The EU Cooperative Compliance Programme for Large Multinational Enterprises: A Promising Mechanism for Tax Certainty in the Uncertain Tax World Following the OECD/G20 Base Erosion and Profit Shifting Initiative?

This article examines the EU Cooperative Compliance Programme for Large Multinational Enterprises (European Trust and Cooperation Approach, or ETACA) and discusses its potential and that of the OECD’s International Compliance Assurance Programme as mechanisms that could provide (a minimum level of) tax certainty following the OECD/G20 Base Erosion and Profit Shifting initiative.

1. Introduction

The purpose of this article is to analyse the EU Cooperative Compliance Programme for Large Multinational Enterprises (European Trust and Cooperation Approach, or ETACA). The ETACA was initiated by the European Commission (the “Commission”) as part of its strategy and tax agenda for the implementation of fairer taxation.

In the light of this objective, the authors first examine the scope and functioning of the ETACA on the basis of the guidelines jointly developed by the Commission and national experts from the Member States of the European Union (“Member States”, in general) participating in the programme. The ETACA is inspired by the International Compliance Assurance Programme (ICAP), as developed by the OECD from 2018 to the present. Accordingly, the authors also address the differences between the two multilateral cooperative tax risks review programmes aimed at groups of multinational enterprises (MNEs). Next, the authors provide some thoughts on the usefulness of these programmes in the current context of transformation of the international tax system, highlighting their implications and potential functionality as “low-voltage measures” that is aimed at providing a minimum level of tax certainty. In this regard, both the ETACA and the ICAP would permit MNE groups to carry out their activities in conditions that are compatible with the principle of legal certainty, with the principles inspiring the OECD itself and with the proper functioning of the EU’s internal market.

Finally, the authors present the article’s conclusions.

In the authors’ opinion, the ETACA is a step in the right direction. This conclusion can be arrived at, as the ETACA allows MNE groups to strengthen their corporate governance in tax matters and to verify (ex ante) certain aspects of their transfer pricing policy (level of tax risk).

2. Origin, Objectives and Main Benefits of the ETACA (Pilot)

In July 2020, “An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy” (the “Action Plan”) was published. The Action Plan announced the Commission’s intention to develop, together with the Member States, an “EU cooperative compliance framework”, which, based on greater collaboration, trust and transparency amongst tax administrations, would contribute to facilitate and promote tax compliance for businesses. According to the Action Plan, the initiative:

would provide a clear framework for a preventive dialogue between tax administrations for the common resolution of cross-border tax issues in the area of corporate income tax.

The Action Plan also stated that the ETACA would complement existing national and international programmes in this field, covering both large companies and SMEs. It would also be without prejudice to the adoption of differentiated approaches to examine the specific characteristics and needs of these taxpayers.

References

Consequently, at the end of 2021, the Commission published guidelines for the implementation of the ETACA. A pilot phase of the ETACA was initiated in March 2022, focusing specifically on the transfer pricing risks of this group of taxpayers. Currently, the ETACA involves 14 tax administrations of the Member States. To a large extent, it could be said that the ETACA is inspired by the ICAP as developed by the OECD Forum on Tax Administration (FTA). However, there are important differences between the ETACA and the ICAP, as the latter is a more developed programme with wider material and geographical scope.

The ETACA essentially seeks to promote communication and preventive dialogue between these taxpayers and the tax administrations of the participating Member States in an environment of cooperation, transparency and trust to enable the tax administrations to perform an ex ante assessment of the transfer pricing risks arising from certain intra-group transactions carried out by large MNEs in the EU internal market. As a result, the main purpose of the ETACA is to improve the levels of legal certainty regarding such transactions and to reduce the risk of double taxation. Transparency, cooperation, a reduction in tax disputes and legal certainty are the backbone of the ETACA. In this respect, it could be said that the ETACA follows in the wake of the ICAP, but in a different legal context.

From the taxpayer’s point of view, it is important to note that, although participation in the ETACA would not provide the legal certainty offered by other instruments such as advance pricing agreements (APAs), it would give assurance that, in relation to those transactions analysed and classified as “low risk”, it is unlikely that the tax administrations involved in the risk assessment process will devote resources to carry out tax audits regarding such transactions. In addition, the adoption of a common and multilateral approach in assessing the tax risks arising from the covered transactions would help to prevent companies from being subject to arbitrary transfer pricing adjustments. Such a state of affairs should prevent litigation and reduce tax compliance costs for MNE groups participating in the ETACA.

The tax administrations of the Member States involved could also benefit from the ETACA. In this regard, participation in the ETACA would permit national tax administrations to allocate the available human and material resources more efficiently by devoting such resources to dealing with transactions that present higher levels of complexity and tax risk from a transfer pricing perspective.

All of the tax administrations participating in the ETACA will be integrated into the programme’s Steering Group led by the Commission. Accordingly, once the pilot phase of the ETACA has been completed, the Steering Group will: (1) evaluate the programme outcome; (2) discuss feedback received from participating national tax administrations and MNE groups; (3) analyse any procedural issues that may have arisen during the transfer pricing risk assessment; and (4) update, where necessary, the programme’s guidelines. Moreover, when the ETACA becomes permanent, the Steering Group will meet twice a year to monitor the functioning of the programme, and to ensure that its implementation in the participating Member States is consistent.

3. Scope of the ETACA (Pilot)

3.1. Personal scope and eligibility criteria

In its pilot phase, the ETACA is available to those MNEs with a global total consolidated group revenue in excess of EUR 750 million, whose ultimate parent entity (UPE) is established in the European Union. However, MNEs with total consolidated group revenue of less than this threshold may also participate in the ETACA if they can provide the same information as is contained in the country-by-country (CbC) report. Once the pilot phase has been completed, it is envisaged that the ETACA will be extended to MNEs whose UPE is located outside the European Union.

It is important to remember that, ultimately, the decision on whether a taxpayer is suitable for the ETACA will be made on a case-by-case basis by the tax administrations involved. Accordingly, those MNE groups that voluntarily wish to participate in the ETACA will have to pass a form of “suitability test”. This test will consider elements such as: (1) the footprint of the MNE group and the

8. That is, Austria, Belgium, Denmark, Finland, Germany, Hungary, Italy, Ireland, Luxembourg, the Netherlands, Poland, Portugal, the Slovak Republic and Spain. The list of tax administrations currently participating in this programme can be found at https://taxation-customs.ec.europa.eu/eu-cooperative-compliance-programme/european-trust-and-cooperation-approach-eta-ca-pilot-project-mnes_en (accessed 5 Sept. 2022).
11. Id., at pp. 3-4.
12. Id., at p. 3.
13. Id., at p. 10.
15. Id.
volume and materiality of the intra-group transactions covered by the ETACA in the European Union; (2) the past behaviour of the MNE group towards tax compliance; (3) the commitment of the MNE group to engage cooperatively and transparently throughout the process; and/or (4) the implementation by the MNE group of an internal tax control framework (TCF).

It should be noted that, despite the fact that the UPE or other MNE group entity whose tax residence is located in one of the participating Member States is subject to a tax audit does not necessarily preclude the possibility of participating in the ETACA, such a situation would be an additional factor in assessing the taxpayer’s suitability for the programme. Similarly, it should be noted that a taxpayer’s participation in a national cooperative compliance programme would not guarantee access to the ETACA. However, this circumstance should be assessed positively in the context of the “suitability test” outlined previously in this section.

MNE groups wishing to participate in the ETACA should adopt a collaborative position with the tax administrations. In this regard, MNE groups should commit to act transparently and cooperatively, to maintain an open and frank dialogue with the participating tax administrations, to be open with regard to areas of uncertainty and the positions taken in these areas, to provide requested documentation and information in a timely manner (giving a clear and transparent response to the questions posed by the participating tax administrations), and to work pro-actively towards the resolution of potential issues that may arise within the framework of the ETACA.

### 3.2. Covered transactions

In principle, the transfer pricing risk assessment from a common and multilateral approach conducted in the ETACA is limited to routine intra-group transactions, i.e. transactions where one of the parties performs simple functions, and does not make unique and valuable contributions, for example, transactions involving low-risk distributors, contract manufacturers, or low value-add services. These types of transactions, although easier to benchmark, may also give rise to double taxation. Such a situation is especially so, considering, in particular, the vagueness and imprecision of the OECD Transfer Pricing Guidelines (2017) and (2022)

It is important to note that MNE groups participating in the ETACA will be required to disclose all intra-group transactions. On the other hand, it should be noted that the ETACA does not only cover intra-group transactions between entities resident in the participating Member States, but could also encompass transactions with entities resident in third countries, or in Member States not participating in the programme that are relevant for the participating Member States. However, in such cases, the “effects” of the ETACA for the taxpayer would be limited to the participating Member States whose tax administrations carried out the transfer pricing risk assessment. As a result, in these cases, the ETACA would operate with “unilateral effects”, which would limit its usefulness in the current context where transfer pricing analyses and models are constructed from a bilateral or multilateral perspective taking into account the MNE group’s value chain.

### 4. Coordination Between Member States Participating in the ETACA (Pilot)

As stated in section 2., the ETACA is based on an ex ante multilateral assessment of the transfer pricing risks arising from certain intra-group transactions that is performed in a context of cooperation, trust and transparency with those large MNEs that are participating in the programme. Accordingly, the existence of an adequate level of coordination between the tax administrations participating in this tax risk assessment is a key element for the proper functioning of the ETACA.

In this respect, and as a general rule, it has been established that the tax administration of the Member State where the UPE of the group is resident will be responsible for carrying out these coordination tasks, thereby playing an essential role throughout all the phases of the ETACA (i.e. (1) the admission phase (see section 5.1.); (2) the risk

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16. Id. at p. 6. The main TCF model was developed by the OECD in 2016, representing a “flexible standard” that each MNE group can adopt to its business and corporate governance framework. With regard to the OECD TCF and its functionality in a post-BEPS context, see J.M. Calderón Carrero, Corporate Tax Governance 2.0: The Role of Tax Control Frameworks Following the OECD/G20 Base Erosion and Profit Shifting Project, 74 Bull. Inril. Taxn. 3 (2020), Journal Articles & Opinion Pieces IBFD.

17. Id.

18. Id. at p. 10.

19. See OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD 2017), Primary Sources IBFD and OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD 2022), Primary Sources IBFD (hereinafter the Transfer Pricing Guidelines (2022)).

20. European Commission, Guidelines European Trust and Cooperation Approach (ETACA), supra n. 1, at pp. 5 and 12.

21. Id. at p. 5.

22. Id.

23. Id.
assessment phase (see section 5.2.); and (3) the outcome phase (see section 5.3). 24 However, if the tax administration of the Member State of the UPE does not agree to participate in the ETACA or refuses to act as coordinating tax administration for duly justified reasons, 25 it is envisaged that, on request by the MNE group, this role can be taken over by the tax administration of the Member State where the group has a principal entity or significant activity. 26 The tasks of the coordinating tax administration would consider a number of aspects of the ETACA. Such aspects would include: 27 (1) ensuring smooth cooperation between all members of the Transfer Pricing Assurance Project (TPAP) group; 28 (2) facilitating coordination and communication with the taxpayer, keeping the taxpayer informed throughout the different phases of the ETACA; (3) encouraging communication among all of the participants in the programme; (4) acting as a single point of contact; and/or (5) ensuring that all participating tax administrations receive the same level of information.

5. Phases of the ETACA (Pilot)

5.1. The admission phase

MNE groups interested in participating in the ETACA must submit a formal application to the coordinating tax administration justifying their suitability to participate in the programme. 29 Along with the application form, the taxpayer must submit the Preliminary Information Note, which is intended to provide tax administrations with an overview of the group. 30 In general, the submission of such an application will be preceded by an initial contact between the UPE of the group concerned and the tax administration of the Member State in which its tax residence is located, either at the request of the taxpayer or on the tax administration’s own initiative, so as to be able to explore the group’s possible participation in the ETACA. 31 If, on the basis of the application submitted, the coordinating tax administration decides that the group is suitable to participate in the ETACA, it will contact the tax administrations of the Member States in which the taxpayer carries out intra-group transactions and share with them the details of the Preliminary Information Note. This action will be taken so that those tax administrations can express a preliminary opinion as to whether they are interested in participating in the transfer pricing risk assessment of the case at issue. 32 In making this decision (the “opt-in/opt-out decision”), tax administrations should take into account relevant elements, such as the footprint of the group and the volume and materiality of the covered transactions in the Member State concerned, the level of resources required for participating in the ETACA, the quality of the TCF implemented by the group, the existence of an APA that applies to the covered transactions, or the fact that a tax audit is being carried out in relation to covered transactions. Those tax administrations that choose ultimately not to participate in the multilateral risk assessment are required to justify their decision duly. 33

Once a “sufficient” number of tax administrations have expressed a preliminary interest in participating in the common risk assessment, thereby becoming part of the TPAP group, 34 the taxpayer will be asked to submit a set of documentation included in the so-called “Main Documentation Package”. The essential purpose of the Main Documentation Package is to provide participating tax administrations with a complete picture of the MNE group as well as adequate information on the covered transactions and periods. In principle, tax administrations should not require the taxpayer to provide additional documents to those contained in the Main Documentation Package without prejudice to the possibility of requesting clarifications in relation to that information. 35

24. Id., at p. 8.
25. Here it should be noted that European Commission, Guidelines European Trust and Cooperation Approach (ETACA), supra n. 1 provide for several grounds that could substantiate the decision of the tax administration of the Member State where the UPE is resident not to act as coordinating tax administration, namely: (1) a lack of the necessary resources to play this role as a result of its participation as coordinating tax administration in other Transfer Pricing Assurance Project (TPAP) groups; (2) insufficient footprint of the UPE in its Member State of residence; and (3) the fact that the covered intra-group transactions are not relevant from the perspective of the Member State where the UPE is resident. The decision not to act as coordinating tax administration could also be based on reasons other than the foregoing, provided that this is duly justified by the tax administration of the Member State of residence of the UPE (see European Commission, Guidelines European Trust and Cooperation Approach (ETACA), supra n. 1, at pp. 8-9).
27. Id.
28. Id., at pp. 7 and 9. The TPAP group would consist of the coordinating tax administration and the other national tax administrations that, in the specific case, decide to participate in the multilateral risk assessment.
29. In this regard, it has been established that, in the application form, a taxpayer should specify: (1) the footprint of the MNE and the volume and materiality of intra-group covered transactions within the European Union; (2) whether it has incurred a serious penalty as a consequence of tax fraud, repeated wilful default and/or repeated gross negligence; (3) the commitment to engage cooperatively and transparently throughout the process; and/or (4) whether it has implemented an internal TCF (see European Commission, Guidelines European Trust and Cooperation Approach (ETACA), supra n. 1, at p. 17).
30. Among other things, this Preliminary Information Note will contain information on the Member States in which the taxpayer: (1) carries out intra-group transactions (including the amount in euro in respect of each of the proposed covered transactions); (2) has entered into APAs; (3) is the subject of mutual agreement procedures (MAPs); (4) has obtained relevant cross-border rulings (for example, patent box rulings); and/or (5) has re-structuring in the last three years (see European Commission, Guidelines European Trust and Cooperation Approach (ETACA), supra n. 1, at p. 19).
31. European Commission, Guidelines European Trust and Cooperation Approach (ETACA), supra n. 1, at p. 11. A preliminary meeting (or meetings) between the taxpayer and the coordinating tax administration may be held before the formal request of participation in the ETACA is made to discuss issues, such as the suitability of an MNE group to participate in the programme, the type and extent of the information that must be provided and/or the formalities of the process.
32. Id., at pp. 11-12 and 18.
33. Id., at p. 9.
34. Id. As a general rule, the TPAP group should consist of a minimum of five national tax administrations. However, this figure could vary depending on the number of Member States in which the MNE group is present.
35. Id., at p. 7. The list of documents comprising the Main Documentation Package is set out in European Commission, Guidelines European Trust and Cooperation Approach (ETACA), supra n. 1, at Annex 4. Such documentation would include, among other things, the following documents:...
In order to finalize the selection of participating tax administrations and the periods and intra-group transactions to be covered by the ETACA, the coordinating tax administration should organize a “kick-off” meeting. Exceptionally, it could be the case that, following the examination of the Main Documentation Package provided by the taxpayer, one of the tax administrations that expressed a preliminary interest in participating in the ETACA decides not to participate. In such a case, the withdrawing tax administration should explain the reasons for its decision.36

The admission phase, which started with the submission by the MNE group of the formal application together with the Preliminary Information Note, will end with the decision of the participating tax administrations on the transactions and the periods to be covered by the ETACA. This phase should be completed within a period of between four and eight weeks.37

5.2. The risk assessment phase

This phase is intended to classify, on a binary basis, the intra-group transactions covered by the ETACA into one of two categories, namely (1) “low risk” and (2) “no-low risk”. For this purpose, participating tax administrations will carry out an assessment of the tax risks arising from the covered transactions following, to the extent possible, a “common approach”.38 This phase should be completed in a maximum of 20 weeks. Accordingly, the risk assessment performed in the context of the ETACA is not an in-depth transfer pricing risk assessment of the kind that would be carried out within the framework of a tax audit or an APA procedure, but, rather, only a high-level transfer pricing analysis.39

In this respect, and with the aim of ensuring an adequate level of coordination, efficiency and consistency when performing the aforementioned risk assessment, it has been established that it should be carried out in two stages. These two stages are summarized below.

In the first stage, the functional analysis will be reviewed to understand and clarify, based on the facts and circumstances reported by the taxpayer, the functional profiles of the companies involved in the covered transactions. Consequently, for example, if an MNE group claims to be undertaking distribution activities by way of low-risk distributors, the participating tax administrations should evaluate whether the functions, assets and risks of the distribution entities, as described in the Main Documentation Package, correspond to a functional profile of a low-risk distributor.40

The second stage of the risk assessment will focus on analysing whether the transfer pricing methodology of the covered intra-group transactions is consistent with the previously identified functional profile. In this regard, participating tax administrations may review the transfer pricing methods and the benchmark analysis used to price the covered transactions. In addition, participating tax administrations should assess the measures adopted by the taxpayer to ensure that the transfer pricing methodology is applied accurately and that the transfer pricing information provided (for example, through its tax returns or the CbC report) is correct.41

Once these two stages have been completed, the participating tax administrations will meet to share their preliminary conclusions regarding the risk classification of the covered transactions (i.e. low risk versus no-low risk) and to discuss any outstanding issues. Next, such preliminary conclusions will be discussed in a meeting with the MNE group. Once the taxpayer’s feedback has been obtained, the participating tax administrations will meet again to take the final decision on the classification of the covered transactions. In this respect, it should be noted that, while the participating tax administrations should endeavour to reach an agreement on the level of tax risk of each of the intra-group transactions analysed, as this would enhance legal certainty and reduce the risk of double taxation, such an outcome is not guaranteed.42

Here, it is important to bear in mind that, as a general rule, during the risk assessment phase the taxpayer will not be given the option to modify its transfer pricing policy to avoid certain intra-group transactions being classified as no-low risk. Nevertheless, in exceptional cases, the participating tax administrations may consider on a case-by-case basis giving the taxpayer such an option.43

5.3. The outcome phase

The results obtained in the tax risk assessment carried out in the risk assessment phase (see section 5.2.) must be set out in a final summary report that is signed by all the participating tax administrations. In the event that the tax administrations in question have not reached an agreement on the level of tax risk of the covered transactions (low risk versus no-low risk), this report must include the risk classification given by each of the tax administrations to these transactions, as well as an explanation of the reasons on which such differences are based.44
The coordinating tax administration is responsible for notifying the UPE with an outcome letter that reflects the determinations expressed by the participating tax administrations in the final summary report. This outcome letter, together with the final summary report, should be submitted within four to eight weeks of the meeting concluding the risk assessment phase. The outcome letter addresses issues such as the national tax administrations involved in the common risk assessment, the list of the covered transactions and the risk rating given to each of them (low risk versus no-low risk), the covered periods and the agreed roll forward period, and/or the existence of possible caveats or limitations.

The outcome letter will also contain a statement that, in relation to those covered transactions classified as low risk, it is not anticipated that the relevant tax administrations involved in the risk assessment process will devote resources to a further in-depth review of the tax risks arising from such transactions. In this respect, it should be noted that a minimum period of assurance should be guaranteed for at least the covered periods and the following two tax filling periods (the roll-forward period), provided that there are no substantial changes in the facts and circumstances that have been assessed. Accordingly, the outcome letter will also refer to the taxpayer’s obligation to inform the participating tax administrations of any relevant changes that occur after the completion of the risk assessment and that affect the covered risks.

In any event, as has been noted in section 2., participation in the ETACA does not provide MNE groups with a level of legal certainty equivalent to that offered by other bilateral or multilateral tools, such as APAs or mutual agreement procedures (MAPs) and other tax arbitration mechanisms.

6. ETACA (Pilot): Configuration and Functionality in a Post-BEPS Context – Towards the Instrumentalization of the Principle of Legal Certainty in International Taxation Through Low-Voltage Measures?

6.1. The context and regulatory framework in which the ETACA arises and would operate

The implementation by the European Union of the ETACA should be viewed positively, considering the current international and EU tax context, where, as a consequence of the transformation of the international tax system itself, there is a notable intensification of the tax risks connected with cross-border activities and flows and an increasing number of international tax controversies. It could be said that this is a hyper-complex regulatory era, which, to a large extent, is due to the rapid development of “new” (post-BEPS) substantive and interpretative principles, international tax standards and the corresponding (national and international) implementing rules. These new “regulatory sources” are implemented through principles and provisions, which, in many cases, are diffuse, obscure and imprecise in terms of their delimitation and scope, thereby permitting a wide margin for interpretation and discretion in their application.

The main consequence is legal and/or tax uncertainty, as this entire internationalized regulatory framework is conducive to generating a divergent and asymmetric application by the different administrations and taxpayers, without there being tax cooperation mechanisms at an EU or international level to permit an effective ex ante prevention of these problems or an ex post resolution of such tax controversies. Accordingly, it can be anticipated that the result of such a hyper-complex framework would not only involve an increase in compliance costs.
and greater difficulty for taxpayers in articulating consistent tax compliance models with low fiscal risk,55 but also, by the generation of a greater number of cases of double or multiple taxation that negatively affect trade, investment and cross-border economic flows, or, in the case of the European Union, the functioning of the internal market itself. The direction of the evolution and development of the international tax system has moved abruptly towards the articulation of mechanisms and clauses limiting international tax planning schemes and tax competition between states, but through excessively vague measures that have a clear deficit of legal certainty, thereby favouring the intensification of tax risks, tax controversies and double taxation.56 Both the post-BEPS 1.0 measures57 and the common approach to minimum corporate taxation for large companies (Pillar Two BEPS 2.0 2021 to 2022) pose serious problems of legal certainty and multiple taxation because no systemic mechanisms have been put in place to ensure effectively their ex ante prevention or ex post resolution.58 As a result, it is clear that most new international standards and “model rules” are so complex and open-ended that they permit a wide margin of interpretation at the national and international level that can hardly be considered to be compatible with the fundamental tax principles of legality and legal certainty. It is not clear whether this legal uncertainty can be considered to be a structural part of the current system of international taxation. However, it is evident that the level of tax risks deriving from it are higher than ever before.59

Some countries have initiated domestic cooperative tax compliance programmes in the last decade as a mechanism or formula aimed at promoting legal certainty in the application of the most intricate aspects of the international tax framework on large taxpayers that have developed complex business transactions, corporate structures that resemble a mangrove swamp and fragmented global value chains. As also occurred with the origin of the APAs, these cooperative tax compliance programmes constituted a formula to facilitate the application of the tax law within the scope of a non-controversial bilateral “procedure” based on the principles of good faith, transparency and trust in which the taxpayers and tax administrations can determine the most suitable way to apply the law taking into consideration all the particular business circumstances of the taxpayer. Consequently, these programmes, at least originally, were structured according to the principles of voluntariness, transparency, mutual trust and legal certainty with the purpose of achieving effective tax compliance by large companies with the assistance and supervision of the tax administrations when applying the complex and imprecise tax regulations to the different (and also complex) business models and intra-group transactions dynamically implemented by MNE or transnational groups of companies.60 Moreover, it should be noted that, at least in a number of OECD member countries (for example, Australia, the Netherlands and the United Kingdom), these programmes are evolving towards (mandatory) tax assurance programmes, whereby the cooperative-assistance approach is being diluted while the transparency dimension and real-time tax supervision and control are being intensified outside tax audit procedures in the strict sense of the term. Furthermore, the current state of affairs reveals a very low trust in MNEs among tax administrations, which perceived large businesses as having a low willingness to pay their “fair share of tax”.61

6.2. The ETACA as a European cooperative tax model inspired by the OECD’s ICAP

The ETACA, which is inspired by the ICAP, can be regarded as a multilateral preventive and coordinated control mechanism for transfer pricing tax risks.62 To a great extent, the ETACA is based on the principles and spirit of national cooperative compliance programmes in the terms established by the OECD.63 However, there are significant differences between the ETACA and the ICAP 2.0 as developed by the OECD’s FTA. In particular, it should be noted that the ETACA (2021 to 2022) is a pilot programme, and as such its current configuration is set to evolve by expanding its operability, as was the case with the ICAP (2018 (pilot) to 2021 (Handbook 2.0)). At the present time, there are a number of differences between the two programmes.64 In this context the following five differences should be noted:

(1) Currently, 22 tax administrations that are members of the FTA are participating in the ICAP,65 while the


61. See OECD, Tax Morale II: Building Trust Between Tax Administrations and Large Businesses (OECD 2022).


64. A more detailed analysis on this issue can be found in Russo, Engelmoer & Martini, supra n. 63, at secs. 4. and 5.

65. The functioning of the ICAP has shown that a level of participation between four and eight tax administrations permits an adequate functioning of the programme.
ETACA involves 14 tax administrations of Member States.

From the perspective of the personal scope of application, the ETACA is more flexible than the ICAP, as it permits access to the programme for MNE groups with a global total consolidated group revenue of less than EUR 750 million (the CbC reporting threshold).

The ETACA is aimed at a high-level review of the transfer pricing policy of MNE groups, in particular, the application of the arm’s-length principle (ALP) with regard to routine transactions (for example, transactions involving low-risk distributors). However, the ICAP permits the review of any international transaction or structure that gives rise to tax risks, on terms agreed by the MNE group and the tax administrations participating in the programme.

The ICAP expressly provides for the possibility of using a number of mechanisms (issue resolution procedures) within the framework of the programme to implement a higher level of cooperation and legal certainty. The ETACA does not currently provide for an issue resolution procedure, but it does leave open the (exceptional) possibility that a taxpayer may modify its transfer pricing policy so as to be aligned with the position of a participating tax administration and avoid a no-low risk classification in respect of the covered transactions.

The results of the ICAP are reflected in the outcome letters issued by the different participating tax administrations in which they explain the reasons for their tax risk rating of the different transactions and structures reviewed. In contrast, the ETACA tries to overcome such a jurisdictional approach through a “common outcome letter” that would represent a common assessment of the risks as analysed by the participating tax administrations. (However, the ETACA guidelines do envisage the possibility that a common agreement on the risk level of the covered transactions cannot be reached as well as the possibility that the outcome letter includes “caveats or limitations”.)

Through the adoption of this common approach in assessing the tax risks arising from the covered transactions, the ETACA could be intended to reflect the increased level of cooperation and duty of loyalty that exists between the Member States. However, it should not be overlooked that: (1) direct taxation remains an exclusive competence of the Member States; (2) the essential elements of the corporate income tax of the Member States have not yet been harmonized; and (3) the ALP is an international standard that has been developing in a dynamic, open and non-regulatory manner by the OECD through the OECD Transfer Pricing Guidelines, without excluding national approaches or significant modulations of this principle through domestic measures or legislation in each jurisdiction. It is true that the European Union has accepted the tax functionality and international configuration of the ALP, but by no means can it be considered that there is a uniform and monolithic understanding of the ALP at international or European level. In fact, the OECD/G20 BEPS Project (1.0, 2015 and 2.0, 2021 to 2022) opened the Pandora’s box regarding the configuration and functionality of the ALP, which is bringing about a substantive

66. The issue resolution procedure included in the ICAP (see OECD, International Compliance Assurance Programme: Handbook for tax administrations and MNE groups (2021) (the “ICAP 2.0”), supra n. 9 at pp. 26-27) provides that the taxpayer and one or more of the participating tax administrations that consider that one or more identified covered risks would not be assured or would not qualify as low risk may agree on the correct tax treatment of a covered transaction. This position may include making tax adjustments (or corresponding adjustments) in the periods covered by the ICAP. Such adjustments may require the taxpayer to make changes to the tax positions reported in its tax returns. The OECD, International Compliance Assurance Programme: Pilot Handbook – Working Document (2018) (the “ICAP 1.0”), supra n. 9 already provided for this same possibility, but the mechanism was outside the programme. Accordingly, the OECD, International Compliance Assurance Programme: Handbook for tax administrations and MNE groups (2021) (the “ICAP 2.0”), supra n. 9 brings considerable progress in terms of tax coordination and legal certainty, as the outcome of the issue resolution procedure will be reflected in the outcome letters. However, it should be noted that the invocation in this context of mechanisms, such as APAs or MAPs, by the taxpayer would require the implementation of national or international procedures outside the ICAP.


68. Some authors have pointed out that the ETACAs “joint outcome approach” may strain the functioning of the programme and lead to more adjustments, considering the ICAP’s experience, as tax administrations operate with different (national) risk assessment approaches and methodologies and try to express such approaches in the outcome letters (see Russo, Engelmoer & Martini, supra n. 63, at sec. 3). With regard to the risk assessment, the ICAP also envisages the use of the OECD, Country-by-Country Reporting Handbook on Effective Tax Risk Assessment (OEDC 2017) (see OECD, International Compliance Assurance Programme: Handbook for tax administrations and MNE groups (2021) (the “ICAP 2.0”), supra n. 9 at pp. 26 and 71. Calderón Carrero et al., Convenios de doble imposición. El impacto BEPS. Análisis y evolución de la red española de tratados fiscales, pp. 1079 et seq. (CISS-Wolters Kluwer 2020).


71. See Andrés R. Collet, Transfer Pricing and the Arm’s Length after the Pillars, 105 Tax Notes Int'l. 5, pp. 543-555 (2022); A. J. Martín Jiménez, Transfer Pricing and EU Law Following the ECI Judgement in SGI. Some Thoughts on Controversial Issues, 64 Bull. Int’l. Tax. 5 (2010), Journal Articles & Opinion Pieces IBFD, and W. Schön, Transfer Pricing Issues of BEPS in the Light of the EU law. Working Paper No. 2015-09, Max Planck Institute for Tax Law and Public Finance (2015). In this regard, it is striking that European Commission, Guidelines European Trust and Cooperation Approach (ETACA), supra n. 1 do not refer to the work of the EU Joint Transfer Pricing Forum (JTPF) as materials to be taken into account for the purposes of implementing the ETACA. Among such material, some of which has been endorsed by the EU Economic and Financial Affairs Council (ECOFIN), the following should be noted: (1) JTPF, Report on Risk Management, JTPF/007/final/2013; (2) JTPF, A Coordinator (ETACA)’s Transfer Pricing Handbook, JTPF/013/2018; (3) JTPF, Report on the Use of Comparables in the EU, JTPF/007/2016/final; and (4) European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period April 2009 to June 2010 and related proposals (i) Guidelines on low value adding intra-group services and (ii) Potential approaches to non-EU triangular cases. COM(2011)36 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0016&from=EN (accessed 9 Nov. 2022).
transformation of this principle. Accordingly, the ALP and its international regulatory framework (the OECD Transfer Pricing Guidelines) continue to maintain their structural functionality, but their (non-controversial) application to very internationalized MNE groups, with complex business models and fragmented global value chains, is becoming more and more difficult both for the MNEs and for tax administrations. 72

6.3. The ETACA as an instrument to achieve a higher level of legal certainty

The ETACA guidelines state that the common outcome letter resulting from participation in such a programme does not constitute the result of a tax audit, an APA or an advance tax ruling. 73 Accordingly, these guidelines do not limit the participating tax administrations to conduct examinations in the future. The outcome letter is merely informative in nature, and does not constitute an administrative act subject to review or appeal. 74 In this regard, it is clear that both the ICAP and the ETACA are mechanisms that provide “comfort” (i.e. a reduction in tax risks as a consequence of the cooperative approach adopted by the MNE), and make it possible to solidify cooperative tax relations between the MNE group and the tax administrations of the jurisdictions where they operate. 75 However, these are mechanisms that would not provide legal certainty in the strict sense, so that they cannot be considered “interchangeable” with a bilateral and/or multilateral APA, or with the outcome of a so-called “joint audit” or a MAP and/or arbitration. 76 Notwithstanding this, the authors consider that the statements made by the tax administrations that are included in the outcome letters should have legal effects at a domestic level, in accordance with the principles of good administration, legitimate trust and the so-called “estoppel doctrine”. 77

In the same vein, the instrumental relationship that can be established between the participation of an MNE group in the ICAP and the implementation of other cooperative mechanisms, such as an APA or a MAP, should be emphasized, as the information, documentation and conclusions reached in the framework of such a multilateral risk review programme can be used, and serve as a basis for developing and reaching an agreement in accordance with the regulations governing the above-mentioned mechanisms. 78 The ETACA could also have such instrumental functionality, particularly if the programme evolves, as would be desirable, in the same direction as the ICAP. Here, it would be key that the ETACA’s objective scope of application was broadened to cover the review of all types of tax risks encountered by MNE groups.

6.4. Issues raised by the lack of an ETACA regulatory framework

The ETACA lacks its own regulatory framework, inasmuch as the guidelines for its application drawn up by the Commission are mere soft law. The authors consider that this lack of regulation in a mechanism aimed at generating legal certainty is neither consistent with its purpose nor with the principles of the rule of law.

It is true that the operation of the ETACA is based on the application of EU mutual assistance mechanisms between tax administrations in tax matters. However, such mechanisms by no means constitute a complete regulatory framework, but, rather, are a partial and mainly procedural one. Here, it should be noted that all of the documentation and information provided by the MNE group, and shared between the tax administrations participating in the ETACA and the ICAP, must be transmitted in accordance with the channels provided for in the instruments for mutual assistance and exchange of tax information between the participating States. These channels include, for example, the Council of Europe/OECD Mutual Assistance Treaty (1988) 79 and the Protocol to the 1988 Treaty (2010), 80 those tax treaties that adopt article 26 of the OECD Model 81 and/or Directive (2011/16) on mutual assistance regarding taxation in the European Union. 82 The application of these instruments is critical, for as well as providing a legal basis for the transmission of information, they establish the conditions of confidentiality and the limits to the use of such information for mainly (and, even in some cases, exclusively) tax purposes. 83

MNEs should be aware that the information and documentation submitted within the scope of the ETACA and/or the ICAP can be used by the tax administrations of the participating countries in the framework of domestic tax procedures 84 that may be launched after the comple-

73. See European Commission, Guidelines European Trust and Cooperation Approach (ETACA), supra n. 1, at pp. 22-23.
74. Id.
76. See OECD, International Compliance Assurance Programme: Handbook for tax administrations and MNE groups (2021) (the “ICAP 2.0”), supra n. 9, at pp. 8-10.
78. See OECD, International Compliance Assurance Programme: Handbook for tax administrations and MNE groups (2021) (the “ICAP 2.0”), supra n. 9, at p. 16.
tion of the ETACA and/or the ICAP “procedures”. As a result, an MNE group participating in the ETACA and/or the ICAP must be prepared not only to increase significantly its level of transparency regarding its tax model, strategy, group structures and intra-group transactions, but also to face a heterogeneous assessment of its level of tax risk by different tax administrations. The latter situation may lead to tax assurance in some cases, and audit procedures focused on the risks analysed in the framework of such programmes in others.

It should be also noted that modern mechanisms of administrative assistance in tax matters permit the exchange of information with the tax administrations of “third countries”. Consequently, it cannot be ignored that the tax administrations of non-participating countries could have access to the documentation produced within the framework of these cross-border cooperative programmes.

In the same sense, it should be emphasized that both the ETACA initiated by the Commission and the ICAP developed by the FTA and the OECD are “voluntary programmes” that have been configured and implemented on the basis of guidelines or handbooks, respectively, that operate as a form of international soft law that is adopted by the participating tax administrations, which the MNE groups willing to participate in such programmes also undertake to observe. Accordingly, these programmes and the administrative procedures and actions carried out within their framework do not operate on the basis of the existence of an ad hoc domestic or international regulation, and beyond that which refers to the general regulation of international mutual assistance mechanisms in tax matters. In the authors’ view, the “voluntary” nature of the participation of administrations and taxpayers in this type of programmes does not justify such a status quo. In fact, APAs (and/or tax rulings), which can also be classified as “voluntary cooperative mechanisms”, are regulated by domestic regulations that determine the position, actions and the entire framework to which the tax administrations and taxpayers who are parties to the procedure are subject, without the existence of a type of “private tax law”, which permits a tax administration to place itself outside the substantive or procedural tax regulations that apply in each jurisdiction. The same applies to joint audits.

The authors consider that the different countries involved in these programmes should regulate, albeit minimally, the conditions of participation of their respective tax administrations and the rights and obligations of taxpayers who have accessed such international programmes in such a way that the legality, good administrative governance and constitutionality of these programmes is guaranteed. As is the case with APAs and tax settlements, the authors think that it makes sense that the application of these cooperative mechanisms are subject to legal regulation and supervision to ensure their good governance, as well as the protection of the rights of taxpayers who operate in a cross-border context.

Moreover, in the authors’ opinion, it might make sense to articulate greater coordination between international cooperative programmes and national cooperative programmes, so that, at the very least, the conclusions reached in the former would apply within the framework of the latter. It also seems to be reasonable to establish more direct connections between the ETACA and the ICAP and the tax dispute resolution mechanisms provided for in international treaties (tax treaties, the Council of Europe/OECD Mutual Assistance Treaty (1988) and the Protocol to the 1988 Treaty (2010), etc.) or in the Directive (2017/1852) on tax dispute resolution mechanisms in the European Union, so that the greater transparency and cooperation developed by an MNE group in the framework of these programmes would be recognized for the purposes of the application of such mechanisms by improving, for example, the access procedure, a fast-track route or even the participation in such mechanisms by taxpayers.

6.5. Functionality and benefits from participation in ETACA and/or ICAP from MNE groups’ perspective

As noted in section 2, the ETACA is a multilateral cooperative programme inspired by the OECD’s ICAP that can contribute to reducing transfer pricing risks and tax disputes between tax administrations of Member States, thereby contributing to the proper functioning of the internal market. Moreover, participation in these multilateral cooperative programmes can have other positive collateral effects for MNE groups, such as: (1) the improvement of their reputation (the “halo effect”) in terms of

see ES. Reglamento del Impuesto sobre Sociedades (Corporate Income Tax Regulation), art. 231 or OECD. Transfer Pricing Guidelines (2022), supra n. 19, at paras. 4.167–4.168.

85. See European Commission, Guidelines European Trust and Cooperation Approach (ETACA), supra n. 1, at p. 12 and OECD, International Compliance Assurance Programme: Handbook for tax administrations and MNE groups (2021) (the “ICAP 2.0”), supra n. 9, at p. 29. It is true, however, that both the ICAP and the ETACA seek to provide tax assurance to the MNE group in case of a low-risk rating of the covered transactions during the covered periods and the two subsequent tax filing periods (roll-forward periods) (see European Commission, Guidelines European Trust and Cooperation Approach (ETACA), supra n. 1, at p. 16 and OECD, International Compliance Assurance Programme: Handbook for tax administrations and MNE groups (2021) (the “ICAP 2.0”), supra n. 9, at p. 17).

86. See Katz-Pearlman & Sullivan, supra n. 75.


88. Among the issues to be regulated in relation to the rights of taxpayers, the following should be noted: (1) the possibility for a taxpayer to use the voluntary regularisation mechanisms during or after its participation in the ETACA in respect of matters subject to the multilateral risk assessment; (2) the potential effects that may result from the ETACA with regard to the tax statute of limitations; (3) the implications of voluntary cooperation and provision of information by the taxpayer for penalty purposes; (4) a taxpayer’s safeguards against misuse of information and documentation provided during its participation in the ETACA; and (5) the right of (qualified) access to dispute resolution mechanisms (i.e. APAs and/or MAPs) as a consequence of the cooperative position developed by the taxpayer in the ETACA.

89. For instance, some authors have highlighted the desirability that the conditions of access to these programmes be consistent with the principle of equality (see Russo & Martini, supra n. 62).

governance and tax sustainability, the extension to other tax administrations (not participating in the programme) of the low (or non-existent and/or immaterial) tax risk assessments resulting from the outcome letters; and/or (3) the possibility to obtain a tax settlement or to enter into APAs and/or bilateral advance pricing agreements (BAPAS) and MAPs in relation to the transactions or structures reviewed within the framework of these programmes. Both the ETACA and the ICAP can be used by taxpayers as a “litmus test” of the transfer pricing policy of the MNE group, which can be, in certain cases, very useful and constitute a good practice in terms of tax governance in the context following the OECD/G20 BEPS initiative. This situation could apply in the current one, in respect of which the international tax system is being transformed without having articulated mechanisms to ensure the ex post resolution of any tax controversies that may arise as a result of the set of circumstances that are part of this process (for example, regulatory hyper-complexity, the lack of international fiscal coordination, the articulation of imprecise fiscal standards and fiscal unilateralism).

The authors also think that these cross-border cooperative programmes (i.e. the ETACA and/or the ICAP) should be resized and expanded so that they could constitute a key piece of the future toolbox for legal certainty and international tax coordination. The proper application of the ALP in a post-BEPS 2.0 context, particularly once the Pillar Two minimum global taxation measures have been implemented, requires a set of mechanisms that favour coordinated application at an international level.

The sustainability of the post-BEPS 2.0 international tax system depends largely on the implementation of new mechanisms that ensure legal certainty in tax matters and limit international tax disputes. Mechanisms, such as the ETACA and/or the ICAP, properly regulated and resized, could contribute to realizing these objectives. The authors think that the ex ante application of these multilateral cooperative tax programmes could be particularly useful, where the resulting low-risk assessment of the transfer pricing policy of an MNE group derived from a multilateral cooperative programme generates an international iuris tantum presumption that the MNE’s group profit allocation system so assessed is in accordance with the ALP. Such a state of affairs could help to minimize tax controversies with regard to the application of the corporate global minimum taxation framework (Pillar Two), which is built and works on the ALP platform.

7. Conclusions

The ETACA constitutes a (low-voltage) measure that is part of (so far) weak tax policy line aimed at articulating mechanisms to implement and improve the current low level of tax certainty that applies at the international level. This situation results, to a large extent, from a hyper-complex, fragmented and imprecise tax framework where, from a tax enforcement perspective, unilateral administrative approaches tend to prevail, even in relation to “international standards and instruments”, with no international tax cooperation mechanisms to resolve effectively (ex ante or ex post) the tax risks and disputes that increasingly arise in this context with all that this entails (higher compliance costs, distortions and tax obstacles to investment flows and cross-border activities, higher capital costs for companies, etc.). Accordingly, in the authors’ view, it is clear that these cross-border cooperative tax programmes are a step in the right direction. However, the current configuration of the ETACA is not up to the needs of legal certainty and coordination between tax administrations that an international tax system demands for a world that is increasingly globalized in economic and tax regulatory terms.

91. It should be noted that there is a connection between the sustainability objectives and the tax policy of large companies, which is specified on the basis of a series of parameters, such as the level of corporate governance in tax matters (including tax risk management and cooperative relations with tax administrations), fair tax contribution and tax transparency (see B. Crookston, The Changing Landscape-ESC and Taxation, Bloomberg Tax (22 Apr. 2022)).

92. See L. Corona et al., OECD Forum on Tax Administration Releases New Handbook for ICAP, EY Tax News Update, Global Edition (24 Feb. 2021). In this regard, it has also been pointed out that, in a world moving towards a minimum corporate taxation of large companies and the limitation of tax competition through corporate income tax, the greater legal certainty and flexibility that a cooperative relational framework between tax administrations and MNEs could provide is gaining momentum, and could contribute to improving the investment climate and attraction/retention of activities by large companies (see R. Were, HMRC Takes Action to Improve Large Business Tax Administration, Macfarlanes LLP (2 Dec. 2021)).

93. Some leading tax practitioners have pointed out how the substantive development of the ALP on the occasion of the BEPS 1.0 Project (2015) has led to a “more constrained” ALP which is aimed at eradicating formalistic profit allocation models, affecting both tax administrations and MNEs. However, despite the substantive development of the ALP, it is rightly noted that the application of transfer pricing is very casuistic and entails a margin of appreciation of facts and circumstances that is very subjective, both from the perspective of the taxpayer and of the authorities themselves. Certainly, it is undeniable that MNEs have a greater command of the facts, but the escalation of international tax control combined with increased specialization and experience of the inspectors in transfer pricing matters and the intensification of tax transparency (post BEPS transfer pricing documentation) even the playing field and places MNEs in a new and more uncertain territory, particularly considering the tensions resulting from a changing international tax system. In this context, consistency and defensive approaches to the profit allocation model must prevail (see M. McDonald et al., Talking Transfer Pricing and the Arm’s Length Principle, Skadden USA, GILTI Conscience (30 Aug. 2022)). Such a model must not only be methodologically and technically consistent, factually and valuationally supported (reliable benchmarks) and consistent from a documentary point of view, but it must also be “reasonable” in terms of profit allocation, considering the “real FAR [Functions, Assets & Risks]” (see F. Matthews, Transfer Pricing Litigation: Where Are We Headed?, Tax Analysts, Taxing Issues (23 June 2022)). In this context, it should be pointed out that the transformation of the international tax system that derives from the measures resulting from the BEPS 1.0 and 2.0 Projects, does not entail the overcoming of the ALP, but rather the ALP forms a structural part of the functioning of the new system with all that this entails (see Andrus & Collier, supra n. 71).

94. See Coleman et al., supra n. 72.

95. The measures derived from OECD. Making Dispute Resolution Mechanisms More Effective – Action 14: Final Report 2015 (OECD 2015). Primary Sources IBFD are wholly insufficient to resolve the multiple problems and controversies resulting from the current international tax system (see M. Herzfeld, Looking Past the Crumbling Pillars, 107 Tax Notes Intl. 6, pp 647 et seq (8 Aug. 2022)). Furthermore, it should be noted that the implantation of Pillars One and Two of BEPS 2.0 require new generation mechanisms that guarantee the elimination of the double taxation problems and tax asymmetries that will result from the new (and possibly more complex) typology of tax controversies that will be generated as a result of its application at the multilateral level.