COUNTERING HARMFUL TAX PRACTICES: THE FEASIBILITY OF COMPULSORY AND SPONTANEOUS EXCHANGE OF INFORMATION ON TAX RULINGS

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Section 1: Introduction

The Organisation for Economic Cooperation & Development (OECD) has consistently formulated model international tax rules which member countries and non-member countries have adopted in the creation of their double tax agreements (DTAs). In furtherance of this pivotal role,[1] the committee on fiscal affairs (CFA) of the OECD in 1998 commenced a project against harmful tax competition in the form of harmful tax practices. This was, according to the 1996 mandate from the ministers of the OECD Council, to 'develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions and the consequences for national tax bases, and report back in 1998'.[2] Malawi is estimated to have lost US $ 43 million tax revenue to an Australian multinational

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1 A P Morriss and L Moberg, 'Cartelizing taxes: Understanding the OECD's Campaign against Harmful Tax Competition' (2011) University of Alabama School of Law Working Paper 1, 15, 20, 25 &47 <http://ssrn.com/abstract=1950627> accessed 11 November 2015.

2 OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publishing 1998) 3.

enterprise (MNE) as a result of the tax competition mechanism operated by the government.[3]

In the 1998 report produced by the CFA and approved by the OECD council, measures and recommendations were made on tackling harmful tax competition eg the forum on harmful tax practices (FHTP) was created to implement the guidance and recommendations of the report.[4] There have been supplementary works by the OECD in this area.[5] Notwithstanding these, in 2013, there was a renewed drive against base erosion & profit shifting (BEPS) by multinational enterprises (MNEs).[6] Consequently, the CFA approved the BEPS Action plan which was subsequently endorsed by the G20.[7] The BEPS Action plan has fifteen Action items and Action item 5, which is the focus is this article is concerned with harmful tax practices. The OECD considers these as some of the more important

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3 ActionAid, 'An Extractive Affair- How one Australian mining company's tax dealings are costing the world's poorest Country millions'2

<https://polcms.secure.europarl.europa.eu/cmsdata/upload/03543a54-0473-473c-836d-b743427476ec/Malawi_tax_report_updated_table_16_june.pdf> accessed 11 November 2015.

4 OECD (n 2) 44-45, 53-55. That there be publication of the conditions for rulings in order to ensure transparency.

5 Progress reports were published in 2000, 2001, 2004 & 2006 See: OECD, 'The OECD's Project on Harmful Tax Practices: 2006 Update on Progress in Member Countries' 2. A publication was made in 2004 to give guidance on identifying harmful preferential regimes using the guidance in the 1998 Report. See: OECD, 'The OECD'S project on Harmful Tax Practices: Consolidated Application Note Guidance in applying the 1998 report to preferential tax regimes' (CAN 2004) <http://www.oecd.org/ctp/harmful/30901132.pdf> accessed 11 November 2015. The Global forum on taxation created in 2001, was restructured as 'Global forum on Transparency & EOI for tax purposes' (Global Forum) in 2009. This is now the premier international body for ensuring implementation on internationally agreed standards of transparency and EOI in tax matters. <http://www.oecd.org/tax/transparency/abouttheglobalforum.htm> accessed 11 November 2015.

6 The first press release on BEPS by the OECD was on 12 February 2013. See OECD, 'BEPs Newsroom'. <http://www.oecd.org/tax/beps-news.htm> accessed 11 November 2015. While the first BEPs recommendations which included action 5 were published on 16 September 2014. See: OECD, 'OECD releases first BEPs recommendations to G20 for international approach to combat tax avoidance by multinationals' <http://www.oecd.org/newsroom/oecd-releases-first-beps-recommendations-to-g20-for-international-approach-to-combat-tax-avoidance-by-multinationals.htm> accessed 14 July 2015.

7 OECD, *Counter Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance* (OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing 2014) 13; OECD, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report*, (OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing 2015) (2015 Action 5 Final Report) 11.

'pressure points' in its campaign against BEPS.[8] By Action item 5, the FHTP was given a mandate to renew the work on harmful tax practices with priority in two areas namely: (a) improving transparency, including compulsory spontaneous exchange on rulings[9] related to preferential regimes and (b) on requiring substantial activity for any preferential regime.[10]

As rulings have recently come under scrutiny especially in the European Union (EU),[11] this article focuses on the priority area aimed at creating a model international framework for compulsory spontaneous exchange on rulings. The second priority area is beyond the scope of this article.

In an effort to stem harmful tax practices, Action 5 seeks to engage all countries, not just country members of the OECD, hence the article examines the legal validity of rulings in an OECD member country and a non-OECD country. The United Kingdom (UK) is chosen as a jurisdiction on which to focus because its patent box regime has recently been probed and found to be somewhat preferential; in fact the regime is regarded as being inconsistent with the new nexus approach, hence a call for amendment.[12] Furthermore, it is an example of an OECD country actively involved in the BEPS Action plan. Nigeria is selected as it is a non-OECD country. Apart from being one of the biggest economies in Africa,[13] Nigeria has been brought into the BEPS project as a developing country.[14] Moreover, Nigeria thrives on tax incentives which, are, arguably,

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8 See OECD (n 7) 9, 14; 2015 Action 5 Final Report (n 7) para 4.

9 References to rulings in this article generally mean rulings from the tax perspective and not rulings in the general sense i.e. rulings by a body other than the regular courts of the country, usually the tax authority.

10 See OECD (n 7) 9; 2015 Action 5 Final Report (n 7) para 1.

11 Commission, 'Report from the commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the Regions (Report on Competition Policy 2014)' COM (2015) 247 final 15-16. <http://ec.europa.eu/competition/publications/annual_report/2014/part1_en.pdf> accessed 11 November 2015.

12 See 2015 Action 5 Final Report (n 7) paras 147-148, 153.

13 OECD, *Global forum on transparency and Exchange of Information for Tax purposes Peer Reviews: Nigeria 2013: Phase 1: Legal and Regulatory Framework*, (OECD Publishing 2013) 10.

14 OECD, 'Developing Countries and BEPS' <http://www.oecd.org/ctp/developing-countries-and-beps.htm> accessed 11 November 2015. Nigeria is actively involved in the BEPS project through its direct participation in the CFA. See also 2015 Action 5 Final Report (n 7) para 154 on the need to engage third countries in the process of curbing harmful tax practices and BEPS.

preferential regimes used to attract foreign investment and more importantly, the OECD has now advocated for the monitoring of such regimes.[15]

The article provides circumstantial examination of the readiness of OECD and non-OECD countries to absolve the outcomes of Action 5 on the first priority area (transparency). It seeks to examine the feasibility (particularly in relation to the UK and Nigeria) of countries' compulsorily exchanging rulings. This is relevant because Action 5 concerns changing the current international tax rules to make them more transparent. However, where different national provisions have diverging features, there could be a problem of feasibility of the proposed change. As the BEPS final outcomes released on 5 October 2015 have been endorsed by the G20 finance ministers and the G20 heads of States during their summit in November 2015 are expected to take a decision on these outcomes,[16] this article seeks to analyse issues concerning them.

Section two begins with an examination of the nature of rulings. The binding nature or otherwise of rulings in the U.K & Nigeria is appraised. In this regard, the article analyses pieces of legislation, cases, principle(s), administrative practices and other regulations on rulings in these jurisdictions to determine their true legal nature.

Section three considers the nexus between rulings and BEPS as well as tax competition and harmful tax practices. Transparency and exchange of information (EOI) are analysed as the bases to the solution to BEPS and harmful tax practices. Section four examines the framework of the OECD for compulsory spontaneous exchange on rulings. Current efforts made by the EU in the investigation of ruling system in Member States (MSs) and the proposal for amendment of a Directive[17] are also assessed. Furthermore, the benefits of the proposed framework are reviewed vis a vis the challenges. All these aim to determine whether the framework will work in practice.

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15 Federal Inland Revenue Service- Tax Legislations and Tax Policy, 'National Tax Policy: Federal Ministry of Finance' (April 2012) 19 <http://www.firs.gov.ng/Tax-Management/Pages/Tax-Legislations.aspx> accessed 11 November 2015; 2015 Action 5 Final Report (n 7) para 150.

16 See (n 7); OECD, 'G20 finance ministers endorse reforms to the international tax system for curbing avoidance by multinational enterprises' <http://www.oecd.org/tax/g20-finance-ministers-endorse-reforms-to-the-international-tax-system-for-curbing-avoidance-by-multinational-enterprises.htm> accessed 11 November 2015.

17 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1 (Council Directive 2011/16/EU).

Section five concludes the work and highlights factors which countries could consider in implementing the framework.

Section 2: Legal Nature of Rulings

In the standard legal parlance, ruling is a decision of the court whether interlocutory or final, on a matter before it.[18] However, from the tax perspective it has a different meaning. Romano views it from the perspective of the interpretative role of the tax authority for democratising the relation between the State and taxpayers.[19] This is not all encompassing. For instance, in Sweden, this interpretative role is performed by an independent body other than the tax authority.[20] In order to fine-tune their potentially taxable activity to the provisions of the fiscal legislation, taxpayers will normally seek to know the actual implication of the legislation as errors here can create a huge financial burden on the taxpayers.[21] Hence, by a ruling, there is guidance by the tax administration to specified taxpayer(s) with regard to their tax circumstance and on which there is a right to rely.[22] This definition is linked more to advance tax rulings (ATRs) and cannot be said to properly define general rulings. Notwithstanding this, a ruling is a confirmation given to taxpayers, whether potential or actual, general or specific, by the ruling authority on how their tax bills will be calculated under the relevant tax law.[23]

The legal bases for rulings in the tax administration process include: statutory provisions, administrative regulations, administrative principles like legitimate expectation, etc.[24] Some countries have a statutory ruling system while in others rulings are operated informally and enforced by virtue of principles like legitimate

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18 *Black's Law Dictionary* (10th edn, 2014) 1533.

19 C Romano, *Advance Tax Rulings and Principles of Law: Towards a European Tax Rulings System?* (Volume 4, Doctoral Series International Bureau of Fiscal Documentation Academic Council 2002) 3-5.

20 MJ Ellis, 'Advance Rulings- General Report' (1999) 84b Cahiers De Droit Fiscal International 23.

21 E Andersson, 'Advance Rulings by the Authorities at the Request of a Taxpayer General Report for the 19th International Congress on Financial and Fiscal Law' (1965) 50B Cahiers De Droit Fiscal International 7.

22 See OECD (CAN 2004) (n 5) 47.

23 Commission, 'Combatting Corporate tax avoidance: Commission Presents Tax Transparency (Fact Sheet)' (March 2015) Memo 15/4609 2.1. <http://europa.eu/rapid/press-release_MEMO-15-4609_en.htm> accessed 11 November 2015.

24 C Romano, 'Private rulings system in EU member states: a comparative survey', (2001) Volume 41 No 1, European Taxation 20; See also C Romano (n 19) 256.

expectation, etc. The United States (US) and Sweden have statutorily developed procedures for administering ATRs.[25] On the other hand, and as will be shown below, some countries inter alia the UK and Nigeria do not have a general statutory ruling system.

2.1. Nature of Rulings

Rulings have been classified as: general rulings, ATRs, advance pricing arrangements (APAs),[26] public rulings, private rulings, formal rulings, informal rulings, international rulings, letter rulings (determination letters),[27] comfort rulings,[28] etc. These classifications cannot be regarded as water-tight as rulings practices vary from country to country where they sometimes overlap.[29]

General rulings are the authorised construction of the law implemented by the tax authorities or affirmation on the application of the law.[30] Unlike ATRs they are not given upon requests of a specific taxpayer but issued in the public interest of good implementation of the tax system.[31] They are similar to public rulings.[32] ATR is a binding statement from the tax authority upon request by a potential taxpayer on the tax treatment and implication of a contemplated transaction or factual situation.[33] Romano refers to it as private ruling.[34] ATRs are an application of tax law to potential transactions in contrast with completed transactions.[35] They are unilateral pronouncements given by the tax administration.[36] The use of 'binding statement' to define ATRs can be argued as not representative of the whole picture as will be shown below.

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25 C Silfverberg, 'National Report: Sweden'; R Culbertson and C Halphen, 'National Report: United States' (1999) 84b Cahiers De Droit Fiscal International 565-580, 627-657.

26 See Romano (n 19) 21. Romano conceives this as an alternative dispute resolution ruling method that gives certainty to TP rules by resolving TP disputes harmoniously.

27 ibid 78. These are ATRs peculiar to the US.

28 See Romano (n 19) 20.These were peculiar to the US and are now prohibited.

29 See Ellis (n 20) 23.

30 J Prebble, *Advance Rulings on Tax Liability* (Victoria University Press for the Institute of policy studies 1986) 37.

31 ibid.

32 See Ellis (n 20) 22.

33 ibid 22; C S Triplett and JC Maloney, 'Advance Rulings in the United States' (2001) Vol 55 No 9 Bulletin for international taxation 407.

34 See Romano (n 24) 18.

35 P Holdstock, 'United Kingdom Reports for the 19th International Congress on Financial and Fiscal Law' (1965) 50B Cahiers De Droit Fiscal International 249.

36 See Romano (n 19) 485.

APAs are rulings used in the transfer pricing (TP) sphere having regard to the transfer prices in future controlled transactions i.e. intra group transactions over a fixed duration.[37] They are utilised inter alia to determine the appropriate arm's length price for the intra group transaction(s). Official operation of APAs began in the USA in 1991,[38] in the Netherlands in 1994,[39] in the UK in 1999[40] and Nigeria in 2012.[41]

APAs and ATRs can be distinguished. ATRs are unilateral decisions of a tax administration, while APAs which are agreements between one or more tax authorities and the potential taxpayer(s) can be unilateral (involving one tax administration), bilateral or multilateral (involving more than one tax authority).[42] APAs relate more to factual matters than the interpretation & application of the law and are focused on settling transactions or series of transactions related to the potential taxpayer in cross-border cases.[43] On the other hand, ATRs are concerned with one or more specific transactions. In addition, APAs usually have audit mechanisms to determine whether there are changes during the term of the APA.[44] Formal rulings are dependent on the specific statutory authority (save for international rulings).[45] While ATRs not classified as formal rulings, are informal rulings.[46] International rulings involve tax authorities of more than one State e.g. bilateral and multilateral APAs.[47]

The foregoing demonstrate that ruling is utilised for future taxable transactions[48] as opposed to completed taxable transactions; where the transaction has taken place, the taxpayer will have to go through the normal assessment process.[49] However,

37 OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD Publishing 2010) 168.

38 See Romano (n 19) 485.

39 ibid.

40 HMRC, 'Seeking clearance or approval for a transaction' <https://www.gov.uk/seeking-clearance-or-approval-for-a-transaction> accessed 11 November 2015.

41 The Income Tax (Transfer Pricing) Regulations No 1, 2012 (Nigeria TP Regulations).

42 See Romano (n 19) 132-136, 486.

43 ibid.

44 See OECD (n 37) 171.

45 See Ellis (n 20) 23.

46 ibid.

47 ibid.

48 Or prior to the filing of tax returns.

49 See Ellis (n 20) 23.

rulings are not given in all cases. The negative cases vary from country to country and include: cases involving questions of law already before the courts, etc.[50] Prebble is undoubtedly correct when he argued that it is more beneficial to have fewer negative cases and such cases should not be in absolute terms so as to improve the intelligence gathering capacity of the tax administration.[51] Though the number of the negative cases depends on the underlying tax policy of the relevant jurisdiction, a State that wishes to encourage better cooperation between the taxpayers and the tax administration may consider limiting the negative cases as a means to achieve the goal.

In countries with a ruling system, certain procedural and substantive essentials ought to be appropriately considered for an effective operation of the system. These issues include: person(s) authorised to apply for rulings, fees, publication, body authorised to issue rulings, possibility of appeal, duration of validity of ruling, etc.[52]

2.2. Reasons for Rulings

The literature contain a number reasons why countries have introduced and operate a ruling system whether formally or informally. Consequently, ATR is argued to be an invaluable tool in modern tax administration and compliance.[53] These reasons vary from country to country.[54] Some of these reasons[55] are analysed below:

1. Certainty about tax treatment

   The principle of certainty is part of the rule of law which ought to be a feature of the tax system.[56] Certainty allows taxpayer(s) to engage in

50 See Prebble (n 30) 126.

51 ibid.

52 See Romano (n 19) 207-280.

53 See Ellis (n 20) 24.

54 See Romano (n 19) 70-71. In the USA, it was the 'complexity & technicality' of the tax laws. In the Netherlands, it was 'to give certainty to foreign taxpayers investing in the Netherlands'. In Italy, it was 'for simplification of the tax system' & to encourage participation by taxpayers in unclear areas of the tax system like anti-avoidance legislation.

55 See Prebble (n 30) 26; Ellis (n 20) 25; OECD (n 37) 174. Other reasons include: the introduction of Anti-Avoidance Rules with extreme provisions that catch even transactions with genuine commercial purpose; using APAs to prevent double taxation etc.

56 D Southern, *Taxation of Loan Relationships and Derivative Contracts* (9th edn, Bloomsbury Professional ltd 2012) 1.

business and tax planning as there is predictability to taxation.[57] Knowledge of the tax repercussions of a transaction enables parties to continue with the transaction with conviction.[58] Prebble argues that this is beneficial to the economy of a country as it allows for trial of novel business transactions.[59] Uncertainty in the tax treatment of a proposed transaction deters investment in a new venture, especially those of an innovative kind, thereby stalling economic activity.[60]

Arguments that a ruling system brings certainty may not entirely be the case. This is because in countries like the UK there are limits on the enforceability of ruling like change of law by Parliament, different interpretation given by the court, non-disclosure, tax avoidance schemes etc. In other words, a ruling given by the tax authority may subsequently not be adhered to by the tax authority. Furthermore, within the EU, the State Aid investigations by the commission on rulings issued by tax authorities, counter the argument that a ruling system brings certainty. This is because if these rulings are eventually found to be State Aid as prohibited by EU Law, the rulings and steps taken by the taxpayer(s) concerning those rulings may be vitiated.

2. Complexity of tax laws

Tax statutes are not always straightforward in terms of interpretation. This is explained by factors like: the particularly varying nature of economic life, likelihood of tax avoidance, etc.[61] Rulings can neutralise the complexity of a tax system as they serve as dialogue mechanism between taxpayers and tax authorities.[62] This benefit to taxpayers was acknowledged in *R v Inland Revenue Commissioners, ex p MFK Underwriting Agents Ltd* by Judge J thus: 'The practice exist because the revenue has concluded that it is of assistance to the administration of a complex tax system and ultimately to the benefit of the overall tax yield.'[63]

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57 FBD Colcavagno, 'Advance Rulings on Application of tax treaties' (2007) Volume 47 No 8, European Taxation 398; 2015 Action 5 final report (n 7) para 93.

58 *R v Inland Revenue Commissioners, ex p Matrix Securities Ltd* [1994] STC 272 (HL) 292 (Lord Browne Wilkinson).

59 See Prebble (n 30) 22.

60 *The Queen on the Application of GSTS Pathology LLP Serco Ltd, Guy's and St Thomas' NHS Foundation Trust v. Commissioners for Revenue & Customs* [2013] EWHC 1801 (QB) |13|; [2013] STC 2017.

61 See Andersson (n 21) 7.

62 See Romano (n 24) 21.

63 [1990] 1 WLR 1545 (QB) 1573.

3. Ruling as information

As a result of the difficulty of understanding the relevant tax law, a ruling serves as means of information to the potential taxpayer.[64] The rulings process acknowledges the guidance needed by potential taxpayers in application of tax laws and that the regular court process may be slow and costly. A ruling system has a positive connection with the taxpayers' right to the latest information. Hence, it is argued that laws that are well-known and thoroughly understood are more readily adhered to.[65] This view does not consider the possibility that thorough knowledge of the tax law is a necessary tool that can be used in aggressive tax planning that cause the erosion of a country's tax base. Once a taxpayer knows the scope of the law, there is always a desire to take tax advantage of what is not prohibited by the letter of the law even though it goes against the spirit of the law.

4. Uniformity of tax treatment of taxpayers by tax authorities

Where previous rulings are used in subsequent potentially taxable transactions with similar circumstances and conditions, there will be uniformity of the policy of the tax authority. Publication of these rulings or availability of these rulings to other taxpayers is key for uniformity here.[66] This brings consistency in the application of the tax laws but publication has to be balanced with the protection of taxpayers' confidentiality.[67]

However, uniformity in tax treatment will vary according to the binding effect of these rulings. This is because where previous rulings are not binding on the tax authorities, they may not be applied to future potentially taxable transactions.

5. Minimisation of Controversy and Litigation

Some have argued that rulings reduce the frequently recourse to the regular courts in order to settle tax disputes. When faced with an adverse ruling, the potential taxpayer will seek less disputable way(s) of proceeding with the transaction, or may simply decide not to proceed.[68] This is because of the burden of litigation to businesses in the forms of: finance, time and uncertainty of outcome. Consequently, the chance of a challenge to the transaction by the tax authority in court is greatly reduced.

However, it is argued that the above is subject to the condition that the ruling authority does not resile from its position. As will be shown below,

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64 See Prebble (n 30) 21.

65 G Delorme, 'The dialogue between the tax administration and the taxpayer up to the filing of the tax Return-General Report' (1980) 65a Cahiers De Droit Fiscal International 44.

66 See Prebble (n 30) 22.

67 See Romano (n 24) 22.

68 See Ellis (n 20) 26.

where the authority resiles, the taxpayers usually approach the court for remedy. Furthermore, as adverse rulings can be appealed against in some countries, this can be said to increase litigation.[69]

6. Facilitation of enforcement of Tax Laws

This is a benefit from the perspective of the tax administration. A ruling system enables the tax authorities to be current on the emerging trends in business and tax planning.[70] This is particularly useful at the time of assessment as a novel and complex transaction must have been familiarised with at the time of ruling. During assessment, the tax authority will not be encountering such transaction for the first time. Use of rulings saves time during the audit process as this process will be confined to confirmation of facts as stated in the ruling.[71] An effectively designed ruling system has the capacity of improving the functionality of the self-assessment system.[72] The peculiar advantage of APAs is that they reduce clash between different tax authorities.[73]

2.3. Legal validity of Ruling in the UK

In the UK, the majority of national taxes are administered and collected by Her Majesty's Revenue & Customs (HMRC).[74]

A formal and general statutory rulings system does not exist in the UK but some tax statutes usually provide for clearance procedures akin to a ruling system.[75]

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69 ibid.

70 See Prebble (n 30) 23.

71 SR Lainoff, 'Perspective of the United States of America' in International Fiscal Association, *Advance Ruling: Practice and Legality: Proceedings of a Seminar held in Cancun, Mexico, in 1992 during the 46th Congress of the International Fiscal Association* (Vol.17a Kluwer Law and Taxation Publishers 1994) 31.

72 See Romano (n 19) xi, 69. The adoption of a self-assessment system influenced the development of ATRs.

73 J Tiley and G Loutzenhiser, *Advanced Topics in Revenue Law Corporation Tax; International and European Tax; Savings; Charities* (Hart Publishing 2013) 379.

74 OECD, *Global forum on transparency and Exchange of Information for Tax purposes Peer Review Report Combined: Phase 1 + Phase 2 incorporating Phase 2 ratings United Kingdom* (OECD Publishing 2013) 15

75 B.R. Obuoforibo, *United Kingdom - Corporate Taxation* sec. 1., Country Surveys IBFD 15 <http://0-online.ibfd.org.catalogue.ulrls.lon.ac.uk/kbase/#topic=doc&url=/highlight/collections/gtha/html/gtha_uk_s_001.html&q=B.R.+Obuoforibo%252C+United+Kingdom+-Corporate+Taxation+sec.+1.%252C+Country+Surveys+IBFD+countries+kingdoms+taxations&WT.z_nav=Navigation&colid=4915> accessed 11 November 2015.

HMRC publishes statements of practice which explain its interpretation of tax legislation and the way it applies the law in practice.[76] Furthermore, HMRC interpretations are published in the HMRC's tax bulletin.[77] These statements of practice and interpretations are however not binding as both the taxpayer and HMRC may reach different interpretation.[78]

APAs are regulated under the Taxation (International and Other Provisions) Act (TIOPA) 2010, s 218-230. There is also a Statement of Practice 'SP' 2/10 that provides guidance on how HMRC interpretes the APA legislation and implements it in practice.[79] The duration of the APA is usually between 3-5 years.[80] Furthermore, there is a statement of practice on APAs relating to thin capitalisation i.e. financing companies more with loan than equity.[81] The binding tariff information ruling given by HMRC for the correct classification of goods imported or exported, is binding on all customs in the EU and is generally valid for 6 years.[82]

HMRC will in practice usually give ruling (advance clearance) for some potentially taxable transactions.[83] These include: controlled foreign companies transactions (TIOPA 2010, pt 9A); proposed share exchange transactions (Taxation of Chargeable Gains Act (TCGA) 1992, s 138(1)); proposed demerger transactions (Corporation Tax Act (CTA) 2010, s 1091); etc.[84] Advance clearance will not be given to proposed transactions which in the view of HMRC constitutes tax avoidance.[85]

Informal rulings are given by the tax authority in some cases. There is neither obligation on the taxpayer to seek informal ruling nor duty on the tax authority to

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76 A Redston, *Tolley's Yellow Tax Hand book 2014-2015 Part 2* (Lexis Nexis 2014) 1993.

77 ibid 2241.

78 See Redston (n 76) 1993, 2241.

79 Advance Pricing Agreements 2010, SP 2/10.

80 ibid paragraph 25.

81 Advance Thin Capitalisation Agreements under the APA Legislation 2012, SP 1/12; TIOPA 2010, s 229(4).

82 HMRC, 'Seeking Clearance or Approval for a Transaction' <https://www.gov.uk/binding-tariff-information-rulings> accessed 11 November 2015.

83 HMRC, 'Seeking Clearance or Approval for a Transaction' <https://www.gov.uk/seeking-clearance-or-approval-for-a-transaction> accessed 11 November 2015.

84 ibid.

85 ibid.

respond to such request.[86] Where these rulings are issued, there are circumstances in which the courts allow the tax authority to renege from the ruling and there are also circumstances where the courts do not. Some cases are examined below.

In *MFK Underwriting Agents Ltd,*[87] there was a proposal for investment in a certain type of bond (index linked gilt-edged stock) by some Lloyds' underwriters holding premium funds. The investment was to be structured to produce capital gains rather than income as a means of reducing tax liability. Consequently, the financial institutions proposing to issue such bonds and the potential investors approached the tax authority seeking assurances on the likely tax treatment of the prospective bonds. Series of assurances were made by different officials of the tax authority that the indexation uplift reflected in the sale price or redemption value of the bond would be taxed as a capital gain and not as income. The investment was made, subsequently on the 27 October 1988, the tax authority resolved that the indexation element should be taxed as income.[88] Hence, the investors applied for judicial review of the 1988 decision on the ground that it was inter alia an abuse of power.[89]

The issue for determination was whether the tax authority was precluded from seeking to tax the indexation uplift element of the bonds as income rather than capital gain.[90] Bingham LJ elucidated on the two conditions under which an informal ruling binds the tax authority.[91] The first is that the taxpayer must have fully disclosed all the facts relating to the taxable transaction.[92] Secondly, the ruling or statement relied on must be unequivocal.[93] Bingham LJ also noted that the doctrine of legitimate expectation which is rooted in fairness from a two way perspective also makes an informal ruling binding on the tax authority.

The Court consequently held inter alia that the tax authority was not precluded and there was no abuse of power. This is because though the tax authority has the managerial discretion to issue ruling, no clear statements were given by the

86 PN Hobbs, 'United Kingdom National Report' (1999) 84b Studies on International Fiscal Law Cahiers De Droit Fiscal International 601, 604; *R v Inland Revenue Commissioners, ex p Camacq Corporation and another* [1989] STC 785 (QB) 791.

87 See (n 63).

88 ibid 1550, 1562.

89 1550.

90 1551.

91 1569-1570.

92 1569.

93 ibid.

officials. Moreover, in some of the assurances sought for the potential tax treatment, there was no full disclosure of all the material facts. This case demonstrates the problem of an informal ruling system where there is no designated authority to issue rulings. Here, there were different officials issuing out varying interpretation of the law.

In *Matrix Securities Ltd,*[94] there was a unit trust scheme devised for investors to qualify for capital allowances under the Capital Allowances Act 1990. The vendor of the scheme sought advance clearance from the local inspector of taxes that investors in the scheme would qualify for certain amount of capital allowances. The inspector gave the assurance sought in a letter of 27 July 1993. Subsequently, the tax authority revoked the clearance.

The issue for determination was whether the tax authority was entitled to revoke the clearance.[95] The Court held inter alia that the tax authority was entitled to make such revocation as the vendor was involved in a tax avoidance scheme and there was non-disclosure of a vital piece of information by the vendor in obtaining the ruling (i.e. the vendor gave misleading information).[96] The scheme was designed to obtain £38 million initial allowances in circumstances where only £7.2 million initial allowances were actually available.[97] Here, the ruling was given by a tax inspector who was not in a specialist division familiar with such schemes which would have not approved the scheme in question.[98] It highlights the problem that can arise with informal rulings where there is no designated ruling authority.

In *R (on the application of Davies & anor) v Commissioners for Her Majesty's Revenue & Customs; R (on the application of Gaines-Cooper) v Commissioners for Her Majesty's Revenue and Customs,*[99] the issue was whether the taxpayers had been resident in the UK for the relevant tax periods. The taxpayers had relied on certain paragraphs in the Inland Revenue booklet IR 20 published by the tax authority for the circumstances necessary to be regarded as non-resident in the UK for tax purposes.

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94 See (n 58).

95 ibid 275, 287, 292.

96 293. Lord Browne-Wilkinson gave lack of abuse of power by the tax authority as the reason for his decision. This is because the vendor was aware of a letter from a specialist division of the tax authority stating that the authority will not be bound by future advance clearances given by the local tax inspector.

97 281.

98 282.

99 [2011] UKSC 47, [2011] 1WLR 2625.

The Court held inter alia that from the circumstances of the case and evidence before the court, there was no basis for the taxpayers to have legitimate expectation based on the booklet of the tax authority. The booklet was general guidance by the tax authority on when an English resident subsequently became a non-resident hence not liable to pay taxes of the UK. The booklet construed as a whole did not clearly create legitimate expectation.

In *GSTS Pathology LLP Serco Ltd, Guy's and St Thomas' NHS Foundation Trust,*[100] a ruling was given by HMRC on exemption from value added tax (VAT) for a proposed transaction (supplies of pathology services). Here, HMRC had initially issued a ruling in 2008 that the proposed structure was not tax exempt from VAT (i.e. taxable at the standard rate). It subsequently gave another ruling in 2010 that the structure was tax exempt and the implementation of this ruling was to start from 1st May 2013.

An injunction was sought to restrain the implementation of the 2010 ruling. The Court held inter alia that the taxpayers were entitled to an interim injunction restraining HMRC from implementing the 2010 ruling that significantly changed the position of the earlier ruling on the same issue. This is because the taxpayers had a legitimate expectation in the light of the earlier ruling of HMRC.

The above highlight that rulings are legally valid tools used by the HMRC in tax administration. However, the decisions of the courts imply that informal rulings are binding to the extent that the taxpayer has a legitimate expectation to rely on the ruling and it is an abuse of power for the tax authority to extract tax contrary to the ruling.[101] The doctrine of legitimate expectation means that where the tax authority so conducts itself in a way that creates a genuine projection that certain course will be followed, it would normally be unfair if the authority were allowed to deviate from that course to the detriment of the taxpayer who entertained the projection, especially if he has acted on it.[102] However, this legitimate expectation is not seen in absolute terms as there are situations when rulings given may be subsequently revoked even though they have been genuinely relied on e.g. change of the law by the legislature, different interpretation given by the court,[103] overriding public interest,[104] non- disclosure

100 See (n 60).

101 See (n 58) 292.

102 See (n 63) 1569-1570.

103 See (n 60) 20.

104 See (n 60) 22.

of full facts, tax avoidance schemes etc.[105] In other words, under the laws of the UK, rulings are not always binding on the tax authority.

The principles in these cases counter the argument that the use of rulings brings certainty to tax. If these rulings can be subsequently held not to be binding in certain circumstances, then it is argued that rulings do not always bring certainty.

2.4. Legal validity of Ruling in Nigeria

Nigeria is a federal State with a single tax authority at the central level while the various component states making the federation have their respective tax authorities.[106] As the focus of the work in on taxes paid by companies, the relevant tax authority is the Federal Inland Revenue Service (FIRS) as companies and allied matters are within the exclusive competence of the Central Government.[107]

Nigeria has no statute on rulings. However, the TP Regulations as formulated by the FIRS govern only APAs.[108] The provisions of the regulations are largely similar to the model in the OECD TP Guidelines.[109] APAs here are to apply to controlled transactions for a period not exceeding three years.[110] Some cases show that rulings are informally used in practice by the FIRS in tax administration. These cases are examined below.

In *Halliburton West Africa Limited v Federal Board of Inland Revenue,*[111] the taxpayer/appellant,[112] a non-resident company entered into an agreement with its

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105 See also: *Camacq Corporation and another* (n 86); *R v Inspector of Taxes, ex p Brumfield* [1989] STC 151 (QB).

106 See OECD (n 13) 12.

107 Section 4(2)(3) &Items 32 & 59 under Part 1 of 2nd Schedule Constitution of the Federal Republic of Nigeria (CFRN) 1999 as amended; Sections 1, 2 & 1st Schedule of the FIRS (Establishment) Act 2007 No.13 (FIRS Act).

108 See (n 41), Regulations 7 & 8.

109 See OECD (n 37); Regulation 11 states that the regulations shall subject to relevant tax laws be applied in accordance with the OECD TP Guidelines as may be updated from time to time. As a result of this provision and the BEPS Action Plan on TP, changes to the OECD TP Guidelines will automatically become applicable under Nigerian law.

110 Regulation 7 (7).

111 (2006) 7 Commercial Law Reports Nigeria (CLRN) 138.

112 The case was an appeal from a specialised tax Court known as the Body of Appeal Commissioners where the taxpayer had lost. This specialised Court is now known as the Tax Appeal Tribunal (TAT). Section 59 & 5th Schedule of FIRS Act.

obtain contracts from third parties in Nigeria. These contracts to be billed in US dollars were executed by the taxpayer and Halliburton Nigeria. Under this arrangement the taxpayer derived income and it also paid Halliburton Nigeria 100% of its operating expenses in executing the contracts in Nigeria plus management fee of 4% of the taxpayer's revenue derived in Nigeria from such contracts. The tax authority issued notices of additional assessments to tax on the taxpayer in the total sum of $6,972,248 with regard to certain tax periods for which self-assessment tax returns had been filed and tax liabilities paid by the taxpayer.

Hence, the taxpayer brought an action challenging the additional assessment on the ground inter alia that such additional assessments were not in conformity with earlier representation made by the tax authority to the taxpayer. The representations were that the tax authority was ready to accept recharges (i.e. money paid by the taxpayer to Halliburton Nigeria) as allowable deductions from a non-Nigerian company's turnover in determining the company's total assessable profits.

One of the issues for determination before the Federal High Court (FHC) was whether a legitimate expectation was created in favour of the taxpayer having regard to representation made by the tax authority.[113] Although the taxpayer won the case on another ground,[114] the court rejected the argument of the taxpayer on legitimate expectation. According to the court the representation was an information circular issued to the general public and as such neither law nor representation.[115] The FHC held that the maker of the information circular was giving his personal opinion on point of law. Therefore no legitimate expectation was created in favour of the taxpayer.

When the case came before the Court of Appeal (CA),[116] the decision of the FHC was overruled but the CA made an obscure pronouncement on the principle of legitimate expectation. The CA relying inter alia on *MFK Underwriting Agents Ltd,*[117] held that reliance on the doctrine of the legitimate expectation by the

113 See 2006 (n 111) 147.

114 158. On ground that not allowing the deduction will amount to double taxation of a single contract.

115 155. In *Global Marine International Drilling Corporation v Federal Inland Revenue Service,* Appeal No: TAT/SSZ/003/2011, (TAT, 30th July 2013), the TAT held that such circular cannot supersede the Laws of Nigeria even if rightly interpreted.

116 *Federal Board of Inland Revenue (FBIR) v Halliburton (WA) Limited* (2014) Law Pavilion Electronic Law Report (LPELR) - 24230(CA).

117 See (n 63).

taxpayer required full disclosure and utmost good faith by the taxpayer.[118] It continued that the taxpayer had not made full disclosure by failing to declare the profit Halliburton Nigeria was to derive from the transaction upon which the original assessment was made. Hence, the taxpayer could not reasonably rely on the representation of the tax authority to reap the benefit of legitimate expectation which is based on utmost good faith by stakeholders in tax matters. The CA held further that as the doctrine is a question of fact, it cannot be canvassed on appeal and that the tax statutory provision supersedes whatever representation made thereby making the doctrine of legitimate expectation to yield ground to clear words of the statute.

The decision of the CA here is far from clear. On the one hand it approves of the doctrine of legitimate expectation on the condition of full disclosure as in the UK. On the other hand, it says that the doctrine is subject to 'clear' words of the tax statute. If the tax statute were so 'clear' indeed, this case would not have gone through three different stages of litigation. One may however cautiously argue that the doctrine of legitimate expectation is recognised under Nigerian tax law.

In *Saipem Contracting Nigeria Ltd & Others v Federal Inland Revenue Service & Others,*[119] the three plaintiffs were members of the same MNE involved inter alia in drilling services in the petroleum industry. They consisted of a resident company and two non-resident companies. The three companies signed a consortium contract with the 3rd Defendant under which they were required to carry out separate scopes of the work. The non-resident companies were responsible for the part of the work to be executed outside Nigeria, while the resident company was responsible for the work to be done in Nigeria. The tax authority upon request made a written representation to the plaintiffs that the 2nd and 3rd plaintiffs being non-resident companies, were not liable to VAT, withholding tax and companies' income tax on their portion of the contract. The tax authority subsequently reversed its position and raised tax assessments on the non- resident companies. Hence an action was commenced in court challenging the subsequent reversal by the tax authority.

One of the issues for determination was whether the tax authority was prevented from reneging from its earlier written representation to the taxpayers that they were not liable for those taxes. The court held that parties to a suit cannot by conduct or consent alter the provision of a statute. It continued that it is the law that guides payment of tax which prevails, despite whatever representation the tax authority made to the plaintiffs. As the representations cannot override tax law

118 See FBIR (n 116) 41-43.

119 Suit No: FHC/L/CS/1081/09, (FHC, 27 March 2014). Certified True Copy gotten on 31st March 2014.

provisions, the tax authority is not prevented from reversing its initial representation where such position contradicts the law.

This case implies that informal rulings from the FIRS do not have the binding force of law as the FIRS can subsequently reverse its position without any remedy to the taxpayer who has genuinely relied on such to his detriment. Some have likened this to a retroactive decision which violates the due process of law.[120] Whether this will be the same position under the Nigeria TP Regulations dealing with APAs is yet to be determined by the courts. Being an administrative regulation, it is argued that the results may be somewhat different. Moreover, APAs are more in the nature of an agreement between the taxpayer and the tax authority.

The foregoing evidence that APAs are legally valid under the Nigeria TP regulations. Furthermore, the cases show that the FHC has refused to hold informal rulings which can be regarded as ATRs as binding on the tax authority because they are opinions of the tax authority. This is not good law for a country that relies on foreign investment from MNEs. Reneging on a ruling given by the tax authority means additional tax assessments are made as shown in all the cases and this increases the financial burden of the investor. It also suggests insincerity on the part of the tax authority especially where the ruling is a taxpayer specific one as in the *Saipem* case. However, the decision of the CA in *Halliburton (WA) Limited* shows that the doctrine of legitimate expectation can be the basis for enforcing a ruling given by FIRS. Though the CA was not clear in its analysis of this doctrine, it is argued that there is a binding decision under which ruling may or may not be held binding against the FIRS.[121] This also places limit on the certainty which a ruling gives to potentially taxable transactions because the validity of such ruling depends on whether it is upheld on the basis of legitimate expectation.

Section 3: Rulings as means of BEPS

This section is against the backdrop of the negative sides of rulings specifically the use of rulings to attract new investments to location where value is not created.[122]

120 OK Obayemi, 'Legal Validity of Tax Opinions/ Advance Tax Rulings in Nigeria' *Thisday Newspaper (*Lagos, 30 September 2014) 12.

121 CA is higher than the FHC. It is the second highest Court in the hierarchy of courts in Nigeria. The highest Court in Nigeria is the Supreme Court. CFRN 1999 as amended, Sections 6 (5), 233, 235 & 240.

122 See Ellis (n 20) 28-29. See also OECD (n 37) 174-178. There are other negative sides such as giving the tax administration an inappropriate influence on other branches of government and private business operations.

Rulings can be used as a tax competition mechanism to cause erosion of the tax base of another country and shift profits from one country to the other in a manner that can be regarded as harmful. Consequently, the OECD and the EU are working on changing the current international tax rules. Transparency being one of the pillars for this change. This is particularly important where the ruling is unilateral in nature e.g. ATRs and unilateral APAs.

3.1. BEPS

BEPs entails use of aggressive tax planning techniques by MNEs to beat the current national and international rules thereby unfairly reducing their tax liability.[123] The unfairness comes from the fact that these techniques are used to shift income to low or no tax jurisdictions in a manner that countries where the economic activities are performed and value is created, do not get to tax such profits.[124] In cross border scenarios, rulings can determine the shifting of a group's taxable profits between its subsidiaries located in different countries e.g. rulings which offer low level of taxation to certain MNEs can entice them to artificially shift profit there.[125] This is a form of tax avoidance which undermines the tax bases of countries.

3.2. Tax Competition Vs Harmful Tax Practice

Tax competition being the target of the 1998 report and Action 5 is the process of unhelpful but interconnected fixing of tax rates between jurisdictions that enjoy tax sovereignty, in a bid for commercially relevant investments.[126] It is largely associated with reducing fiscal burden to attract resource flows. It is a microcosm in the macrocosm of States' competition for economic activities.[127] Though there are arguments in favour of tax competition,[128] the other side of the divide which perceives it as harmful, backs the campaign of the OECD that aims to minimise its spillover effects.[129]

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123 OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing 2013) 7, 8, 9, 10.

124 ibid.

125 See Commission (n 23) 2.1.

126 J Englisch and A Yevgenyeva, 'The "upgraded" strategy against harmful tax practices under the BEPS Action plan' (2013) British Tax Review 620, 622.

127 See Morriss and Moberg (n 1) 3.

128 For example, giving investors choice on location of investment. See P Lampreave Marquez, 'Fiscal Competitiveness versus Harmful Tax Competition in the European Union' (2011) 65 Bull Intl Taxn Journal IBFD 5.

129 See OECD (n 2) 15-16, 18.

Consequently, the 1998 Report which focuses on geographically mobile activities such as financial and other service activities, elucidates on factors used in identifying harmful tax practice. The report restricts harmful tax practices to tax havens and harmful preferential regimes.[130] Harmful tax competition or harmful tax practice is the exploitation of the interaction of tax systems by for example enacting special tax rules and having tax administration practice that basically encroach on the tax base of other countries. The spillover effects of these rules/practices are such that they divert capital flows emanating from the other countries in a manner that aggressively avoid the other countries' taxes.[131] The negative effects of these are inter alia erosion of tax bases of other countries and placing more tax burdens on less mobile tax bases like labour, property.[132]

A country has a potentially harmful preferential regime where though it raises significant revenues from its income tax, its tax system has features of harmful tax competition.[133] Preferential is tax preference compared with general principles of taxation in the relevant country e.g. where rulings are not generally given in a country but where it comes to a non-resident making investment in the country, then rulings will be given.[134]A preferential regime which usually divert passive investments could be in a general tax system or tax administration practice or specific statutory framework.[135] Hence, four key factors used in identifying a harmful preferential regime are: that it imposes low or zero effective tax rate on the income in question; it is 'ring-fenced' as it only applies to non-resident and the domestic economy is insulated from the spill-over effect of such regime; it lacks transparency in its administration; and there is lack of effective EOI on the regime.[136] There has been added a 5th key factor that the regime encourages purely tax driven arrangements with no substantial activities.[137] This was different under the 1998 report. The other factors used to determine a potentially harmful preferential regime include: artificial definition of the tax base, failure to comply with international TP principles, etc.[138]

130 ibid 3, 9.

131 See OECD (n 2) 16.

132 ibid 8, 16.

133 See OECD (n 2) 20.

134 See OECD (n 7) 22; 2015 Action 5 Final Report (n 7) para 13.

135 See OECD (n 2) 25.

136 ibid 25-30.

137 See OECD (n 7) 22, 27-28; 2015 Action 5 Final Report (n 7) paras 14, 24, 25.

138 See OECD (n 2) 30-34.

In determining whether a preferential regime is harmful, all the aforementioned factors are evaluated and a harmful preferential regime will be labelled as one where it has low or zero effective tax rate and one or more of the remaining factors.[139] In the evaluation of whether a regime has actually created harmful economic effects three issues considered are: 1) Does the regime divert activity from one country to the country providing the regime, instead of creating significant new activity? 2) Is the amount of activities in the host country proportionate to the level of investment? 3) Is the regime the main reason for the location of an activity?[140]

This campaign against harmful tax competition by the OECD, is regarded as more politically motivated than globally beneficial.[141] As it is more beneficial to the association of rich industralised OECD countries with high tax rates whose competitive position changed as a result of sophisticated manner in which investors used international financial structures to reduce tax burdens on international transactions. In other words, as these countries were struggling to capture capital from newly internationalised transactions, they sought to restrict tax competition. Moreover, the campaign is a shift of tax policy by the OECD from enhancing competition in the international economy through elimination of double taxation to aiding large economies limit competition in finance from small countries.

Arguments that the campaign has a lopsided benefit is an allegation which requires empirical evidence. However, it does not dispute the fact that some countries aggressively encroach on the tax base of other countries while exercising their taxing powers. Though tax sovereignty is a key part of a country's sovereignty, the interdependence of countries as a result of globalisation has made cooperation by countries even more relevant. Moreover, there are times when tax competition can even be detrimental to the country operating the mechanism.[142]

In Nigeria, the Industrial Development (Income Tax Relief) Act 1971[143] provides a pioneer status tax holiday regime.[144] Here, some industries located in some poor areas in Nigeria get between 3-5 year tax holiday upon investment in that area and industry eg a company starting off the manufacture of tea, coffee, etc. in such

139 See OECD (n 2) 25, 26; See OECD (n 7) 23; 2015 Action 5 Final Report (n 7) para 17-18.

140 See OECD (n 2) 34-35.

141 See Morriss and Moberg (n 1) 2, 11, 25, 33, 34, 45, 46, 48.

142 See ActionAid (n 3).

143 Chapter I7, Laws of The Federation of Nigeria (LFN) 2004.

144 A regime where tax is not paid for some particular period.

areas will be entitled to this tax incentive.[145] This can be a harmful preferential regime. An MNE like Starbucks can set up a subsidiary in such area to manufacture coffee which it uses in its core business. Subsequently, it gets the FIRS to give a ruling that it is entitled to the tax holiday and a TP mechanism is used to shift most of the profits of Starbucks as a group to the subsidiary during the tax holiday period.

In UK, the patent box regime was introduced from 1 April 2013.[146] Here, qualifying companies are taxed on a lower rate of corporation tax i.e.10% with regard to their patented inventions.[147] This is significantly lower than the current 20%,[148] therefore arguably preferential. Though a way of enhancing research and development activities by attracting mobile forms of intellectual capital,[149] it has been found to be somewhat preferential and inconsistent with the new nexus approach, hence a call for amendment.[150] Rulings on this regime can be used to divert capital in an aggressive manner that can be labelled as encroaching on the tax base of other countries especially where there is no transparency.

3.3. Transparency and EOI

Being key concepts which determine whether a preferential regime is harmful, the OECD has provided useful notes for assessment.[151] Where they are lacking, it is more difficult for the affected countries to take countermeasures against what is happening in the country operating such regime. Moreover, lack of transparency can forestall effective EOI.[152]

Transparency means openness in the administration of the regime by the binding conditions of applicability being made clear and details of the applicability to a particular taxpayer being made available to tax authorities of other countries affected.[153] Hence publication or availability of the application of the regime to all

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145 Sections 1(1), 3(6), 10; The List of Pioneer Industries/Products Approved by the National Council of Ministers in 1989, Official Gazette No 61 27th May 2015 Volume 102, 353.

146 Finance Act (FA) 2012, s 19.

147 CTA 2010, s 357A (4).

148 FA 2013, s 6(1).

149 J Lutts, 'Compatibility of IP Box Regimes with EU State Aid Rules and Code of Conduct' (2014/2015) EC Tax Review 258.

150 See (n 12).

151 See CAN 2004 (n 5) 9-17; 28-46; 52-58.

152 ibid 9.

153 See OECD (n 2) 28.

taxpayers is key here.[154] The two ways in which a rulings regime can be regarded as non-transparent are: (1) where the conditions of application of the regime are unclear and neither available to all taxpayers nor other tax authorities. & (2) where the regime has the potential to provide rulings that do not conform to the usual implementation of the law and administrative process.[155] Through these ways, the regime can be used in a discriminatory manner to attract foreign investment.

The relevance of EOI lies in the tendency of MNEs to exaggerate their income in entities reaping the tax advantage of a preferential regime.[156] Furthermore, there are three standard qualifications for effective EOI namely: (1) Important information on intra-group transactions should be available to the country operating the regime. (2) There must be no obstacles to the exchange of that information under the terms of the relevant DTA or EOI instrument & (3) The country must in fact exchange that information in practice.[157]

The 2014 OECD Model Tax Convention contains provision on EOI in Article 26 and there is an OECD Model Agreement on EOI in Tax matters.[158] However, these models do not contemplate compulsory spontaneous exchange on rulings. They only cover information that is 'foreseeably relevant' and this gives the sending country latitude for much discretion to decide what is relevant and what is not. This may be deliberately or negligently exploited to avoid sharing information with another country.[159]

The UK being very active in EOI in tax matters, has an extensive legal and regulatory framework for transparency and EOI[160] but compulsory spontaneous exchange on rulings is not covered. The effectiveness of the UK in EOI in practice has been regarded by the Global forum[161] as largely compliant with international standards.[162] The Finance Act (FA) 2015, s 122 has adopted the OECD's guidance on country by country reporting on TP documentation.

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154 See Prebble (n 30) 22.

155 See CAN 2004 (n 5) 52.

156 See CAN 2004 (n 5) 53.

157 See CAN 2004 (n 5) 55.

158 Eg the 2002 Model.

159 See Commission (n 23) 2.3.

160 See OECD (n 74) 7, 8, 75, 104-116.

161 See (n 5).

162 See OECD (n 74) 9, 75.

In Nigeria, there is a legal and regulatory framework for transparency and EOI[163] but compulsory spontaneous exchange on rulings is not envisaged. Having joined the Global Forum in April 2011, Nigeria has 64 EOI relationships via 17 DTAs and a Multilateral Convention on Mutual Administrative Assistance in Tax Matters even though only 9 out of the DTAs with EOI provisions are in force.[164]

To forestall harmful tax practices and BEPs, it is argued that transparency & EOI are checks and balances on the use of rulings by countries.[165]

Section 4: Compulsory spontaneous exchange on Rulings

As a solution to the menace of BEPS and harmful tax practices, the OECD via the FHTP has formulated a detailed framework for the compulsory spontaneous exchange on rulings.[166] "Compulsory' means a duty to spontaneously exchange data where the requisite criteria are met.[167] While 'spontaneous EOI' presupposes an instance of one State knowing about a possibly material information to another State, but the information has not been demanded by the second State.[168]

In improving transparency, the FHTP has taken three focal steps namely: developing a framework for compulsory spontaneous information exchange on rulings, further enhancing transparency by shifting focus to instances where the absence of exchanges can cause BEPS concerns and developing a general best practices for the design and operation of ruling regimes.[169]

4.1. The OECD Framework[170]

The framework now covers rulings 'that may give rise to BEPS concerns in the absence of compulsory spontaneous exchange of such rulings'.[171] This is an

163 See OECD (n 13) 7, 56, 57, 59, 82-88; See also Section 8(1)(i) FIRS Act on duty of FIRS to facilitate the fast EOI with the relevant national or international agency on tax matters.

164 See OECD (n 13) 7, 59.

165 See Ellis (n 20) 29.

166 See OECD (n 7) 10; 2015 Action 5 Final Report (n 7) paras 90a, 91 & 103. These are minimum standards which countries ought to adopt to combat BEPS and harmful tax practices.

167 See OECD (n 7) 36.

168 ibid.

169 2015 Action 5 Final Report (n 7) para 90.

170 See OECD (n 7) 38-50; 2015 Action 5 Final Report (n 7) paras 90a & 91.

171 2015 Action 5 Final Report (n 7) p 9 & para 90b.

improvement on the 2014 progress report which was restricted to rulings related to preferential regimes. Being a significant upgrading, it is commendable because the 2014 position had the tendency to unduly restrict the effective implementation of the framework. Moreover, the 2015 position may take care of purely domestic rulings which are subsequently found by the FHTP to give rise to BEPS concerns (eg cross-border effects) in the absence of exchange of such rulings. To avoid extraneous administrative burden, the framework aims to exchange only information (ruling) relevant to other tax authorities.[172] Hence, the framework considers the following issues namely:

- Rulings covered by the framework
- Recipient countries of the information
- Application of the framework to past and future rulings
- Information to be exchanged
- Practical implementation issues
- Reciprocity
- Confidentiality

On the first issue, the framework concerns only rulings issued to a specified taxpayer and on which the taxpayer is entitled to rely eg ATRs.[173] Compulsory spontaneous exchange of general rulings is not currently required because inter alia there is an uneven administrative burden in ascertaining the country or countries the information should be exchanged with.[174] In line with expanding the coverage, the 2015 final report encompasses six categories of taxpayer specific rulings namely: (1) Cross-border rulings related to preferential regimes; (2) Cross-border unilateral APAs or any other cross-border unilateral rulings bordering on TP; (3) Cross-border rulings giving a unilateral downward adjustment to taxable profits not directly reflected in the taxpayer's commercial accounts; (4) Permanent establishment (PE) rulings; (5) Related party conduit rulings; (6) Any other type of ruling where the FHTP agrees in future that the absence of spontaneous information exchange would give rise to BEPs concerns.[175] The report provides detailed analysis on how these categories of rulings can cause BEPS and harmful tax practices.[176]

172 See OECD (n 7) 38; 2015 Action 5 Final Report (n 7) para 92.

173 See OECD (n 7) 37; 2015 Action 5 Final Report (n 7) para 96.

174 See OECD (n 7) 37-38; 2015 Action 5 Final Report (n 7) para 102.

175 2015 Action 5 Final Report (n 7) para 91.

176 ibid paras 103-120.

The framework has not given a clear meaning of 'cross-border rulings' but merely gives some examples of what may be regarded as 'cross-border rulings'. It is suggested that like under the EU proposal which gives a meaning to 'advance cross-border ruling' in pages 9-10 of the draft, the OECD framework ought to provide a meaning or at least minimum standard(s) used in recognising cross-border rulings. This will undoubtedly give greater clarity to countries in the implementation process.

Secondly, the recipient of such information is proposed to be State of the PE or residence States whether of all related parties or the ultimate parent company or the immediate parent company or the head office or the ultimate beneficial owner etc.[177] The related party threshold has been kept at 25% but this is to be under review by the FHTP.[178]

The 2015 final report appears to deviate from the 2014 progress report which uses broad terms like 'any affected country' and 'includes' to describe the recipient. This consequently omits the source country as a recipient unlike in the 2014 report. Even though the description in 2015 final report now takes precedence,[179] the wide description in the 2014 progress report, is preferable because giving a bright-line test may unduly restrict implementation of the framework.

Thirdly, the framework is to apply to both past and future rulings. Rulings issued on or after 1 January 2010 and still in force from 1 January 2014 have been agreed to be exchanged; countries have until the end of 2016 to exchange these past rulings. Whether this is a feasible target will vary from country to country depending on commitment and available national legal framework. Future rulings have been stated to be those issued on or after 1 April 2016 and it is expected that information on these future rulings be exchanged from this date.[180] The distinction between past and future rulings is also one of the significant improvement in the 2015 final report. There was no such distinction in the 2014 progress report. No reason(s) are stated for the acceptance of the time lag for past ruling; giving reasons for such may enable third countries appreciate the framework better.

In the area of information subject to exchange, a dual approach has been agreed by the OECD. This aims to balance the need for greater transparency with not putting excessive administrative burden on tax authorities. In the first instance, a common template for the exchange is now available under the framework. The template

177 2015 Action 5 Final Report (n 7) paras 121-125 & p 73(Annex B).

178 ibid para 122.

179 2015 Action 5 Final Report (n 7) 9, para 90a.

180 ibid paras 126-129, 153.

comprises data such as: ruling reference number; identification of the taxpayer (where appropriate the group of companies to which the taxpayer belongs); date of issuance of the ruling; accounting periods/tax years covered by the ruling; type of ruling issued; additional information on the ruling and taxpayer (to be optionally provided on transaction amount, entity's annual turnover & profit of the entity) ; short summary of the issue covered by the ruling; reason(s) for exchange with the recipient State; details of entities in the recipient State; etc.[181] The common template will serve as the basis upon which the receiving country can ascertain whether to request the ruling itself in the second step. There is no provision in both the 2014 & 2015 report for what happens where a ruling is revoked by the tax authority and this is allowed by the Courts. The cases analysed in section 2 show that this is a reality e.g. in *Saipem* case, the implication of the decision means that the non-resident companies have to pay additional taxes. This means that tax adjustments may have to be made in their resident countries. Hence, it is suggested that when there is a revocation of a ruling, there ought to be a duty on the sending country to make an exchange with the affected country.

On practical implementation issues,[182] the OECD recommends that the exchange of future rulings occur as quickly as possible with any affected country. It proposes no later than 3 months after the ruling becomes available to the competent authority of the country in which the ruling is given. It also recognises that legal impediments like appeals etc. may cause delay in the exchange thereby vitiating the 3 month time limit. Hence, it states that the relevant country should exchange 'without undue delay' once the legal impediment ceases to exist. This appears very subjective and may be a leeway for abuse by some countries. Moreover, duration of legal impediments in countries vary significantly according to the peculiar nature of the legal system in question (eg in some countries reasonable legal impediment may take 10-15 years, while in others, it may take 2-5 years). However, countries adopting the framework will have to consider issues such as this in order to renegotiate their DTAs or accept any multilateral instrument on the framework.

On the issue of reciprocity, the OECD recommends that the sending country with the duty to make such exchange, cannot use lack of reciprocity as a ground for not making such an exchange to an affected country. In other words, where the affected country does not grant and consequently cannot exchange rulings which prompt such duty, the sending country is still under obligation to make the exchange. This however presupposes that the affected country is committed to making the exchange where it grants such rulings.[183]

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181 2015 Action 5 Final Report (n 7) para 130-131; p 74-79 (Annex C).

182 ibid para 132-135.

183 2015 Action 5 Final Report (n 7) para 136.

On the issue of confidentiality,[184] the receiving country is to have legal framework necessary to protect the confidentiality of the information exchanged. OECD states that information exchange partners may suspend or restrict the extent of the EOI if appropriate protection is not in place or there has been breach in confidentiality and they are not convinced that the situation has been appropriately settled. The issue here is how does a country know that appropriate protection is not in place in the other country? How can the availability of appropriate protection be verified by a sending country? Regular audit/peer review by the FHTP or global forum may be the solution here. The framework states that the information exchanged under the framework may be used only for tax purposes or other purposes allowed by the relevant exchange instrument. It adds that where domestic law allows for a wider use of the exchanged information, then international provisions & instruments are expected to prevail over domestic laws. Whether this will be fully accepted or implemented by countries which depend on constitutional provisions in the relevant country and the judicial attitude of the relevant domestic courts to statutory tax provisions.

The OECD has also made recommendations on best practices in operating a ruling system.[185] These best practices which also apply to general rulings, are not part of the framework but are guidance for the operation of a ruling system. [186] They are basically effective guidelines which a country that uses rulings in the tax administration process ought to conform to. They touch on guidelines for the process of granting a ruling, duration of the ruling/audit procedure, publication and exchange of ruling information.

For proper implementation process, countries without a legal framework on EOI have been given time to put in place that framework to be able to spontaneously exchange information under Action 5.[187] Furthermore, there will be an annual review of the exchange process by the FHTP starting at the beginning of 2017. Hence, countries that issue taxpayer-specific rulings as stipulated in the framework will be required to provide statistics on the following: (1) the total figures of spontaneous exchanges made under the framework; (2) the figures of spontaneous exchanges made by category of ruling; (3) country or countries the exchange was made with; (4) details of situations where they had insufficient information to identify all the relevant recipient countries and therefore applied a 'best efforts approach'.[188]

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184 ibid paras 137-140.

185 2015 Action 5 Final Report (n 7) para 141.

186 ibid paras 90-91 & 102.

187 2015 Action 5 Final Report (n 7) p 69 (footnote 1).

188 ibid para 153.

4.2. The EU Position

Work commenced against harmful tax competition on the mandate of the meeting of the Economic and Financial Affairs Council (ECOFIN) held in December 1997 and the code of conduct for business taxation was one outcome of this mandate.[189] Since June 2013 the commission has investigated rulings given in some Member States (MSs) to MNEs. In December 2014, investigation was extended to ruling systems of all EU MSs to determine whether they constitute state aid measures as prohibited by EU law.[190] Some of these investigations are examined below:

a) *Alleged aid to Apple in Ireland* (Case SA.38373) Commission Decision 2014/C 369/04 [2014] OJ C 369/22

Formal State aid investigation commenced on 11 June 2014.[191] The rulings investigated here were APAs granted in 1991 and 2007 to companies (including branches) in the Apple Group which is headquartered in the US. Some of these companies are Irish tax resident while some are not.

These were APAs issued by the Irish tax authority on reduced profit allocation to branches operating in Ireland. Documents submitted by the tax authority to the commission neither contained a TP report nor a cost sharing agreement. The 1991 APA had no expiry date and was in force until 2007 when another APA was given. Hence the commission investigated whether these APAs complied with the arm's length principle as contained in the OECD guidelines for determining the appropriate transfer prices.

The commission alleged that the 1991 APA was bargained rather than backed by reference to the relevant TP methodology using comparable transactions.[192] The 2007 ruling failed to explain the reason for the choice of TP method used in calculating the profits of the branches.[193] The APAs were in part backed by employment considerations rather than a pricing arrangement that would have been accepted by a reasonable independent party.

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189 European Commission, 'Harmful Tax Competition' <http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/index_en.htm#code_conduct> accessed 11 November 2015.

190 Consolidated Version of the Treaty on the functioning of the European Union [2012] OJ C 326/47 (TFEU). Article 108 empowers the Commission to carry out this function to protect the European Internal Market (EIM) from State Aid measures. These are selective measures that distort or threaten to distort competition in the EIM by favouring some undertakings.

191 ibid Article 108(2).

192 C 369/33.

193 ibid.

After investigation, the commission's preliminary view is that both APAs in favour of the Apple group constitute State aid as prohibited under the TFEU.[194] The commission also adds that the aid is not compatible with the European Internal Market (EIM). The commission has requested Ireland to submit more documents/information necessary to assess the impact of the aid.

b) *Alleged aid to Starbucks in The Netherlands* (Case SA. 38374) Commission Decision 2014/C 460/03 [2014] OJ C 460/11

This investigation commenced on 11 June 2014. The APA was given by the Dutch tax authority to Starbucks Manufacturing EMEA BV in 2008 with regard to the arm's length remuneration of the company's coffee roasting operations in the Netherlands. This remuneration which is a fixed percentage of the relevant cost base was arrived at according to the TP report prepared by the taxpayer's advisor. Here, any profit in excess of the taxable profit agreed in the APA was paid to an associated company located outside the Netherlands as tax deductible royalty.

The commission believes that the APA constitutes State aid and doubts that the company is paying sufficient amount of tax in the Netherlands. The commission alleges that the arm's length remuneration approved by the ruling, departs from conditions which would have been set between independent parties. This is because inter alia the payment of tax deductible royalty to the associated company located outside the Netherlands under the APA is not linked to the value of the related intellectual property.[195]

With the commission's preliminary view after investigation that the APA constitutes State aid prohibited by EU Law, it requested the Netherlands to submit more documents/information necessary to assess the measure. Eventually, on 21 October 2015, the commission concluded that the Netherlands granted selective tax advantages to Starbucks which are illegal under the EU State aid rules. Hence, the Commission has ordered the Netherlands to recover the unpaid tax from Starbucks, in order to remove the unfair competitive advantage it has enjoyed and to restore equal treatment with other companies in similar situations. The amounts to recover are €20 - €30 million. It also means that the companies can no

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194 Article 107.

195 C 420/12.

longer continue to benefit from the advantageous tax treatment granted by these APAs.[196]

c) *Alleged aid to Fiat Finance & Trade in Luxembourg* (Case SA. 38375) Commission Decision 2014/C 369/05 [2014] OJ C 369/37

The investigation commenced on 11 June 2014. This concerns an APA of 2012 confirming the taxable basis of Fiat Finance & Trade (FFT) in Luxembourg by the tax authority. The commission believes that the APA constitutes State aid and FFT is not paying sufficient amount of tax in Luxembourg because of the APA.

The commission doubts if the taxable basis of FFT as approved by the APA reflects the appropriate arm's length remuneration as would have been agreed between reasonable independent parties. This is because the tax authority accepted a very low figure for minimum capital based on an economically unjustifiable assumption of the requirements.

Forming a preliminary view after investigation that the ruling constitutes State aid under EU law the commission requested from Luxembourg more information/documents to assess the impact of the aid. Subsequently, on 21 October 2015, the commission concluded that Luxembourg granted selective tax advantages to FFT which are illegal under the EU State aid rules. Consequently, the Commission has ordered Luxembourg to recover the unpaid tax from FFT, respectively, in order to remove the unfair competitive advantage it has enjoyed and to restore equal treatment with other companies in similar situations. The amounts to recover are €20 - €30 million. It also means that FFT can no longer continue to benefit from the advantageous tax treatment granted by these APAs.[197]

d) *Alleged aid to Amazon in Luxembourg* (Case SA. 38944) Commission Decision 2015/C 044/02 [2015] OJ C 44/13

This investigation commenced on 7 October 2014. It concerns an APA of 2003 on business structures put in place by Amazon in its European business operations. The Amazon group which operates as an online retailer is headquartered in the US but carries out business operations through subsidiaries in Europe. The Amazon group sought to restructure its European business operations by establishing its headquarters in

196 European Commission News, 'Deepening EMU and Fiat and Starbucks tax decisions' <http://ec.europa.eu/news/2015/10/20151021_en.htm> accessed 30 October 2015; European Commission Press Release, 'Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under the EU State aid rules' <http://europa.eu/rapid/press-release_IP-15-5880_en.htm> accessed 30 October 2015.

197 ibid.

Luxembourg, hence it sought APA with regard to the exploitation of intellectual property rights owned and developed in the US. The tax authority issued the APA approving the licensing fee to be paid under the TP arrangement and this determined the deductions (royalty payment) to be made from corporate income tax to be paid by Amazon in Luxembourg.

The commission believes that the APA constitutes State aid measures which confer selective advantage on the Amazon Group by reducing its tax liability in Luxembourg. The commission asserts that the terms of the APA depart from the arrangement which a reasonable party, operating in the open market would have accepted under normal conditions. The reasons are inter alia that the TP method used does not correspond to any of the methods in the OECD guidelines[198]

The commission after investigation takes the preliminary view that the APA constitutes State Aid under EU law and this aid is not compatible with the EIM. It has therefore requested more information/documents from Luxembourg to assess the impact of the aid.

e) *Excess profit tax ruling system in Belgium* (Case SA.37667) Commission Decision 2015/C 188/04 [2015] OJ C 188/24

Under the Belgian Law, there is a statutory ruling regime which allows companies that are part of an MNE to claim deductions like intra group synergies. These deductions will usually significantly reduce the tax liability of such companies compared to purely domestic companies. The commission alleges that the application of the regime is based on the improper analysis of the OECD TP rules.[199] Hence, it considers that the regime is a 'selective advantage tantamount to State aid.'[200] Formal investigation has been opened.

The above indicate that rulings especially APAs are being exploited as forms of harmful tax practices. This is by issuing APAs that do not conform with the open market price so as to get low taxes on intra-group transfer prices which would entice MNEs to shift/locate their business operations to the country giving such tax advantage. Some of these APAs which have no fixed duration or unreasonably long duration raise the issue of whether transfer prices agreed eg over ten years ago can still reasonably be regarded as an arm's length remuneration.

198 C 44/14.

199 C 188/25.

200 ibid.

In March 2015, the Commission made a proposal for new rules within the EU on disclosure of tax arrangements between MNEs and tax authorities.[201] This 'tax transparency package'[202] aims at mandating tax authorities within the EU to exchange information with other EU tax authorities on tax rulings given to MNEs. Tax rulings may unintentionally create gaps between MSs' tax systems and have the negative effect of artificially shifting profit to location where value is not created e.g. where two MSs separately agree to tax deduction on the same income for the MNE via APAs.[203]

On 6th October 2015, MSs via the ECOFIN reached a political agreement on automatic EOI on tax rulings thereby accepting the 'tax transparency package' in principle. MSs will have to transpose the new rules into national law before the end of 2016, meaning that the Directive will come into effect on 1 January 2017.[204] The draft amendment indicates that MSs will be required to automatically exchange information on their ATRs concerning cross-border transactions and APAs. Like the OECD framework, it is deemed appropriate to limit the exchange to such ATRs and APAs issued to specified taxpayer(s). Such rulings issued to natural persons are also excluded from automatic exchange. There is a draft retroactive provision for the exchange of rulings given 5 years prior to the date on which the proposed directive takes effect. Furthermore, there is a draft special provision for the establishment of a 'secure central directory' where MSs will upload and store such information. This central directory is expected to be accessible to all MSs and the commission. Who takes responsibility for hackers? The sending country or affected/recipient country or commission? The commission will have to consider this in making practical arrangements necessary for the establishment of such a directory. The EU parliament has criticised the proposed amendment because it is restricted to ATRs concerning cross-border transactions &

201 Commission, 'Combatting Corporate tax avoidance: Commission Presents Tax Transparency (Press Release)' <http://europa.eu/rapid/press-release_IP-15-4610_en.htm> accessed 11 November 2015.

202 ibid.

203 See Commission (n 23) 2.2.

204 European Council Press releases and statements, 'Cross-border tax rulings: Council approves transparency rules' <http://www.consilium.europa.eu/en/press/press-releases/2015/10/06-cross-border-tax-rulings/> accessed 30 October 2015; European Commission Press release, 'Tax transparency: Commission welcomes agreement reached by Member States on the automatic exchange of information on tax rulings' <http://europa.eu/rapid/press-release_IP-15-5780_en.htm> accessed 30 October 2015.

APAs.[205] It prefers the amendment to apply to all tax rulings as purely domestic transactions can have cross-border implications.

The 'tax transparency package' is about a proposal for amending Council Directive 2011/16/EU.[206] The directive has provisions dealing with mandatory and spontaneous EOI.[207] Notwithstanding this, the proposed amendment seeks to extend the exchange of tax information to mandatory automatic exchange on rulings with cross-border implications, thereby removing the discretion of MSs in the exchange process. This clearly supports the OECD/G20 BEPS action plan on Action item 5. It reinforces the need for change to the status quo on tax rulings practices both nationally and internationally.

4.3. Benefits of the OECD Framework

1. Countermeasures by affected/recipient countries

ATRs and unilateral APAs by their nature are given without notifying other jurisdictions likely to be affected.[208] Implementing the OECD framework, means that countries likely to be affected by the ruling will be able to take appropriate defensive action.[209]

For example, country X administers a tax holiday regime. An MNE headquartered in country Y but operating via a subsidiary in X gets a ruling from the authorities in X that it is entitled to the regime. The subsidiary under an APA (backed by employment considerations) is allowed to charge higher prices for the goods transferred to its headquarters. It then transfers the profits in the form of dividends to a holding company in country Z. There is a DTA between Z and X under which X does not charge withholding tax on dividends paid to beneficial owners in Z or Z has rules that exempt foreign source income from tax (the holding company gets a ruling from the relevant authority in Z on this). Here the income from the transferred goods gets taxed nowhere and the affected country Y where the value was created does not tax too as it will be regarded as expenses by the headquarters.

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205 European Parliament News-Press release, 'Council deal on automatic exchange of tax rulings is a "missed opportunity" ' <http://www.europarl.europa.eu/news/en/news-room/content/20151022IPR98803/html/Council-deal-on-automatic-exchange-of-tax-rulings-is-a-%E2%80%9Cmissed-opportunity%E2%80%9D> accessed 30 October 2015.

206 See (n 17). Amendment of the directive requires unanimity by the Council of the EU after consulting the European Parliament. TFEU, art 115.

207 Articles 8 & 9.

208 See Romano (n 19) 134.

209 ibid 134-135.

The framework will serve as a check and balance on the use of rulings of a unilateral nature. Where these rulings are exchanged, countries likely to be affected by non-arm's length APAs, that do not comply with international TP standards, can take the necessary defensive measures. These include: taxing the untaxed income if necessary, disregarding a tax exemption as an anti-abuse measure, demanding more information if there is belief that their tax bases are being eroded.

2. Forestalling National Tax Base Erosion by MNEs

This is one of the primary objectives of transparency.[210] The framework will give countries the necessary information to counteract profit shifting.

Using the example in (1), where such rulings are exchanged, Z may decide to disregard its tax exemption rules for the dividends from X. X may also decide to restrict the application of the regime in the case of high profits. This is because by not doing so, it is allowing the MNE to erode its tax base.[211]

3. Better Transparency

The framework will create international checks and balances on how countries operate their ruling system. It will curb corruption by tax authorities in the issuing of rulings. Having knowledge that affected countries will have access to these rulings will impute caution on the sending countries when issuing these rulings.

Using the example in (1), X operating the preferential regime will make conscious effort in issuing the APA to only allow the arm's length price for goods sold by the subsidiary to the headquarters. This is because such APA will in any event be exchanged under the framework.

4.4. Challenges of the OECD Framework.

1. State aid investigation by the European commission

A ruling can be given in 2015, compulsorily exchanged in the same year but State aid investigation commences some years after.[212] What happens if the ruling is nullified by the investigation because of the decision of the commission or Court of Justice of the European Union (CJEU) declaring it to be State aid contrary to EU Law? What if the exchanged ruling has made the affected/recipient country to make TP adjustments to the

210 See European Commission (n 23) 2.2.

211 See ActionAid (n 3).

212 In all the State aid investigations discussed, investigations commenced years after the APAs were issued.

detriment of its revenue? What happens to the MNE that has paid dividends to shareholders because of these rulings but has to subsequently refund taxes to the MS that granted the aid? These issues may be compelling reasons why it has taken the MSs seven months of negotiation to reach a political agreement on the proposed change.[213] This is because where the relevant Council Directive is not amended, there will be peculiar challenge(s) within the EU when State aid rules are applied.

2. Varying legal validity of ruling

Section 2 shows that rulings are not always binding. What happens if a ruling is compulsorily exchanged with an affected/recipient country which makes tax adjustments but subsequently a court in the sending country decides that the sending country's tax authority can revoke the initial ruling? Is there an obligation to notify the affected country of the court's decision? It is suggested that there ought to be such obligation because the change may require another tax adjustment. This is not stated in the OECD framework.

3. Confidentiality Issues

Trade secrets and other confidential details than concern the running of the MNE are usually divulged in negotiations for APAs. Hence, MNEs will be concerned about the protection of the privacy of such information in order to ensure that their competitors do not gain access to these trade secrets. It is argued that if an MNE is doing what is genuine, then it should not be bothered about compulsory exchange on rulings through which information on its business may be given to other tax authorities. The EU proposal seeks to establish a 'secure central directory' that will be accessible to MSs and the commission.

The OECD proposes that information exchange partners may suspend or restrict the scope of the EOI if appropriate protection is not in place or there has been breach in confidentiality and they are not satisfied that the situation has been appropriately resolved. The issue here is how does a country know that appropriate protection is not in place in the other country? How can the availability of appropriate safeguards be verified by a sending country? Are the peer reviews on countries' tax systems usually done by the global forum adequate to take care of these issues?[214] Within

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213 The proposal was first made by the commission in March 2015 and by October 2015, the ECOFIN reached a consensus.

214 See OECD (n 13); OECD (n 74); OECD, 'Global Forum on tax transparency pushes forward international co-operation against tax evasion' <http://www.oecd.org/tax/global-forum-on-tax-transparency-pushes-forward-international-co-operation-against-tax-evasion.htm> accessed 31 October 2015.

the EU these issues may not be weighty due to the available binding frameworks and watchdog institutions like the commission and CJEU. However, outside the EU these issues pose real challenge(s) to countries.

4. Restricted Framework

The effect of restricting the framework to mobile activities has not been properly analysed by the FHTP. What about immobile activities? In the 2015 final report, the FHTP has expanded the framework to cover rulings that could give rise to BEPS concerns in the absence of such exchange. This is unlike the 2014 progress report which was restricted to rulings related to preferential regimes. This is a commendable improvement.

5. Disagreement with the ruling of the sending country

An affected/recipient State may believe that the sending State has not applied the appropriate TP methodology to an APA even though the later State believes otherwise. Under the EU, the MS can instigate the commission to take necessary action. What about countries not in the EU? What will be the remedy to an affected/recipient State not in the EU? Can arbitration really resolve this? This is an issue which the framework has not addressed. Perhaps, the work on Action item 14 may have made the FHTP to overlook this area.[215]

6. Verification Concerns

How does a receiving country verify that the whole information has been exchanged? Is annual audit by the FHTP enough? What happens in the case of incomplete exchange? Full transparency will rest on the goodwill of the sending country.

7. Other Issues

The cost and administrative burden of engaging more personnel to translate an exchanged information in a different language, will have to be factored in the tax administration process of a country. In developing countries like Nigeria, the quality of record system is not as high as in developed countries like the UK. The requisite advance technology may not yet be available in developing countries. There have been other criticisms against the BEPS Action plan such as giving excessive power to tax authorities to the detriment of corporate taxpayers, increasing the risk of such taxpayers being audited more frequently and aggressively than before; etc. which all

215 OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report*, (OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, 2015).

have the unintended consequences of leading to diminished cross-border investment and decreased global economic growth.[216]

Section 5: Conclusion

Rulings by their nature are tools used in tax administration. They are used to determine potential tax liability for future taxable transactions. In preventing MNEs from eroding national tax bases, making compulsory and spontaneous exchange on certain categories of tax rulings part of the international tax rules, is desirable. Its feasibility however depends on prevailing national legal structures and the commitment of States. The article evidences that countries can oscillate between formal and informal ruling system at the same time. Furthermore, countries like the UK and Nigeria are already committed to the principle of transparency through their various EOI frameworks. Adding some categories of rulings to the information to be exchanged will undoubtedly bring greater transparency.

However, section 2 indicates that rulings are not always binding. It highlights how the legal validity of informal rulings can place limits on the certainty which rulings are argued to bring. Though legally valid tools, they are not absolutely enforceable. The UK cases illustrate the limits e.g. non-disclosure of the full facts by the taxpayer seeking the ruling, change of law by the legislature, different interpretation given by the courts, where the transaction is a tax avoidance scheme etc. In the UK, reliance on the doctrine of legitimate expectation in enforcing rulings appears fairly settled. On the other hand, in Nigeria there is room for greater clarity as the CA arguably did not make a clear pronouncement. As Nigeria has shown direct interest in the OECD/G20 BEPS action plan, it is imperative on the Federal Legislature to create a legislative framework for ATRs on when they would be binding and when not.

Section 3 highlights that ruling being a tax competition tool can be used by States in a manner that constitutes harmful tax practice as explained in the 1998 Report. Rulings can be used to cause BEPS by MNEs via diverting capital from one country to the other. The EU State aid investigations discussed in section 4 show these especially with the use of APAs. Therefore, changes proposed by the OECD are commendable as a result of the benefits that have been considered above. However, the framework ought to make provision for what happens in cases where a ruling is compulsorily exchanged with an affected country which makes tax

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216 Collins Barrow National Incorporated, 'Canada: Tax Flash- BEPS: The Final Reports' (Mondaq Article, October 15 2015) http://www.mondaq.com/article.asp?articleid=435270&email_access=on> accessed 24 October 2015.

adjustment but subsequently a court in the sending country decides that the sending country's tax authority can revoke the initial ruling. The affected country ought to be notified of this because the revocation may require another tax adjustment.

From the enforcement perspective, the difference between the EU and the OECD actions is that the EU has watchdog institutions like the commission and the CJEU. This contrasts with the OECD whose measures are not legally binding but merely serve as models which countries may or may not adopt. In implementing these Action 5 outcomes, countries ought to consider issues such as verification concerns, cost issues, confidentiality issues etc. as raised in section 4. This is especially important as any change(s) will greatly affect the way MNEs do business and cross-border investment in economies. Though some countries are eager to implement the outcomes of the OECD/G20 BEPS action plan,[217] it is advisable to carry out a prior appraisal of the impact of fully implementing all these outcomes through domestic laws, DTAs and multilateral instruments. Countries may want to consider the effect of these on the competitiveness of their MNEs eg whether these changes will increase or reduce the competitiveness of their MNEs.

With the pace at which the OECD/G20 & EU are progressing,[218] it appears almost certain that compulsory spontaneous exchange on ATRs on cross-border transactions and APAs will be made part of the body of model[219] international tax rules in the near future. However, the issues raised in this article need to be carefully considered by respective countries to ensure that the framework functions in a more effectively practical way.

217 For example in the UK, the Diverted Profits Tax on artificial avoidance of PE came into force in March 2015 by virtue of the Finance Act 2015, pt 3. This occurred despite some constructive criticism and its possible violation of EU law. See: Clifford Chance, 'The UK Diverted Profits Tax: Final Legislation Published' (2015) <http://www.cliffordchance.com /briefings/2015/03/the_uk_diverted_profitstaxfinallegislatio.html> accessed 11 November 2015.

218 OECD, 'BEPS Newsroom' <http://www.oecd.org/tax/beps-news.htm> accessed 30 October 2015; European Parliament Committees-Tax Rulings and Other Measures Similar in Nature or Effect, 'Publications' <http://www.europarl.europa.eu/ committees/ en/taxe/publications.html?tab=Presentations> accessed 11 November 2015; European Council- Press releases and statements, 'Cross-border tax rulings: Council approves transparency rules' <http://www.consilium.europa.eu/en/press/press-releases/2015/10/06-cross-border-tax-rulings/> accessed 11 November 2015. The respective meetings of G20 leaders and ECOFIN in November 2015 where these new rules are highly predicted to be endorsed, will indeed be a turning point in the field of international taxation.

219 Directives are binding EU Law.