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Addressing Aggressive Tax Planning through Unitary Tax or Self-Regulation

- A Study on the Possible Need for an International Tax Reform

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Contents

Summary

Domestic and international regulations aiming to facilitate international trade and investment today enable multinational corporations (MNCs) to operate transnationally through the use of branches or subsidiary companies. Within the field of corporate taxation, the lack of a global and universal tax system regulating international tax matters however allows MNCs to exploit gaps and loopholes within such regulations to lower or even eradicate their tax burden. Regulations on national and international levels have been somewhat effective in counteracting the prevalence of such corporate tax avoidance, often referred to as 'aggressive tax planning' (ATP), foremost through the OECD's 'Action Plan on Base Erosion and Profit Shifting'. However, international tax rules based on the separate entity principle and the arm's length principle continue to facilitate aggressive tax planning and corporate tax avoidance remains a vast and global issue.

The effects of corporate tax avoidance demonstrate the pressing need for a reformation of current international tax rules. Although a unitary tax approach similar to the 'Common Consolidated Corporate Tax Base' proposal issued by the European Union could be effective in combatting ATP, the implementation of such a solution may prove difficult and would require the harmonization of national and international tax rules. The prospects of such an international reform being implemented on a global scale in the near future are therefore slim. A more plausible yet still effective alternative is self-regulation by MNCs. As public and investor pressure on MNCs to act responsibly in regard to their tax management is rapidly increasing, and soft law standards are placing higher demands on corporations to act in accordance with both the letter and the spirit of relevant tax laws, corporations are increasingly incentivized to act as "good tax citizens". Although self-regulation alone may not eradicate ATP, it is clearly a crucial complement to existing international anti-avoidance regulations.

Sammanfattning

Regelverk på nationell och internationell nivå som syftar till att uppmuntra och underlätta internationella investeringar och handel möjliggör idag för multinationella företag att verka transnationellt genom användning av filialer och dotterbolag. När det kommer till företagsbeskattning har avsaknaden av ett globalt och universellt skattesystem för att reglera internationella skattefrågor dock möjliggjort för multinationella företag att utnyttja kryphål inom sådana regleringar, för att reducera eller till och med helt undvika sitt skatteansvar. Lagstiftning på nationell och internationell nivå har varit förhållandevis effektivt för att motverka sådan skatteflykt, ofta kallat ’aggressiv skatteplanering’, framför allt genom OECD:s ’Action Plan on Base Erosion and Profit Shifting’. Internationella skatteregler baserade på ’separate entity principle’ och armlängdsprincipen fortsätter däremot att möjliggöra aggressiv skatteplanering och företagsskatteflykt är fortfarande ett utbrett och globalt problem.

Effekterna av aggressiv skatteplanering illustrerar det överhängande behovet av en reformering av de nuvarande internationella skattereglerna. Även om en gemensam företagsskattebas likt det som föreslagits av Europeiska Unionen effektivt skulle kunna motverka aggressiv skatteplanering, skulle implementeringen av en sådan reform på global nivå kräva en harmonisering av nationella och internationella skatteregler och utsikterna för en sådan lösning är små. Ett mer troligt men likväl effektivt alternativ är självreglering. I takt med att påtryckningar från såväl allmänheten som investerare gällande multinationella företags ansvar för sin skattehantering ökar och "soft law" i form av icke-bindande principer och normer ställer allt högre krav på företag att agera i enlighet med såväl ordalydelse som syfte av relevant skattelagstiftning, blir det allt viktigare för företag att agera som ”good tax citizens”. Även om självreglering inte på egen hand kan eliminera aggressiv skatteplanering, är det uppenbarligen ett viktigt komplement till existerande skatteregler mot aggressiv skatteplanering.

Preface

Det är med skräckblandad förtjusning som jag lämnar Juridicum och Lund bakom mig. Jag vill börja med att tacka Peter Nilsson, för inspiration till karriärval och för värdefull handledning. Ett stort tack till mitt älskade kompisgäng, för alla minnen och fina kvällar på Stora Fiskaregatan. Ni har förgyllt min studietid.

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Abbreviations

ATP	Aggressive Tax Planning
BEPS	Base erosion and profit shifting
CbC	Country-by-Country
CCCTB	Common Consolidated Corporate Tax Base
CCG	EU Code of Conduct Group
CFC	Controlled foreign companies
CSR	Corporate Social Responsibility
DST	Digital Services Tax
EU	European Union
GAAP	Generally Accepted Accounting Principles
GAAR	General Anti-Avoidance Rule
GDP	Gross Domestic Product
ICIJ	International Consortium of Investigative Journalism
IFRS	International Financial Reporting Standard
IP	Intellectual Property
MDR	Mandatory Disclosure Rules
MNC	Multinational corporation
MNE	Multinational enterprise
OECD	Organization for Economic Co-operation
PE	Permanent Establishment

PRI	Principles for Responsible Investments
SAAR	Specific Anti-Avoidance Rule
SDGs	Sustainable Development Goals
UK	United Kingdom
UN	United Nations
US	United States

1 Introduction

Globalization enables multinational corporations (MNCs) to operate transnationally. Through the use of branches or subsidiary companies, large corporations are able to create value all over the world. Domestic and international regulations have emerged to encourage such cross-border operations and to facilitate international competition and investment.[1] Within the field of corporate taxation however, the lack of a global and universal tax system regulating international tax matters enables multinational corporations to exploit gaps and loopholes within such legislation to lower or even eliminate their tax burden through the use of aggressive tax planning strategies.[2]

The focus on widespread and strategic tax avoidance by large multinational corporations has increased within the international community in recent years and the need for stricter requirements on corporate tax avoidance is now highly prioritized on the international agenda.[3] As a result, governments and international organizations such as the OECD have been active in the development of initiatives to combat strategic tax avoidance and aggressive tax planning by multinational corporations. Foremost amongst such initiatives has been the OECD Base Erosion and Profit Shifting ("BEPS") initiative, aiming to reform international tax rules by closing regulatory gaps and inconsistencies within the international tax system.[4] However, as evidence shows, corporate tax avoidance remains a vast and global problem and current regulations have not managed to eradicate the prevalence of aggressive tax planning. According to the non-governmental organization Tax Justice Network, current data and research suggest that around 500 billion US dollars are lost to corporate tax avoidance and aggressive tax planning each year.[5] In addition, estimates show that an equivalent of around

[1] See for example *'the Merger Directive'* and *'the Parent-Subsidiary Directive'*
[2] OECD (2013), *Addressing Base Erosion and Profit Shifting*, p. 34
[3] See for example: OECD (2015), *Explanatory Statement*, p. 4 ff.
[4] OECD (2013), *Addressing Base Erosion and Profit Shifting,* p. 7 ff.
[5] Cobham, Alex (2017), *Tax Avoidance and Evasion- The Scale of the Problem*, p. 2

650 billion US dollars are shifted to low-tax jurisdictions, commonly referred to as 'tax havens' from countries worldwide every year.[6] According to the World Economic Forum, this constitutes a global revenue loss of 200 billion US dollars each year.[7] Large multinational corporations such as Apple and Google have reportedly managed to pay minimal effective corporate tax through the funneling of profits to low-tax jurisdictions and corporations such as Amazon and Netflix have exploited loopholes in national and international tax regulations to significantly reduce its tax burden.[8]

The prevalence of corporate tax avoidance is not only evident in traditional tax havens. As stated in the European Commission's report on 'Aggressive Tax Planning Indicators', countries such as Ireland which imposes a statutory corporate tax rate of as low as 12.5 per cent, has managed to entice significant tax base into the country.[9] Similarly, countries such as Malta and Luxembourg are raising more revenue from corporate tax collections in relation to their Gross Domestic Product (GDP) than other Member States within the EU.[10] According to the European Commission, the reason for this is largely due to aggressive tax planning strategies by multinational corporations.[11]

The aggressive tax planning strategies conducted by multinational corporations are largely facilitated by the design of the current international tax system, based on rules like the separate entity principle and the arm's length principle. Such principles prescribe the treatment of multinational corporate groups as separate legal entities dealing at arm's length with each other.[12] As the widespread issue of corporate tax avoidance has fueled heavy reactions from the public sphere, the current tax system is being heavily

[6] Wier, Ludvig, (2020) *Tax havens cost governments $200 billion a year. It's time to change the way global tax works*, World Economic Forum
[7] ibid
[8] EU Commission (2014), *Commission Investigation on State Aid*; Meijer, Bart (2019), *Google Shifted $23 to tax haven Bermuda in 2017: filing,* Reuters; Gardner, Matthew et al. (2019), *Corporate Tax Avoidance in the First Year of the Trump Tax Law,* Institute on Taxation and Economic Policy, p. 8
[9] European Commission (2017), *Aggressive Tax Planning Indicators*, p. 121
[10] ibid
[11] ibid at p. 121 ff.
[12] Rohatgi, Roy (2002), p. 412-414; Hilling, Axel; Ostas, Daniel T. (2017), p. 43; Lodin, Sven-Olof et al. (2019), p. 399; OECD (2017), *Transfer Pricing Guidelines,* p. 16

criticized.[13] One solution presented to deal with the issue surrounding aggressive tax planning is a unitary tax approach, in which corporate groups are instead treated as one entity.[14] Multinational corporate groups would instead be taxed on a consolidated basis, and its profits would be allocated to the jurisdictions in which they operate on the basis of the amount of economic activity taking place in each country.[15]

Another solution may be self-regulation by multinational corporations through the adoption of a 'responsible tax' or 'corporate tax responsibility' approach to tax planning.[16] As pressure from relevant stakeholders demanding action on aggressive tax planning is increasing and 'soft law' standards[17] such as the OECD Guidelines for Multinational Enterprises are placing higher demands on corporations to act responsibly in matters of taxation, companies are facing increased risks of reputational damage as well as legal and commercial consequences by engaging in aggressive tax planning schemes.[18] Accordingly, many companies have started to address tax as a part of their corporate social responsibility by including tax as a sustainability issue in their annual and/or sustainability reports, by publishing 'Tax Responsibility' reports and by disclosing tax information through voluntary reporting systems such as the Global Reporting Initiative and Dow Jones Sustainability Index.[19] The question remains if self-regulation by corporations is sufficient in counteracting aggressive tax planning, or if there is a need for a vast reformation of international tax rules such as the development of a unitary tax approach.

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[13] See for example: Picciotto, Sol (2012), *Towards Unitary Taxation of Transnational Corporations,* Tax Justice Network, p. 1 ff.
[14] ibid
[15] Rohatgi, Roy (2002), p. 626
[16] The terms 'responsible tax conduct' and 'corporate tax responsibility' will be used interchangeably throughout this thesis.
[17] 'Soft law' can be defined as non-binding obligations and social expectations, as opposed to 'hard law' which are legally binding obligations. See for example: European Center for Constitutional and Human Rights E.V., Glossary, *Hard Law/Soft Law* and U.N. Human Rights Council (2007), '*Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts'*, para. 45
[18] See for example: PRI (2015), *Engagement Guidance on Corporate Tax Responsibility,* p. 3 ff.; OECD (2011), *Guidelines for Multinational Enterprises,* p. 60
[19] See for example: KPMG (2019), *Tax Transparency i Sverige 2018-2019*

1.1 Purpose

The purpose of this thesis is to examine possible alternatives to current national and international rules aiming to prevent aggressive tax planning and corporate tax avoidance. This will include examining the possibilities of implementing legislation based on a unitary tax approach. To do so, this thesis will review the current international tax system and the effectiveness of current national and international tax rules, in order to determine whether a reformation of such rules may be necessary and plausible. The examination will also include investigating fundamental and internationally recognized principles of international tax law as well as new regulatory developments within the field of corporate tax. This thesis also aims to investigate the relevance of the normative concept of responsible tax conduct and soft law instruments emerging within the interrelated field of corporate social responsibility and tax management, in counteracting aggressive tax planning schemes by multinational corporations.

1.2 Research Questions

To fulfil the purpose of this thesis, the following research questions will be examined:

- How is aggressive tax planning addressed today within international tax law?
- What are the prospects for implementing unitary tax legislation to combat the prevalence of aggressive tax planning on a global level?
- Is the concept of corporate tax responsibility and self-regulation an effective alternative to a unitary tax approach in combatting aggressive tax planning by multinational corporations?

1.3 Previous Research and Delimitations

Extensive research on the interrelated concept of taxation and corporate social responsibility has been conducted in recent years. Scholars such as Knuutinen, Avi-Yonah, Hilling and Ostas have all concluded that CSR may indeed be relevant in tax matters.[20] In addition, organizations such as the Principles for Responsible Investment (PRI) have presented broad research on the financial and investment risks connected with engagement in aggressive tax planning.[21] Many scholars familiar with the interrelated concept of CSR and taxation have discussed the subject by including aspects connected to the morality and social justice of corporate taxation.[22] This thesis does not aim to contribute to the discussion on the relevance of tax and CSR but has as its underlying assumption that matters of taxation are indeed an integral part of corporate social responsibility (as has been established by for example the OECD).[23] Therefore, the moral and ethical reasons for corporations to act responsibly in regard to issues of taxation will not be particularly discussed. Nonetheless, an overview of the background to the interdisciplinary field of corporate taxation and CSR is necessary to grasp the essence of this thesis, and a general description of the emergence of the concept of 'corporate tax responsibility' will therefore be presented.

Furthermore, the discussions surrounding the need for reformed international tax regulations and alternative solutions have been extensive. In addition to the proposed Common Consolidated Corporate Tax Base (CCCTB) system presented by the EU,[24] organizations such as the Tax Justice Network have presented comprehensive research on the possibilities of implementing a unitary tax system.[25] This thesis does not aim to present a utopian solution to the global issues surrounding corporate taxation but will build on the established and plausible alternative of a unitary tax system similar to the one

[20] See for example: Hilling, Axel; Ostas, Daniel T. (2017); Avi-Yonah, Reuven S., (2014) and Knuutinen, Reijo (2014)
[21] See for example: PRI (2015), *Engagement Guidance on Corporate Tax Responsibility,* p. 3 ff.
[22] See for example: Avi-Yonah, Reuven S., (2014) and Knuutinen, Reijo (2014)
[23] See for example: OECD (2011), *Guidelines for Multinational Enterprises,* p. 60
[24] European Commission (2016), *Proposal for a Council Directive on a Common Corporate Tax Base*
[25] See for example: Picciotto, Sol (2012), *Towards Unitary Taxation of Transnational Corporations,* Tax Justice Network, p. 1 ff.

presented by the EU. This thesis recognizes that the implementation of a unitary tax system on a global and universal level naturally comes with its challenges. Tax regulations and systems significantly differ between different parts of the world and although the EU has presented a thorough and conceivable framework for a unitary tax system, such rules would, naturally, be limited to the European Union. The possibility, and likelihood, of implementing a similar solution in other parts of the world may of course vary. However, this thesis does not aim to provide an in-depth analysis of the technical requirements needed for the application of such a system, but rather aims to illustrate the flaws and weaknesses in the current international tax system which give rise to aggressive tax planning schemes and global corporate tax avoidance. In such, although excerpts from domestic laws will be used in an exemplifying manner (for example excerpts from Swedish law and EU law) the examination presented in this thesis will therefore not be linked to any particular country. In addition, recognizing that most countries use different types of taxes to collect revenues and to tax corporations in or from their jurisdiction[26] (including for example corporate income tax and consumption taxes) ,[27]this thesis will solely focus on corporate income tax to limit its scope, and will not discuss matters of consumption taxes or any other forms of corporate taxes.

Finally, it is undisputed that there is an increase in research presenting the benefits of adopting a responsible tax approach to business. This is also evident in soft law standards and guidelines for responsible conduct.[28] However, it seems that the vast majority of such research is presented from a business case perspective, focusing on the risks that corporations may expose themselves to when engaging in aggressive tax behavior.[29] Less research is centered around the positive externalities of responsible tax conduct, and the possibility of using self-regulation and responsible tax conduct as a

[26] Hilling, Axel; Ostas, Daniel T., (2017), p. 27
[27] ibid
[28] See for example: See for example: OECD (2011), *Guidelines for Multinational Enterprises,* p. 60
[29] See for example: PRI (2015), *Engagement Guidance on Corporate Tax Responsibility,* p. 3 ff.

replacement or complement to the existing international tax system. This thesis therefore aims to address this gap.

1.4 Methodology and Material

Apart from using an interdisciplinary method, this essay uses a method which may be described as a critical analysis of law (Swedish: *rättsanalytisk metod*). This approach extends beyond the determination of applicable law and instead offers opportunities to criticize, analyze and discuss applicable law more freely.[30] This approach recognizes that there may be several solutions to a legal problem and allows for the use of a wider array of sources than the traditional legal method.[31] The first part of this thesis attempts to determine current legislation within the field of corporate taxation and aggressive tax planning, and also conducts a critical analysis of such legislation. For this reason, a critical analysis of established law is a suitable methodology for this thesis.

Moreover, the methodological approach of a critical analysis of law further embraces interdisciplinarity by recognizing that law is a part of a normative and social context.[32] As this thesis examines and compares internationally recognized aspects of international corporate taxation with international standards and principles within the area of corporate social responsibility, and as such aims to address an issue that is not purely legal, an interdisciplinary method is thus useful as a complement to the critical analysis of law method used in this thesis. The interdisciplinary method combines two traditional fields of study in order to examine issues which have some coherence but is more amply comprehended from an interdisciplinary perspective than a single disciplinary perspective.[33]

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[30] Sandgren, Claes (2018), p. 48 ff.
[31] ibid
[32] ibid
[33] Nääv, Maria; Zamboni, Mauro (red.) (2018), p. 436 ff.

Because aggressive tax planning by multinational corporations (as the definition of such corporations implies), is mainly conducted on an international level, the focus of this thesis will be on international corporate taxation, and an international perspective is therefore applied on this thesis. The primary material used for this examination will therefore derive mainly from international organizations such as the OECD and the European Union. Recognizing that there may be wide discrepancies in the tax regulations of countries worldwide, this thesis will use material from the OECD and the EU as a reference point as these serve as a relevant and internationally accepted standards on the issue.[34] Because of its general and international perspective, an in-depth examination of the legislation of any particular country will not be conducted. Excerpts from domestic and EU legislation are however used throughout the thesis in an exemplifying manner, to provide a comprehensive foundation for the conducted examination. Relevant Swedish and EU legislation has therefore been investigated through an examination of recognized sources of law.

To provide a comprehensive description of various interpretations of the concept of corporate tax responsibility or responsible tax conduct, literature and academic writings by scholars acquainted with the areas of corporate law, tax law and corporate social responsibility have been examined. In addition, official reports and information on the issue have also been derived from international organizations and non-governmental organizations. This includes the OECD Guidelines for Multinational Enterprises which serves as an internationally accepted standard on the matter.

Furthermore, the amount of case law reviewed in this essay is limited. Because aggressive tax planning strategies are technically conducted within the realms of what is legal, establishing guidance through case law may prove difficult. The case of Chevron is however used in an exemplifying manner to highlight the complex matters of applying anti-avoidance rules (in this case transfer pricing regulations). The inclusion of the case also aims to illustrate

[34] See for example: United Nations, *International Tax Cooperation Overview*

how the strictly legal nature of aggressive tax planning may be altered as governments are becoming increasingly concerned with closing regulatory loopholes.

1.5 Structure

This essay begins with an overview of the basic structures of corporate taxation and the basis for fiscal jurisdiction in matters of international taxation (chapter 2). This chapter will also review the concept of juridical double taxation.

Chapter 3 will provide a description of the fundamental concepts of tax planning. This chapter will also provide a classification of traditional terms and concepts within corporate taxation and provides an “in abstracto” description of the most common strategies of aggressive tax planning used by multinational corporations.

Chapter 4 will review the legal framework related to aggressive tax planning, including domestic and international anti-avoidance regulations. In addition, this chapter will examine recent legal and regulatory developments in regard to aggressive tax planning.

In chapter 5, the concept of corporate tax responsibility will be discussed. This will include a brief description of the concept of corporate social responsibility and the recognized role of corporations and corporate responsibility in achieving sustainable development. In addition, theories on the interrelation between corporate responsibility and taxation will be discussed. Chapter 5 will also review international developments on corporate tax responsibility and responsible tax conduct, including a review of relevant standards and guidelines related to corporate responsibility.

Finally, chapter 6 and 7 will outline an analysis and a conclusion based on the examination presented. This will include investigating how aggressive tax planning is addressed within international tax law as well as the relevance of corporate tax responsibility and self-regulation in combatting aggressive tax planning. This will be conducted by comparing self-regulatory measures with the unitary tax approach.

2 Basic Concepts and Principles of International Taxation

2.1 Background

Corporate taxation has long been the subject of widespread debate. While there have been arguments promoting the reduction or even elimination of corporate taxes, the collection of taxes is generally justified by three factors.[35] Firstly, states must collect sufficient revenue to be able to finance public expenditures and to provide essential benefits to its citizens. Secondly, the collection of taxes may be used to regulate social and economic behavior, for example through rules incentivizing the payment of tax (such as penalty amnesties or tax cuts). Finally, states may use the collection of tax to distribute wealth within the state in order to achieve for example tax equality.[36] The execution of taxation is regarded a sovereign matter for each and all states.[37] As a result, all jurisdictions have the sovereignty to collect taxes according to their own tax rules and regulations.[38]

Because tax is a sovereign matter for states, there is no universal tax system.[39] In order to regulate the interaction between domestic tax systems, international tax law however provides rules for transnational business and cross-border transactions.[40] In general, this includes international agreements between countries (such as multilateral international agreements and double tax treaties) and customary international law and general principles of law (including practices of international organizations).[41] In order to fully comprehend the topics that this thesis concerns, a review of the basic and

[35] Hilling, Axel; Ostas, Daniel T. (2017), p. 27-34
[36] ibid
[37] Berglund; Ceije (2018), p. 20
[38] Rohtagi, Roy (2018), p. 20
[39] Berglund; Ceije (2018), p. 20
[40] Rohatgi, Roy (2002), p. 11
[41] ibid

fundamental principles of international tax law must be conducted. As one of the main issues within aggressive tax planning lies in the way the international tax system is designed, an overview of the basic structures within the taxation of multinational corporations will thus be presented.

2.2 Taxation of Multinational Corporations

The OECD defines multinational corporate groups as "a group of associated companies with business establishments in two or more countries".[42] Generally, and in most jurisdictions, such groups are not taxed on a consolidated level.[43] Instead, each corporation constitutes a separate taxable entity in accordance with the separate entity principle.[44] What constitutes a corporate group may differ between jurisdictions. According to Swedish legislation for example, a corporate group consists of a parent company (which must possess at least 50 per cent of the voting rights of all shares or interests in or exercise controlling influence over the subsidiary) and its subsidiaries.[45]

The corporation's taxable income is determined on the basis of its profits.[46] Depending on in which jurisdiction the taxable legal entity is located in, different accounting standards are used in order to record the corporation's profits and expenses.[47] Outside of the United States, the corporation's tax base is typically based on the accounting standards commonly referred to as the International Financial Reporting Standards (IFRS).[48] Other accounting principles however still remain, including the Generally Accepted Accounting Principles in the US (US GAAP).[49]

[42] See for example: OECD (2017), *Transfer Pricing Guidelines,* p. 28
[43] This is the case in for example Sweden, see: Lodin, Sven-Olof et al. (2019), p. 399; OECD (2017), *Transfer Pricing Guidelines,* p. 16
[44] ibid
[45] Chapter 1, Section 11 of The Swedish Companies Act (2005:551); Lodin, Sven-Olof et al., (2017), p. 419-420
[46] Schreiber, Ulrich (2013), p. 4
[47] ibid
[48] The IFRS apply to all EU companies. See: Majaski, Christina, *IFRS vs. U.S. GAAP: What's the Difference?,* European Commission (2008), *Adopting Certain International Accounting Standards*
[49] ibid

For multinational corporate groups consisting of a parent company located in one jurisdiction, and branches or subsidiaries located in another jurisdiction, this means that not only several sets of tax rates, but also several sets of tax regulations and accounting principles, may be applied on its operations. Because all countries are free to determine their own tax rates, depending on which jurisdiction the taxable corporation is located in, the amount of tax levied on the corporation may therefore vary considerably.[50] According to international tax law, the basis for fiscal jurisdiction is determined by the principles of residence and source jurisdiction.[51] Countries may either levy taxes on basis of residential connection (residence-based taxation) or on the basis of income derived from business operations in that country (source-based taxation).[52]

2.2.1 Residence-based Taxation

In general, residence-based taxation creates what is commonly known as unlimited tax liability.[53] The principle of unlimited tax liability subjects legal (and natural) persons to taxation on its worldwide income, regardless of where it is derived on the basis of the corporation's residential connection to the jurisdiction.[54] For a corporation, this connection might either be established through the corporation's place of incorporation or its place of management (where control over the corporation is exercised).[55]

Generally, whether the corporation is regarded as incorporated in a certain jurisdiction is determined on the basis of where the company is registered or has its statutory seat.[56] Typically, the corporation must be considered a legal person under relevant company laws for it to be regarded as incorporated in a certain country.[57] In some jurisdictions, the corporation must have its

[50] Berglund; Ceije (2018), p. 20; Rohtagi, Roy (2002) p. 160
[51] Hilling, Axel; Ostas, Daniel T. (2017), p. 40
[52] Avi-Yonah, Reuven S., (2019), p. 8
[53] Berglund; Ceije (2018), pp. 20-21
[54] ibid
[55] Berglund; Ceije (2018), p. 23; Schreiber, Ulrich (2013), p. 12
[56] Rohtagi, Roy (2018) pp. 15-16
[57] Berglund; Ceije (2018), p. 24

statutory seat in the country for it to be registered as a corporation in that country.[58] In cases where the unlimited tax liability is instead determined by the place of management, where control over the company is exercised regarding the corporation, is usually decisive.[59] This may include where the day-to-day management of the corporation is executed or where strategic decisions regarding the corporation is taken.[60] As the corporation is typically managed by a board of directors, where the corporation holds its board meetings may also be a determinative factor.[61] Some tax systems may use both the incorporation and place of management as determining criteria. In such cases, normally fulfilling one of the criteria is sufficient for unlimited tax liability to be established.[62]

2.2.2 Source-based Taxation

Although the connection to a certain jurisdiction may not be sufficient to create unlimited tax liability, the corporation may still perform enough business activities in another jurisdiction to establish so-called limited tax liability.[63] This is often the case when multinational corporations operate in a foreign country (a 'source country') through a branch by for example setting up a permanent establishment.[64] According to the principle of limited tax liability, the source country is entitled to tax the profits attributed to the branch.[65] This may include active income (such as wages derived from a permanent establishment in the source country) and passive income (such as interest payments, dividends and royalties paid by a resident of the source state).[66] As a general rule, the corporation must perform a sufficient level of economic activities through such an establishment for its profits to be subject to tax.[67] A sufficient level of economic activities may include having a fixed

[58] Berglund; Ceije (2018), p. 24
[59] ibid
[60] Rohtagi, Roy (2018), p. 16
[61] Berglund; Ceije (2018), p. 24
[62] ibid
[63] Berglund; Ceije (2018), p. 25; Schreiber, Ulrich (2013), p. 12
[64] ibid
[65] Schreiber, Ulrich (2013), p. 12
[66] Berglund; Ceije (2018), p. 25
[67] Rohtagi, Roy (2018), pp.134-141 and 164-169

place of business (such as a facility or an office space) or a dependent agent which acts on behalf of the corporation and habitually concludes contracts in the corporation's name.[68]

2.3 International Juridical Double Taxation

Due to the lack of transnational coordination between the tax systems of different jurisdictions, the principles of unlimited and limited tax liability may in some cases create what is known as international juridical double taxation.[69] Such double taxation may be the result of overlapping tax bases, in which more than one jurisdiction claims the right to tax a certain income or gain of the same entity at the same time.[70] This may be due to differentiating tax rules in the source country and the residence country, for example if a corporation's residential connection is based on its place of incorporation in one jurisdiction, but on its place of management in another jurisdiction.[71] The two countries will then both regard the corporation as a resident in the respective jurisdictions and tax the entity accordingly. A similar situation may occur when two source countries claim the right to tax the same income of a corporation. [72] Double legal taxation may also arise due to differences in the characterization of taxable entities (for example a partnership may be a taxable entity in one state but not in another state) or differences in the assessment and definitions of taxable income (for example rules determining the profit of a branch in one jurisdiction may severely differ from the respective rules in another jurisdiction).[73] Double taxation will then arise due to the conflict in entity or income characterization or due to the mismatch between tax systems.[74]

As a reaction to the mismatches between overlapping tax systems, unilateral and bilateral regulations have emerged in order to relieve issues of double

[68] Rohtagi, Roy (2018), at pp. 134-141 and p. 153
[69] Schreiber, Ulrich (2013) pp. 12-13, Berglund; Ceije (2018), pp. 27-28
[70] Schreiber, Ulrich (2013), p. 13
[71] Rohatgi, Roy (2002), p. 13
[72] ibid
[73] Schreiber, Ulrich (2013), p. 13, Rohatgi, Roy (2002), p. 14
[74] Rohatgi, Roy (2002), p. 14

taxation.[75] Foremost are bilateral tax treaties, containing international tax rules which aim to distribute taxing rates among states.[76] The international tax rules consist of source rules (defining tax objects such as dividend and interest income and immovable property), assignment rules (allocating exclusive or limited taxing rights to jurisdictions) and relief rules (aiming to mitigate juridical double taxation).[77] In general, tax treaties thus force the contracting states to give up their right to tax a corporation in accordance with their domestic regulations in certain situations, either partially or altogether.[78]

The design of tax treaties may vary greatly depending on the jurisdiction. However, most tax treaties are derived from model tax conventions which may serve as guidance in the negotiations of tax treaties.[79] To date, the majority of existing bilateral tax treaties are based on the model tax conventions created by the Organization for Economic Cooperation and Development (OECD) and the United Nations.[80] In addition, the coordination of corporate taxes has been a priority within larger international bodies such as the European Union.[81] Through Council Directives such as the 'Merger Directive' and the 'Parent-Subsidiary' Directive, the EU has emphasized the importance of a "common system of taxation", aiming to remove any "restrictions, disadvantages or distortions" arising from mismatches between tax regulations of EU Member States.[82]

However, gaps within such regulations have simultaneously created opportunities for multinational companies to exploit inconsistencies within tax systems, which in turn allow companies to pay lower overall taxation, or even achieve double non-taxation.[83] This issue thus illustrates the core of this thesis, namely how the current international tax system facilitates the aggressive tax avoidance by multinational corporations.

[75] Berglund; Ceije (2018), pp. 14-15
[76] Berglund; Ceije (2018), pp. 14-15; Rohtagi, Roy (2002), p. 14 ff.
[77] Rohtagi, Roy (2002), p. 14-15; Berglund; Ceije (2018), p. 14-15
[78] Berglund; Ceije (2018), pp. 14-15
[79] Rohtagi, Roy (2002), p. 24
[80] Rohtagi, Roy (2018), p. 45
[81] Berglund; Ceije (2018), pp. 84-85
[82] See 'the Merger Directive' and 'the Parent-Subsidiary Directive'. See also Cerioni, Luca (2007), p. 4
[83] OECD (2013), *Addressing Base Erosion and Profit Shifting*, p. 35-36

3 Fundamentals of International Tax Planning

3.1 Classification of Concepts

3.1.1 Aggressive Tax Planning

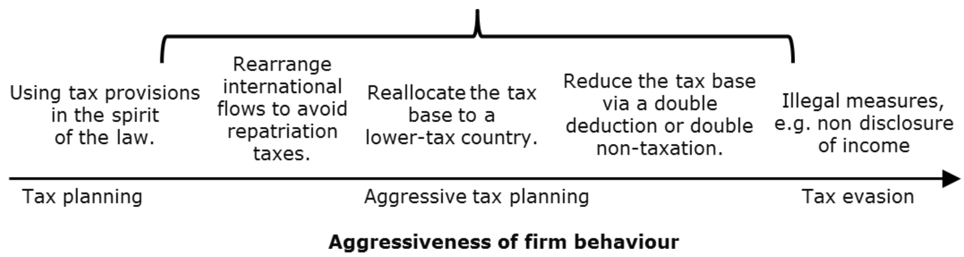
Although domestic and international measures have been effective in combating international juridical double taxation, such regulations have as already mentioned also opened up possibilities for multinational corporations to take advantage of existing tax regulations to achieve a more beneficial tax burden.[84] Commonly referred to as 'corporate tax planning', such tax-reducing measures may to some extent be accepted provided that they are conducted in accordance with general tax provisions.[85] However, the OECD has concluded that tax regulations aiming to mitigate double taxation may also create opportunities for corporations to reduce their tax liability in ways not intended by the regulator.[86] International and interstate bodies such as the OECD and the EU Commission often refer to such strategies as "aggressive tax planning" (ATP).[87] The term aggressive tax planning is often used interchangeably with the term "tax avoidance". According to the European Commission, both terms may be used to describe tax reducing strategies which violate the spirit of applicable tax regulations.[88] The two terms will therefore henceforth be used interchangeably to describe such behavior.

The OECD defines the concept of tax avoidance as 'the arrangement of a taxpayer's affair that is intended to reduce his tax liability and that although the arrangement could be strictly legal, it is usually in contradiction with the intent of the law it purports to follow'.[89] As stated, tax avoidance and

[84] OECD (2013), *Action Plan on Base Erosion and Profit Shifting,* p. 9 ff.
[85] OECD (1987), *International Tax Avoidance and Evasion* p. 16
[86] OECD (2013), *Addressing Base Erosion and Profit Shifting,* p. 39
[87] Hilling, Axel; Ostas, Daniel T. (2017), p. 45
[88] European Commission (2017), *Aggressive Tax Planning Indicators,* p. 22
[89] OECD Glossary of Tax Terms, "Tax Avoidance"

aggressive tax planning generally are used to describe the same types of tax reducing or tax avoiding arrangements. Although the term lacks legal definition, the European Commission describes the concept of aggressive tax planning in similar terms as the OECD's definition of tax avoidance, stating that aggressive tax planning may be described as arrangements aimed at reducing tax liability, which may be within the realms of what is legal but contravenes the intent of the legislation.[90] The action of aggressive tax planning could thus be defined as transactions which are indeed conducted in accordance with the letter of the law, but violates the spirit of the law.[91] According to the European Commission, such arrangements are often the result of the exploitation of the "technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability".[92]

Figure 1: Scope of ATP Definition



Source: EU Commission (2017),
Aggressive Tax Planning Indicators, p. 22

3.1.2 Tax Evasion

Apart from separating aggressive tax planning, or "unacceptable tax planning" from acceptable tax planning, the concept of aggressive tax planning must also be distinguished from tax evasion. Traditionally, the term tax evasion is defined as the deliberate evasion of taxes through unlawful means, in which not only the purpose, but also the letter of the law is violated.[93] The scope of the definition of tax evasion may differ between jurisdictions but generally includes the failure to submit, or concealment of

[90] European Commission (2017), *Curbing Aggressive Tax Planning*, p. 1; Knuutinen, Reijo (2014), p. 37
[91] European Commission (2017), *Aggressive Tax planning Indicators*, p. 22-23
[92] ibid at p. 23
[93] OECD (1987), *International Tax Avoidance and Evasion*, p. 16; Hilling, Axel; Ostas, Daniel T. (2017), p. 49

income or information from tax authorities leading to an avoidance of tax which the corporation is legally obliged to pay.[94] As the purpose of this thesis is to examine the *legal*, yet aggressive tax planning strategies of multinational corporations, the concepts of acceptable tax planning and tax evasion will henceforth not particularly be discussed.

3.2 Basic Principles of Aggressive Tax Planning

There are a number of ways in which multinational corporations may engage in aggressive tax planning. Often such arrangements include the artificial shifting of profits from a jurisdiction in which the corporation's economic activity actually takes place (often a high-tax jurisdiction) to a jurisdiction where the economic activity is reported for fiscal reasons (often a low-tax jurisdiction).[95] The following chapter will outline the most common strategies of aggressive tax planning. However, as such strategies may differ depending on in which jurisdiction they are conducted, and as legislation aiming to counter such strategies may also differ between jurisdictions, the following tax avoidance arrangements will henceforth be discussed "in abstracto" and will not derive from any particular country or jurisdiction.

3.2.1 Key Strategies for Aggressive Tax Planning

3.2.1.1 Transfer of Assets

In order to reduce their tax burden, corporations may use transfer pricing, i.e. transactions of services or goods between two or more companies of the same corporate group[96] to shift taxable profits in a high-tax jurisdiction to a low-tax jurisdiction.[97] According to tax regulations in most jurisdictions,

[94] OECD (1987), *International Tax Avoidance and Evasion*, p. 16. See also for example: Sections 2, 3 and 4 of the Swedish Tax Offences Act (1971:69)
[95] OECD (2013), *Action Plan on Base Erosion and Profit Shifting* p. 10
[96] Rohatgi, Roy (2002), p. 412
[97] Schreiber, Ulrich (2013), p. 70

transactions between entities under common control must be 'at arm's length', meaning that the transaction must reflect a fair market value for goods and services which would have been accepted by unrelated parties.[98]

However, by artificially reducing the cost of such goods and services, multinational corporations are able to shift profits and losses from high-tax jurisdictions to low-tax jurisdictions, and thus reduce the corporation's tax burden.[99] As an example, assume that 'corporation A' is located in a high-tax jurisdiction. Corporation A has a 'subsidiary B' in a low-tax jurisdiction. Corporation A will sell goods or services to subsidiary B at an artificially reduced cost, resulting in low revenues for corporation A and lower costs for subsidiary B. Corporation A may then buy the goods or services from subsidiary B at an inflated price, resulting in higher tax-deductible expenses for corporation A.[100] Through such transactions, corporation A will thus reduce its tax burden.[101]

3.2.1.2 Intra-group Payments

The artificial transferring of assets may also include intra-group payments, such as royalties and interest payments. Under civil law, shareholders are typically allowed to provide debt capital through the conclusion of loan contracts to the corporation for tax purposes.[102] According to the so-called 'net principle', such payments may be deducted from pre-tax profits.[103] Dividends however, (the distribution of profits from the corporation to its shareholders) are generally not tax-deductible.[104] By transferring its profits in order to generate tax-deductible expenses, corporations may take advantage of differences in the tax treatments of dividends and interest payments.[105] For example, a shareholder of corporation A may provide debt capital to the corporation by lending money to the corporation. The corporation will pay

[98] Rohatgi, Roy (2002), p. 412-414; Hilling, Axel; Ostas, Daniel T. (2017), p. 43
[99] Schreiber, Ulrich (2013), p. 35
[100] According to the "net principle" all expenses are tax-deductible for the corporation unless expressly exempted. See for example: Schreiber, Ulrich (2013), p. 4
[101] ibid
[102] Schreiber, Ulrich (2013), p. 2
[103] ibid at p. 4
[104] Schreiber, Ulrich (2013), p. 1
[105] Schreiber, Ulrich (2013), p. 32; Rohatgi, Roy (2002), p. 458-459

interest on the loan, which is tax-deductible (an expense) for the corporation, and a taxable income for the shareholder receiving the payment. Through its interest payment, the corporation is able to reduce its taxable profits. The result becomes a tax-deductible expense which the corporation may use to reduce its tax burden.[106]

For multinational corporations, a similar arrangement can be conducted using externals sources (e.g. a bank) or an entity within the corporation group (often set up in a low-tax jurisdiction).[107] As in the abovementioned example, corporation A is assumed to be located in a high-tax jurisdiction. Corporation A has a subsidiary B, in a low-tax jurisdiction. Subsidiary B borrows money from a bank and lends that money to corporation A in the high-tax jurisdiction at a higher interest rate. As the interest payment is tax-deductible, corporation A can lower its profits in the high-tax jurisdiction, which will lead to a lower tax burden. The interest payments received by subsidiary B will in turn be taxed at a low rate (as subsidiary B is located in a low-tax jurisdiction).[108]

3.2.1.2.1 Chevron Australia Holdings Pty Ltd v Commissioner of Taxation

In 2017, the Full Federal Court of Australia concluded that a loan between Chevron Australia and its US subsidiary Chevron Texaco Funding Corporation could not be determined as at arm’s length as required under transfer pricing regulations.[109] The case centered around a 2.5 billion US dollar loan from a Chevron subsidiary located in the United States to its parent Chevron Australia Holdings Pty Limited in which the interest rate was remarkably high.[110] As the corporation could not show that the Commissioner’s arm’s length consideration was unwarranted, the corporation was sentenced to a 340 million Australian dollar penalty.[111]

[106] Schreiber, Ulrich (2013), p. 32; Rohatgi, Roy (2002), p. 458-459
[107] The Fair Tax Campaign (2013), p. 7
[108] ibid
[109] Chevron Australia v. Commissioner of Taxation
[110] ibid
[111] Ashurst (2017), *Chevron Settles A$340m Australian Tax Appeal*

3.2.1.3 Hybrid Mismatch Arrangements

A third way in which multinational corporations can engage in aggressive tax planning is through exploiting discrepancies in how entities or financial instruments are treated under the tax systems of two or more countries.[112] The OECD refers to such schemes as 'hybrid mismatch arrangements', which usually result in the avoidance of tax liability or the long-term deferral of taxation.[113] A common way to engage in such arrangements is through the use of hybrid financial instruments. By way of an example, subsidiary B located in country B, may conduct a capital distribution to its parent A, located in country A. If the tax treatments of the instrument differ between country A and country B, the payment issued by subsidiary B may thus be perceived as non-taxable dividends in one country, while perceived as a tax-deductible interest payment in the other country.[114] A corporation may thus achieve a deductible interest expense without being subject to a corresponding taxable interest income, or even achieve two deductible interest expenses in different jurisdictions for one interest income tax payment.[115]

3.2.1.4 Tax Havens and Shell Companies

Lately tax avoidance strategies involving so-called tax havens have been the focus of the international community as well as the media and civil society. While definitions may vary across different jurisdictions, the OECD defines tax havens as jurisdictions which imposes little or no corporate income tax liability.[116] Generally, such jurisdictions are characterized by a lack of transparency in regard to legal, legislative and administrative functions, little or no requirements of disclosure of information, and few or no tax treaties.[117] In addition, guarantees of bank or commercial secrecy or confidentiality may be offered and exchange of information and cooperation with foreign tax

[112] OECD (2014), *Neutralising the Effects of Hybrid Mismatch Arrangements*, p. 31
[113] ibid
[114] Hilling, Axel; Ostas, Daniel T. (2017), p.44
[115] OECD (2012), *Hybrid Mismatch Arrangements,* pp. 7-10; Hilling, Axel; Ostas, Daniel T. (2017), p.44
[116] OECD Glossary, "Tax Haven"; Rohatgi, Roy (2002), p. 618
[117] Remeur, Cécile (2019), *EU Listing of Tax Havens,* European Parliamentary Research Service, pp. 1-3; PRI (2015), p. 14

authorities may be limited.[118] Jurisdictions classified as tax havens in the classical sense may also use tax incentives in order to attract foreign investments. Such incentives may include tax holidays, certain exemptions or other preferential treatments.[119]

The ways in which tax havens are used for tax avoidance purposes may vary.[120] One such strategy includes the artificial shifting of residence to a suitable low-tax jurisdiction by manipulating rules determining fiscal residence.[121] However, a more typical scenario entails multinational corporations setting up subsidiaries in the form of 'shell companies' or 'offshore companies' in tax haven jurisdictions.[122] The shell company will be a formally incorporated and registered legal entity, but will generally lack significant assets, substantive business activities or employees in the tax haven jurisdiction. Instead, the company is typically used for accounting purposes or as a pass-through for transaction flows.[123] By using such strategies, corporations may thus lower their tax burden, compared to if the tax payments would be made in a high-tax jurisdiction.[124]

The use of tax havens has been subject to significant public scrutiny in recent years. Incidents include the Panama Papers Scandal, which revealed the offshore assets of a number of influential people and information on more than 200,000 entities incorporated in offshore tax havens.[125] The revelations included information from the Panamanian law firm Mossack Fonseca, a known creator of shell companies, which could then be used to disguise ownership of assets.[126] The scandal followed the 'Luxembourg Leaks', which revealed how large global corporations by exploiting mismatches in the international tax system and making beneficial deals with Luxembourg

[118] Rohatgi, Roy (2002), pp. 226 and 618; OECD (1987), *International Tax Avoidance and Evasion*, pp. 21-27
[119] ibid
[120] It should be noted however that non-tax motivated transactions with genuine economic substance also may occur in tax havens. See for example OECD (1987), *International Tax Avoidance and Evasion,* p. 24
[121] OECD (1987), *International Tax Avoidance and Evasion*, p. 24
[122] OECD Glossary of Tax Terms, "Shell Company"; Rohatgi, Roy (2002), pp. 226-227, 608 and 618; OECD (1987), *International Tax Avoidance and Evasion*, pp. 24-25
[123] ibid
[124] ibid
[125] ICIJ (2016), *Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption*
[126] ibid

managed to avoid taxes both in Luxembourg and in other parts of the world.[127] The International Consortium of Investigative Journalists (ICIJ) for example revealed that subsidiaries located in Luxembourg, although handling large amounts of capital, de facto conducted little genuine economic activity in the country.[128]

In addition, companies registered in tax havens have been the focus of much attention in light of the current pandemic, Covid-19. As economies worldwide are implementing bailout programs to mitigate the economic effects following the crisis, several countries have announced that corporations registered in tax havens will not be receiving financial aid.[129] Amongst such countries is Denmark, who has proclaimed that "companies seeking compensation […] must pay the tax to which they are liable under international agreements and national rules."[130]

3.2.1.4.1 The 'Double Irish' and the 'Double Irish With a Dutch Sandwich'

A well-known example of the use of tax havens for tax purposes is the so-called 'Double Irish'.[131] Typically used by US multinational corporations in order to funnel international profits through Ireland to low-tax jurisdictions, the strategy exploits differences in the definition of corporate residence between jurisdictions (in this case between Ireland, which uses the place of management as the determining factor for corporate residency, and the United States, which uses the determining factor of registration). Multinational corporations are thus able to place assets (usually intellectual property) in a subsidiary which is registered in Ireland but controlled from a low-tax jurisdiction.[132] According to US tax rules, the subsidiary is domiciled in Ireland, while according to Irish tax rules, the subsidiary is domiciled in the

[127] Wayne; Carr et al. (2014), *Leaked Documents Expose Global Companies' Secret Tax Deals in Luxembourg*
[128] ibid
[129] Bostock, Bill (2020), *Denmark and Poland are refusing to bail out companies registered in offshore tax havens,* Business Insider
[130] ibid
[131] Hilling, Axel; Ostas, Daniel T. (2017), p. 42-43; Houlder, Vanessa (2014), *Q&A: What is the double Irish?,* Financial Times
[132] ibid

tax haven.[133] Royalty payments received by the subsidiary will therefore be untaxed, and multinational corporations can "park" the money in the tax haven.[134]

The strategy has been used by large well-known multinational corporations, including Apple.[135] Following media reports that certain companies were receiving beneficial deals from national tax authorities, the European Commission launched an investigation against Apple (amongst other companies) in 2014.[136] Under EU regulations on 'state aid', EU Member States are prohibited from giving selective tax benefits to companies, as this may affect and distort trade and competition within the EU.[137] The investigation concluded that the Irish tax authorities had in fact granted Apple such tax benefits, which allowed the corporation to an effective corporate tax rate of 0.0005 per cent in 2014.[138] Apple was sentenced to a fine by the European Commission[139] and received immense public scrutiny following the scandal.[140]

Using a slightly more advanced structure, multinational corporations have also been involved in the so-called 'Double Irish With a Dutch Sandwich'.[141] In most cases, a U.S. parent company will transfer intellectual property (typically royalties from sales to customers in the U.S.) to a holding company located in Ireland.[142] The US company's profits are lowered, and the royalties are taxed at a low rate in Ireland according to Irish tax regulations. A second Irish company is used to transfer profits made from sales to customers in Europe, to the first Irish company using a Dutch company as an intermediary. The first Irish company can then forward the money to a tax haven which will

[133] Hilling, Axel; Ostas, Daniel T. (2017), p.42-43; Houlder, Vanessa (2014), *Q&A: What is the double Irish?,* Financial Times
[134] ibid
[135] EU Commission (2014), *Commission Investigation on State Aid*
[136] ibid
[137] ibid
[138] European Commission (2016), *State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion,* Press Release
[139] European Commission (2016), *Commission Decision on State Aid Implemented by Ireland to Apple*
[140] See for example: Hoxie, Josh (2018), *Commentary: Apple Avoided $40 Billion in Taxes. Now It Wants a Gold Star?,* Fortune
[141] Hilling, Axel; Ostas, Daniel T. (2017), p.42-43
[142] ibid

impose little or no tax on the money.[143] The large U.S. multinational corporation Google received severe public scrutiny in 2017 for its alleged involvement in such a strategy.[144] Reportedly, the corporation funneled close to 20 billion Euros through a Dutch shell company located in Bermuda, which is recognized as a tax haven.[145] After legislation closing the regulatory loophole giving rise to such tax avoiding schemes was passed in Ireland in 2015,[146] and after receiving significant criticism from the public, Google recently announced that it would abstain from using the tax planning strategy.[147]

[143] Hilling, Axel; Ostas, Daniel T. (2017), p.42-43
[144] Meijer, Bart (2019), *Google Shifted $23 to tax haven Bermuda in 2017: filing,* Reuters
[145] ibid
[146] McDonald, Henry (2014), *Ireland to close 'double Irish' tax loophole,* The Guardian
[147] Helmore, Edward (2020), *Google says it will no longer use 'Double Irish, Dutch sandwich' tax loophole,* The Guardian

4 Legal Framework for Aggressive Tax Planning

The sophisticated strategies used by multinational corporations to avoid tax have resulted in the need for new rules targeting aggressive tax planning on both national and international levels. Many countries have adopted so-called anti-avoidance rules to counteract the prevalence of tax avoidance by multinational corporations. Such regulations include rules on transfer pricing, controlled foreign corporations (CFC), thin capitalization and general anti-avoidance rules (GAAR). Countries adhering to the OECD initiative on BEPS commit to adopting such anti-avoidance rules.[148] The precise scope and design of such regulations may of course differ between jurisdictions. This chapter will therefore review the most common forms of anti-avoidance rules from a general and "in abstracto" perspective. In addition, the EU has been actively engaged in the prevention of corporate tax avoidance, foremost through the adoption of the anti-tax avoidance directive (ATAD) which sets out rules for its Member States on combatting tax avoidance.[149]

4.1 Domestic Regulations in regard to Aggressive Tax Planning

4.1.1 Specific Anti-Avoidance Rules

An effective domestic measure to prevent and counteract corporate tax avoidance are through so-called anti-avoidance rules.[150] Generally, such rules are divided into Specific Anti-Avoidance Rules aiming to target certain recognized transactions in which the risk of tax avoidance is typically high (commonly referred to as SAARs) or General Anti-Avoidance Rules that aim to target any kind of identified tax avoidance (typically known as GAARs).[151]

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[148] OECD (2013), *Action Plan on Base Erosion and Profit Shifting,* p. 13
[149] See for example: 'The Anti Tax Avoidance Directive'and European Commission (2016), *The Anti Tax Avoidance Package- Questions and Answers,* pp. 1-3
[150] Johansson; Bieltvedt et al. (2016), *Anti-Avoidance Rules Against International Tax Planning,* p. 5
[151] Hilling, Axel; Ostas, Daniel T. (2017), p. 52; Rohatgi, Roy (2002), p. 343-344

Typically, SAARs are characterized by clear formulations and a clearly defined scope, which increases certainty, but naturally limits the scope of application compared to GAARs which are more broadly defined.[152] Examples of SAARs include domestic rules on controlled foreign corporations, transfer pricing and thin capitalization.[153]

4.1.1.1 Transfer Pricing Regulations

In order to counteract strategic cross-border transactions which aim to allocate income within corporate groups to low-tax jurisdictions, many countries have adopted transfer pricing regulations.[154] In general, transfer pricing rules allow the tax authorities in their respective jurisdictions to adjust prices set between related entities or parties which are not regarded as at arm's length.[155] Typically, the transfer pricing regulations of most jurisdictions follow the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations,[156] which aim to provide guidance in the implementation and application of the arm's length principle.[157] In many jurisdictions, large multinational corporations might in addition be required to document transactions with related parties and present the arm's length consideration of transactions between such parties.[158]

4.1.1.2 Thin Capitalization Rules

Thin capitalization rules generally aim to target the deductibility of interest, usually by limiting the level of debt that can generate tax-deductible expenses such as interest.[159] As companies in general are financed through debt or equity (typically a mixture of the two), the rules aim to prevent that multinational corporate groups strategically structure their financial

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152 Hilling, Axel; Ostas, Daniel T. (2017), p. 52
153 ibid
154 Hilling, Axel; Ostas, Daniel T. (2017), p. 43
155 OECD (2017), *Transfer Pricing Guidelines,* p. 34
156 See for example the OECD's Transfer Pricing Country Profiles (lastly updated June 2019)
157 OECD (2017), *Transfer Pricing Guidelines,* pp. 15-20
158 This is the case in for example Sweden, see: Swedish Parliament, *Riksdagsskrivelse 2016/17:160*
159 OECD (2012), *Thin Capitalisation Legislation*, p. 7; Rohatgi, Roy (2002), p. 396 ff.

arrangements in ways that result in the company being financed through a higher level of debt compared to the level of equity.[160] Because interest payments are tax-deductible in most jurisdictions, companies may otherwise deliberately increase the level of debt in the company, resulting in high levels of tax-deductible interest and low levels of taxable profit.[161] This may in turn lead to the interest not being taxed in the receiving jurisdiction or taxed at a considerably low rate.[162] Although the design and scope of application of such rules may vary between jurisdictions, thin capitalization rules typically limit the amount of interest that a taxpayer may deduct from its taxable profit through a debt threshold. Interest that exceeds the amount of debt above this threshold, will not be tax-deductible.[163] The rules may also reclassify the interest as a dividend.[164]

Generally, most thin capitalization rules are based on either the 'arm's length approach' or the 'ratio approach'. [165] The arm's length approach determines the threshold of debt on the basis of what an independent lender would loan the corporation.[166] Accordingly, this approach generally looks at the level of debt that the corporation would be able to borrow, or would have borrowed, had the lender been an independent party acting in accordance with the arm's length principle.[167] Under the ratio approach however, the threshold determining the allowed maximum level of debt has already been determined by a ratio, for example the ratio of debt to equity.[168]

4.1.1.3 Controlled Foreign Company Rules

Controlled Foreign Corporation (CFC) rules stipulate that the income of foreign subsidiaries is subject to taxation in the residence country without deferral if certain conditions are met.[169] CFC rules generally apply to foreign

[160] OECD (2012), *Thin Capitalisation Legislation,* p. 3; Rohatgi, Roy (2002), p. 396 ff., 585 and 591
[161] ibid
[162] ibid
[163] ibid
[164] Rohatgi, Roy (2002), p. 396
[165] OECD (2012), *Thin Capitalisation Legislation,* p. 8
[166] ibid; Rohatgi, Roy (2002), p. 396
[167] ibid
[168] Rohatgi, Roy (2002), p. 397-398; OECD (2012), *Thin Capitalisation Legislation,* p. 8
[169] Rohatgi, Roy (2002), p. 584; Schreiber, Ulrich (2013), p. 48

corporations under the control or influence of resident shareholders (located in the parent jurisdiction).[170] Typically, the rules are applicable on certain types of income generated by the foreign company, such as dividends or interest (passive income).[171] For example, assume a parent corporation located in a high-tax jurisdiction, controlling a foreign subsidiary in a low-tax jurisdiction. In certain cases, and under certain conditions, the high-tax jurisdiction may have the right to tax the income of the subsidiary located in the low-tax jurisdiction. The regulations thus aim to protect domestic tax bases by hindering corporations from shifting their profit to low-tax jurisdictions.[172]

4.1.2 General Anti-Avoidance Rules

Because specific anti-avoidance rules typically have a limited scope of application, they may not instantly be able to target new and creative tax avoidance arrangements. Therefore, SAARs are in many jurisdictions complemented by a General Anti-Avoidance Rule (GAAR), aiming to counteract tax avoidance strategies which cannot be combatted through traditional tax regulations.[173] Generally, GAARs have a more general and broad scope of application and tend to target transactions or arrangements which lack real economic substance or may result in effects which contravenes the purpose of relevant legislation.[174]

The design and precise scope of application of GAARs may differ between jurisdictions. However, in for example Swedish legislation, the GAAR can be found in Section 2 of the Swedish Tax Avoidance Act.[175] The provision consists of four cumulative criteria, including an arrangement conducted by the taxpayer (directly or indirectly) which gives rise to a substantial tax benefit. In order for the provision to be applied, it must be proven that the

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[170] OECD (2015), *Designing Effective Controlled Foreign Company Rules,* p. 9; Rohatgi, Roy (2002), p. 584
[171] ibid
[172] Asen, Elke (2019), *CFC Rules in Europe,* Tax Foundation; Rohatgi, Roy (2002), p. 584
[173] Suter, Cristoph (2017), *The Rise of General Anti-Avoidance Rules in Taxation,* Financier Worldwide Magazine
[174] Hilling, Axel; Ostas, Daniel T. (2017), p. 52
[175] Section 2 of the Swedish Tax Avoidance Act (1995:575)

taxpayer's sole or main purpose was obtaining such a tax benefit. Finally, the arrangement must contravene the purpose of the legislation.[176] According to Swedish law, the fourth criterion is typically the decisive requisite for the application of the Swedish GAAR.[177]

4.2 International Regulations in regard to Aggressive Tax Planning

4.2.1 Base Erosion and Profit Shifting (BEPS)

The Base Erosion and Profit Shifting (BEPS) Project and its global action plan is one of the more extensive initiatives aimed at counteracting corporate tax avoidance. The term 'Base Erosion and Profit Shifting' refers to tax planning strategies that exploit gaps and inconsistencies in different tax regulations, or the shifting or profits to jurisdictions where little or no genuine economic activity takes place, for the purpose of lowering or eradicating tax liability.[178] According to the OECD, such strategies may result in the distortion of fair competition, as corporations operating transnationally may profit from legal but tax-reducing opportunities, thus putting corporations operating in domestic markets at a competitive disadvantage.[179] In addition, the prevalence of BEPS may lead to revenue losses for governments worldwide and an underfunding of public investment.[180] In order to combat such strategies, the BEPS project therefore aims to reform international tax rules and ensure that corporations are taxed according to where their genuine economic activities take place, and where they de facto create value.[181]

The OECD launched the BEPS Project in 2013, and through its subsequent 'Action Plan on Base Erosion and Profit Shifting' presented a revision of current international rules on corporate tax as well as a number of minimum

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176 Section 2 of the Swedish Tax Avoidance Act (1995:575)
177 Swedish Government Official Reports (1996:44), pp. 104 f.; Lodin, Sven-Olof et al. (2017), p. 744
178 *OECD, About the Inclusive Framework on BEPS*
179 OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, p. 8; Hilling, Axel; Ostas, Daniel T. (2017), p. 45
180 ibid
181 OECD (2015), *Explanatory Statement,* pp. 4-11.

standard rules expected to be implemented by all countries.[182] The action plan consists of fifteen "actions" aiming to establish international coherence of corporate income taxation, ensure transparency in international tax matters and create alignment between corporate taxation and genuine economic activity.[183] Firstly, the action plan includes four actions aiming to ensure the coherence of corporate taxation, including rules on hybrid mismatch arrangements, interest deductions and similar financial payments and the strengthening of CFC regulation. In addition, a common set of rules to combat harmful tax practices in a more efficient way is presented.[184] The action plan further presents five actions to align taxation with the locations in which real economic activity is performed and genuine value is created. These actions include measures to prevent the abuse of treaties aiming to mitigate double taxation, altering the definition of permanent establishment as to prevent the artificial avoidance of a PE status and rules to assure that the outcomes of transfer pricing are aligned with real value creation.[185]

In addition, the BEPS Action Plan offers an extensive framework on improving transparency within corporate taxation. This includes improving the data collection and information on the effects and impacts of BEPS as well as improving taxpayers' disclosure on tax planning strategies.[186] Under Action 13, all large multinational corporations are required to prepare a country-by-country report in which the corporation shall provide data and information on the allocation of income, tax payments, profits, and economic activity in each jurisdiction in which it operates.[187] The requirements have been implemented by EU Council Directive 2016/881/EU ('DAC4') and apply to large multinational enterprises with a consolidated revenue of 750 million euros or more.[188]

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182 OECD (2013), *Action Plan on Base Erosion and Profit Shifting*

183 OECD (2013), *Action Plan on Base Erosion and Profit Shifting,* p. 13 ff.; OECD (2013), *Addressing Base Erosion and Profit Shifting,* pp. 5-11

184 OECD (2013), *Action Plan on Base Erosion and Profit Shifting,* p. 14-18

185 ibid at, p. 19-24

186 OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, p. 21

187 OECD (2019), *Guidance on the Implementation of Country-by-Country Reporting,* p. 5

188 'DAC 4 Directive'

4.2.2 The Anti Tax Avoidance Package

To ensure the adequate implementation of the BEPS Action Plan, the European Commission introduced a 'Anti-Tax Avoidance Package' (ATAP) in January 2016.[189] The initiative consists of a number of measures aiming to encourage tax transparency, counteract aggressive tax planning and establish a more effective corporate tax environment within the EU.[190] As part of the avoidance package, the Commission also presented its proposal for an Anti-Tax Avoidance Directive (ATAD).[191] The directive sets out six anti-abuse measures legally binding to all Member States, including rules on CFCs, hybrid mismatches and general anti-avoidance rules.[192] The directive was amended in May 2017 with the introduction of ATAD II which aims to target hybrid mismatches between the EU and third countries.[193] ATAD thus applies to all taxpayers (including EU permanent establishments of non-EU companies) that are subject to corporate tax in the EU.[194]

4.3 Legal and Regulatory Developments in regard to Aggressive Tax Planning

4.3.1 Tax Challenges Related to the Digital Economy

Over the last few years, concerns have been raised that the existing international tax system is not adequately targeting issues related to the digitalization of the economy.[195] The issue lies in the fact that digital companies (typically selling goods or services online) are able to make profits on customers worldwide (through for example e-commerce or users of digital services).[196] Because current international tax rules base taxation on where economic activity is generated (traditionally the place of production), a

[189] European Commission (2016), *The Anti Tax Avoidance Package- Questions and Answers,* pp. 1-3
[190] ibid
[191] 'The Anti Tax Avoidance Directive'
[192] Hultqvist, Anders (2016), pp. 856-858
[193] 'The Anti Tax Avoidance Directive II'
[194] ibid at p. 2
[195] See for example: OECD (2019), *Addressing the Tax Challenges of the Digitalisation of the Economy,* p. 5
[196] OECD (2018), *Tax Challenges Arising from Digitalisation,* p. 18 ff.

mismatch between the income derived from certain digital activities and the taxation of the value created in jurisdictions where the company has users or customers but no physical presence, will arise.[197]

As a response, the OECD has presented a proposal that would subject digital corporations to tax based on the location of their consumers rather than the location of the corporation's operations. The proposed framework presents new regulations for a digital tax, where the traditional tax rules based on physical presence are disregarded and replaced with rules based on where the corporations' operations occur.[198] The framework states that a consensus on the new rules are expected to be reached in 2020.[199] Several countries have however already adopted unilateral regulations to tackle the challenges related to the digital economy. Commonly referred to as a digital services tax (DST), these regulations aim to tax the revenue of large digital companies.[200] Some countries have chosen to only tax digital companies on the basis of online advertisements, while other countries like France targets a broader scope of digital services, including targeted advertisement and so-called intermediary services (the provision of a digital interface).[201] Most jurisdictions have also implemented a worldwide revenue threshold of 750 million euros.[202]

Several large, well-known digital companies have recently been the subject of heavy criticism for allegedly paying an effective tax rate of well below what they should, due to strategic tax planning schemes and loopholes facilitated by an international tax system that is poorly adapted to the digital economy.[203] Such companies include Netflix, Facebook and Amazon, which, although disputing such allegations, reportedly paid zero or below zero per

[197] OECD (2018), *Tax Challenges Arising from Digitalisation,* p. 18 ff.
[198] OECD (2019), *Secretariat Proposal for a" Unified Approach" under Pillar One,* pp. 3-5. See also: European Parliament (2018), *Taxation of the Digital Economy,* Proposal for a Council Directive
[199] OECD (2019), *Secretariat Proposal for a" Unified Approach" under Pillar One,* pp. 3-5
[200] Asen, Elke (2019), *Announced, Proposed, and Implemented Services Taxes in Europe,* Tax Foundation; KPMG (2019), *France: Digital Services Tax (3%) is Enacted*
[201] ibid
[202] ibid
[203] Gardner, Matthew et al. (2019), *Corporate Tax Avoidance in the First Year of the Trump Tax Law,* Institute on Taxation and Economic Policy, p. 8

cent federal income tax in the United States in 2018.[204] Similar allegations have been made regarding the companies' tax payments within Europe.[205] The companies have been exposed to heavy public criticism as a result of such alleged tax avoidance.[206]

4.3.2 Mandatory Reporting of Cross-Border Transactions for Taxpayers and Intermediaries

As the result of a proposal issued by the European Commission, the European Council adopted new mandatory requirements on disclosure of cross-border transactions for intermediaries and relevant taxpayers in 2018.[207] According to the Directive, an intermediate is defined as "any individual or company that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable cross-border arrangement."[208] The new disclosure rules requires such intermediaries (and in some cases taxpayers) to disclose information to the tax authorities in their respective EU member states, on certain types of cross-border arrangements that may be perceived as potentially aggressive.[209] In cases where an intermediary is absent, for example in cases where the intermediary is located outside of the European Union, the taxpayer is required to report the cross-border arrangement. [210]

The proposal was presented as an amendment to the Directive on Administrative Cooperation ('DAC') and was implemented through Council Directive 2018/822/EU ('DAC 6').[211] The new rules will apply to intermediaries and taxpayers from 1 July 2020.[212] However reportable cross-border arrangements conducted after the Directive's entry into force (25 June

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[204] Gardner, Matthew et al. (2019), *Corporate Tax Avoidance in the First Year of the Trump Tax Law,* Institute on Taxation and Economic Policy, p. 8
[205] Sweney, Mark (2020), *Netflix accused of funneling UK profits through Netherlands,* The Guardian
[206] ibid
[207] KPMG (2018), *Mandatory disclosure requirements for intermediaries,* pp. 1-2
[208] 'The DAC 6 Directive'
[209] KPMG (2018), *Mandatory disclosure requirements for intermediaries,* pp. 1-2
[210] ibid
[211] 'The DAC 6 Directive'; KPMG (2018), *Mandatory disclosure requirements for intermediaries,* p. 2
[212] KPMG (2018), *Mandatory disclosure requirements for intermediaries,* p. 2

2018) will also have to be reported.[213] The overarching goal of the new mandatory disclosure rules is to improve tax transparency and counteract corporate tax avoidance by targeting cross-border transactions which are deemed not conducted for genuine reasons.[214] The Directive thereby aims to provide tax authorities with an instrument to detect risks of corporate tax avoidance at an early stage as well as conduct audits in a more effective manner.[215] In addition, the exchange of information between tax authorities in different Member States may enable jurisdictions to take action on aggressive tax practices as well as make necessary adjustments to current regulations.[216] The new regulations also aim to have a preventive effect, averting taxpayers from engaging in certain transactions.[217] However, the disclosure of a reportable cross-border transaction does not automatically entail an indication of aggressive tax planning.[218]

4.3.3 The European Commission's Common Consolidated Corporate Tax Base

In October 2016, the European Commission re-launched a proposal on the so-called Common Consolidation Corporate Tax Base (CCCTB).[219] The proposal suggests the implementation of a common EU tax system for calculating the taxable profits of corporations in the EU.[220] The suggested tax system is a form of unitary tax system (also known as global formulary apportionment) in which corporate groups (including both domestic and foreign branches) are treated as a single unit as opposed to separate legal entities interacting in accordance with the arm's length principle.[221] The overall goal of the CCCTB is to facilitate cross-border trade and investment within the EU, as well as increase transparency in regard to corporate taxation

[213] KPMG (2018), *Mandatory disclosure requirements for intermediaries,* p. 2
[214] 'The DAC 6 Directive'; KPMG (2018), *Mandatory disclosure requirements for intermediaries,* p. 2 ff.
[215] ibid
[216] ibid
[217] A&L Goodbody (2020), *DAC6 Mandatory Reporting to Tax Authorities of Certain Cross-Border Transactions,* Lexology
[218] ibid
[219] European Commission (2016), *Proposal for a Council Directive on a Common Corporate Tax Base;* European Commission (2015), *Questions and Answers on the CCCTB re-launch*
[220] European Commission (2016), *Proposal for a Council Directive on a Common Corporate Tax Base,* p. 2
[221] Rohatgi, Roy (2002), p. 626

and the effective tax rates of Member States.[222] In addition, as stated by the European Commission, a common consolidated corporate tax base would also be effective in the counteracting of tax avoidance and aggressive tax planning practices by removing flaws and mismatches in the current corporate tax system.[223]

The proposal derives from the notion that multinational corporations, as opposed to being subject to a number of different corporate tax systems within the EU, would only have to submit one tax return for the economic activities performed within the EU.[224] Each member of the EU corporate group, meaning the parent and any related subsidiary companies residing in the EU, would compute its profits separately.[225] The profits of each entity would then be added and consolidated at the level of the parent company.[226] Using an apportionment formula, the group's consolidated taxable profits would be apportioned out between the member states in which the corporation operates, enabling corporations to offset losses in one EU member state against profits in another member state.[227] The member states would have the right to tax the corporation based on three equally weighted factors, including the corporation's assets, the labour force that the corporation has in each member state, and the sales that the corporation conducts in each member state. As each member state would then tax its share of the profits at its own statutory tax rate, the sovereignty of member states in determining their tax rates would not be affected.[228]

The proposal was originally presented in 2011 but was never adopted due to its ambitious nature.[229] In its 2016 amendment, the EU therefore suggested that the common consolidated corporate tax base be implemented through a

[222] European Commission (2015), *Questions and Answers on the CCCTB re-launch*
[223] ibid
[224] European Commission (2016), *Commission Proposes Major Corporate Tax Reform for the EU*
[225] ibid at pp. 10 and 21
[226] European Commission (2016), *Proposal for a Council Directive on a Common Corporate Tax Base*, p. 8
[227] European Commission (2016), *Commission Proposes Major Corporate Tax Reform for the EU;* European Commission (2016), *Proposal for a Council Directive on a Common Corporate Tax Base,* p. 10
[228]European Commission (2016), *Proposal for a Council Directive on a Common Corporate Tax Base*, pp. 5 and 10
[229] European Commission (2016), *Proposal for a Council Directive on a Common Corporate Tax Base*, p. 3

step-by-step approach.[230] The first step would be establishing a mandatory collection of rules determining the common corporate tax base.[231] Although in its first proposal, the EU suggested an optional system for implementation of the common tax base, the new directive affirms that the rules would be mandatory for all corporations belong to corporate groups above a certain size.[232] According to the proposal, this would include corporations with a consolidated revenue of 750 million Euro or more, meaning that micro as well as small and medium size corporations would be exempted from the mandatory application of the rules.[233] The proposal is currently being considered by the European Council. [234]

4.3.4 The EU Tax Haven Blacklist

The European Union has published a list of so-called "non-cooperative tax jurisdictions" (commonly also referred to as the EU tax haven blacklist) as an instrument for EU Member Countries to counteract tax avoidance and aggressive tax planning schemes.[235] Using a screening process based on three criteria including transparency, fair tax competition and implementation of the OECD's Base Erosion and Profit Shifting Minimum Criteria, the EU aims to prevent abusive tax practices and to encourage fair tax competition by flagging jurisdictions not compliant with the criteria as "tax havens" (formally 'non-cooperative jurisdictions').[236] First adopted in 2017, the list is habitually updated with the latest revision taking place in February 2020.[237] In accordance with recommendations by the EU Code of Conduct Group (Business Taxation) (CCG), EU Member States are encouraged to impose sanctions, referred to as "defensive-measures", against blacklisted jurisdictions by the end of 2020, including restrictions on the deduction of

[230] European Commission (2016), *Proposal for a Council Directive on a Common Corporate Tax Base*, p. 3
[231] ibid
[232] ibid at pp. 2-3
[233] ibid at p. 8
[234] European Commission (2015), *Questions and Answers on the CCCTB re-launch*
[235] European Council (2020), *Taxation: EU list of non-cooperative jurisdictions*
[236] European Council (2017), *The EU List of Non-Cooperative Jurisdictions for Tax Purposes,* p. 23-24
[237] European Council (2017), *The EU List of Non-Cooperative Jurisdictions for Tax Purposes,* Council Conclusions; European Council (2020), *The Council Conclusions on the Revised EU List of Non-Cooperative Jurisdictions for Tax Purposes*

expenses otherwise permitted and applying a withholding tax at a higher rate on for example interest and royalties.[238] In addition, the defensive-measures entail including the income of a corporate entity resident or permanent establishment located in a non-cooperative jurisdiction in the corporation's tax base.[239]

[238] European Council (2019), *Code of Conduct Group (Business Taxation) Report to the Council,* p. 47-50
[239] ibid at p. 47

5 Corporate Tax Responsibility

In recent decades, there has been a widespread debate about the nexus between taxation and CSR. While traditionally the view on taxation may have been merely formalistic, affirming that the obligation to pay taxes must clearly follow from the letter of the law, there has been increased acceptance regarding the importance of including matters of taxation in the corporate responsibility of corporations.[240] As aforementioned, this has fueled the emergence of terms such as ‘responsible tax conduct’ or ‘corporate tax responsibility’, stating that corporations have a societal responsibility to pay taxes in due time and in the jurisdictions where they conduct actual business activities.[241] As stated by for example the former director-general of the Swedish Tax Agency, Ingemar Hansson, tax may be regarded a sustainability issue, and corporations should therefore be encouraged to implement sustainable tax policies and include tax matters in their corporate social responsibility efforts.[242] In addition, the European Commission has affirmed that the tax policies of corporations should be an essential element of CSR and that socially responsible behavior does not allow for tax avoiding arrangements or the use of tax havens.[243]

5.1 Corporate Social Responsibility

5.1.1 Definition and Scope of Corporate Social Responsibility

Traditionally, the concept of corporate social responsibility (CSR) has been largely focused on environmental and social issues.[244] Despite the lack of a universally accepted definition, the concept is generally used to describe actions taken by corporations above their legal obligations which are aimed at making positive contributions to the environment, society or the

[240] See for example Avi-Yonah, Reuven S., (2014) and Knuutinen, Reijo (2014)
[241] See for example PRI (2015), *Engagement Guidance on Corporate Tax Responsibility,* p. 3 ff.
[242] Hansson, Ingemar (2015), Op-Ed*: Taxes are a matter for the board of directors*, Dagens Industri
[243] European Parliament (2013) *Resolution on Corporate Social Responsibility*, note 7
[244] Knuutinen, Reijo (2014), p. 37

economy.[245] This may include integrating social, environmental and human rights considerations in business operations and in interactions with relevant stakeholders of the corporation.[246] The term as such is thus not a legal concept, but can be defined as a voluntary responsibility taken by the corporation in its business operations, that extends beyond legal compliance and includes environmental and social concerns.[247]

The concept of corporate social responsibility dates back several decades, with early scholars such as Bowen and Davis arguing that the actions of corporations should follow the objectives and values of society and that taking into consideration interests beyond direct economic interests could be economically beneficial to the corporation in the long term.[248] The Triple Bottom Line model developed by Elkington has offered an agreed upon description of corporate responsibility, claiming that in order for corporations to be sustainable, it must incorporate economic, environmental and social aspects in its business.[249]

In recent years, the concept of CSR has however been increasingly used conjointly, and in certain cases even interchangeably, with the concept of sustainable development, corporate sustainability and corporate citizenship.[250] Despite variations in the definition of such concepts, there has been wide acceptance in recognizing the role of corporations in achieving sustainable development. Already at the Brundtland Commission in 1987, where the concept of sustainable development was coined, the significance of private investment and responsibility of transnational corporations in fulfilling sustainable development objectives was highlighted.[251] The United Nations (UN) has further acknowledged the vital role that corporations play

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[245] European Commission (2011), *A renewed EU strategy 2011-14 for Corporate Social Responsibility,* p. 6
[246] ibid
[247] *(European Commission (2002) Communication from the Commission concerning Corporate Social Responsibility),* p. 3
[248] Carroll, Archie B. (1999), s. 269-271
[249] Elkington, John (1998), pp. 74-94
[250] See for example: United Nations Global Compact and the International Finance Corporation (2009), *Corporate Governance: The Foundation for Corporate Citizenship and Sustainable Business,* p. 1 ff.
[251] World Commission on Environment and Development (1987)

in achieving the UN Sustainable Development Goals (SGDs) and its appurtenant '2030 Agenda for Sustainable Development'.[252]

Corporate sustainability thus recognizes that there is coherence between the long-term interests of corporations and sustainable development.[253] In such, the concept of corporate sustainability does not disregard the importance of economic growth and profitability, but rather encourages (and in some respects requires) the corporation to include social and ethical considerations in its operations.[254] This includes in particular aspects which are necessary components of sustainable development, such as environmental, social and economic developments.[255] To pursue such goals, and to comply with the expectations of their stakeholders, many multinational corporations therefore incorporate voluntary responsibility standards in the fundamental values of the corporation, often reflecting its commitment to CSR in their annual or sustainability reports.[256]

5.1.2 The Company Law Approach

Although recognized as a vital component of sustainable development by large parts of the international community, the concept and importance of corporate social responsibility has been subject to widespread debate. Scholars such as Freidman have argued that the very concept of corporate social responsibility contradicts the true responsibility of corporations, namely the responsibility to increase profits for the benefits of its shareholders.[257] Friedman argues that the social responsibility of corporations is to increase profits in accordance with the law.[258] Any measures that extend

[252] See for example the United Nations Global Compact (2014), *Guide to Corporate Sustainability,* p. 7 ff.
[253] Wilson, Mel (2003), *Corporate Sustainability: What is it and Where Does it Come From?* Ivey Business Journal
[254] ibid
[255] ibid
[256] See for example: KPMG (2019), *Tax Transparency i Sverige 2018-2019*
[257] Friedman, Milton (1970), *The Social Responsibility of Business Is to Increase Its Profits,* N.Y. Times Magazine p. 32
[258] ibid

beyond what is required by law should contribute to the maximization of shareholder value.[259]

The purpose of profit maximization is a fundamental principle of company law in many jurisdictions. The Swedish Companies Act for example states that a company has an overall profit-making purpose and exists mainly to strive for profit maximization.[260] The purpose of profit maximization is also illustrated by Bergström and Samuelsson from the perspective of investors, stating that the will of investors to invest in a company will be impacted unless there is a possibility of receiving revenue through dividends.[261] If applying such a perspective, not having a clearly expressed profit purpose may thus impact the corporation's ability to gain financial support and investments.[262] However, as stated by for example Persson and Österman, the profit purpose of the corporation does not necessarily prohibit the corporation from considering other interests in its business operations, provided that such interests do not infringe on the fulfillment of the profit motive.[263] This perspective may also find support in corporate law. The Swedish Companies Act for example states that the business activities of a corporation might be conducted with other purposes than pure profit maximization, if explicitly provided in the company's articles of association.[264]

5.2 Corporate Social Responsibility and the Inclusion of Tax Matters

5.2.1 Theories on the Interrelation of CSR and Taxation

The interrelation between taxation and corporate responsibility has been a subject of debate among scholars. Avi-Yonah has been at the forefront of such

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[259] Friedman, Milton (1970), *The Social Responsibility of Business Is to Increase Its Profits,* N.Y. Times Magazine p. 32
[260] Bergström, Clas; Samuelsson, Per (2012), s. 24 ff.
[261] Bergström, Clas; Samuelsson, Per (2012), s. 51 ff.
[262] ibid
[263] Svernlöv, Carl; Persson Österman, Roger (2016), *Corporate Social Responsibility and Corporate Taxation,* p. 36
[264] ibid at p. 34

discussions, examining the connection between CSR and taxation in several articles.[265] Avi-Yonah concludes that engaging in strategic tax-reducing schemes for the sole purpose of achieving a more beneficial tax liability should not be accepted, as such behavior not only undermines the corporation's relationship with the jurisdiction in which it operates but has a negative impact on the state's ability to carry out essential functions of society.[266] He therefore claims that the corporation has a responsibility to contribute to society by paying a sufficient amount of tax and by not engaging in aggressive tax behavior.[267] It is the moral obligation of corporate managers to fulfill such a goal, rather than the implementation of additional legal instruments.[268]

Knuutinen argues in a similar manner, claiming that taxation is an important part of corporate social responsibility, as the implementation of inter-nation equity requires responsibility and fairness in tax competition.[269] Knuutinen views aggressive tax planning from the perspective of CSR, stating that aggressive tax planning can be defined as actions which are conducted within the realms of what is legal, but which do not meet the expectations and requirements of its stakeholders.[270] He claims that as long as the incorporation of CSR does not hinder appropriate and necessary corporate tax planning (for example to avoid issues of double taxation), including taxation in CSR efforts may be effective in meeting stakeholder expectations.[271]

The nexus between CSR and taxation has however been challenged on the basis that taxation does not derive from ethical and social norms, but rather that the obligation to pay taxes must clearly follow from the letter of the law.[272] Timonen supports such a view, arguing that corporate taxes are nothing more than a corporate expense which, in line with the primary profit

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[265] See for example: Avi-Yonah, Reuven S.. (2014), *Just say No: Corporate taxation and social behavior*
[266] Avi-Yonah, Reuven S., (2014), p. 27 ff.
[267] Avi-Yonah, Reuven S., (2008), p. 195; Hilling, Axel; Ostas, Daniel T. (2017), p. 126
[268] ibid
[269] Avi-Yonah, Reuven S., (2008), p. 195; Hilling, Axel; Ostas, Daniel T. (2017), p. 126
[270] Knuutinen, Reijo (2014), p. 37
[271] Knuutinen, Reijo (2014), p. 66
[272] Timonen, Pekka (2008), pp. 199-203; Hilling, Axel; Ostas, Daniel T. (2017), p. 126

maximization goal of the corporation, should be minimized. Therefore, the corporation must act with the best interest of its shareholders in mind.[273]

5.2.2 Defintions of Corporate Tax Responsibility and Responsible Tax Conduct

The definition and scope of responsible tax conduct or corporate tax responsibility may vary between corporations and jurisdictions. According to the OECD, a vital part of responsible tax conduct is complying with both the letter and the spirit of relevant tax laws.[274] In its Guidelines for Multinational Enterprises, the OECD defines corporate citizenship in the context of taxation as "[compliance] with both the letter and the spirit of tax laws and regulations in all countries in which they operate".[275] This includes determining the intention of relevant tax laws and "[interpreting] those tax rules consistent with that intention in light of the statutory language and relevant, contemporaneous legislative history."[276] Recognizing the importance of corporate taxes as a part of government revenue, the Guidelines state that a part of responsible tax conduct is refraining from conducting transactions where the tax result does not align with the transaction's underlying economic consequences.[277] The Guidelines also encourage corporations to incorporate tax in their tax risk management, including adopting tax policy principles which reflect tax transparency and compliance.[278]

Several definitions include the importance of corporate transparency and disclosure of relevant information in regard to taxation. KPMG, one of the world's largest accounting organizations, for example defines the concept of responsible tax as "taxation that is transparent, objective, ethical and reliable and that is based upon the principles of sustainability, for the common good

[273] Timonen, Pekka (2008), pp. 199-203; Hilling, Axel; Ostas, Daniel T. (2017), p. 126
[274] OECD (2011), *Guidelines for Multinational Enterprises,* p. 60; Hilling, Axel; Ostas, Daniel T. (2017), p. 154
[275] ibid
[276] ibid
[277] OECD (2011), *Guidelines for Multinational Enterprises,* p. 60
[278] Ibid at p. 60-61

of all stakeholders in the society".[279] This includes ensuring compliance with relevant tax regulations as well as contributing to required adjustments for the improvement of tax systems.[280] CSR Europe further states that important aspects of responsible tax behavior include aligning taxation with where value is created, publicly disclosing relevant information on tax matters and developing a tax strategy which reflects the corporation's fundamental values and attitudes towards tax.[281]

5.3 International Developments in regard to Responsible Tax Conduct

Although the extent and manner in which CSR may be incorporated in the tax strategies of multinational corporations may vary subject to opinion, there seems to be consensus on the fact that CSR and tax issues are at the very least becoming an increasingly interrelated concept. Apart from the regulatory developments aiming to combat aggressive tax planning, corporate responsibility in context of tax has also been encouraged by the media, investors and non-governmental organizations.[282] In addition, corporate responsibility in the context of tax management has seemingly become a topic of greater attention also amongst corporations. As pressure from stakeholder groups such as the public and institutional investors is increasing, many corporations are using reporting standards to disclose information on tax matters as well as including issues on taxation in their annual or sustainability reports or in 'Tax Responsibility' reports.[283]

[279] Kahraman, Abdulkadir (2017), *"Responsible Tax" Approach in Tax Governance,* KPMG; KPMG (2015), *Principles for Responsible Tax Practice*
[280] Kahraman, Abdulkadir (2017), *"Responsible Tax" Approach in Tax Governance,* KPMG; KPMG (2015), *Principles for Responsible Tax Practice*
[281] CSR Europe, *A Blueprint for Responsible and Transparent Tax Behaviour,* p. 5 and pp. 10-17
[282] See for example: Norges Bank Investment Management, *Tax and Transparency: Expectations Towards Companies* and Tax Justice Network (2015), *Ten Reasons to Defend the Corporate Tax*
[283] See for example: KPMG (2019), *Tax Transparency i Sverige 2018-2019*

5.3.1 Investor Initiatives

During recent years, institutional investors have started to place higher demands on corporations regarding their tax management. Recognizing the financial, reputational, legal and commercial risks that aggressive and inappropriate tax behavior may entail, more and more investors include matters of taxation in their investment analysis and decision-making processes.[284] The responsible investment platform Principles for Responsible Investment (PRI) has been particularly active in the area of responsible taxation. Through its investor guidance report 'Engagement Guidance on Corporate Tax Responsibility', it provides investors with information on how to identify and mitigate risks related to aggressive tax planning as well as recommendations on investor-company dialogue.[285] The guidance states that engaging in aggressive tax planning may expose corporations to earnings risk and governance complications, create risk to reputation and contribute to reduced public investments and other societal and macroeconomic risks.[286] The guidance was supplemented in 2017 with 'The Investors' Recommendations on Corporate Income Tax Disclosure', setting out a number of recommendations to improve disclosure related to corporate tax policy and governance and risk management.[287]

Large investors such as Norges Bank Investment Management and Nordea Asset Management have also engaged in the area of responsible tax practices and launched investor expectations and best practices.[288] Moreover, a large number of investors stated in a submission to the OECD that the country-by-country reporting of multinationals should be made public in order to increase transparency and provide essential information for investors in decision-making processes and investment analysis.[289]

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[284] See for example: PRI (2015), *Engagement Guidance on Corporate Responsibility.* See also: Nordea Asset Management (2014), *Responsible Corporate Tax Practices* and Norges Bank Investment Management, *Tax and Transparency: Expectations Towards Companies*

[285] PRI (2015), *Engagement Guidance on Corporate Tax Responsibility,* p. 2 ff.; PRI (2018), *Evaluating and Engaging on Corporate Tax Transparency: An Investor Guide,* p. 5

[286] PRI (2015), *Engagement Guidance on Corporate Tax Responsibility,* pp. 7-10, PRI (2018), *Evaluating and Engaging on Corporate Tax Transparency: An Investor Guide,* p. 5

[287] UN PRI (2017), *The Investors' Recommendations on Corporate Income Tax Disclosure,* p. 1 ff

[288] Nordea Asset Management (2014), *Responsible Corporate Tax Practices,* and Norges Bank Investment Management, *Tax and Transparency: Expectations Towards Companies*

[289] Cobham, Alex (2020), *Investors Demand OECD Tax Transparency*

5.3.2 Voluntary Tax Reporting Requirements

The growing focus on tax responsibility is also evident within the corporate sector and many corporations are voluntarily disclosing information related to their tax payments in annual reports, sustainability reports or 'tax responsibility' reports.[290] In addition, corporations may use reporting standards or guidelines in order to communicate on important sustainability issues. Although the application of such standards is voluntary, the expectations or demands of relevant stakeholders may require corporations to follow them. There are a number of reporting standards which may be applicable on multinational corporations. The most common standards related to the disclosure of tax matters are the 'Global Reporting Initiative Sustainable Reporting Standards' and the 'Dow Jones Sustainability Index'.[291]

5.3.2.1 Global Reporting Initative

The Global Reporting Initiative is one of the most widely accepted international corporate responsibility reporting guidelines. Established in 1997, the GRI Sustainable Reporting Standards (GRI Standards) uses disclosure standards within sustainable development in order to help companies identify and mitigate risks related to sustainability issues and to encourage accountability within the corporate sphere.[292]

Although earlier versions of the guidelines have addressed issues of taxation through the inclusion of corporate payments to governments, a new version of the guidelines containing an increased emphasis on the reporting of tax was published in 2019.[293] The standard, referred to as 'GRI 207: Tax 2019' is the first sustainability standard including public country-by-country reporting of tax payments and requires companies reporting according to GRI's standards to report on the company's tax strategy and tax payments in each jurisdiction

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[290] KPMG (2019), *Tax Transparency i Sverige 2018-2019*
[291] See example: KPMG (2019), *Tax Transparency i Sverige 2018-2019*
[292] Gordon, Kathryn (2001), The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison, p. 9
[293] GRI Standards (2019), *GRI 207: Tax 2019*

in which the corporation operates.[294] The new standard aims to provide the identification and mitigation of risks in the tax strategies of corporations as well as encourage accountability in regard to tax payments.[295]

5.3.2.2 Dow Jones Sustainability Index

The Dow Jones Sustainability Index (DJSI), launched in 1999, examines the sustainability performance of leading companies based on environmental, social and economic performance.[296] The Index includes a specific tax strategy criterion, evaluating the transparency of corporations in regard to taxation and taxation risk. The aim of the criteria is to assess how the corporation addresses risk management in regard to taxation.[297] In 2018, the Index added a new criterion on tax management, which seeks to determine whether the corporation's reported tax rate is in accordance with industry expectations.[298] The Index states that reports of low tax rates due to involvement in complex tax arrangements may be an indication of higher sources of reputational and organizational risk and damage.[299]

5.3.3 Trends Related to Responsible Tax Conduct

According to a recent study conducted by KPMG, there is an increasing trend of voluntary reporting in respect to taxation in recent years.[300] A 2019 study presents a benchmark of the tax management of large as well as government-owned Swedish companies.[301] Using publicly available information retrieved from the annual reports, websites and possible sustainability reports of the benchmarked companies, the study examines to what extent Swedish

[294] GRI Standards (2019), *GRI 207: Tax 2019*
[295] ibid
[296] KPMG, *Dow Jones Sustainability Index*
[297] RobecoSam (2018), *DJSI 2018 Review Results,* p. 5
[298] ibid
[299] ibid
[300] KPMG (2019), *Tax Transparency i Sverige 2018-2019,* p. 3
[301] Publicly listed companies on Large Cap OMXS, government owned companies with an ownership of at least 50 per cent and unlisted large companies among companies with the highest turnover in Sweden were included in the study. For all categories the years of 2018-2019 were examined. See: KPMG (2019), *Tax Transparency i Sverige 2018-2019,* p. 7

companies report on tax as a sustainability issue against the background of factors driving the development towards increased transparency and tax disclosure.[302] According to the study, such factors include legal and regulatory changes, increased scrutiny from the media and increased pressure from investors.[303]

The study concluded that there is a positive trend especially amongst large publicly listed Swedish companies in regard to reporting on issues of taxation.[304] In addition, a majority of the companies had published a public tax policy stating that they viewed matters of taxation as an important part of corporate sustainability and that they took a clear stance against engaging in aggressive tax planning behavior, on their website.[305]

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302 KPMG (2019), *Tax Transparency i Sverige 2018-2019,* p. 1 ff.
303 ibid
304 ibid at p. 10 ff.
305 ibid at p. 3 ff. and p. 12 ff.

6 Analysis

6.1 National and International Regulations on Aggressive Tax Planning

Although domestic and international regulations have emerged in order to counteract aggressive tax planning strategies by multinational corporations, corporate tax avoidance prevails on a large scale. As illustrated by the Tax Justice Network, the widespread prevalence of aggressive tax planning and corporate tax avoidance has resulted in the deprivation of government revenues on a massive scale. As corporate taxes play an essential role in the public finances of all countries, tax avoidance not only negatively impacts sources of funding for crucial parts of society such as education and healthcare, but also has an effect on the goods and services necessary for the execution of corporate business, such as an adequate legal and administrative system and the provision of infrastructure. For low-income jurisdictions, this is of course even more crucial, as the lack of government revenue may lead to critical underfunding of public investment and may undermine such countries' ability to achieve economic growth and sustainable development. In addition, the aggressive tax planning activities conducted by multinational corporations may also have a severe effect on tax competition between countries. As governments attempt to attract foreign investment, the reduction of corporate tax rates and granting of tax-deductible allowances is encouraged. If jurisdictions are collecting less tax from corporations, governments will have to replace this income with other taxes, for example personal income tax or consumption tax. This may in turn have negative effects on the distribution of wealth and the achievement of tax equality. In addition, it may also encourage the establishment of tax shelters, in which individuals legally may form shell companies to protect their income from high tax rates and tax liability. An individual could therefore for example form a shell company and claim that their earnings are corporate income.

The strategic and sophisticated ways in multinational corporations are able to engage in aggressive tax planning strategies and avoid corporate taxation is largely facilitated by current international tax rules based on the separate entity and arm's length principles. As opposed to taxing multinational corporations as consolidated groups, current international tax rules treat each entity of the group as a separate taxable entity, and transactions between such entities are taxed in accordance with what is regarded a fair market value for goods and services as would have been accepted by unrelated parties. However, coordination between tax authorities is far from perfect and corporations are still able to determine their effective taxation based on other factors than where their real economic activity takes place and where they create genuine value. In turn, multinational corporations are therefore free to design their tax strategies in ways that can minimize or even eradicate their corporate tax burden completely.

As reviewed in the previous chapters, new and improved regulatory standards on both national and international levels have attempted to combat the prevalence of aggressive tax planning and to close regulatory loopholes in the international tax system, foremost through the implementation of the BEPS Action Plan. Such initiatives are important and have been somewhat effective in promoting international coherence of corporate taxation and ensuring alignment between corporate taxation and real economic activity. Through general and specific anti-avoidance rules, countries have been given tools to counter the most prevalent aggressive tax planning schemes such as the abuse of bilateral tax treaties, engaging in intercompany credit arrangements with unusually high interest rates, artificially reducing the cost of goods and services or altering the definition of permanent establishment to reduce or avoid tax liability.

Attempts to combat aggressive tax planning have also been made through coordinated approaches within the EU. The EU has been active in the coordination of economic policies and the development of anti-avoidance measures through initiatives such as Anti Tax Avoidance Directive (ATAD) and increased requirements on country-by-country reporting. Moreover, through the adoption of the DAC 6 Directive requiring intermediaries to under certain circumstances disclose information on cross-border transactions, the EU has provided tax authorities with instruments for early detection of risks of aggressive tax planning. The regulations thus improve the execution of audits and facilitate measures for EU jurisdictions to adapt their tax regulations in order to prevent inappropriate transactions.

However, despite complex legislative initiatives aiming to patch up loopholes and inconsistencies in the international tax system, corporations are still managing to engage in sophisticated tax planning and profit shifting schemes. As evidence shows, the myriad of anti-avoidance rules implemented across tax systems are evidently vulnerable to manipulation and may be hard to apply in practice. For example, in matters of transfer pricing, determining which price accurately reflects as "fair market value" in accordance with the arm's lengths principle may prove difficult for both multinational corporations and tax authorities. In addition, although general anti-avoidance rules have emerged to counter tax avoidance strategies which do not fall within the limited scope of specific anti-avoidance rules, proving that the taxpayer's sole or main purpose was obtaining a tax benefit (as is a requisite for the application of GAAR in for example Swedish legislation), may be problematic.

The problems with the current international tax system are also fueled by the fast developing progress within the digital economy, as large digital companies are able to take advantage of obsolete and poorly adaptable international tax rules based on the requirement of physical presence, and loopholes in domestic tax rules. In such, large digital companies are able to earn profits from customers and users worldwide without that income being subject to tax in the countries from which they are derived. The international community has been active in finding solutions to such challenges in recent years, foremost through the current OECD negotiations on a digital tax as well as unilateral interim digital services taxes implemented on national levels (for example in France). However, the implementation of effective legislation is slow, and corporations are still able to funnel large amounts of income to tax havens where they go untaxed.

Efforts have been made by interstate bodies to combat the use of such tax havens, for example through EU's list of 'non-cooperative tax jurisdictions' (the EU Tax Haven Blacklist). In addition, countermeasures have also been taken on domestic levels, as countries like Ireland have adopted unilateral measures to close regulatory loopholes and prevent the shifting of profits to low or no-tax jurisdictions. However, as is evident by the revelations in the Panama Papers and Luxembourg Leaks, the use of such low-tax jurisdictions remains high. In addition, non-traditional tax havens, including high-income countries such Ireland, Luxembourg and Malta are attracting significant tax base and are managing to raise more corporate tax revenue from multinational corporations in relation to their GDP than high-income countries with higher statutory corporate taxes. Although legislative initiatives as well as bilateral tax treaties aim to control and regulate issues relating to tax havens, this may in addition prove difficult, as jurisdictions rely on the bilateral exchange of information authorized under tax treaties to appropriately tax multinational corporations on their profits. Tax havens which offer the comfort of secrecy and discretion might thus severely impair the proper execution of taxation as well obstruct international anti-avoidance efforts.

6.2 The Possibilities of A Unitary Tax

As the above discussion shows, the international tax system is struggling to keep up with the developments within international business despite new regulations and an increased focus on challenges arising from the digital economy. Anti-avoidance regulations implemented at national and international levels have managed to interfere with many of the more common aggressive tax strategies, however, the implementation of effective legislation is slow and, in some cases, inadequate. As current anti-avoidance rules are merely patching up an existing system with mediocre stopgap fixes rather than structurally reforming the system with long-term, comprehensive and holistic solutions, it is thus clear that there is a need for a reformation of international tax rules. Such a change of approach should disregard current principles of international tax law, such as the separate entity and arm's length principles, that continue to facilitate aggressive tax planning and corporate tax avoidance.

One solution to the problem could be a unitary approach to corporate taxation. Through such an approach, the traditional tax treatment of multinational corporations would be dissolved, and corporate groups would instead be taxed on a consolidated level. As opposed to the separate entity principle, the multinational corporate group would be treated as a single business entity subject to tax based on its overall global profit. In similarity with the proposal on a common consolidated corporate tax base issued by the EU, the group's consolidated profits would then be apportioned out to each jurisdiction in which it operates on the basis of the amount of actual value created and genuine economic activity that actually took place in that jurisdiction. Thereby, even if a corporation would merely have a box office or a cash box in a tax haven, only a small portion of the corporation's global income would be taxed at a low rate (or not at all) in the tax haven in accordance with the apportionment formula.

Already proposed within the EU, such a solution, if properly implemented, could be beneficial to both corporations and tax authorities. Firstly, it would simplify international tax rules, as many of the specific and general anti-avoidance rules would be replaced with a harmonized international tax system targeting complex deductions and regulatory loopholes. This would in turn significantly reduce compliance costs for both corporations and tax authorities as taxable profits would not need to be calculated for each entity of the corporate group. In addition, it would promote greater certainty in the international tax system by reducing subjective and ad hoc decisions. More importantly, the introduction of a unitary approach to corporate taxation would reduce incentives for multinational corporations to engage in artificial tax schemes and would reduce profit-shifting to low-tax jurisdictions and tax havens. This in turn would naturally increase important tax revenues.

However, the implementation of a worldwide unitary tax system may be considered a near utopian solution. Firstly, it would require the establishment of an apportionment formula. Although such a formula has already been proposed by the EU, a one-size-fits-all solution that would be equally appropriate for developing and developed countries may be hard to create. It would further require the approval and participation of states worldwide, which may prove difficult as taxation is so closely connected to the sovereignty of each and all states. Moreover, a unitary tax approach would require a harmonization of accounting principles used by multinational corporate groups. Although corporate groups would be subject to tax on a consolidated level, the profits and expenses recorded by the corporation would differ depending on which accounting standards would be used. As the IFRS accounting standards apply for EU listed corporations, such an issue does not obstruct the implementation of the EU CCCTB. However, as long as jurisdictions are using different accounting standards such as the US GAAP and the IFRS, a unitary tax approach would offer scope for tax planning as corporations are free to determine the level of profits recorded by strategically choosing the standards that best suit its tax planning strategy.

In addition, a unitary tax approach would also require the harmonization of rules defining multinational corporate groups. As the definition of a corporate group may differ between jurisdictions, entities within the group may be regarded as a subsidiary in one jurisdiction, but not fulfil the requirements in another jurisdiction. For example, different jurisdictions may for example define “controlling influence” over a subsidiary differently or have a lower or higher threshold of ownership than 50 per cent. A harmonization of such rules is thus essential in order to determine which entities would be included in the consolidated taxation of the corporate group. If not, the mismatch between rules could offer scope for tax planning, as corporate groups could establish joint ventures or other types of partnerships and record or allocate its profits in entities outside of the consolidated tax base. Such profits would therefore have to be included in the corporation's tax base. The corporate group could otherwise act in accordance with applicable legislation and general accepted accounting principles, but not in accordance with what is regarded as a good tax citizen. Finally, the implementation of a unitary tax system would require a significant reformation of current international tax rules, which would likely be a costly and time-consuming effort. As such, the prospective of such an international reform being implemented in the near future is slim.

6.3 Self-Regulation as a Possible Alternative

A more plausible alternative that aligns with the recent trends of responsible tax conduct is self-regulation by multinational corporations, in which corporations act in accordance with soft law standards on responsible tax conduct (such as the OECD Guidelines for Multinational Enterprises) and expectations from relevant stakeholders. As pressure from such stakeholders, for example civil society and institutional investors, is increasing, such expectations could be an effective incentive for corporations to abstain from aggressive tax behavior and ensure that their corporate taxation aligns with genuine economic activities and value creation.

The prospects of such self-regulatory measures being effective may at first glance seem slim. As corporations have a responsibility to comply with the purpose of profit maximization prescribed by company law in many jurisdictions, the interrelation between taxation and corporate responsibility may seem to present a conflict of interest. As taxes are like any other expense, minimizing taxes would thus maximize profits for its shareholders. It may therefore seem unlikely that corporations would voluntarily engage in responsible tax conduct and avoid legal opportunities to lower their tax liabilities. By viewing taxation as a part of corporate responsibility (which in turn would entail abstaining from any involvement in aggressive tax planning), some might argue that the corporation would fail to uphold its economic responsibility of maximizing value for its shareholders.

However, as concluded by Persson and Österman, the purpose of profit maximization does not necessarily prohibit corporations from taking other interests into consideration, as long as such interests do not infringe on the profit motive. In addition, there is seemingly an increasing understanding that the long-term profits of corporations to some extent may be reliant upon its reputational image. As has been apparent in the cases for example Google and Amazon, corporations engaged in legal, yet aggressive tax planning strategies have been exposed to significant reputational damage due to aggressive tax behavior considered highly controversial in the public eye. Such damage to the corporation's reputational image may naturally also negatively impact the corporation's financial success due to loss of revenue and damage to the overall brand value of the corporation.

Given that the tax management of corporations may very well impact its financial results, it seems that the traditional and formalistic view of taxation may be beginning to fade, and the notion that maximizing shareholder value is the equivalent of minimizing tax expenses may no longer be a valid argument. As public scrutiny and negative media coverage regarding the tax management of large multinational corporations is increasing, there is a growing need for corporations to be able to defend international tax planning arrangements and explain how these align with corporate sustainability strategies in order to protect themselves from public smearing and reputational consequences. In addition, soft law standards and international principles such as the OECD Guidelines for Multinational Enterprises are now placing higher demands on corporations to act responsibly regarding their tax planning strategies. This includes not only acting in accordance with both the letter and the intention, or spirit, of the relevant legislation but also including tax matters as a potential reputational and financial risk. Hence, it is clear that matters of taxation are becoming as relevant in the risk management strategies of multinational corporations as traditional aspects of CSR, such as issues related to the environment, corruption or human rights.

Moreover, although new regulatory anti-avoidance measures presented at national and international levels may be nothing more than band-aid solutions in eradicating aggressive tax planning, multinational corporations may be facing an increasing legal risk in the form of potential lawsuits, fines and tax disputes as a result of regulatory developments. In addition, as requirements on transparency is increasing through initiatives such as the country-by-country reporting and the 'DAC 6' Directive, it is likely that the number of inquiries and tax investigations launched at multinational corporations will only increase. As is apparent in the cases of Apple and Chevron, this may in turn result in financial consequences for the corporation, through increased expenses connected to legal disputes and compliance. In addition, as countries such as Ireland are becoming more active in closing regulatory loopholes in domestic legislation, corporations may also suffer earnings risks. As has been illustrated in the case of Apple, earnings based on tax-optimizing strategies may be more volatile in regard to such regulatory change.

The increasing pressure from the investment community may also serve as an incentive for corporations to engage in self-regulatory measures. Through initiatives proposed by for example the PRI, institutional investors are starting to demand action on corporate aggressive tax planning, claiming that corporations must conduct their business in accordance with standards on corporate social responsibility. In addition to the increasing requirements on transparency presented across the OECD and the EU, investors are thus now enabled to calculate financial risks related to tax issues based on the tax information and strategies of corporations. As this may in turn impact the company's ability to gain financial support and investments, corporations are increasingly incentivized to integrate a CSR approach in their tax planning strategies. Combined with the inclusion of tax management disclosure criteria in sustainability reporting mechanisms such as the GRI and DJSI, it is thus evident that there is a changing landscape within the field of tax responsibility which may only increase corporation's exposure to reputational risks in regard to their tax planning strategies. It is likely that this will have an encouraging effect on voluntary self-regulation and tax transparency.

Against the aforementioned background, it is clear that multinational corporations may not be able to conduct their business strictly on the basis of legal compliance without taking into consideration expectations of relevant stakeholders and the risk of reputational and financial consequences. This is well illustrated in the recent Tax Transparency report issued by KPMG, which shows that there is seemingly an increasing number of corporations which choose to self-regulate in regard to tax management, by disclosing relevant tax information and publicly announcing that they will abstain from aggressive tax behavior. This is evident when considering the increasing number of especially large, publicly listed companies that have committed to not engaging in aggressive tax planning in tax policies published on their websites or in their annual or sustainability reports. In such, if the majority of large multinational corporations would include issues of taxation in their risk management strategies and comply with the standards on responsible tax conduct outlines in the OECD Guidelines for Multinational Enterprises, the prevalence of aggressive tax planning would naturally eventually cease to exist. If corporations voluntarily abstain from engaging in aggressive tax behavior, the need for anti-avoidance measures on regulatory levels would not be necessary.

However, the question remains if the self-regulatory measures by multinational corporations alone could be effective in counteracting aggressive tax planning. For corporations already engaging in CSR efforts through compliance with the law and actions above such legal obligations in accordance with goals on sustainable development and good corporate citizenship, this may be a good solution. However, corporations that for example do not consider their reputational risk severe enough, may not be willing to disregard legal tax planning opportunities, even if engaging in such arrangements would be subject to heavy public scrutiny. In addition, encouraging universal and voluntary compliance with stakeholder expectations may prove difficult. Despite investor and public pressure, disclosing sensitive information on for example tax payments on country-by-country levels may expose the corporation to increased scrutiny from governments and the media, which in turn may lead to commercial and competitive disadvantages. Finally, as multinational corporations by definition operate transnationally, finding a universal definition of what constitutes corporate tax responsibility or responsible tax conduct may be hard. As company law and business ethics may differ depending on which country the corporation operates in, some corporations may therefore define the concept of being a "good tax citizen" as simply complying with relevant tax laws.

Nevertheless, considering the current state of the international tax system and in lack of an implementation of common and unitary tax rules, self-regulatory measures performed by multinational corporations can clearly serve as an effective instrument in combating aggressive tax planning. If self-regulation increases and multinational corporations start viewing responsible tax management as a part of their corporate responsibility, the need to prevent aggressive tax planning through legislation will naturally decrease. However, although there is seemingly a positive trend within the field of responsible tax management or corporate tax responsibility, encouraging a universal effort from multinational corporations to operate in a responsible manner in regard to their tax planning, or in regard to any aspect of corporate responsibility for that matter, is probably a near impossible task. As such, the eradication of aggressive tax planning through self-regulation by multinational corporations alone is likely not a plausible outcome. However, as the current design of the international tax system is clearly not adept to sufficiently combat aggressive tax planning, self-regulation by multinational corporations in regard to tax management is evidently a vital component. It is thus clear that the self-regulatory measures taken by corporations in the form of compliance with soft law standards on taxation such as the OECD Guidelines for Multinational Enterprises and compliance with increased public and investor pressure in regard to transparency and responsible tax conduct is a necessary complement to current international tax rules on aggressive tax planning.

7 Conclusion

As the abovementioned examination illustrates, aggressive tax planning remains a vast and global issue. National and international regulations aiming to combat the prevalence of aggressive tax planning have emerged as a result, first and foremost through the adoption of the BEPS Action Plan as well as the implementation of specific and general anti-avoidance rules and increased requirements on transparency and corporate tax disclosure. Although such regulations to some extent have been effective in closing regulatory loopholes, current international tax rules based on the separate entity principle and the arm's length principle continue to facilitate corporate tax avoidance, leading to severe effects on sources of funding for essential functions in society such as healthcare, education and infrastructure as well as impacts on the ability of countries to achieve sustainable development. In addition, tax competition between countries have been exacerbated by the aggressive tax planning strategies of multinational corporations as governments are attempting to attract foreign investment, fueling the reduction of corporate tax rates worldwide.

The continuing effects of corporate tax avoidance illustrates the pressing need for a reformation of current international tax rules. Although a unitary tax approach similar to the CCCTB proposal issued by the EU would solve many of the issues caused by the international tax systems as it would subject multinational corporate groups to tax on a consolidated basis, a one-size-fits-all solution would be difficult to create and would require the harmonization of many fundamental principles of corporate tax law. In addition, implementing such a vast reformation of the international tax system would likely be a significantly time consuming and costly process. A more plausible yet still effective alternative is self-regulation by multinational corporations. As public and investor pressure on multinational corporations to act responsibly in regard to their tax management is rapidly increasing and soft law standards on responsible tax conduct are placing higher demands on corporations to act in accordance with not only the letter of the law, but also the intention of those laws, multinational corporations are becoming increasingly aware of the consequences they may suffer from engaging in aggressive tax behavior. In such, increasing stakeholder expectations may work as an incentive for corporations to act in accordance with what is regarded as ‘good tax citizenship’. It is thus evident that self-regulatory measures in regard to responsible tax conduct is an effective instrument in combatting the prevalence of aggressive tax planning. Although self-regulation alone may not be sufficient to eradicate aggressive tax planning, it clearly is a crucial complement to existing international tax regulations.

In light of recent events, the developments of international tax following the current Covid-19 pandemic will be interesting to follow. As governments are scrambling for resources to restore economic growth and manage critical underfunding of public investment, it is likely that the focus on reforming international tax rules and counteracting corporate tax avoidance and aggressive tax planning will only increase. As previously mentioned, actions have already been taken by countries such as Denmark, by announcing that corporations registered in tax havens will not be eligible for the financial aid distributed to mitigate the economic effects of the pandemic. Although the corporate sector is in no way responsible for the Covid-19 crisis and the demobilization of the global economy, it is likely that the current pandemic will at the very least create a more robust consensus on the importance of responsible tax conduct and that higher demands from governments and civil society will place multinational corporations under increased pressure to engage in self-regulatory measures in regard to their tax planning strategies.

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