Fair Taxation and Corporate Social Responsibility

Karina Kim Egholm Elgaard, Rasmus Kristian Feldthusen,
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Chapter 8

Taxation, General Anti-Avoidance Rules and Corporate Social Responsibility

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Summary: *As a result of the OECD/G20 project on base erosion and profit shifting as well as the adoption of the EU anti-tax avoidance directive, many countries have recently introduced or strengthened general anti-avoidance rules (GAARs) in their tax treaties and domestic tax legislations. Arguably, such general anti-avoidance rules are turning the responsibility to obey the spirit of the law from a CSR expectation into a legal obligation. Against this background, it is discussed whether CSR can or should (still) play an important role with respect to measuring and guiding MNEs' tax planning behaviour. It is concluded that the widespread use of GAARs cannot be expected to eliminate or significantly reduce the need for CSR considerations and guidance—at least not in the foreseeable future, inter alia because these provisions bring along significant interpretive uncertainty and cannot be expected to prevent all tax planning that compromises the spirit of the tax legislation. Accordingly, instead of downplaying the role of CSR and responsible business conduct, it is suggested to update the chapter on taxation in the OECD Guidelines*

for Multinational Enterprises in order to provide better and more detailed guidance on how MNEs should strike a proper balance between tax planning and CSR.

1. Tax law versus CSR

The connection between corporate social responsibility (CSR) and tax payments is a recurrent issue. At intervals during recent years many academics, policymakers, international organizations, non-governmental organizations (NGOs), and business representatives have argued that multinational enterprises (MNEs) should not just observe formal tax rules but also take due account of corporate social responsibility (CSR) when acting in tax-related matters.[1] Broadly speaking, it has been argued that MNEs should voluntarily comply with both the letter and the spirit of the tax laws and regulations in all countries in which they operate.[2] The reference to CSR also entails that MNEs should consider the societal impacts of their decisions on taxation, for example, in regard to the needs of the countries in which an MNE makes an income that is—or may be—taxable.

This line of thinking deviates from more traditional views on tax law and taxation. From an economic point of view, taxes may be considered a cost like any other cost, towards which businesses and their managements naturally have an incentive and perhaps even an obligation to minimize for the benefit of their shareholders. Thus, it has been argued that there is nothing magical or special about taxes as a cost, except that they are subject to adjustment by government action.[3]

From a constitutional point of view, it has been argued that the rule of law, among other things, dictates that taxes must be imposed through a proper legislative process and in a way that enables taxpay-

1. For more on this debate see A. Hilling & D. Ostas, *Corporate Taxation and Social Responsibility* (Wolters Kluwer, 2017).
2. See OECD, *Guidelines for Multinational Enterprises* (OECD Publishing, 2011), pp. 60 et seq.
3. Cf. H.D. Rosenbloom, 'Where's the Pony? Reflections on the Making of International Tax Policy', 63 *Bulletin for International Taxation* 11, pp. 535–542 (2009).

ers to predict the tax consequences of their actions with a sufficient degree of certainty.[4] From this perspective, taxation may be considered an infringement on the taxpayer's property rights as well as economic freedom, and it may, therefore, be argued that such government interference should be—as far as possible—enshrined in clear legislation.[5] Moreover, as confirmed by long-standing case law in several jurisdictions,[6] the taxpayer, therefore, has—within the limits of the law—the right to arrange his or her affairs in such a way that the least amount of tax has to be paid.[7]

No single academic definition of what constitutes CSR exists, and perhaps for that reason academic debates often apply the European Commission's definition of CSR. According to the most recent of these, introduced in 2011, CSR is 'the responsibility of enterprises for their impacts on society'. The Commission explicitly notes that 'respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility.'[8]

Positions arguing that a company should act in accordance with the spirit and intent of the law in order to pay their fair share of tax—especially in the countries in which the taxable income is made—have long been related to theories on CSR.[9] Theorizing on CSR and 'responsible' payment of tax is a relatively narrow effort within CSR

4. Cf. G.S. Cooper, Conflicts, 'Challenges and Choices—The Rule of Law and Anti-Avoidance Rules' in G.S. Cooper (ed), *Tax Avoidance and the Rule of Law* (IBFD, 1997), pp. 13–50.

5. For a discussion of such arguments, which can be traced back to the thoughts of Adam Smith, see H. Gribnau, 'General Report' in H. Gribnau & M. Pauwels (eds), *Retroactivity of Tax Legislation* (IBFD, 2013), at pp. 80 et seq.

6. See A.P. Dourado, 'General Report' in A.P. Dourado (ed), *Tax Avoidance Revisited in the EU BEPS Context* (IBFD, 2017), pp. 3–4, with references to case law and national reports from several jurisdictions.

7. L. Cerioni, 'International Tax Planning and Corporate Social Responsibility (CSR): Crucial Issues and a Proposed "Assessment" in the European Union Context', 25 *European Business Law Review* 6, pp. 845–875 (2014).

8. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A renewed EU Strategy 2011–2014 for Corporate Social Responsibility', COM(2011) 681 final.

studies. Some of this theorizing argues that a socially responsible company does not just comply with the minimal requirement of the law but strives to understand the intent of the legislative requirement in its broader societal context.[10] In a tax payment context, this can be understood as meaning that MNEs should not engage in tax avoidance and aggressive tax planning. Such arguments have relied on risk-considerations as well as broader considerations on (business) morality and ethics.[11] However, academic positions on CSR and tax behaviour vary considerably.

Accordingly, even among tax scholars and other legal professionals, disagreement exists. For example, van Eijsden sees CSR in relation to tax behaviour as a profit maximizing strategy, because responsible tax behaviour by an MNE can mitigate a number of corporate risks.[12] Along the same line of thinking, Knuutinen argues that corporate tax planning must be balanced against the potential costs

9. For more on the principle of fairness in tax law see for example F. Debelva, 'Fairness And International Taxation: Star-Crossed Lovers?', 10 *World Tax Journal* 4, pp. 563–583 (2018), J.J. Burgers & I.J Valderama, 'Fairness: A Dire International Tax Standard with No Meaning?', 45 *Intertax* 12, pp. 767–782 (2017), S. Hemels, 'Fairness: A legal Principle in EU Tax Law?' in C. Brokelind (ed), *Principles of Law: Function, Status and Impact in EU Tax Law* (IBFD, 2014), chapter 18, K.H. Datt, 'Paying a fair share of tax and aggressive tax planning—A tale of two myths', 12 *eJournal of Tax Research* 2, pp. 410–411 (2014), J.D. Rolim, *Proportionality and Fair Taxation* (Kluwer International 2014), P. Essers, 'International Tax Justice between Machiavelli and Habermas', 68 *Bulletin for International Taxation* 2, pp. 54–66 (2014), S.A. Stevens, 'The Duty of Countries and Enterprises to Pay Their Fair Share', 42 *Intertax* 11, pp. 702–708 (2014), R.F. van Brederode, 'A Normative Evaluation of Tax Law Enforcement: Legislative and Political Responses to Tax Avoidance and Evasion', 42 *Intertax* 12, pp, 764–783 (2014), R. Happé, 'Multinationals, Enforcement Covenants and Fair Share', 35 *Intertax* 10, pp. 537–547, and K. Holmes, *The Concept of Income* (IBFD, 2001), chapter 1 (Tax Fairness).
10. M.S. Schwartz & A.B. Carroll, 'Corporate Social Responsibility: A three-domain approach', 13 *Business Ethics Quarterly* 4, pp. 503–530 (2003).
11. For a thorough review of the literature on tax planning and CSR see Hilling & Ostas, supra n. 1, at pp. 121 et seq.
12. Cf. A. van Eijsden, 'The Relationship between Corporate Responsibility and Tax: Unknown and Unloved', 22 *EC Tax Review* 1, pp. 56–61 (2013).

of triggering reputational damage.[13] By contrast, Avi-Yonah as well as Gribnau & Jallai argue that MNEs face a moral or ethical obligation not to engage deliberately in strategic tax behaviour solely designed to minimize tax payment. Accordingly, they believe MNEs should, among other things, exercise corporate self-restraint, because trust among citizens is a necessity for the well-functioning society on which the corporations themselves rest.[14]

Other authors are—for various and sometimes opposite reasons—critical towards using CSR-considerations as a guideline for measuring or improving corporate tax behaviour. For example, Dietsch has argued that violating CSR is a part of the business model in the tax advisor industry, and that CSR therefore is not an appropriate tool for dealing with aggressive tax planning because of the inherent motivational challenges and collective action-problems.[15] One may argue that this says more about the willingness of certain professions to engage in tax planning than it says about CSR and the principles that guide business ethics. Others, like Panayi, have argued that the use of fuzzy non-legal notions of morality, fairness, and responsibility add further complexity and uncertainty, and that it is better to focus on creating clear rules and principles.[16] Moreover, Hasseldine & Morris have acknowledged that the relationship between CSR and tax avoidance (as well as other legal tax planning behaviour) is import-

13. Cf. R. Knuutinen, 'Corporate Social Responsibility, Taxation and Aggressive Tax Planning', *Nordic Tax Journal* 1, pp. 36–75 (2014).
14. Cf. R.S. Avi-Yonah, 'Corporate Taxation and Corporate Social Responsibility', 11 *NYU Journal of Law and Business* 1, pp. 1–29 (2014), and H. Gribnau & A. Jallai, 'Good Tax Governance: A Matter of Moral Responsibility and Transparency', *Nordic Tax Journal*, pp. 70–88 (2017). See also H. Gribnau, 'Corporate Social Responsibility and Tax Planning: Not by Rules Alone', 24 *Social & Legal Studies* 2, pp. 225–250 (2015).
15. P. Dietsch, 'Asking the Fox to Guard the Henhouse: The Tax Planning Industry and Corporate Social Responsibility', 18 *Ethical Perspectives* 3, pp. 341–354 (2011).
16. C. HJI. Panayi, 'Is Aggressive Tax Planning Socially Irresponsible?', 43 *Intertax* 10, pp. 544–558 (2015).

ant, but they have also stressed that there is an element of confusion in the current debate.[17]

On the policy and soft-law side, recent years have witnessed several attempts by public national or international organisations to assert influence over the tax payment patterns and decisions of MNEs. In addition to a diversity of other efforts by the Organisation of Economic Cooperation and Development (OECD) to address aggressive tax planning, the soft-law OECD Guidelines for Multinational Enterprises contain a chapter devoted to taxation which emphasises that companies should observe the spirit of tax law and therefore not exploit gaps.[18] The Guidelines are non-binding recommendations addressed to companies operating in or from adhering countries. But they are not without bite as adhering countries have a legally binding commitment to promote the Guidelines and to make a remedy processes available when non-observance is alleged.

Within another political and regulatory context, the OECD and G20 have engaged in a project on mitigation of base erosion and profit shifting (BEPS).[19] The project may be seen as a response to the weaknesses of the current international tax framework which have caused opportunities for erosion of national tax bases, for example, by enabling MNEs to shift profits to low tax jurisdictions through various aggressive tax planning techniques. Broadly speaking, the aim of the project is to ensure that profits are taxed where economic activities take place and value is created.[20]

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17. J. Hasseldine & G. Morris, 'Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection', 37 *Accounting Forum*, pp. 1–14 (2013). The authors provide a critical response to an article by P. Sikka, 'Smoke and mirrors: Corporate social responsibility and tax avoidance', 34 *Accounting Forum*, pp. 153–168 (2010). See also P. Sikka, 'Smoke and mirrors: Corporate social responsibility and tax avoidance—A reply to Hasseldine and Morris', 37 *Accounting Forum*, pp. 15–28.
18. OECD, *Guidelines for Multinational Enterprises* (OECD Publishing, 2011), chapter XI, available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>.
19. OECD, *Addressing Base Erosion and Profit Shifting* (OECD Publishing, 2013) and OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing, 2013).
20. For more on the OECD BEPS Project see R. Danone (ed), *Base Erosion and Profit Shifting (BEPS)—Impact for European and International Tax Policy* (Schulthess,

In 2015, the work within the OECD/G20 resulted in a comprehensive package of anti-BEPS measures.[21] These measures were presented in the form of soft law instruments, but when fully implemented—inter alia through the adoption of the so-called multilateral instrument (MLI)—the measures are predicted to represent the first substantial renovation of the international tax rules in almost a century.[22] The MLI entered into force on 1 July 2018 and more than 80 jurisdictions are currently covered by the MLI, including a number of developing countries that form part of the so-called inclusive framework.[23]

In a separate activity to combat tax avoidance practices that directly affect the functioning of the internal market, the EU's Anti-Tax Avoidance Directive (ATAD) adopted in 2016 prescribes five legally-binding anti-abuse measures which all member states should apply against common forms of aggressive tax planning. Member states had to implement most of the rules in the ATAD by 31 December 2018.[24]

As a result of the BEPS Project and the ATAD, many countries in various regions have recently introduced or strengthened general anti-avoidance rules (GAARs) in their tax treaties and domestic tax legislation, or have at least been evaluating whether their already existing GAARs live up to the new international standards.[25] Other

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2016). See also Yariv Brauner, 'BEPS: An Interim Evaluation', 6 *World Tax Journal* 1 (2014) and section 5 below.

21. See for example OECD/G20, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances—Action 6: Final Report* (OECD Publishing, 2015).
22. OECD, *The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (2016). The aim of the MLI is to assist the signatories in implementing the tax treaty-related measures of the BEPS Project in a swift way, i.e. without the need of re-negotiating every single bilateral tax treaty.
23. OECD/G20, *Peer Review Report on Treaty Shopping—Prevention of Treaty Abuse* (OECD Publishing, 2019). The Inclusive Framework on BEPS was established in 2016 and is open to all interested jurisdictions. Currently more than 125 jurisdictions take part.
24. Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

countries are currently in the process of doing so.[26] The OECD GAAR as well as the EU GAAR explicitly require taxpayers and authorities to take the spirit of the law into account when interpreting and applying the law.[27] Arguably, these GAARs turn the responsibility to obey the spirit of the law from a CSR expectation into a legal obligation.

Against this background, the aim of this article is to discuss whether CSR can or should (still) play an important role with respect to measuring and guiding MNEs' tax planning behaviour, or whether the legal obligations prescribed in the GAARs reduce the importance of CSR considerations. Accordingly, section 2 explains the term aggressive tax planning which has played a major role in recent debates about the corporate tax behaviour of MNEs. In section 3, we describe the uneasy relationship between CSR and (tax) regulation. Section 4 discusses the implications of the OECD Guidelines for MNEs, and Section 5 analyses the new OECD and EU GAARs. Based on the findings in the previous sections, section 6 comprises a discussion as to whether the legal obligations prescribed in the new GAARs reduce the importance of CSR considerations. Finally, section 7 summarizes and offers our conclusions.

2. Aggressive tax planning

Recent years' debate concerning the tax behaviour of (certain) MNEs shows that many societal stakeholders are concerned that MNEs do not pay their fair share of tax, not least in regard to the states where

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25. See O. Popa, An 'Overview of ATAD Implementation in EU Member States', 59 *European Taxation* 2/3 (2019). See also J. Prebble, Kelsen, 'the Principle of Exclusion of Contradictions, and General Anti-Avoidance Rules' in *Philosophical Foundations of Tax Law* (M. Bhandari ed, Oxford University Press, 2017), at pp. 79–98, who explains that even though many countries enacted GAARs during the twentieth century, several major economies did so only in relatively recent years.
26. See OECD/G20, supra n. 23, according to which many jurisdictions have begun to translate their commitment on treaty shopping into action.
27. See B. Kuzniacki, 'The Principal Purpose Test (PPT) in BEPS Action 6 and the MLI: Exploring Challenges Arising from Its Legal Implementation and Practical Application', 10 *World Tax Journal* 2, pp. 233–293 (2018).

the taxable income was made. This perception, combined with the economic downturn in the aftermath of the financial crisis, has triggered a blurred public and political demand for MNEs to stop conducting aggressive tax planning.[28]

The term 'aggressive tax planning' is a relatively new umbrella concept covering some forms of both (international) tax planning and tax avoidance.[29] Tax avoidance is a legal concept covering arrangements causing a company to enjoy taxation advantages—the granting of which are not intended by the legal system. Negatively defined, tax avoidance is neither tax evasion, which constitutes a (criminal) offence, nor ordinary tax planning (understood as the legitimate right of taxpayers to arrange their affairs in a way that reduces the overall tax burden).[30]

The concept of 'aggressive tax planning' appears to have originated within the OECD, more specifically with the Forum on Tax Administration, which was established in 2002 with the policy aim of *influencing the environment within which tax systems operate in order to move away from a confrontational dialogue to more constructive engagement*. After the 2006 meeting of the forum, the so-called Seoul Declaration was issued in which concerns about aggressive tax planning were expressed.[31] In 2008, the declaration was followed by a study containing, among other things, a brief two-pronged definition of the concept of 'aggressive tax planning'.[32] This two-pronged definition referred to:

28. P. K. Schmidt, 'Når multinationale selskaber skal betale en fair andel i skat—en balanceakt i krydsfeltet mellem skatteret og corporate social responsibility', *Tidsskrift for Skatter & Afgifter*, pp. 1655–1665 (2015).
29. A.P. Dourado, 'Aggressive Tax Planning in EU Law and in Light of BEPS: The EC Recommendation on Aggressive Tax Planning and BEPS Actions 2 and 6', 42 *Intertax* 1, pp. 42–57 (2015).
30. A.P. Dourado, 'General Report in Tax Avoidance Revisited' in A.P. Dourado (ed), *the EU BEPS Context* (IBFD, 2017) at pp. 3 et seq.
31. OECD, *Final Seoul Declaration, Third Meeting of the Forum on Tax Administration* (OECD, 2006).
32. OECD, *Study into the Role of Tax Intermediaries* (OECD, 2008).

> '(1) Planning involving a tax position that is tenable but has unintended and unexpected revenue consequences [...] (2) Taking a tax position that is favourable to the taxpayer without openly disclosing that there is uncertainty whether significant matters in the return accord with the law [...]'.

The definition implies that the focus of the OECD is on arrangements that achieve a result not foreseen by legislators or that rely upon an uncertain tax position. In the tax law literature, the definition has rightly been criticised for being vague and difficult to apply in practice. Accordingly, with respect to the first part of the definition it has been argued that all too often the legislator has no clear idea of what it wishes to achieve by tax legislation, and concerning the second part it has been pointed out that the definition does not provide a clear indication of the required degree of uncertainty.[33]

Despite the criticism, the term 'aggressive tax planning' has subsequently been used and elaborated on as a concept linked to a call for new policy developments and coordinated international action.[34] For example, in connection to the BEPS Project, the OECD has described aggressive tax planning as strategies that exploit gaps and mismatches in tax rules to make profits 'disappear' for tax purposes or to shift profits to locations where there is little or no real activity but the taxes are low, resulting in little or no overall corporate tax being paid.[35]

In the European Commission's usage, the term 'aggressive tax planning' refers to practices that reduce the tax liability of an MNE through technically legal arrangements which contradict the intention of the law. The reduction is achieved by taking advantage of the technicalities of a tax system or of mismatches between two or more

33. P. Baker, 'The BEPS Project: Disclosure of Aggressive Tax Planning Schemes', 43 *Intertax* 1, pp. 85–90 (2015). See also P. Piantavigna, 'Reflections on the Fight against Aggressive Tax Planning (When the Law Is Silent)', 10 *World Tax Journal* 4, pp. 537–561 (2018), who argue that it is impossible to ascertain whether the revenue loss for two or more states is to be considered unintended, since it could be the result of the application of legitimate tax competitive measures.
34. Dourado, supra n. 29.
35. OECD, *BEPS—2014 Deliverables, Frequently Asked Questions* (OECD, 2014).

tax systems.[36] Among the available definitions, we apply the Commission's definition, which highlights the core of aggressive tax planning —i.e. legally exploiting technicalities of various tax systems to reduce the tax liability—in a rather short way.

However, even though the above descriptions of the term 'aggressive tax planning' may provide some guidance, the exact meaning of the concept remains unclear.[37] Perhaps for that reason, the term is hardly used in the final 2015 deliverables of the OECD BEPS Project, in which more technical and specific concerns related to various kinds of base erosion and profit shifting techniques seem to have replaced the use of the term 'aggressive tax planning'. However, despite the fact that this OECD project may have left behind the concept of 'aggressive tax planning', the concept still seems to have a tremendous impact on the debate at policy level as well as in the media.[38] This indicates a persisting and massive public demand for MNEs to change their corporate tax behaviour to promote non-aggressive tax planning. Accordingly, the term will be used throughout the article when appropriate.

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36. Commission recommendation on aggressive tax planning, C(2012) 8806 final. For more on aggressive tax planning in an EU Law perspective see P. Pistone, 'The meaning of Tax Avoidance and Aggressive Tax Planning' in A.P. Dourado (ed), *European Union Law: Some Thoughts in Connection with the Reaction to Such Practices by the European Union in Tax Avoidance Revisited in the EU BEPS Context* (IBFD, 2017), at pp. 73–100.
37. J. Carrero & A. Seara, 'The Concept of "Aggressive Tax Planning" Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border between Legitimate and Illegitimate Tax Planning', 44 *Intertax* 3, pp. 206–226 (2016). The authors are very critical towards the use of the concept aggressive tax planning and describe it as poorly defined concept (that it is not synonymous of 'tax avoidance') entailing an ambiguous idea with an instrumental purpose.
38. A. M. Jiménez, 'Tax Avoidance and Aggressive Tax Planning as an International Standard—BEPS and the "New" Standards of (Legal and Illegal) Tax Avoidance' in A.P. Dourado (ed), *Tax Avoidance Revisited in the EU BEPS Context* (IBFD, 2017), at pp. 26–34.

3. CSR and public regulation: no longer strange bedfellows

Both regulatory practices to shape corporate conduct and the discourse on CSR have undergone significant change over the past 20 years. An uneasy relationship between CSR and law, marked by a formal recognition that CSR implies basic compliance with law[39] along with an insistence that CSR is voluntary action beyond the requirements of the law,[40] has given way to explicit recognition that CSR and law are related in many ways. Around the world, authorities have begun actively to deploy a variety of regulatory modalities to promote CSR. Supported by hard or soft law, national governments and the EU apply a diversity of means to influence business activity.[41] This includes tax breaks that require a basis in law, or reduced occupational health and safety monitoring fees or other economic benefits underpinned by law for 'responsible' companies that self-regulate.

These steps have been accompanied by a surge in public regulation that seeks to address the limitations by national jurisdiction and of international law. If companies can still decide for themselves what they want to do in terms of CSR, they are increasingly required to take CSR stances, provide transparency on their CSR policies, their implementation and the outcomes, or explain if they do not find CSR

39. A.B. Carroll, 'A three-dimensional conceptual model of corporate performance', 4 *The Academy of Management Review* 4, pp. 497–505 (1979).

40. See for example the EU's definition of CSR 2001–2011, Communication from the Commission, 'Corporate Social Responsibility: A business contribution to sustainable development', COM(2002)347, and Communication from the Commission, 'Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on CSR', COM (2006)136.final. The definition was changed only in 2011, see Communication from the Commission on CSR, 'A renewed EU Strategy 2011–2014 for Corporate Social Responsibility', COM(2011)681.

41. K. Buhmann, 'Public regulators and CSR: The "Social Licence to Operate" in recent United Nations instruments on Business and Human Rights and the juridification of CSR', 136 *Journal of Business Ethics* 4, pp. 699–714 (2016), K. Buhmann, 'Reflexive regulation of CSR: A case study of public-policy interests in EU public-private regulation of CSR', 8 *International and Comparative Corporate Law Journal* 2, pp. 38–76 (2011).

relevant.[42] Insisting on CSR being distinct from public law is becoming increasingly meaningless in view of both national and international developments. National governments in various regions require mandatory CSR spending,[43] mandatory CSR reporting in some regions or countries,[44] or mandatory risk-based due diligence processes to identify and manage CSR risks.[45] Large and many smaller companies in the EU are required to issue non-financial reports on CSR[46] after the EU in 2011 changed its CSR definition to enable public regulation of CSR.[47]

For a long time CSR has been closely connected to social and environmental international law in terms of social expectations or CSR guidance. There is an explicit connection between public international law and CSR in that much CSR normativity is influenced by

42. The EU's Non-Financial Reporting Directive (2014/95/EU) applies a 'comply-or-explain' approach, requiring companies subject to the Directive to report on their CSR policies but allowing them to explain if and why they do not find it relevant to have policies for particular CSR issues set out in the Directive.

43. Mauritius and India have introduced such requirements.

44. For example, Denmark introduced mandatory CSR reporting for more than 1,000 companies in 2008. The 'conflict minerals' disclosure requirement introduced by the United States' Dodd-Franck reform for companies manufacturing products for which the minerals in question are necessary for the functionality or production may also be considered a form of CSR reporting. The requirement was was motivated by the US legislators' wish to help reduce the exploitation and trade of 'conflict minerals' originating in the Democratic Republic of Congo (DRC) or neighbouring countries that were helping to finance conflict characterized by extreme levels of violence and human rights violation in the eastern DRC (US Congress (2010), Dodd-Frank wall street reform and consumer protection act (2010—H.R. 4173).

45. For example, in 2017 France adopted an act requiring certain companies to undertake risk-based due diligence, that is, due diligence aiming to identify risks caused by the company to society (LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre). The United Kingdom introduced similar requirements in regard to modern slavery in 2015 (Modern Slavery Act 2015 of 26 March 2015).

46. Directive 2014/95/EU of the European Parliament and 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 (2014) L 330/1–9.

47. Communication from the Commission (2011), supra n. 40.

international labour law or international law on human rights or the environment.[48] Major CSR guidance or reporting instruments such as the United Nations Global Compact, the ISO 26000 Social Responsibility Guidance Standard, and the Global Reporting Initiative expect companies to observe norms of conduct set forth in international law on human rights, labour rights, the environment, and anti-corruption. The UN Special Representative on Business and Human Rights has explicitly recognised that social expectations are an important element in generating demands on businesses to respect human rights, including some that may develop into soft law.[49] It is well-known that soft law often develops into hard law.

Arguably, a similar trend may be observed for MNEs to pay taxes where profits were made if these are also the places where tax revenues matter the most to societies in need of funding for building the institutions that will deliver sustainable, equitable and long-term socio-economic growth. It has long been recognised that universal education of girls and boys is a key avenue for this, and that access to free or at least affordable health care for children, their mothers, and entire families is another important factor. Both issues were key elements highlighted by the UN's Millennium Goals,[50] and they constitute a consistent feature of the 2015 UN Report, which provides the reasoning for the Sustainable Development Goals (SDG) as well.[51] When MNEs pay taxes in host countries that are in need of funds to build the institutional structures for education, health care etc., they can help governments to provide these public goods for their populations. When MNEs do not pay an adequate amount of taxes where

48. K. Buhmann, 'Corporate Social Responsibility—what role for law? Some Legal Aspects of CSR', 6 *Corporate Governance—The International Journal of Business in Society* 2, pp. 188–202 (2006).
49. 'Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', UN Doc. E/CN.4/2006/97, 22 February 2006, para. 74.
50. P. Alston, 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the Millennium Development Goals', 27 *Human Rights Quarterly* 3, pp. 755–829 (2015).
51. 'Transforming our world: the 2030 Agenda for Sustainable Development', UN Doc. A/Res/70/1, 21 October 2015, esp. at SDGs 3 and 4.

profits are made—because they benefit from technically legal schemes allowing profits to be shifted elsewhere—the companies arguably make it more difficult for governments to provide basic socio-economic public goods to their needy populations. Hence, from the CSR perspective, a company benefiting from aggressive tax planning may be considered to act in contravention of the interests of the country where the profit was made. However, the matter is complicated by the fact that some such countries' domestic tax legislation allows tax planning because a liberal tax regime is seen as a way to attract multinational economic actors,[52] and by the fact that it is not an easy task to determine where an MNE in effect generates value.[53]

So far, taxation rules have not been incorporated similarly as basic sources of norms for responsible corporate conduct to the same and quite general extent as international human rights and labour law, environmental standards, and anti-corruption.[54] However, the OECD Guidelines for Multinational Enterprises stand out in this regard. Applying the OECD terminology of 'responsible business conduct', the Guidelines explicitly state that MNEs have to consider their policies and practices of tax payment and transparency as elaborated below.

52. For a thorough analysis of how states compete with one another for investments, residents and tax revenue see T. Dagan, *International Tax Policy Between Competition and Cooperation* (Cambridge University Press, 2018).

53. See for example J. Becker & J. Englisch, 'Taxing Where Value Is Created—What's User Contribution Got to Do With It?', 47 *Intertax* 2, pp. 161–171 (2019), who point out that the notion of value creation is not a traditional concept of international tax law, and that no common and concise definition exists. See also J. Hay, 'Taxation Where Value is Created' and the OECD/G20 Base Erosion and Profit Shifting Initiative', 72 *Bulletin for International Taxation* 4/5, pp. 203–208 (2018).

54. See G.R. Dowling, 'The Curious Case of Corporate Tax Avoidance: Is it Socially Irresponsible?', 124 *Journal of Business Ethics* 1, pp. 173–184 (2014), who argues that CSR scholarship traditionally has been largely silent on the issue of corporate tax planning.

4. The OECD Guidelines for MNEs

The OECD Guidelines for Multinational Enterprises are recommendations from the OECD states to economic actors headquartered in those states or in other states that have acceded to the Guidelines. Access to the Guidelines is optional for non-OECD states. Non-OECD members account for around one fifth of the currently 48 states that have acceded to the Guidelines. Revised most recently in 2011, the Guidelines were adopted in 1976 as an annex to an investment agreement that is legally binding for participating states, thus creating obligations on those states to promote observance of the Guidelines with firms that operate in or from those states. While the Guidelines are non-binding for private economic actors, their observance is monitored by the National Contact Points (NCPs), which are state-based complaints and remedy institutions that each adhering state must set up. NCPs have a dual role of promoting the Guidelines (typically through information and other knowledge-building activities) and handling complaints of non-observance of the Guidelines. NCPs are non-judicial remedy institutions but empowered to issue statements on conduct assessed not to be in accordance with the Guidelines of the OECD. They may also issue recommendations, thereby contributing to shape future conduct by companies and—implicitly—indicating ways of operating that are deemed to be more aligned with the Guidelines than other alternatives. Being state-based, all NCPs operate under their own national scheme but directed by the objective of functional equivalence and of jointly furthering the effectiveness and implementation of the OECD Guidelines.[55] As companies are affected not only by legal sanctions but also by reactions from stakeholders that may affect the company's 'social license to operate',[56] NCP statements offering critique may cause

55. OECD Guidelines, Procedural Guidance, I.

56. J. Prno & D.S. Slocombe, 'Exploring the origins of "social license to operate" in the mining sector: Perspectives from governance and sustainability theories', 37 *Resources Policy*, pp. 346–357 (2012). A report by the Danish Tax Law Advisory Council observes that the risk for a company of being found to be involved in illegal tax planning appears to carry a larger preventative effect than a sanction,

reputational damage for an economic actor. The impact of NCP statements as a 'naming and shaming' sanction can be enhanced because NCPs enjoy a degree of extraterritorial power: a complaint or issue that occurs in a non-adhering country can be handled by an NCP if the economic entity (e.g. a buyer or institutional investor) has its home state in adhering.[57]

The OECD Guidelines are structured as a series of principles of conduct with explanatory comments adding additional information. Part one contains 11 substantive chapters, addressing issues ranging from general principles, disclosure and human rights to the environment, combating bribery, consumer concerns, and taxation. Part two focuses on implementation, in particular through the dual task of NCPs to promote knowledge and observance of the Guidelines and handle complaints. The chapter on general principles notes, amongst other things, that enterprises should 'Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues.'[58] The chapter on disclosure recognises that 'a growing number of firms have issued voluntary codes of corporate conduct, which are expressions of commitments to ethical values in such areas as environment, human rights, labour standards, consumer protection, or taxation.'[59]

Comprising only two normative paragraphs complemented by seven commentary paragraphs, the Guidelines Chapter 11 on taxation[60] is one of the briefest. The first normative paragraph notes the importance of enterprises contributing 'to the public finances of host

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see Skattelovrådet, 'Styrket indsats mod skattely: Udveksling af oplysninger. Hvidvask. Straf', pp. 34–35 (2018). This suggests that the reputational damage or other adverse impacts on the company's social licence to operate is a significant factor for companies' decisions in regard to tax planning.

57. See further, K. Buhmann, 'Defying territorial limitations: Regulating business conduct extraterritorially through establishing obligations' in *EU law and national law in Human Rights and Business: Direct Corporate Accountability for Human Rights* (J.L Cernic & T. van Ho eds, Wolf Legal Publishers, 2015), pp. 179–228.

58. OECD Guidelines, supra n. 18, Chapter II.A.5.

59. OECD Guidelines, supra n. 18, Chapter III, Commentary 34.

60. OECD Guidelines, supra n. 18.

countries by making timely payment of their tax liabilities. In particular, enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate.' That point is followed by the statement that 'complying with the spirit of the law means discerning and following the intention of the legislature. It does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation.'

The Guidelines further explain that tax compliance 'includes such measures as providing to the relevant authorities timely information that is relevant or required by law for purposes of the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle'. The second normative paragraph adds that enterprises 'should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems. In particular, corporate boards should adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated.'

According to the commentary, an enterprise complies with the spirit of the tax laws and regulations if it takes reasonable steps to determine the intention of the legislature and interprets those tax rules consistent with that intention in light of the statutory language and relevant contemporaneous legislative history. Transactions should not be structured in a way that will lead to tax results that are inconsistent with the underlying economic consequences of the transaction unless specific legislation designed to give that result exists. Overall, the commentary strongly emphasizes the responsibility of MNEs to cooperate with authorities, including to provide them with relevant information to ensure an effective and equitable application of the tax laws. It notes that enterprises' commitments to co-operation, transparency, and tax compliance should be reflected in risk management systems, structures and policies. A comprehensive risk management strategy should include taxation which will assist the company in effectively managing tax risk and thereby reduce related major financial, regulatory and reputational risks.

In regard to transfer pricing, the commentary makes reference to the arm's length principle which is included in both the OECD Model Tax Convention and the UN Model Double Taxation Convention between Developed and Developing Countries as the internationally accepted standard for adjusting the profits between associated enterprises. It explains that the proper application of the arm's length principle requires MNEs to cooperate with tax authorities and to furnish all information that is relevant or required by law regarding the selection of the transfer pricing method adopted for the international transactions undertaken by them and their related party, and it includes a reference to the OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD Transfer Pricing Guidelines).

As this shows, the OECD Guidelines for Multinational Enterprises largely treat issues of responsible business conduct in regard to taxation as issues of compliance with the law. However, the Guidelines emphasize that the responsible enterprise should have regard not just to the letter of the law but also the spirit of the law. Yet the current brevity of the Guidelines' chapter on tax does not spell out what this means in practice.

This takes us back to CSR as a matter of not exploiting gaps in law and governance and paying attention to the intention of the law. At the same time, the emphasis on the need to pay respect to the spirit of the law as a core principle for responsible business conduct further emphasizes the blurring of boundaries between the law and CSR.

So far, NCPs have not considered taxation much. The first-ever complaint to an NCP in a case concerning corporate tax avoidance was only filed in October 2018. Targeting the Dutch subsidiaries and related companies of Chevron Corporation and the role of these in concealment of Chevron's tax-related information, the complaint alleges that the Dutch companies have been involved in Chevron's use of myriad letterbox companies to facilitate its tax avoidance schemes. At the time of writing the case is still being considered by the Dutch NCP.[61] However, there are indications that some NCPs are beginning to pay increased attention to corporate tax payment practices.

In view of the OECD Guidelines' treatment of taxation, it may be argued that the issue of enterprises' responsibilities for tax payment is no different from their responsibilities for labour rights, human rights, or abstention from corruption or bribery: responsible companies are expected not to abuse governance gaps, including inadequate implementation or monitoring of the law. Much of the problem relating to tax and CSR then appears to be one of jurisdictions seeking to undercut each other to offer the most attractive tax regimes to MNEs in an effort to attract investment. This often means offering companies low taxation—within the limits of applicable law. By making forum shopping for favorable taxation available and by allowing aggressive tax planning, states are placing MNEs in awkward positions between a hard place and rock. Arguably, they are not helping MNEs to make socially responsible decisions when they make it legal to make the irresponsible one. In addition, it could be argued that many governments send mixed messages to taxpayers by providing various tax breaks and tax incentives. Providing these opportunities may allegedly promote a 'tax planning culture' among citizens and businesses.[62]

To the extent that the OECD Guidelines function as CSR guidance, the distinction between CSR and law is once again becoming blurred. As noted, the OECD's BEPS project recognizes tax planning that results in shifting profits to locations with little or no real activity as problematic. This corresponds fairly well to the normative reasoning set out in the opening paragraphs of the Guidelines' chapter on taxation. The Guidelines' emphasis on the need to observe the spirit

61. Complaint against Chevron Netherlands and others, lodged with the Dutch NCP by FNV, ITF, PSI, Industri ALL Global Union supported by Friends of the Earth, October 2018 (available at <https://www.somo.nl/nl/wp-content/uploads/sites/2/2018/10/Chevron-Complaint.pdf>, accessed 1 February 2019).

62. J. Freedman, 'The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility', 59 *Current Legal Problems* 1, pp. 359–390 (2006).

of the law is complemented by the EU Commission's recognition of the significance of the intention of the law, which is also described above.

It is interesting to observe that the OECD Guidelines—as a soft law instrument—broke ground by explicating certain societal expectations of responsible business conduct that have since been followed by initiatives of a more conventional legal or political character in various jurisdictions. To give one example, the EU's Conflict Minerals Regulation is largely inspired by the OECD Guidelines' approach to risk-based due diligence as a corporate practice to identify and prevent harm in the supply chain, and a guidance issued by the OECD on responsible supply chains of minerals.[63] A similar tendency is suggested by the BEPS project and the Commission's language on CSR. This confirms the observation made in the context of business responsibilities for human rights that social expectations in regard to corporate impacts on society may pave the way for harder regulation.

In this context, one may ask whether governments are in fact doing enough to help enterprises make socially responsible decisions on taxation. Indeed, private initiatives are establishing principles for responsible tax, recognising that this is closely related to public trust in the corporate sector.[64] Therefore an appropriate first step could be to update the chapter on taxation in the OECD Guidelines for Multinational Enterprises in order to provide better and more detailed guidance on how MNEs should strike a proper balance between tax planning and CSR. Such update could use the already carried out private initiatives as a point of departure.

5. The increased use and significance of GAARs

Besides providing better guidance to MNEs (as addressed in section 4), another way to curb undesirable tax behaviour of MNEs, including aggressive tax planning, is to introduce new hard law measures.

63. *OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas* (Third edition, Paris: OECD, 2016).

64. In particular, 'the B-team initiative', <http://www.bteam.org/plan-b/responsible-tax/> (accessed 14 February 2019).

As explained in section 1 above, many countries have recently been engaged in introducing or strengthening GAARs in their tax regimes and tax treaties. In this regard, the BEPS Project may be seen as the main driver since many of the initial soft law recommendations of the BEPS project are now in the process of being translated into hard law.[65]

One of the deliveries (Action 6) consisted of a report dealing with the issue of how to prevent the granting of treaty benefits in inappropriate circumstances. Action 6 was seen as one of the most important actions of the BEPS Project as the use of treaty abuse strategies, including so-called treaty shopping, was considered an important part of various aggressive tax planning strategies that caused serious erosion of tax bases in jurisdictions around the world.[66] In other words, some MNEs were considered to claim treaty benefits in situations where these benefits were not intended to be granted.

Among other things, the report on action 6 stated that countries should commit to ensure a minimum level of protection against treaty shopping.[67] An overwhelming majority of the signatories to the MLI has chosen to do that by opting for the so-called principal purpose rule (PPT rule).[68] Accordingly, the OECD predicts that, in total, the PPT will be implemented in around 1260 tax treaties to be covered under the MLI. As a consequence, only the PPT rule will be analysed

65. See for example OECD/G20, supra n. 23 (Peer Review Report). See also section 1 above.

66. See OECD/G20, supra n. 21. On p. 17 in the report 'treaty shopping' is described as arrangements through which a person who is not a resident of a contracting state may attempt to obtain benefits that a tax treaty grants to a resident of that state. Typically, such treaty shopping arrangements involve persons who are resident of third states attempting to access indirectly the benefits of a treaty between two contracting states, e.g. through the use of a conduit company.

67. Countries should do that by including in their bilateral tax treaties: (1) a combined approach of a so-called limitation-on-benefits clause (LOB rule) and a principal purpose test (PPT rule), (2) a PPT rule alone or (3) an LOB rule supplemented by a mechanism that would deal with conduit financing arrangements not already dealt with in tax treaties.

68. Kuzniacki, supra n. 27.

below—despite the fact that the countries may also implement action 6 by other means.[69]

However, before analysing the PPT rule, it is worth noting that the EU also has taken a number of initiatives in order to mitigate aggressive tax planning. The most prominent initiative is the ATAD, which was adopted by the Council of the European Union in 2016. The ATAD is a minimum directive containing legally binding anti-avoidance measures, and it may be seen as a coordinated EU response to the BEPS agenda. In the following, the OECD PPT rule and the GAAR prescribed in Article 6 of the ATAD are analysed in more detail in separate sections.[70]

5.1. The OECD Principal Purpose Test (PPT rule)

The final version of the PPT rule can be found in Article 7(1) of the Multilateral Instrument and Article 29(9) in the OECD Model (2017). The provision states:

> '[...] a *benefit* under this Convention shall not be granted in respect of an item of income or capital if it is *reasonable to conclude*, having regard to all relevant facts and circumstances, that obtaining that benefit was *one of the principal purposes* of any *arrangement or transaction* that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the *object and purpose* of the relevant provisions of this Convention.'

The aim of the PPT is to prevent treaty abuse—through treaty shopping and rule shopping—as well as circumvention of domestic (anti-

69. See OECD/G20, supra n. 23, at p. 23. As an alternative to opting for the PPT rule alone the signatories also have the possibility of opting for a combined approach of a so-called limitation-on-benefits clause (LOB clause) and the PPT rule, or for an LOB clause supplemented by a mechanism that would deal with conduit financing arrangements not already dealt with in tax treaties. However, only a few signatories have opted for these alternatives.

70. See also P.K. Schmidt, 'Abuse and Avoidance—a contemporary analysis of Danish tax law', *Revue International du droit fiscal* 4, pp. 489–499 (2018), on which section 5.1 and 5.2 are partly based.

avoidance) measures.[71] The term 'benefit' includes all limitations on taxation—including a tax reduction, exemption, deferral, or refund—and the term 'arrangement or transaction' should be interpreted broadly. The reference to the words 'one of the principal purposes' means that obtaining the benefit under the tax convention need not be the sole or dominant purpose. In other words, it is sufficient for the application of the provision that at least one of the principal purposes was to obtain the benefit. Where an arrangement is inextricably linked to a core commercial activity and its form has not been driven by considerations of obtaining a benefit (i.e. so-called bona fide transactions), it is unlikely that its principal purpose will be considered to be obtaining the benefit.[72]

Even if it is reasonable to conclude that obtaining a benefit was one of the principal purposes (i.e. the so-called subjective test is satisfied), the taxpayer may still be able to escape the application of the PPT if it can be established that granting the benefit would be in accordance with the *object and purpose* of the relevant provisions of the tax treaty (i.e. the so-called objective test is satisfied). It is worth noting that while the tax authorities apparently only need to be able reasonably to conclude that obtaining a benefit was one of the principal purposes, it appears that the taxpayer must establish (i.e. prove) that the conditions for applying the exemption exist.[73] In addition, it appears odd that the provision makes explicit reference to the object

71. OECD/G20, supra n. 21. For more on the aim of the PPT see B. Kuzniacki, supra n. 27. See also M.L. Gomes, 'The DNA of the Principal Purpose Test in the Multilateral Instrument', 47 *Intertax* 1, pp. 66–90.

72. Cf. OECD Model, Commentary on Article 29, Para. 169–181 (2017). The Commentary also provides a number of useful examples, see Para. 182.

73. It has been subject to criticism that the burden of proof appears to rest heavily on the taxpayer and that a high threshold is imposed on the taxpayer, cf. E. Pinetz, 'Final Report on Action 6 of the OECD/G20 Base Erosion and Profit Shifting initiative: Preventing of Treaty Abuse', 70 *Bulletin for International Taxation* 1–2 (2016), pp. 113–120. See also M. Lang, 'BEPS Action 6: Introducing an Anti-abuse Rule in Tax Treaties', *Tax Notes International*, pp. 655–664 (2014), who finds that the bias in favour of the tax authorities is fairly obvious. Moreover, R. Kok, 'The Principal Purpose Test in Tax Treaties under BEPS 6', 44 *Intertax* 5 (2016), pp. 406–412 argues that the subjective test is a relatively easy test, whereas the objective test is hard to interpret.

and purpose of the given treaty provision as it is already a fundamental principle of international tax law that treaty provisions should always be interpreted in light of their object and purpose. Thus, one could ask whether the PPT rule has any scope of application on its own or whether the PPT rule should be seen as a mere hint of the possible interpretation.[74]

A final assessment of the merits of the PPT rule has to await how the courts will handle cases on treaty abuse in the years to come. However, based on the above presentation of the separate elements of the PPT rule as well as the heavy criticism expressed in the academic literature, it seems reasonable to assume that the PPT rule—alongside its potential to help mitigating aggressive tax planning—will bring additional complexity and uncertainty into the international tax framework.[75]

74. In the literature it has been questioned whether the new provision in effect merely codifies an already existing legal situation, cf. Pinetz, supra n. 73. One difference may be that the PPT—besides denying benefits contrary to the object and purpose of a tax treaty provision—also allows governments to address cases of improper use of tax treaties even if domestic law does not allow it, see E. Barret & M. Evers, *OECD Report in 103A Cahiers de droit fiscal international*, (International Fiscal association ed, Sdu Fiscale & Financiële Uitgevers, 2018), pp. 99–100, and the *OECD Model, Commentary on Article 29*, Para. 169 (2017). Moreover, it could be argued that the PPT lowers the anti-abuse standard previously applied through interpretation, and that the PPT alters how the burden of proof is placed, cf. A. Moreno, 'GAARs and Treaties: From Guiding Principle to the Principal Purpose Test. What have we gained from BEPS Action 6?', 45 *Intertax* 6/7, pp. 432–446 (2016).

75. For more about this critique of the PPT rule see for example Kuzniacki, supra n. 27, Gomes, supra n. 69, Pinetz, supra n. 73, Moreno, supra n. 55, and R.J. Danon, 'Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups', 72 *Bulletin for International Taxation* 1, pp. 31–55 (2018). For a discussion of the PPT rule's compliance with primary EU law see O. Koriak, 'The Principal Purpose Test under BEPS Action 6: Is the OECD Proposal Compliant with EU Law?', 56 *European Taxation* 12, pp. 552–559 (2016).

5.2. The GAAR in the Anti-Tax Avoidance Directive (ATAD-GAAR)

The GAAR prescribed in Article 6 of the ATAD applies to cross-border situations as well as purely domestic situations, and its scope includes all taxpayers that are subject to corporate tax in one or more member states, including permanent establishments in one or more member states of entities resident for tax purposes in a third country, cf. Article 1.[76] The wording of the GAAR is as follows:

> '1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an *arrangement or a series of arrangements* which, having been put into place for the *main purpose or one of the main purposes* of obtaining a *tax advantage that defeats the object or purpose* of the applicable tax law, are *not genuine* having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.
>
> 2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.
>
> 3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.'

When taking a closer look at the wording of the GAAR, four main conditions for applying the provision can be deduced.

First, there should be an *arrangement or a series of arrangements*. This condition is relatively straightforward and should probably be interpreted broadly so that any transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking, or

76. The ATAD is a minimum directive, cf. Section 3 of the ATAD, which entails that member states are in principle free to adopt stricter rules than the ones set out in the directive. For more on the genesis and scope of the ATAD see e.g. A. Rigaut, 'Anti-Tax Avoidance Directive (2016/1164): New EU Policy Horizons', 56 *European Taxation* 11 (2016), pp. 497–505.

event should be considered to be included.[77] As an arrangement may comprise more than one step or part, one may ask how closely linked these individual steps or parts should be in order to be considered one arrangement or one series of arrangements. However, it does not seem possible to provide an answer to this question *in abstracto*.

Second, the *main purpose or one of the main purposes* should be to obtain a tax advantage. This subjective condition sets a very low threshold for when to consider abusive behaviour of a taxpayer as the condition only appears to definitely exclude situations in which obtaining a tax advantage is merely incidental.[78] Moreover, it has convincingly been argued that the condition deviates from the test normally applied by the CJEU in its general case law on abusive practices, which typically requires that the sole, principal, or predominant purpose of the transaction is the pursuit of a tax benefit.[79]

Third, the *tax advantage* should *defeat* the *object or purpose* of the applicable tax law. With respect to this objective test, the term 'tax advantage' should probably be interpreted broadly so that it applies to any reduction in tax liability that stems from an arrangement of a taxpayer relative to another more appropriate and genuine arrangement. The second part of the condition seems more problematic as it is not always easy clearly to determine the object and purpose of the legislation in question. Moreover, it is not entirely clear which object and purpose are to be assessed—should it be the provision that the taxpayer relies on, the provision the tax authorities rely on, or those of the tax regime as a whole?[80]

77. Cf. A.G. Prats et al., *EU Report in 103A Cahiers de droit fiscal international* (International Fiscal association ed., Sdu Fiscale & Financiële Uitgevers, 2018), at p. 75.
78. Cf. Prats et al., supra n. 77, at p. 75.
79. Cf. L. De Broe & D. Beckers, 'The General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Analysis Against the Wider Perspective of the European Court of Justice's Case Law on Abuse of EU Law', *EC Tax Review* 3, pp. 133–144 (2017). For more on the subjective element see P. Piantavigna, 'The Role of the Subjective Element in Tax Abuse and Aggressive Tax Planning', 10 *World Tax Journal* 4 (2018), pp. 193–232.
80. Cf. Prats et al., supra n. 77, at p. 75.

Fourth, the arrangement(s) in question should not be genuine as having regard to all relevant facts and circumstances. It is explicitly stated in the provision that arrangement(s) should be considered as non-genuine to the extent that they are not put into place for valid commercial reasons reflecting economic reality. Despite this clarification, interpretive uncertainty still remains, inter alia because the term ‘not genuine’ does not necessarily mean the same as ‘wholly artificial arrangements’ which has consistently been used by the CJEU in cases on abuse.[81] Furthermore, it should be noted that minimizing the tax burden should probably not be considered a valid commercial reason in this regard—despite the fact that the taxpayer, as a main rule, still has the right to choose the most expedient structure for tax purposes.[82]

If all four conditions are met and therefore the arrangements are to be ignored, the tax liability shall be calculated in accordance with national law. Generally, this seems to entail that where abusive arrangements are to be set aside, the tax liability should be calculated in a way that is in accordance with the object and purpose of the provision that was circumvented.[83]As a starting point, it is the responsibility of the tax authorities to show that the conditions for applying the GAAR are fulfilled. Once this likelihood is demonstrated, the taxpayer must show that the arrangement or series of arrangements have been put into place for valid commercial reasons, which reflect economic reality.[84]

It must be concluded that the scope of the GAAR—just like the PPT rule discussed above—is not particularly clear, and that future case law of the member states’ national courts as well as the European Court of Justice must be awaited in order to evaluate

81. Cf. De Broe & Beckers, supra n. 79.
82. Cf. J. Bundgaard, ‘Internationale omgåelses- og misbrugsklausuler i national skatteret’ in J. Bundgaard et al. (eds), *Den evige udfordring—omgåelse og misbrug i skatteretten* (Ex Tuto, 2015), p. 255, who analyzes the GAAR in the Parent-Subsidiary Directive (2011/96), which contains a similarly worded GAAR.
83. Cf. De Broe & Beckers, supra n. 79.
84. Cf. Bundgaard, supra n. 82.

whether the right balance has been stricken.[85] Accordingly, even though the GAAR and the PPT rule may assist the tax authorities in their quest to mitigate aggressive tax planning, it should not be overlooked that these provisions bring additional complexity into the tax legislation, and that they may deteriorate the possibility of taxpayers to predict the consequences of their transactions.[86] However, the fact that these provisions bring along additional uncertainty and complexity should not be a great surprise as this may be seen as a common and inherent challenge posed by GAARs.[87]

6. The new GAARs—implications for a persistent need for CSR-considerations?

In an article from 2004, Freedman argues that the legislation should give more direction to taxpayers—especially directors—on the balance of their duties as this cannot merely be left to considerations of morality. As a result, she proposes that a principle-based GAAR should be introduced in the tax legislation of the UK as such a provision, if drafted properly, could help alter the norms of behaviour and provide the necessary legal backing to the notions of morality gathering around the CSR debate.[88] The developments noted above suggest that this is now occurring as a result of multilateral and regional developments.

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85. Cf. F. de Wilde, 'Is the ATAD's GAAR a Pandora's Box?' in P. Pistone & D. Weber (eds), *The Implementation of Anti-BEPS Rules in the EU: A Comprehensive Study* (IBFD, 2018), pp. 301 et seq., who argues that the language used in the GAAR appears to cover a much wider range of scenarios than in the traditional anti-abuse case law of the European Court of Justice.
86. Cf. Prats et al., supra n. 77, De Broe & Beckers, supra n. 79 and de Wilde, supra n. 85.
87. See Prebble, supra n. 25.
88. Cf. J. Freedman, 'Defining taxpayer responsibility: in support of a general anti-avoidance principle', *British Tax Review* 4, pp. 332–357 (2004). It should be mentioned, that Freedman acknowledges that introducing such a principle will not provide legal certainty, but she argues that certainty is the wrong test of such a principle.

Against this background, it seems worth discussing whether these new GAARs could be expected to reduce or even eliminate the need for CSR considerations and guidance. As explained below, we do not believe that the widespread use of GAARs will eliminate or significantly reduce the need for CSR considerations and guidance, regardless of whether CSR is viewed as a profit maximising strategy or a moral obligation, or more generally as socially responsible business conduct.

As indicated in section 1, some authors viewing CSR as a profit maximising strategy typically focus on CSR as a tool to handle the risks associated with (aggressive) tax planning.[89] These risks can roughly be divided into five categories: (1) reputational risk due to bad publicity, (2) regime risk following from increased risk of litigation, (3) cash-flow risk due to uncertainty about future after-tax cash-flows, (4) risk of losing investor confidence and (5) additional cost due to the growing scale and complexity of tax laws enacted to address aggressive tax planning. These risks, in particular the first four, could harm shareholder value and therefore a profit maximizing MNE has to balance the potential gains from aggressive tax planning against these risks.

Arguably, the widespread adoption of the PPT rule and/or the GAAR in the ATAD should not be expected significantly to change the importance of this balancing act—at least not in the foreseeable future. One important reason is that these GAARs, as argued in section 5, bring along significant interpretive uncertainty and add more complexity to the international framework. Another important reason is that these GAARs cannot be expected to prevent all tax planning that compromises the spirit of the tax legislation as a number of other conditions also have to be fulfilled for the GAARs to apply. In other words, on the one hand, it may be even harder for MNEs to estimate the risk associated with aggressive tax planning because of the increased uncertainty, and, on the other hand, an MNE cannot be sure that its tax behaviour will be considered socially responsible just

89. Cf. Van Eijsden, supra n. 12, Knuutinen, supra n. 13, and Schmidt, supra n 70.

because the tax authorities have not succeeded in using the new GAARs to strike down a given tax planning arrangement of an MNE.

However, the law and CSR tend to engage corporate managers at different levels of abstraction. First, at the national as well as international level, agreement on codification and therefore binding requirements typically only sets the minimum level of behaviour that is needed or acceptable. CSR has played a relevant role to help raise the bar in areas of human and labour rights, the environment, and other areas precisely because the law leaves plenty of scope for those that wish to go beyond the minimum. Numerous efforts to turn CSR-norms or CSR-expectations into soft or even hard law have failed on account of lack of support from governments or lobbying by business associations.[90] Second, and in relation to the first, CSR tends to generate corporate support and action with other types of managers than what is generated by legal requirements. Consequently, as long as there will be temptations for companies to engage in aggressive tax planning, whether within the frameworks of the law—national or international regulation—or not, there will be a case for CSR norms to raise the bar further for responsible tax behaviour. Studies indicate that clever reasoning by external actors will activate the reasoning and normative standards that drive the most socially responsible action of companies up.[91] This speaks to the continued relevance of CSR guidance to complement hard law on taxation.

Furthermore, if CSR is also looked upon as a moral obligation,[92] the new GAARs do not appear to diminish the importance of CSR considerations. As already pointed out and taking the design and cumulative conditions of the GAARs into account, the GAARs can-

90. See e.g., D. Kinley et al., 'The Norms are Dead. Long Live the Norms!: The Politics Behind the UN Human Rights Norms for Corporations' in McBarnet et al. (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007), pp. 459–475, and K. Buhmann, *Changing sustainability norms through communicative processes: the emergence of the Business & Human Rights regime as transnational law* (Edward Elgar Publishers, 2017).

91. K. Buhmann, K. (2017), supra n. 90.

92. As the view expressed by authors such as Hilling & Ostas, supra n. 1, Avi-Yonah, supra n. 14 and Gribnau & Jallai, supra n. 14.

not be expected to shut down all possibilities for successfully engaging in aggressive tax planning that goes against the spirit of the tax legislation. Accordingly, it appears that room will still be left for MNEs to benefit from tax planning that may be considered morally wrong.

Moreover, even though political steps to introduce hard law on responsible taxation may be on the rise in EU and OECD countries, many other countries refrain from introducing similar steps. Partly as a result of their interest in attracting foreign investment, production, and jobs, it is likely that a number of low-wage countries and emergent economies will continue to offer foreign companies attractive tax regimes. In this light, general CSR observations related to responsible tax conduct, as well as the OECD Guidelines' guidance for responsible business conduct, may continue to play a role to remind companies not to engage in aggressive tax planning. Although the tax law of host countries may be favourable to MNEs trying to shift profits elsewhere, such behaviour contravenes norms on CSR in general and responsible business conduct according to the OECD Guidelines. That is particularly the case when host countries offer favourable tax schemes precisely because they are in need of capital to deliver on their obligations to provide public goods to their populations.

7. Conclusions

It is often argued that MNEs should not just observe formal tax rules but should also act responsibly when acting in tax matters. Broadly speaking, these arguments rely on risk-considerations and/or considerations on (business) morality and ethics, including CSR. They suggest that there is a limit as to how far MNEs can go in their efforts legally to minimize the effective tax burden if they are to be considered responsible societal actors.

The introduction showed that there is no consistency in views on what CSR conduct means in regard to taxation. More explicitly, the OECD Guidelines emphasise that responsible business conduct means to comply with the spirit of the law.

Fundamentally, we share the view that there are good reasons for MNEs to act socially responsible in tax matters. CSR and law are related in many ways, and the distinction between CSR and law is becoming increasingly blurred, among other things, because international organizations and legislators around the world are actively deploying a variety of regulatory modalities to promote CSR.

The analysis has shown that initiatives related to GAARs, such as those advanced by the multilateral BEPS Project and the EU, to some extent are turning the responsibility to obey the spirit of the law into a legal obligation. Many countries of varying economic levels of development have recently introduced GAARs in their tax regimes and tax treaties or strengthened the ones already in place. Regardless of whether they are based on the PPT or the ATAD GAAR, these new sets of rules explicitly require taxpayers and authorities to take the spirit of the law into account when interpreting and applying the law.

Against this background, we asked whether CSR-considerations remain relevant as guidance for responsible MNE tax planning and general tax behaviour. In our view, however, the widespread use of GAARs cannot be expected to eliminate or significantly reduce the need for CSR considerations and guidance—at least not in the foreseeable future. In particular, GAARs bring along significant interpretive uncertainty and GAARs cannot be expected to prevent all tax planning that compromises the spirit of the tax legislation as a number of other conditions also have to be fulfilled for the GAARs to apply. As a consequence, CSR-considerations may still play an important role to ensure responsible tax planning for MNEs.

Accordingly, instead of downplaying the role of CSR and responsible business conduct, we suggest that international organizations such as the OECD should embrace the possibility for playing a growing role in initiating changes in the CSR practices of MNEs. An appropriate first step could be to update the chapter on taxation in the OECD Guidelines for Multinational Enterprises in order to provide better and more detailed guidance on how MNEs should strike a proper balance between tax planning and CSR. This activity could also involve developing detailed guidance to help companies prepare responsible tax strategies. Detailed guidance for responsible taxation could assist MNEs in navigating the persisting grey zones between exploiting legal opportunities for tax planning and responsible acting.