Fair Taxation and Corporate Social Responsibility

Karina Kim Egholm Elgaard, Rasmus Kristian Feldthusen,
Axel Hilling and Matti Kukkonen (eds)

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Chapter 7

Corporate Social Responsibility and Taxation in Regulation – The EU Perspective

Professor María Amparo Grau Ruiz,
Complutense University of Madrid[1]

Summary: *The progress in Corporate Social Responsibility and taxation can be assessed through a review of the current regulation and regulatory projects in the European Union. The evolution of corporate regulation and CSR is connected with the UN Sustainable Development Goals, the UN Guiding Principles on Business and Human Rights, and the OECD work on Responsible Business Conduct. The EU taxation priorities are analysed. Special attention is paid here to the Directive on non-financial and diversity information, as well as the Regulation on public country-by-country reporting. After a Commission´s stocktaking exercise, new expectations appear, regarding a more accurate future tax treatment.*

1. PI CertificaRSE Project, DER2015-65374-R MINECO-FEDER. More information at <https://www.ucm.es/proyecto-certificarse/>.

1. The evolution of 'corporate regulation' and 'corporate social responsibility'

According to the United Nations Research Institute for Social Development,[2] the evolution of corporate regulatory policies in recent years shows the following trends: (1) In the 1980s, the focus was on de-regulation, (2) In the 1990s, there was a shift towards self-regulation (with voluntary initiatives such as the adoption of codes of conduct, in a scenario of limited capacity or lack of regulatory willingness on the part of governments and international organisations), (3) currently, there is a co-regulation phase[3] (between multilateral institutions, governments, companies, and civil society) in which standards are set, compliance is reported, monitored, audited and certified. Nowadays, there is also a renewed interest in international regulation, because many problems have planetary dimensions and it is necessary to make joint efforts on a global scale to address them.

Corporate social responsibility (CSR) is a dynamic concept that mostly depends on circumstances of time and place. It can be expressed in different manners. A pure concept of CSR implies going beyond the binding regulation and its application. There are different standards available voluntarily to adhere to, in order to prove good entrepreneurial behaviour; depending on the level of commitment wanted. Often the standards evolve progressively, requiring the subsequent adoption of a higher one. Once a certain level is commonly accepted and generally spread in the public perception, it is easier to turn the minimum standards into mandatory legislation. This will be, indeed, a political decision.[4]

2. UNRISD, 'Corporate Social Responsibility and Business Regulation', Research *and Policy Brief*, No. 1, Geneva, 2004, <http://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/F862A71428FAC633C1256E9B002F1021?OpenDocument>.

3. The EU Strategy improves self and co-regulation processes. See <https://ec.europa.eu/digital-single-market/communities/better-self-and-co-regulation>.

4. Where there is a view that change is appropriate, it may not be the case that regulation by Government is needed to secure it. One of the strengths of our system of corporate governance has been the use of non-legislative standards adopted by business itself. UK *Green Paper on Corporate Governance*, November 2016.

Taxation can be used to promote socially responsible behaviour with the environment, with workers, and good economic governance.[5] Within taxation itself, corporate social responsibility can be also applied, as CSR is a multidimensional process with internal and external implications in any company.

2. The EU twin taxation priorities: efficiency & fairness

The fairness agenda is much more than the fight against fraud, evasion, and avoidance. Taxation also plays a role in reducing inequalities and promoting social justice. Taxation and CSR policies can be mutually reinforcing (i.e. CSR can be used to spread good tax practices, while taxation can promote other areas of CSR). Even small businesses can integrate social and environmental issues into what they do. In their case, a cluster approach can help to lower the costs of CSR with indirect financial aid measures.

Public authorities can play a supporting role through a smart mix of voluntary policy measures and, where necessary, complementary regulation. The EU wishes to inject more openness and trust into taxation, and needs this smart mix to face the so-called 'dual tax gap': the tax policy gap (existing between the tax due under an optimal tax policy and the tax due under current tax policy) and the tax compliance gap (existing between the tax due under the current tax policy structure and the tax actually collected).

There has been a lot of discussion about revenue collection, due to the economic crisis, and emphasis has been put on the compliance gap. The Tax Agencies are trying to increase the amount recovered to balance the public accounts and finance sustainable development. However, most of the States focus on collecting more or increasing the fiscal space, which often implies the establishment of new taxes to generate revenue. Evidently, if we do not look for the financial means to achieve the Sustainable Development Objectives, we will not make real progress towards them. At the Addis Ababa Conference, innovative financing mechanisms were sought and some guidelines were

5. Grau Ruiz, M.A., *Sostenibilidad global y actividad financiera. Los incentivos a la participacion privada y su control* (Thomson-Reuters Aranzadir, Cizur Menor, 2019).

given to all countries. The European Union launched the message to collect more. The OECD referred to better spending instead.

In the European Union, the tax priorities, as declared at various forums, are both efficiency and justice. However, it seems, as it happens in Spain, that tax justice means only fighting against national and international tax fraud and avoidance, often criminalizing (graphically: accentuating the use of the stick, as opposed to the carrot).

Certainly, public authorities must make an intelligent combination of voluntary measures and, where appropriate, complementary regulation. Therefore, a margin for controllable tax incentives could be allowed to stimulate voluntary good behaviour. Tax expenditures are another way to spend. Basically, tax revenue is lost in the short-term, in order to get some valuable return, sometimes in the long run. Some actions in the field of law enforcement (related to the tax compliance gap) may not suffice, it is desirable to promote simultaneously actions in the field of the regulatory design (related to the tax policy gap). A deeper and longer-term vision should promote sustainable contributions by the private sector through incentives for research and innovation or for smart and green investment, for instance.

In this sense, when it is literally assumed that 'companies can become socially responsible:—by integrating social, environmental, ethical, consumer, and human rights concerns into their business strategy and operations;—following the law' an argument can be found for our interpretation.[6] In our view, following the law is clearly binding if an imperative rule is adopted. Therefore, the mention of the law can be understood as rules with a promotional nature that allow voluntary compliance (as it is the case with tax incentives).

Tax administrations and taxpayers, who have changed the antagonistic relationship after the Seoul Declaration embracing the cooperative approach (with Codes of Good Tax Practices that allow the one who collects and the one who pays to look good), are accountable for what they do for society. Both have to produce 'ESG' (environ-

6. See <http://ec.europa.eu/growth/industry/corporate-social-responsibility/>.

mental, social, governance) benefits together. Of course, these cost money and an intelligent agreement must be reached when sharing the costs between them (deciding whether the private sector has to sacrifice any economic benefit and whether or not the public sector has to compensate it).

Definitively, CSR cannot replace appropriate legislation, but good CSR policies can very much complement it. Regulation is being covered through the EU's agenda for corporate tax reform, and it is critical to leave room to ensure that companies and policymakers are pulling together on the issue of fairer taxation and sustainable development.

3. The EU approach to CSR in the light of the international context

In the international scenario, there are, at this time, various interlinked fronts: the United Nations Sustainable Development Goals,[7] the United Nations Guiding Principles on Business and Human Rights, the OECD Responsible Business Conduct initiative or the EU Corporate Social Responsibility Strategy. All of these objectives and means push for a better world (one with values on which we can build a more cohesive society) and its implementation deserves careful attention.

The EU adopted in June 2017 the new European Consensus on Development based on the '5 Ps' of the 2030 Agenda: People, Planet, Prosperity, Peace, and Partnership, and has been systematically integrating social, economic and environmental dimensions in its initiatives since then. More recently, in January 2019, the EU Commission has issued a Reflection Paper 'Towards sustainable Europe 2030' to show its significant commitment.[8]

7. United Nations, 'Transforming our world: The 2030 Agenda for Sustainable Development', Resolution 70/1 adopted by the General Assembly on 25 September 2015.
8. See <https://ec.europa.eu/europeaid/sites/devco/files/european-consensus-on-development-final-20170626_en.pdf> and <https://ec.europa.eu/commission/files/reflection-paper-towards-sustainable-europe_en>.

As part of the EU Commission's work on supporting the implementation of the United Nations 2030 Agenda, a Working document has been published during March 2019 where stocktaking is made of all the progress made in the European Union since 2011 on Corporate Social Responsibility.[9] The Commission's 2016 Communication 'Next steps for a sustainable European future: European action for sustainability', already featured CSR as a contributory set of actions under Sustainable Development Goal number 8, devoted to economic growth. The following pages try to summarize and comment on the most interesting ideas found in this Working document. Basically, the Commission calls for practical action, irrespective of whether it is labelled 'Corporate Social Responsibility', 'Responsible Business Conduct', 'Business and Human Rights', 'Sustainable Development Goals' or all four together.

It is quite obvious that companies do not only offer products or services, and create jobs and opportunities, but also have impacts on society in terms of working conditions, human rights, health, environment, innovation, education, and training. The European Union Strategy defined broadly the concept of Corporate Social Responsibility: 'the responsibility of enterprises for their impacts on society'. In a more detailed perspective, this means that companies 'should have in place a *process to integrate* social, environmental, ethical, human rights and consumer concerns *into their business operations and core strategy* in close collaboration with their stakeholders, with the aim of maximising the creation of *shared value* for their owners/shareholders and civil society at large and identifying, *preventing and mitigating* pos-

9. In 2011, the Commission adopted its renewed strategy for CSR, which combines horizontal approaches to promote CSR with more specific approaches for individual sectors and policy areas. It aimed to align European and global approaches to CSR. European Commission, 'Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress', *Commission Staff Working Document*, Brussels, 20 March 2019 [SWD (2019) 143 final], p. 4. Commission services issued in 2014 a Compendium on national public policies in the area of CSR. See <https://ec.europa.eu/digital-single-market/en/news/corporate-social-responsibility-national-public-policies-european-union-compendium-2014>.

sible adverse impacts'.[10] How to consider all these factors and agents' views, where to add them, and which purposes should be followed, is highlighted.

Accordingly, the EU citizens expect that companies understand both their positive and negative impacts on society, in order to promote the former and manage adequately the latter. All this can be facilitated by providing incentives for the uptake of Corporate Social Responsibility (or Responsible Business Conduct, because the EU uses both expressions interchangeably), including by setting benchmarks and other requirements; or when necessary and appropriate, by adopting legislation. Therefore, the smart mix of voluntary and mandatory actions can be envisaged. Respect for applicable legislation is always a prerequisite for meeting that responsibility; and also, if applicable, respect for collective agreements between social partners (i.e. the International Labour Organization and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy). In fact, over the last decades, many companies have made environmental and social responsibility a core part of their corporate missions, both on a voluntary basis and spurred on by public authorities.[11] 77% of EU companies include corporate social respons-

10. European Commission, 'Corporate Social Responsibility…', cit., pp. 3–4.
11. Social enterprises focus on achieving wider social, environmental or community objectives and prioritise their social impact over profit. They are managed in an open and responsible manner, and involve employees, consumers and stakeholders affected by their commercial activities. Among the EU actions, let us mention the Social Business Initiative of 2011, as well as the recommendations of an Expert Group on social entrepreneurship and the Communication 'Europe's next leaders: the Start-up and Scale-up Initiative' of 2016. In addition the Commission improved social enterprises' access to funding and markets (e.g. the European social entrepreneurship fund label introduced in 2013 to make it easier for them to attract private investments). In 2014, the EU Programme for Employment and Social Innovation tried to promote a high level of quality and sustainable employment. Social enterprises also became an investment priority of the European Regional Development Fund and European Social Fund and thematic focus of the 7th framework programme and Horizon 2020. European Commission, 'Corporate Social Responsibility…', cit., pp. 7 and 35.

ibility in their reporting and many of them lead in integrating corporate social responsibility activities with the SDGs.[12]

The OECD has also defined 'Responsible Business Conduct' with the same twofold purpose: making a positive contribution to economic, environmental and social progress with a view to achieving sustainable development; and avoiding and addressing adverse impacts related to an enterprise's direct and indirect operations, products or services. A more ambitious reach can be observed here, in the reference made to 'direct and indirect' operations. To put this philosophy into practice, the OECD Guidelines for Multinational Enterprises cover different areas of business responsibilities, including taxation among others (e.g. information disclosure, human rights, employment and industrial relations, environment, combatting bribery and corruption, consumer interests, science and technology, and competition). When Governments adhere to these Guidelines, they adopt a binding commitment to set up National Contact Points in charge of several tasks (i.e. promote RBC, respond to enquiries, and provide mediation and conciliation platform). Here, the EU Commission is also represented at the OECD Investment Committee, which oversees the implementation of the OECD Guidelines.[13]

12. European Commission, 'Annexes to the Reflection paper Towards a sustainable Europe by 2030', COM (2019) 22 final, Brussels, 30 January 2019, p.42. The rules on tax transparency and anti-tax avoidance measures are included in SDG 16 (Peace, Justice and Strong Institutions). 'EU public finances, including the Multi-annual Financial Framework, should be fully sustainable and the definition of environmental, social and governance risks embedded within financial regulations. Sustainable fiscal reforms should be carried out at Member State level, corporate tax avoidance and fiscal dumping addressed and the Addis Ababa Action Agenda fully implemented'. Executive Summary 'Europe moving towards a sustainable future'—Contribution of the SDG Multi-Stakeholder Platform to the Reflection Paper 'Towards a sustainable Europe by 2030' October 2018, p. 68. The full contribution of the SDG Multi-Stakeholder Platform to the Reflection Paper 'Towards a sustainable Europe by 2030' is available at <https://ec.europa.eu/info/sites/info/files/sdg_multi-stakeholder_platform_input_to_reflection_paper_sustainable_europe2.pdf>.
13. Under the OECD Investment Committee a Working Party on Responsible Business Conduct has been established. <http://www.oecd.org/daf/inv/mne/480043

The Guiding Principles on Business and Human Rights were unanimously endorsed by the UN Human Rights Council in 2011. Preventing and remedying abuses or toleration of abuses by businesses is a joint responsibility of the private sector and public authorities, in the light of the three interrelated pillars that were articulated.[14] Particularly in the EU, the Action Plan on Human Rights and Democracy 2015–2019 emphasised the implementation of these Guiding Principles.

4. A brief review of the regulatory progress made in the tax-related field within the EU

The EU Platform on Tax Good Governance was established in 2012. Hosted by the Commission, it allows the Member States to discuss with businesses, NGOs and academia issues related to corporate taxation. Occasionally, this Platform has paid attention to the specific issue of Corporate Social Responsibility and Taxation,[15] however most of its work has been focused on Tax Transparency to Fight Tax Evasion and Avoidance. In 2015 the Communication on this topic provided 'there must also be a stronger onus on companies to engage in tax practices that are transparent and fair'. Of course, we think that

23.pdf>. The May 2018 OECD Recommendation on the OECD General Due Diligence Guidance for Responsible Business conduct is applicable to all sectors. <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>. European Commission, 'Corporate Social Responsibility…', cit., p. 22.

14. 'The state duty to protect against human rights abuses by third parties, including businesses, through appropriate policies, regulation and adjudication; The corporate responsibility to respect human rights, in essence meaning to act with due diligence to avoid infringing on the rights of others; and The need for an effective access to judicial and non-judicial remedy by victims of corporate abuse'. European Commission, 'Corporate Social Responsibility […]', cit., pp. 4–6, <https://eeas.europa.eu/sites/eeas/files/eu_action_plan_on_human_rights_and_democracy_en_2.pdf >.

15. Meeting of the EU Platform for tax good governance, 15 March 2016. Meeting of the EU Platform for tax good governance, 14 June 2016. See <https://ec.europa.eu/taxation_customs/business/company-tax/tax-good-governance/platform-tax-good-governance_en>.

it is desirable that companies' tax practice be fair and transparent. However, we believe that instead of a 'stronger onus', a different path to stimulate their good tax behaviour and other positive impacts could also be used. It seems that the EU tax transparency framework has been reinforced in the past years only with the purpose to eliminate negative impacts,[16] so there is still some room to promote positive ones.

In this sense, the Action Plan for Fair and Efficient Corporate Taxation in the EU mainly entailed the Anti-Tax Avoidance Directives and the re-launch the Common Consolidated Corporate Tax Base. Additionally, the flow of different types of tax information between the Member States has been enormously enhanced, through the Directive on automatic exchange of tax rulings and advance pricing agreements, the Directive on automatic exchange of country-by-country reports, and the Directive on new transparency rules for intermediaries relating to cross-border arrangements.[17] The underlying idea in all these instruments is to provide national tax authorities with a clearer overview of the tax practices of companies that operate in their territories and to better target their audits against tax avoidance. In our view, someday the scope might be broadened to take

16. European Commission, 'Corporate Social Responsibility…', cit., pp. 8 and 27. Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings. Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms. Directive 2015/2376/EU on automatic exchange of tax rulings and advance pricing agreements. Directive 2016/881/EU on automatic exchange of country by country reports. Directive 2016/1164/EU laying down rules against tax avoidance practices that directly affect the functioning of the internal market. Directive 2018/822/EU on automatic exchange of cross-border arrangements, <http://ec.europa.eu/taxation_customs/business/company-tax/action-plan-corporate-taxation_en> and https://eiti.org/supporter/european-commission>.

17. Applicable as from July 2020, it will affect tax advisors, accountants and lawyers who provide their clients with schemes that could help avoid tax, they must be reported to the tax authorities for the exchange of this information between Member States.

into account some deserved incentives for generating positive impacts on sustainability worldwide.[18]

In the oil, gas, mining and forestry sectors, due to the Directive on Country-by-country reporting, companies report payments made to governments of the countries in which they operate, including taxes levied on their income, production or profits, royalties, and licence fees. This also facilitates the adoption of the Extractive Industry Transparency Initiative. Similarly, the Fourth Capital Requirements Directive enhanced transparency as regards taxes paid in the countries where banks operate.

5. The possible financial impact of CSR actions: why reporting on non-financial activities?

The Non-Financial Reporting Directive[19] requires certain largest EU companies, as well as other public-interest entities, to disclose their business model, policies, outcomes, principal risks and risk management, and key performance indicators relevant to the particular business. They must report on the due diligence process that they implement with regard to environmental, social and employee issues, respect for human rights, and bribery and anti-corruption.[20]

18. Commission services have launched an external study aimed at assessing the possible need to require corporate boards to develop and disclose a sustainability strategy, including due diligence throughout the supply chain, and measurable sustainability targets. European Commission, 'Corporate Social Responsibility…', cit., p. 20. Eventually, in the future, we believe that this could be connected with the measured impact of the tax incentives granted.
19. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups; OJ L 330, 15 November 2014, p. 1–9. Small and medium-sized enterprises often have a naturally responsible approach to business (due to their close relations with employees, local community, and partners) through informal and intuitive processes. The EU has developed CSR handbooks and manuals for them. European Commission, 'Corporate Social Responsibility…', cit., p. 59.
20. Companies were reporting for the first time in 2018 covering financial year 2017. In mid-2019 a first review of the Directive will be published, as part of a broader Fitness Check exercise on the overall EU framework for company reporting. The Commission's Non-Binding Guidelines for reporting non-financial information,

It is essential to enhance the visibility of CSR at every dimension (not exclusively for marketing purposes). A crucial element of CSR is that sustainability impacts need to be measured and communicated in a credible and consistent way. Some labelling schemes have been set in the European Union for that purpose (e.g. EU Ecolabel or EU Organic Label). There are also procedures to ensure that plans, programmes, and projects likely to have significant effects on the environment, population and human health, are subject to an assessment, prior to their approval or authorisation.[21]

Apart from the effective communication with the stakeholders and the reputational interests, the involvement in CSR activities can have financial consequences if the public authorities decide so. For instance, in the financial period 2014–2020, a general requirement to present a sustainable forest management plan or equivalent instrument has been introduced in order to be eligible for the support under all forestry measures. Additionally, the use of Green Public Procurement or Socially Responsible Public Procurement (to be updated in 2019 to reflect the 2014 Directives) in public purchasing

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published in July 2017 will be updated by mid- 2019, to integrate the recommendations of the Task Force on Climate-related Financial Disclosures established by the G20's Financial Stability Board. The European Financial Reporting Advisory Group hosts the European Corporate Reporting Laboratory to identify and document innovations in reporting practices, where work is envisaged in the area of environmental accounting. European Commission, 'Corporate Social Responsibility…', cit., pp. 28–29.

21. European Commission, 'Corporate Social Responsibility…', cit., pp. 40–41. The EU Ecolabel is a voluntary label promoting environmental excellence. In addition to the environmental aspects, in some cases, e.g. for textiles, the criteria also includes minimum requirements on labour conditions. It can be used as a marketing tool, as it provides easy and reliable information to ease consumer choice. The EU Organic Label serves as a guarantee for sustainably produced products. EU Regulation 2018/848, repealing Council Regulation (EC) No. 834/2007, will apply from 1 January 2021. Environmental Impact Assessment Directive 2011/92/EU or the Strategic Environmental Assessment Directive 2001/42/EC. The EU Eco-Management and Audit Scheme (EMAS) is a management instrument developed by the Commission for companies and other organisations to evaluate, report, and improve their environmental performance. With a broader perspective, ISO 26000 offers Guidance on social responsibility, although cannot be certified to unlike some other well-known ISO standards.

can create additional market opportunities for sustainable products, promote supply chain due diligence and encourage the market to shift towards more environmentally friendly and socially responsible solutions.[22]

Corporate reporting may serve as well for better control of tax incentives. It is not only important to know how much the public sector stops collecting for promoting non-fiscal objectives through the tax expenditures budget, but also to have this information confronted with the reports on taxes paid by companies and their non-financial data. The problem is who can do this task. Frequently, the tax administration does not have enough resources and many companies can no longer assume more indirect tax pressure with added administrative costs.

Certifications then come into play. There are certifying agents in many sectors (e.g. forestry or housing). With certificates, it is possible to trace whether or not the extra-fiscal purpose is really fulfilled. The basic problem is who certifies, how they certify and who controls him/her. In certain sectors, there is also an oversaturation of certificates that can confuse the consumer. There are economic studies of how certification markets play, with their pros and cons. But, if in public procurement, on the side of public spending, certificates are already admitted,[23] why should not they be admitted, on the revenue side, to grant tax incentives?

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22. European Commission, 'Corporate Social Responsibility...', cit., pp. 39 and 32. For enterprises benefits are expressly stated 'in terms of risk management, cost savings, access to capital, customer relationships, human resources management, sustainability of operations, ability to innovate and eventually profit'. See <http://ec.europa.eu/growth/industry/corporate-social-responsibility/>.

23. Following the amendments to the relevant Community Directives, reference can be made to certifications or standards, after a case brought before the Court of Justice of the European Union in which the tender had incorporated the requirement that the coffee be fairly traded. Judgment of the EU Court of Justice of 10 May 2012, *European Commission v Kingdom of the Netherlands.* NL:EUCJ, 12 May 2012, Case C-368/10, ECLI:EU:C:2012:284. Grau Ruiz, M. A., 'Some Lessons Learnt From Environmental Labelling Information Schemes: Could Certification Of Inclusive Robotics Follow A Similar Path?', *Eprint UCM*, 2019. Available at <https://eprints.ucm.es/50680/>.

In the fiscal area, the efficiency of a social responsibility label for companies was contemplated as a possible solution to address tax evasion and aggressive tax planning;[24] and quite recently 'certified taxpayers' have appeared to show their commitment with voluntary tax compliance and self-control (e.g. UNE 19602). [25]

6. The update of the EU Directive 2014/95/EU on non-financial and diversity information

The Directive on disclosure of non-financial and diversity information by certain large undertakings has already been implemented by all the Member States, though in 2017 the Commission had to open several infringement cases for late transposition of this Directive (affecting to Ireland, Spain and Cyprus).[26]

The Commission provided Guidelines on non-financial reporting, with the methodology for preparing the non-financial information reports.[27] These Guidelines recognise the importance of linkages and inter-relations of information (the 'connectivity'), whether they take place between different aspects of non-financial information, or, more deeply, between financial and non-financial information. Here

24. Meeting of the EU Platform for tax good governance, 14 June 2016.
25. Martín Fernández, J.; Rodríguez Márquez, J., *Memento práctico—compliance fiscal. Buenas prácticas tributarias* (Francis Lefebvre—AENOR, Madrid, 2019).
26. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. OJ L 330, 15 November 2014, pp. 1–9. Commission Staff Working Document Part II: Policy areas Accompanying the document Report From The European Commission Monitoring the application of European Union law 2017 Annual Report. SWD/2018/378 final. Commission Staff Working Document Part III: Member States Accompanying the document Report From The Commission Monitoring the application of European Union law 2017 Annual Report. SWD/2018/379 final.
27. See Communication from the Commission—Guidelines on non-financial reporting (methodology for reporting non-financial information). C/2017/4234. OJ C 215, 5 July 2017, pp. 1–20, <https://ec.europa.eu/info/publications/170626-non-financial-reporting-guidelines_en>; <https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en>.

the public authorities are also expressly seen as stakeholders, which is correct.

Regarding the review of the Directive 2014/95/EU, its Article 3 states that the Commission shall submit a report to the European Parliament and to the Council on the implementation of this Directive, including, among other aspects, its scope, particularly as regards large non-listed undertakings, its effectiveness and the level of guidance and methods provided. The report had to be published by 6 December 2018, and if appropriate, accompanied by legislative proposals. Apparently, some work has been carried out to amend the Directive, but only with a more limited purpose.

In March 2018 the Commission published the action plan on financing for sustainable growth. The Commission there committed to updating the non-binding guidelines on non-financial reporting, to add the climate-related information as a new supplement. This update would be published in June 2019. These efforts are aligned with the report on climate-related disclosures elaborated by the technical expert group on sustainable finance. After publishing this report in January 2019, they invited feedback, and the Commission is now consulting stakeholders. So probably there will be a partial update (in the area of climate-related action) relatively soon, although other expected modifications do not seem to be addressed yet (the one related to non-listed undertakings). It is clear that the effectiveness of the Directive depends, to a large extent, on the guidance and methods, and hopefully, they will be assessed in the future.

7. How the Regulation on public country-by-country reporting by MNE is coming along

A review clause was introduced in Directive 2013/34/EU.[28] The Commission, following the mandate, has to consider the possibility of a broader scope in its provisions. Therefore, the obligation initially imposed on large undertakings to annually produce a country-by-country report could be later expanded to additional industry sectors.

This controversial question has been dealt through a long-lasting procedure. The European Parliament held a strong debate on the disclosure of income tax information by certain undertakings and branches on the 18th of April 2018.[29] Afterwards, on the 27th of March 2019, the plenary has adopted a report on the proposal for a Directive. The Commission's proposal as amended constitutes the Parliament's first-reading position, which is contained in its recent legislative Resolution.[30] The following paragraphs underline the main changes proposed by both institutions.

In January 2019, the state of play of the Proposal for Directive of the European Parliament and the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches seemed to have experienced some

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28. Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29 June 2013, p. 19). The introduction of the review clause was made following the European Council Conclusions of 22 May 2013.
29. Pavel Svoboda, on behalf of the Committee on Legal Affairs (O-000015/2018-(B8-0013/2018) (2016/0107(COD)) (2018/2552(RSP)).
30. European Parliament Legislative Resolution of 27 March 2019 on the proposal for a directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (COM(2016)0198—C8-0146/2016—2016/0107(COD)) (Ordinary legislative procedure: first reading) P8_TA-PROV(2019)0309. Information Note, Brussels, 4 April 2019 (OR. en) 7742/19.

progress in the Council.[31] In particular, a new Chapter 10a was inserted, dealing with the report on Income tax information. The European Parliament has added a new paragraph 1b insisting on the desired objectives to fulfil: 'a fair and effective corporate tax system should respond to the urgent need for a progressive and fair global tax policy, promote the redistribution of wealth and combat inequalities';[32] and a new paragraph 4e explaining the benefits that this strategy will bring for all the stakeholders: 'more transparency in financial disclosure results in a win-win situation as tax administrations will be more efficient, civil society more involved, employees better informed, and investors less risk-averse. In addition, undertakings will benefit from better relations with stakeholders, resulting in more stability, along with easier access to finance due to a clearer risk profile and an enhanced reputation'. In fact, this continues the work carried out in the past by the EU to strengthen the rights of sharehold-

31. Presidency compromise proposal—State of play. 5134/19 COR 1, Interinstitutional File: 2016/0107 (COD), Brussels, 17 January 2019.

32. Regarding recital 2, the European Parliament makes some additions (here in italics): 'in its resolution of 16 December 2015 on bringing transparency, coordination and convergence to corporate tax policies in the Union acknowledged that increased transparency, *cooperation and convergence* in the area of corporate taxation *policy in the Union* can improve tax collection, make the work of tax authorities more efficient, *support policymakers in assessing the current taxation system to develop future legislation*, ensure increased public trust and confidence in tax systems and governments *and improve investment decision-making based on more accurate risk profiles of companies*'. They are in line with the usefulness of this tool for many stakeholders. Particularly, the European Parliament refers in a detailed manner to the public, the shareholders, the decision-makers and employees by adding why their situation will improve: '(2a) Public country-by-country reporting is an efficient and appropriate tool to increase transparency in relation to the activities of multinational enterprises, and to enable the public to assess the impact of those activities on the real economy. It will also improve shareholders' ability to properly evaluate the risks taken by companies, lead to investment strategies based on accurate information and enhance the ability of decision-makers to assess the efficiency and the impact of national legislations. (2b) Country-by-country reporting will also have a positive impact on employees' rights to information and consultation as provided for in Directive 2002/14/EC and, by increasing knowledge on companies' activities, on the quality of engaged dialogue within companies'.

ers and investors, helping them to know part of the financial and non-financial aspects of companies' performance and to enable them to better hold companies to account.[33] Due to the complexity of the issues dealt in these reports, an effort should be made to make them understandable to each target group.

The reasons to move forward with the reporting are explained by the Commission in the proposed recital 2: 'In parallel with the work undertaken by the Council to fight corporate income tax avoidance, it is necessary to enhance public scrutiny of corporate income taxes borne by multinational undertakings carrying out activities in the Union, as this is an essential element to further foster corporate responsibility to contribute to the welfare of our societies, to promote a better informed public debate and to regain the trust of citizens of the Union in the fairness of the national tax systems'. The European Parliament makes a reference also in this paragraph to corporate accountability and includes the adjective: 'foster corporate *social* responsibility' stressing its importance.[34] In addition, it alerts of the risks related to the investment climate for certain companies and adds the following: 'Public scrutiny, however, has to be conducted without harming the investment climate in the Union or the competitiveness of Union companies, especially SMEs as defined in this Directive and mid-cap companies as defined in Regulation (EU) 2015/1017, which

33. 'Reflection paper: Towards a Sustainable Europe by 2030', 30 January 2109, p. 26. Available at <https://ec.europa.eu/commission/publications/reflection-paper-towards-sustainable-europe-2030_en>. Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

34. The European Parliament proposes a new directive Recital 5 a: 'The Commission has defined corporate social responsibility (CSR) as the responsibility of enterprises for their impact on society. CSR should be company led. Public authorities can play a supporting role through a smart mix of voluntary policy measures and, where necessary, complementary regulation. Companies can become socially responsible either by following the law or by integrating social, environmental, ethical, consumer or human rights concerns into their business strategy and operations, or both'.

should be excluded from the reporting obligation established under this Directive'.

The contents of the new report are limited to avoid that disclosure gives rise to disproportionate risks or disadvantages for undertakings and excessive administrative burden.[35] The exhaustive list of the required information can be found in Article 48c:

> 1. The report on income tax information shall include information relating to all the activities of the standalone undertaking or the ultimate parent undertaking, including those of all affiliated undertakings consolidated in the financial statement in respect of the relevant financial year.
>
> 2. The information referred to in paragraph 1 shall be as follows:
>   (-a) the name of the ultimate parent undertaking or the standalone undertaking, financial year concerned and the currency used;
>   (a) a brief description of the nature of the activities;
>   (b) the number of employees which is the average number of employees during the financial year;
>   (c) the revenues which are:
>   (i) the sum of the net turnover, other operating income, income from participating interests, excluding dividends received from affiliated undertakings, income from other investments and loans forming part of the fixed assets, other interest receivable and similar income as listed in Annexes V and VI of this Directive, or

35. As announced in recital 8: 'The report on income tax information should provide information concerning all the activities of all the affiliated undertakings of a group consolidated by an ultimate parent undertaking or, depending on the circumstances, concerning all the activities of a standalone undertaking'. Recital 8a says that when preparing a report on income tax information, undertakings should be entitled to prepare the information on the basis of the Council Directive 2011/16/EU, indicating the reporting framework used, and they might include an overall narrative providing explanations in case of material discrepancies at group level between the amounts of taxes accrued and the amounts of taxes paid, taking into account corresponding amounts concerning previous financial years.

(ii) the income as defined by or within the meaning of the financial reporting framework on the basis of which financial statements are prepared excluding value adjustments and dividends received from affiliated undertakings;

(d) the amount of profit or loss before income tax;

(e) the amount of income tax accrued during the relevant financial year which is the current tax expense recognised on taxable profits or losses of the financial year by undertakings and branches in the relevant tax jurisdiction;

(f) the amount of income tax paid on cash basis which is the amount of income tax paid during the relevant financial year by undertakings and branches in the relevant tax jurisdiction; and

(g) the amount of accumulated earnings at the end of the relevant financial year.

The European Parliament has made some observations regarding some of these items (reflected below in italics):

> (a) *the name of the ultimate undertaking and, where applicable, the list of all its subsidiaries*, a brief description of the nature of their activities *and their respective geographical location*;
> (b) the number of employees *on a full-time equivalent basis*;
> (ba) *fixed assets other than cash or cash equivalents*;
> (c) the amount of the net turnover, *including a distinction between* the turnover made with related parties *and the turnover made with unrelated parties*;
> (ga) *stated capital*;
> (gb) *details of public subsidies received and any donations made to politicians, political organisations or political foundations*;
> (gc) *whether undertakings, subsidiaries or branches benefit from preferential tax treatment, from a patent box or equivalent regimes.*

Both in its internal and external action, the EU will need to continue to promote the implementation of internationally agreed guidelines and principles on responsible business conduct. This is also important in order to ensure an international level playing field.[36] The European Parliament, in recital 6 of the proposal for the Directive, specifies that 'the public should be able to scrutinise all the activities of a group when the group has certain establishments within *and outside* the Union', because this is in line with a coherent policy for development, as domestic resources mobilization is necessary in developing countries. So 'providing their citizens access to corporate country-by-country information would allow them and tax administrations in their countries to monitor, assess and hold those companies to account'.

The information should be broken down by Member State with a level of detail that enables citizens better to assess the contribution of multinational undertakings to welfare in each of them. Details are also required for operations with certain third country tax jurisdictions that pose particular challenges (i.e. the ones listed in the EU list of non-cooperative jurisdictions for tax purposes).[37] For all other third country operations, the information should be given in an aggregate number.

In principle, the report should be made accessible within twelve months after the balance sheet date in accordance with Article 48d[38] and shall remain accessible on the relevant website for a minimum of five consecutive years. However, undertakings have a possibility to defer disclosing certain information for a limited number of years,

36. European Commission, 'Reflection paper…', cit., p.27.
37. There is an exception when the report explicitly confirms that the affiliated undertakings of a group governed by the laws of such tax jurisdiction do not engage directly in transactions with any affiliated undertaking of the same group governed by the laws of any Member State.
38. Recitals 9, 9a and 10. The latter specifies 'The members of the administrative, management and supervisory bodies of the ultimate parent undertaking or standalone undertakings which are established within the Union and which have the obligation to draw up, publish and make accessible the report on income tax information, should be collectively responsible for ensuring the compliance with these reporting obligations'. However, in case this information or report is not provided, the subsidiary undertakings should publish and make accessible a statement as to why the report on income tax information could not be published and made accessible.

provided they clearly disclose the deferral and give a reasoned explanation for it. This deferral will prevent competitors, not subjected to similar transparency, from drawing conclusions about their current activities. The maximum duration of the deferral is fixed: the information omitted shall be made public in a later report on income tax information within no more than four years from the date of its original omission. Notwithstanding, the information pertaining to tax jurisdictions listed in the EU list of non-cooperative jurisdictions for tax purposes may never be omitted.

The European Parliament proposes a new subparagraph 3 a, b and c in Article 48c, paragraph 3. Basically, it supports that the Member States may allow one or more specific items to be temporarily omitted from the report as regards activities in one or more specific tax jurisdictions when their disclosure would be seriously prejudicial to the commercial position of the undertakings. However, the omission shall not prevent a fair and balanced understanding of the tax position. The undertaking shall seek each year a new authorisation from the competent authority, which will take a decision on the basis of a new assessment of the situation.[39] The Member States shall notify the Commission of the granting of such a temporary derogation and shall transmit to it, in a confidential manner, the omitted information together with a detailed explanation for the derogation granted. Every year, the Commission shall publish on its website the notifications received and the explanations provided. The Commission shall monitor the use of such a temporary derogation authorised by national authorities and shall adopt guidelines to assist the Member

39. The European Parliament proposes a new Recital 9a to ensure the participation of the tax authority in the decision on non disclosure: 'When the information to be disclosed could be considered commercially sensitive information by the undertaking, the latter should be able to request *authorisation* from the competent authority where it is established *not to disclose the full extent of information*. In cases in which the *national competent authority* is not a tax authority, the *competent tax authority should be involved in the decision*'. Where the information omitted no longer complies with the requirement, it shall immediately be made publicly available. As from the end of the non-disclosure period, the undertaking shall also retroactively disclose, in the form of an arithmetic average, the information required.

States defining cases where the publication of information shall be considered seriously prejudicial to the commercial position of the undertakings to which it relates. All this reminds us of the prohibited State Aids and leads to thinking about the importance that procedural rules and information are acquiring in this system when competitive advantages are provided without sound justification.

The stipulated place for publication is the website of the undertaking, of the subsidiary or affiliated undertaking, or of the branch, depending on the specific case. In the event of an exemption to publish the report granted by the Member State, the website of the undertakings and branches may contain information on this point and refer to the website of the corresponding register (the one mentioned in Article 3(1) of Directive 2009/101/EC). Regarding accessibility the European Parliament has proposed several changes: The report shall be published in a common template available free of charge in an open data format, made publicly available in at least one of the official languages of the Union and filed in a public registry managed by the Commission.[40]

In order to ensure public awareness on the scope of and on compliance with the reporting obligations, Member States might require that statutory auditor(s) or audit firm(s) state whether an undertaking is required to draw up a report on income tax information, as pointed out in Recital 11.

40. Article 48b(1), subparagraph 1, 'Member States shall require ultimate parent undertakings governed by their national laws and having a consolidated turnover *of or* exceeding EUR 750 000 000 as well as undertakings governed by their national laws that are not affiliated undertakings and having a net turnover *of or* exceeding EUR 750 000 000 to draw up and *make publicly available free of charge* a report on income tax information on an annual basis'. Subparagraph 2: 'The report on income tax information shall be *published in a common template available free of charge in an open data format and* made accessible to the public on the website of the undertaking on the date of its publication *in at least one of the official languages of the Union. On the same date, the undertaking shall also file the report in a public registry managed by the Commission. Member States shall not apply the rules set out in this paragraph where such undertakings are established only within the territory of a single Member State and in no other tax jurisdiction*' (European Parliament's position is in italics).

A proposed new Recital 11a is related to infringements of the requirements on reporting. They should be reported in a public registry managed by the Commission. Penalties could include administrative fines or exclusions from public calls for tenders and from the awarding of funding from the Union's structural funds. As the European Parliament states, the penalties provided for shall be effective, proportionate and dissuasive. Three years after the entry into force of this Directive, the Commission shall compile a list of the measures and penalties laid down by each Member State.[41]

In the opinion of the European Parliament (under a new Article 48ia), no later than four years after the adoption of this Directive, the Commission shall review whether it would be appropriate to enlarge the scope of undertakings and branches required to report on income tax information, the content of the report and the temporary derogation.

Five years after the transposition date, the Commission shall report to the European Parliament and to the Council, on the compliance with and the impact of the reporting obligations set out in Articles 48a to 48f, and the results, taking into account transparency and competitiveness requirements. The European Parliament adds in Article 48i(1) that the Commission 'shall assess the costs and benefits of lowering the consolidated net turnover threshold beyond which undertakings and branches are required to report on income tax information. The report shall, in addition, evaluate any necessity to take further complementary measures'.

One can easily derive from the previous analysis a clear idea: the current position of the European Parliament may be stricter at certain points, but in general, it gives the green light for the use of this tool.

8. Future expectations and conclusion

Currently, we are experiencing how some traditional roles change and there is certain convergence: the social sector is becoming more

41. Article 51(1): 'Member States shall *lay down rules on penalties* applicable to infringements of the national provisions adopted in accordance with this Directive and shall take all the measures necessary to ensure that *they are implemented*.'

business-like, and many businesses are keen to demonstrate their social impact. Some entrepreneurs and investors want to make a difference and tackle social and environmental challenges. Many ordinary businesses engage in social responsibility initiatives, and also new intentionally and strategically mission-led businesses are born (e.g. in the United Kingdom). The latter usually integrate a long-term or binding commitment in their corporate purpose and in their daily operations to have a positive social impact through its business, though profit-driven. They are also obliged to inform their shareholders about their impacts.

At EU level, it is useful to identify ways in which more sustainable business conduct can be promoted. As it is acknowledged: 'We will have to reflect on different forms of additional incentives for businesses to integrate SDGs in their operations' (including exploring the potential of emerging technologies and the circular economy).[42]

A company voluntarily chooses the means to cause either directly or indirectly (by paying, managing or ruling taxes where enforceability is not possible due to a lack of capacity, e.g. in a developing country) a positive ESG impact on society (either domestic or abroad). Quality tax planning should assess the value created for sustainability. This would require greater transparency in the tax benefits companies receive and contributions to public goals they make. The tax treatment for corporations and their shareholders could be better adjusted in the future depending on their CSR for global ESG criteria.

To safeguard public authorities' financial capacity to invest in the sustainability transition, the action is also needed to achieve sustainable fiscal reform at all levels. We should strengthen the fight against tax evasion and corporate tax avoidance. Transnational cooperation is necessary to deal with the issue of tax havens that undermine the tax base of both the EU and developing countries. 'More fundamentally, EU tax systems and pricing should be designed to reflect real costs, address our main social and environ-

42. European Commission, 'Reflection paper…', cit., p. 27.

mental issues and trigger behavioural change throughout the economy'.[43]

A fine-tuned tax treatment needs more than increasing the tax space and earmarking collected revenue for sustainable goals, or codes on good tax practices. Certainty for tax administrations and taxpayers must be improved with clearer rules when it comes to 'produce' together ESG benefits. For an efficient 'cost-sharing' of non-financial goals, one could take the financial sector expertise to fund projects, with best practices and exclusions, according to some regional NGOs references to certifications for different sectors; and learn from the insurance estimations.

Businesses have a vital role to play in the sustainability transition.[44] Fair taxation is only possible if conceived with global scope. Hopefully, someday the public authorities will jointly allow tax consideration of ESG direct contributions by companies worldwide.

Important horizontal enablers such as taxation, responsible business conduct, and new business models will create the right conditions for sustainability change 'if they are geared towards an innovative green, inclusive and socially just economic transition'.[45] Both, regulation and CSR in tax matters are necessary to promote sustainable development.

43. European Commission, 'Reflection paper...', cit., p. 25.
44. European Commission, 'Reflection paper...', cit., p. 32.
45. European Commission, 'Reflection paper...', cit., p. 14.