broad and general scope. In addition, the *Convention between the Government of the United States of America and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* art. 22 (19 Aug. 1999) (as amended through 2006), Treaties IBFD, contains a more specific limitation-on-benefits clause. *See* J. Bundgaard & P.K. Schmidt, *Denmark* , in *Tax Treaties and Tax Avoidance: Application of Anti-Avoidance Provisions* pp. 261-279 (IFA Cahiers vol. 95A, IBFD 2010), Online Books IBFD.
72. For more on the general risk of conflict between existing treaties and the multilateral instrument, *see* N. Bravo, *The Multilateral Tax Instrument and Its Relationship with Tax Treaties* , 8 World Tax J. 3, pp. 279-304 (2016), Journals IBFD.
73. Bundgaard & Schmidt, *supra* n. 71 , at pp. 261-279.
74. *See also* P. Valente, *BEPS Action 15: Release of Multilateral Instrument* , 45 Intertax 3, pp. 219-228 (2017), who is also quite optimistic in this regard.

them in the context of the principal-purpose test. Although these tools may prove useful in order to mitigate tax avoidance, in the authors' view, they also cause concerns as regards legal certainty for taxpayers.[75]

75. J. Hattingh, *The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?* , 71 Bull. Intl. Taxn. 3/4 (2017), Journals IBFD.