Fair Taxation and Corporate Social Responsibility

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Axel Hilling and Matti Kukkonen (eds)

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Tax Transparency – How to Report Responsible Choices

Associate Professor Axel Hilling, Lund University, & EU Affairs
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1. Introduction[1]

1.1. Cooperating for a sustainable society

In September 2015, the 193 member countries of the UN General Assembly endorsed the UN's Sustainable Development Goals (SDG). The SDGs, which supersede the UN's Millennium Development Goals, encompass 17 sustainable development goals and 169 targets, to be achieved globally before the end of 2030 under the rubric of the 2030 Agenda for Sustainable Development.[2] Although the success of the 2030 Agenda eventually depends on a positive engagement of the global society, its individuals and organizations, the ulti-

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1. Appreciation goes to Ragnar Söderbergs's Foundation for financial support to complete this book chapter.
2. United Nations Resolution 70/1, adopted by the General Assembly on 25 September 2015. Transforming our World: the 2030 Agenda for Sustainable Development.

mate formal responsibility for the development and maintenance of a sustainable society falls on individual governments.[3]

The United Nations Conference on Trade and Development (UNCTAD) estimated the annual cost of reaching the 2030 Agenda at between USD 5,000 and 7,000 billion, more than half of which is required for developing countries alone.[4] Put in perspective, these amounts are huge in relation to the World's total official development assistance (ODA) of USD 146.6 billion in 2017,[5] but small in relation to the World's total gross domestic product (GDP) of USD 80,738 billion in 2017.[6] These perspectives indicate that certainly there are enough global resources to finance the Agenda, but it will be challenging to collect these resources and make them work for sustainable development where they are most needed.[7]

There are primarily two ways in which a company can address the financial needs for the fulfilment of the Agenda: by direct investments in a country; and by financing with a share of its value-added, which is distributed by the company, its employees, and its shareholders as tax revenues to governments. Of course the law regulates payment of taxes for companies, their employees, and their shareholders. In that sense, the collection of tax revenues is the responsibility of each government. Notwithstanding great efforts made nationally and internationally to create and maintain robust tax regulations, experience shows that a globalized environment with heterogeneous tax regulations creates endless opportunities for international tax planning, which, in its most aggressive form, may reduce a tax sub-

3. Ibid., paragraph 63.
4. UNCTAD. 2014. World Investment Report 2014. Investing in the SDGs: An Action Plan. Geneva: United Nations Conference on Trade and Development.
5. OECD, 'Development aid stable in 2017 with more sent to poorest countries', at <http://www.oecd.org/development/development-aid-stable-in-2017-with-more-sent-to-poorest-countries.htm> (visited 7 March 2019).
6. World Bank Group, GDP (current US$), at <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD> (visited 7 March 2019).
7. See e.g. SDG Index and Dashboard for an overview of the progress, on national bases, of the 2030 Agenda: <http://www.sdgindex.org/> (visited 28 March 2019).

ject's taxes to almost nothing.[8] The dependency of governments on robust tax systems was evident in the aftermath to the financial crisis of 2007–2008. Tepid economic growth made it difficult to repair strained public finances by raising taxes, leading to public debt across the OECD—increased from an average 73 percent of GDP in 2007 to 111 percent in 2014.[9] This development raised opinions about the necessity of just contributions to public finances, leading to ambitious regulatory anti-tax-avoidance initiatives by the G20/OECD and the European Union.[10]

1.2. Corporate income taxation and sustainable development

Aggressive tax planning poses serious challenges on the public finances of developed countries, albeit less serious than the harm it imposes on developing countries. According the International Monetary Fund, the long-term revenue losses from base erosion and profit shifting—measured as ratio of overall revenue losses divided by GDP —is more than three times larger in developing countries than it is in OECD countries.[11] Oxfam estimates that developing countries lose around USD 100 billion annually, 'more than enough to provide education for all of the 124 million children currently out of school, and to pay for health interventions that could save the lives of six million children'.[12] Needless to say, the shifting of profit from public finances to private wealth through aggressive tax planning bolsters growing

8. See e.g. Ingramam, Christopher, 'Amazon paid no federal taxes on USD 11.2 billion in profits last year', *Washington Post*, 16 February 2019, at <https://www.washingtonpost.com/us-policy/2019/02/16/amazon-paid-no-federal-taxes-billion-profits-last-year/?noredirect=on&utm_term=.0aabb1ace803> (visited 11 April 2019).
9. Elbra, Ainsley & Eccleston, Richard, *Introduction: business, civil society and the 'new' politics of corporate tax justice: paying a fair share?* (Elgar Politics and Business, 2018).
10. OECD, *Addressing Base Erosion and Profit Shifting* (OECD Publishing, 2013), and European Commission, 'Anti Tax Avoidance Package', at <https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en> (visited 7 March 2019).
11. Crivelli, Ernesto, De Mooij, Ruud & Keen, Michael, 'IMF Working Paper, Base Erosion, Profit Shifting and Developing Countries', WP/15/118, 2015.

inequality globally and nationally. Since 2015, the richest 1 percent of the world has owned more wealth than the remaining 99 percent, and today the eight richest people on earth have more wealth than the poorest half of the world.[13]

If one examines the effects of aggressive tax planning in relation to the goals in the Agenda, it is evident that the two are in conflict. Polarizing wealth to the few at the cost of financing sustainable development for the many—by financing healthcare and education, for example—is in direct conflict with several of the SDGs.[14] Research suggests that such significant implications, caused by aggressive tax planning, cannot be effectively dealt with solely by international aid inflows, but that the problem must be solved at its root.[15] Thus, the fight against aggressive tax planning is key to the fulfilment of the Agenda, which makes corporate income taxation a vital area within global and national endeavours toward a sustainable society.

1.3. Shared responsibility

The fundamental Rule of Law is often interpreted as placing the sole responsibility for a well functioning and robust tax system on individual governments—including the responsibility to close opportunities for aggressive tax planning.[16] History shows, however, that such a

12. Aubry, Manon, Dauphin, Thomas, 'Opening the Vaults: the use of tax havens by Europe's biggest banks', *Oxfam International & Fair Finance Guide International*, March 2017, p. 10.
13. Hardoon, Deborah, An Economy for the 99%, it is time to build a human economy that benefits everyone, not just the privileged few, Oxfam International, January 2017.
14. See especially: Sustainable Development Goal 3, Ensure healthy lives and promote well being for all at all ages; Sustainable Development Goal 4, Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all; and Sustainable Development Goal 10, Reduce inequality within and among countries.
15. Curtis, Mark, and O'Hare, Bernadette, Lost Revenues in Low Income Countries, Curtis Research, July 2017.
16. See e.g. Cooper, Graeme S. Conflicts, Challenges and Choices—the Rule of Law and Anti-Avoidance Rules, in Cooper, Graeme S. (ed), *Tax Avoidance and the Rule of Law* (IBFD, 1997), pp. 13–50.

polemic relationship between taxpayers and government (derived from the idea that taxes are private burdens—a perspective that legitimises self-serving interpretations of tax legislation) makes way for aggressive tax planning. Thus, the sustainable aspiration for robust tax systems will likely require less polarization and greater cooperation between governments and taxpayers.[17] In essence, a higher level of cooperation would require that taxpayers interpret and apply tax law in the way that best mirrors the intent of their government, rather than employing a self-serving interpretation and application. Such cooperation is consistent with UN's pledge to foster 'an ethic of global citizenship and shared responsibility'.[18]

A corporation that voluntarily resists the self-serving option of aggressive tax planning for the sake of sustainability may reduce its profits and receive a competitive disadvantage in relation to corporations that choose not to cooperate with the goal of sustainability.[19] To compensate for this potential disadvantage, several civil society initiatives have initiated reporting systems to accredit corporations with sustainable tax policies.[20] This tax transparency accreditation can add value to the corporation and make it attractive for it to act sustainably. Thus, a corporation that does not have a transparent, sustainable tax policy may be decreasing its own value, potentially making it unprofitable not to cooperate with the government in regard to aggressive tax planning. As a result, campaigners for just taxation and sustainability have positioned tax transparency as a key issue in the fight for tax justice and against aggressive tax planning.[21]

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17. See e.g. Hilling, Axel, Ostas Daniel T., *Corporate Taxation and Social Responsibility* (Wolters Kluwer, 2017), pp. 150–155.
18. United Nations, Resolution adopted by the General Assembly on 25 September 2015, 70/1. Transforming our world: the 2030 Agenda for Sustainable Development, paragraph 36.
19. Dietsch, Peter, 'Asking the Fox to Guard the Henhouse: The Tax Planning Industry and Corporate Social Responsibility', *Ethical Perspectives* 18, 2011, pp. 341–354.
20. See especially, Fair Tax Mark, CSR Europe, and Global Reporting Initiative (GRI), all discussed in Section 5.
21. See e.g. Cobham, Alex, Country by country reporting for the Sustainable Development Goals, August 2018, at <https://www.taxjustice.net/2018/10/25/country-

1.4. Purpose and outline

With few exceptions, contemporary legal research on tax and sustainability either criticizes the subject area[22] or focuses on policy discussions regarding relevant legislative initiatives—anti-tax avoidance regulations for example.[23] The purpose of this paper is somewhat different; it is a relatively descriptive chapter with three goals: to explain why aggressive tax planning is a sustainability issue, the difficulty of meeting challenges posed by aggressive tax planning by traditional legal measures, and how tax transparency may be a more efficient tool for addressing that issue. In addition, it illustrates and explains the current movements toward sustainable corporate taxation through tax transparency.

Sections 2 and 3 explain how tax legislation unavoidably provides opportunities for aggressive tax planning and how governments try to fight it with complex anti-tax-avoidance rules and rules for the exchange of information—usually with limited success. Section 4 discusses the necessity of governments and taxpayers cooperating on tax issues in order to meet the challenges of the 2030 Agenda. Section 5 presents public and private initiatives for tax transparency, with special focus on the EU's draft on public country-by-country reporting (CBCR), Fair Tax Mark, and CSR Europe's Blueprint for Responsible and Transparent Tax Behaviour. Summary and conclusions are presented in Section 6.

2. Opportunities for aggressive tax planning

Aggressive tax planning is not a legal term; it is a term used to communicate a type of action that falls outside the traditional terminology of tax planning, tax avoidance, and tax evasion. *Tax planning* is the efficient application of tax law in accordance with legal intent.

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by-country-reporting-for-the-sustainable-development-goals/> (visited 7 March 2019).

22. See, e.g. Datt, Kalmen H., 'To shame or not to shame: That is the question', *eJournal of Tax Research*, vol. 14, 2016, pp. 486–505.

23. See e.g. Koerver Schmidt, Peter & Buhmann, Karin, 'Taxation, General Anti-Avoidance Rules and Corporate Social Responsibility', Chapter 8 in this book.

Tax avoidance is a legal term, which generally captures actions that follow the letter of the law, but is contrary to the spirit of the law. Such actions are deemed void in the legislation, but unlike *tax evasion*, which targets fraudulent transactions, they are not criminal.[24] *Aggressive tax planning* is conduct not covered by existing anti-tax avoidance legislation, but leads to a result that is in conflict with the intent of legislature and/or generally accepted international tax principles.[25] The tax strategies of several US multinational enterprises (MNEs), such as Amazon and Apple, have allowed them to pay relatively low taxes[26], but these strategies have been outside the scope of existing anti-tax avoidance legislation. (They are challenged, however, by state aid regulations within EU competition law[27]). Thus, aggressive tax planning can be pictured as tax avoidance outside the scope of anti-tax avoidance legislation.

The regulatory conditions for international tax planning often result from a government's tax incentives to attract foreign investments, usually referred to as 'the race to the bottom'. In the most extreme cases, governments turn jurisdictions into tax havens,[28] but

24. See e.g. Christians, Allison, 'Distinguishing tax avoidance and evasion' in Hashimazade, Nigar & Epifantseva, Yuliya, *The Routledge Companion to Tax Avoidance Research* (Routledge, 2017), pp. 417–429.
25. The European Commission defines aggressive tax planning in the following way: 'Aggressive tax planning (ATP) consists in taxpayers' reducing their tax liability through arrangements that may be legal but are in contradiction with the intent of the law. ATP includes exploiting loopholes in a tax system and mismatches between tax systems. It may also lead to double non-taxation or double deductions'. European Commission 2017 (<http://www.europarl.europa.eu/cmsdata/150511/5%20-%2004%20european-semester_thematic-factsheet_curbing-agressive-tax-planning_en.pdf>).
26. According to the European Commission, Apple paid 0.005% tax on European profits in 2014.
27. See: 'State aid: Commission finds Luxembourg gave illegal tax benefits to Amazon worth around €250 million', at <http://europa.eu/rapid/press-release_IP-17-3701_en.htm> (visited 5 March 2019); and 'State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion', at <http://europa.eu/rapid/press-release_IP-16-2923_en.htm> (visited 5 March 2019).
28. Bou Mansour, Mark, 'New ranking reveals corporate tax havens behind breakdown of global corporate tax system; toll of UK's tax war exposed, Tax Justice Network', at: <https://www.taxjustice.net/2019/05/28/new-ranking-reveals-cor-

there are also numerous examples of targeted tax breaks aimed at attracting foreign capital.[29] Thus, corporate executives may argue that corporate tax planning is to act in concordance with governmental intentions, while simultaneously serving as an effective legal method to increase shareholder value—because reduced tax increases shareholder profits. Corporations that conduct tax planning deemed too aggressive are often considered socially irresponsible, however, as their behaviours reduce government resources and therefore its ability to exercise its responsibility for developing and maintaining a sustainable society. Thus, although aggressive tax planning is not illegal, it is usually considered wrong and irresponsible by the society. In such situations, corporations are often accused of not paying their fair share of taxes.[30]

Corporations that are publicly indicted for not paying their fair share of taxes may respond by acting economically rational: If the criticism has a negative influence on earnings, because their tax policies upset consumers, for example, they may want to take less aggressive tax positions—a tax position that mirrors the spirit of the law, and/or a generally accepted principle of international taxation.[31] If their tax strategy generates greater value to shareholders compared to a loss of revenue because of public criticism, then the aggressive tax positions often remains—defended by its alignment with the letter of the law.[32]

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porate-tax-havens-behind-breakdown-of-global-corporate-tax-system-toll-of-uks-tax-war-exposed/> (visited 12 June 2019).

29. It is important to note that tax incentives erode the tax bases of developing countries as seriously as aggressive tax planning does, and that they may cause serious negative effects on societies in addition to the economic growth they are meant to bolster. (See e.g. Curtis, Mark, and O'Hare, Bernadette, 'Lost Revenues in Low Income Countries', *Curtis research*, July 2017; and Wåhlin, Malena, 'TO THE LAST DROP Water and human rights impacts of the agro export industry in Ica, Peru: the responsibility of buyers', *Report* # 92, Swedwach, November 2018).
30. Christians, Allison (2013), 'How Starbucks Lost Its Social Licence—And Paid £20 Million to Get it Back, The Big Picture', *Tax Notes*, 12 August 2013, pp. 637–639.
31. Ibid.
32. See e.g. Apple's CEO Tim Cook's open letter: 'A Message to the Apple Community in Europe', 30 August 2016, at <https://www.apple.com/uk/customer-

In addition to a global variety of competing tax jurisdictions, legal discretion within the grey zone between the letter and spirit of the law provides opportunities for corporations to conduct a more or less aggressive tax strategy. Within this grey zone—the penumbra of doubt—the norm for corporate tax conduct seems not necessarily to be the (spirit of the) law; rather the norm seems to be reduced corporate (tax) expenses, consumer perceptions, and eventually, future shareholder value.

A corporate tax strategy that one-sidedly focuses on shareholder value is problematic, however, considering that tax revenues are used for financing public goods for the benefit of other than these shareholders. As noted in Section 1, tax revenues are essential for the building and maintenance of a sustainable society. Thus, aggressive tax planning can be seen as a relatively undemocratic redistribution of income from potential public investments to the private wealth of corporate owners, and as counterproductive in relation to the fulfilment of the 2030 Agenda.

One way to deal with this fallacy is to call for a professionally honest interpretation of tax law,[33] one that requests ethical conduct in the application of tax legislation, resulting in an application that aligns with the underlying values on relevant tax laws, international tax regimes, and awareness of the potential harm that aggressive tax planning may generate, not least in relation to the UN's 17 SDGs.[34] Under such an interpretation, corporate tax strategies for the sole benefit of shareholders would not be possible. Critics argue, however, that such an interpretation places responsibility for the functioning of the law on the interpreter rather than on the legislature, where it ultimately belongs.[35]

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letter/> (visited 15 April 2019).

33. Hilling, Axel & Ostas, Daniel T., *Corporate Taxation and Social Responsibility* (Wolter Kluwer 2017), pp. 145–149.

34. Hilling, Axel & Ostas Daniel T., 'Corporate Income Taxation, CSR and the UN's 2030 Agenda for Sustainable Development', *Kluwer Tax Blog*, 14 May 2018, at <http://kluwertaxblog.com/2018/05/14/corporate-income-taxation-csr-uns-2030-agenda-sustainable-development/> (visited 15 April 2019).

3. Imperfect tax legislation and exchange of information

Critics of professionally honest interpretation of tax legislation usually argue that legislation that provides opportunities for aggressive tax planning is deficient, and must be changed in order to minimize the penumbra of doubt and to increase certainty.[36] To place the entire responsibility for a well functioning tax legislation on the legislature is not realistic, however. Even in a national context, the desire for perfect tax legislation seems rather naïve, a perspective that Wheatcroft had already expressed in 1965:

> No country has yet succeeded, or is likely to succeed, in framing its tax laws in such a way that it is clear how the tax liability will be calculated on any conceivable set of facts. Even the most accurate draftsman of law will not always be able to find precise language to convey his meaning and the wisest legislator cannot foresee every possible situation that may arise.[37]

Today, more than 50 years later, this quote is more relevant than ever, as tax legislatures face huge challenges in the rapid development of the way value is created within the society. Broadly speaking, value creation, and therefore a government's income tax base, has moved from a nation's industry economy to an international financial economy and from the production of physical goods to the production of digital goods and services. With an international tax regime dated back to the 1920s, and with national income tax systems based on principles that are just as old, it is more than difficult for legislatures to meet challenges posed by this recent economic development.[38]

35. Datt, Kalmen H. (2014), 'Paying a fair share of tax and aggressive tax planning—A tale of two myths', *eJournal of Tax Research*, pp. 410–432.
36. Datt, Kalmen H (2016), 'To shame or not to shame: That is the question', *eJournal of Tax Research*, pp. 486–505.
37. Wheatcroft, G.S.A. (1965), 'The Interpretation of Taxation Laws with Special Reference to Form and Substance, General Report', *Cahiers de Droit Fiscal*, Vol. La, p. 7.
38. See e.g. Woodward, Richard, 'The evolution of the international corporate tax regime, 1920–2008' in Eccleston, Richard & Elbra Ainsley (eds), *Show Your Taxes —Business, Civil Society and the 'New' Politics of Corporate Tax Justice, Paying a Fair*

In addition to special new tax regimes like the suggested digital tax in the EU,[39] the G20's and OECD's Base Erosion and Profit Shifting (BEPS) project,[40] and the EU's Anti-Tax Avoidance Package[41] suggest that opportunities to engage in aggressive tax planning should be addressed by introducing generally applicable anti-avoidance regulations—General Anti-Avoidance Rules (GAARs) for example.[42] A GAAR applies to transactions and arrangements that obtain a tax advantage that defeats the spirit of the applicable tax law. Such non-genuine transactions and arrangements shall be ignored, and the tax liability shall be calculated in accordance with national law. Thus, GAARs intend to hinder aggressive tax planning and tax avoidance by making those actions void, but it does not pose any real sanctions to prevent taxpayers from conducting them.

In addition to anti-tax avoidance regulations, such as GAARs, the OECD and the EU suggest the implementation of extensive regulations for the exchange of information among tax authorities. Over the past few years, the Directive on administrative cooperation in the field of taxation (DAC) has been amended several times.[43] For example, as of June 2017, large multinational enterprises (MNEs) within the EU must report selected information about their business

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Share (Elgar Politics and Business, 2018), pp. 22–39. Avi-Yonah, Reuven S., 'The International Tax Regime: A Centennial Reconsideration' (25 June 2015), *University of Michigan Public Law Research Paper* No. 462. Available at SSRN: <https://ssrn.com/abstract=2622883 or http://dx.doi.org/10.2139/ssrn.2622883> (visited 15 april 2019).

39. COM (2018) 147 final, 2018/0072 (CNS), Proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence.
40. <http://www.oecd.org/tax/beps/>.
41. <https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en>.
42. Article 6, General anti-abuse rule, in Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affects the functioning of the internal market. See also Hilling, Axel & Hilling, Maria, 'Regleringsteknik i syfte att motverka aggressiv skatteplanering' in Kristoffersson, E., Olsson, S. & Rendahl, P. (eds), *Festskrift till Björn Westberg* (Iustus förlag, 2016), pp. 49–58.
43. Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

and taxpaying in every country in which they are active—CBCR.[44] The reported information is not public, however, but is used only for tax-risk assessment by administrations in their review of corporate taxpayers. Similarly, as of July 2020, intermediaries must report any cross-border arrangements that fall within one of a number of categories setting out specific characteristics identified as potentially indicative of aggressive tax planning[45]—also for the eyes of the authorities only. Thus, it appears as if the rationale of the OECD and the EU is that transparency regulations (i.e. exchange of information among tax authorities) will make the application of anti-avoidance legislation more effective.

To summarize, new regulations against aggressive tax planning do not decrease the penumbra of doubt that creates opportunities for corporations to conduct aggressive tax planning. The regulation for exchange of information increases the risk of being accused, but because the penalties are limited, an economically rational corporation will not necessarily take a less aggressive tax position because of the new regulations.

4. Making responsible choices

4.1. Shared responsibility to finance the public good

Thus far we have argued that the UN's 2030 Agenda requires substantial investments in the public good, which is ultimately financed

44. OECD (2015), 'Transfer Pricing Documentation and Country-by-Country Reporting', Action 13—2015 Final Report, G20/OECD Base Erosion Profit Shifting Project; Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation. CBCR, as the G20/OECD and the EU currently present it, appears to be strongly influenced by the suggestion of Richard Murphy, year 2003, for a new accounting standard on reporting turnover and tax by location. See Murphy, Richard (2004), 'Location, location', *Accountancy magazine*, (March), pp. 90–91.
45. Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

by tax revenues. Governments assume the entire responsibility for collecting tax revenues by drafting legislation that undoubtedly creates unintentional leeway for tax planning, no matter how much information is being exchanged among tax authorities. This model for success—imperfect legislation and enormous amounts of information—has been questioned by civil society, with the argument that taxpayers must share the responsibility of ensuring that enough tax revenues are collected.[46] Taxpayers can share this responsibility by making responsible choices in the interpretation and application of the tax law. In a situation in which a corporation, due to judicial discretion, may choose to apply the law in a self-serving way or in a way that aligns with general maxims of tax law, it should choose the latter alternative. It should conduct a professionally honest interpretation.[47] Information about corporate tax conduct is becoming increasingly relevant for corporate stakeholders, such as capital investors.[48] Thus, over the past few years, several initiatives for public tax reporting have been presented.

4.2. Fair taxation and legitimacy

Initiatives for public tax reporting generally aim at making corporations disclose their tax payments, in order for stakeholders to evaluate whether it is a fair amount, or not. When fair taxation is measured, the discussion unavoidably focuses on the relationships between taxpayers and their expectations of each other. Thus, the meaning of fair taxation relies heavily on the ethics of a specific soci-

46. See e.g. Tax Justice Network, Andres Knobel, 'Country by country reports: why "automatic" is no replacement for "public"', at <https://www.taxjustice.net/2018/07/17/country-by-country-reports-why-automatic-is-no-replacement-for-public/> (visited 30 April 2010).
47. Hilling, Axel & Ostas, Daniel T., *Corporate Taxation and Social Responsibility* (Wolter Kluwer, 2017), pp. 145–149. See also Bird Robert & Davis-Nozemack, Karie (2018), 'Tax avoidance as a sustainability problem', *Journal of Business Ethics*, 2018, pp. 1009–1025.
48. Stanely-Smith, Joe, 'Investor pressure drives corporate tax policy development', *International tax review*, 1 February 2019, at <https://www.internationaltaxreview.com/Article/3856759/Investor-pressure-drives-corporate-tax-policy-development.html?ArticleId=3856759> (visited 30 April 2019).

ety. There are good arguments, however, that fairness is not merely an ethical concept; it is also a legal principle, on which public law, like tax law, is drafted. Hemels argues that the fairness principle is a relevant legal principle in today's national and international taxation.[49] She observes that it differs from several other legal principles, like the Rule of Law, that impose obligations on the government. The fairness principle primarily imposes an obligation on taxpayers toward each other: to pay their fair share of tax. Thus, both ethics and legal principles underpinning tax legislation call for fair taxation.

Although the concept of fair taxation as a general goal for raising revenue is notoriously imprecise, it plays a critical role as a benchmark for the legitimacy of the tax system. Legitimacy is a concept that encompasses citizens' convictions of the normative appropriateness of the management structure, state officials, and management processes. Of central importance is the belief of a majority of taxpayers that rules and decisions should be followed only if the taxpayer considers them legitimate and that perceptions of legitimacy can be based on such general, positivistic factors as who decided the rules and decisions or in what terms they are presented.[50] Taxpayers who believe that the interests of other taxpayers are favoured over their own interests may lose faith in the system, challenging the legitimacy of the system and damaging the morale of taxpayers.[51]

To summarize, fair taxation is imperative for the legitimacy and functioning of any tax system, which is, in turn, a prerequisite for the fulfilment of the UN's 2030 Agenda. The fairness principle imposes

49. Hemels, Sigrid (2015), 'Fairness and Taxation in a Globalized World' (February 26). Available at SSRN: <https://ssrn.com/abstract=2570750> or <http://dx.doi.org/10.2139/ssrn.2570750>.

50. See, e.g., Tyler, Tom R., *Why People obey the Law* (2006), pp. 3–7 (discussing normative commitments to obey the law in terms of personal morality and legitimacy).

51. Braithwaite refers to the greatest challenges for taxation in terms of fiscal termites, which in turn introduce moral termites into the tax system: celebrated citizens, sport stars, and super entrepreneurs for example, that communicate by their actions (e.g. by utilizing fiscal termites for advanced tax planning) that tax avoidance is normal and acceptable. See Braithwaite, John, *Markets in Vice Markets in Virtue* (2005), pp. 23–25.

obligations on taxpayers by other taxpayers, which means that it requires transparent information about tax payments. How to measure objectively whether a tax payment is fair or not, is notoriously difficult, however. Yet, serious attempts have been undertaken by the EU and by several civil society organizations. In essence, these transparency initiatives aim at communicating whether a taxpayer has made responsible choices.

5. Tax transparency

5.1. Public country-by-country reporting (CBCR)

A general purpose of the G20/OECD's and the EU's anti-tax avoidance initiatives has been to ensure that tax is paid in the jurisdiction where the corporation makes profit.[52] Therefore regulations for the exchange of information among tax authorities are designed to provide country-specific information with reference to business activity and corporate tax payments (see Section 3). CBCR requires large MNEs to provide information about their total revenues and profits before income tax and the paid and accrued income tax in each jurisdiction in which they have conducted business.[53] According to the CBCR, MNEs shall also report their number of employees, tangible assets, retained earnings, and stated capital in each jurisdiction; they must also identify each entity within the company group and provide information about the activity it conducts.[54]

With the goal of strengthening transparency within corporate taxation, the EU Commission and the EU Parliament proposed that some of the information required under CBCR reporting regulations

52. See e.g. Lennar, Michael, 'Act of creation: the OECD/G20 test of "Value Creation" as a basis for taxing rights and its relevance to developing countries, Transnational Corporations, *UNCTAD*, Volume 25, 2018, Number 3, pp. 55–84, at <https://unctad.org/en/PublicationChapters/diaeia2018d5a4_en.pdf> (visited 17 May 2019).
53. OECD (2015), 'Transfer Pricing Documentation and Country-by-Country Reporting', Action 13—2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.
54. Ibid.

should also be publicly available in corporate financial reports.[55] In addition to detailed information about tax payments within the EU and in countries listed on a 'Common EU list of certain tax jurisdictions', which comprise non-EU countries that help make tax abuse possible, MNEs are required to provide aggregated information on business conducted elsewhere.

The proposals for public CBCR was well received among several stakeholders,[56] but met heavy resistance from others. Several civil society organizations argued for a more comprehensive regulation,[57] whereas the private sector argued against any type of public tax disclosure. For example, business sector lobbyists expressed concern about public CBCR, and argued that 'by making the EU a lone front runner in terms of public disclosure, [we] risk undermining our attractiveness as a location for investment, particularly from overseas.'[58] Some governments also argued against the proposal. The Irish and Swedish governments argued in terms of subsidiarity, saying that 'the proposal also entails a harmonisation of tax regulations, and from this it follows that the legal basis of the proposal should be changed.'[59]

Currently, in the spring of 2019, it appears that the legal initiative of public CBCR is stuck in a political deadlock, and that the way toward tax transparency goes, not through national parliaments, but

55. For a summary of these proposals see e.g. Eurodad, 'Public country by country reporting: state of play in Europe December 2017', at <https://eurodad.org/files/pdf/5a38ca30553a1.pdf> (visited 12 April 2019).

56. See e.g. European Economic and Social Committee, 'Public tax transparency (country-by-country reporting)', at: <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/public-tax-transparency-country-country-reporting> (visited 3 April 2019).

57. See e.g. Oxfam et al., 'Open Letter to Juncker, Commission proposal on disclosure of income tax information by certain multinational corporations', April 2016, at: <https://www-cdn.oxfam.org/s3fs-public/file_attachments/openletter_juncker_public-cbcr.pdf> (visited 12 April 2019).

58. See Business Europe, 'Country-by-country reporting risks damaging EU investment', at: <https://www.businesseurope.eu/sites/buseur/files/media/press_releases/2016-04-12_tax_country-by-country_reporting.pdf> (visited 3 April 2019).

59. See Swedish Parliament, 'Statement Summary', at: <http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20160107/serik.do> (visited 3 April 2019).

via civil society initiatives of tax accreditation and corporate governance.

5.2. Accreditation and corporate governance

When it comes to the transparency initiatives that have grown from private organizations, there are two clear trends. First, there are organizations certifying companies that live up to reasonably high standards of tax transparency. The most well known such organization is probably the British Fair Tax Mark Ltd. In addition, there are established organizations that set standards for sustainability reporting of taxes—the Global Reporting Initiative (GRI), for example. Following these standards does not directly provide formal certification, but it does so indirectly because of the wide recognition of the standard setter. The second trend deals with tax transparency by defining tax as a central pillar within corporate governance. The B Team, a not-for-profit initiative formed by a global group of business leaders, presented a package of Responsible Tax Principles in early 2018.[60] These principles aim to guide corporate executives to conduct responsible tax practice through good corporate governance. Furthermore, CSR Europe, a business network on corporate social responsibility that has been working on this issue since 2016, recently published *A Blueprint for Responsible and Transparent Tax Behavior*, which aims at helping its member companies and companies of member organizations to implement tax into regular CSR strategies, and thereby increase tax transparency. To illustrate how tax can be dealt with as a corporate government issue, we provide a short review of CSR Europe's Blueprint. But first, we review tax accreditation with reference to the work of Fair Tax Mark Ltd.

60. The B Team, 'A New Bar for Responsible Tax: The B Team Responsible Tax Principles', at <http://www.bteam.org/announcements/responsibletax-2/> (visited 11 April 2019).

5.3. Fair Tax Mark

5.3.1. Evaluating fair tax

Fair Tax Mark Ltd (FTM) is a not-for-profit community benefit society, established in the UK in February 2014. FTM certifies organizations 'that pay the right amount of corporation tax at the right time and in the right place'. They do so because 'tax affects us all, [and therefore] we think companies should report on their tax practices transparently so we can understand how they're contributing.'[61] Thus, the purpose of FTM is to reveal the choices that organizations make in their application of tax law, in order to provide the public with the assurance that these choices are socially responsible. If they are, FTM awards the organization with the Fair Tax Mark.

FTM has developed standardized scoring systems to evaluate whether or not an organization contributes a fair share of tax. Small- and medium-sized companies (SMEs) are evaluated annually based on ten criteria, whereas UK-owned multinational enterprises (MNEs) are subject annually to a more extensive evaluation standard. In order to achieve the Fair Tax Mark, the organization must score at least 65 percent. The two scoring systems rest on the same guiding principles:

1. A company should pay the right amount of tax (but no more) in the right place at the right time according to the spirit of the law of the jurisdiction in question.
2. A company should be able to be held to account on its tax behaviour by the public, based on the information it chooses to publish.

A corporation's compliance with these principles is evaluated on measures of transparency, tax policy, tax rate, and disclosure.

61. Fair Tax Mark, 'Who we are': <https://fairtaxmark.net/who-we-are/> (visited 22 February 2019).

5.3.2. Transparency

In order for the public to evaluate an organization's tax conduct, certain key information must be present. FTM collects that information under the heading of 'Transparency', which comprises 30 percent of the total assessment criteria. Several pieces of information are required: clear evidence of what the company does; clear reference to a trading address; information on who ultimately benefits from the business undertaken by the organization (i.e. beneficial ownership); names and addresses of all directors; the total pay of these directors; and a full set of accounts, including director's report, profit and loss accounts, and notes.[62] The information shall be easily assessable—on the organization's website, or in a Fair Tax Mark Statement, for example.

5.3.3. Tax policy

Because every business organization is subject to tax, the baseline for this evaluation criteria is that every organization has an implicit or explicit tax policy that governs the organization's business objective in regard to tax and constitutes imperative information in the evaluation of an organization's tax conduct. Tax Policy is weighted 25 percent of the overall assessment. Points are awarded if the organization has a public tax policy; additional points are awarded if that tax policy states that the company will not abuse tax havens or undertake tax avoidance—by using artificial or abusive transactions to reduce taxes paid, for example.[63]

5.3.4. Tax rate and disclosure

The remaining 45 percent of the assessment deals with the organization's current tax rate. First, its current tax rate is evaluated in relation to the expected headline rate over a four-year period, and points

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62. Fair Tax Mark Criteria Notes, UK Small Business (with turnover £1 million and less) Standard; Fair Tax Mark Criteria Notes, Solely UK-based Companies Standard.
63. Fair Tax Mark Criteria Notes, 'UK Small Business (with turnover GBP 1 million and less) Standard'; Fair Tax Mark Criteria Notes, 'Solely UK-based Companies Standard'.

are awarded based on the similarity of the current and expected tax rates. If the organization's current tax rate deviates more than 7 percentage points from the expected headline rate, no points are awarded. In years when the organization registers a loss, the expected headline rate can be dropped to 0 percent for those years.

To provide the information necessary for understanding an organization's current tax rate and to gain further insight into the organization's tax liability, FTM requires detailed disclosure—both numerical and narrative reconciliation of the current tax charge. Any deferred tax must be identified and explained, for example, with a numerical note and a narrative explanation.[64]

5.3.5. Fair Tax Mark for MNEs

The assessment for MNEs follows the same system as for SMEs, although more information is required in regard to the MNE's tax policy. Moreover, MNEs are required to provide detailed information about the organization's foreign tax payments. In essence, this requirement corresponds to the CBCR developed by the G20/OECD within its BEPS project.[65] Thus, the FTM makes CBCR data public in case MNEs are accredited by the organization.

5.3.6. Fair Tax Mark—more than a commercial product?

Fair Tax Mark claims that its standards represent the product of more than a year's research and consultation with a broad range of stakeholders, including civil society NGOs, businesses, and practitioners. In addition, input has also been achieved from a technical advisory group with representatives from academia and the profession. The technical advisory group hosts such well known tax justice campaigners as Alex Cobham and Richard Murphy, who communicate that the Fair Tax Mark is more than just another commercial product within the tax and accounting business. The startlingly low fees for accredit-

64. Ibid.
65. Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 —2015 Final Report, at <http://www.oecd.org/tax/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report-9789264241480-en.htm> (visited 26 February 2019).

ation, FTM's organization, its business model, and the content of its products also point in the direction of FTM producing more than mere economic value. That value lays in the promotion of a corporate culture wherein aggressive tax planning is banned, and openness, honesty, and trustworthiness is honoured.

5.4. CSR Europe

5.4.1. A Blueprint for Responsible and Transparent Tax Behavior

CSR Europe was established in Brussels in 1996, and is a leading European business network for Corporate Social Responsibility. Through a network of 39 corporate members and 41 National CSR organizations, it has gathered over 10,000 companies, and acts as a united platform for those businesses looking to enhance sustainable growth and to make a positive contribution to society.[66]

Building upon its work and expertise on the management of corporate transparency and governance, the organization decided to start working on the topic of tax transparency and responsible tax behaviour in 2016. The basis for its work is the belief that taxes are one of the ways in which businesses can contribute to society, and that tax responsibility is an essential tool for businesses to achieve the UN Sustainable Development Goals.[67]

CSR Europe states that responsible and tax-transparent companies are key to rebuilding social trust and addressing the growing expectations of policymakers and the public.[68] Increasing the coherence between tax behaviour and the wider sustainable business strategy also has the potential to highlight a company's total contribution to society, manage its reputation, and increase its social credentials.

66. CSR Europe, 'History', at <https://www.internationaltaxreview.com/Article/3856759/Investor-pressure-drives-corporate-tax-policy-development.html?ArticleId=3856759> (visited 30 April 2019).
67. CSR Europe, 'Blueprint for companies on Responsible and Transparent Tax Behavior'.
68. Ibid.

Against this backdrop, CSR Europe's project, Tax Transparency and Responsible Tax Behavior, is aimed at scaling up corporate tax transparency and establishing responsible tax behavior within companies as one of the pillars of good governance. The last achievement in this work has been the launch of a *Blueprint for companies on Responsible and Transparent Tax Behavior* (Blueprint), which gathers existing resources and practical examples of how companies are integrating responsible tax behaviour into their business operations. CSR Europe's goal is to use these resources in a process of building capacity in this field, and it aims to inspire companies to start working in this direction. Moreover, the organization aims to support CSR and Tax Managers to start working more closely together, in order to embed sustainability into tax decisions and practices.

5.4.2. Six thematic areas

The Blueprint clarifies the concept of responsible and transparent tax behaviour by breaking it down into six areas that represent the main elements of tax responsibility in a business environment. Within the first area, tax-planning strategies are discussed with a focus on how companies can align taxation with value creation. The second area—tax-function management and governance—examines the ways in which companies can develop the right processes to manage tax for what refers to (1) tax strategy, (2) tax control framework and (3) tax technology. Third, public transparency and reporting is discussed, with a special focus on how companies can disclose relevant tax-related information to the public, an overview of current measures and initiatives in terms of mandatory and voluntary public and non-disclosure, including the world of the OECD and the EU proposal on CBCR. The fourth area deals with the interaction between companies and tax authorities, and offers a snapshot of the current trends within this area, offering examples of how companies can manage the relationship with tax authorities and cope with the current digital transformation of tax administration. Tax incentives and their impact on public finances is dealt with in the fifth thematic area. This area still remains a challenge, especially in terms of assessing the impact of tax incentives not only at the economic level, but particularly for its societal aspects. The sixth and final thematic area deals with the way in which companies can build a narrative to accompany a tax strategy that examines ways of engaging with internal and external stakeholders.

All chapters of the publication start with a high-level snapshot or objective observation of the current market practice in each of the six identified areas. It then zooms in on the current position of the participating companies with respect to the thematic area, including the company's tax strategy and practical experience.

5.4.3. Companies' best practices

To illustrate how companies can achieve progress within the six thematic areas, CSR Europe's Blueprint offers practical examples on how companies integrate responsible tax behaviour into their business operations. The Blueprint analyses examples of specific measures implemented by well known MNEs. Building on the collection of good practices in the field of responsible tax behaviour from these companies, the Blueprint can be used as inspiration for industry peers who are striving to become more responsible and transparent on their tax policies and payments.

5.4.4. Inventory of twenty existing initiatives

In addition to offering guidelines for good tax governance, CSR Europe would like the Blueprint to be a one-stop shop for those who want to learn more about existing tools and resources on responsible and transparent tax behaviour. It therefore offers an inventory of the business associations, NGOs, non-profit initiatives, and intergovernmental organizations that have proactively developed guidelines, benchmarks, and scorecards in recent years. CSR Europe's Blueprint provides a comprehensive overview, including a short descriptive summary of 20 such initiatives.

5.4.5. The way forward

The Blueprint outlines key takeaways to inspire companies that want to invest further in responsible and transparent tax behaviour. It does so by identifying significant trends and remaining challenges. First, CSR Europe has identified a growing trend that the publication of corporate tax strategies and/or tax policy documents are endorsed and approved at the board level. Moreover, it is important with enhanced collaboration between the CSR and Tax departments: the cases collected in the Blueprint show a trend toward increased collaboration between these teams as a way of embedding tax into a sustainable business strategy of companies and of strengthening the credibility of the CSR strategy and its commitment to the achievement of the UN SDGs. Finally, there seem to be a growing preparedness for enhanced transparency and tax-reporting requirements and a more open and 'pedagogical' approach toward many stakeholders.

One of the challenges addressed in the Blueprint is identification of the role of a company's tax function. The dependence of the tax department on the finance or legal department, commonplace in many companies, causes mismatches between the various functions and their objectives. Another challenge is implementation of a tax strategy and the monitoring of its execution—the execution of its underlying principles by all employees, and its continued monitoring against set Key Performance Indicators (KPIs).

As a way forward, CSR Europe plans to build on positive examples and trends identified in its Blueprint and offer additional support to interested companies through stakeholder dialogues, peer-to-peer learning, and exchange of best practices.

6. Concluding remarks

Tax revenues are vital for the financing of the UN's 2030 Agenda, which makes robust tax systems essential for sustainability. International tax competition among jurisdictions and imperfect tax legislation make it possible for taxpayers to avoid paying taxes, however—conduct generally referred to as 'aggressive tax planning'.

The inability of a country to create robust tax systems and to stop aggressive tax planning has placed responsible tax conduct on the agenda on several civil society organizations—Fair Tax Mark and CSR Europe, for example. These organizations recognize that the robustness of a tax system depends not only on the legislature, but also on the choices that taxpayers make when interpreting and applying the law. Consequently, corporate tax conduct directly mirrors a corporation's goal of contributing toward sustainable development within the society in which it operates. Therefore public corporate tax policies and transparency in corporate tax conduct constitute essential information in any society—information that communicates whether a corporation has made responsible choices about sustainable development.