Fair Taxation and Corporate Social Responsibility

Karina Kim Egholm Elgaard, Rasmus Kristian Feldthusen,
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Chapter 6

Can Corporations Contribute to Sustainable Development by Paying Taxes?

PhD Researcher Ave-Geidi Jallai, Tilburg University

Summary: *This contribution focuses on good tax governance and corporate governance. It will be analysed whether corporate governance rules leave corporate managers sufficient latitude to engage in socially responsible tax planning. From the profit-making objective of corporations is tax a cost and should be managed accordingly. On the other hand, taxes are investment to a society and therefore indirect investments to the well-being of the company. Based on UN's Sustainable Development Goals, it will be illustrated how engaging in good tax governance contributes into the sustainable development and adds up to corporate success.*

1. Introduction

Due to the public attention that in recent years has focused a lot on international corporate tax planning, multinational corporations face various difficult dilemmas. This contribution takes a closer look at corporate moral and legal responsibilities. Namely, on the one hand, multinationals are accused of not paying (enough) tax. The media has published reports on tax planning, generally shining a negative light on the practice, and accusing that corporations avoid paying their 'fair share' of taxes.[1] The reports on so-called aggressive tax planning practices have triggered public outcry with politicians sharing this public sentiment and accusing multinationals of immoral behaviour.[2] Paying taxes according to the letter of the law only does not seem to suffice any more; corporations are often expected to take into account moral considerations in addition to purely legal and economic ones. On the other hand, corporate laws set certain limits to corporate boards' actions, especially when it comes to 'spending' shareholders money. Consequently, corporations are confronted with conflicting and evolving expectations with regard to their tax planning behaviour. They have to respond to the changes in order to survive in a competitive market and face complex choices in their everyday business making: whether to choose an exclusively economic approach (aiming at paying as less tax as possible) that maximizes the shareholder value, or consider also a moral approach that satisfies a larger group of stakeholders and society at large.

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1. See e.g. Birrell, I. (6 January 2014), 'Bill Gates Preaches the Aid Gospel, But Is He Just a Hypocrite?' *The Guardian*. Retrieved from: <http://www.theguardian.com/commentisfree/2014/jan/06/bill-gates-preaches-fighting-poverty-hypocrite-microsoft-tax> (accessed 19 February 2019); Tax Justice Network (TJN) (6 January 2014), 'Bill Gates: Is He Just a hypocrite?' Retrieved from: <http://taxjustice.blogspot.nl/2014/01/bill-gates-is-he-just-hypocrite.html> (accessed 24 February 2019); Conway, Z. (29 May 2015). 'BBC Uncovers "Aggressive" Tax Avoidance Scheme', *BBC News*. Retrieved from: <http://www.bbc.com/news/business-32914372> (accessed 18 February 2019); Setzler, B. (17 January 2014). 'The Real Tax Threat to American Businesses', *US News*. Retrieved from: <http://www.usnews.com/opinion/blogs/economic-intelligence/2014/01/17/americas-corporate-tax-problem-is-that-big-corporations-dont-pay-enough> (accessed 24 February 2019).
2. UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011–12. Nineteenth Report of Session 2012–13 Report, Together With Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited; Wintour, P. (6 February 2015), Ed Miliband, 'I won't back down on tax avoidance', *The Guardian* (online), <http://www.theguardian.com/politics/2015/feb/06/ed-miliband-tax-avoidance-business-labour> (accessed 24 February 2019); European Commission. The Fight against Tax Fraud and Tax Evasion. Overview webpage.

It is evident that corporations have specific responsibilities that reach beyond the pure obligation to follow the laws. The extent of such responsibilities is, nevertheless, debatable. For instance, corporations that present themselves as socially responsible (for instance, under the roof of corporate social responsibility, CSR), have accepted to respect moral responsibilities towards society in a form of going beyond pure compliance with the law.[3] Thus, it could be expected from such corporations that they engage in good tax governance; tax governance that is in line with their social responsibility agenda. Nevertheless, from a corporate perspective, such reasoning might not be very convincing. Corporations namely face several legal obligations not (directly) related to tax. Different cultural and legal systems burden corporations with various responsibilities such as 'fiduciary duties, duties of care, good faith, adequate management, gross or simple mismanagement.'[4] Sometimes such obligations might be considered in conflict with corporate moral responsibilities towards society. Especially in tax matters such conflict can be challenging for tax can be considered both, corporate cost and moral responsibility, at the same time.[5]

This contribution focuses on the responsibilities that corporate managers have with regard to tax governance that takes wider social responsibilities as a starting point. Based on corporate governance principles it will be explored whether corporate managers have sufficient latitude under the corporate rules to engage in tax planning that does not exploit the law, such as aggressive tax planning for instance does. This contribution is built upon other researches that

3. See e.g. Gribnau, J. L. M. & Jallai, A.-G. (2017), 'Good Tax Governance: A Matter of Moral Responsibility and Transparency', *Nordic Tax Journal* 1, pp. 70–88.
4. Eijsbouts, J. (2011), 'Corporate Responsibility, Beyond Voluntarism Regulatory Options To Reinforce The Licence To Operate', *Inaugural Speech, Maastricht University*, p. 39.
5. Schön, W. (2008), 'Tax and Corporate Governance: A Legal Approach' in Schön, W. (ed), *Tax and Corporate Governance* (pp. 31–62) (Berlin/Heidelberg: Springer-Verlag); UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011–12. Nineteenth Report of Session 2012–13 Report, Together With Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited, Q. 485, p. Ev 40.

focus on the link between CSR and tax planning.[6] First, this contribution focuses on corporate governance (CG) (section 2) and its basic principles (section 3). Further, it will be analysed where the link between CG and tax planning lies (section 4) and what kind of tax planning can be considered in the best long-term interests of the company (section 5). In order to provide a more practical context, tax planning and corporate interests will be placed in the context of the United Nations Sustainable Development Goals (UN SDGs) (section 6). The last section (7) concludes.

2. Corporate governance (CG)

'Governance' as such is a broad concept that applies to the purpose, management and functions of nations, governments, communities, and organizations such as corporations. Governance of corporations, corporate governance (CG), refers to the way power is distributed within a corporation and to the decision-making process with regard to the use of this power. Its sets of rules and principles for how a (large and usually listed) company should be regulated and managed.[7] CG originates with the birth of corporations. Already in 1776 Adam Smith pointed at the need for supervision of managers because of the (legal) separation of ownership in capital from the control over that capital—i.e. the management of a business.[8]

6. See e.g. Gribnau, J. L. M. & Jallai, A.-G. (2017), 'Good Tax Governance: A Matter of Moral Responsibility and Transparency', *Nordic Tax Journal* 1, pp. 70–88; Gribnau, J. L. M. & Jallai, A.-G. (2018), 'Sustainable Tax Governance and Transparency' in Arvidsson, S. (ed), *Challenges in Managing Sustainable Business: Reporting, Taxation, Ethics and Governance* (pp. 337–369) (Lund: Springer Nature/Palgrave Macmillian); Holland, K., Lindop, S. & Zainudin, F. (2016), 'Tax Avoidance: A Threat to Corporate Legitimacy? An Examination of Companies' Financial and CSR Reports', *British Tax Review* 3, pp. 310–338; Hilling, A. & Ostas, D. T. (2017), *Corporate Taxation and Social Responsibility* (Stockholm: Wolters Kluwer).
7. Du Plessis J. J., Hargovan, A., Bagaric, M. & Harris, J.R. (2015), *Principles of Contemporary Corporate Governance* (3rd ed., Melbourne: Cambridge University Press), p. XXV.
8. '[T]he directors of such companies, however, being the managers rather of other people's money than of their own, it cannot well be expected, that they should

The concept of corporate governance can have varying definitions. Many theoretical definitions of CG reflect the concern for the supposedly self-serving motivation of managers related to the separation of ownership and control. For instance, Shleifer and Vishny define CG as 'the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment.'[9] There is need for control of those who have to realize this return on investment. La Porta et al. define CG as 'a set of mechanisms through which outside investors protect themselves against expropriation by the insiders.'[10] Friese et al. aptly summarize the common general elements as 'the sum of all mechanisms of control and supervision that are aimed at ensuring the successful operation of a business in a corporate form and in this respect to remedy the effects of the separation of ownership and management.'[11]

Cadbury, whose work on developing CG in practice is recognized around the world,[12] wrote in his foreword to the World Bank's Corporate Governance Framework for Implementation that CG concerns 'holding the balance between economic and social goals and between individual and communal goals.' According to him it is the aim of CG to 'align as nearly as possible the interests of individuals, corporations and society' while encouraging 'the efficient use of resources' and assuring the 'accountability for the stewardship of

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watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own [...]. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company.' Smith, A. (1776), *An Inquiry into the Nature and Causes of the Wealth of Nations of 1776* (Indianapolis: Liberty Fund), p. 741.

9. Shleifer, A. & Vishny, R. (1997), 'A Survey of Corporate Governance', *Journal of Finance*, 52(2), pp. 737–783.
10. La Porta R., Lopez-de-Silanes, F., Shleifer, A. & Vishny, R. (2000), 'Investor Protection and Corporate Governance', *Journal of Financial Economics*, 58(1), pp. 3–27, p. 4.
11. Friese, A., Link, S. & Mayer, S. (2008), 'Taxation and Corporate Governance—The State of the Art' in Schön, W. (ed), *Tax and Corporate Governance* (pp. 357–425) (Berlin: Springer Verlag), p. 364.
12. Adeney, M. (6 September 2015), 'Sir Adrian Cadbury Obituary', *The Guardian* (online), <https://www.theguardian.com/business/2015/sep/06/sir-adrian-cadbury> (accessed 29 April 2019).

those resources.'[13] According to this, a CG system should provide incentives for the corporate board to 'pursue objectives that are in the interest of both the company and is stakeholders.'[14] This, for instance, leaves room for considering broader social responsibilities under the obligations that derive from CG.

The aim of CG rules is to provide 'the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.'[15] An effective CG system is necessary for building trust in the functioning of a market economy.[16] Therefore, CG can be seen as a 'part of the larger economic context' which is also affected by tax rules, but also 'business ethics and corporate awareness of the environmental and societal interests of the communities in which a company operates.'[17] The view that CG should include ethics is, nevertheless, not commonly agreed upon. The general underlying assumption in the bigger part of the CG literature is that corporate managers 'operate with self-serving motivation'[18] which should be controlled; normally with legal

13. A. Cadbury, foreword in Iskander, M.R. & Chamlou, N. (2000), *Corporate Governance: a Framework for Implementation. The World Bank Group* (Washington: The World Bank), p. vi, <http://documents.worldbank.org/curated/en/831651468781818619/pdf/30446.pdf> (accessed 22 April 2019).
14. Van Daelen, M. M. A. (2012), *Risk Management and Corporate Governance: Match Between the Legal Framework and Practice* (Doctoral dissertation, Brugge: Die Keure), p. 243; see also Ruggie, J. G. (2013), *Just Business: Multinational Corporations and Human Rights* (New York: W. W. Norton & Company), p. 132.
15. Owens, J. P. (2008), 'Good Corporate Governance: The Tax Dimension' in. Schön, W. (ed), *Tax and Corporate Governance* (pp. 9–12) (Berlin/Heidelberg: Springer-Verlag), p. 9.
16. Ibid.
17. Ibid.
18. Buchholtz, A. K. et al. (2008), 'Corporate Governance and Corporate Social Responsibility' in Crane, A. McWilliams, A., Matten, D., Moon, J. & Siegel, D. S. (eds), *The Oxford Handbook of Corporate Social Responsibility* (pp. 327–345) (New York: Oxford University Press), p. 329. Nowadays the managers' self-serving motivation is conceptualized as agency theory, according to which one person (agent) has to make decisions on behalf of (or that affects the) another person (principal). Corporate governance rules should offer a safety net in case there occur conflicts between agents and principals. Agents are usually corporate managers and principals are stakeholders, while shareholders are often considered as

rules or economic incentives. Nevertheless, it does not imply that it is commonly agreed whose interests—shareholders only or stakeholders in a broader sense—CG should take into account or prioritize. Corporations are managed and directed by a board of directors; CG determines corporate accountability: to whom is the corporate board accountable and for what.

To a large extent it is argued that the corporate board 'acts as a surrogate for the shareholders of the corporation and its primary role is to oversee management's performance in terms of increasing profits and meeting social responsibilities.'[19] That is why CG rules usually focus on the conflicting relationship between the corporate board and shareholders. For instance, according to the UK Cadbury Commission, CG is 'the system by which companies are directed and controlled'[20] to protect investors. The Anglo-Saxon CG model is built on agency theory, according to which 'the shareholders not only own the company but also its assets, which are entrusted to the managers based on their so-called fiduciary duty.'[21] Based on this theory corporations should in principle be run by serving the shareholders' interests. Even though modern corporate law recognises that corporation is 'a legal institution in its own right, owning its assets and being responsible for its liabilities'[22] it still sets shareholders in the centre of corporate actions.

Nevertheless, not all CG rules or guidelines require focusing on shareholders' interests only. For instance, the Dutch Corporate Governance Code that represents the stakeholder-oriented Rhineland model of CG, concerns mechanisms to supervise the behaviour of

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the most important group of stakeholders.

19. See also Bower, J. L. & Paine, L. S. (2017), 'The Error at the Heart of Corporate Leadership', *Harvard Business Review*, May–June issue, <https://hbr.org/2017/05/managing-for-the-long-term> (accessed 11 March 2019).

20. Cadbury, A. (1 December 1992), *Report of the Committee on the Financial Aspects of Corporate Governance* (London: The Committee on the Financial Aspects of Corporate Governance and Gee and Co. Ltd.), para. 2.5.

21. Eijsbouts, J. (2011), 'Corporate Responsibility, Beyond Voluntarism Regulatory Options To Reinforce The Licence To Operate', *Inaugural Speech, Maastricht University*, pp. 48–49.

22. Ibid.

different actors. According to its preamble, the Dutch point of departure is that the corporation is 'a long-term alliance between the various parties involved in the company.'[23] The Dutch Code refers to different actors—the stakeholders, 'the groups and individuals who, directly or indirectly, influence—or are influenced by—the attainment of the company's objects: i.e. employees, shareholders and other lenders, suppliers, customers, the public sector and civil society.' The Dutch Code sets the responsibility on corporate board 'for weighing up these interests, generally with a view to ensuring the continuity of the enterprise, while the company endeavours to create long-term shareholder value.'[24]

Furthermore, according to the OECD reflects CG 'a set of relationships between a company's management, its board, its shareholders and other stakeholders.' It additionally sets a framework for achieving the objectives of the company and for monitoring the corporate performance.[25] The OECD also notes that the aim of CG is to 'build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies.'[26] Such perspective clearly goes further than focusing on the shareholder interests only. In short, there are various different starting points possible when it comes to whose interests corporate managers should praise. For understanding the latitude the corporate managers have when making choices, it is necessary to take a closer look at the normative basis of CG.

23. 'Corporate governance gaat over goed bestuur van beursgenoteerde bedrijven en het toezicht daarop. Het regelt verhoudingen tussen bestuurders, commissarissen en aandeelhouders. De overheid heeft wetten opgesteld voor goed en eerlijk bestuur van bedrijven. Ook is er een gedragscode: de Corporate Governance Code.' Dutch Corporate Governance Code.
24. Dutch Corporate Governance Code. Preamble point 7.
25. OECD (2015), *G20/OECD Principles of Corporate Governance* (Paris: OECD Publishing), p. 9.
26. Ibid., p. 7.

3. The normative basis for CG

CG, thus, sets certain rules and principles for a company management in order to decrease possible negative externalities that might rise from self-interested behaviour of managers. The most complex tension in the CG debate that has not been solved yet is how to balance 'the profit-making objective of corporations and company officers against broader social responsibilities owed to the wider community.'[27] With regard to tax planning, this balancing act is complicated. On the one hand, tax is a cost and the economic shareholder value perspective requires that costs are kept low. Aggressive tax planning might be seen as means to keep costs low. On the other hand, taxes are investment to a society and due to their moral element, corporations should abstain from tax planning practices that aim at the absolute minimum without ethical considerations.[28] Moreover, aggressive tax planning also brings certain costs and risks, which in the long-term might harm shareholder value as well, such as costs of tax advisors, implementing complicated structures, reputation harm or conflicts with tax authorities.[29] How should corporate boards deal with such dilemma?

According to the OECD, corporate boards 'should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders.'[30] Indeed, in certain jurisdictions it is a legal requirement for corporate boards to 'act in the interest of the company, taking into account the interests of

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27. Du Plessis J. J. et al. (2015), *Principles of Contemporary Corporate Governance* (3rd ed., Melbourne: Cambridge University Press), p. XXV.
28. Gribnau, J. L. M. & Jallai, A.-G. (2017), 'Good Tax Governance: A Matter of Moral Responsibility and Transparency', *Nordic Tax Journal* 1, pp. 70–88; See also Gribnau, J. L. M. (2017), 'The Integrity of the Tax System after BEPS: A Shared Responsibility', *Erasmus Law Review* 1, pp. 12–28.
29. See e.g. Lavermicocca, C. & Buchan, J. (2015), 'Role of Reputational Risk in Tax Decision Making by Large Companies', *eJournal of Tax Research* 13 (1), pp. 5–50, p. 15.
30. OECD (2015), *G20/OECD Principles of Corporate Governance* (Paris: OECD Publishing), pp. 45–46.

shareholders, employees, and the public good.'[31] The central concern of CG is that the corporate board would not become self-interested. Therefore, the members of the corporate boards have a fiduciary duty, which according to the OECD consists of two key elements: 'the duty of care and the duty of loyalty.' The first duty 'requires board members to act on a fully informed basis, in good faith, with due diligence and care'[32] while the second 'underpins effective implementation' of CG rules.[33]

According to Stout the fiduciary duty of loyalty precludes corporate boards from 'using their corporate positions to line their own pockets;' while at the same time managers remain free 'to pursue other, non-shareholder-related goals under the comforting mantle of the business judgement rule.'[34] According to the business judgement rule (BJR) the managers are obliged to act in the best interests of the company. Advancing the successful operation of the corporation demands pursuing the interests of the corporation. The board's discretion to make decisions that involve alternative choices can be derived from the BJR. Stout adds that 'contrary to the shareholder primacy thesis, shareholders cannot recover against directors or officers for breach of fiduciary duty simply because those directors and officers favour stakeholders' interests over the shareholders'

31. Ibid.
32. 'In some jurisdictions there is a standard of reference which is the behaviour that a reasonably prudent person would exercise in similar circumstances. In nearly all jurisdictions, the duty of care does not extend to errors of business judgement so long as board members are not grossly negligent and a decision is made with due diligence, etc. The principle calls for board members to act on a fully informed basis. Good practice takes this to mean that they should be satisfied that key corporate information and compliance systems are fundamentally sound and underpin the key monitoring role of the board advocated by the Principles. In many jurisdictions this meaning is already considered an element of the duty of care, while in others it is required by securities regulation, accounting standards, etc.', ibid.
33. Ibid.
34. Stout, L. A. (2012), 'New Thinking on "Shareholder Primacy"' in Vasudev, P.M. & Watson, S. (eds), *Corporate Governance after the Financial Crisis* (pp. 25–41) (Cheltenham: Edward Elgar Publishing), p. 29.

own.'[35] Contrary to various other corporate law scholars, Stout is convinced that 'corporate law treats directors not as agents of shareholders but as fiduciaries who owe legal duties not only to shareholders, but also to the corporate entity itself.'[36] This view makes sense because a healthy corporation itself is a precondition to shareholder's welfare. Moreover, considering the shareholder mobility, it is nowadays difficult directly to connect all shareholders with the company as such (instead of shares).

Schön, on the other hand, has (in 2008) argued that the duty of care requires that corporate boards 'take all decisions which are expected to bring about a positive net return on investment.'[37] Consequently, 'any tax-driven measure shall be taken if the expected amount of tax reduction fairly surpasses the ensuing costs,' such as 'the narrow range of advisory and compliance costs for the tax measure itself and the broad range of costs incurred by the tax-driven operation as such.'[38] This implies that corporate managers should, based on cost-benefit analysis, choose whether to engage in various tax planning structures in order to fulfil their duty of care. In the same vein, Schön has later argued that in Germany managers have discretion with regard to the choice of tax planning structures, which is protected by the BJR. Only in quite extreme situations there will be a violation of their duty of care.[39] Schön has also argued (in 2005)

35. Ibid.
36. Stout, L. A. (2016), 'Corporate Entities: Their Ownership, Control, and Purpose. Oxford Handbook of Law and Economics, Forthcoming', *Cornell Legal Studies Research Paper* No. 16–38, pp. 22–23.
37. Schön, W. (2008), 'Tax and Corporate Governance: A Legal Approach' in Schön, W. (ed), *Tax and Corporate Governance* (pp. 31–62) (Berlin/Heidelberg: Springer-Verlag), pp. 46–47.
38. Ibid.
39. Schön, W. (2013), 'Vorstandspflichten und Steuerplanung' in Krieger, G., Lutter, M. & Schmidt, K. (eds), *Festschrift für Michael Hoffmann-Becking zum 70. Geburtstag* (Munich: Beck), pp. 1091–1092; see also Jallai, A.-G. & Gribnau, J. L. M. (2018), 'Aggressive Tax Planning and Corporate Social Irresponsibility: Managerial Discretion in the Light of Corporate Governance' in Mulligan, E. & Oats, L. (eds), *Contemporary Issues in Tax Research, Volume 3* (Birmingham: Fiscal Publications), pp. 51–86.

that aggressive tax planning might at some point 'tend to employ corporate constructions which are not justified from a corporate governance standpoint' for it may result in 'a dramatic loss of transparency for the shareholders, who are no longer in the position to estimate the true profitability of their capital.' Consequently, such managerial behaviour is according to Schön harmful from a shareholder value perspective.[40]

It goes without saying that Schön is right in arguing that managers must not act in conflict with their legal duties. However, Stout's broader interpretation on managers' duties illustrates well how legal requirements leave room for interpretation. While managers' fiduciary duty might be considered as a requirement of acting in the best interests of the shareholders, the concept of fiduciary relationship is much broader than understood in corporate law. For instance, Ghahramani points out, 'fiduciary relationship need not be created by contract; it may arise out of an informal relationship where both parties understand that a special trust or confidence has been reposed.'[41] Fiduciary responsibilities are initially not based on 'threatening liability but by expressing and reinforcing social norms of careful and loyal behaviour.'[42] Fiduciary duties in general are, however, not considered as special duties for 'they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings.'[43] In contrast, the basic functions of taxation suggest that paying taxes is an obligation that has a moral footing.[44] According to this line of reasoning, to my mind, fidu-

40. Schön, W. (2005), 'Playing Different Games? Regulatory Competition in Tax and Company Law Compared', *Common Market Law Review* 42 (2), pp. 331–365, pp. 348–349.
41. Ghahramani, S. (2018), 'Business Ethics, Contractarianism, and (Optional?) Fiduciary Duties in Corporate Law', *Business Law Review* 39 (1), pp. 20–24, p. 21.
42. Ibid.
43. Easterbrook, F. H. & Fischel, D. R. (1993), 'Contract and Fiduciary Duty', *The Journal of Law and Economics* 36 (1), pp. 425–446. As cited in Ghahramani, S. (2018), 'Business Ethics, Contractarianism, and (Optional?) Fiduciary Duties in Corporate Law', *Business Law Review* 39 (1), pp. 20–24, p. 20.
44. See e.g. Gribnau, J. L. M. (2017), 'The Integrity of the Tax System after BEPS: A Shared Responsibility', *Erasmus Law Review* 1, pp. 12–28.

ciary duties of corporate managers do not hinder considering moral responsibility in the context tax governance for good tax governance does not expect managers to act in their own interests but in the (long-term) interests of the company, which eventually should be also in the interests of the shareholders, as I will also argue in the following sections. Moreover, considering the attention corporate tax planning has recently received, it also has an effect on shareholders' expectations and decision-making, as I will explain later.

Fiduciary duty is foremost one of the crucial tools of CG for preventing managers from the self-interested behaviour (avoid agency costs). At the same time, the BJR requires managers to act in the best interests of the company and leaves thereby for managers the freedom to 'pursue other, non-shareholder-related goals.'[45] Even the shareholder primacy principle does not provide the shareholders with the possibility to 'recover against directors or officers for breach of fiduciary duty simply because those directors and officers favour stakeholders' interests over the shareholders' own.'[46] For instance, US corporate law, which follows the shareholder primacy model, allows corporate boards 'leeway to commit corporate resources to projects that benefit the public' as long as such decisions have 'some plausible connection to future profitability.'[47]

To my mind, corporate decision-making should be in line with legal requirements but these legal requirements leave sufficient room for corporate boards to engage in socially responsible behaviour. I believe that Stout's position reflects the complex business environment and decision making better than strict corporate hard law approach. Corporate managers need to combine legal requirements

45. Stout, L. A. (2012), 'New Thinking on "Shareholder Primacy"' in Vasudev, P. M. & Watson, S. (eds), *Corporate Governance after the Financial Crisis* (Cheltenham: Edward Elgar Publishing), pp. 25–41, p. 29.

46. Ibid.

47. Stavins, R. N. et al. (2008), 'Corporate Social Responsibility Through an Economic Lens', *HKS Working Paper* No RWP08-023; FEEM Working Paper No 842008, p. 17; Stavins, R. N. et al. (2008), 'Corporate Social Responsibility Through an Economic Lens', *HKS Working Paper* No RWP08-023; FEEM Working Paper No 842008, p. 17.

with economic results and a myriad of conflicting interests. Having said that, it is not self-evident how such balancing act should be done in the context of tax planning.

4. How does tax relate to CG?

Some business and tax experts have claimed that various corporate legal obligations, such as the responsibility to promote the interests of shareholders, have an important effect on corporate tax decisions.[48] It is the responsibility of corporate managers to ensure that corporate legal obligations are met. The responsibility to operate in the best interests of the shareholders seems sometimes even overriding the interests of other stakeholders which, for instance, is in the heart of corporate social responsibility (CSR). Schön, for example, has argued (in 2008[49]) that the corporate management 'is not in the position to deviate from the goal to maximize the after-tax profit of the firm without consent from the shareholders in their entirety.'[50] According to him, any tax decision that 'substantially changes the risk profile of the corporation' is out of the scope of managerial decision-making if it is not directly stated otherwise in the corporate statutes.[51] Choosing the right tax-strategy is, thus, a task of corporate management. However, Sikka, for example, is concerned about the 'considerable autonomy' the corporate management enjoys 'to appro-

48. See e.g. Schön, W. (2008), 'Tax and Corporate Governance: A Legal Approach' in Schön, W. (ed), *Tax and Corporate Governance* (Berlin/Heidelberg: Springer-Verlag), pp. 31–62; See also Amin, M. 'The Case Against Morality in Tax, *Common Vision Blog*, <http://www.covi.org.uk/case-morality-tax/> (accessed 13 April 2019).

49. I am not aware of whether and how his view in this matter has changed in the last decade.

50. Schön, W. (2008), 'Tax and Corporate Governance: A Legal Approach' in Schön, W. (ed), *Tax and Corporate Governance* (Berlin/Heidelberg: Springer-Verlag), pp. 31–62, p. 47. Indeed, it must be mentioned that this line of reasoning was developed more than 10 years ago. Much has changed during this time. For the best knowledge of the author of this research, prof. Schön has not recently developed this argumentation further (in English).

51. Ibid., p. 48.

priate economic surpluses for shareholders.'[52] This seems to suggest that managers have a choice but they use it consciously for increasing shareholder value instead of the welfare of larger group of stakeholders.

Indeed, corporate management has to follow the applicable laws but, in the words of Sikka, 'their discretion to pay democratically agreed taxes and maximise social welfare, is severely constrained by ideologies that preclude corporations from voluntarily embracing policies which subordinate shareholder interests to the advancement of collective social welfare.'[53] Opting for socially responsible tax governance is, thus, also a question of the autonomy of corporate management. Based on two previously illustrated views, namely Anglo-Saxon theory and Rhineland theory, corporate boards face certain pressure to opt for aggressive tax planning for increasing shareholder value. If this were the case, exercising socially responsible tax governance would be strongly hindered. Whether such position holds true (especially in light of current debates) is, however, not that certain.[54] In general the management has to operate in the best interests of the company and good tax governance serves in my opinion this responsibility better than pure shareholder value maximisation approach.

Naturally, the distinction between shareholder and stakeholder approaches is in practice not as clear as illustrated previously. Nevertheless, for the purposes of this contribution it suffices to conclude that, the main difference between the two approaches lies in prioritizing conflicting interests: shareholder theory prioritises the economic interests of the company, while stakeholder theory sets society above or on the equal level with pure economic interests. It is not the aim of this contribution to argue in favour of one or criticise the other model. On the contrary, the aim is to find a connecting factor, which appears to be acting in the long-term best interests of the company.

52. Sikka, P. (2010), 'Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance', *Accounting Forum* 34 (3–4), pp. 153–168, p. 155.
53. Ibid.
54. Ibid.

Without doubt is financial performance crucial for the best long-term interests of the company. In addition, 'financial success is important because the more a company earns the more taxes it is able to pay.'[55] Taxes are important for corporate-decision-making for '[T]hey have strong implications for the year end results as well as the profitability and the ability to pay dividends.'[56] Consequently, taxes can affect the share price.[57] Therefore, corporate boards should balance between 'being profitable and not taking tax risks that could have negative impacts on the business performance and the financial statements.'[58] In other words, corporate boards are 'responsible for tax risk management' and they will be held accountable for doing so by the shareholders as well as stakeholders of the company.[59] Tax planning does not regard only direct financial returns but also has effect on corporate reputation, which in turn may influence the interests of a company in the long run.[60]

Especially multinationals that aspire to be socially responsible should seriously address their tax planning practices. Next to acting in the best financial interests of the company (and thus shareholders), they also need to be aware of the societal effects of tax planning. The attention corporate tax planning has received in recent years (for instance in public media and in a form of public hearings where corporate managers need to explain their tax planning strategies) have shown that corporate boards have to understand better the content of company's tax strategies. This has also resulted in changing relationship between corporate management and tax directors. Tax is an important topic in the boardrooms nowadays.

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55. Erle, B. (2008), 'Tax Risk Management and Board Responsibility' in Schön, W. (ed), *Tax and Corporate Governance* (Berlin/Heidelberg: Springer-Verlag), pp. 205–220, pp. 205–206.
56. Ibid.
57. 'In February 2006 Google announced reduced earnings due to a higher than expected tax charge. Market value fell by 20 billion dollars.' Ibid.
58. Ibid.
59. Ibid., p. 220.
60. Gribnau, J. L. M. & Jallai, A.-G. (2017), 'Good Tax Governance: A Matter of Moral Responsibility and Transparency', *Nordic Tax Journal* 1, pp. 70–88.

Indeed, shareholders enjoy a specific position and resulting rights in a corporation according to corporate governance rules. Various legal rules prevent managers acting against the interest of shareholders. Moreover, as equity financing is important for corporations, managers have serious financial and competition-related motivations to try to satisfy shareholders. Nevertheless, socially responsible corporations build a certain profile, which creates expectations (amongst both, shareholders and stakeholders at large) on such corporations. Not living up to this profile, corporate reputations amongst different stakeholders, such as consumers, shareholders, media, or government, might be damaged.[61] Moreover, also 'shareholder interest' is not one commonly agreed concept because various shareholders can have different interests.[62]

It is true that, for some, acting in the best interests of the company equals to creating shareholder value means maximizing profits 'by excluding extraneous factors like social responsibility.'[63] Nevertheless, the research on socially responsible investment (SRI) suggests that socially responsible and transparent firms constitute a lower risk investment.[64] Consequently, in order to live up to plural expectations on corporations, which are crucial fundament for ensuring the best long-term success of a corporation, corporate managers have sufficient latitude with regard the corporate decision-making.

Thus the question is whether and to what extent are shareholders willing to take the risk of aggressive tax planning. Based on legal-positivist thinking, Schön argued that it is naïve to think that '"honest" shareholders do not want their company to engage in more or less strategic tax planning.' He argued that '[A]s long as shareholders have not declared formally their will in one way or the other that the company shall abstain from certain tax measures, thus "putting tax

61. Ibid.

62. See also: Bower, J. L. & Paine, L. S. (2017), 'The Error at the Heart of Corporate Leadership', *Harvard Business Review*, May–June issue. Retrieved from: <https://hbr.org/2017/05/managing-for-the-long-term> (accessed 11 January 2019).

63. Tapscott, D. & Ticoll, D. (2004), *The Naked Corporation. How the Age of Transparency Will Revolutionize Business* (New York: Penguin), p. 235.

64. Ibid., pp 236–241.

paying first", management has no justification to do so.'[65] In addition to questionability of such argument, nowadays the importance of socially responsible investments is growing.[66] The European Parliament, for instance, stresses that SRI 'is part of the implementation process of CSR in investment decisions; notes that although there is currently no universal definition of SRI, it usually combines investors' financial objectives with their concerns regarding social, environmental and ethical (SEE) and corporate governance issues.'[67]

Indeed, some investor groups can be hesitant about this 'difficult trade-off between return on investment and social responsibility.'[68] It is, however, inevitable that both short-term and responsible shareholders need to make compromises in their ideal solutions in order to make the general picture work. Therefore, tax adds another spectrum to corporations' attractiveness for investors. Also the EU has been considering sustainable investing as fiduciary duty for investors.[69] Another good evidence of the importance of SRI is also BlackRock's ('one of the most influential investors in the world'[70]) letter, entitled 'A sense of purpose', to many publicly held companies in

65. Schön, W. (2008), 'Tax and Corporate Governance: A Legal Approach' in Schön, W. (ed), *Tax and Corporate Governance* (Berlin / Heidelberg: Springer-Verlag), pp. 31–62, p. 48.
66. See e.g. Schuil, G., Van Diepen, M., Van Der Helm, G., Verbunt, S. & Vellenga, I. (2014), *Good Tax Governance in Transition: Transcending the Tax Debate to CSR*. Report coordinated by the Dutch Association of Investors for Sustainable Development (VBDO) with contributions from Oikos and PwC. Retrieved from: <https://www.vbdo.nl/wp-content/uploads/2018/10/GoodTaxGovernanceinTransition.pdf> (accessed 24 February 2019); PRI, BlackRock.
67. European Parliament (22 January 2016), Resolution of 6 February 2013 on Corporate Social Responsibility: Accountable, Transparent and Responsible Business Behaviour and Sustainable Growth (2012/2098(INI)). Pt. 20.
68. Verstappen, R. et al. (2017), *VBDO Investor Guide: Integration of Tax in Responsible Investment: Practical Steps to Design and Implement a Responsible Tax Strategy for Investors* (VBDO & PwC), p. 6.
69. Rust, S. (13 November 2017), 'EU Considering Sustainable Investing as Fiduciary Duty for Investors', *European Pensions and Institutional Investment News* (online). Retrieved from: <https://www.ipe.com/news/esg/eu-considering-sustainable-investing-as-fiduciary-duty-for-investors/www.ipe.com/news/esg/eu-considering-sustainable-investing-as-fiduciary-duty-for-investors/10021736.fullarticle> (accessed 5 February 2019).

which they invest, stating that '[T]o prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society.'[71] Indeed, Fink, a CEO of BlackRock, did not ask corporations to stop aggressive tax planning nor did he deny the corporate responsibility to be accountable to shareholders. He stated that responsible companies will ultimately 'provide subpar returns to the investors who depend on it'. This suggests that the investor is careful talking about long-term shareholder value.[72] Nevertheless, BlackRock's statement showed that also institutional investors who are often thought to be short-term and self-interested set sustainability and corporate responsibility high on the agenda.[73] Also the UN Principles for Responsible Investment (PRI), a voluntary and aspirational set of investment principles developed by investors, stress the importance of responsible tax planning practices.[74] In CSR theory, it is long clear that besides 'self-interest and concern for profits' a successful firm requires more 'trust, a sense of loyalty, and good relationships with all stakeholders and, as a consequence, an enduring cooperation among those who are involved in or are independent with the firm.'[75]

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70. Sorkin, A. S. (15 January 2018), 'BlackRock's Message: Contribute to Society, or Risk Losing Our Support', *The New York Times* (online). Retrieved from: <https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html?smid=tw-share> (accessed 5 May 2019).
71. Fink, L. (2018), 'Annual Letter To CEOs: "A Sense of Purpose"', retrieved from: <https://www.blackrock.com/corporate/en-us/investor-relations/larry-fink-ceo-letter> (accessed 22 May 2019).
72. Alexander, R. (26 February 2018), 'Benefit Corporation: Accountability Matters', *Corporate Governance*. Retrieved from: <https://www.corpgov.net/2018/02/benefit-corporation-accountability-matters/> (accessed 28 April 2019).
73. See also Turak, N. (25 January 2018), '"We don't talk about inclusion" and that's a problem, says BlackRock's Larry Fink', *CNBC news* (online). Retrieved from: <https://www.cnbc.com/2018/01/25/we-dont-talk-about-inclusion-and-thats-a-problem-says-blackrocks-larry-fink.html> (accessed 22 May 2019).
74. See e.g. UN. (6 February 2017), 'New Recommendations Help Investors Engage on Tax'. Retrieved from: <https://www.unpri.org/news/new-guidance-helps-investors-engage-on-tax> (accessed 5 February 2019).
75. Melé, D. (2008), 'Corporate Social Responsibility Theories' in Crane, A., Matten, D., McWilliams, A., Moon, J. & Siegel, D. S. (eds), *The Oxford Handbook of*

The growing importance of SRI has, however, not only provided 'an economic incentive for companies to adopt socially responsible practices' but also 'means to measure comparative investment returns between those companies that meet criteria for social investment funds and those that do not.'[76] For instance, RobecoSAM, which is also a part of Dow Jones Sustainability Index,[77] claims that as a result of recent financial crisis that 'exposed significant risks associated with short-termism,' there is a growing demand amongst investors for 'long-term oriented strategies that integrate economic, environmental and social criteria within their portfolios.'[78] Therefore, sustainability considerations have become an important part of investors' decision-making.[79]

The OECD Principles of CG, for instance, refer to ethical concerns as one of the relevant factors that (should) affect corporations' decision-making processes.[80] Without denying the importance of shareholders, the OECD also points out that CG should also include

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Corporate Social Responsibility (Oxford: Oxford University Press), pp. 47–82, p. 61. See also Hosmer, L. T. (1995), 'Trust: The Connecting Link between Organizational Theory and Philosophical Ethics', *Academy Management Review* 20(2), pp. 373–403; Kay, J. (1993), *The Foundations of Corporate Success* (Oxford: Oxford University Press); Kotter, J. P. & Heskett, J. (1992), *Corporate Culture and Performance* (New York: Free Press).

76. Roselle, J. (2011), 'The Triple Bottom Line: Building Shareholder Value' in Mullerat, R. (ed), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2nd Ed., Alphen aan de Rijn: Kluwer Law International), pp. 129–156, p. 136.
77. <http://www.sustainability-indices.com/>.
78. RobecoSAM. (2015), 'Measuring Intangibles ROBECOSAM's Corporate Sustainability Assessment Methodology', p. 16. Retrieved from: <http://www.sustainability-indices.com/images/Measuring_Intangibles_CSA_methodology.pdf>.
79. Dixon, C. & Sharma, A. (24 January 2018), 'Weil Discusses 2018 10-K and Proxy Season: Spotlight on Corporate Sustainability', *Columbia Law School's Blue Sky Blog on Corporations and the Capital Markets*; see also: Schroder, A. (9 March 2017), 'Responsible Investing Growing in Importance'; see also 'Socially responsible investments (SRIs) constitute one of the most rapidly growing segments of the investing community, representing over $2.34 trillion or over 10% of all investments'; Tschopp, D. J. (2005), 'Corporate Social Responsibility: A Comparison Between the United States and the European Union', *Corporate Social Responsibility and Environmental Management* 12 (1), pp. 55–59, p. 57.

other stakeholders for they contribute into the success of the corporation.[81] Considering the interests of stakeholders is according to the OECD in the long-term interest of corporations. Furthermore, in its MNE Guidelines,[82] the OECD points out that good CG reassures 'shareholders and other stakeholders that their rights are protected and make it possible for corporations to decrease the cost of capital and to facilitate their access to the capital market.'[83] Moreover, corporate boards should, according to the OECD, 'adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated.'[84] Considering that aggressive tax planning 'may involve substantial indirect costs, including reputation losses, political trouble, more expensive debt, and a higher risk of stock price crash',[85] it does not seem that corporate boards engage in such practices act in the best interests of the company. Even Schön, who argued for corporate managers' legal responsibility to create shareholders' value, agrees that 'the management acts contrary to its duty of care when they set up structures where the tax advantages are regularly outweighed by the compliance costs and any negative impact on the real operations

80. OECD (2015), *G20/OECD Principles of Corporate Governance* (Paris: OECD Publishing), pp. 9–10.

81. Ibid, p. 34.

82. See more OECD (2011), *OECD Guidelines for Multinational Enterprises* (Paris: OECD Publishing).

83. OECD (2015), *G20/OECD Principles of Corporate Governance* (Paris: OECD Publishing), p. 10.

84. OECD (2011), *OECD Guidelines for Multinational Enterprises* (Paris: OECD Publishing), pp. 60–61. See also Gribnau, J. L. M., Van der Enden, E. & K. Baisalbayeva, K. (2018), 'Codes of Conduct as a Means to Manage Ethical Tax Governance', *Intertax* 46 (5), pp. 390–407.

85. Bayar, O. et al. (2018), 'Corporate Governance, Tax Avoidance, and Finance Constraints', *The CLS Blue Sky Blog*. Retrieved from: <http://clsbluesky.law.columbia.edu/2018/01/11/corporate-governance-tax-avoidance-and-financial-constraints/> (accessed 8 May 2019).

of the company.'[86] But what kind of tax planning is in the best interests of the company?

5. Tax planning and best interests of the company

Corporate boards can use their discretion to engage in CSR, and give their own interpretation to what they consider as going beyond the pure compliance with legal rules. This indicates that boards are quite flexible when acting in the best interests of the company under the concept of CSR. Moreover, multinationals that already have a CSR strategy in place have an incentive to think further that strict compliance with the legal rules.

It is, however, not easy to decide what is in the best long-term interests of the company. Multinational operations affect and are affected by myriad of factors in various areas. It goes without saying that 'taxes are the result of firm's strategy and decisions.'[87] Corporations that wish to change can do that. For instance, in 2013 the Tax Justice Network (TJN) asked a prestigious law firm Farrer & Co for an opinion with regard to corporate fiduciary duties and tax planning. The TJN concluded that managers indeed have the obligation 'to promote the success of the company, but this should not be misunderstood as requiring blinkered attention solely to maximising distributable profits.'[88] Farrer & Co noted that, according to the UK corporate law, '[I]t is not possible to construe a director's statutory duty to promote the success of the company as constituting a positive duty to avoid tax.'[89] As a matter of fact, the law firm argued that 'the legislation expressly protects directors from criticism in circumstances

86. Schön, W. (2008), 'Tax and Corporate Governance: A Legal Approach' in Schön, W. (ed), *Tax and Corporate Governance* (Berlin/Heidelberg: Springer-Verlag), pp. 31–62, p. 56.
87. Huseynov, F. & Klamm, B. K. (2012), 'Tax Avoidance, Tax Management and Corporate Social Responsibility', *Journal of Corporate Finance* 18 (4), pp. 804–827, p. 809.
88. Tax Justice Network (9 September 2013), 'Formal Legal Opinion: Company Directors Have no Fiduciary Duty to Avoid Tax'. Retrieved from: <http://taxjustice.blogspot.nl/2013/09/a-legal-opinion-on-directors-duties-on.html> (accessed 30 April 2019).

where they take decisions based on the kind of factors which would militate against tax avoidance (e.g. change-of-law risk, reputation, brand impact, relationship with HMRC and community impact).'[90] Director's fiduciary duty under the UK corporate law suggests, according to Farrar & Co, that corporate decisions are 'taken in good faith in pursuit of the success of the company upon proper deliberation and with regard to the relevant factors'.[91] As long as such general duty is in principle met, courts would not question that.

Having said that, corporate managers can also have various reasons for believing that tax avoidance is in the long term interests of the company, such as 'the adverse risk profile of tax-structured transactions in the long term' or 'the desirability of investment' in other important spheres for company stakeholders.[92] Moreover, states often incentivise corporations to plan their taxes with various tax reliefs and incentives without giving clear guidance on how far corporations could go. Thus, if the managers have a solid reason 'in good faith and upon proper deliberation' to believe that corporate tax structuring is in the best long term interests of the company, the managers 'would be immune from judicial criticism' as well.[93] As a result, corporate fiduciary duty, especially as developed under the Anglo-Saxon CG theory, does not strictly require nor prohibit corporate tax avoidance. Farrar & Co opinion explains that 'codified corporate governance practice and performance-related executive reward structures' are the reasons why some corporate managers 'may tend towards the result that the board is motivated to act to the measurable financial benefit of shareholders.'[94] This is, according to the law firm, an 'erroneous assumption' rather than misunderstanding the fiduciary duty.

89. Farrer & Co (7 June 2013), 'Fiduciary Duties and Tax Avoidance', *Opinion*. Retrieved from: <http://www.taxjustice.net/cms/upload/pdf/Farrer_and_Co_Opinion_on_Fiduciary_Duties_and_Tax_Avoidance.pdf> (accessed 30 April 2019), p. 1.
90. Ibid.
91. Ibid., p. 3.
92. Ibid.
93. Ibid.
94. Ibid, p. 4.

In terms of tax planning, to my mind, it is in the best interests of the company to stay away from irresponsible behaviour. Indeed, businesses are driven by taking risks and aggressive tax planning might bring considerable short-term gains. Aggressive tax planning or tax avoidance may 'result in both higher cash flows and higher after-tax earnings'[95] but at the same time it brings certain risks, such as reputation damage.[96] It is argued that stock price is determined by 'whatever society values'[97] and as shown through this research, society seems not to value aggressive tax planning. Thus, tax planning creates a situation where risks are confronted with rewards and corporations have to make choice. It is often up to corporate managers to decide whether they engage moral considerations in their decision-making or not. Thus, corporate tax avoidance is by no legal means an obligation but rather a choice for corporate managers. Moreover, tax planning to a certain degree is a reasonable business-practice. Consequently, corporate managers have latitude in their decision-making. However, corporations that operate under the flagship of CSR already pose such expectation on their managers.

From a moral perspective, aggressive tax planning conflicts with CSR and (even though not being illegal) is not in the best interests of the company for it might for instance harm corporate reputation and trustworthiness. It is evident that businesses face many changing regulations, such as OECD BEPS Action Plan, as well as societal expectations.[98] The expectations of stakeholders are becoming increasingly important for 'companies are more and more relying on their reputa-

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95. Austin, C. R. & Wilson, R. J. (2017), 'An Examination of Reputational Costs and Tax Avoidance: Evidence from Firms with Valuable Consumer Brands', *Journal of the American Taxation Association* 39(1), pp. 67–93, p. 67.
96. See e.g. Tapscott, D. & Ticoll, D. (2004), *The Naked Corporation. How the Age of Transparency Will Revolutionize Business* (New York: Penguin), p. 78; Lavermicocca, C. & Buchan, J. (2015), 'Role of Reputational Risk in Tax Decision Making by Large Companies', *eJournal of Tax Research* 13 (1), pp. 5–50, p. 15.
97. Dobson, J. (1999), 'Is Shareholder Wealth Maximization Immoral?', *Financial Analysts Journal* 55 (5), pp. 69–75, p. 71.
98. See OECD. (2013), *Addressing Base Erosion and Profit Shifting (BEPS)* (Paris: OECD Publishing). See also OECD. (2015), *G20/OECD Principles of Corporate Governance* (Paris: OECD Publishing), pp. 46–47.

tion of behaving in a socially responsible way as a factor contributing to their success.'[99] The OECD clearly states that aggressive tax planning does not 'contribute to the long term interests of the company and its shareholders, and can cause legal and reputational risks.'[100] Besides, as shown above, SRI proves that also the preferences of investors might change in time. Hence, good tax governance can be attractive to investors because of reduced compliance costs and a lower risk of future liabilities (for instance related to the reputation damage). Hence, corporations should balance tax risk management with good tax governance. High ethical standards are evidently 'in the long term interests of the company as a means to make it credible and trustworthy, not only in day-to-day operations but also with respect to longer term commitments.'[101]

To sum, it is not an easy task to devise a concrete guidance for corporate managers with regard to behaving in the best interests of the company. Similarly to CSR, it is easier to agree upon what is not responsible and not in the best long-term interests of the company. Aggressive tax planning clearly constitutes as socially irresponsible corporate behaviour and thus it is not in the best interests of a company. Therefore, corporate boards should make use of their latitude to engage good tax governance. Based on the SDGs, I will explain in the following section why should the managers choose for more responsible and sustainable business practice.

6. SDGs, tax planning and CG

Roselle writes that good CG is 'a key ingredient' for a successful implementation of CSR because 'without it the company will lack the vision, leadership and accountability to develop sustainable profit in a manner that will appropriately consider the needs of all of the com-

99. Erle, B. (2008), 'Tax Risk Management and Board Responsibility', in Schön, W. (ed), *Tax and Corporate Governance* (Berlin/Heidelberg: Springer-Verlag), pp. 205–220, p. 220.

100. OECD. (2015), *G20/OECD Principles of Corporate Governance* (Paris: OECD Publishing), pp. 46–47.

101. Ibid.

pany's constituencies.'[102] Increasingly, CG should not only 'ensure that the company has tools required to comply with applicable laws and regulations' but also 'to articulate in a consistent manner how it views its responsibilities and commitments to the people and communities that it seeks to serve.'[103]

Also UN Sustainable Development Goals (SDGs), the worldwide supported sustainability agreements, rely on tax governance that considers wider social effects. Most of the countries in the world (UN members) and also many corporations have agreed to contribute to SDGs that are aimed at achieving a better future; well-functioning and sustainable societies and markets. Taxation is crucial for achieving SDGs. In recent years, SDGs have received much attention in the context of state as well as corporate responsibilities. SDGs are 17 goals to fight against poverty, inequality and climate change, adopted in 2015 by UN member states. SDGs 'call for action by all countries, poor, rich and middle-income to promote prosperity while protecting the planet', and 'recognize that ending poverty must go hand-in-hand with strategies that build economic growth.'[104] It is to a large extent governments' responsibility to establish regulatory frameworks in order to achieve SDGs by 2030. The SDGs are aimed at achieving well-functioning and sustainable societies and markets. In recent years, SDGs have received much attention in the context of state as well as corporate responsibilities. Thus, such SDGs provide a concreter content for corporate social responsibilities.

Most SDGs, such as ending poverty, developing infrastructure or reduce inequality, are (based on) essential public goods that are financed by collecting taxes.[105] Therefore, 'taxation has a key role to

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102. Roselle, J. (2011), 'The Triple Bottom Line: Building Shareholder Value' in Mullerat, R. (ed), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2nd Ed., Alphen aan de Rijn: Kluwer Law International), pp. 129–156, p. 133.
103. Ibid.
104. UN, *The Sustainable Development Agenda*.
105. UN. (2014), *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, Magdalena Sepúlveda Carmona, p. 1.

play in financing the SDGs.'[106] Achieving SDGs depends largely on whether and how governments succeed in improving and enforcing their tax systems.[107] At the same time, as a group of leading companies maintains, 'fairer, more transparent tax systems, should be supported and upheld by business.'[108] Perfect laws do not exist and multinationals will always have a choice whether to comply with the (moral) norms or circumvent the system.[109] Thus corporate boards have moral choices when it comes to tax planning.[110] This usually goes at the expense of public revenue and shifts the tax burden to less expert or mobile taxpayers. Tax avoidance has, therefore, to my mind an important influence on achieving SDGs. Taxation is 'instrumental to state-building';[111] by not contributing his or her fair share to the society, a taxpayer limits the state's possibility to provide essential public goods and services. In other words, 'tax abuses deprive governments of the resources required to provide the programmes that give effect to economic, social and cultural rights, and to create and strengthen the institutions that uphold civil and political rights.'[112]

Consequently corporate tax avoidance and aggressive tax planning can be categorized as unsustainable because in case corporations 'are not willing to fund the political institutional environment (such as schools, hospitals, the police, and the justice system), they

106. Platform for Collaboration on Tax. (16 February 2018), Platform Partners' Statement at the Closing of the Conference, p. 1.

107. Lustig, N. (2015), 'A Missing Target in the SDGs: Tax Systems Should Not Reduce the Income of the Poor', *International Growth Centre*.

108. The B Team. (2018), *A New Bar For Responsible Tax: The B Team Responsible Tax Principles*, p. 1.

109. See e.g. Gribnau, J. L. M. (2017), 'The Integrity of the Tax System after BEPS: A Shared Responsibility', *Erasmus Law Review* 1, pp. 12–28.

110. Gribnau, J. L. M. & Jallai, A.-G. (2017), 'Good Tax Governance: A Matter of Moral Responsibility and Transparency', *Nordic Tax Journal* 1, pp. 70–88.

111. Panayi, C. H. J. I. (2017), 'The Europeanization of Good Tax Governance' in Albors-Llorens, A., Lianos, I., Micklitz, H.-W., Schütze, R. & Tridimas, T. (eds), *Yearbook of European Law* (Oxford: Oxford University Press), pp. 1–54, p. 22.

112. IBAInternational Bar Association. (2013, October), 'Tax Abuses, Poverty and Human Rights', a report of the International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights, p. 2.

erode one of the key institutional bases of their corporate success.'[113] In 2017 the Business and Sustainable Development Commission (BSDC) launched a report that explains the necessity of corporate engagement with regard to sustainable development.[114] According to this report businesses need to regain public trust and in order to do that, they need to demonstrate that they pay taxes where revenue is earned and are socially aware and responsible in other fields, such as environmental and labour standards; 'to build an economy that is more just.'[115]

Achieving SDGs also include new possibilities for companies. For instance, it arguably opens up 'US$12 trillion of market opportunities in the four economic systems'[116] and creates 380 million new jobs.[117] However, in order to 'capture these opportunities in full, businesses need to pursue social and environmental sustainability as avidly as they pursue market share and shareholder value.' In case businesses fail to do that, 'the costs and uncertainty of unsustainable development could swell until there is no viable world in which to do business.'[118] Moreover, a responsible mind-set and focus helps to build corporate reputation amongst different stakeholders.[119] These

113. Crane, A. & Matten, D. (2016), *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed., Oxford: Oxford University Press), pp. 33–34.

114. 'The Business and Sustainable Development Commission was launched in Davos in January 2016. It brings together leaders from business, finance, civil society, labour, and international organisations, with the twin aims of mapping the economic prize that could be available to business if the UN Sustainable Development Goals are achieved, and describing how business can contribute to delivering these goals.' See Business and Sustainable Development Commission (January 2017). Better Business Better World: The report of the Business & Sustainable Development Commission. Retrieved from: <http://report.businesscommission.org/uploads/BetterBiz-BetterWorld_170215_012417.pdf>.

115. Business and Sustainable Development Commission (January 2017), 'Better Business Better World: The report of the Business & Sustainable Development Commission', pp. 7–8.

116. Ibid., p 12.

117. Ibid., p 18.

118. Ibid., p 12.

119. See e.g. Ibid., p 12.

are clear examples of (external) motivations to engage good tax governance (in addition to internal drive to act socially responsible).

A concrete governance tool to engage responsible tax planning is a code of conduct, which can be conceptualized as a set of corporate self-regulatory[120] 'rules that guides and orients behaviour within an organisation or sector in order to promote social, environmental, and/or ethical behaviour.'[121] It is a tool for internal and external communication of CSR commitments,[122] to clarify corporations' understanding of moral behaviour. In other words, such codes set ethical behavioural standards for corporate decisions and operations. Such codes, thus, are a tool for combining various intrinsic and extrinsic motivations of good tax governance; on the one hand, they give a practical form for corporate moral values, and on the other hand they send the external stakeholders a message that corporation accounts to its moral behaviour. Codes of conduct help 'to achieve moral consistency throughout the company' if they are 'implemented strongly and embedded in the organizational culture.'[123] Moreover, a code of

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120. Self-regulation stands for regulation that is 'exclusively set by business' for business. Such set of rules and norms are considered to work 'as a direct counterpart to governmental regulation'. Examples of such self-regulatory standards are 'collective agreements or commitments by industry', which are 'intended to avoid, forestall or soften potential laws', or corporate codes of conduct. Crane, A. & Matten, D. (2016), *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed., Oxford: Oxford University Press), p. 520.

121. Leipziger, D. (2010), 'Codes of Conduct' in Visser, W., Matten, D., Pohl, M. & Tolhurst, N. (ed), *The A to Z of Corporate Social Responsibility* (Chichester: Wiley), pp. 71–74; Gribnau, J. L. M. et al. (2018), 'Codes of Conduct as a Means to Manage Ethical Tax Governance', *Intertax* 46 (5), 390–407, p. 398. Referring to: Buchholtz, A. K. & Carroll, A. B. (2008), *Business & Society: Ethics & Stakeholder Management* (7th Ed., Mason: South-Western Cengage Learning), p. 401.

122. Bondy, K. et al. (2008), 'Codes of Conducts as a Tool for Sustainable Governance in MNCs, in Corporate Social Responsibility' in Crane, A., Matten, D. & Spence, L. J. (eds), *Readings and Cases in a Global Context* (London: Routledge), pp. 432–448. As referred to in Gribnau, J. L. M. et al. (2018), 'Codes of Conduct as a Means to Manage Ethical Tax Governance', *Intertax* 46 (5), pp. 390–407, p. 398.

123. Gribnau, J. L. M. et al. (2018), 'Codes of Conduct as a Means to Manage Ethical Tax Governance', *Intertax* 46 (5), pp. 390–407, p. 398. Referring to Buchholtz, A. K. & Carroll, A. B. (2008), *Business & Society: Ethics & Stakeholder Management*

conduct can be 'a truly helpful resource that employees use for ethical decision-making.'[124] Indeed, since stakeholders' expectations as well as regulatory environment, business strategy, or ethical norms may change in time, corporations should adjust such code if necessary. Bouwer & Paine aptly argue that corporate long-term interests can only be prospered 'if they're able to learn, adapt, and regularly transform themselves.'[125] Therefore, Harris' suggestion to 'periodically review the code—every three years is common—and update it to remain aligned with changes in the business or in the regulatory environment' is useful.[126] Additionally, corporate employees on different levels should be trained on a continuous basis 'about their responsibilities functioning as ethical role models, recognizing and preventing retaliation, and responding to' arising concerns.[127]

Managing corporate strategy and values, as well as reputation and trust amongst stakeholders suggests that tax governance is a responsibility of the corporate board. It is part of corporate risk management. According to Mitchell, 'running a successful and sustainable business' requires that corporate managers do not risk with undermining the legitimacy of their business by ignoring CSR concerns.[128] Thus, it is the role of the board 'to set general guidelines for the company's global tax philosophy and the framework for the gov-

(7th Ed., Mason: South-Western Cengage Learning), p. 331.

124. Harris, A. R. (2017), 'Creating a Code of Ethics and Conduct', *National Defense Magazine*. Retrieved from: <http://www.nationaldefensemagazine.org/articles/2017/8/23/creating-a-code-of-ethics-and-conduct> (accessed 19 February 2019).

125. Bower, J. L. & Paine, L. S. (2017), 'The Error at the Heart of Corporate Leadership', *Harvard Business Review*, May–June issue. Retrieved from: <https://hbr.org/2017/05/managing-for-the-long-term> (accessed 11 January 2019).

126. Harris, A. R. (2017), 'Creating a Code of Ethics and Conduct', *National Defense Magazine*. Retrieved from: <http://www.nationaldefensemagazine.org/articles/2017/8/23/creating-a-code-of-ethics-and-conduct> (accessed 19 February 2019).

127. Ibid.

128. Mitchell, L. E. (2007), 'The Board as a Path Toward Corporate Social Responsibility' in McBarnet, D., Voiculescu, A. & Campbell T. (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press), pp. 279–307, p. 281.

ernance of tax issues and processes.'[129] For developing a code of conduct for good tax governance, management should have certain tax values that are respected in their decision-making process. Good tax governance, as a self-regulatory approach, should be attractive for multinationals because it is fairly flexible and corporations can give its own niche-related content to it. Moreover, companies have a choice on deciding how far-reaching their social responsibility strategy is. In other words, multinationals aspiring to engage in good tax governance should have certain ethical tax values in place. For example, PwC suggests that sustainable tax is a concept that is based on four key elements: (a) conscious choices, that are made based on (b) corporate values (which are developed in dialogue with various stakeholders), and that are (c) implemented though the corporation (e.g. in a form of Tax Control Framework), and that is (d) digitalized.[130] To my mind, developing certain tax values is at the core of good tax governance for it is leading corporate boards as well as the employees in decision-making processes.

Therefore, corporate management should 'set general guidelines for the company's global tax philosophy and the framework for the governance of tax issues and processes.'[131] Such tax philosophy should be integrated to 'the overall business mission and vision'. Multinationals that aspire to be regarded as responsible corporations are expected to have (often required) 'an internal validation system' (Tax Control Framework) next to moral values. A Tax Control Framework (TCF) is a guiding corporate tax strategy plan that is aimed at explaining corporate tax strategy, 'what the tax risks are and how

129. Bronzewska, K. & Van der Enden, E. (2014), 'Tax Control Framework—A Conceptual Approach: The Six Nuances of Good Tax Governance', *Bulletin for International Taxation* 68 (11), pp. 635–640, p. 636.

130. PwC (2017), 'Sustainable Tax for Institutional Investors & Asset Managers'. Retrieved from: <https://www.pwc.nl/nl/dienstverlening/tax/documents/sustainable-tax-brochure.pdf> (accessed 27 February 2019).

131. Bronzewska, K. & Van der Enden, E. (2014), 'Tax Control Framework—A Conceptual Approach: The Six Nuances of Good Tax Governance', *Bulletin for International Taxation* 68 (11), pp. 635–640, p. 636.

these are managed.'[132] The OECD defines TCF as 'the part of the system of internal control that assures the accuracy and completeness of the tax returns and disclosures made by an enterprise.' The OECD appraises the importance of TCF from the perspective of co-operative compliance.[133]

In its MNE Guidelines, the OECD states that corporations' 'commitments to co-operation, transparency and tax compliance should be reflected in risk management systems, structures and policies.' Corporate boards should according to OECD 'proactively develop appropriate tax policy principles, as well as establish internal tax control systems so that the actions of management are consistent with the views of the board with regard to tax risk.' Developing a TCF allows according to the OECD 'the enterprise to not only act as a good corporate citizen but also to effectively manage tax risk, which can serve to avoid major financial, regulatory and reputation risk for an enterprise.'[134] In my view, corporate tax code and TCF can be seen as complementary to each other for TCF is a corporate tool to show that it is in control of its good tax governance.

Corporations that wish to develop tax values and the risk management framework for that (such as TCF) can use various sources to begin with. In the recent years many organizations, such as VBDO,[135] PRI,[136] Fair Tax Mark,[137] or B Corp,[138] have published various prin-

132. Ibid., pp. 635–636.
133. OECD (2016), *Co-operative Tax Compliance: Building Better Tax Control Frameworks*. (Paris: OECD Publishing), p. 7.
134. OECD (2011), *Guidelines for Multinational Enterprises* (Paris: OECD Publishing), p. 61.
135. See e.g. Verstappen, R. et al. (2017), *VBDO Investor Guide: Integration of Tax in Responsible Investment: Practical Steps to Design and Implement a Responsible Tax Strategy for Investors* (VBDO & PwC), p. 13; Urbach, X. et al. (2018), 'Tax Transparency Benchmark 2018: A comparative study of 76 Dutch listed companies'.
136. UN PRI, *Information Page on Principles of Responsible investment* (PRI).
137. Fair Tax Mark. Retrieved from <https://fairtaxmark.net> (accessed 3 March 2019).
138. The B Team. (2018), 'A New Bar For Responsible Tax: The B Team Responsible Tax Principles'. See also: Alexander, R. (26 February 2018), 'Benefit Corporation: Accountability Matters', *Corporate Governance*.

ciples for responsible tax.[139] For instance, VBDO guiding principles are an appropriate illustration for companies that wish to develop a code of conduct for good tax governance. These principles are: (1) define and communicate a clear strategy regarding tax governance; (2) align taxation with the business and tax is not to be regarded as a profit centre in itself; (3) respect the spirit of the law, i.e. tax compliant behaviour is the norm; (4) have insight into the management of tax risks; (5) monitor and test tax controls and adhere to tax policies and strategy; and (6) be able to provide tax assurance.[140] In a nutshell, all such principles concern integer and sustainable decision-making, transparency, compliance with the laws, and cooperation with tax authorities. Therefore, they also contribute into sustainable development and achieving UN's SDGs.

There are several multinationals that already have developed good tax governance, such as Unilever or DSM.[141] I am convinced that in the future such corporate practices will be rather a common business-practice than an exceptional example. It is suggested that usually first adaptors of good tax governance are financial institutions 'including institutional investors' for 'they are and have been subject to increased scrutiny by regulators and the general public.'[142] Consequently, it is only a matter of time that also multinationals should implement more responsible tax practices for they are likely to face the pressure from such investors. Thus, they could gain competitive advantage if they are ahead of time by developing good tax gov-

139. In practice, corporations use key performance indicators (KPIs) to measure whether and how business objectives are achieved. Also with regard to taxation KPIs are important for business practice for they enable to measure corporations' tax performance against its overall business objectives and goals. It is, nevertheless, out of the scope of this research to propose possible examples for good tax governance KPIs. See more on KPMG (2016), 'Key Performance Indicators Driving Indirect Tax Value: Getting Down To Business With Indirect Tax'.

140. Schuil, G. et al. (2014), 'Good Tax Governance in Transition: Transcending the Tax Debate to CSR', Report coordinated by the Dutch Association of Investors for Sustainable Development (VBDO) with contributions from Oikos and PwC.

141. Urbach, X. et al. (2018), 'Tax Transparency Benchmark 2018: A comparative study of 76 Dutch listed companies'.

142. PwC (2017), 'Sustainable Tax for Institutional Investors & Asset Managers'.

ernance. PwC suggests that 'from a fiduciary perspective, developing a robust tax governance model is valuable to demonstrate that you are in control of your tax position and that potential tax risks around investments are being monitored.'[143] This sends also a positive message to value-seeking shareholders.[144]

There is also evidence that multinationals that have been in the centre of various aggressive tax planning scandals are changing their tax strategies. For instance, some sources claim that social-media giant Facebook is changing its legal structure in order to ensure that 'ad revenues would be booked in the local markets rather than at its international headquarters in Ireland.'[145] Also Google has allegedly become more transparent in New Zealand after public pressure.[146] Furthermore, Starbucks allegedly changed its corporate structure in Europe in order to pay more tax in the UK after 2012.[147] In addition, ten large UK multinationals that are accredited to the Fair Tax Mark made in December 2015 a statement supporting that 'progressive business practice is recognised and other companies are challenged to be as transparent as possible.' The statement praised the tax transparency and paying fair share, thus, good tax governance in the context of this contribution. Moreover, it claimed that tax is a CSR and sustainability issue to which corporations need to respond.[148] These are

143. Ibid.

144. A food for thought: 'Even Lehman Brothers had a page on sustainability in its 2007 annual report, hailing its role as an environmentally conscious "global corporate citizen".' Edgecliffe-Johnson, A. (4 January 2019), 'Beyond the Bottom Line: Should Business Put Purpose Before Profit?', *Financial Times* (online). Retrieved from <https://www.ft.com/content/a84647f8-0d0b-11e9-a3aa-118c761d2745> (accessed 11 January 2019).

145. Kuchler, H. (12 December 2017), 'Facebook to Stop Booking Ad Sales Through Irish HQ', *Financial Times* (online). Retrieved from <https://www.ft.com/content/62a68f3c-deb8-11e7-a8a4-0a1e63a52f9c> (Accessed 12 December 2018).

146. Smyth, J. (22 February 2018), 'Google Shift Strikes Blow for New Zealand in Global Tax Clampdown', *Financial Times* (online). Retrieved from <https://amp-ft-com.cdn.ampproject.org/c/s/amp.ft.com/content/7aa6ec34-179e-11e8-9e9c-25c814761640> (accessed 27 March 2019).

147. Note, however, that they do not admit any wrongdoing with regard to practices that were in the centre of criticism.

clear examples of business-practice positive reaction to changing societal expectations with regard to corporate tax planning.

7. Conclusion

This contribution aimed at understanding whether multinationals face certain constraints in corporate law that restrict them considering tax as a part of corporate social responsibly. Thus, good tax governance was analysed from the perspective of CG principles. Various corporate law elements behind corporate decision-making were placed into the context of tax planning.

Tax considerations inevitably form an important part of a corporate decision-making.[149] Corporate decision-making needs to consider factors such as trust and reputation, which can be severely harmed when engaging aggressive tax planning, but also tax as a cost element, which should be kept low. From various regulatory developments as well as from the high public attention it can be concluded that minimally paying its due taxes according to the strict letter of the law (thus, engaging tax avoidance or aggressive tax planning) does not seem to count as sufficient anymore. Nevertheless, satisfying shareholders with higher returns as a result of aggressive tax planning might force corporations to slip away from the idea of good tax governance.

Some business and tax experts have claimed that the various corporate responsibilities to operate in the best interests of the shareholders seem sometimes even overriding the interests of other stakeholders. This suggests that corporate boards are forced to engage aggressive tax planning or alike. This contribution aimed to prove such position wrong, showing that the corporate board has responsibilities towards shareholders as well as larger group of stakeholders. CG should set certain rules and principles for company management in order to decrease possible negative externalities that might rise

148. The Guardian (15 December 2015), 'MEPs Should Support a Fair Tax Payer Label', *Open letter to The Guardian* (online).

149. See also Desai, M. A. & Dharmapala, D. (2006), 'Corporate Tax Avoidance and High-Powered Incentives', *Journal of Financial Economics* 79 (1), pp. 145–179.

from self-interested behaviour of managers. From the corporate law perspective, it is often suggested that corporate board that acts as agents for shareholders, the owners of the company, should increase the value of shareholders. Thus, any kind of corporate actions are expected to add up the shareholder value. On the other hand, nowadays shareholders cannot be directly identified as the owners of the company any more but as the owners of the shares of the company for they are very mobile. This suggests that for the long-term sustainability of corporation, the boards should act in the best interests of the company instead of shareholders.

It goes without saying that the distinction between shareholder and stakeholder approaches is in practice not an exact science. The connecting factor between both approaches is that corporate boards should foremost be acting in the long-term best interests of the company. Without doubt a financial performance is crucial for the best long-term interests of the company. Besides, a financially healthy corporation can add more value to a society than a corporation that performs poorly with regard to its economic responsibilities.[150] Therefore, corporate boards should balance between being profitable and being socially responsible.

From the profit-making objective of corporations is tax a cost and should be managed accordingly. On the other hand, taxes are investment to a society and therefore indirect investments to the well-being of the company. Moreover, it is argued that also from the moral perspective corporations should abstain from tax planning practices that aim at the absolute minimum without ethical considerations. Per definition, CSR requires managers to take into account the interests of company's stakeholders in a broader sense. Thus, in order to act in the best interests of the CSR-company (for instance, by not risking with reputation damage), the interests to be served by managers include those of the shareholders (who are internal stakeholders) as well as the (other) stakeholders. Moreover, engaging in good tax gov-

150. See Carroll, A. B. (1991), 'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders', *Business Horizons* 34 (4), pp. 39–48, pp. 40–43.

ernance contributes into the sustainable development (as was illustrated based on the example of the UN SDGs) and adds up to corporate success.