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BRAIN DRAIN AND TAX COMPETITION: DO WE NEED ANOTHER BEPS?

In the article we argue that the origins of the international tax base erosion in the corporate sector, which are the harmful tax competition for capital and old-fashioned international tax rules, are also relevant for the taxation of income of the high-skilled and mobile workforce. Therefore, a multilateral rethinking of the global tax architecture is proposed in order to conceptually address the problem properly and in a harmonized manner. We point out, based on the examples of Russia and Serbia, several problems of tax base erosion for mobile “talents”, with a case study analysis of scenarios of “talent” migration involving sportspersons, researchers and IT specialists. Finally, we propose some ideas for global tax cooperation in order to mitigate the negative tax effects of brain drain based on adapting the existing recommendations of the BEPS Project for the cases of migrating individuals.

Key words: *BEPS. – Brain drain. – Tax competition. – OECD Model Convention. – Tax residence.*

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1. INTRODUCTION

Imagine you are playing *Who Wants to Be a Millionaire?* on Italian TV. The host asks you the last question (the answer to which can set you up for the rest of your life) – “What makes Italy lose about 14 billion euros annually, which equals approximately 1% of its GDP?” (*ANSA Politics* 2019) You are given four options, but you don’t know the correct answer to the question. You turn to your lifelines: Ask the Audience, 50:50, Phone a Friend. Initially, you call your old friend, but on the end of a telephone they tell you that he moved to another country for a better life. Ok, you take another lifeline, 50:50, but the host apologizes and tells you that the show editor was recently offered higher salaries in the US, and therefore, he quit. Wha-a-at! You turn to Ask the Audience, but there is no one in the studio either – everyone has chosen to leave the country. Sounds like a nightmare for any trivia player!

You probably have already realized what is the correct answer to the question. It is *brain drain*, which does not have an unambiguous definition, but rather a list of definitions:

- emigration of educated or professional people from one country, economic sector, or area for another usually for better pay or living conditions;¹
- migration of health personnel in search of the better standard of living and quality of life, higher salaries, access to advanced technology and more stable political conditions in different places worldwide;²
- the situation in which large numbers of educated and very skilled people leave their own country to live and work in another one where pay and conditions are better.³

The modern world is characterized by a high degree of inequality in the context of the brain drain. We turn to one of the studies of the Gallup Institute (2018), in which the authors tried to determine how much the population of a give country would change if everyone willing to move to another country really moved to where they wanted (Potential Net Migration Index – PNMI). The results are quite shocking – for 109 out of 150 countries negative the values vary from –1% to –70%.

¹ See the definition of *brain drain* in the Merriam-Webster Dictionary. <https://www.merriam-webster.com/dictionary/brain%20drain> (last visited 25 September 2019).

² See Megan Ivy. Why brain drain hurts a developing nation? <https://borgenproject.org/brain-drain-hurts-developing-nation/> (last visited 25 September 2019).

³ See the meaning of *brain drain* in the Cambridge English Dictionary. <https://dictionary.cambridge.org/dictionary/english/brain-drain> (last visited 25 September 2019).

However, we presume that the impact of tax burden on the decision to leave is insignificant. In particular, the comparison of the Gallup Institute (2018) data with the national tax rates (NTR) for the jurisdictions of some leaders and outsiders, according to KPMG (2019a), may also support this.

Table 1: Potential Net Migration Index (PNMI) and Nominal Tax Rates (NTR)

Country	PNMI Indicator	NTR Indicator
New Zealand	231%	33%
Singapore	225%	22%
Iceland	208%	46.24%
UAE	204%	0%
Switzerland	187%	40%
...
Nigeria	-46%	24%
Congo	-50%	35%
Syria	-44%	7%
Senegal	-34%	11%
Sierra Leone	-70%	5%

The results presented in the table show a slight correlation between the PNMI and the NTR. However, in our opinion, the problem of brain drain is still closely intertwined with tax issues both in the original country of residence of the individual and in his new jurisdiction. As Mohapatra (2012, 1) notes “the emigration of workers, especially high-skilled workers, is often perceived to create a fiscal loss – when considering the cost of educating these workers and foregone tax revenues for the home country.” Global challenges require global solutions, therefore, this article is focused on the search and development of such global approaches to cooperation in the area of taxation, aimed at solving the abovementioned problem of brain drain and losses of tax revenues, and to streamlining the global approaches to taxation of income of mobile talented professionals.

2. BRAIN DRAIN IN RUSSIA AND SERBIA IN THE CONTEXT OF TAX RULES

2.1. Characteristic of the Brain Drain problem in Russia and Serbia

In addition to the common Slavic roots, the proximity of languages and cultures, the interweaving of historical destinies and, of course, the Orthodox faith, Russia and Serbia are united by the brain drain problem. This issue was recognized by the Serbian President Aleksandar Vučić as a “serious” inhibitory factor in the development of the Serbian economy (B92 2019). In particular, the results of the study conducted by the Institute for Development and Innovations claim that losses stemming from emigration of Serbia’s young people abroad cost the country 1.2 billion euros per year (about 2% of Serbian GDP), which is comparable to the amount of exports of IT services or agricultural products (NI 2019). IMF statistics say that around 50,000 people left Serbia in 2018 (RTS 2019). The results of a study conducted by RANEPА indicate a real increase in skilled emigration from Russia, although this is not about “the annual departure of millions, or even hundreds of thousands of people”. According to the calculations, around 100 thousand Russians emigrate to developed countries every year, of which around 40% have higher education (RBC 2018).

Is the tax burden important when the Russian and Serbian “brains” decided whether to emigrate? An analysis conducted by Chernykh (2018) regarding drivers for relocating IT specialists abroad indicates that career factors (“decent wages”, “interesting projects, career prospects”) have crucial importance for leaking brains, but comfort factors (“climatic conditions”, “good ecology”) are also important. A tax motivation does not play a significant role in deciding to emigrate. The main motivations of the drain of Serbian “brains” are also classic – according to RTS (2015) – it is “high unemployment, low incomes, and insecurity”.

2.2. Assessment of the Scale of Tax Losses from Brain Drain in Russia and Serbia

The results of the calculation of tax revenue losses from the brain drain are presented in Table 2. We use presume that emigrating workers earn an average salary at the highest level, so we calculated the potential personal income tax revenues from taxing such wages based on the statutory personal income tax rates of 12% and 13% for Serbia and Russia, respectively.

Table 2. Tax revenue losses from brain drain

Index	Russian Federation	Republic of Serbia
Number of emigrants per year	~100,000 (<i>RBC</i> 2018)	~50,000 (<i>RTS</i> 2019)
Average salary (highest)	51,000 RUB (Federal State Statistics Service 2017)	104,000 RSD (Statistical Office 2018)
Amount of tax losses from the brain drain	~7.95 bln. RUB.	~ 6.24 bln. RSD
Amount of collected personal income tax	~ 3301 bln. RUB (Federal Tax Service 2018)	~ 122.9 bln. RSD (Ministry of Finance of Republic of Serbia 2019)
Share	0.24%	5.07%

These calculations do not take into account indirect benefits for the donor country such as transfer of skills or remittances to family members of the emigrating individual; however, we suggest that even such simple estimation can indicate that the scale of the tax losses from the brain drain is much more significant in Serbia than in Russia. For the Russian Federation the indicator of net tax losses is not significant, not exceeding even 0.5% of personal income tax revenues, while for the Republic of Serbia the brain drain can even seriously affect the collection of personal income tax.

2.3. Comparison of Criteria for Tax Residence of Individuals in Russia and Serbia

Art. 207 of the Tax Code of the Russian Federation (hereinafter – the Tax Code) establishes the general rule for an individual to be considered to be tax resident of Russia, which is their actual physical presence in Russia for at least 183 calendar days of the calendar year⁴. Residents are subject to tax in Russia on their worldwide income and nonresidents are only taxed on incomes derived from the sources in Russia.

⁴ This criterion is not the only one. Among other, secondary criteria, one can single out the recognition by tax residents of the Russian Federation of Russian military personnel serving abroad, as well as employees of state authorities and local self-government bodies sent to work outside of the state, regardless of the actual time spent in the Russian Federation.

Serbian residents are also subject to tax in Serbia on their worldwide income and nonresidents are subject to tax on Serbian-source income only. However, the Russian approach is different from the Serbian in the criteria for determining the residence of individuals. The key difference is that in addition to the objective criteria (“quantitative-day” factor), the Serbian tax legislation also establishes a subjective criteria for the tax residents of individuals, which is having domicile, residence or center of business and life interests in Serbia.

“Individuals are considered to be resident for tax purposes if they have a domicile, residence or center of business and life interests in Serbia or if they spend more than 183 days within a 12-month period, which begins or ends in the tax year (i.e. the calendar year)” (EY 2018a).

In the context of brain drain we can suggest that a stronger personal tax nexus to jurisdiction, which we can see in the Serbian legislation, is probably more beneficial for the donor country because it will allow such country to continue taxing the income of emigrants or remote workers because they are still Serbian tax residents on a worldwide basis. However, as follows from the analysis below, such a taxation possibility can be limited by tax treaties. On the other hand, the simplicity of the Russian tax residence rules for individuals can potentially limit the potential tax base of the state, not allowing it to continue taxing the income of emigrants or remote workers. According to the Ministry of Finance of the Russian Federation (2019), there is currently an intensive discussion in Russia about reforming the individual tax residence criteria in the direction of introducing subjective criteria such as the center of vital and business interests and/or by reducing the required period of physical presence in the country to 90 days. Such reform is intended to tighten the personal income tax residence criteria in Russia and to broaden its tax base.

3. ANALYSIS OF SPECIFIC CASES OF BRAIN DRAIN

Two types of rules that allow countries to tax individual income can be distinguished in the framework of the current approaches to taxation of the income of mobile and qualified individuals. First, these are the rules characterizing the personal nexus of an individual to the country, i.e. the rules of tax residency. Second, these are the rules characterizing the territorial nexus of income, establishing the criteria for income received from sources in the given country. As mentioned above, the current instruments of tax coordination, in relation to the taxation of income of migrant individuals (system of bilateral double tax treaties), mainly focus on the problem of eliminating double taxation by resolving potential conflicts through special rules. Such conflicts, according to

Holmes (2007, 23–24) can be residence-residence, residence-source or source-source. So, tax treaties restrict the rights of countries to tax the income. Such limitations of countries' taxing rights are reflected in the respective bilateral double tax treaties.

We analyze cases of brain drain typical for Russia and Serbia on the examples of an IT specialist, an athlete and a researcher, in the context of the existing international tax architecture and describe possible directions for the development of international tax cooperation in the field.

3.1. IT Specialists

3.1.1. Treaty Provisions Related to Income from Employment

The authors' analysis below relates not only to classical IT specialists (such as, for example, software developers) but also to the broader list of professions characterized as the remote workforce. In today's digital world, fewer and fewer professions require physical presence in the office. For example, this statement is almost 100% likely to be related to the activities of beauty-bloggers/vloggers/travel-bloggers, entrepreneurs, foreign language teachers, designers, writers, etc., because such professionals can work from anywhere in the world. This process has even led to the emergence of the concept of the "digital nomadism" and taxes are one of the main issues that both nomads and the state face, according to Kostic (2018, 191). Article 15 of the OECD Model Convention (OECD 2017a), Income from Employment, and Article 15 of the UN Model Convention (United Nations 2017), Dependent Personal Services,⁵ set the rules for the elimination of double taxation of cross-border income of such a mobile workforce:⁶

1. Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment

⁵ Hereinafter, the OECD Model (2017) and UN Model (2017) adopt the OECD and UN Model Tax Conventions. The following abbreviations are used when referring to the UN and OECD Model Conventions: OECD MTC, OECD MC, UN MTC, UN MC.

⁶ Article 15 (paragraphs 1–2) of the OECD Model Convention is given. In our opinion, paragraph 3, which, for example, separately regulates the taxation of income of aircraft crew members, does not apply to the current study.

exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

- (a) The recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; and
- (b) The remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and
- (c) The remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

So, in other words the Article 15 of the OECD MC (OECD 2017a) cited above sets the exclusive rights of taxation of the employment income by the state of the employer's residence in two situations:

- if employment is exercised in the state of the employer's residence (Article 15(1));
- if the employment is not exercised in the state of the employer's residence, but all three conditions mentioned in Article 15(2) fulfill: (a) worker does not spent more than 183 days in the country of treaty partner; (b) income is not paid by the employer resident in the country of treaty partner; (c) income is not paid by the employer's PE or fixed base in the country of treaty partner.

In any other situations as prescribed by the Article 15(1) source country can tax such income and its taxing rights are not limited.

What is more, in some situations income of the remote workers can potentially fall in the scope of the Article 14 of the UN Model Convention (United Nations 2017), which covers income from “professional services and other activities of an independent character”.⁷ The fate of this article is very dramatic. Although it has been removed from the OECD Model Convention for various reasons⁸ and is not affected by the Base Erosion and Profit Shifting (BEPS) Multilateral Convention, it is present in various forms in the actual tax treaties including both Russian and Serbian double tax treaties.⁹ Here is this article from the UN Model Convention (United Nations 2017):

⁷ Article 14 (2) of the OECD MTC (2017a) does not define what “professional services” are, but the commentaries to it note that they “particularly” include “independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.” The commentary to the article adds that this list is not exhaustive and that any difficulties in applying this paragraph may be resolved through a mutual agreement procedure.

⁸ In fact, one key reason is that Article 14 of the UN Model Convention (2017) may well be covered by Article 7 Business profits.

⁹ See, for example, double tax treaties that were concluded between the Russian Federation and Germany (1996), or between Bulgaria and Republic of Serbia (1998).

1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also be taxed in the other Contracting State:

- (a) If he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other Contracting State; or
- (b) If his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State.

In the other words, Article 14 of the UN MC (UN 2017), cited above, sets the exclusive rights of taxation of the country of residence of the provider of professional services or other activities of an independent character unless there is either (1) a fixed base of such a service provider in the treaty partner state, or (2) time of stay of such a service provider in the treaty partner state is more than 183 days during a calendar year.

3.1.2. Offshorization or Emigration of the Workforce: Is Serbian Tax Base More Protected Against Erosion Than the Russian?

3.1.2.1. Offshorization of the Workforce

Let us consider the following case of the offshorization of the workforce. A Russian citizen and its tax resident, highly-qualified IT specialist, Evgeniy Kaspersky, decided to become a “digital nomad” starting from 1 April 2019. In April 2019, Evgeniy decided to leave Russia and settle in Cyprus, from where he continued performing his job duties for his Russian employer until the end of 2019. Such offshorization can be potentially motivated by corporate tax planning reasons. For example, the management of the Russian-based IT corporation can decide to locate at its subsidiary in Cyprus the development, enhancement, maintenance, protection and exploitation (DEMPE) functions, in relation to important intangibles. This can be done in order to bridge the gap between the corporate and economic structure of the multinational entity (MNE) group and to comply with the post-BEPS transfer pricing requirements (OECD 2015a, 13).

By applying the double tax treaty between Russia and Cyprus¹⁰ to this case we can make observation that Russian taxing rights for such income from employment will be limited under Article 15 of Russia-Cyprus double tax treaty, which is based on Article 15 of the OECD Model, with exception of paragraphs (3) and (4) which relate to building sites, construction, assembly, or installation, to journalists and to employment exercised onboard ships. Therefore, Russia cannot tax such income for two main reasons: first, Evgeny ceases to be Russian tax resident, so both under Article 15(1) and 15(2) Russia cannot tax his employment income as the residence state; second, the employment is physically exercised in Cyprus and not in Russia, so under Article 15(1) Russia cannot tax such income as a source state either.

Let us assume that his Serbian colleague Borislav Djordjević made the same actions – moved to Cyprus and started working remotely for his home-country employer, from February to the end of the calendar year. It should be emphasized that in this situation the rights of the donor country to tax the income from employment are not limited by a tax treaty in case of such a remote worker who still has “vital interests” in the Republic of Serbia (family members and a house in Belgrade) and therefore remains a tax resident of Serbia. We shall also take into account that the residence-residence conflict can be potentially resolved under Article 4(2)¹¹ in favor of Serbia because such a person can have permanent homes available in both states, and personal ties with Serbia are stronger. Serbia can tax such income as the state of residence even if the employment is physically exercised in Cyprus and not in Serbia.¹² Cyprus also can tax such income from employment because timing condition from Article 15(2(a)) ensuring the exclusive right of the residence state to tax income from employment exercised in the other state is not fulfilled in this case. However, if such income was taxed in Cyprus it is exempt in Serbia, under Article 23(1(a)),¹³ because this article uses the exemption method for the elimination of double taxation.

At the same time, if such a remote worker were to cease to be a Serbian tax resident, for example, if he sells house in Belgrade and his family moves to Cyprus, then the rights of Serbia to tax such income would be limited under Article 15 of the tax treaty for the same reasons

¹⁰ Agreement between the Government of the Republic of Cyprus and the Government of the Russian Federation for the avoidance of double taxation with respect to taxes on income and on capital (1998)

¹¹ Convention between the Republic of Cyprus and the Socialist Federative Republic of Yugoslavia for the avoidance of double taxation with respect to taxes on income and on capital (1985)

¹² *Ibid.*

¹³ *Ibid.*

as in Russian case above – the employment is not physically exercised in Serbia.

So, we suggest that the Serbian tax base is more protected from the erosion resulting from such offshoring of its workforce than the Russian tax base. However, if such income of the remote employer is taxed in the recipient country, the results are the same for the both states – they lose tax revenue because the recipient country has a priority right to tax such income.

3.1.2.2. *Emigration of the Workforce*

Let us consider the case of the emigration of the skilled workforce. A Serbian citizen and its tax resident, highly-qualified IT specialist Stefan Ibrahimović, decided to work for UK company starting on 1 April 2019. In April 2019, Stefan leaved Belgrade and settled in London, from where he continued performing his job duties for his UK employer until the end of 2019. Such emigration can be potentially motivated with classical combination of the reasons: quality of life, better career prospects, higher salary, etc. Let us also look at tax consequences of the same scenario performed by his Russian friend Mahomed Burkhanov, who migrated from Moscow to London to work for the same UK company in March 2019 and continued working their until the end of the year.

In this situation, the results of application of the double tax treaty¹⁴ in the case of the Russian emigrant are the same as in the case above for the offshoring of the workforce – Russia loses its taxing rights and its tax base. For Serbian emigrant, the results are also the same as in the case above.¹⁵ Serbia can tax employment income of its resident as long as it considers the emigrant to have strong personal nexus with Serbia. Such nexus can be evidenced by the home available to him in Serbia and the center of business and life interests in Serbia. So, potential residence-residence conflict will be resolved in favor of Serbia under Article 4(2).¹⁶ The only difference from the previous scenario is that if the UK also taxed such employment income, such tax would be credited against the Serbian tax, but not exempted as was the case in the previous example, because the Yugoslavia-UK double tax treaty (DTT)¹⁷ contains the credit method for the elimination of double taxation.

¹⁴ Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Russian Federation for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains (1994)

¹⁵ Convention between the United Kingdom of Great Britain and Northern Ireland and the Socialist Federative Republic of Yugoslavia for the avoidance of double taxation with respect to taxes on income (1981)

¹⁶ *Ibid.*

¹⁷ *Ibid.*

3.1.3. *Interim Conclusion*

We can conclude from the analysis above that economically the tax consequences of the migration and offshoring of the workforce from Russia and Serbia are almost the same – the donor countries lose their personal income tax base (taxing employment income) and give the recipient countries the priority rights to tax such income. Such tax policy outcomes can potentially result in the losses of tax revenues from personal income tax by the countries suffering from the problem of the brain drain.

3.2. Athletes

The Russian Federation is known all over the world for its athletes. For example, at the 2016 Summer Olympics, the Russian national team was at the 4th place and the Russian national football team reached the quarter-final at the 2018 FIFA World Cup. Serbian representatives of sports are also very famous all over the world. These are the names of Novak Djoković, Ana Ivanović, Jelena Janković, Vlade Divac, Branislav Ivanović, Sinisa Mihajlović and others. As experts note, in individual sports (although, in our opinion, this is also possible in team sports), the change of tax residence for the purpose of tax planning is a very common practice. For example, Gatto (2017) suggest that as of 2017 such well-known tennis players as Novak Djoković, Caroline Wozniacki, Marin Čilić, Petra Kvitová are residents of Monaco, Borna Ćorić, Karen Khachanov and Svetlana Kuznetsova are UAE residents. Each of these countries does not levy taxes on the income of individuals and has very flexible tax residence requirements.

Such tax policy practices can be analyzed in the context of criteria developed in the OECD's work on harmful tax competition (OECD 2015b) because they can potentially lead to the losses of tax base by the other countries which have strong personal nexus with such individuals and can be potentially described as "tax residence for sale". Such practices erode the foundation of tax law because they in fact regard legal rights and tax sovereignty – the concepts that cannot by definition have market value – as market commodities and shift the line between those residents who get residence status by buying it or investing in the country's economy and other persons who get this status resulting from personal inherent nexus with the state (Thirion, Scherrer 2018).

Prevention of double taxation of cross-border income of "entertainers and sportspersons" is regulated by Article 17 of the OECD Model Convention (OECD 2017a), which contains two paragraphs. The first one states that "notwithstanding the provisions of Article 15, income derived by a resident of a Contracting state as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a

sportsperson, from that resident's personal activities as such exercised in the other Contracting State, may be taxed in that other State." The second paragraph, states that "where income in respect of personal activities exercised by an entertainer or a sportsperson acting as such accrues not to the entertainer or sportsperson but to another person, that income may, notwithstanding the provisions of Article 15, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised."

However, what income and what share of it may be taxed by the state hosting the sporting event under Article 17(1) of the OECD MTC? The answer to this question is contained in the commentary to Article 17 of the OECD MTC (2017a) relating to the taxation of "entertainers and sportspersons". Paragraph 8 of the commentary states the following: "Paragraph 1 applies to income derived directly and indirectly from a performance by an individual entertainer or sportsperson. In some cases the income will not be paid to the individual, or his impresario or agent, directly with respect to a specific performance. For instance, a member of an orchestra may be paid a salary rather than receive payment for each separate performance: a Contracting State where a performance takes place is entitled, under paragraph 1, to tax the proportion of the musician's salary which corresponds to such a performance." Although this passage mainly refers to artists, it is safe to assume that the same approach can be applied to the salaries of athletes.

As the commentators further note, entertainers and athletes often earn royalties, sponsorships or advertising fees. Where there is a close relationship between the income received and the activities carried out in the country, the host State is also entitled to tax the income. The determination of the level of such relationship can be made on the basis of an analysis of the "timing of the income-generating event," the "nature of the consideration for the payment," and the "contractual arrangements" for participation in such events. Finally, the provisions of Article 17 may also apply to the taxation of remuneration for the time spent on "rehearsal, education or similar training" of athletes in the receiving State.

The distribution of the taxing rights of athletes' income between two countries that have a tax treaty depends on the jurisdiction in which the athlete is a tax resident, as well as on the state in which the sports activities are carried out. Based on this idea, we suggest the borderline scenarios where the donor state loses its tax revenues resulting from athletes' brain drain.

The state drastically loses the right to tax the athlete's income if:

- the athlete ceases to be a tax resident of this State;
- the athlete is not a participant in events taking place in this State.

In our opinion, this risk is more significant for the tax system of the Russian Federation, which uses only a simple “quantitative and daily” approach to determining whether an individual is a tax resident of the state.

3.2.1. “G” Case: How to Lose the Right to Tax the Income of a “Draining Feet”?

Let’s consider the relationship between Russian tax legislation and tax treaties in the context of brain drain on an example from professional football. Let us assume that at the end of July 2018, Russian midfielder of FC SKA (Moscow), Alexander G., joined FC Amateur from the Principality of Monaco. Prior to joining the foreign club, Alexander was a tax resident of Russia. Most of the player’s matches and training process took place in the Russian Federation. Therefore, it can be stated that regular income from the player’s sporting activities was taxed in the Russian Federation, at a rate of 13%.

Let us assume that at the end of August 2018 Alexander G. received his first income from a foreign football club. Probably, the athlete is not yet a tax resident of Monaco, as he has not spent enough time in the Principality. On the other hand, the athlete is likely to be recognized as a tax resident of the Russian Federation at the end of 2018, as he has spent more than 183 days in the country that year. Thus, our hero will have to calculate and pay personal income tax at the rate of 13% on his own, as well as submit a personal income tax return to the tax authority where he resides, no later than April 30 of the following year.

Due to the large number of matches in the French championship (FC Amateur is a rare example of a football club that plays in a foreign league), the athlete begins to visit the Russian Federation less and less often. Let’s assume that for the whole year of 2019 the period of his stay in the state was 45 days (vacation and a stay in the national football team). Then, with a high degree of probability, we can conclude that, for the fiscal year 2019 Alexander G. will cease to be a tax resident of the Russian Federation, and so Russia will lose the right to tax his income. There is an example of “draining foot”. Additionally, if the athlete becomes a tax resident of Monaco, his income will be taxed at a zero rate.

3.2.2. “Branislav” Case: How Can the Russian Federation Tax the Foreign Player’s Income?

As we see from the example above, Russia can easily lose the tax revenue from the taxation of income of its talented sportspersons if they cease to be Russian tax residents. In this section we analyze possible scenarios of taxing a foreign footballer’s income in Russia.

The most obvious situation is if any foreign athlete become a tax resident of the Russian Federation. This is very likely scenario, because Russia is not only exporter but also an importer of the football talents. Many of the world stars have been playing for a long time in the Premier League: for example, Branislav Ivanović and André Schürrle.

The second scenario is of a foreign club to arrive to Russia for a tournament match. As mentioned above, the host country may tax the relevant part of the salary, as well as royalties, sponsorships or advertising fees, which are closely related to the activities in the respective country. For the situation in question, such income may include the remuneration for the interview given by the player during the tournament, or the fee for the use of their photo on the posters inviting fans to the match. Let's assume that attacking player of the Italian football club FC Sardinia Bronislav Stanley arrived with his team to play a match against Moscow-based FC Berezovsky. Bronislav is obviously not a tax resident of the Russian Federation, so his income will be taxed at a higher rate of 30%, rather than 13%, which can potentially result in an additional increase in tax revenue for Russia. However, in our opinion, this is the end of the positive aspects of the current mechanism of taxation of athletes arriving solely for sporting events. First, the mechanism of tax collection from a foreign athlete is absolutely incomprehensible.¹⁸ Secondly, the probability of a particular club coming to Russia is not the highest. Third, it is unlikely that the potential amounts can be comparable to the full taxation of the income of an athlete with the status of a tax resident of the Russian Federation.

As noted above, under Serbian national legislation, an individual may also be recognized as a tax resident on the basis of subjective criteria. Probably such an approach protects the tax base of the Balkan country from eroding, but only with the limited extent. Let us turn once again to the case study of tennis player Novak Djoković, in particular to one of his more recent interviews (Gatto 2018) in which he said that the choice in favor of Monaco was made due to the “beauty” of the Principality. He stated that he has a house in which his wife and children live, as well as his current and former coaches in this beautiful country – the presence of such conditions allows Novak Djoković to “fully focus on tennis.” If we assume that Novak can be considered a tax resident of Serbia, we would probably be wrong. First, the tennis player does not meet the “quantitative and daily” criterion of at least 183 days of the physical presence in Serbia (which is likely, considering the traveling lifestyle of the athlete). The

¹⁸ “Dear Lionel Messi! You have to register for tax purposes in Serbia, because you participated in a friendly match between the Serbia and Argentina. We do not know what part of your income we will tax, but we are still waiting for you with a full set of documents at 5 Save Maskovica Street, Belgrade”. In our opinion, this situation absolutely fantastic!

analysis of the subjective criteria also shows that center of his vital interest is more likely in Monaco because his home and family live their indicating his strong personal ties to the Principality.

3.2.3. Athletes in the Digital Age: The Case of Non-Taxation

In the context of the challenges of the digitalization of the economy and brain drain, another potential problem should be mentioned, which is at the intersection of sport and entertainment. Let us turn to one piece of recent news (Grace 2019):

“Electronic violinist Lindsey Stirling is putting on a new kind of interactive virtual concert, performing live to fans in avatar form. The concert, put on in collaboration with streaming platform Wave, will take place at 3 p.m. (EST) on Monday 26 August. Stirling will perform through her avatar, powered by art body motion and face capture technology. Fans will also be able created their own avatars and attend the virtual show by downloading the Wave virtual reality (VR) app, supported by HTC Vive and Oculus Rift. Throughout the concert, Stirling will interact with fans ‘in a variety of direct, mysterious and surpris[ing] ways.’ Limited edition concert merchandise will be available to buy.”

Based on the content of this news we imagine the following case. Suppose that we have two young athletes – a Russian citizen, resident of the Russian Federation, Anton, and a citizen of the Republic of Serbia and its tax resident, Branka. Both are recognized ice skating masters. In 2019 our heroes decided to end their professional sport careers and form a duo to perform colorful ice shows. While devising their marketing strategy, the young athletes turned to the fast-evolving “augmented reality” technology, which allows them to create unique special effects for the audience. This choice also allowed new entrepreneurs not to be physically present in other countries, which greatly facilitated the working conditions for both themselves and the support team.

Based on this logic, the athletes relocated to the small jurisdiction Y, with which both Russia and Serbia have double tax treaties in force. The legislation of state Y offers low rates of personal income tax, as well as simple criteria for determining the residence of individuals (stay in the state Y for 90 days during a calendar year and a “permanent home available”). Finally, country Y is characterized by the availability of cheap and qualified labor and a large number of free ice rinks. In order to replenish the seed capital and to buy real estate in State Y, both Branka and Anton sold their apartments in Belgrade and in Moscow, respectively. Thus, at the beginning of January 2019, our heroes left for jurisdiction Y to settle all the legal issues and practice the “virtual” show. In October

2019, the production was triumphantly launched and broadcast to a large number of viewers, including in the Russian Federation and Serbia. The project is monetized through selling the online advertisement space during the online broadcasting aimed at target groups from Russia and Serbia.

What “piece of the tax pie” can Russia and Serbia claim? Admittedly, it is a small one or even none. It is likely that in 2019 Anton will not be recognized as a tax resident of the Russian Federation and Branka will not be recognized as a tax resident of Serbia due to the “quantitative factor” and the sale of real estate in Belgrade. Physically, our young “athletes” did not travel to the two countries for performances, which severely limits the possibilities for taxation although the fact that the “virtual” value was created in the source countries is obvious.

3.2.4. Interim Conclusion

We can conclude from the analysis above that generally tax treaties do not limit countries’ rights to tax the income of the athletes while the athletes are their tax residents. If an athlete ceases to be a tax resident of the country, which is a common scenario in the context of brain drain, then the donor country loses its right to tax the income of such athlete until he physically arrives and take part in sporting events in the country.

The change of tax residence can be also accompanied by harmful tax competition between the jurisdictions, ultimately leading to so-called “tax residence shopping”, which is especially relevant for individual star sportspersons who earn very huge amounts of income. If we consider that such sportspersons are often born, raised and trained in developing countries, where they took their first steps as a professional sportspersons, we come to the conclusion that the non-taxed income of such sportspersons is in fact the tax base of such donor countries lost due to brain drain.

Furthermore, our analysis shows that the rule in Article 17(1) allowing the host country to tax part of athlete’s income from sports events in this country is impractical and generally useless, because the administrative costs of the implementation of the taxation mechanism for such income and allocation of the appropriate tax base can outweigh the tax benefits received; this rule is also not in line with the process of the digitalization of entertainment and sports content.

3.3. Academics and Scientific Researchers

Besides its achievements in the area of professional sports, the Russian Federation is famous throughout the world for its activities in the field of scientific research. For example, according to the rating of publishing activity by Scimago Journal & Country Rank (2018)¹⁹, the

¹⁹ See: Scimago Journal & Country Rank. <https://www.scimagojr.com/countryrank.php?year=2018> (last visited 6 October 2019).

Russian Federation ranks 11th, and according with the rating QS World University Rankings (2019)²⁰ there are currently 27 Russian universities in the world top-1000 list. The rankings of the Republic of Serbia on the same lists are following: the country holds the 54th place in the first nomination and only one Serbian university – the University of Belgrade – is in the list of top-1000.²¹

How do these brain drain statistics in the field of research and education relate to the countries' fiscal interests? The basic tax policy idea can be to expand tax jurisdiction to the widest extent possible in order to try on the one hand to secure the right to tax the income of researchers leaving the country and on the other hand to tax foreigners arriving in the country. The balance between these two tax policy goals can depend on the net balance of export and import in the areas of research and higher education. However, tax policymakers can have also other considerations and use other taxing approaches towards income of researchers. For example, the positive social and economic impact of research and education on the wider society can be considered, therefore countries can exempt from taxation the income of researchers, such as research grants.

3.3.1. Taxation of Academic Researchers' Income Under the OECD and UN Models

Both the OECD MC and the UN MC do not contain separate articles addressing the issues of double taxation of the income of academic researchers (professors, lecturers, etc.). However, we cannot claim that this issue was historically ignored by the academic community. It is presumed that this issue is covered by the provisions of articles 14 (in case of providing independent personal services), 15 (dependent personal services), 19 (if remuneration is paid by the one of the negotiating states) in case of the UN MC (United Nations 2017, 452). However, “it was noted that articles 14 and 15 commonly did not exempt a visiting teacher's compensation from taxation at source because they generally allowed source taxation of service performers who were present in the host country for more than 183 days, and many teaching assignments exceeded that period of time” (United Nations 2017, 452).

At the end of the 20th century experts proposed to amend the UN MC and to add a separate article covering the issues of double taxation of income of “visiting teachers”. However, there was no consensus regarding such provisions, so the discussion ended in the compromise decision: not to make amendments into the Convention but to amend the Commentaries

²⁰ See: QS World Universities Rankings. <https://www.topuniversities.com/university-rankings/world-university-rankings/2019> (last visited 6 October 2019).

²¹ *Ibid.*

to the Convention, explaining that double tax treaties can potentially have such special articles and some guidance regarding the contents of such articles in case of having bilateral discussion about the issue (United Nations 2017, 453):

- The purpose of a tax treaty generally is to avoid double taxation, and double exemption of teachers is not desirable,
- It is advisable to limit benefits for visits with a maximum duration (normally two years), and the time limit should be subject to expansion in individual cases by mutual agreement between the competent authorities of the Contracting States,
- Whether the benefits should be limited to teaching services performed at certain institutions “recognized” by the Contracting States where the services are performed,
- Whether, in the case of visiting professors and other teachers who also do research, to limit benefits remuneration for research performed in the public (vs. private) interest,
- Whether an individual may be entitled to the benefits of the article more than once.

If we observe the real networks of bilateral tax treaties of the analyzed countries we can say that the draft provisions proposed by the OECD MC (OECD 2017a) are not accepted as a rule by both the Russian Federation and the Republic of Serbia. There are plenty of double tax treaties of which Russia is a part where taxation of scientific researchers is regulated by a separate article or an article similar to the article contained in the UN MC (United Nations 2017). One example is the double tax treaty between Serbia and Bulgaria²² where the issue of double taxation is regulated by Article 21 Professors and Scientific Researchers, which contains the following provisions:

1. An individual who visits a Contracting State for the purpose of teaching or carrying out research at a university, college, school or other recognized educational institution in that State and who is or was immediately before that visit a resident of the other Contracting State, shall be exempt from taxation in the first-mentioned State on remuneration for such teaching or research for a period not exceeding two years from the date of his first visit for that purpose, provided that such remuneration is derived by him from outside that State.

2. The provisions of paragraph 1 of this Article shall not apply to income from research if such research is undertaken not in the public

²² See: Convention between the Government of the Republic of Bulgaria and the Federal Government of the Federal Republic of Yugoslavia for the avoidance of double taxation with respect to taxes on income and on capital (2000).

interest but primarily for the private benefit of a specific person or persons.

The provisions of Article 21 of Serbia-Bulgaria DTT precludes the recipient state from taxing the income received by the newly-arrived professor or scientific researcher, but only if such income is derived from sources outside that recipient state. Such an approach protects income of the “drained brain” from being taxed at the place of their migration if such academic migration or travel is financed by a source outside the recipient state. At the same time such an approach does not shield donor state from tax revenue losses in cases when such academic travel or migration is financed by the recipient state. These scenarios and the effects of double tax treaties in the context of brain drain are illustrated by the two cases below.

3.3.2. Case 1: Scientific Researcher Leaves the State and Receives Financing from This State, Donor State Is Temporarily Protected from Loss of Tax Revenues

A teacher of the Serbian language at the local university, Jovana B., a resident of the Republic of Serbia, moves to country Y with the aim of popularizing the Serbian language among the students of the local university. The academic trip is financed from the grant program financed by the Serbian university and lasts for the period of one year. There is a double tax treaty between the Republic of Serbia and country Y with the same provisions as in Article 21 of the Serbia-Bulgaria DTT.

We can conclude that the income of Jovana B. will not be taxed in country Y. If Jovana B. is still a tax resident of the Republic of Serbia, her income will be taxed in Serbia. Therefore, this example illustrates the “normal” scenario of the application of such a provision. The effects in the context of brain drain are: (1) the donor country does not lose its revenues for the period mentioned in the DTT, (2) however, the donor country can still lose its revenue if Jovana’s academic trip lasts for more than one year because she will likely not be regarded as tax resident of Serbia, therefore in this case double non-taxation can arise.

3.3.3. Case 2: Scientific Researcher Leaves the Country Financed by the Recipient Country

Let us now assume that, as in the previous case, Jovana moved to the same country Y with the same academic purpose, but in this example her academic visit is financed by country Y. In this case provisions of Article 21 of the DTT, similar to Article 21 of the Serbia-Bulgaria DTT, would not prevent the recipient country from taxing her income because it is sourced outside of the Republic of Serbia. However, such income can

also be taxed in Serbia for as long as Jovana is a Serbian tax resident. So, the issue of double taxation can arise, which will be resolved under the relevant DTT Article on double tax relief. However, the recipient country will have priority right to tax the income and the donor country (Serbia in this example) will be providing relief in the form of credit or exemption.

3.3.4. Interim Conclusion

We can conclude that donor countries can potentially lose the right to tax foreign sourced income of emigrating researchers who are moving to conduct their research and teaching activities abroad, if such relocations are financed by the recipient country.

We also propose the idea for the design of separate article in the UN MC devoted to taxation of researchers and visiting teachers. We believe that in such an article only the country financing the research project or visit should have the exclusive right to tax such income, irrespective from the period of the research visit. We propose such idea because: (1) academic research is usually conducted for public benefit, so we can deliberately create the possibility for individual countries to exempt such public good from taxation if they wish so (Pigouvian subsidy argument) (Pigou 1920); (2) experienced researchers can be very mobile, engaging in projects around the world, so it is more convenient to tax their income based on the source rather than the residence principle.

Application of the tax treaties based on the UN and the OECD models can lead to double non-taxation and inconsistencies between the country of taxation and the country of real economic activity of mobile individuals. Therefore, we put forward the idea of the need to expand areas of global tax coordination aimed at minimizing and mitigating the negative consequences of the migration of the qualified specialists from less-developed countries to more-developed countries, as well as creating global tax rules that would not create additional artificial incentives for migration and would not lead to an unfair loss of tax revenues and resources by human capital donor-countries.

4. BEOGRADSKI EPOHALAN POREZNI SPORAZUM (BEPS 2.0) OR POSSIBLE DIRECTIONS FOR DEVELOPMENT OF INTERNATIONAL TAX COOPERATION ADDRESSING THE BRAIN DRAIN ISSUE

4.1. Limits of International Tax Cooperation in the Area of Brain Drain

In this paragraph we stress the necessity for the rethinking the design of international tax law in the complex, cohesive and multilateral way, with

the aim of aligning the place of taxation with the place of talent creation and making some proposals for further advancement. On the one hand, the history of international relations contains a large number of examples of successfully concluded multilateral agreements. On the other hand, they are mostly limited to specific regional unions and are formed where there are economic, cultural or ethnic preconditions for their creation (Bravo 2016, 280). Moreover, according to some experts, multilateral mechanisms, including consensus between countries on certain tax issues, are a “utopian view of international tax law” (Schwartz 2015).

Broekhuijsen, Vording (2016, 43) highlights the following ideas in the context of global governance:

- (neo)realism – states are rational players in an anarchist world, and for any development, the initiative of the most developed countries is required;
- (neo)liberalism – states are subjects of relations for which economic rationality plays the most important role in participating in multilateral agreements – countries enter into multilateral cooperation only if they see this as an economic benefit that can be estimated.

It seems difficult to unambiguously determine which of the strategies is dominant in the context of tax cooperation for the purpose of combating the brain drain. On the one hand, the tax policies of the BRICs countries (Brazil, Russia, India, and China), especially China and India, whose opinion on tax issues may differ from the position of the OECD, are beginning to gain more weight in the global tax governance debate. On the other hand, the current international tax architecture is “under the umbrella” of the developed OECD countries, which are the main recipients of the “brains” from developing jurisdictions. This, in particular, is again indicated by the Gallup Institute data: out of 41 regions that have potential positive population growth in the scenario of a complete emigration of brains, 22 are developed countries that are members of the OECD:

Table 3: Jurisdiction structure with positive population growth²³

Indicator	OECD countries	Other countries
Amount	23	18

²³ See: compiled by authors based on World Bank Data. <https://data.worldbank.org/indicator/ny.gdp.mktp.cdm> (last visited 25 September 2019), and Gallup Institute. http://news.gallup.com/migration/interactive.aspx?g_source=link_news9&g_campaign=item_245204&g_medium=copy (last visited 25 September 2019).

Share of GDP in global GDP	53.04%	2.57%
Potential Net Migration Index	83%	63%

Based on the results in Table 3, it can be presumed that the role of the developed OECD countries so far remains dominant in global coordination of taxation, which, in particular, is also indicated by the experience of drafting the multilateral agreement under BEPS (Byrne 2016). Therefore, assuming that brain drain is a positive process for recipient countries, it seems unlikely that there will be a radical transformation of the international tax architecture towards a certain redistribution of tax revenues in favor of developing countries suffering from the brain drain. That is why we consider ideas such as the Bhagwati tax (Bhagwati 1976, 34) to be utopian and unrealistic. However, we call for some form of global cooperation and some ideas for such cooperation are presented below.

We take into account the unprecedented scale of tax cooperation observed at the present. Despite the fact that initially researchers from different countries expressed some skepticism regarding the effectiveness of the implementation of the BEPS plan (can the idea of interstate tax cooperation for a more equitable tax collection be a significant incentive for jurisdictions?), as of 2019, it can be stated that the BEPS plan met its expectations at least retarding the rate of expansion of its ideas worldwide.

First, the qualitative and quantitative composition of the participant countries is surprising. As of July 2019, 132 jurisdictions are member states of Inclusive Framework on BEPS, including both developed (e.g. the USA, the UK) and developing countries (e.g., China, India) and typical offshore countries (e.g. British Virgin Islands, Belize, Barbados).²⁴ A significant number of participants are also covered by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS – “a king treaty” implementing BEPS measures into the actual double tax treaties. Despite the fact that Action 15 of the BEPS plan was not part of the so-called “minimum standard” of BEPS, 89 jurisdictions have already signed it (OECD 2019c).

Second, prior to the implementation of the BEPS plan, many countries aggressively used tax incentives for multinational corporations as part of their international tax policies (for example, having low tax rates for foreign sourced income in conjunction with no exchange of information). However, since the launch of the BEPS plan, the OECD has already analyzed 287 tax regimes, of which 76 were canceled, 11 were recognized as malicious or potentially harmful, 15 are in the process of

²⁴ See: OECD. What is BEPS? <http://www.oecd.org/tax/beps/about/> (last visited 26 September 2019).

cancellation/replacement, etc. (KPMG 2019b), which is the result of the BEPS Action 5 on harmful tax competition.

Of course, the BEPS will not stop international tax competition, as its scope does not affect all forms of tax incentives for attracting global capital. However, for the first time, countries have shown such global intention for international tax cooperation on the issue of non-taxation.

4.2. What Can We Pick from the BEPS Project for the Proposed BEPS 2.0?

In our opinion, some points of the BEPS Project are irrelevant for the proposed multilateral tax cooperation in the context of brain drain. These are Action 2 – Neutralizing the Effects of Hybrid Mismatch Arrangements, Action 3 – Controlled Foreign Company, Action 4 – Limitation on Interest Deductions, primarily because these actions relate to corporations and do not relate to individual income. We do not claim that the experience of these actions is generally not applicable to brain drain – rather, we can discuss the need for a more in-depth analysis. We propose some ideas of adapting the approaches developed under the BEPS Project for addressing the brain drain issue, presented in Table 4.

Table 4: Selected BEPS Plan Actions and their applicability to BEPS 2.0

Action	Scope of applicability
1 – Tax Challenges Arising from Digitalization	Improving the mechanism of income allocation in the context of the migration of talented individuals in the direction of more alignment between the place of taxation and the place of creation of value, which in the case of individuals is the place of “talent creation and skills development” and in the context of the digitalization of the economy is the place of virtual economic activity and economic presence
8–10 – Transfer Pricing	
13 – Country-by-Country Reporting	
5 – Harmful Tax Practices	Assessment of limits of acceptability of “aggressive tax incentives” employed by the countries in the processes of brain drain Exchange of information relating to tax incentives for attracting “brains”
6 – Prevention of Tax Treaty Abuse	Improving the preamble to bilateral tax treaties in order to show countries’ intentions to not create opportunities for non-taxation of migrating individuals
11 – BEPS Data Analysis	Creating an internationally consistent methodology for assessing tax losses from brain drain

Action	Scope of applicability
12 – Mandatory Disclosure Rules	Disclosure of information about the level of tax burden on mobile highly-qualified individuals
14 – Mutual Agreement Procedure	Streamlining the mechanism of mutual agreement procedure for addressing the scenarios of “double residence” or “no residence” in the context of brain drain. The development of the concept of “vital interests” in relation to digital nomads
15 – Multilateral Instrument	Multilateral agreement for the synchronized implementation of anti-brain drain measures in bilateral tax treaties

4.2.1. Limits of the Acceptability of “Aggressive Tax Incentives” Employed by Countries in the Processes of Brain Drain and the Launch of a Spontaneous Exchange of Information on Incentives for Attracting “Brains” (Action 5)

Various socio-economic instruments can be used to combat “brain drain”. They also include measures to improve national tax policies – here are just a few recent changes:

- a reduction in the tax rate for young Poles with the intention to decrease the level of brain drain in Poland (Voice of America 2019);²⁵
- the elimination of tax incentives for tax residents working abroad (Arendse 2019);²⁶
- lowering the requirements for tax residence to increase win in tax competition for digital nomads (CNews 2018);²⁷

²⁵ At the end of July 2019, the Polish government abolished the personal income tax for young Poles, under the age of 26 years old and earning less than PLN 85,500. As Polish Prime Minister Mateusz Morawiecki noted, this decision was made in order to stop the brain drain from the country, the scale of which is very significant. Since 2004 between 1.5 and 2 million citizens left the country. According to experts, about 2 million people will be able to take advantage of this benefit. (Voice of America 2019)

²⁶ Previously, South African tax residents living and working abroad for more than 183 days (and more than 60 consecutive days) were exempted from paying the national tax on their foreign income, but starting from March 2020, this approach will change. The amendments will require South African specialists who reside and work abroad but are still considered “physically present” (quantitatively daily test) or “usually resident” (subjective assessment of “actions, connections and intentions”) in the country to pay tax to the South African state in the amount of up to 45% of their gross foreign income, provided that it exceeds ZAR 1 million. (Arendse 2019)

²⁷ In 2018, a draft law was discussed in Russia, according to which IT specialists spending more than 90 days a year in Russia can receive tax resident status. The changes are aimed at increasing the country’s tax attractiveness for traveling IT professionals,

Despite the different approaches, each of these cases represents the reaction of the states to the global process of the brain drain/brain gain. However, in our opinion, in addition to the cooperative struggle against aggressive corporate tax regimes, in the near future the international tax community may also require a similar “audit” of the provisions of national laws directly or indirectly aimed at attracting and retaining human capital. For example, the reasons for the expansion of tax sovereignty in the case of the Republic of South Africa may indicate its necessity: according to the competent authorities, the cancelled tax exemption was excessively “generous”, especially in cases where an individual worked in a jurisdiction with an extremely low or zero personal income tax rate (e.g. UAE) (Arendse 2019).

Thus, the first issue at which such an audit should be directed is the delineation of cross-border situations in which brain drain can lead to non-taxation or reduced taxation, as well as a clear definition of the conditions under which the tax incentives provided by one country harms another country. When developing a methodology for determining the integrity of provisions in domestic tax legislation, attention should also be paid to criteria indicating the potential harmfulness of the preferential regimes outlined in the OECD report *Harmful Tax Competition: An Emerging Global Issue* (OECD 1998):

Table 5: A list of factors indicating the harmfulness of the preferential regime

Key factors	Other factors
No or low effective tax rates	An artificial definition of the tax base
“Ring-Fencing” of Regimes	Failure to adhere to international transfer pricing principles
Lack of transparency	Foreign source income exempt from residence country tax
Lack of effective exchange of information	Negotiable tax rate or tax base
	Existence of secrecy provisions
	Access to a wide network of tax treaties
	Regimes that are promoted as tax minimization vehicles
	The regime encourages purely tax-driven operations or arrangements

who, according to the new rules, will be able to pay income tax at a rate of 13% – one of the lowest income tax rates in the world. (CNews 2018)

This report includes a sequential set of three questions, the answers to which help determine whether the potentially harmful tax regime is actually harmful (OECD 1998):

- Does the tax regime shift activity from one country to the country providing the preferential tax regime, rather than generate significant new activity?
- Is the presence and level of activities in the host country commensurate with the amount of investment or income?
- Is the preferential tax regime the primary motivation for the location of an activity?

In addition to conducting continuous monitoring and spontaneous exchange of information about such regimes, by analogy with the recommendations of the Report (OECD 1998) and BEPS Action 5, we offer the following: after considering the economic consequences of the existence of preferential provisions in national legislation, such norms can be considered aggressive, and the country will have the opportunity to cancel or modify them by amending national tax legislation. In turn, other countries may take protective measures against the negative impact of such provisions, while also encouraging the possibility of adjusting or even denouncing them.

4.2.2. Unified Methodology for Assessing Tax Losses from Brain Drain (Action 11)

The magnitude of the BEPS problem in the corporate area is between USD 100 bln and USD 240 bln or between 4% and 10% of global corporate income tax (CIT) revenues (OECD 2015c, 15). In addition to significant financial losses, the BEPS process has other economic consequences, including, for example, tilting the playing field in favor of tax-aggressive MNEs, distorting the location of highly-mobile, intangible assets, misdirecting foreign direct investment, etc. (OECD 2015c, 15).

Therefore, in our opinion, monitoring the BEPS magnitude is one of the most important parts of the BEPS plan. As noted by the OECD, “the lack of quality data on corporate taxation has been a major limitation to measuring the fiscal and economic effects of tax avoidance as well as any efforts to measure the impact of the implementation measures agreed as part of the BEPS Project” and “increasing the quality of the data and the analytical tools available, through the ongoing work under Action 11, is crucial in being able to measure the impact of tax avoidance and the effect of the implementation of the BEPS measures in curbing these practices.”²⁸

²⁸ See: OECD. Action 11 BEPS data analysis. <https://www.oecd.org/tax/beps/beps-actions/action11/> (last visited 24 September 2019).

To date, the Inclusive Framework is actively working on this action of the BEPS Project. In particular, in January 2019, the Corporate Tax Statistics Database was launched, which stores data related to the BEPS process and the taxation of MNEs in general. Additionally, the first Inclusive Framework presented the first summary statistics based on an analysis of the results from the implementation of Action 13 on Country-by-Country Reporting.²⁹ Finally, the international organization notes that the workflow under Action 11 is too early to stop: the Inclusive Framework is developing “new and enhanced datasets and analytical tools that can assist in measuring and monitoring the fiscal and economic impacts of tax avoidance and the effects of the implementation of the BEPS measures”.³⁰

Unfortunately we cannot say that the international tax community has a similar level of analytical apparatus for assessing tax losses from a brain drain. Humanity does not fully understand the extent of tax losses from a brain drain, although it is intuitively clear that it is not much less than losses of USD 100 bln to USD 240 bln from tax avoidance by the corporations (this, for example, is indicated by the calculation of net tax losses from a brain drain in the Republic of Serbia). As a result of this, we recommend the development of a methodology for assessing tax losses from brain drain, taking into account the best practice of BEPS Action 11,³¹ the use of which could reliably indicate the extent of the problem in the context of jurisdictions. Such a methodology would consider both the direct effects, such as losses of tax revenues in the donor country and their gains in the recipient country, and indirect effects, such as benefits from remittances to members of emigrants’ families, transfer of knowledge, etc.

4.2.3. Disclosure of the Tax Burden on Certain Individuals (Action 12)

The authors of the BEPS Plan note: “the lack of timely, comprehensive and relevant information on aggressive tax planning strategies is one of the main challenges faced by tax authorities worldwide” (OECD 2015d, 9). As a result, in order to obtain preventive information, the OECD recommends the development of a set of mandatory rules for the disclosure of information regarding aggressive transactions, taking into account the balance of business and government interests. According to the OECD, the implementation of a tax disclosure mechanism may

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ For example, the OECD report on Action 11 of the BEPS Plan provides the possibility of applying six indicators when assessing the extent of tax base erosion. It is also noted that the indicators developed are illustrative because of possible limitations in data availability. Therefore, in our opinion, even the use of the methodology outlined in the first part of the article would make it possible to understand the preliminary scale of tax losses from brain drain.

pursue the simultaneous achievement of the two goals. First, such an instrument allows competent authorities to more effectively respond to changes in tax behavior of the taxpayers, second, it acts as a strong deterrence tool – both taxpayers and promoters of schemes will be more careful in choosing one tax scheme or another, if there is a requirement to disclose it (OECD 2015d, 9). Despite the fact that Action 12 is not included in the so-called BEPS minimum standards, some experts suggest its acknowledgement as a next BEPS minimum standard (Mosquera Valderrama 2018). Moreover, it should be noted that the ideas of BEPS 12 are actively being implemented³² (Directive 2018/822/EU), however, these changes have far from a positive perception by business representatives (EY 2018b).

So, in our opinion, the basic ideas of the BEPS Action 12 can be applied to cases of brain drain. For example, companies could provide information to the tax authorities about employees:

- 1) who recently moved to work in this country;
- 2) who could potentially be a tax resident of another state (other states);
- 3) whose level of tax burden is zero or close to it;
- 4) whose place of physical location during the performance of employment duties does not coincide with the place of payment of employment income.

In the future, such aggregated data could be included in the scope of the information exchange and form the basis for calculating tax revenue losses. However, it should be noted that the OECD indicates that the “lack of clarity and certainty can lead to inadvertent failure to disclose, which may increase resistance to such rules from taxpayers” or “could result in a tax administration receiving poor quality or irrelevant information” (OECD 2015d, 19). That is why such tax policy measure, if implemented, should be thoroughly designed.

4.2.4. Digitalization of the Mutual Agreement Procedure (Action 14)

Data from the OECD jurisdiction-specific guidance (OECD 2019a) indicates that today subjective criteria are already used by many jurisdictions in determining the tax residence of individuals. This trend will probably continue to grow, since the presence of only objective criteria in the tax legislation does not reflect the tax nexus of an individual with a country properly. A possible overlap of subjective criteria in

³² See: Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements

different states inevitably can lead to an increase in the number of cross-border tax disputes.

Almost all double tax agreements contain rules related to the mutual agreement procedure. For example, Article 25 of the OECD MC provides for a mechanism, independent of the usual legal remedies available in domestic law, by which the competent authorities of the Contracting States can resolve disagreements or difficulties related to the interpretation or application of the Convention on a mutually agreed basis. However, as noted by the OECD itself, despite the widespread dissemination of this provision in double tax treaties, the current mutual agreement procedure is still far from ideal and requires reform.³³

The BEPS Action 14 recommendations were aimed at solving some of the mentioned problems but in our opinion it does not contain revolutionary ideas; therefore, a detailed disclosure of the essence of BEPS Action 14 is not the purpose of this article. We applaud the positive developments of the MAP mechanism after the implementation of BEPS Action 14; according to the OECD, as of 2017, the average term for solving tax disputes under the MAP is 30 months, for cases related to transfer pricing, and 17 months for other cases.³⁴ However, we consider these terms “luxurious” for modern international taxation.

In our opinion, it is time for a “real-time” mutual agreement procedure that would reduce the level of transaction costs and time costs for all parties. Moreover, speeding up the MAP process can lead to more rapid accumulation of the MAP experience that states can use to improve their brain drain policies. As a result, we recommend the development of a digital mutual agreement procedure for competent authorities, whose presence would solve the issues of a multiple residence of “drain brains” in “a few clicks”.

4.2.5. Multilateral Instrument (Action 15)

In July 2018, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral Instrument or MLI) was signed by more than 85 jurisdictions. This multilateral agreement is the “new word” in international taxation, as it allowed a large number of changes to be introduced in double tax treaties in a synchronized manner, without the need for separate negotiations for each of the double tax treaties.³⁵ We believe that this experience can be

³³ See: OECD. Action 14 Mutual Agreement Procedure. <http://www.oecd.org/tax/beps/beps-actions/action14/> (last visited 25 September 2019).

³⁴ See: OECD. Mutual Agreement Procedure Statistics for 2018. <https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm> (last visited 25 September 2019).

³⁵ See: OECD. Action 15 Multilateral Instrument, <http://www.oecd.org/tax/beps/beps-actions/action15/> (last visited 25 September 2019).

useful in a coordinated fight against brain drain. Among the priority issues requiring the development of a “single view” in the context of improving the function of double tax treaties, the following can be distinguished:

- Does the current version of the preamble set out in the current versions of the OECD and the UN model conventions (OECD 2017a; United Nations 2017) require clarification that the bilateral tax agreement does not apply in situations leading to “aggressive” attracting of “brains”?
- Does the current version of Article 15 of the OECD and UN MCs related to income from employment reflect the economic nature of such income in cross-border situations?
- Is a separate article related to cross-border taxation of scientists, professors, etc. necessary in the subsequent versions of the OECD and the UN model conventions?
- Does the current version of the Article 14 of the UN MC, about income from independent professional services, need an update?
- Are the provisions of the Article 17 of the OECD and UN MCs, related to income of sportspersons and entertainers, in line with the economic nature of the value creation in this area in the era of digitalization?

4.2.6. Value Creation in the Context of Brain Drain (Actions 1, 8–10, 13)

The current distributive rules and nexus rules that are present in the double tax treaties and domestic legislation based on the concepts of source, residence, place of physical employment and others, discussed in the analysis presented in section 3 above, do not reflect the value creation process of the “talent creating, developing and exploiting”. “Talents” can potentially create value for their employers and society at large and can earn high income for themselves. However, “talents” do not come from nowhere; it takes time and effort, nurture, training and education in order to create the “initial talent”, which is developed by the different kinds of collaborations and activity. So, if we apply the value-creation approach that is proposed in BEPS Project Actions 8–10 (OECD 2015a) to individuals, we can argue that countries where significant contributions to “talent creation” were made can have potential subsequent rights to tax such an individual’s incomes. This line of argument can potentially be reflected in the OECD MC and the UN MC, in order to ensure fairness of sharing the global tax pie consisting of the incomes of such talented individuals. Such a substantial form of nexus may seem complicated, however, in practice it can be a useful proxy for income allocation of

highly-skilled workers in the global digitalized and mobile world, where value is increasingly created by intangible assets. Below we offer some conceptual ideas for such an approach.

First, the state where a person obtained their professional education and crucial experience can potentially be regarded as a state which has a right to tax at least some part of the subsequent income of such a person, especially in cases where education was government– funded. This idea can also be developed for the case of sportspersons leaving the state where they were trained and took their first steps in professional sports. Another relevant case is if the researcher who invented a new technology in a given state, based on the research infrastructure in that state, plans to move to a different state for the monetization of his invention. Generally, this idea is just a projection of the approach described in the OECD International Transfer Pricing Guidelines regarding corporate restructurings (OECD 2017b). The basis for such an idea is the result of the analysis, supporting the ease with which the donor state can lose taxing rights for talents in the case of IT specialists, sportspersons and academics, mentioned above.

Second, in determining the place of taxation of the talent’s income that was generated distantly by the means of telecommunication or electronic networks, we suggest the allocation of part of the tax base to the county where the economic source of such income is situated – which can be the country of the market audience watching the online broadcast or the country of the employer who pays to the distant IT specialist. This idea is in line with the OECD work on the digitalization of the economy (OECD 2019b).

Third, the approach developed in BEPS Action 13 (OECD 2015e) for developing harmonized global rules of reporting information summarizing the activities of a multinational corporation in all the states where it is present can also be quite useful as an administrative tool, forming basic tax risk assessments for highly mobile individuals. In the same manner as in the case of the country-by-country reporting by Action 13 of the BEPS Project, such an approach can start with the application only in regard to the global economic activities of individuals with a global income exceeding a defined, relatively high threshold. This administrative requirement is critical in the case of taxing the income of the celebrities, including sportspersons and entertainers, but could in the future also be used as the basis for assessment of the income of the “digital nomads”.

5. CONCLUSION

The main results of the analysis above are outlined below.

1) The domestic tax residence rules of donor countries of qualified specialists make it quite easy to break the personal nexus with the tax jurisdiction of the countries of emigration, which leads to their unfair loss of tax revenues. So, if countries don't want to lose tax revenues they should introduce more strict criteria for tax residence status, as well as special rules aimed at creating tax obstacles for termination of tax residence in the country, such as exit taxes. They should also consider this policy when negotiating tax treaties, which usually limits their rights to taxation of both the migrating and the offshoring workforce.

2) The rules for eliminating double taxation provided by both the OECD and the UN model conventions are obsolete and do not reflect the current problems of distribution of taxing rights in the context of the analyzed talent migration strategies. Situations of double taxation, double non-taxation and unfair limitations of taxation rights of the donor states can arise as a result of application of double tax treaties. This problem is exacerbated in the context of several current trends, which include:

- development of digital marketing strategies for the promotion and distribution of entertainment content, for example, broadcasting sports events over the internet,
- increasing level of mobility of the skilled workforce, as well as expanding opportunities for working remotely, for example, in regard to IT specialists.

3) As for income of the mobile scientific researchers the provisions of the double tax treaties, based on relevant Articles of the OECD and the UN model conventions,³⁶ can lead to unsatisfactory results: unfair loss by the donor country of the right to tax the income of emigrating researchers and possible double taxation of their income, fragmentation and complexity of regulation.

4) In our opinion, a new tax policy ideology is needed for rethinking the global tax architecture, in the context of brain drain issue, which should be based on two general ideas:

- (1) prevention of the migration of talents obtaining tax benefits, whose incomes are subject to double non-taxation due to the application of a combination of international and national tax rules,

³⁶ For example, Article 14, 15 and 20 of the UN MC (2017), Article 15 of the OECD MC (2017)

- (2) compensation the unfair loss of tax revenues to the countries which educated and then donated their qualified specialists to other countries.

We believe that the positive experience of the BEPS Project can be transferred to a cooperative approach in addressing the negative tax implications of brain drain. The main objective of such a project would be to reform the existing architecture of international taxation in the context of increasing mobility of qualified specialists and taking into account the interests of developing countries, including, in particular:

- the permissible limits of tax policy in attracting talented migrants to one’s jurisdiction,
- approaches to cooperation in administrative matters in this area,
- approaches to developing a methodology for determining the place of creation of added value by skilled migrants, which would be a prerequisite for the country to have the right to tax income created by their activities;
- streamlining the mutual agreement procedure in regard to cases of mobile individuals.

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