



EU-US trade and investment relations: Effects on tax evasion, money laundering and tax transparency

Ex-Post Impact Assessment

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EU-US trade and investment relations Effects on tax evasion, money laundering and tax transparency

In-depth Analysis

by Dr Isabelle Ioannides with Simona Guagliardo

On 12 October 2016, the coordinators of the Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion (PANA) decided to send a mission to the USA and more specifically to Washington, DC and to Delaware, from 20 to 24 March 2017. This Ex-Post Impact Assessment has been drawn up by the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the European Parliament's Directorate-General for Parliamentary Research Services, to provide Members with the necessary background information in support of their meetings in the USA.

Abstract

This Ex-Post Impact Assessment analyses the EU-US trade and investment relations to assess whether and, if so, to what extent these relations have impacted on issues related to tax evasion, money laundering and tax transparency. The EU and US economies are highly intertwined, generating together half the world's gross domestic product and more than 30 % of global trade. Overall, trade and investment relations between the European Union and the USA do not seem to have impacted on US efforts to combat tax evasion, strengthen anti-money laundering legislation, and its implementation, and boost tax transparency.

While some progress was made on the ongoing negotiation of the Transatlantic Trade and Investment Partnership (TTIP), which also aims to establish regulatory cooperation between the EU and the USA on financial services, progress has been below expectations. The USA has set up mechanisms for information exchange with EU Member States, has signed tax treaties with almost all EU Member States, and has developed a robust legal framework to address money laundering and combat terrorism financing. Despite being largely compliant with the recommendations of the Financial Action Task Force, challenges remain on questions of beneficial ownership, cross-border exchange of information, privacy issues, and designated non-financial businesses and professions.

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LINGUISTIC VERSIONS

Original: EN

This document is available on the internet at: <http://www.europarl.europa.eu/thinktank>

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Manuscript completed in March 2017. Brussels © European Union, 2017.

PE 598.602

ISBN 978-92-846-0693-1

doi:10.2861/062731

QA-04-17-225-EN-N

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List of Acronyms

AEOI	Automatic Exchange of Information
AML/CFT	Anti-Money Laundering/Combating the Financing of Terrorism
APA	Advance Pricing Agreements
BEPS	Base Erosion and Profit Shifting
BSA	Bank Secrecy Act
CbC	Country-by-Country
CDD	Customer Due Diligence
CFA	Company Formation Agents
CFC	Controlled Foreign Company
CRS	Common Reporting System
DC	District of Columbia
DG	Directorate General
DNFBP	Designated Non-Financial Businesses and Professions
EU	European Union
FATCA	Foreign Account Tax Compliance Act
FATF	Financial Action Task Force
FDI	Foreign Direct Investment
FFI	Foreign Financial Institutions
FSB	Financial Stability Board
GDP	Gross Domestic Product
HIRE	Hiring Incentives to Restore Employment
HSBC-US	Hong Kong and Shanghai Banking Corporation - United States
ICT	Information and Communication Technology
IGA	Intergovernmental Agreement
IRS	Internal Revenue Service
LOB	Limitation on Benefits
ML	Money Laundering
MNE	Multinational Enterprises
MSB	Money Services Business
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Cooperation and Development
PPT	Principal Purpose Test
R&D	Research and Development
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom of Great Britain and Northern Ireland
USA/US	United States of America/United States
USTR	United States Trade Representative
TFEU	Treaty on the Functioning of the European Union
VAT	Value Added Tax
WTO	World Trade Organisation

Executive summary

The United States of America (USA) is seen as an emerging leading tax and secrecy haven for rich foreigners. By resisting new global disclosure standards, it provides an array of secrecy and tax-free facilities for non-residents at federal and state levels, notably in Nevada, Delaware, Wyoming, and South Dakota. This Ex-Post Impact Assessment shows that:

1. In general, trade and investment relations between the European Union (EU) and the United States (US) do not seem to have impacted on US efforts to combat tax evasion, strengthen anti-money laundering legislation and its implementation, and boost tax transparency.
2. The EU and US economies have never before been as intertwined as they are today, especially in the fields of financial services, telecommunications, network industries, advertising, computer services and other related activities. The two economies together generate nearly half of the world's gross domestic product and over 30% of global trade (2014). The USA is the EU's top partner in trade in goods and they are also each other's most important commercial partners and major growth markets for trade in services and related foreign direct investment.
3. The EU is aiming to establish a framework for regulatory cooperation on financial services in the EU-US Transatlantic Trade and Investment Partnership (TTIP). To date, despite some results in the negotiations, achievements have been below expectations. Moreover, money laundering, tax evasion and tax transparency are not mentioned in the TTIP Section on Trade in Services, Investment and E-Commerce.
4. Unlike virtually all of the other developed countries in the world, the USA has not signed up to the OECD's Common Reporting Standard. It has, nonetheless, developed a robust framework of international agreements addressing international double taxation, tax fraud and other tax-related crimes. In accordance with the OECD model, the USA has signed tax treaties with all EU Member States, except Croatia. A provision establishing the exchange of information between competent tax authorities is included in all modern US tax treaties.
5. The US Congress enacted the Foreign Account Tax Compliance Act (FATCA) in 2010 to target non-compliance by US taxpayers using foreign accounts. To date, the USA has signed FATCA Intergovernmental Agreements (IGAs) with all EU Member States, except Greece, to implement the FATCA regulation. US mechanisms in place allow for effective exchange of information, and information exchange partners have indicated general satisfaction with this programme. However, the effectiveness of US information exchange on beneficial ownership has raised concerns.
6. According to the 2016 Financial Action Task Force (FATF) report, the United States has overall developed a robust legal framework to address money laundering activities and combat the financing of terrorism. Shortcomings remain in relevant sectors: privacy issues raised by some EU Member States, the generally unsatisfactory US information exchange system with regard to beneficial ownership and to designated non-financial businesses and professions, and challenges in facilitating cross-border exchange of information and enforcement of internal controls and foreign branches and subsidiaries.

1. Introduction

Just over a year ago, *Bloomberg Businessweek* named the United States ‘the world’s favourite new tax haven’.¹ By resisting new global disclosure standards, the United States is creating a hot new market: a place to hide foreign wealth, especially in Nevada, Delaware, Wyoming and South Dakota. The USA is seen as an emerging leading tax and secrecy haven for rich foreigners, when in parallel it has reprimanded other countries for helping rich Americans hide their money offshore. It is difficult to estimate how much revenue the United States loses from tax avoidance and evasion, but some have suggested that the annual cost of offshore tax abuses may be around US\$100 billion per year.²

The United States provides a wide array of secrecy and tax-free facilities for non-residents, both at a federal level and at the level of individual states. Many of the main federal-level facilities were originally crafted with official tolerance or approval, in some cases to help with the US balance of payments difficulties during the Vietnam War. Nonetheless, some facilities – such as tolerance by states like Delaware or Nevada of highly secretive anonymous shell companies – are rather the result of a race to the bottom between individual states on standards of disclosure and transparency.³ That is the reason why Delaware, for example, made Mondaq’s top 20 list of offshore fund locations. This small East Coast state ranks first in importance in the USA (by a wide margin) for this asset class and also serves as one of the favoured places for real estate funds. Delaware’s advanced business statutes make it an attractive place for global investors. ‘Reviewed and updated on a regular basis, these statutes provide ease, clarity, and flexibility in business entity formations and transactions, including mergers, transfers, and conversions.’⁴

In parallel, tax inequality was a prominent issue in the latest US presidential campaign. Concerns over tax inequality drove Bernie Sanders’ presidential campaign; but the rich-poor divide in the United States talks to US voters more broadly and is among the top concerns of Democratic voters. The US public’s appetite for action on taxation is high, but it remains to be seen how the new US administration will respond. Throughout the campaign, the newly elected President Trump was accused of dodging federal income tax, as do many wealthy Americans.⁵

¹ Jesse Drucker, [The World’s Favorite New Tax Haven Is the United States](#), *Bloomberg Businessweek*, 27 January 2016.

² Jane G. Gravelle, [Tax Havens: International Tax Avoidance and Evasion](#), Congressional Research Service, US Congress, Washington, DC, 15 January 2015, p. 1.

³ [Narrative Report on the USA](#), in *Financial Secrecy Index*, Tax Justice Network, p. 1.

⁴ CT Corporation, *A Guide to the Top 20 Offshore Fund Locations*, *Mondaq Business Briefing*, 10 December 2015.

⁵ Josh Hoxie, *An Appetite for Action on Tax Reform*, *Eastern Group Publications*, 26 October 2016.

On the European continent, following an in-depth state aid investigation launched in June 2014, the European Commission concluded that tax rulings issued by Ireland to Apple have substantially and artificially lowered the tax paid by Apple in Ireland since 1991. In response, the European Commission ruled in January 2016 that Apple pay a €13 billion penalty to the Irish government for breaking rules against the provision of state aid. The US administration considered this response as hostile and as adding to the uncertainty about completion of the ambitious Transatlantic Trade and Investment Partnership (TTIP).⁶ For their part, Apple and Ireland have also reacted and are launching a legal challenge against this decision.⁷

In June 2013, the US House Committee on Ways and Means had already reacted to this scandal by backing a proposal to hit companies in countries where the corporation tax rate is 15% or less. Experts say this is a specific reference to Ireland's controversial 12.5% rate. The idea was that the new tax rules would encourage multinationals like Apple and Google to move their operations – and consequently their significant profits – back to the United States, also in line with the new US President's discourse.⁸ This scandal was also seen as extending beyond Ireland and Apple to 'include every country that has a tax treaty with Ireland that has allowed the profits generated from the sale of expensive iPhones, iPads, MacBooks and all manner of glitzy accessories to be squirrelled away in a stateless company that pays no tax.'⁹

Against this background, this in-depth analysis aims to analyse the EU-US trade and investment relationship to assess whether and to what extent it has impacted on issues related to tax evasion and money laundering and if it has boosted tax transparency. In doing so, this ex-post impact assessment examines the measures, if any, that the United States has taken to meet international standards on boosting tax transparency and on controlling tax evasion and money laundering.

The analysis first provides an overview of the major scale of EU-US trade and investment transactions pointing to the importance of the transatlantic relationship. It then examines the state of the implementation of international tax regulations in the United States as monitored by the OECD and the implementation of bilateral tax treaties between the United States and EU Member States. It goes on to analyse how the exchange of information between the United States and the EU takes place, and to assess whether it works. Last but not least, this ex-post impact assessment examines how the United States has aimed to close the gap on money laundering.

⁶ The profits on any Apple product sold outside the United States were funnelled through an Ireland-based company into a stateless entity that paid tax at an effective rate of 0.005 % up to 2014.

⁷ Tim Warstall, Ireland and Apple Ready their Appeals against the EU Commission's \$14 billion Tax Decision, *Forbes*, 19 December 2016.

⁸ Sam Smythl and Niamh Griffin, US to Target Ireland in Move on Tax Havens: Plan to Entice Apple and Google Home Could Cost Thousands of Jobs Here, *Irish Mail on Sunday*, 16 June 2013.

⁹ Ann Crotty, APPLE INC – Upsetting the Applecourt, *The Financial Mail*, 15 September 2016.

Box 1: Methodology

The analysis in this ex-post impact assessment is based on a study of statistical data available on the Eurostat database and empirical evidence collected in secondary literature relating to the evaluation of the EU-US trade and investment relationship and its potential and actual impact on tax evasion, money laundering and tax transparency.

Accordingly, this in-depth analysis takes into account the assessment and recommendations made by the Financial Action Task Force, the state of the implementation of BEPS action in the United States as monitored by the OECD, the reports of the High Level Working Group on the negotiation of the Trade and Investment Partnership (TTIP) issued by the European Commission, the latest developments in the EU-US trade and investment relationship as reported by the main financial media outlets, and analyses written by experts and academics.

2. EU-US trade and investments in numbers

Together, the European Union and the United States have a combined population of approximately 840 million people (2016 estimates) who generate nearly half of the world's gross domestic product (GDP) and over 30 % of global trade (2014).¹⁰ Each day, goods and services worth US\$2.7 billion/€2 billion are traded bilaterally, promoting economic growth and supporting millions of jobs in both economies. In addition, the United States and the EU have directly invested more than US\$3.7 trillion/€2.8 trillion on both sides of the Atlantic.¹¹ In other words, the EU-US economic relationship can be influential on the global scene.

The USA is the EU's top trading partner and export market (representing 20.7 % of EU total goods exports and 14.4 % of total EU imports of goods, in 2015). Exports of goods to and imports from the United States by the EU-28 amounted respectively to €371 and €249 billion in 2015.¹² The EU registered a trade surplus of €122 billion in its trade with the USA. The United States is also the largest single country trader in services, while the EU (as a block) is the largest trader in services among all regions of the world. They are also each other's most important commercial partner and major growth markets when it comes to trade in services and related foreign direct investment (FDI). Most US American and EU jobs are in the services sectors, which account for 73.6 % of the EU GDP and 79.5 % of US GDP (2016 estimates).¹³

¹⁰ See [CIA Factbook](#) and Eurostat ([Share of EU in the World Trade](#)), February 2017.

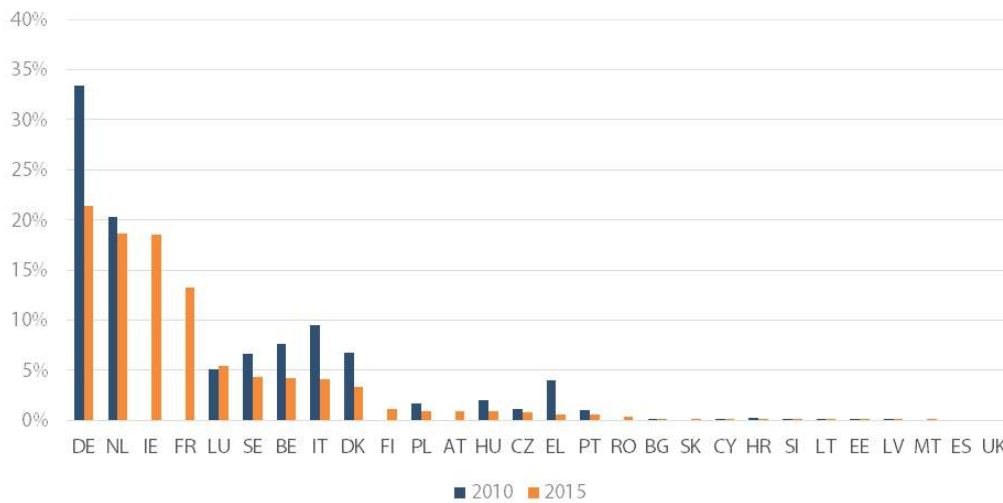
¹¹ European Commission, *Final Report High Level Working Group on Jobs and Growth*, Directorate General for Trade, Brussels, 11 February 2013, p. 1.

¹² Laura Puccio, *Legislative Train 12.2016 - 6 Reasonable and Balanced Free Trade Agreement with the United States / up to €68bn*, European Parliamentary Research Service, European Parliament, Brussels, December 2016, p. 4.

¹³ See [CIA Factbook](#), February 2017.

The two economies have never before been as intertwined as they are today, in the fields of financial services, telecommunications, network industries, advertising, computer services and other related activities. Protected services sectors on both sides of the Atlantic account for about 20 % of combined EU-US GDP – more than the agricultural and manufacturing sectors combined. ‘Major services sectors such as electricity, transport, distribution and business services are subject to particularly high levels of protection.’¹⁴

**Figure 1: EU-28 imports in services from the United States, 2010 and 2015
(in % of total available EU-28 imports)**

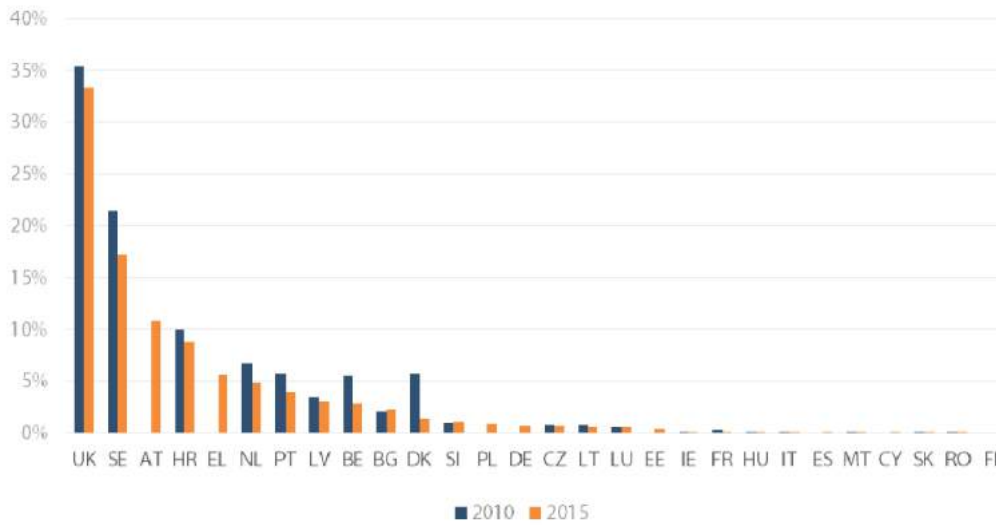


Source: Christian Dietrich, EPRS, using data from Eurostat, [EU-28 imports in services from the USA](#).

As **Figure 1** shows, EU imports in services from the USA have been largely concentrated in Denmark, the Netherlands, Ireland, and France. Overall, EU imports in services from the USA have dropped between 2010 and 2015, as the same figure illustrates. It should be noted that data was not available either for 2010 or for 2015 for Spain and the United Kingdom (UK). Additionally, data was missing for Ireland, France, Finland, Austria, Romania, Malta and Slovakia for 2010.

¹⁴ Karel Lannoo, *Financial Services and the Transatlantic Trade and Investment Partnership*, No 302, Centre for European Policy Studies, Brussels, 20 November 2013, p. 6.

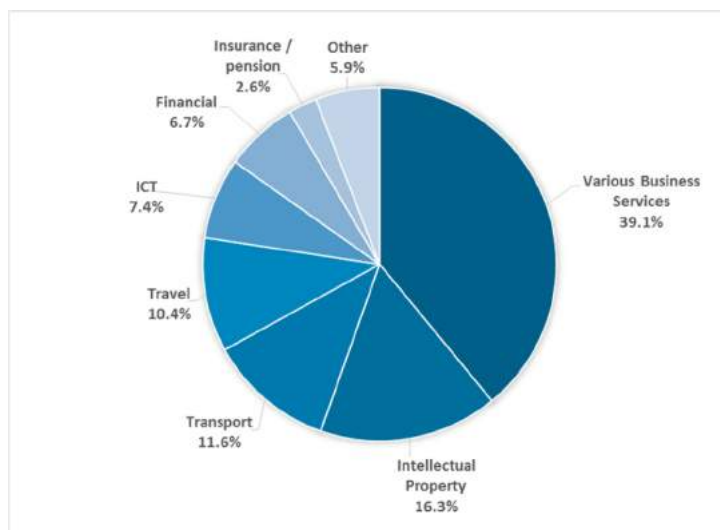
Figure 2: EU-28 exports in services to the United States, 2010 and 2015 (in % of available EU-28 exports)



Source: Christian Dietrich, EPRS, using data from Eurostat, [EU-28 exports in services to the USA](#).

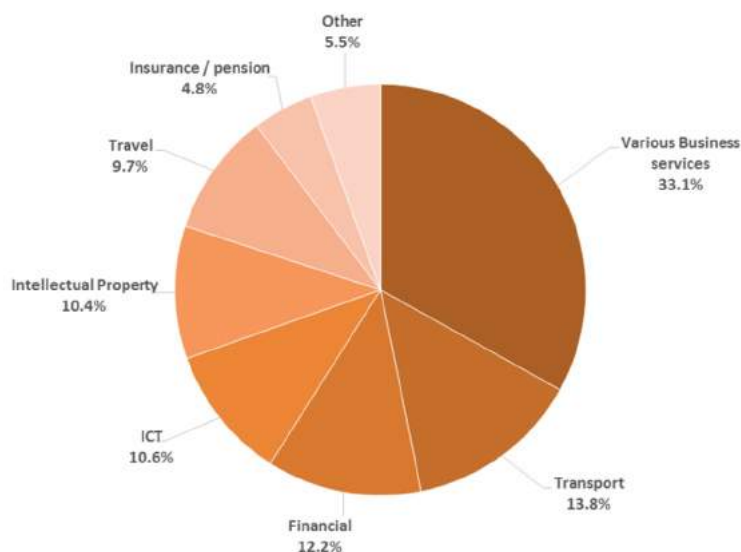
Figure 3 and **Figure 4** illustrate the main sectors in EU-US trade in services. As the two figures show, the main sectors of EU imports of services from the USA in 2015 (at 39.1 %) and exports to the USA in 2015 (at 33.1 %) include legal, accounting, consulting, public relations, R&D, architectural, engineering, scientific, advertising, market research, public opinion, trade related, operating leasing, waste treating and de-pollution services. On the import side, services include intellectual property (16.3 %), all transport (11.6 %), all travel (10.4 %), information and communication technology (ICT) (7.4 %) and financial services (6.7 %). On the export side, the same sectors are of importance but to differing degrees, as shown in **Figure 4**.

Figure 3: EU imports of services from the USA (2015)



Source: Simona Guagliardo, EPRS, using data from Eurostat, [sectors of EU-28 trade in services](#).

Figure 4: EU exports of services to the USA (2015)



Source: Simona Guagliardo, EPRS, using data from Eurostat, [sectors of EU-28 trade in services](#).

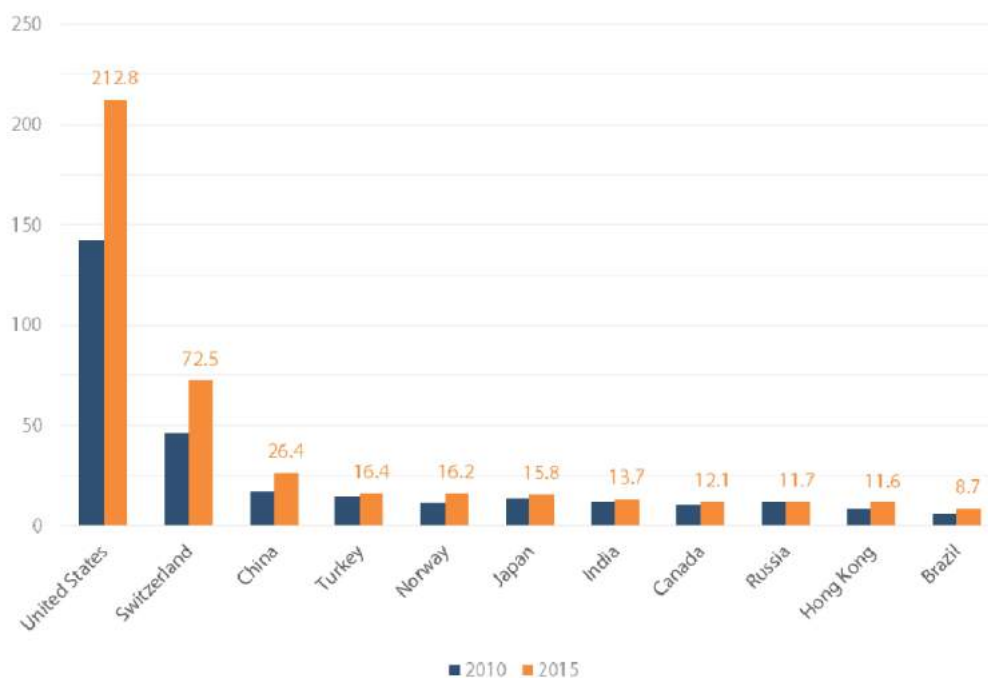
According to Eurostat, four of the top ten export markets for US services are in Europe. In 2015, the United States remained by far the largest destination for EU-28 exports of services, with this trade valued at €212.8 billion. This means that the EU-28 exports of services to the United States is equivalent to 26 % of all EU-28 exports of services to non-member countries. According to **Figure 6**, the next largest destinations were Switzerland (14 %), China, Hong Kong and Japan (all 9.2 %), Norway (3.4 %), Russia (3 %), Turkey (1.4 %), Canada, India and Brazil (all 5.8 %).¹⁵

In 2015, Eurostat data shows that the main countries of origin of EU-28 imports of services were the same as the destinations of EU-28 exports of services that had the highest shares. Again, the United States accounted for the largest value of imported services from the EU-28, valued at €225.8 billion. This sum is equivalent to over 30 % of the total of EU-28 imports of services from non-member countries. The next highest shares were from Switzerland (10 %) and China (4 %).¹⁶ (See **Figure 5** and **Figure 6**).

¹⁵ [Eurostat - EU-28 exports in services](#), 13 January 2017.

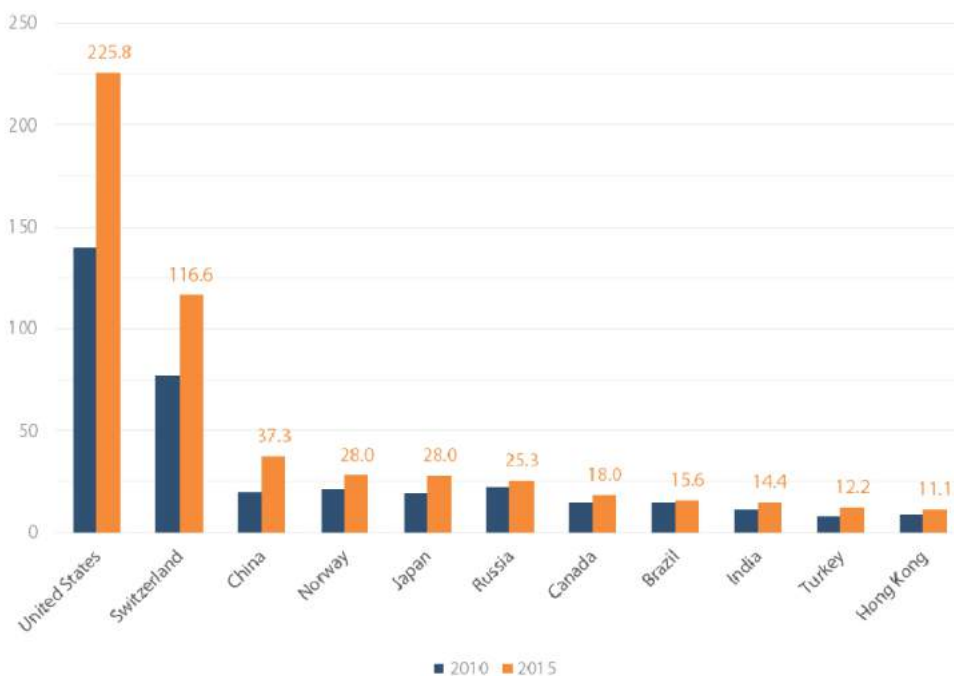
¹⁶ [Eurostat - International Trade in Services](#), 10 February 2017.

Figure 5: EU-28 imports in services with main partners, 2010 and 2015 (in € billion)



Source: Christian Dietrich, EPRS, using data from Eurostat, [EU-28 imports in services](#).

Figure 6: EU-28 exports in services with main partners, 2010 and 2015 (in € billion)



Source: Christian Dietrich, EPRS, using data from Eurostat, [EU-28 exports in services](#).

As **Figure 7** and **Figure 8** illustrate, EU-US ties are particularly strong in foreign direct investment (FDI), portfolio investment, banking claims, trade and affiliate sales in goods and services, mutual R&D investment, patent cooperation, technology flows, and sales of knowledge-intensive services.¹⁷ Both EU inward flows (direct investments in EU Member States from non-member countries) and outward flows (EU Member States' direct investments in countries outside the EU) fell sharply in 2014 and were at their lowest levels during the 2009-2014 period. This big fall was mainly due to large disinvestments in some traditional partner countries, including the United States (€-69.8 billion). 'This large fall has affected, in particular, Luxembourg and the Netherlands due to declines in investments made by special-purpose entities. Disinvestments were particularly high for equity capital acquisitions in the United States market that went from €219.9 billion in 2013 to €82.1 billion in 2014.'¹⁸

Equally, direct investments in the EU also fell in 2014, thus mirroring the development for outward flows. Again, this was largely due to the flows with relation to the United States: FDI from the United States also dropped from €433.4 billion in 2013 to €-20.3 billion in 2014, in other words from investment to disinvestment. The EU Member States that were most affected were the Netherlands and Luxembourg, both declaring significant withdrawals in equity capital by United States investors.¹⁹ Nonetheless, the United States has maintained its position as the major holder of FDI stocks in the EU-28: 60 % of the total US FDI outflows globally went to Europe in 2015. Only 16.1 % went to the Asia-Pacific region.²⁰

As to inward and outward FDI stocks, they continued to grow steadily in 2014 and followed the trend from previous years. At the end of 2014, North America (United States and Canada) had the biggest share (40.2 %) of EU-28 FDI stocks from the rest of the world. The United States alone accounted for some 34.5 % (€1 985 billion) of all EU-28 outward stocks. At the end of 2014, the United States held close to 40 % of total EU-28 FDI inward stocks from the rest of the world. The United States thus maintained its position as the major holder of FDI stocks in the EU-28, having invested, as of the end of 2013, mostly in the financial services sector, followed by manufacturing; one third of the latter was in the manufacture of petroleum, chemical, pharmaceutical, rubber and plastic products; and another third in the manufacture of food products, beverages and tobacco products.²¹

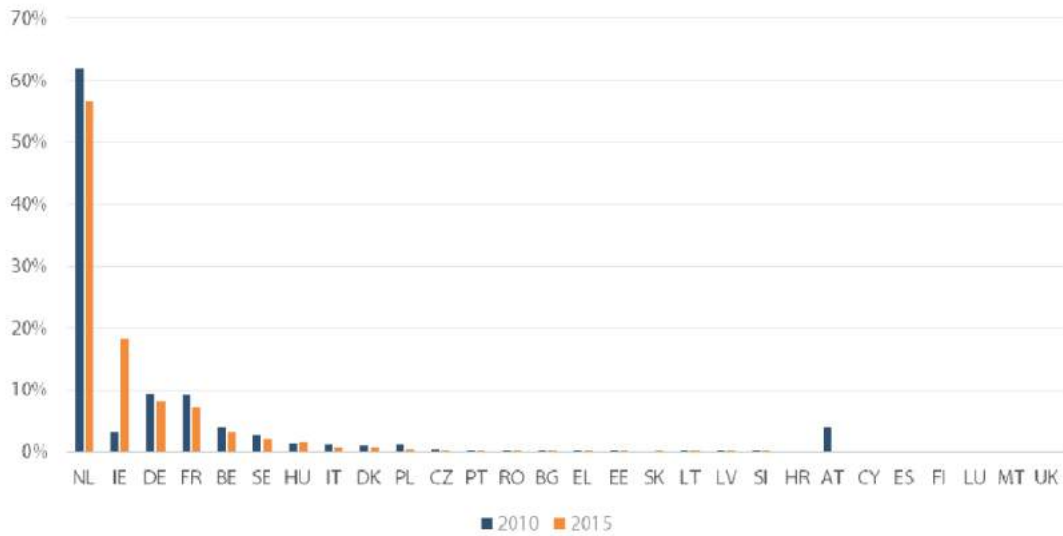
¹⁷ Daniel S. Hamilton and Joseph P. Quinlan, *The Transatlantic Economy 2016. Annual Survey of Jobs, Trade and Investment between the United States and Europe*, Center for Transatlantic Relations Johns Hopkins University, Paul H. Nitze School of Advanced International Studies, Washington, DC, 2016, p. V.

¹⁸ [Eurostat - Foreign Direct Investment](#), 10 February 2017.

¹⁹ [Eurostat - Foreign Direct Investment](#), 10 February 2017.

²⁰ Daniel S. Hamilton, and Joseph P. Quinlan, *The Transatlantic Economy 2016. Annual Survey of Jobs, Trade and Investment between the United States and Europe*, Center for Transatlantic Relations Johns Hopkins University, Paul H. Nitze School of Advanced International Studies, Washington, DC, 2016, p. VI.

²¹ [Eurostat - Foreign Direct Investment](#), 10 February 2017.

Figure 7: EU-US foreign direct investment, 2010 and 2015 (% of total inward FDI)

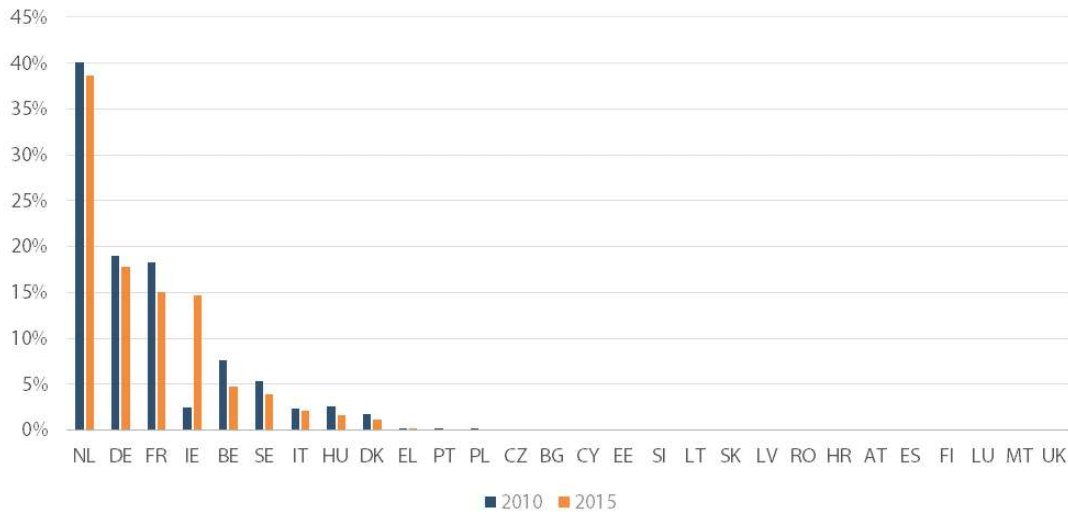
Source: Christian Dietrich, EPRS, using data from Eurostat, [EU Member States inward FDI](#).

Moreover, US FDI to Europe has become increasingly concentrated. As illustrated in **Figure 7**, in the first nine months of 2015, five countries on the European continent accounted for nearly 90 % of total US FDI outflows, which is equal to US\$138.3 billion. ‘These were the Netherlands (US\$43.2 billion, 31.2 %); Ireland (US\$27.3 billion, 19.7 %); the UK (US\$25.3 billion, 18.3 % of total); Luxembourg (US\$15.3 billion, 11 %); and Switzerland (US\$12.4 billion, 9 %).’²²

As **Figure 7** and **Figure 8** illustrate, the caveat in measuring the impact of inward and outward FDI between the EU and the United States is the incompleteness of data. On the inward FDI between the EU and the United States (**Figure 7**), data is not available for either 2010 or 2015 for Cyprus, Spain, Finland, Lithuania, Malta and the United Kingdom. In addition, for the same graph, data is missing for Slovakia and Croatia in 2010 and for Austria in 2015. Similarly, on the outward FDI from the EU to the United States (**Figure 8**), there was no data available either for 2010 or for 2015 for Cyprus, Spain, Finland, Lithuania, Malta and the United Kingdom. Moreover, for the same graph, data is missing for Latvia and Austria for the year 2010.

²² Daniel S. Hamilton and Joseph P. Quinlan, *The Transatlantic Economy 2016. Annual Survey of Jobs, Trade and Investment between the United States and Europe*, Center for Transatlantic Relations Johns Hopkins University, Paul H. Nitze School of Advanced International Studies, Washington, DC, 2016, p. VI.

Figure 8: EU-US foreign direct investment, 2010 and 2015 (% of total outward FDI)



Source: Christian Dietrich, EPRS, using data from Eurostat, [EU Member States outward FDI](#).

3. EU-US trade relations and the implementation of international tax regulations

Virtually all the developed countries in the world have signed up to the OECD's Common Reporting Standard (CRS), but the USA has not. CRS undermines banking confidentiality as it requires a country's domestic banks to give its tax authority specified information in relation to accounts held by residents of other CRS assenting countries. In the USA, banking regulation is split between the federal and state government and most states do not take kindly to the federal government seeking to interfere in their affairs. Delaware, Nevada, Florida and Wyoming, all with very strict banking confidentiality regulations, would oppose the passing of a federal law on CRS in Congress. It goes beyond passing a federal law, however. CRS requires legislation to force banks and other financial intermediaries to give the requisite information to the Internal Revenue Service (IRS) so that they can pass it on to other tax authorities. That may require state legislation or, at best, federal legislation that impinges on the rights of individual states.²³

US multinationals are likely to be disproportionately impacted by the base erosion and profit shifting (BEPS) project because US international tax rules are disharmonious with the rest of the world.²⁴ The United States has the highest statutory tax rate among major

²³ [Comment: Will the USA Adopt the Common Reporting Standard?](#), *International Accounting Bulletin*, 1 April 2016.

²⁴ Base erosion and profit shifting (BEPS) refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to shift profits artificially to low or no-tax locations. Under the inclusive framework, over 100 countries and jurisdictions are collaborating to implement the BEPS measures and tackle BEPS. For further information, please refer to the OECD webpages on [BEPS](#).

global economies. It also has a comprehensive ‘worldwide’ tax system in which the foreign earnings of US companies are subject to US corporate tax with a credit for taxes paid to the foreign jurisdiction. In addition to complying with the tax rules and regulations of individual countries, the BEPS project will have an impact on business executives, since it will ensure compliance with multilateral, non-tax agreements possibly impinging on tax rules.

At EU level, to prevent aggressive tax planning, tax avoidance and tax evasion by multinational enterprises, the European Commission adopted an [Action Plan](#) on 17 June 2015 for fair and efficient corporate taxation in the European Union. This plan also dealt with issues related to harmful tax practices and to the work of the Code of Conduct Group. Moreover, the [Anti-Tax Avoidance Package](#) of 28 January 2016 is part of the EU’s ambitious agenda for fairer, simpler and more effective corporate taxation in the EU. The package contains concrete measures to prevent aggressive tax planning, boost tax transparency and create a level playing field for all businesses in the EU. Furthermore, a series of investigations have been conducted into specific tax rulings and tax regimes involving Ireland (as already mentioned), the Netherlands and Luxembourg, primarily targeting US multinationals.²⁵ For instance, French authorities raided the Paris headquarters of two US corporate giants, Google and McDonalds in May and June 2016 respectively. Moreover, the European Commission is investigating tax deals that Amazon reached in Luxembourg and has accused the Netherlands of allowing Starbucks to avoid more than US\$30 million in taxes.²⁶

Table 1 presents the results of the final report and the explanatory statement published by the G20/OECD in October 2015, outlining the state of the consensus actions under the BEPS project. The output under each of the BEPS actions is intended to form a complete and cohesive approach covering domestic law recommendations and international principles under the OECD model tax treaty and transfer pricing guidelines. In **Table 1** minimum standards and revision of existing standards denote standards whereby all G20/OECD members are committed to consistent implementation; common approach(es) facilitate convergence of national practices; and best practice refers to guidance drawing on best practices.

²⁵ David Ernick, BEPS Puts More Tax Roadblocks in Front of US-based Companies, *Industry Week*, 9 April 2015.

²⁶ Renae Merle, European Authorities Eyeing US Multinationals’ Tax Bills, *The Washington Post*, 1 June 2016.

Table 1: The extent of BEPS action implementation by the United States

Action	OECD Categorisation	State of Implementation	Expected Timing
Address VAT on business to customers digital services (Action 1)	Common approach	The USA does not have a VAT and there are no proposals to introduce one.	N/A
Neutralise the effects of hybrid mismatch arrangements (Action 2)	Common approach	The USA has dual consolidated loss rules that generally embody Recommendations 6 (deductible hybrid payments rule) and 7 (dual resident payer rule) in Part I of Action 2. US law and tax treaties generally embody the treaty recommendations in Part II of Action 2. No legislative proposals on other Action 2 recommendations are currently active.	N/A
Strengthen controlled foreign companies (CFCs) (Action 3)	Best practice	The existing US CFC regime incorporates many of the recommendations from Action 3. No legislative proposals on changes to the CFC regime are currently active.	N/A
Limit base erosion via interest deductions (Action 4)	Common approach	An existing fixed-ratio limit on the deductibility of net interest expense generally applies to foreign-owned corporations, but the ratio is generally 50 % instead of 10 % to 30 %. No legislative proposals on Action 4 recommendations are currently active.	N/A
Counter harmful tax practices more effectively (Action 5)	Minimum standard	US law does not have a preferential intellectual property regime of the type discussed in Action 5. Other than unilateral advance pricing arrangements (APAs), the USA generally does not issue rulings of the type that must be spontaneously exchanged under Action 5.	N/A
Prevent treaty abuse (Action 6)	Minimum standard	The USA generally meets the Action 6 minimum standard through its 'limitations on benefits' (LOB) provisions in treaties in force or in treaties or protocols awaiting ratification, and in its anti-conduit rules. The Treasury Department released a revised US model income tax convention in February 2016, which makes the LOB model provision more restrictive. The Congress remains opposed to, and will not adopt, a 'principal purpose test' (PPT) rule.	Signed tax treaties that would add LOB provisions to US treaties with Hungary and Poland have been awaiting Senate consent since 2011, with no definite prospects for completion of the process in the near future.
Prevent avoidance of permanent establishment status (Action 7)	Revision of existing standard	The Treasury Department appears to be somewhat favourably disposed to some, but not all, of the recommendations in Action 7, but is awaiting the completion of the anticipated report on the attribution of profits. Signed tax treaties have been delayed in the Senate since 2011 and may remain so indefinitely, so the timing of any changes is unknown.	N/A

Action	OECD Categorisation	State of Implementation	Expected Timing
Ensure transfer pricing outcomes are in line with value actions (Actions 8-10)	Revision of existing standard	The Treasury Department has stated that the consistency of existing domestic transfer pricing principles with Actions 8-10 means that harmonising the two will not require 'substantial' changes to US transfer pricing regulations. The application of Article 9 of US tax treaties is expected to generally be consistent with Actions 8-10.	N/A
Ensure disclosure of aggressive tax planning (Action 12)	Best practice	Existing US law has statutory and regulatory disclosure rules for aggressive tax planning. There are no active proposals for change.	N/A
Re-examine transfer pricing documentation (Action 13)	Common approach	Existing US law has documentation requirements that are at least equivalent to, or serve the same purpose as, the Action 13 local file. The USA has thus far not indicated that it will require the creation or filing of a master file but IRS would likely ask for a taxpayer's master file, if it exists, in the event of audit.	N/A
Re-examine CbC reporting (Action 13)	Minimum standard	The Treasury Department released final regulations on 29 June 2016 that require annual CbC reporting by US entities that are the ultimate parent entity of a multinational enterprise with annual revenue of US\$850 million or more. The final regulations apply to taxable years of parents of US multinational enterprises (MNE) groups that begin on or after 30 June 2016. The IRS has also indicated that it will accept and automatically exchange CbC reports for taxable years beginning on or after 1 January 2016 but before the effective date of the final regulations. The USA has not signed the multilateral competent authority agreement or any bilateral agreements for the exchange of CbC information, but is expected to enter into bilateral agreements later this year or in 2017, prior to the first automatic exchanges beginning in 2018 (for the 2016 taxable year).	Final regulations issued on 29 June 2016 and applying to taxable years of parents of US MNE groups that begin on or after 30 June 2016
Make dispute resolution more effective (Action 14)	Minimum standard complemented by best practice	Action 14 is broadly consistent with the existing US position on dispute resolution. US tax treaties that would add arbitration provisions to US treaties with Japan, Spain and Switzerland are awaiting Senate consent, with no definite prospects for completion of the process in the foreseeable future. The USA is one of the countries committed to binding arbitration.	Not yet known

Source: Adapted from [BEPS Actions Implementation by Country, United States](#), Deloitte, October 2016.

4. EU-US trade developments

4.1. EU-US trade negotiations and financial services

The EU is aiming to establish a framework for regulatory cooperation on financial services in the EU-US Transatlantic Trade and Investment Partnership (TTIP), the negotiations for which began in July 2013. The TTIP could potentially cover all types of financial service, including: banks and the granting of credit of any kind; (re)insurance, including its sale; leasing; payment services of all kinds, including credit cards, guarantees or warranties; trading in securities; derivatives; and financial transactions on all types of market; foreign exchange transactions; fund management; clearing; provision and analysis of financial data and consultation of all kinds, such as that involved in corporate finance or company purchases.²⁷ Although the EU and the United States already export a substantial number of services to each other, EU firms still face hurdles when they try to sell their services on the US market.²⁸

The TTIP negotiations cover a wide range of issues relevant to the questions at hand with a view to reaching agreement on ambitious provisions going beyond World Trade Organization (WTO) rules. By the end of 2016, 15 rounds of negotiations had taken place (the last round took place in Brussels in October 2016). By then, there were 17 consolidated documents on the negotiation table; for the remaining chapters there were textual proposals from either the EU or the US side. Notwithstanding some results, achievements have been below expectations.²⁹

Progress was achieved on the services chapter on the basis of the offers exchanged in July 2015. The EU's objective is to pursue a high degree of ambition and gain substantial new market access for EU firms. For market access in services to be effective, recognition of professional qualifications is needed. The negotiators had a discussion on mutual recognition agreements for professional services, in particular with respect to architects and audits as those are professional services for which the EU has created a more unified legal framework. It should be noted that there is no mention of money laundering, tax evasion and tax transparency in the proposed TTIP Section on Trade in Services, Investment and E-Commerce. The Commission draft text on this section states that additional provisions (e.g. on taxation) will be inserted in the general/horizontal part of

²⁷ Markus Henn, *Financial Services in the Planned EU-US Trade Agreement TTIP*, Factsheet, World Economy, Ecology and Development – WEED, Berlin, November 2013.

²⁸ European Commission, *The Transatlantic Trade and Investment Partnership (TTIP), Towards an EU-US Trade Deal. Inside TTIP. An Overview and Chapter-by-Chapter Guide in Plain English*, Publications Office of the European Union, Luxembourg, 2015, p. 13.

²⁹ Laura Puccio, *Legislative Train 12.2016 - 6 Reasonable and Balanced Free Trade Agreement with the United States / up to €68bn*, European Parliamentary Research Service, European Parliament, Brussels, December 2016, p. 4.

the agreement and will apply to this section.³⁰ However, the discussion with regard to cross-border data flows had been momentarily suspended while agreement was found on how to resolve EU-US data privacy issues.³¹

Box 2: EU framework for negotiation of the TTIP chapter on services

- Tackle barriers EU businesses face in sectors such as telecommunications (limits on how much an EU shareholder can own of a US company), the dredging of harbours, ports or waterways.
- Secure mobility enabling professionals to practice on both sides of the Atlantic, by recognising each other's professional qualifications.
- Facilitate, speed up and clarify how individuals and firms can obtain licences or formal approval to offer services (e.g. auditing, management consultancy and legal advice).
- Agree on new rules for industries, which are key to the EU economy (e.g. telecommunications and e-commerce, financial services, postal and courier services, maritime transport).
- Secure protection for sensitive sectors (e.g. audio-visual and public services such as health, education, social services and water distribution).

Source: European Commission, [The Transatlantic Trade and Investment Partnership \(TTIP\), Towards an EU-US Trade Deal. Inside TTIP. An Overview and Chapter-by-Chapter Guide in Plain English](#), Publications Office of the European Union, Luxembourg, 2015, p. 13.

In the same way as other EU trade agreements, TTIP will need the European Parliament's consent before it can be signed by the Council of the EU, in accordance with Articles 207 and 218 of the Treaty on the Functioning of the European Union (TFEU). On 8 July 2015, the European Parliament adopted a resolution making recommendations on the TTIP negotiations to the European Commission. Three points were of particular importance.³²

- Firstly, the resolution pointed to a majority-held position in the European Parliament that seeks to encourage the European Commission to find a balanced outcome to the TTIP negotiations. The resolution stated that TTIP should increase reciprocal market access for goods, services and investment, more specifically, remove US restrictions on EU-owned maritime and air transport services and on foreign ownership of airlines, and improve EU access to US telecommunications markets.
- Secondly, Parliament wished to ensure that national and, if applicable, local authorities retain the full right to introduce, adopt, maintain or repeal any measures

³⁰ European Commission, [Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-Commerce](#), Proposal for Services, Investment and E-Commerce Text, DG Trade, Brussels, 31 July 2015, pp. 51-52.

³¹ For a detailed account of the state of affairs on the TTIP negotiations, see Laura Puccio, [Legislative Train 12.2016 - 6 Reasonable and Balanced Free Trade Agreement with the United States / up to €68bn](#), European Parliamentary Research Service, European Parliament, Brussels, December 2016, p. 74, pp. 59-64.

³² European Parliament, [European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership \(TTIP\)](#), Reference no P8_TA(2015)0252, Strasbourg, 8 July 2015.

with regard to the commissioning, organisation, funding and provision of public services as provided in the Treaties as well as in the EU's negotiating mandate.

- Thirdly, the European Parliament set an indispensable condition to its consent, insisting on the replacement of the arbitration system in investor-state dispute settlement. In response, the European Commission proposed in September 2015 (fine-tuned in November 2015) the creation of an Investor-State Court system.³³ The EU proposal includes an appellate mechanism but the scope of the appellate review has not been defined in the EU textual proposal for TTIP. The judges would be publicly selected by the president of the tribunal on a rotational basis from the pool of judges appointed by the EU and USA.³⁴

4.2. Implications of the Trump presidency

The election of Donald Trump in November 2016 has raised significant questions about the future direction of US economic policy and its potential impact on Europe. As a result, the outlook for transatlantic cooperation on economic matters has changed dramatically. Already during Trump's presidential campaign, TTIP was not mentioned once. Furthermore, Trump has demonstrated that he prefers bilateral relations with individual EU Member States rather than relations with the EU as a whole, which may point to a potential US disengagement with EU integration. In that context, President Trump has taken immediate steps to reorder US economic alliances, setting up meetings with leaders from Mexico and Canada on North American affairs and hosting UK Prime Minister Theresa May to lay the groundwork for a bilateral trade deal with the UK.³⁵

Changes can also be observed in the way the White House intends to engage in trade policy. Leaders of the Trump administration's new trade team will share the job held by the US trade representative over the past eight years. First, Robert Lighthizer is the President Trump's pick to be the US trade representative (USTR). The hearing for the nominated USTR has yet to be scheduled, which is seen as indicative of low interest in the international trade agenda. Second, Commerce secretary nominee Wilbur Ross, a friend of President Trump, will be the chief trade policy strategist. Completing the Trump team is Peter Navarro, who will head the new National Trade Council and will be the point person on trade issues at the White House. The current triumvirate of trade officials and staff slated for leadership roles in formulating trade policy departs from the Obama administration model of one primary architect designing the contours of market-opening trade agreements.

³³ European Commission, [Why the New EU Proposal for an Investment Court System in TTIP is Beneficial to both States and Investors](#), Brussels, 12 November 2015.

³⁴ Laura Puccio, [Legislative Train 12.2016 - 6 Reasonable and Balanced Free Trade Agreement with the United States / up to €68bn](#), European Parliamentary Research Service, European Parliament, Brussels, December 2016, p. 66.

³⁵ William Mauldin, President Donald Trump Makes Revised Trade Deals an Early Priority; Two Days after Taking Office, Nafta Renegotiation and a Potential Bilateral Pact with the UK are on the Agenda, *The Wall Street Journal Online*, 23 January 2017; Daniel Gros, [Trump: Goading and Testing the EU](#), Centre for European Policy Studies (CEPS), Brussels, not dated.

Lighthizer³⁶ by statute will have the primary role in trade negotiations and will work in close coordination with Ross and Navarro. Lighthizer has the most Washington experience as a former senior Capitol Hill staffer and former deputy USTR. But Ross brings to the table his experience as a businessman who has been affected by trade, and Navarro is an economist. This ensures that the primary players on the Trump trade team have a good mix of different perspectives, all of which matter in making trade policy. Ross will have many other responsibilities in managing a large agency, so he could be pulled away from trade, while Navarro has the benefit of proximity to Trump since his office is located in the White House. Navarro, unlike Lighthizer, does not need Senate confirmation. Moreover, past administrations have had the National Security Council and National Economic Council host senior trade policy meetings, a role that could shift to the National Trade Council.³⁷

Other key players on the trade team include Jason Greenblatt, who holds the newly created White House post of special representative for international negotiations. Greenblatt has been the chief legal officer and an executive vice president at the Trump Organization and has advised Trump on both domestic and international business and legal affairs. Greenblatt, who attended the Senate Finance Committee meeting with Navarro, will be involved in trade talks. Former Goldman Sachs President and Chief Executive Officer Gary Cohn, director of the National Economic Council, also will have a major voice on trade policy. Jared Kushner, senior adviser to the President at the White House and the US President's son-in-law, is another key member of the team. Kushner has already met with Canadian and Mexican trade officials.

Trade attorney Stephen Vaughn, a member of Trump's USTR transition team, is expected to be named USTR general counsel and Gilbert Kaplan, partner with King & Spalding, is likely to become Commerce Undersecretary for international trade following Ross's Senate approval. Vaughn would replace Maria Pagan, who is the current acting general counsel. Pagan is also serving as acting USTR. The USTR general counsel position does not need Senate confirmation.³⁸

All these actors seem to have differing views on trade policy, so it remains to be seen whether the administration will have a coherent approach to trade. Team Trump is considering renegotiation of the North American Free Trade Agreement (NAFTA) as well as bilateral agreements with Japan and the UK. Trump said in a February White House meeting with congressional leaders that Ross will be representing the USA in negotiations on NAFTA with Canada and Mexico. These negotiations will provide the opportunity for US lawmakers and international (including EU) stakeholders to watch top members of the Trump trade team in the NAFTA talks closely to see how their roles are defined and how their positions on US trade policy will play out.

³⁶ Lighthizer's previous work in Brazil and China required him to register as a foreign agent, and the act stipulates that such agents cannot serve as USTR, absent a congressional waiver.

³⁷ Len Bracken, Team Trump to share power in trade policy, *Bloomberg BNA*, 23 February 2017.

³⁸ Len Bracken, Team Trump to share power in trade policy, *Bloomberg BNA*, 23 February 2017.

5. Double taxation agreements

The 1996 United States Model Income Tax Convention was updated in 2006 and more recently in 2016. The revised Model Convention follows the US Department of Treasury's tax treaty policy and the OECD's Model Tax Convention on Income and Capital. This updated version of the US Tax Convention 'includes a number of new provisions intended to more effectively implement the Treasury Department's longstanding policy that tax treaties should eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance'.³⁹ However, many of the 2016 updates reflect technical improvements and do not represent major changes to the prior model. Moreover, this updated model has not yet been used for tax treaties with the EU Member States, since the USA had already signed tax treaties with all EU Member States – with the sole exception of Croatia – to avoid international double taxation.⁴⁰

The tax treaties normally apply to 'persons' who are residents of one or both of the parties to the agreement. The term 'persons' is further explained in each tax treaty and normally includes 'an individual, an estate, a trust, a partnership, a company, and any other body of persons'.⁴¹ On the US side, tax treaties with EU Member States always cover federal income taxes imposed by the Internal Revenue Code⁴², excluding social security taxes. Moreover, they may cover taxes other than federal income taxes. An overview of all tax treaties signed with EU Member States points to a pattern: treaties signed before the 1980s cover only income taxes, whereas treaties signed after the 1980s normally also include the investment income of private foundations and/or insurance premiums paid to foreign insurers, with the exception of the US-Hungary tax treaty, signed in 1979, that also covers private foundations and foreign insurers. **Table 2** provides an overview of the scope and types of taxes included in the tax treaties that the United States has signed with each of the EU Member States.

As **Table 2** shows, the US tax treaties with Greece, Poland, Romania and Austria cover federal income taxes imposed by the Internal Revenue Code and do not include taxes on private foundations and foreign insurers. In contrast, other EU Member States (Belgium, Denmark, the Baltic Republics, Portugal, Slovakia, Slovenia, Czech Republic and Malta) have signed tax treaties with the USA that include only the category of excise taxes on investment income of private foundations, whereas the US treaties with Germany and Luxembourg comprise taxes imposed on insurance premiums paid to foreign insurers. The treaties signed with Cyprus, Finland, France, Hungary, Ireland, Italy, the Netherlands, Spain, Sweden and the UK cover both taxes on private foundations and

³⁹ US Department of the Treasury, [Treasury Announces Release of 2016 US Model Income Tax Treaty](#), Press Release, Washington, DC, 17 February 2016.

⁴⁰ See [US Internal Revenue Service \(IRS\)](#), 17 February 2017.

⁴¹ Article 3 (General Definitions), [2006 US Model Income Tax Convention](#), 15 November 2006.

⁴² The [Internal Revenue Code](#) refers to Title 26 of the US Code and covers all relevant rules pertaining to income, gift, estate, sales, payroll, and excise taxes.

foreign insurers. Bulgaria represents the only case in which investment income of foreign private foundations is subject to the tax treaty.

On the side of EU Member States, the range of taxes covered by the agreements varies according to the specific tax systems in force in each EU Member State. All the US-EU Member States tax treaties include income taxes, both on individual and corporate income. Some of them, notably in the case of Denmark, Estonia, Finland, Portugal and Sweden, cover also local income taxes. Other specific categories of tax are also taken into account in some cases (see **Table 2**).

Table 2: Overview of the US-EU Member States tax treaties

EU Member State	Date of signature	General Effective Date*	Taxes covered other than income taxes	
			United States	Partner Country
Austria	31 May 1996	1 January 1999	-	-
Belgium	9 July 1970	1 January 1972	Federal excise taxes imposed on investment income of private foundations	Income tax on non-residents; Income tax on legal entities
Bulgaria	23 February 2007	1 January 2009	-	-
Croatia	-	-	-	-
Cyprus	19 March 1984	1 January 1986	Excise taxes imposed on insurance premiums paid to foreign insurers and on investment income of private foundations	Capital gains tax; Special contribution
Czech Republic	16 September 1993	1 January 1993	Federal excise taxes imposed on investment income of private foundations	Real property tax
Denmark	6 May 1948	1 January 1948	Federal excise taxes imposed on investment income of private foundations	Taxes imposed under the Hydrocarbon Tax Act
Estonia	15 January 2008	1 January 2000	Federal excise taxes imposed on investment income of private foundations	-
Finland	21 September 1989	1 January 1991	Excise taxes imposed on insurance premiums paid to foreign insurers and on investment income of private foundations	Income tax on non-residents; Church tax; Capital tax
France	31 August 1994	1 January 1996	Excise taxes imposed on insurance premiums paid to foreign insurers and on investment income of private foundations	Wealth tax; Wages tax
Germany	29 August 1989	1 January 1990 *1 January 1991 for former DDR*	Excise taxes imposed on insurance premiums paid to foreign insurers	Capital tax; Trade tax
Greece	20 February 1950	1 January 1953	-	-
Hungary	12 February 1979	1 January 1980	Excise taxes imposed on insurance premiums paid to foreign insurers and on investment income of private foundations	Income tax on intellectual activities; Profit taxes; Enterprises special tax; Levy on dividends and profit distributions of commercial companies
Ireland	28 July 1997	1 January 1998	Excise taxes imposed on insurance premiums paid to foreign insurers and on investment income of private foundations	Capital gains tax
Italy	17 April 1984	1 January 1985	Excise taxes imposed on insurance premiums paid to foreign insurers and on investment income of private foundations	Regional tax on productive activities

EU Member State	Date of signature	General Effective Date*	Taxes covered other than income taxes	
			United States	Partner Country
Latvia	15 January 1998	1 January 2000	Federal excise taxes imposed on investment income of private foundations	-
Lithuania	15 January 1998	1 January 2000	Federal excise taxes imposed on investment income of private foundations	-
Luxembourg	18 December 1962	1 January 1964	Excise tax imposed on insurance premiums paid to foreign insurers	Tax on fees of directors of companies; Capital tax; Communal trade tax
Malta	8 August 2008	1 January 2010	Federal excise taxes imposed on investment income of private foundations	-
Netherlands	18 December 1992	1 January 1994	Excise taxes imposed on insurance premiums paid to foreign insurers and on investment income of private foundations	Wages tax
Poland	8 October 1974	1 January 1976	-	Wages tax; Equalisation tax
Portugal	6 September 1994	1 January 1996	Federal excise taxes imposed on investment income of private foundations	-
Romania	4 December 1973	1 January 1976	-	Income tax on non-residents
Slovak Republic	8 October 1993	1 January 1993	Federal excise taxes imposed on investment income of private foundations	Real property tax
Slovenia	21 June 1999	1 January 2002	Federal excise taxes imposed on investment income of private foundations	Assets tax on banks and savings institutions
Spain	22 February 1990	1 January 1991	Excise taxes imposed on insurance premiums paid to foreign insurers and on investment income of private foundations	-
Sweden	1 September 1994	1 January 1996	Excise taxes imposed on insurance premiums paid to foreign insurers and on investment income of private foundations	Income tax on non-residents; Withholding tax on dividends; Income tax on non-resident artistes and athletes; Excise taxes imposed on insurance premiums paid to foreign insurers
United Kingdom	31 December 1975	1 January 1980	Excise taxes imposed on insurance premiums paid to foreign insurers and on investment income of private foundations	Capital gains tax; Petroleum revenue tax

Source: [US Internal Revenue Service, 17 February 2017](#).

* The tax treaties enter into force when the instruments of ratification between the two contracting parties have been exchanged. Nonetheless, tax treaties set a general date from which the provisions take effect. This general effective date is normally set on the first day of January of the year in which the convention enters into force, so to apply to a complete taxable period.

6. Ensuring exchange of information

6.1. EU-US Automatic Exchange of Information (AEOI)

In accordance with OECD guidelines and the Global Forum on Transparency and Exchange of Information for Tax Purposes in the area of the automatic exchange of information, each tax treaty that the USA has signed with an EU Member State provides for the exchange of information for tax purposes between the competent authorities of the contracting state. Exchange of information is regarded as a key element in the fight against tax fraud, tax evasion and other tax-related crimes on both sides of the Atlantic. The United States too considers that effective exchange of information between tax authorities and greater transparency are crucial to combat tax evasion. In response to this need, a provision establishing this exchange of information between competent tax authorities is included in all modern US tax treaties.⁴³

Nonetheless, differences in the scope of the clause on the exchange of information in the different US tax treaties with EU Member States persist. Broadly speaking, exchange of information is not restricted by the general scope of the tax treaty, meaning that it is applicable to persons who may not be residents in either contracting state. Thus, information may be exchanged with respect to residents of third states. Moreover, exchange of information is not constrained by the taxes covered by the treaty, meaning that it may pertain to all taxes imposed by the national government. The majority of the EU Member States apply this scheme of information exchange clause, which is not restricted by the general scope of the tax treaty or the taxes covered. Nevertheless, exceptions do exist. For instance, the exchange of information that takes place in the context of the US tax treaties signed with Belgium, Ireland, Italy, Luxembourg, the Netherlands, Spain and the UK is limited to the taxes covered by the tax treaty. Cyprus agreed on an exchange of information that is not applicable to persons who are not residents in either Cyprus or the United States. Moreover, the US tax treaties with Greece, Poland and Romania do not include either of these two rules.

The existing US-Luxembourg treaty includes exchange of information clauses that do not comply with the US model treaty or with the international norms on transparency. Moreover, the US authorities recently stressed that the jurisdiction of Luxembourg 'has not achieved a satisfactory rating under the peer review process of the Global Forum on Transparency and Exchange of Information.' The same applies to Switzerland.⁴⁴

⁴³ Robert B. Stack, [Opening Statement of Robert B. Stack Treasury Deputy Assistant Secretary \(International Tax Affairs\)](#), United States Senate Committee on Foreign Relations, Washington, DC, 29 October 2015, p. 5.

⁴⁴ Joint Committee on Taxation, [Testimony of the Staff of the Joint Committee on Taxation Before the Senate Committee on Foreign Relations Hearing on the Proposed Tax Treaties with Chile, Hungary, and Poland the Proposed Tax Protocols with Luxembourg, Switzerland, Spain, and Japan, and the Proposed Protocol Amending the Multilateral Convention on Mutual Administrative Assistance in Tax Matters](#) (JCX-137-15), Congress of the United States, Washington, DC, 29 October 2015, p. 14.

Effective exchange of information is also crucial in opposing tax haven' abuse and the international tax evasion and avoidance that can result. Addressing tax evasion and avoidance by putting a stop to tax havens has been the subject of a number of legislative proposals made in the US Congress and also by the US President.

For instance, Senator Carl Levin's proposed bill on a 'Stop Tax Haven Abuse Act' has been under discussion in the US Congress since it was first introduced in 2007. The bill included important new rules to deter offshore transactions designed to avoid US income taxes. The original bill's provisions were discussed and amended during the 112th and 113th Congresses and the latest version was introduced to the House during the 114th meeting of the US legislative branch, in January 2015.⁴⁵ The legislative proposal addresses tax evasion and introduces measures that might improve compliance, such as extending to tax enforcement the sanctions of the USA Patriot Act used to impose penalties for money laundering and terrorist financing, placing the burden of proof in court on the taxpayer and increasing penalties.⁴⁶

President Obama proposed several international corporate tax revisions relating to multinational corporations. They included provisions establishing that a portion of overall deductions, reflecting the share of foreign deferred income, would be disallowed until the income was repatriated; and a restriction on the use of foreign tax credits when associated income was not recognised.⁴⁷

6.2. Foreign Account Tax Compliance Act (FATCA)

During the 111th Congress, the HIRE Act (P.L. 111-147) included several anti-evasion provisions, and P.L. 111-226 included foreign tax credit provisions directed at perceived abuses by US multinationals. Numerous legislative proposals to address both individual tax evasion and corporate tax avoidance have been advanced.⁴⁸ Included in the HIRE Act, the US Congress enacted the Foreign Account Tax Compliance Act in 2010 to target non-compliance by US taxpayers using foreign accounts. It requires foreign financial institutions (FFIs) to report to the IRS information about financial accounts held by US taxpayers, or by foreign entities in which US taxpayers hold a substantial ownership interest. 'FFIs are encouraged to either directly register with the IRS to comply with the FATCA regulations (and FFI agreement, if applicable) or comply with the FATCA Intergovernmental Agreements (IGA) treated as in effect in their jurisdictions.'⁴⁹

⁴⁵ For further information, refer to [H.R.297 - Stop Tax Haven Abuse Act. 114th Congress \(2015-2016\)](#).

⁴⁶ Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, Congressional Research Service, Washington, DC, 15 January 2015, pp. 36-37.

⁴⁷ Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, Congressional Research Service, Washington, DC, 15 January 2015, pp. 45-46.

⁴⁸ Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, Congressional Research Service, US Congress, Washington, DC, 15 January 2015.

⁴⁹ US Department of the Treasury, [Resource Center - Foreign Account Tax Compliance Act \(FATCA\)](#), Washington, DC, 15 February 2017.

One of the goals of FATCA is to lift banking secrecy protecting the privacy of US taxpayers. 'Under the Act, financial institutions are required, in cooperation with the relevant tax authorities, to identify account holders who are US taxpayers and to make available their names, taxpayer identification numbers, addresses, account balances and income paid to and disbursed from such accounts. US taxpayers holding accounts abroad are required to fill out the Form 8938 and attach it to their income tax returns. The FATCA regulations also help close tax loopholes used by foreign investors for avoiding paying taxes on US dividends.'⁵⁰

The effective implementation of the FATCA regulation implies cooperation between US and foreign tax authorities. The USA has therefore signed intergovernmental agreements with foreign jurisdictions in order to implement it. These intergovernmental agreements aim to improve international tax compliance and provide for the implementation of FATCA based on domestic reporting and reciprocal automatic exchange pursuant to the tax treaties in force between the USA and the EU Member States.

On both sides of the Atlantic, there is a commitment to strengthen cooperation in the framework of FATCA. Soon after the enactment of the FATCA regulation in the US, political statements in the European Union were made in that direction. In that vein, France, Germany, Italy, Spain, the UK and the United States issued a Joint Statement in July 2012, announcing an agreement to improve tax compliance and to implement the US FATCA.⁵¹ The USA has so far signed FATCA Intergovernmental Agreements (IGAs) with all EU Member States except Greece, with which an agreement in substance has been reached. All of these IGAs are in force, except for the ones with Croatia and Portugal that are still in the transposition phase.⁵²

Evaluations of the FATCA regulation have pointed both to its virtues and its shortcomings. On the one hand, the United States signed an intergovernmental agreement with more than one hundred jurisdictions to implement the FATCA regulation and its automatic exchange of information mechanism (including the majority of EU Member States, as previously explained). That may reflect positively on enhanced administrative cooperation for tax purposes and increased international tax compliance. On the other hand, administrative costs of complying with FATCA regulation, privacy issues and the effectiveness of US information exchange on beneficial ownership are matters for concern.⁵³ Some EU Member States (Austria in particular) and a number of

⁵⁰ Irena Klemenčič, [Tax Information Exchange with the United States](#), Press Release no 76, Institute of Public Finance, Zagreb, 31 March 2015, p. 1.

⁵¹ Eva-Maria Poptcheva, [A FATCA for the EU? Data Protection Aspects of Automatic Exchange of Bank Information](#), Reference no 130530REV1, Library of the European Parliament, European Parliament, Brussels, 27 May 2013, p. 3.

⁵² US Department of the Treasury, [Resource Center – Foreign Account Tax Compliance Act \(FATCA\)](#), Washington, DC, 15 February 2017.

⁵³ [Taxing America's Diaspora. FATCA's Flaws](#), *The Economist*, 28 June 2014.

experts have pointed to data protection problems posed by FATCA and are calling for FATCA-like EU rules to comply with privacy rules.⁵⁴

The USA has undergone a peer review process under the Global Forum on Transparency and Exchange of Information for Tax Purposes. The purpose of this exercise was to assess the quality of the US legal and regulatory framework for the exchange of information.⁵⁵ The results of the peer review process highlighted that ‘the legal and regulatory framework is generally in place for all entities and arrangements to maintain ownership and identity information through the application of its federal tax law provisions as well as applicable state law’.⁵⁶ The Global Forum report nonetheless highlights that in the case of limited liability companies, which are not subject to federal tax law filing requirements, information on ownership and identity may not be available to US authorities.⁵⁷

Overall, US mechanisms in place allow for effective exchange of information, and information exchange partners have indicated general satisfaction with the US exchange of information programme. However, the effectiveness of US information exchange on beneficial ownership has raised concerns. The latest mutual evaluation report on anti-money laundering and counter-terrorist financing measures published in 2016 by the FATF pointed out ‘the generally unsatisfactory measures’ adopted by the United States for ensuring adequate, accurate and updated information on beneficial ownership.⁵⁸ ‘The inability of the United States to provide information about beneficial ownership of entities formed in the United States has been criticised in the past and led to pressure to eliminate policies that provide foreign persons with the ability to shelter income.’⁵⁹ The

⁵⁴ Eva-Maria Poptcheva, [A FATCA for the EU? Data Protection Aspects of Automatic Exchange of Bank Information](#), Reference no 130530REV1, Library of the European Parliament, European Parliament, Brussels, 27 May 2013, p. 2.

⁵⁵ The Global Forum report was published in November 2013 and reflects the legal and regulatory framework as at February 2011.

⁵⁶ OECD, [Peer Review Report. Combined: Phase 1 + Phase 2, Incorporating Phase 2 ratings. United States](#), Global Forum on Transparency and Exchange of Information for Tax Purposes, Paris, November 2013, p. 8.

⁵⁷ OECD, [Peer Review Report. Combined: Phase 1 + Phase 2, incorporating Phase 2 ratings. United States](#), Global Forum on Transparency and Exchange of Information for Tax Purposes, Paris, November 2013, p. 8.

⁵⁸ Financial Action Task Force (FATF), [Anti-money Laundering and Counter-terrorist Financing Measures. United States](#), Fourth Round Mutual Evaluation Report, Paris, October 2016, p. 226.

⁵⁹ Joint Committee on Taxation, [Testimony of the Staff of the Joint Committee on Taxation Before the Senate Committee on Foreign Relations Hearing on the Proposed Tax Treaties with Chile, Hungary, and Poland the Proposed Tax Protocols with Luxembourg, Switzerland, Spain, and Japan, and the Proposed Protocol Amending the Multilateral Convention on Mutual Administrative Assistance in Tax Matters](#) (JCX-137-15), Congress of the United States, Washington, DC, 29 October 2015, p. 12.

US Treasury Department has earmarked part of its budget for fiscal years 2015 and 2016 for a proposal aimed at addressing the perceived shortcoming.⁶⁰

7. EU-US trade and anti-money laundering

The US financial system and the global dominance of the US dollar, which generates an enormous daily transaction volume through US banks, create significant exposure to potential money laundering activity and risks of cross-border illicit flows. This section provides a summary of the level of compliance with Financial Action Task Force (FATF) recommendations of measures in place in the areas of anti-money laundering and combating the financing of terrorism (AML/CFT) in the United States. An evaluation is also made of the level of effectiveness of the US AML/CFT system. It is based on the FATF report that was drafted following the on-site visit of 18 January to 5 February 2016.

Banking secrecy and the availability of banking information is a relevant factor affecting anti-money laundering efforts and is addressed by the Bank Secrecy Act (BSA), enacted by the US Congress in 1970. The US legal and regulatory framework establishes requirements for recordkeeping and reporting by banks and a variety of other financial institutions and businesses and in some cases by individuals. Moreover, the Bank Secrecy Act imposes anti-money laundering measures on banks and other financial institutions. Banks and financial institutions have implemented those measures since 1987. In 2001, the USA Patriot Act expanded these measures to securities and futures firms, mutual funds, money services businesses (MSBs), and life insurance companies.⁶¹ As the Global Forum peer review reported, this framework complies with international standards on the availability of banking information.⁶²

The recent FATF overview also makes it possible to assess the extent to which the United States has been able to tackle past challenges. For instance, a 2012 report of the Senate Subcommittee on Investigations uncovered serious shortcomings in the way that HSBC US (HBUS) managed the establishment of business relationships and transactions with correspondent banks.⁶³ The report underlines several severe deficiencies in the bank's

⁶⁰ Joint Committee on Taxation, *Testimony of the Staff of the Joint Committee on Taxation Before the Senate Committee on Foreign Relations Hearing on the Proposed Tax Treaties with Chile, Hungary, and Poland the Proposed Tax Protocols with Luxembourg, Switzerland, Spain, and Japan, and the Proposed Protocol Amending the Multilateral Convention on Mutual Administrative Assistance in Tax Matters* (JCX-137-15), Congress of the United States, Washington, DC, 29 October 2015, p. 13.

⁶¹ OECD, *Peer Review Report. Combined: Phase 1 + Phase 2, Incorporating Phase 2 ratings. United States*, Global Forum on Transparency and Exchange of Information for Tax Purposes, Paris, November 2013, pp. 16-17.

⁶² OECD, *Peer Review Report. Combined: Phase 1 + Phase 2, Incorporating Phase 2 ratings. United States*, Global Forum on Transparency and Exchange of Information for Tax Purposes, Paris, November 2013, p. 59.

⁶³ *US Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History*, Majority and Minority Staff Report, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, United States Senate, 17 July 2012.

AML system through practices, such as:

1. opening US correspondent bank accounts for high-risk affiliates without conducting due diligence;
2. facilitating transactions that hinder US efforts to stop terrorists, drug traffickers and rogue jurisdictions and others from using the US financial system;
3. providing US correspondent services for banks with links to terrorism;
4. clearing bulk US dollar travellers' cheques despite signs of suspicious activity;
5. offering high-risk bearer share corporate accounts.

The same report notes that the bank does not have a proper AML programme and does not take sufficient action to remedy these weaknesses, despite earlier warnings by US regulatory authorities. In December 2012, the US authorities and HSBC reached a deferred prosecution agreement relating to numerous money laundering and sanction breaches. 'The agreement includes fines worth US\$1.9 billion and a detailed plan (costed at US\$700 million) by the bank to improve compliance with CDD [customer due diligence] requirements. In addition, an independent monitor will be placed inside the bank – the first time the United States has taken such a step in a foreign bank. Several other banks are cooperating with US authorities over similar investigations.'⁶⁴

According to the 2016 FATF report, overall the United States has developed a robust legal framework addressing money laundering activities and combating financing of terrorism. Understanding of money laundering (ML) and terrorist financing (TF) risks is well-supported by a variety of ongoing and complementary risk assessment processes, including the 2015 *National Money Laundering Risk Assessment* (NMLRA) and *National Terrorist Financing Risk Assessment* (NTFRA). These complementary processes have allowed the United States to attain a significant level of understanding of the ML/TF threats it faces and have helped coordination at the federal level across a vast spectrum of relevant agencies. Moreover, law enforcement agencies have access to a wide range of financial intelligence, capabilities and expertise allowing them to trace assets, identify targets and undertake expert financial ML/TF investigations.

It should be acknowledged that of the 40 technical factors monitored by FATF, the United States was compliant in nine, largely compliant in 21, and partially compliant in six. The United States was non-compliant in three areas, developed below: customer due diligence; transparency and beneficial ownership of legal persons; and regulation and supervision of designated non-financial businesses and professions (DNFBP). Similarly, when looking at effectiveness compliance ratings, of 11 areas, the United States has low compliance ratings in only one area: legal persons and arrangements.⁶⁵ This in general

⁶⁴ OECD, *Illicit Financial Flows from Developing Countries: Measuring OECD Responses*, Paris, 2014, p. 35.

⁶⁵ Other areas include: (1) risk, policy and coordination; (2) international cooperation; (3) financial intelligence; (4) ML investigation and prosecution (rated with substantial compliance); (5) confiscation; (6) TF investigation and prosecution; (7) TF preventive measures and financial sanctions; (8) proliferation financing financial sanctions (rated with high compliance); (9) supervision; and (10) Preventive measures (rated with moderate compliance). See Financial Action

translates into a good level of compliance, also in comparison with FATF evaluations of EU Member States.

Nonetheless, the 2016 FATF mutual evaluation report also draws attention to deficiencies on AML/TF measures. First, although federal law enforcement authorities have the lead role in all large and/or international investigations and have been effective in their efforts, there is no uniform approach to state-level AML efforts and it is not clear that all states give ML due priority. Moreover, while financial institutions (FIs), in general, have an evolved understanding of ML/TF risks and obligations, and now have systems and processes for implementing preventive measures, including for customer on-boarding, transaction monitoring and the reporting of suspicious transactions, key shortcomings relate to the exemptions implied by the regulatory framework of the Bank Secrecy Act.

In addition, significant gaps, including minimal coverage of certain institutions and businesses (investment advisers, lawyers, accountants, real estate agents, trust and company service providers (other than trust companies) point to limitations in the US regulatory framework. Specifically, most designated non-financial businesses and professions (DNFBP) sectors are not subject to comprehensive AML/CFT measures, including requirements on reporting transactions involving more than US\$10 000 in cash, and targeted financial sanctions. DNFBP sectors include lawyers, accountants, real estate agents, trust and company service providers (except trust companies). Moreover, as already mentioned, there is no requirement to systematically record beneficial ownership information (as defined by the FATF). This gap in the legal framework reflects negatively on the ability of law enforcement agencies to implement investigative and surveillance techniques and it hampers the effectiveness of the financial intelligence system that would otherwise be broadly robust. As a result, concerns remain about the ability of competent authorities to access accurate information in a timely manner.⁶⁶

Furthermore, technical shortcomings were identified as to the definition of money laundering offence. Although the FATF report dismissed those deficiencies as minor, it is worth mentioning them: 'the list of domestic predicate and foreign ML offenses did not fully cover the designated categories of offenses; mere possession and concealment of proceeds did not constitute ML; and the definition of property for the cross-border ML offence only included monetary instruments or funds.'⁶⁷

On the exchange of information at an international level, it was found that the United States has minor deficiencies in its implementation of the Vienna and Palermo Conventions. Where dual criminality requirements apply there are the gaps that may be a barrier to providing freezing and confiscation assistance (particularly when the predicate

Task Force (FATF), *Anti-money Laundering and Counter-terrorist Financing Measures. United States*, Fourth Round Mutual Evaluation Report, Paris, October 2016, p. 13.

⁶⁶ Financial Action Task Force (FATF), *Anti-money Laundering and Counter-terrorist Financing Measures. United States*, Fourth Round Mutual Evaluation Report, Paris, October 2016, pp. 6-7, 10.

⁶⁷ Financial Action Task Force (FATF), *Anti-money Laundering and Counter-terrorist Financing Measures. United States*, Fourth Round Mutual Evaluation Report, Paris, October 2016, p. 180.

offence is not covered in the United States); and the USA does not have multiple bilateral extradition treaties explicitly listing ML/TF as extraditable offences.⁶⁸

Last but not least, the FATF report makes suggestions to strengthen the effectiveness of the AML/TF measures in the United States. It recommends that the US administration take steps: to ensure that adequate beneficial ownership information of US legal persons is available to competent authorities in a timely manner, by requiring that such information is obtained at the federal level; to apply appropriate AML/CFT obligations to designated non-financial businesses and professions sectors; and to effectively implement beneficial ownership requirements under the Bank Secrecy Act (scheduled to come into force in 2018) to investment advisers, lawyers, accountants, trust, company service providers and high-end real estate.⁶⁹

On the European Parliament side, the LIBE Committee has put particular emphasis on the gaps in US legislation on anti-money laundering. In one of its opinions of April 2015, the LIBE Committee called on the Commission 'to include a clause on corruption, tax fraud, tax evasion and money laundering in the agreement in order to establish enhanced cooperation between the Member States and the USA, including mechanisms for more efficient international cooperation, mutual legal assistance, asset recovery, technical assistance, exchange of information and implementation of international recommendations and standards.'⁷⁰ However, this LIBE Committee recommendation was not picked up on in the European Parliament's resolution adopted on 8 July 2015, which included recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP).⁷¹

8. Conclusions

Foreign trade and investment data depict a strong, interdependent, and significant EU-US economic relationship. This relationship is likely to grow in importance as advancements in technology and other forces of globalisation force more trade and investment barriers to fall. The relationship could grow closer if and when the EU and United States complete and implement the TTIP. In general, trade and investment relations between the European Union and the United States do not seem to have

⁶⁸ Financial Action Task Force (FATF), [Anti-money Laundering and Counter-terrorist Financing Measures. United States](#), Fourth Round Mutual Evaluation Report, Paris, October 2016, pp. 258-259.

⁶⁹ Financial Action Task Force (FATF), [Anti-money Laundering and Counter-terrorist Financing Measures. United States](#), Fourth Round Mutual Evaluation Report, Paris, October 2016, p. 11.

⁷⁰ Committee on Civil Liberties, Justice and Home Affairs, [Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on International Trade on recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership \(TTIP\) \(2014/2228\(INI\)\)](#), Brussels, 7 April 2015, p. 5.

⁷¹ European Parliament. [Resolution of 8 July 2015 containing the European Parliament's Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership \(TTIP\)](#), Reference no P8_TA(2015)0252, Strasbourg, 8 July 2015.

impacted on US efforts to combat tax evasion, strengthen anti-money laundering legislation and its implementation, and boost tax transparency.

The USA has developed a robust framework of international agreements addressing international double taxation, tax fraud and other tax-related crimes. In accordance with the OECD model, the USA has signed tax treaties with all EU Member States – with the sole exception of Croatia – and intergovernmental agreements with EU Member States jurisdictions in order to implement the FATCA regulation. Moreover, according to FATF, the United States is fully compliant on national tax cooperation and coordination, terrorist financing offences, financial institution secrecy laws, financial intelligence units, and the responsibilities of law enforcement and investigative authorities.

Nonetheless, the level of EU-US transactions is also plagued by challenges linked to tax evasion, tax transparency and money laundering. Shortcomings in the US legal framework and concerns about the effectiveness of US international cooperation for tax purposes have been pointed out. The most relevant are the administrative costs of complying with the FATCA regulation, privacy issues raised by some EU Member States, and the generally unsatisfactory US information exchange system with regard to beneficial ownership and to designated non-financial businesses and professions. FATF also points to the challenges in facilitating cross-border exchange of information and enforcement of internal controls and foreign branches and subsidiaries.

Moreover, while the FATF has found that the United States is largely compliant on anti-money laundering regulation, mere possession is not criminalised and mere acquisition through the commission of the predicate offence is not considered money laundering in the United States. Moreover, tax crimes are not specifically predicates for money laundering and the list of predicate offences for money laundering does not explicitly extend to all conduct that occurred in another country.

The same report has found that the United States capacity to assess risks and apply a risk-based approach is only partially compliant. Challenges include the lack of sufficient and effective mitigation measures against vulnerabilities of high-end real estate agents, lawyers, accountants, trustees and CFAs due to non-coverage under a comprehensive BSA AML/CFT regime; exemptions and thresholds not supported by proven low risk; and limitations to the scope of the regulation since not all investment advisers are covered.

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