

UNIVERSIDADE NOVA

NOVA SCHOOL OF LAW



MARTA VIEGAS LOPES RIBEIRO

**LIMITS TO AGGRESSIVE TAX PLANNING AS AN  
ETHICAL AND SOCIAL RESPONSIBILITY**

Dissertation for obtaining the degree of Masters in Law

Supervisor: Doutora Rita Calçada Pires

Associate Professor of Nova School of Law, Universidade Nova

March 2024

MARTA VIEGAS LOPES RIBEIRO

**LIMITS TO AGGRESSIVE TAX PLANNING AS AN ETHICAL AND SOCIAL  
RESPONSIBILITY**

Supervisor: Doutora Rita Calçada Pires

Associate Professor of Nova School of Law, Universidade Nova

*“Taxes are the price we pay for civilization”*

- Justice Oliver Wendell Holmes

## **Anti-plagiarism statement**

I hereby declare that the work I present, is my own work and that all my citations are correctly acknowledged.

I am aware that the use of unacknowledged extraneous materials and sources constitutes a serious ethical and disciplinary offence.

Lisbon, March 19<sup>th</sup>, 2024

## Citation Method

- The first citation of each title or article is presented with the author's last name, first (and middle names) initials, year of publication, complete title of the source and cited page if applicable.
- Cited documentation with an organizational author will appear with the name of the structure or organization that enacted the document, year of publication, title of the document and the cited chapter, page or paragraph.
- Cited legislation will appear with the title of the legal text, year of publication, official code and the cited page or article, with exception of Constitutional texts and EU foundational treaties which will appear with the title and article cited.
- The next citations will present reference to the surname of the author, year of publication, *op. cit.* and cited page. In sequenced citations of the same title, it will present *Ibid.* and number of the cited page.
- To cite European jurisprudence, we will use the method of citing based of the ECLI. It indicates the type of decision, full date, usual name of the case, registered case number, ECLI code and the cited paragraph. In the following citations of the same decision, we will indicate only the case number, *op.cit.* and the paragraph cited.
- The bibliography is indicated by alphabetic order of the author's last name. When two titles of the same author have been cited, the order will consider the oldest publication year first.

## **Number of characters of the dissertation**

The dissertation's body of text presents a total number of 199.991 characters, including footnotes and spaces.

## Abbreviations

ATAD	Anti-Tax Avoidance Directive
ATP	Aggressive Tax Planning
BEPS	Base Erosion and Profit Shifting
DTA	Double Taxation Agreement
EC	European Commission
ECJ	European Court of Justice
EEC	European Economic Community
ESG	Environmental, Social and Corporate Governance
EU	European Union
G20	Group of Twenty
GAAR	General Anti Abuse Rule
GDP	Gross Domestic Product
HMRC	HM Revenue and Customs
HQ	Headquarters
IRC	International Revenue Code
IRS	Internal Revenue Service
MNCs	Multinational Corporations
MNEs	Multinational Enterprises
MS	Member State
OECD	Organization for Economic Cooperation and Development
UK	United Kingdom
UN	United Nations
US	United States of America

**Resumo:** O Sistema fiscal é uma interação de vários intervenientes, todos responsáveis pela eficiência e integridade das suas funções e objectivos. As empresas estão integradas neste grupo e os seus esforços para diminuir as suas contribuições fiscais parecem ser uma perturbação irresponsável do sistema, utilizando estratégias agressivas que exploram deficiências legais. Os impactos negativos de *tax avoidance* influenciam a necessidade de um trabalho legislativo ativo e de pressão social para motivar a mudança empresarial. A responsabilidade fiscal, enquanto responsabilidade partilhada, garante que todos os intervenientes tenham um papel a desempenhar e uma *fair share* a pagar. Em primeiro lugar, cabe ao governo implementar medidas legais para garantir a limitação efetiva ao planeamento fiscal agressivo e assegurar a justiça distributiva e a igualdade entre os contribuintes. Dado que os padrões de moralidade e ética são mantidos na legislação fiscal através das próprias motivações da cobrança de impostos, um sistema fiscal eficiente e justo deve ser o objetivo de um governo. Além disso, as empresas devem enfrentar a sua responsabilidade na zona cinzenta de *tax avoidance* e nas suas escolhas económicas livres, a fim de evitar os impactos negativos na sociedade. Nestes esforços, os padrões sociais e éticos e a reação pública às práticas de *tax avoidance* podem exercer pressão sobre a reputação corporativa e podem também alcançar a inclusão da responsabilidade fiscal na procura de responsabilidade social corporativa. O trabalho complementar da responsabilidade num quadro de RSE, mecanismos não coercivos e esforços de sustentabilidade é essencial para ajudar os limites legais ao comportamento fiscal agressivo. A responsabilidade social e ética da empresa é uma base para as limitações ao comportamento fiscal agressivo, uma vez que é parte integrante do sistema fiscal e pretende assistir na sua eficiência e justiça.

**Palavras-chave:** Planeamento fiscal agressivo, CSR, ESG, Fair share, sustentabilidade, *tax avoidance*, moralidade fiscal, responsabilidade fiscal.

**Abstract:** The tax system is an interaction of various actors, all responsible for the efficiency and integrity of its functions and objectives. Corporations are integrated into this group, and their efforts to diminish tax contributions appear to be an irresponsible disruption of the system using aggressive strategies that exploit legal deficiencies. The negative impacts of tax avoidance influence the need for active legislative work and societal pressure to motivate corporate change. Tax responsibility, as a shared responsibility, ensures all actors have a role to play and a fair share to pay. First and foremost, it is the government's role to put in place legal action to guarantee effective limitation to aggressive tax planning and assure distributive justice and fairness amongst taxpayers. As standards of morality and ethics are upheld in tax law through the very motivations of tax collection, an efficient and fair tax system must be the government's goal. Additionally, corporations must face their responsibility in the grey area of tax avoidance and in their free economic choices in order to avert the negative impacts on society. In these efforts, social and ethical standards and public backlash on tax avoidance practices can input pressure on corporate reputation and can also reach for tax responsibility inclusion in the demand for corporate social responsibility. The complementary work of responsibility in a CSR framework, non-coercive mechanisms, and sustainability efforts is essential to assisting the vital legal limits on aggressive tax behaviors. The social and ethical responsibility of the corporation is a basis for the limitations on aggressive tax behavior since it is integral to the tax system and intends to aid in its efficiency and fairness.

**Keywords:** Aggressive Tax Planning; CSR; ESG; Fair Share; Sustainability; Tax Avoidance; Tax Morality; Tax Responsibility

## 1. Introduction

Faultlessly, taxation creates an economic and political community, giving substance to democratic governments through the collection and creating a *mutual interdependency through a pool of public resources*<sup>1</sup>. This anticipates a community with core values reaching for solidarity and institutionalism, making tax evasion and avoidance a broken bond of the membership created by the individual's interest in politics and the use of public funds. In other words, since the obligation of every individual to pay their taxes is universal, once one retreats from such demand, it breaks trust in the institutions and the democratic and interdependent systems.

Taxation is seen by most as a limitation on freedom. Even though tax is conceived as a necessary part of living in society<sup>2</sup>, the taxed subject may feel disconnected from the reasoning of taxation and the repercussions of the collection, thus diminishing its legitimacy. Not only that, but the awareness that others in society may be capable of avoiding (or enabled to avoid) this contribution also promotes disbelief in the tax system.

Even when understanding that minimizing tax contribution is an economical choice for cost reduction and is not legally blameworthy, it begs the question of whether corporations should still not disregard the extra responsibilities attached to taxation and how national and international legislation can enforce these responsibilities.

Tax avoidance has been an issue of doctrinal attention, but it has reached the wider public more recently. The media attention on the diminished tax contribution of corporations compared to the growing profits of these has added to the momentum for greater scrutiny. The issue is that all tax practices have social and moral connotations, supposedly contributing to a fairer system in which the relevant actors must be mindful of the impacts on the collective.

The role of the taxpayer and their tax ethics should relate directly to tax compliance, yet there is engagement in individualized choices for personal economic benefits—choices not necessarily illegal but rather inadequate. With Aggressive Tax Planning, it involves a complicated balance of legal dispositions and economic freedom, which finds many

---

<sup>1</sup> Eskelinen, Teppo et al.(2015) *Taxation: its justification and application to global contexts*, p.8

<sup>2</sup> Oliveira, António Fernandes (2009) *A Legitimidade do Planeamento Fiscal, As Cláusulas Gerais Anti-Abuso e os Conflitos de Interesse*, p.29

critics in the societal context, requiring a close look at the motivations. Not only this but this practice collects negative impacts which truly embody the reasoning to justify a more active combat to aggressive tax planning.

And this idea is concurring in an era when Corporate Social Responsibility (CSR) assumed a considerable role in big corporations, in their investors, in politics, and in consumer image. The influence of human rights concerns and environmental protection measures in the last decades has been shown through the development of social responsibility by corporations as an obligation to positively impact their communities. This impact has been marketed by companies, mainly Multinational Enterprises, to ride on the attractiveness of the sustainable movement to 21<sup>st</sup> century customers. However, the more complex tax planning schemes become, the more they show an effort to diminish their substantial contribution to States' funding.

Our efforts are aimed at understanding the negative implications of lowering tax liability in a legal but illegitimate manner and whether such implications justify restricting companies' freedom to look for the most beneficial tax structure for their enterprise. This being said, we will take a look at the existing limitations of corporations' tax planning and the legitimacy of justifying these limits through ethical and social bounds. Further, we'll reach for the importance of Corporate Social Responsibility and the possibility of these measures as vehicles for such limitations. We will also look into ESG policies for this purpose, differentiating this as an external factor of analysis with measurable goals and audits against the intracompany priority of CSR.

The international actors have been discussing the issues of avoiding tax payments and the consequences for State functions. The need for collective and coordinated responses on a regional or worldwide basis is being emphasized for the benefits it may bring to cross-border schemes' combat, always supported by updated and efficient national tax legislation and a continuous effort by domestic authorities to promote good practices within their borders.

The choice of jurisdictions in the analysis of our discussion is based on the important role of these countries and organizations in aggressive tax planning schemes and combat. The UN has been laying out various reports, recommendations, and other important documents that give substance to the concerns about the global effects of these abusive

tax practices on society and environmental and social rights. The role of the corporation in sustainable growth is also a key determinant of their tax responsibilities.

The OECD is an international organization with the goal of sharing knowledge amongst the member countries and cooperatively developing “*evidence-based international standards and finding solutions to a range of social, economic and environmental challenges*”<sup>3</sup>. Their standards on tax policies have been greatly implemented in countries all over, and a lot of organizations, such as the EU, found basis in their work and further complemented their policies. The importance of this organization is seen in its members ranging from all corners of the globe and demonstrating a very wide perspective on the issues and solutions to Aggressive Tax Planning.

The European Union is an important example of regional approach and cohesion, showing great development and growth in commercial and social areas. There is also a very dense and influential legal collection to be analyzed concerning ATP and CSR; therefore, its analysis is indispensable. Looking at the international scene is of utmost importance in the context of aggressive tax planning since it mostly involves cross-border tactics. For this reason, the possibility and ambition of convergence in legal dispositions and aligned projects of transparency and disclosure policies are essential for the effective combat of ATP.

The US is known for its commercial power, and MNEs are either founded or greatly integrated within the US’s market. We will discuss companies such as Starbucks, Google, and Amazon, all founded and still holding their headquarters or intellectual property rights in the US. The significance of the analysis of this country’s context also stems from the different legal backgrounds and codifications of law, more specifically tax law and CSR policies.

If the US is where most international corporations were created and developed, the UK is where these groups find their European center for growth and revenue. The commonalities of these two countries in language, history, and legal aspects promote the UK as a gateway to the European market, creating great opportunities for expansion whilst providing skilled workers, flexibility in enterprise establishment, and tax benefits. As well, and as the UK Government testified, in 2019, almost 1.5 million jobs in the

---

<sup>3</sup> OECD, Who we are, available in: <https://www.oecd.org/about/>, (last accessed March 2024)

country were derived from US-owned businesses<sup>4</sup>, which means the incorporation of US businesses in the British market supports a trade-off in which the contribution to the UK economy means job creation across the country and business turnover disproportionately positive<sup>5</sup>.

The third country we will be pointing out is Portugal, in order to demonstrate the impact and applicability of the EU legal dispositions and recommendations in the Member States. Portugal's legal context will be discussed in terms of domestic law and also to understand some differences with the American example.

Therefore, in the first part, we will set the tone for the discussion going forward by introducing the basic concepts and the issues at hand. Initially, we will look at taxation in general terms, and next, focus will be given to the efforts of tax evasion with the exercise of distinguishing between tax avoidance *contra legem* (tax evasion), tax avoidance *intra legem*, and tax avoidance *extra legem*. With that distinction, we can better dive deep into the legal and doctrinal delineation of aggressive tax planning and its consequences and justifications.

The second chapter finds a discussion of taxation and tax law and their correspondence with ethical, moral, and social concepts and standards. The concept of tax morality is developed with ties to the famous cases of the Global Enterprises hearing in the UK and the outcome of that discussion.

In the third part, we will better understand the legal limitations imposed on ATP already and the governments' sources of concern that justify the legislation and standards proposed. The need for transparency will be reviewed as a form of preventive legal action. An international focus will be considered with a close look at the OECD's reports and action plans, European Commission's stress on this topic, and the main European Court of Justice's jurisprudence. Following that, national legislation, namely in the US and Portugal, will be considered and checked as a form of internal stress on taxpayer compliance and on the authorities cooperation with corporations in order to sustain a fair

---

<sup>4</sup> Department for International Trade(2021) *The role of United States-owned businesses in the United Kingdom*, p.6

<sup>5</sup> *Ibid.*, p.46

tax system. Indeed, in this chapter, we will be able to spot the social and moral conceptualization within the legal systems and international measures.

In Part IV, we will examine the importance of corporate social responsibility, its legal definitions, and propositions internationally. We will assess the relationship with tax responsibility and the possible benefits of interpreting these concepts in an aligned manner.

In the final chapter, we will draw conclusions from our analysis and answer the question of whether and to what extent the limitations of aggressive tax planning are justified by social and ethical responsibilities.

## **Part I**

### **Taxation: Fundamentals and Challenges**

## 1. Taxation: the *fair share*

Taxation may be defined as the compulsory collection of levies from individuals subject to a given taxing jurisdiction by the government of such jurisdiction. Taxes are *legally stipulated* and *universal*. This entails, firstly, an organized State in which the taxation system is managed within the rule of law and the object and subject of taxation are defined, as well as that it applies to every individual under the same conditions.

The OECD extends on the fundamental principles, including that a tax system must ensure *neutrality* and *equitability*, avoiding significant distortion on the affected individual or taxed activity. Taxes should be clear and simple in conception and efficient in compliance<sup>6</sup>.

Fritz Neumark<sup>7</sup> extends the *generality* of taxes by defining this as an obligation of all persons to be subjected to the tax system as defined by law and within their contributive capability (or ability to pay). The exceptions to this rule can be justified by equality demands of economic or social nature. Adam Smith discussed this same topic, and in his words, “*the subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state*”<sup>8</sup>.

This also assures a *solidarity* function: all must pay within their ability, and all that have the same ability to pay should pay in the same share<sup>9</sup>.

At the roots of the tax system are *justice* and *fairness*. As John Rawls wrote, “*Justice is the first virtue of social institutions*” and uncompromising<sup>10</sup>. Indeed, all the aforementioned principles are linked amongst themselves and find their source in fairness. The ability to pay acts as a “*criteria of tax equality*”<sup>11</sup> and sustains solidarity amongst taxpayers.

---

<sup>6</sup> OECD (2014) *Addressing the tax challenges of the Digital Economy*, p.21

<sup>7</sup> Neumark, Fritz (1994) *Principios de la Imposicion*, p.383.

<sup>8</sup> Smith, Adam (1776) *Wealth of Nations*, Book V, Chapter 2

<sup>9</sup> Sá Gomes, Nuno (2005) *Manual de Direito Fiscal* p.204

<sup>10</sup> Rawls, John (1971) *A Theory of Justice*, p.3

<sup>11</sup> Vasques,Sérgio (2005) Capacidade contributiva, rendimento e património,in *Fiscalidade* n.23; p.25

The *fair share* concept is commonly used in the context of tax evasion and avoidance (and is commonly criticized<sup>12</sup>) and it will be used during our analysis. Its meaning derives from this idea of fairness as a foundation of a legal system. As Rawls states, “*the burden of taxation is to be justly shared*”<sup>13</sup>, so there is a share of taxation assigned to every taxpayer based on these principles. The effect of tax avoidance or evasion on the system is felt throughout the areas in which the funds cannot be applied, and Rawls proceeds in his discourse with the idea that our connection with loved ones extends to a community bond and institutions, so “*we cannot in general select who is to be injured by our unfairness. For example, if we cheat on paying our taxes, or if we find some way to avoid doing our fair share for the community, everyone is hurt, our friends and associates along with the rest*”. The concept, therefore, implies that each taxpayer contributes to the costs of public services and government functions in a manner that is equitable and just towards their community.

Lorenz von Stein has also examined the nature of taxation and its role in the community. In his words, “*by virtue of the State’s constitution and administration, part of the individuals’ economic income is withdrawn from them and becomes the community’s income*”<sup>14</sup>. For von Stein, there is a conflict between personal freedom and taxation that arises from the inevitable collection of all people’s forms of income by authorities —as Benjamin Franklin put it, “*in this world nothing can be said to be certain, except death and taxes*”—and, thus, taxation ties back to the community, which, in turn, is indispensable to the development of each person. In his perception, the communal and individual facets of the person justify the contributions, along with the need for the State to regulate social life.

Contribution evolves to be a measure of individual growth within the State, and monetary payments equalize the role of the taxpayer before the State, which, in turn, defines the amount and distribution of taxation through constitutional legitimacy.

The constitutional legitimacy and the idea of (rightful and lawful) taxation being preceded by this legitimate imposition of law and of the governing authority of the State is to say

---

<sup>12</sup> Freedman Judith (2006) *Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle*, p.334

<sup>13</sup> Rawls (1971), *op.cit.*, p.246

<sup>14</sup> Von Stein, Lorenz (1958) On Taxation in: Musgrave, Richard A. et al.; *Classics in the Theory of Public Finance*, p.28

it derives from the existence of democratic participation<sup>15</sup> and of the acceptance of the societal benefits. Taxation must be bound by the will and needs of the State through legal dispositions and constitutional power. The democratic nature of the right to tax goes back to the idea of the community's authority and priority.

Taxation is guaranteed by the principle of legality and assures legal security for all taxpayers. Only the democratically elected higher structures of the State are entitled to create tax laws, and taxation must be materially typified; the subject, object, tax base, and rate must be specified in formal legal text<sup>16</sup>.

Naturally, taxation is mainly justified for its role in covering national public expenditures. Taxation is mostly considered a *means to an end* and not an *end* in itself, being the use of tax funding for those primary ends of the Social Rule of Law. The revenue derived from tax contributions is still a large source of income for public expenditures. The OECD reports on revenue statistics relating to 2022 that the percentage of GDP (i.e. tax-to-GDP ratio) was 34% on average<sup>17</sup>, which makes tax essential to help sustain the government's activity.

As Charles Adams writes, “*for without revenue, governments would collapse, society as we know it would disappear, and chaos would follow (...) Taxes are the fuel that makes civilization run*”<sup>18</sup>.

In 1959, Musgrave presented in his *Theory of Public Finance*<sup>19</sup> the three functions of public expenditure: allocating public goods, redistributing income, and stabilizing the economy. The fundamental duty of paying taxes is understood as the responsibility of each taxpayer for the common good and equal opportunities whilst benefiting from a stable economic reality. It is the duty of each taxpayer within their contributive capability to support State's expenses; “*it is the indispensable contribution to a common and prosperous life of all members of a community organized as a State*”<sup>20</sup>.

---

<sup>15</sup> As James Otis famously put it “*Taxation without representation is tyranny*”.

<sup>16</sup> Dourado, Ana Paula (2019) *Direito Fiscal*, p157

<sup>17</sup> OECD (2023) *Revenue Statistics 2023, Tax Revenue Buoyancy in OECD Countries*; p.1

<sup>18</sup> Adams, Charles (1993) *For Good and Evil: The Impact of Taxes on the Course of Civilization*; p.1

<sup>19</sup> Musgrave, Richard A. (1959) *The Theory of Public Finance: A Study in Public Economy*

<sup>20</sup> Translation of “*contributo indispensável a uma vida em comum e próspera de todos os membros da comunidade organizada em Estado*”. Casalta Nabais, José (1998) *O dever fundamental de pagar impostos*; p.185

For the purpose of our analysis, we will be focusing on corporations. Corporate profits in the last 50 years have soared in most countries with regards to technological advancements and open cross-border commerce; thus, the potential of these entities' contributions is massive for countries' revenue.

Corporate tax is a directly imposed fee on corporate income. It excludes expenses of the company during the fiscal year and applies the tax rate to activity profits. The calculation of taxable income follows standard principles of sound commercial accounting practice and typically relies on the profits reported in the company's financials.

The primary measure is the statutory tax rate. The tax on any surplus income is imposed at the statutory rate, making this rate pivotal in deciding the profit location, contingent upon the actual operational activities of the company. The taxation varies from one country to another, but there are various forms of lowering the taxable income throughout, which include benefits, subsidies, and loopholes. Thus, normally, the effective corporate tax rate is considerably lower than the statutory rate.

The different tax reductions or benefits, considerations of deductibles, dividend treatment, and influences on corporate investment or business incorporations allow for a complex mismatch of legislation and taxation examinations that could lead to a higher rate of tax avoidance, as we will see.

## **2. Challenges to Taxation**

Taxation is, from a taxpayer's perspective, an act of force by the State since it demands a payment restrictive of the person's freedom. Even though it is a justified act because it upholds the structure of a community<sup>21</sup>, there are those who choose to evade or avoid its payment.

Tax Law anticipates that the mandatory collection of levies will find its obstacles and its challengers, and so it provides a set of legal actions to take against those who miss their contributions. Tax authorities and national courts are faced daily with tax evasion<sup>22</sup> and it

---

<sup>21</sup> Oliveira (2009) *op.cit.*, p.29

<sup>22</sup> "There is no civilization that did not tax, and there are probably no taxes that haven't been evaded" in Adams (1993) *op.cit.*, p.395

is important to understand the delimitation of these provisions in order to distinguish them from the issue of aggressive tax planning.

Indeed, Tax Planning or Tax Avoidance are regulated in accordance with its singularity as a legal practice with *extra legem* purposes; however, acts that entail a conscious and intentional non-payment of the due fees through illegal means are very much penalized.

In our analysis, we will focus on Tax Avoidance for the purpose of deepening our understanding of the limitations of tax planning. Nonetheless, knowledge of Tax Evasion is required to understand the legal aspects and borders with the avoiding practices.

## 2.1. Tax Evasion

By analyzing the literature, we can verify the appearance of tax evasion with two definitions: the first is a *lato sensu* definition, whereas the second encapsulates solely the negative feature of evasion's definition.

Tax evasion is described by a multitude of authors as all the situations in which there is a goal of obtaining a tax advantage, whether this is an licit, illicit, or just an immoral advantage. In this ample definition, we may include all *intra legem* methods permitted by law to reduce the tax base, as well as all the grey areas such as tax avoidance or tax planning that are considered *extra legem* (or *in fraudem legem*<sup>23</sup> if considering abusive tax planning). And ultimately, the tax evasion *stricto sensu*, the illicit act that is against the law or *contra legem*. This last one is also the second description of the concept and the one we'll consider as tax evasion going forward.

As such, tax evasion is an illicit situation that may constitute an administrative or criminal infraction, either way specified in legal text. In the face of the social, legal, and economic responsibility of paying your taxes, the intentional and illicit conduct of failing your tax responsibilities or reducing tax liability is considered tax evasion, which makes tax evasion a broad term to include all the different actions that are willful violations of the law.

---

<sup>23</sup> Chylak, Anna (2018) *International Tax Avoidance-Attempt to Define the concept and to distinguish it from International Tax Evasion and International tax planning*, p.27

Jurisdictions draw different lines regarding the unlawful situation, namely which are to be considered of criminal nature or non-compliant, also considering the differences in the concept of tax evasion.

The United States' authority distinguishes tax evasion that may happen within the assessment of the total value to be paid to the tax authority or already at the moment of payment of said value. The use of falsified documents, the occultation of relevant values, simulated deals, and the creation of entities for the sole purpose of having tax benefits are examples of the first category, whereas the second relates to the concealment of money and assets to avoid payment<sup>24</sup>.

Portuguese legislation<sup>25</sup> gives notice to conduct that is fraudulent and deceitful with the intent to evade, reduce, or delay tax responsibilities. In this sense, both a criminal evasion and an administrative evasion constitute *contra legem* acts that “*result in illicit savings, in which the taxpayer enjoy funds that, strictly speaking, do not belong to them*”<sup>26</sup>.

The European Union reflects on the concept of tax evasion through the lens of regionality and the issue of cross-border flows of capital, people, and services, demanding a tremendous effort from the national authorities.

Regardless of conceptualization and dispositions, there are consensual elements that characterize a tax evasion situation, which are the tax obligation, the tax advantage, the attempt, and the willfulness.

#### **i) Obligation**

The act of evading the due amount owed to the tax authority mandates that there was prior to that a tax obligation towards the person. In this sense, the evasion must be of a legal disposition or of its application since there is no illicit if there is no (prior to the act) legal mandate.

---

<sup>24</sup> Office of Chief Counsel Criminal Tax Division (2009) *Tax Crimes Handbook*, p.2

<sup>25</sup> Regime Geral de Infrações Tributárias (2001) Lei nº15/2001; art. 2º/1

<sup>26</sup> Translation of “*resultará uma poupança fiscal ilícita, em que os contribuintes desfrutam de verbas que, em rigor, não lhes pertencem*”. Dos Santos, António Carlos (2009) *Planeamento fiscal, evasão fiscal, elisão fiscal: o fiscalista no seu labirinto* in *Fiscalidade* n.38; p.10

For instance, the Portuguese Constitution<sup>27</sup> clearly states that the tax must be legally stipulated in order to be collected, and the process of levying must be clear for all taxpayers. As well, jurisprudence in the United States confirms the ever-existing need to confirm and prove the tax liability of the person accused of evasion<sup>28</sup>. Not to consider here is the possible applicable levy avoided due to the choice of the taxpayer or economical transfer, which entails an avoidance of taxing incidence, which allows us only to speak of a virtual applicability with no legal repercussions.

## **ii) Attempt**

The attempt at tax evasion is considered in the typology of the offense as the method of evasion<sup>29</sup>. The evasion meets the requirement when the taxpayer engages “*in an affirmative act for the purpose of attempting to evade or defeat the assessment of a tax*”<sup>30</sup>. This action must attempt to impede the correct assessment of the calculation or frustrate it.

To note, the affirmative act does not only require a positive practice but may also include an intentional omission when the person was obligated to a declaration or that is traced as imputable to the taxpayer through concealment or mislead<sup>31</sup>. The most common omission evasion tactic is, clearly, the omission of payment when the facts of the incidence of taxation are fulfilled, but it is also common for the non-delivery of all paramount documents for the tax authority to control the taxpayer’s situation.

## **iii) Advantage**

The main purpose of the legal provisions is to typify the tactics used by taxpayers to unlawfully escape their fair share and, hence, be conferred with an unjustified tax advantage. The illicit act may just try to evade the payment of an additional amount of taxes or evade payment in total. Yet the goal of some evading practices may also be to obtain an unfounded tax advantage that the state intended for truly deserving situations.

---

<sup>27</sup> Constituição da República Portuguesa; art.103º/3

<sup>28</sup> See Office of Chief Counsel Criminal Tax Division (2009) *op.cit.*, p.24 for a list of such cases

<sup>29</sup> The attempt of evasion relates to the fact that there is an attempt frustrated by the tax authorities when they correctly assess the taxpayer’s contribution and/or initiate a fiscal civil or criminal process. See Xavier, Alberto (2014) *Direito Tributário Internacional*, p. 45

<sup>30</sup> Office of Chief Counsel Criminal Tax Division (2009) *op.cit.*, p.21

<sup>31</sup> *Ibid.*, p.22

The key element here is that any evading scheme truly distorts the tax and economic context and erodes state revenue, thus conferring an undeserving advantage.

#### iv) Willfulness

There is evasion when “*the subject direct and intentionally fools the tax administration, infringing tax norms*”<sup>32</sup>. Willfulness is a constant element in all legal dispositions and consecrates this as an illicit offense while differentiating it from mere distraction or unknowing omission.

For that reason, “*Willfulness won't be presumed from a mere showing that taxpayer's act was a violation of the tax law. It must be shown that he acted with a specific intent to defraud*”<sup>33</sup> the tax system. This exercise of proof is not necessary in all situations; for instance, when there is a false statement filed or when the taxpayer has been consistently filling out their returns up until that year, this shows there is knowledge and no argument of unintentional oversight can be sustained here.

Tax evasion *stricto sensu* or tax evasion *contra legem* constitutes an act or omission, and its distortion of the economic substrate infringes the law. For that reason, the limitations of these practices are also guaranteed in the legal text and in the organization of the tax authorities to investigate them.

## 2.2. Tax Avoidance

Unlike tax evasion, tax avoidance does not constitute a violation of the law, nor does it make the avoiding taxpayer liable to action from tax authorities in the same way. This entails that there is an area in which the taxpayer can explore its tax obligations and practices without violating the law.

When talking about *avoidance intra legem* or *tax planning stricto sensu*, we include all the permitted legal activities to reduce tax liability—intentional promotion of tax reduction through legislated tax benefits—or objectively intentional omissions of the legislator in order to allow the taxpayer to obtain a tax reduction. There is no legal judgment to be made since this is included in the free sphere of the individual’s economic

---

<sup>32</sup> Vaz Antunes, Francisco (2006) A Evasão Fiscal e o Crime de Fraude Fiscal no Sistema Fiscal Português in coord. Teixeira, Glória, *Estudos de Direito Fiscal - Teses Selecionadas do I Curso de Pós-Graduação em Direito Fiscal*; p.78

<sup>33</sup> Thomson Reuters (2023) The Willfulness requirement for tax evasion in *Federal Tax Coordinator*

decisions<sup>34</sup>. In fact, it is natural for the taxpayer to search for a reduction in the tax contribution. *Reduction of costs* is a natural economic endeavor and a thought present in every company but also in every household. For example, the simple choice between products or services with different VAT rates is a form of tax planning.

Taxation is seen as a mandatory burden on every structure, and it affects the financing and investment choices of companies. It cannot be said that there is a right to avoid taxation for that reason; rather, there is a possibility within economic freedom to minimize taxation as a consequence of the very structure of the existing tax system<sup>35</sup>. As “*inescapable environmental factors that must be weighed against a variety of other factors*”<sup>36</sup>, taxes can help change the activity, structure, and functioning of a corporation.

Tax avoidance is connected with the concept of Tax Planning which conceptualizes a conglomerate of actions and measures to fulfill the restructuring efforts of a corporation or the avoidance opportunities of individuals. The schemes herein are constructed depending on the investments and cost reduction the economic agent wants, and there are even active professionals who are dedicated to this endeavor—tax intermediaries.

Notwithstanding, the natural pursuit of cost reduction must not surpass the social limits of tax avoidance, which can happen when tax planning becomes aggressive—“*tax planning inevitably reaches a point beyond which it cannot be tolerated within a legal system if it is intended that the system be just*”<sup>37</sup>.

Tax planning, as a legitimate activity, is a constant for every taxpayer, so it is when that planning assumes an unintended and unacceptable result, with no commercial purpose but only aiming for tax reduction, that we identify the aggressiveness.

The OECD in 2008 described it as “*planning involving a tax position that is tenable but has unintended and unexpected tax revenue consequences. Revenue bodies’ concerns*”

---

<sup>34</sup> In Portuguese jurisprudence, the constitutional rights of private initiative and autonomy, freedom of corporate organization— See Acórdão do Tribunal Constitucional n.º 430/2016, processo n.º 367/13 or Acórdão Tribunal da Relação de Coimbra, 03/12/2009, processo n.º 995/05.8TBFND

<sup>35</sup> Almendra, Violeta Ruiz (2005) *Tax Avoidance ant the European Court of Justice: What is at stake for European General Anti-Avoidance Rules?*, p.562

<sup>36</sup> Prawira, Ida Farida Adi, et al. (2021) *The Determinants of Corporate Tax Aggressiveness*; p.1

<sup>37</sup> Vogel, Klaus (1986) *Double Tax Treaties and Their Interpretation*; p.79

relate to the risk that tax legislation can be misused to achieve results which were not foreseen by the legislators”<sup>38</sup>.

Tax avoidance takes on two paths, following this conceptualization: rational business planning and morally questionable avoidance through tax loopholes<sup>39</sup>. Morally questionable, as we will see in the next chapter, translates into a subjective view of tax planning, but it also reflects real, political, and societal concerns. The idea that tax planning can be abusive comes from a deliberate action by a taxpayer that appears legal but results in a tax advantage not permitted by the tax system<sup>40</sup>. On this note, Marta Caldas explains *aggressive tax planning* and *abusive tax planning* as two distinct topics: the first one exploits technicalities and fiscal disparities of legal norms and jurisdictions exceeding the economic justification and creating a *non-predicted tax advantage*; whereas the second one exploits these mismatches without economic motivation, creating an *unwanted tax advantage*<sup>41</sup>.

To put it simply, tax avoidance *extra legem* constitutes an exercise of tax dexterity—“it consists in exploiting loopholes in the tax law in order to reduce one’s tax liability”<sup>42</sup> — constituting a behavior not contrary to the law, however, contrary to the spirit of the law and/or to the legislators’ intention<sup>43</sup>. Going forward, whenever we discuss tax avoidance, we will be focusing on this *path* of extra legem avoidance with immoral/unacceptable connotations.

As there is limited legal scrutiny, there is mostly and primarily a social, or moral censorship of the taxpayer’s use of schemes, for the result is not wanted by the legislator. And as tax law must be typified and clarified in legislation in all jurisdictions, there is no possibility of taxation by analogical application. As Vaz Antunes explained, “*the very nature of the tax norms makes it as, sometimes, the taxpayer’s action wonders outside tax law application – extra legem – and that action is, in principle, licit; that is if it does not*

---

<sup>38</sup> OECD (2008) *Study into the role of tax intermediaries*; p.10

<sup>39</sup> Payne, Dinah M. et al. (2015) *Aggressive tax avoidance: a conundrum for stakeholders, governments and morality*; p.2

<sup>40</sup> Lopes Courinha, Gustavo (2009) *Cláusula Geral Anti-abuso no Direito Tributário: Contributos para a sua compreensão*, p.15

<sup>41</sup> Caldas, Marta (2015) *O Conceito de Planeamento Fiscal Agressivo: Novos Limites ao Planeamento Fiscal?*; p.53

<sup>42</sup> Sandmo, Agnar (2005) *The theory of tax evasion: A retrospective view*; p.646

<sup>43</sup> Panayi, Christiana H. (2015) *Is Aggressive Tax Planning Socially Irresponsible?*; p.545

*constitute an abusive act, abnormal or atypical which is included by the existent anti-abuse norms”.*<sup>44</sup>

Through tax planning *extra legem* there is no violation of the law, yet taxpayers *go around* the law, which is to say the censurable situation does not come from the means —the used practices are legally admissible—but from the obtained results not desired by the law.

Tax avoidance practices are developed with the main goal of finding the best path to anticipate the most damaging fee which means the action plan takes place prior to the tax fact and, thus, the subject avoids the very fact that originated the taxation. As the inexistence of attributable act is within the legal limits, the only real issue is the creation of a grey area of the tax system in which the avoiding practices are not prohibited but not endorsed.

But to keep in mind here is that the result is an abstract debate considering the legislator will never be able to fill in every single gap of the legal system or predict every single arrangement to avoid taxation. More than that, doing anything close to that would restrict economic freedom to a point unsustainable to any growing democratic economy. As Saldanha Sanches wrote “*the evolution of the law is clearly in the way of allowing legal basis for tax planning, as long as it is practices without the abuse of legal rules, without contrived and fraudulent legal dealings, but simply opting for an open path that allows for tax economies*”<sup>45</sup>.

### **3. Aggressive Tax Planning: a *crime* of globalization**

Tax avoidance takes on an abusive character when it exploits tax law instead of sheltering the honest economic substance of the activity being taxed, and its main spotlight is cross-border planning. The most explicit and harmful forms of tax planning are part of a global issue, a globalized issue.

Aggressive Tax Planning assumes an international character due to the utilization of various tax jurisdictions for the elaborate schemes due to the inexistence of legislative

---

<sup>44</sup> Vaz Antunes (2006) *op.cit.*, p.76

<sup>45</sup> Translation: “a evolução da lei é clara no sentido de proporcionar fundamento legal para o planeamento fiscal, desde que seja praticado sem o abuso de formas jurídicas, sem negócios jurídicos artificiosos e fraudulentos, mas limitando-se a escolher a via que se encontra aberta e que lhe permite realizar economias fiscais” in Saldanha Sanches, José (2010) *As duas Constituições: nos dez anos da cláusula geral antiabuso* in coord. Amorim, José Campos, *Planeamento e evasão fiscal*; p.118.

coincidence or collaboration. With a global economy, and as the OECD pointed out, the “*promotion of unacceptable tax minimization arrangements*” results in a constant pressure for States’ tax authorities and the funding of the Nation’s needs<sup>46</sup>.

International tax avoidance refers to deliberate efforts to sidestep specific regulations using a sequence of schemes. These efforts are aimed at either evading taxable events under less favorable tax obligations within a particular legal system or triggering the same events under more favorable legal systems. Tax systems around the world provide different types of rules and obligations to entities, and it is part of the efforts of aggressive tax planners to conjugate these systems in order to face the least tax liability possible. Some countries have more opaque tax systems with fewer disclosure constraints and less overall control for the sake of becoming more fiscally attractive to large capital investors. Adding to this, consulting firms and financial institutions provide services with the sole objective of assisting multinational corporations to achieve more tax benefits and competitive advantage.

Mostly viewed as *extra legem* behavior, the definition of the practices and their legal consequences are hard to tackle by the legal systems and tax authorities, even though they are widely spread and have increasing effects.

Globalization has been an effort of civilizations for millennia now. However, the speed and magnitude of the technological developments of the late 20<sup>th</sup> and 21<sup>st</sup> centuries motivated a change in the economic scene never before testified.

Globalization is, by definition, “*the increasing connectedness and interdependence of world cultures and economies*”<sup>47</sup> or, in a more economic-centered view, in regard to corporations —and as Theodore Levitt<sup>48</sup> saw it —the change in communication and technology that permitted companies to sell the same products around the world. It is evident that globalization carries the possibility for companies to have a global reach and

---

<sup>46</sup> “*Revenue bodies are under constant pressure to close the gap between the tax legally due and the tax actually collected*” in OECD (2006) Third Meeting of OECD Forum on Tax Administration, 14-15 September 2006, Final Seoul Declaration; p.2-3

<sup>47</sup> National Geographic, *Globalization*, available in: <http://education.nationalgeographic.org/resource/globalization> (last accessed January 2024)

<sup>48</sup> The economist who popularized the term in Levitt, Theodore (1983) *The Globalization of Markets*

be connected to a diverse customer base, which in turn allows for a bigger profit margin but also subjects companies to multiple national laws and concurrent regulations.

The globalized world brought forward the opportunity for cross-border investments and commerce and, as a consequence, the issue of double taxation—defined as the conflict between two different States’ claims over the same taxable base. This comes from the domestic tax rules that address income taxation through the outbound investments of resident individuals/ companies and the inbound investments of non-resident individuals/companies<sup>49</sup>. Consequently, the same income may be taxed twice by two distinct jurisdictions, which affects international economic and commercial relations and the choices of the taxpayers.

As domestic tax rules are of State sovereignty, the relief of double taxation can only be done through one sided domestic tax system rules or through bilateral or multilateral treaties. However, as double taxation becomes a severe burden on taxpayers, the risk of non-taxation also arises. “*Just as it is necessary to prevent the double taxation of cross-border income flows, transactions within the Union should not be able to escape tax altogether*”<sup>50</sup>.

Non-taxation is, thus, the extremity of the aggressive efforts of economic agents to avoid taxation in all involved jurisdictions. And the States seem to be facilitating an overall mindset of tax avoidance through the “*race to the bottom*”.

Taking into consideration worldwide numbers, the downward trend in the average rate of corporate tax is considerable, looking at a decline in every region since the 80s<sup>51</sup>. It is clear from all studies that “*competitive pressures have driven down statutory rates*”<sup>52</sup>. Globalization augmented the interaction between corporations and nations with States’ purpose to attract business and companies’ to settle in the most tax advantageous country.

---

<sup>49</sup> Vogel (1986), *op.cit*; p.6

<sup>50</sup> Applicable to EU but also all globalized economy. Commission of the European Communities (1996) *Taxation in the European Union: Report on the development of tax systems*; p.3

<sup>51</sup> See Tax Foundation (2022) Corporate Tax Rates around the World, 2022, available in: <https://taxfoundation.org/data/all/global/corporate-tax-rates-by-country-2022/#Distribution> (last accessed January 2024)

<sup>52</sup> Devereux, Michael P., et al. (2006) The Corporate Income Tax: international trends and options for fundamental reform in European Economy, Economic Papers; p.8

And so the tax competition<sup>53</sup> is fueled by the attractiveness of the tax system for business investment, but ultimately results in a very reduced tax rate, erosion of tax bases, distorting trade and investment, and a complete suffocation of the feebler tax jurisdictions.

There are considerations of tax avoidance as a crime of globalization because it involves the complicity of States<sup>54</sup>. The inaction of a State transforms into state aid, helping the powerful freely override tax rules<sup>55</sup>, but also the competition they propel deepens the gap between the diligent taxpayers and those with resources and only economic gains in mind. “*To an extent, MNE tax avoidance is just the flipside of harmful tax competition and the polemic against aggressive tax planning is very reminiscent of the polemic against tax havens and harmful tax competition*”<sup>56</sup>.

To call ATP a *crime of globalization* is to magnify the significant problem for the new globalized economy and States’ tax authorities, and it also signals the issues created by the elimination of borders and the advent of technology of this past decades.

The technological advancements of the recent past have allowed a lot of businesses to have a strong component of e-commerce or solely be dependent on it. This entails cross-border commerce without the traditional border check<sup>57</sup>. Without a physical form, international transactions hinder the analysis exercise and methods to efficiently collect the imposed tax of the source country from which income is derived.

This is more substantial when the transactions end up in a tax haven—a country or territory with a reduced tax rate or none at all. And again, the existing competition among territories in taxation rates provides for the existence and maintenance of lower tax rates, such is the case of the Netherlands or Luxembourg in the EU, or more known tax havens

---

<sup>53</sup> “*This competition enables companies like Intel to pay no tax at all on its non-U.S. income. The most recent manifestation of this trend has been inversion transactions, in which U.S.-based corporations nominally move their headquarters to a tax haven like Bermuda*” in Avi-Yonah, Reuven S. (2004) *Corporations, Society, and the State: a defense of the corporate tax*; p.1199

<sup>54</sup> Kindly consider Michalowski and Kramer’s definition of State-corporate crime centers on investigating societal harm or illegal breaches arising from the partnership between government and business in a free-market environment. See: Michalowski, Raymon J., et al.(2006). *State-corporate crime: Wrongdoing at the intersection of government and business*.

<sup>55</sup> Evertsson, Nubia (2016) *Corporate tax avoidance: a crime of globalization*; p.205

<sup>56</sup> Panayi (2015) *op.cit.*; p.545

<sup>57</sup> United Nations’ Department of Economic and Social Affairs (2003) *Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries*; p.2

like the Bermudas or the Bahamas. These enable tax avoidance schemes by circumventing “*the rule of law in the countries where they operate and live, and to pay less tax than they should in those countries*”<sup>58</sup>.

As revealed in scandals like the Panama or Paradise Papers, MNCs incorporate subsidiaries in these territories, most often with no real business activity (shell companies), which, in turn, invest in a subsidiary in another country in order to shift the profits back to the tax haven and conceal the real beneficial owners. As millions of documents on offshore accounts were leaked, the world got a glimpse of the proportion of the problem and the number of high-profile individuals and corporations that escape taxation and disregard economic, social, and ethical standards<sup>59</sup>.

A lot of these territories also offer secrecy as an effective immunity from disclosure of their banking transactions and, consequently, another perk to avoiding corporations. All around, tax havens are great examples of aggressive tax planning schemes that promote the opaque activity of corporations.

This is yet another form of public perception of *criminality* used to describe tax avoidance. The scope of tax avoidance is being intertwined with tax evasion/fraud and the legal line between these two concepts seems to be fading through the involvement of media attention<sup>60</sup>. As a matter of fact, the public’s reception of the offshore scandals and MNEs effective tax rates—such as Apple, Google, Starbucks etc.—were incredibly negative and indicated tax avoidance as a new *crime of globalization* against society and moral standards.

#### **4. Negative Impacts of Aggressive Tax Planning**

Aggressive Tax Planning is mainly adopted by multinational companies that abusively exhaust tax systems: “*firms readily utilize public resources while at the same time take great pains to evade as much contribution to fund those services as possible*”<sup>61</sup>.

Indeed, the Tax Justice Network reports that the estimates for profit shifting by MNEs are between USD\$ 900 billion and 1,100 billion a year, corresponding to around 40% of their

---

<sup>58</sup> Tax Justice Network, *What is a tax haven?*. Available in: <https://taxjustice.net/faq/what-is-a-tax-haven/> (last accessed March 2024)

<sup>59</sup> Parliamentary Assembly(2016) *Lessons from the “Panama Papers” to ensure fiscal and social justice*

<sup>60</sup> Christians, Alisson (2014) *Avoidance, Evasion and Taxpayer Morality*, p.41

<sup>61</sup> Bird, Robert et al.(2018) *Tax Avoidance as a Sustainability Problem*; p.1010

international profits<sup>62</sup>. These numbers suggest that companies have been taking advantage of tax systems, resulting in a loss of fair contribution in all jurisdictions involved. This promotes issues amongst different tax jurisdictions and nefarious consequences stretching to other areas of society and economic life.

The abuse of tax structures and their discrepancies was what gave more recognition to the effects of aggressive tax planning and the need for international attention. As Marta Caldas writes, the adoption of *”aggressive tax positions (...) leads to a significant reduction in the tax burden, and generates tense situations, in which citizens have become more sensitive to issues of tax justice, that has become a critical issue for all parties involved (Governments, taxpayers and commerce)”*<sup>63</sup>.

The impacts of ATP reach for the *“distortion of the allocation of the tax burden among citizens”*<sup>64</sup>, the imbalance of contribution with other taxpayers, and the excessive erosion of the taxable base that leads to the degradation of the tax system (and with global effect). It is especially noticeable how these distortions leave MNCs with an unfair advantage over smaller companies.

The power of MNEs derives from their ability to control the company’s resources. In reality, the corporate tax is imposed on corporate income, which, in turn, is used to feed the resources of the corporation. The resources are significant economic, social, and political power<sup>65</sup>. By all means, corporate tax reduces the power of the corporation’s managers and this goal highlights a principle against excessive private accumulation of power: *“taxation to restrict privilege and to affirm communal responsibilities”*<sup>66</sup>.

But not only this, the corporate tax seems to equilibrate or provide a form of equality amongst privates themselves. The power of a company may influence not only political and judicial institutions but also other companies. The accumulation of power to a limit may disrupt the free-market, and corporate taxation is a means of restriction and

---

<sup>62</sup> Tax Justice Network (2023) *State of Tax Justice*, p.23

<sup>63</sup> Translation:”posições fiscais agressivas”, que conduzem a uma significativa redução da carga tributária, e geram situações de tensão, nas quais os cidadãos se tornaram mais sensíveis às questões de justiça fiscal, o que se tornou um assunto crítico para todas as partes envolvidas (Governos, contribuintes e comércio).” Caldas (2015) *op.cit.*, p.28

<sup>64</sup> Almendra (2005) *op.cit.*; p.561

<sup>65</sup> Avi-Yonah (2004) *op.cit.*; p.1211

<sup>66</sup> *Ibid*, p.1239

redistribution. As Michael Walzer so well put it, “*When money carries with it the control, not of things only but of people, too, it ceases to be a private resource*”<sup>67</sup>.

The corporate tax is not only a contribution to society’s funding but also a promotion of distributive justice. However, with the globalization effect, there is an increase in the gap between those who can benefit from mobility and those who are not able to take advantage of such opportunities. There are distributive consequences due to the lack of symmetry in the possibility, capability, and information to engage in tax planning: “*Naturally, escaping tax would apparently bring no harm to the world if all taxpayers were able to escape, and to escape on equal terms*”<sup>68</sup>.

Even though they constitute the majority of the corporate fabric, the smaller companies face big disadvantages competitively and financially with increasing taxation. Smaller companies are not as profitable or resourceful to sustain the most common *avoiding* practices or to pay tax lawyers and tax consultants with enough expertise to devise an aggressive tax plan. These corporations cannot match the scale of operations or capital to be undertaken in international tax avoidance schemes. There is evidence of this link between tax avoidance and increased industry concentration, leading to an inefficient competitive market and high consumer prices<sup>69</sup>. The system’s lack of justice becomes negative to the economic context when this very system should be able to promote a neutral background for choices of commercial activity. The governments’ lack of action when faced with the MNEs exploitation of the tax systems causes a sense of impunity for these big players, leaving the smaller businesses with a heavier burden.

The contributive capability of a corporation is substantial; however, with such practices, it is reduced to a minimum resulting in a deficient and scarce contribution. This creates an imbalance that will need to be compensated elsewhere. This may be through more contributions by the remainder of taxpayers<sup>70</sup> and/or cutting expenses in order to adequate the services to a new, lower budget. Ultimately, it serves as a penalization for the

---

<sup>67</sup> Walzer, Michael (1983) *Spheres of Justice: A Defense of Pluralism and Equality*

<sup>68</sup> Translation: “*naturalmente que a fuga aos impostos aparentemente nada traria de mal ao mundo se todos os contribuintes estivessem em condições de fugir, e de fugir em condições de igualdade*”. Casalta Nabais, José (1995) *Por um Estado Fiscal Sustentável, Estudos de Direito Fiscal*; p.71

<sup>69</sup> OECD (2015) *Measuring and Monitoring BEPS, Action 11- 2015 Final Report*; p.181

<sup>70</sup> David Weisbach uses the analogy of an *externality*, which is, in this case, caused by the government decision to raise taxes to compensate the lack of MNEs’ contribution. See Weisbach, David (2001) *Ten truths about tax shelters*, pp.8-9

compliant taxpayer<sup>71</sup> – as less revenue is derived from tax contributions as a consequence of tax evaders, the *share* of the remainder must be higher. As Marta Caldas writes “*from the point of view of social solidarity, fiscal citizenship and even patriotism, this behavior is reprehensible*”<sup>72</sup>.

There is a threat of social contamination. As the OECD stated as a recognition of tax system organization: “*taxpayers’ attitudes towards paying tax is influenced by other factors such as taxpayers’ perception of the quality of public goods and services and the level of trust between citizens and their governments in general*”<sup>73</sup>.

Individual taxpayers, who are not able to use most tax planning schemes, feel there is a disparity in obligations for persons within the tax system and a sense of impunity from MNCs. Tax authority processes are also questioned, considering their control is not sufficient and it gives incentives to corporations to continue operating through such policies<sup>74</sup>.

For instance, US President Joe Biden claimed in the 2022 State of the Union Address<sup>75</sup> “*the present tax system ain’t fair (...) but let’s make corporations and wealthy Americans start paying their fair share*”. The US President recognized that the American system allows for the largest corporations to avoid federal taxes completely because of profit shifting and finished this critique by urging Congress to the importance of “*(...) closing the loopholes for the very wealthy who pay a lower tax rate than a teacher and a firefighter*”. At least 55 of the largest corporations in America paid no federal corporate income taxes on their 2020 profits and they would have paid a collective total of \$8.5 billion but instead received \$3.5 billion in tax rebates<sup>76</sup>. Tax rebates originate in tax

---

<sup>71</sup> As Plato’s argued “*Where there is an income tax, the just man will pay more and the unjust less on the same income*”

<sup>72</sup> Translation: “Do ponto de vista da solidariedade social, da cidadania fiscal e até de patriotismo, este comportamento é censurável”; Caldas(2015) *op.cit.*; p.52

<sup>73</sup> OECD (2006) *op. cit.*, p.3

<sup>74</sup> Cressey theorized the Fraud Triangle in which Opportunity plays a key role in explaining evading practices in taxpayers. Accordingly, when there is lack of control and noticeable weaknesses tax system, the taxpayer feels there is an opportunity to evade taxes with impunity. See Cressey, Donald (1953) *Other People’s Money: a study of the social psychology of embezzlement*

<sup>75</sup> State of the Union Address on March 1st, 2022. Available in: <https://www.whitehouse.gov/state-of-the-union-2022/> (last accessed February 2004)

<sup>76</sup> Gardner, Matthew, et al.(2021) *55 Corporations Paid \$0 in Federal Taxes on 2020 Profits* Available in: <https://itep.org/55-profitable-corporations-zero-corporate-tax/> (last accessed February 2004)

credits, incentives, or breaks the government's regulator's functions provides; however, these allow for forms of tax avoidance.

The US, but many other countries, legislate on tax benefits such as renewable energy investments, the creation of more job positions, or R&D tax credits. These are examples of state measures designed to positively impact society but which can be counterproductive and disrupt the tax system, providing for untrust and backlash from the public towards this form of *state aid*. This environment also creates a reasonable discredit of the tax authority and tax system overall and puts into question the legitimacy of the authority's action.

The same goes for the issue of countries' tax competition we saw prior. It is true, as governments claim, that the foreign investment of big corporations benefits society from an employment and business development standpoint; yet these should not enable the shift of the tax burden to the remainder of taxpayers. If MNCs can *sway their way into* a privileged stance in the tax system, this will have awry repercussions on others<sup>77</sup>.

Moreover, as tax avoidance results in considerable tax losses for the jurisdictions in which the schemes and arrangements are enacted, the result of not paying their fair share can be even more impactful in developing countries. They are more vulnerable to revenue losses because their need for funding for public infrastructure is ever-existing.

As Oxfam Australia reports, "*approximately USD \$638 billion in profits were shifted out of developing countries by multinational corporations operating all around the world. This resulted in around USD \$172 billion of tax revenue being ripped out of developing countries*"<sup>78</sup>.

The truth is that the reliance on tax revenue for public expenditure in developing countries is greater. These countries face grave issues of poverty, access to health and education infrastructures, injustice and inequality, and climate change. Not only this, but most developing countries suffer from weakened political systems and frail economies. Whenever MNCs abusively shift their profit out of a developing country, this revenue necessary to tackle these dire issues falls shorter and the wealth gap deepens.

---

<sup>77</sup> Barak, Gregg (2015) *The Routledge International Handbook of the Crimes of the Powerful* apud Evertsson (2016) *op.cit*, p.201

<sup>78</sup> OXFAM Australia (2016) *The Hidden Billion. How Tax Havens impact Lives at Home and Abroad*; p.8

Christian Aid actually defines these practices as an abuse of human rights: “*includes all aspects of tax abuse and tax avoidance, as these have a significant impact on the availability of public resources for realising human rights and upholding the rule of law*”<sup>79</sup>. The unavailability of public funds does not entirely justify the failure to respect social and economic rights, yet tax abuse limits the power of governments to realize these rights<sup>80</sup>.

The truth is that globalization’s attributes to promote global commercial activity and these negatively connoted schemes are also the attributes that can help sustain a cooperative system of combating ATP<sup>81</sup>. This entails that there is a common role in improving the global tax system as a way of *global solidarity*<sup>82</sup> and community.

Global leaders have committed to the fight against abusive (legal and illegal) financial flows<sup>83</sup> and the UN 2030 Agenda includes an express disposition of international support for the improvement of tax capacity. Goal 16 of the Agenda calls for a reduction in illicit financial flows, and Goal 17 strengthens the commitments to sustainable development applicable to every country, which can only be obtained through an efficient and fair tax system. “*We can say that this abusive global system needs to be brought to a rapid end. That is what is meant by good governance under the global commitment to sustainable development*”<sup>84</sup>. A tax system that stimulates sustainable growth would not be complacent with corporate ATP.

Indeed, this can be significant to control tax avoidance if we consider it a sustainability problem. The UN acts as the *head* of the exercise of protection of human, social and environmental rights while upholding peace commitments, so it strongly feels the necessity for the development of the future and how it is dependent on the success of the

---

<sup>79</sup> Christian Aid (2019) *Trapped in Illicit Finance How abusive tax and trade practices harm human rights*, p.11-12

<sup>80</sup> Sepulveda, Magdalena Carmona (2014) *Report of the Special Rapporteur on Extreme poverty and human rights*; p.24-28

<sup>81</sup> OECD (2008) *op.cit.*; p.9

<sup>82</sup> United Nations (2015) *Transforming our world: the 2030 Agenda for Sustainable Development*; p.2

<sup>83</sup> Participants agreed to “substantially reduce illicit financial flows by 2030, with a view to eventually eliminating them”. See United Nations (2015) *Third International Conference on Financing for Development (FfD)*. As well the G20 efforts in elaborating the BEPS project with anti-tax avoidance purposes.

<sup>84</sup> Sachs, Jeffrey (2016) Oxfam’s open letter “*Tax havens serve no useful economic purpose*”. Available in <https://www.oxfam.org/en/press-releases/tax-havens-serve-no-useful-economic-purpose-300-economists-tell-world-leaders> (last accessed March 2024)

actions of the present. In 1987, the UNDP described sustainable development as “[meeting] *the needs of the present without compromising the ability of future generations to meet their own needs*”<sup>85</sup>. Considering sustainability as an interconnection of society, the environment and economic development, it is easy to understand that, when related to corporate action, “*sustainability places a primary emphasis on preservation of the resources impacted by firm activity*”<sup>86</sup>.

The value of this conceptualization is connected with the view of solidarity and community we discussed initially. Not only that, but “*sustainability is inextricably linked to equity—to questions of fairness and social justice and of greater access to a better quality of life*”<sup>87</sup>. In this line, tax avoidance is a problem of sustainability when we consider how it depletes the common resource pool by depriving necessary funds for societal structuring and political activity and by eroding regulatory frameworks and shared trust of the tax system. The adverse impact of firm activity on social life and the environment can undermine the growth of a responsible economy, limiting the possible operational force of future generations.

A sound tax system, like we have described, is a great tool to achieve sustainable development and as tax avoidance comes with these negative implications, it becomes a threat not only to the tax system but to this very development.

---

<sup>85</sup> United Nations’ WCED (1987) *Report of the World Commission on Environment and Development: Our Common Future*; p.16

<sup>86</sup> Bird (2018) *op.cit.*; p.1013

<sup>87</sup> UNDP (2011) *Summary: Human Development Report 2011. Sustainability and Equity: A better future for all*; p.1

## **Part II**

### **Ethical and Moral Standards in the Tax System**

## 1. Legality and Tax Morality

Are moral and social standards enough to sustain demanding corporations' *fair share*?

It is true that the legal mandate of the corporate tax is fulfilled within tax avoidance; therefore, aggressive tax planning claims many negative impacts because its behavior, contrary to legislators' intentions, is still able to contaminate the tax system. Even though this is clear, it must be questioned whether corporations can have their business put in question on the basis of principles and not a legal framework.

The arguments about morality and ethical behavior in the tax context face some criticism<sup>88</sup>. Firstly, tax authorities face the mandate of applying the legal text, and thus, it is expected that taxpayers utilize the same spirit. The authorities do not engage in moral evaluation when assessing and applying their norms, which could also be the interpretation of the taxpayer.

Secondly, another point is related to the *entrepreneurial good* made with corporation wealth that the governments may fail to equalize. This is a rather difficult argument since it demands a case-by-case analysis of corporate impact and is often tangled in political ideologies. Nonetheless, the argument goes that the States' duties towards its people are not well fulfilled and there is misguided and misused expenditure of taxpayer's money, whereas there are many corporations acting with a more effective and beneficial impact that could replace a lot of state action if keeping the tax revenue.

Finally, and mostly, the legality argument. As we have laid out, tax law is sustained by the principle of legality: no tax can be levied without such an obligation being provided in statutory words. This principle is core to tax legislation and aims at providing certainty in the taxpayer's responsibility towards the government and in their choices affected by taxes. This entails, on the one hand, that no one can be charged an unlegislated or unavailable tax, but, on the other hand, it can also be considered in the assessment of tax avoidance *extra legem*. If there is no legal prescription, then the taxpayer's behavior should not be evaluated on account of an extension of the law to the moral code. Tax liability must be an objective determination, whereas the implications of a *fairer corporate contribution* subject companies to a biased concept of morality<sup>89</sup>. As Professor

---

<sup>88</sup> Freedman (2006) *op.cit.*, p.337

<sup>89</sup> Datt, Kalmen Hyman (2014) *Paying a fair share of tax and aggressive tax planning - A tale of two myths*, p.411

Honoré defended, “*an obligation to pay an indeterminate amount is not an effective obligation; it requires only a disposition, not an action. So, apart from law no one has an effective obligation to pay tax*”<sup>90</sup>.

As we discussed initially, the concept of a *fair share* faces doubts because it lacks this definition and stands on ethical frameworks that differ from ideology or country. This is a challenging, if not impossible, exercise when we debate cross-border structures and numerous tax systems. Legal certainty for defining the amount owed to state tax authorities with significant and updated legislation on tax avoidance is mandatory, and it legitimizes the *fair share* as the *real share*.

In consequence, international and national action on the subject is essential, for it provides legal substrate for the concerns of moral obligations that have classified some form of avoidance as intolerable. “*If some choices have become universally unacceptable, then rules or at least guidance should be put in place by international organizations such as the OECD to abolish them; and countries should abolish them*”<sup>91</sup>. The measures put forward by the OECD give guidance for countries to effectively legislate, and the EU Directives constitute additional mandatory restrictions on corporations’ tactics. The GAARs, as well, act as a main source of national *legal power* for the ethical standards of economic substance and the prevention of artificial arrangements.

“*When tax systems do not oblige multinational corporate groups to pay their fair share of taxes although the groups are responsible for doing so from an ethical perspective, tax systems lead to and even intensify inequality*”<sup>92</sup>.

To see in Part III, the legal limitations in place and the repetition of moral and social values in the legal text implying these limitations all find their core in these moral considerations, in addition to the economic reasoning. As Skinner commented, “*the law can be used to force us out of our habitual patterns of self-interested behaviour; to force us into the full range of our civic duties*”<sup>93</sup>. All these measures in legal text are a very

---

<sup>90</sup> Honoré, Tony (1993) *The Dependence of Morality on Law*; p.5

<sup>91</sup> Panayi (2015) *op.cit.*; p.556

<sup>92</sup> Scherer, Anna-Lena et al. (2021) *Ethical and Legal Responsibility of Multinational Corporate Groups for a Fair Share of Taxes*; p.2

<sup>93</sup> Skinner, Quentin (1990) *The Republican Ideal of Political Liberty* in Bock, Gisela et al., *Machiavelli and Republicanism*; p.305

clear reflection of the ethical standards that corporations are ignoring by avoiding taxes and sustain society's clamor against tax avoidance.

Legality and morality are both understood as ways of regulating one's behavior toward others. Morality is a "*shared understanding and knowledge about how one should act*" and constitutes "*an informal public system [that] includes moral rules, principles, values, ideals and virtues*"<sup>94</sup> which connects with law. The legal system broadly overlaps this public morality through values of fairness and social welfare<sup>95</sup>. However, there is no perfect match, and a space for individuals' freedom exists (and must exist), demanding the choices of taxpayers to be responsible for the integrity of the system.

As in all aspects of life, freedom, for which it presents various courses of action, demands responsibility. And in this context, tax responsibility is a shared responsibility since it is affected by all actors and affects all actors in society. For rights to be protected, there must be social cooperation and individual responsibility in public funding since freedom comes with a public cost, as Casalta Nabais explained<sup>96</sup>.

In line with our point, the first and main responsibility is that of legislative authorities, since they enact the rules for the tax system to work fairly and effectively. Legality, in a democratic setting, applies equally to all, but in a free space for individual choices, this equal treatment is not assured, if not well regulated, to achieve a fair share for each member of society. And even though there is asymmetry in responsibility, taxpayers themselves are responsible.

This *free space* is the stage for tax avoidance in which the taxpayer decides the implication of its actions: either employing a responsible tax strategy whilst improving their economic stance or exploiting tax systems for solely tax elimination purposes. This means that in this grey area in which legality is not operational, there is a free choice that should be a responsible one on behalf of the taxpayer, with respect to moral values applicable and ethical conduct recognized in society.

---

<sup>94</sup> Gribnau, Hans (2017) *The Integrity of the Tax System after BEPS: A Shared Responsibility*;p.14

<sup>95</sup> Scherer (2021) *op.cit.*;p.3

<sup>96</sup> Casalta Nabais, José (2008) Reflexões sobre quem paga a conta do Estado *Social* in *Ciência e Técnica Fiscal*, n.421; p.8

## 2. The assessment of fairness in the Tax System

Tax policy, as we saw initially, must guarantee the principles of justice and equality. Marta Caldas explains, “*through fiscal policy, States will not only carry out expenses through the financing obtained, but also previously distribute the tax burden in a manner considered fair and equitable*”<sup>97</sup>. And, whenever the largest corporations, with profits reaching for billions, avoid the payment of taxes, the balance of these democratic principles is threatened.

Was this the reason behind the scrutiny of MNEs in the UK when Amazon, Starbucks, and Google were asked to justify their corporate tax contributions in the country? Indeed, it was not the legality of their means.

In November of 2012, multinationals’ officials were called upon by the UK’s Parliament’s Public Accounts Committee with the purpose of disclosing the reasoning for little or no corporate tax being paid in the country<sup>98</sup>.

Beginning with Starbucks, the company had been reporting losses for the whole time of operation in the UK, paying very little in income tax, however, claiming to shareholders of that business’ success and having a significant market share.

In Starbucks’ case, the losses arose from the payment of royalties to the Amsterdam headquarters (and then partly to the US headquarters) and the purchase of coffee from the Swiss subsidiary. This meant the UK company charged the local stores for intellectual property and deducted it as royalty payments in the low-tax-rate country of the Netherlands, and it used the Swiss subsidiary as a middleman for coffee purchases, adding a 20% mark-up. The company continued to file for losses, which assumed a fictitious character when, at the same time it insists on expanding business and employing thousands of workers in the UK against the mere 300 hundred it employs in the Netherlands and Switzerland together. The Committee, understandably, argued that this structure raises questions and entails an exportation of profits to minimize taxation.

---

<sup>97</sup> Translation of “através da política fiscal, os Estados irão, não só, proceder à realização de despesas através do financiamento obtido, como também, previamente distribuir a carga fiscal de forma tida por justa e equitativa”; Caldas (2015) *op.cit*;p.51

<sup>98</sup> All information forward can be found in the transcript: Public Accounts Committee (2012) Minutes of Evidence HC716, Available in <https://publications.parliament.uk/pa/cm201213/cmselect/cmpublicacc/716/121112.htm> (last accessed March 2024)

Following Starbucks, Amazon's public policy director, Andrew Cecil, was questioned about similar controversies. The Chair of the Committee begins the hearing by trying to clarify that, even though a purchase is done through an apparently British website and the products can come from UK *fulfillment centers* (warehouses), the billing of said purchase is done by a Luxembourg company and, thus, taxed there as well.

This company in Luxembourg constitutes the European headquarters of Amazon's operations, and throughout the hearing, the Amazon representative claims all activities go through this HQ as a *pan-European business*. However, it becomes clear that all core activity and wealth generation in UK business is run specifically by local employees, departments, and infrastructure. Committee member, Richard Bacon asks, "*where is the underlying economic activity, the components of which create what we all know as added value and which eventually creates value added tax-or would if it weren't books. It seems from your answers that the answers to those questions are, "in the UK." You said that the people who work in the UK are employed by Amazon.co.uk Ltd, and they are paid by that company, presumably with money that that company has in the UK. Is that correct?"* to which Andrew Cecil answers that these "*are revenues that accrue to Amazon EU Sarl, not to the UK company*".

Nonetheless, he confirms that the books do not go through Luxembourg and that there are 30 times more employees working in the UK than in the headquarters. With this approach, the British market is regarded as a mere *warehouse operation* rather than a business center with all activities and profit generation. Indeed, the profits generated in the UK amount to billions, whereas in Luxembourg, just a couple of million is accounted for, even though most corporate taxation goes through the HQ. The Committee repeatedly stressed that the economic substrate of the organization seems overshadowed by the tax benefits the low-tax country of Luxembourg provides.

Finally, Google's northern and central Europe's vice-president, Matt Brittin, is called by the Chair, and the first conclusion drawn out is that 92% of the company's sales are billed in Ireland, another low-tax-rate country in Europe. Besides Ireland, Dutch and Bermuda entities are also part of the structure of the MNE and taxed therein for the activity of advertising spaces Google provides.

Even though the UK activity is performed by 3000 employees and there is substantial economic activity, the corporate tax is therein avoided by claiming the activity to be

providing services to Google Ireland and justified by Matt Brittin: “*we are required to manage our costs efficiently in order to satisfy our shareholders*”. The Chair of the Committee counterpointed “*so you are minimizing your tax even though it is unfair to British taxpayers*”.

Further, Brittin reiterated, “*we make choices about where we locate and how we set up our structure, in order to ensure we can operate successfully and to minimise the costs and do the efficient things to run our business. That is what we are required to do by shareholders and by law, and that is what we do: play by the rules and manage our business efficiently*”.

To put it simply, the legality of these schemes was not in question, and the Committee was aware that the corporations had acted within the legal framework of the jurisdictions involved. Therefore, the Committee’s scrutiny was related to the tactics of the corporations being against the *spirit of the law*, not against its text. The exploitation of the loopholes and mismatches did not provide legal rationale for any action, but regardless, they were perceived as awry in the eye of the HMRC: “*We are not accusing you of being illegal. We are accusing you of being immoral*”<sup>99</sup>.

The Committee proceeded with the discussion in general which all the officials of the enterprises in the hearing by asking the following:

- i) “*Do you - all of you - accept that alongside your duties to your shareholders, (...), you have obligations to the societies in which you operate, and from which you derive huge benefits, and that those obligations include paying tax?*“ (...)
- ii) “*And do you accept the principle that profits should be taxed in the countries in which they are made and where genuine economic activity is concerned?*”
- iii) “*Do any of you have any discussions internally about issues such as consumer power and the value of your brand, and how that could be influenced by the ethical behaviour or perceptions of your company? How do you factor that into the sort of discussion we have had this afternoon?*”

Both Amazon and Google’s representatives responded with how much value the companies give to consumers’ trust and to their feedback on the brands.

---

<sup>99</sup> Margaret Hodge, the Chair of the Committee, towards Google officials

Starbucks' CFO claimed that the company's intentions when operating anywhere are to commit to job creation and community investment. However, he argued that tax structures globally are complex, influencing transparency records and tax returns of MNCs. To this, the member of the Committee, Ian Swales, replied that it is the companies own choice to organize their structure to transfer money between group companies that provide such an opaque assessment of profit.

Further, Mr. Alstead claimed the importance of consumers' perceptions in sustaining ethical standards: "*We are trying to be very transparent. I appreciate that the media attention has made it look that way, so we need to do a better job of finding a way to communicate. I assure you that our intent is to operate at the highest ethical standards*".

The Committee's final questions implicate the seriousness of consumers' perceptions and the emphasis on ethical standards put forward by businesses, even when legality is not in question. This is a reflection of the current debate on the disapproval of tax planning.

Indeed, the Institute of Business Ethics agrees that the gaps in cross-border legislation that allow for ATP open the said *moral free space* for managers to choose to arrange tax affairs and, thus, determine how much to pay<sup>100</sup>. Hence, there's little ethical weighing of corporate responsibility by managers when avoiding taxation.

Nathalie Goyette speaks on this debate: "*furthermore, morality has entered the tax arena. Faced with criticism and popular discontent towards certain companies whose tax planning has been revealed, some suggest that it is time to make a distinction between acceptable moral tax planning and immoral tax planning*"<sup>101</sup>.

And when we speak of *immoral tax planning*, we speak exactly of the cases discussed above: companies whose revenues amount to billions, and even though they claim to pay their fair share, there is engagement in complex tax structures. Which means there is an immoral implication to avoiding contributing more justly to the development of the countries that provide them infrastructure for operations and to the wellbeing of the people who constitute their workforce and their customer base.

---

<sup>100</sup> IBE (2013) *Tax avoidance as an ethical issue for business*, available at: [www.ibe.org.uk/resource/tax-avoidance-as-an-ethical-issue-for-business.html](http://www.ibe.org.uk/resource/tax-avoidance-as-an-ethical-issue-for-business.html) (last accessed March 2024)

<sup>101</sup> Goyette, Nathalie (2014) *L'évitement fiscal et la fraude fiscale au Canada* apud Caldas (2015) *op. cit.*; p.51

Truly, what we see are market distortions. Whenever the ideal tax system is being debated, the economic efficiency and neutrality of taxation are brought up, however, it seems tax avoidance creates great distortions that are not being accounted for due to free market justifications. The use of legal tactics “*undermines the integrity and equity of existing tax structures; increases the administrative burden of revenue collection; and perhaps most importantly, increases income disparities within and between nation states*”<sup>102</sup>.

With ATP, the lack of payment by one entity according to their ability to pay affects the solidarity amongst taxpayers. “*The existence of a tax morality equally and predominantly respects the principles of justice and equality*”<sup>103</sup>.

Tax morality (and very clearly we see with the UK Hearing) becomes a topic of public interest and defined by the ethical understanding of the care for society each tax contribution sustains. Morality is not a legal mechanism, thus, not used by tax officers or court judges for effective decision-making; nonetheless, it is both a foundation of law and a power tool for taxpayers to pressure input both on the legislator to act preventively and on companies to do better<sup>104</sup>. The tax morality standards are put up by public perception and social concerns, thus, becoming a form of social standard.

This standard imposes legislators’ actions and influences corporate action. As the principle of legality sustains, the taxpayer can claim for the legislator to act on their power to change the legal tax system since their action is not only needed but indispensable to all taxpayers security and economic freedom. Nonetheless, this social and moral standard can be enforced by taxpayers, consumers, and employees of corporations through the force of the economy<sup>105</sup>.

For this reason, we interpret tax morality’s importance in limiting ATP from two perspectives: as a government’s justification for legal action and preventively developing

---

<sup>102</sup> Christensen, John et al.(2004) *The Social Irresponsibility of Corporate Tax Avoidance: Taking CSR to the bottom line*; p. 41

<sup>103</sup> Translation of “A existência de uma tax morality respeita igualmente e predominantemente a princípios de justiça e igualdade”; Caldas (2015) *op.cit.*; p.51

<sup>104</sup> Caldas (2015) *op cit.*;p.55

<sup>105</sup> Justice Murphy described tax avoidance schemes as *anti-social activities*; in the High Court of Australia, 21 May 1982, O’Brien v Komesaroff , 150 CLR 310, (at p329)

the principles of information and transparency; and as the taxpayer's tool through tax responsibility and brand reputation.

## **Part III**

### **Legal Limitations**

## 1. Legal Limitations

We will first take a look at the perspective of the legal action.

The financial benefits of tax compliance are evident in the need for efficient tax collection for state funding. But as well, tax morality becomes a government's opportunity to implement legal limits, transparency, and disclosure of information mechanisms. Next, we will present the existing legal text and jurisprudence on ATP combat to provide for a more effective and fair tax system, but also one that tries to anticipate ATP and its negative effects.

But to consider first is that the tax structures are in urgent need of updating in order to follow up on developments in the economic context, mostly in the corporate's setting, as well as to avoid disparities and the erosion of the tax base<sup>106</sup>. So far, regulatory changes are a form of poorly *patching up* the problem with no sense of anticipation<sup>107</sup>. In consequence of globalization and the increased mobility of capital, services, and people, tax legislation is outdated as it was mainly conceived in very national-centralized systems.

The need for tax justice and trust in state authority is a globalized issue, and the problem is common across borders. Thus, it is essential for national legislation's updates to be consistent and agreed upon in the international scene and with partner tax authorities.

The pressure from taxpayers plays a key role in this call. Heydon Prowse, a journalist and comedian, released in 2016 a documentary<sup>108</sup> with the purpose of having small businesses in a town in Wales use MNC scale avoidance schemes. From the uprising with tax avoidance schemes in the UK that we analyzed came the idea, and the purpose was to say to the UK government, "*it is only fair play*" for everyone to legally exploit the loopholes and schemes of avoidance, as do corporations. The objective was, thus, to force the government to *patch up said loopholes*, of course, whilst showing that there must be

---

<sup>106</sup> PwC (2013) *Tax strategy and corporate reputation: a business issue*; p.5

<sup>107</sup> "*It forces [the government] to be reactive rather than proactive*". Jellum, Linda (2014) *Codifying and Miscodifying Judicial Anti-Abuse Tax Doctrines*; p.586

<sup>108</sup> *The Town That Took on The Taxman*; Directed by Tom Costello, starring Prowse Heydon (2016) Available in [https://www.youtube.com/watch?v=ipV\\_GU7YaQg&t=6s](https://www.youtube.com/watch?v=ipV_GU7YaQg&t=6s)

equality in the tax system so everyone is able to use the same schemes to avoid taxes, such as everyone is able to pay their due tax contribution.

## 2. The need for transparency

For this purpose, and in line with Marta Caldas, it is needed “*a preventive reaction of a political nature established through the enshrinement of compliance duties on the part of taxpayers and/or fiscal intermediaries for tax administration (advanced disclosure rules), with the consequent “improvement of legal-fiscal standards”*”<sup>109</sup>.

In this sense, the government can develop a better system through transparency and *prior disclosure* regimes. The purpose is to establish and anticipate areas of disparity between legal systems in order to direct forces to legislate those areas and to have states be able to share the burden of tax planning when international mismatches are in question. “*Agreement is needed at a global level to define minimum standards of transparency and disclosure by companies and to enable the development of wider networks of cooperation extending beyond the OECD to all developing countries and transition economies*”<sup>110</sup>.

As we will see further, the emphasis on transparency is present in all tax reforms, and there are legal measures implemented that already act on this agreement of globalized responses. But here we check the preventive action that provides significant orientation, security in risk assessment, and cooperation guidelines in order to achieve the needed transparency. The next measures we offer for analysis are specific to reporting and disclosing information, and some with voluntary characteristics.

Transparency demands the disclosure of accounting and tax structures in place. Why is this necessary, and how can it provide some relief from the negative tax planning consequences?

Transparency has been associated with democratic values and good governance in every legal context, and recent years have shown a call for transparency not only in matters of tax avoidance by MNEs but also for the “*government to provide information on tax*

---

<sup>109</sup> Translation of “reação preventiva de natureza política estatuída através da consagração de deveres de conformação por partes dos contribuintes e/ou intermediários fiscais para com a administração tributária (advanced disclosure rules), com o consequente “aperfeiçoamento das normas jurídico-fiscais” Caldas (2015) *op.cit.*; p.55

<sup>110</sup> Christensen, John et al. (2004) *Tax Avoidance, Tax Competition and Globalisation: making tax justice a focus for global activism*; p.11

*concession and arrangements made to accommodate MNEs*<sup>111</sup>. The avoiders are in focus in most pieces of debate, yet governments' intervention or lack thereof has been questioned due to the enable character of a series of measures and policies, such as tax agreements, in their competition to attract businesses with low tax rates or their inefficiency in assessing and prosecuting tax avoiders.

The claim for transparency roots in the need for information, clarity, and accuracy<sup>112</sup>. It is a call for a mechanism of legitimacy and trust in the organization of a company and its tax strategies, even though there isn't always certainty in the disclosed information<sup>113</sup>. Albeit this issue, transparency is significantly more important when we consider these aggressive schemes that normally involve a wide range of arrangements and opaque tactics, such as involvement of tax havens, as we saw. If transparency provides for a clearer view of the arrangements and habitates the intervention of tax authorities conducive to the full payment of a corporation's fair share, then it can help avoid the repercussions of ATP.

Transparency is pertinent as well in the CSR policies we will discuss further. The motivations for the relevance are similar, and the effect of transparency also contributes to a better grasp of corporations governance and the implementation of adequate policies.

Of relevance for the purpose of tax compliance and ATP tackling is the International Compliance Assurance Programme launched by the OECD to incite a cooperative approach to tax issues between MNEs and tax authorities. This gives MNCs the possibility to "*engage actively, openly and in a fully transparent manner with increased tax certainty*"<sup>114</sup>. The positive impact of this project is voluntary tax compliance and engaging taxpayer behavior with tax administrations, as well as a preventive approach to dispute resolution.

The program uses country-by-country reports, which include vast information on enterprises' cross-border activities to further clarify a company's exercise as well as provide data for inter-tax administrations' decisions and assessments. Not only does this

---

<sup>111</sup> Oats, Lynne et al.(2019) *Corporate tax avoidance:is tax transparency the soltuion?*; p.571

<sup>112</sup> Schnackenberg, Andrew K. et al. (2016) *Organizational transparency: a new perspective on managing trust in organization-stakeholder relationships.*; pp.14-16

<sup>113</sup> Roberts, John (2018) *Managing only with transparency: the strategic functions of ignorance*, p. 54.

<sup>114</sup> OECD (2021) *International Compliance Assurance Programme: Handbook for tax administrations and MNE groups*;p.6

facilitate the overall endeavors of the tax administrations, but it also saves on the costs of investigations and separate inquiries<sup>115</sup>.

The EU also plays an important role in promoting communication between Member States' tax administrations to allow *“the power to efficiently cooperate at international level [and] to overcome the negative effects of an ever-increasing globalization on the internal market”*<sup>116</sup>. This motivated the publication of the Council's Directive on Administrative Cooperation (DAC) which *“helps to ensure that all taxpayers pay their fair share of the tax burden, irrespective of where they work, retire, hold a bank account and invest or do business”*<sup>117</sup>. Of particular relevance are the norms relating to information on tax rulings, country-by-country reporting, income generated by sellers on digital platforms, and aggressive tax planning schemes by intermediaries.

On the exchange of information amongst tax authorities, we also have the Intergovernmental Agreements or the UN Model Income Tax Treaties provision on information sharing.

As well a word for tax intermediaries, a paramount resource of MNEs. The truth is that aggressive tax planning schemes are developing faster than legal practice can predict or combat, especially if we consider the involvement of tax intermediaries.

ATP requires significant knowledge of tax legislation and tax systems since tax law is a fast-changing branch of law. For this reason, there is also a requirement of consistent awareness of the updates in legal measures. The logical response to these demands is to resort to tax professionals —tax consultants and advisors, accounting firms, law firms, financial institutions, or specialized corporate departments. These are recognized as tax intermediaries and they play a critical role in the promotion of tax planning schemes.

Their usefulness is undeniable for taxpayers' understanding of their obligation towards tax authorities and when considering corporations in many areas of activity and/or with

---

<sup>115</sup> For more information on tax transparency efforts, see OECD, *Tax Transparency*, available in: <https://www.oecd.org/tax/beps/tax-transparency/> (last accessed March 2024)

<sup>116</sup> Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC

<sup>117</sup> European Commission, *Administrative cooperation in (direct) taxation in the EU*. Available in [https://taxation-customs.ec.europa.eu/taxation-1/tax-co-operation-and-control/administrative-co-operation-and-mutual-assistance/enhanced-administrative-cooperation-field-direct-taxation\\_en](https://taxation-customs.ec.europa.eu/taxation-1/tax-co-operation-and-control/administrative-co-operation-and-mutual-assistance/enhanced-administrative-cooperation-field-direct-taxation_en) (last accessed March 2024)

cross-border investments and enterprises, compliance with multiple legislations can be hard, so having professional help is of utmost importance.

Regardless of their essentiality on these matters, there are negative aspects of the engagement with these professionals and their action is currently requested to develop avoidance schemes. As the OECD described, “*some of them are also designers and promoters of aggressive tax planning, a role that has a negative impact on tax systems*”<sup>118</sup>.

In this same report, the OECD characterizes tax intermediaries as the *supply* of aggressive tax planning, whereas taxpayers’ are the *demand* side of these practices. As there is demand for implementing tax planning structures in order to diminish the tax burden, the professionals will perform their services to the best of their abilities in order to satisfy the client’s needs. For that reason, it seems tax authorities, in their relationship with both parties, have only influential power over demand.

Regardless of the obstacles, tax authorities commit to also finding a possible connection with the tax intermediaries and improving their knowledge of their role in tax schemes. The involvement of tax advisers and financial institutions in the combat against ATP and its negative impacts is pertinent when considering there may be a shift to an ethical behavior in counseling the taxpayers in less aggressive tax strategies or managing the taxpayer strategy in a more responsible manner.

In reality, tax advisers have few obligations towards authorities other than compliance with law prescriptions thus, their duty of loyalty remains with the client. There are accounting codes of practice that rule their activity and reputational risks, with an increased focus on the professional integrity of big consulting firms that could deter some forms of aggressive planning advice, yet these do not secure or deter their involvement in aggressive practices.

Both the OECD and the European Union called for measures against tax intermediaries that facilitate and assist in arrangements that lead to aggressive tax planning and even tax evasion. The OECD recommends registration and regulation of tax advisors, advance disclosure of ATP schemes, future compliance agreements after a sanctioned tax intermediary and penalty regimes<sup>119</sup>. The OECD published the Common Reporting

---

<sup>118</sup> OECD (2008) *op.cit*; p.5

<sup>119</sup> *Ibid.*, p.18

Standard, with which there can be automatic exchange of information with financial institutions and tax authorities, with the main application being tax evasion<sup>120</sup>. In the EU, the DAC 6<sup>121</sup> is a transparency initiative that requires tax intermediaries to report on specific cross-border arrangements, which aims at fighting back on the speed of ATP's developments and avoiding further disruption of the internal market.

The US Congress also enacted in 2010 the Foreign Account Tax Compliance Act (FATCA) which “*compels foreign banks to disclose account held by US taxpayers to the IRS automatically each year*”<sup>122</sup>. In this case, the intermediaries here included are the financial institutions and the legislation means to include international banks in the IRS' search for non-compliant US taxpayers.

We can conclude that the transparency efforts are mostly complementary to other measures of anti-tax avoidance, but they themselves are very positive for the coordination and necessity of information exchange. As we testified, tax compliance is dependent on the legal text but also reliant on the responsibility of taxpayers and, indeed these disclosures can enforce the perspective of the taxpayer on a fairer taxation.

### **3. The International Response to ATP**

It is clear that the unilateral character of tax systems has constraints for the now conceptually global idea of taxes and corporations. With a corporation able to have structures on every continent, international teams of professionals and consultants and the ever efforts to reduce their liability to avoid the taxation's financial burden, it is imperative for international convergence and dependence. Not only must national legislation fit the new globalized reality, but the international framework must promote cooperation towards fairness and transparency.

---

<sup>120</sup> OECD (2017) *Standard for Automatic Exchange of Financial Account Information in Tax Matters*. Available in: <https://www.oecd.org/tax/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-account-information-in-tax-matters-second-edition-9789264267992-en.htm> (last accessed March 2024)

<sup>121</sup> Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements

<sup>122</sup> Zucman, Gabriel (2014) *Taxing across borders: Tracking Personal Wealth and Corporate Profits*, p.142

The various forms of ATP are offered by the various forms of taxation or non-taxation in various jurisdictions. Hence, one jurisdiction cannot possibly tackle the issues at hand and the combat on ATP requires an international understanding and concertation<sup>123</sup>.

Professor Rita Calçada Pires argues that there must be aligned positions amongst states for there is an ever-growing dependence on their economic systems. For the Professor, three areas of improvement in state relations must be regarded: refusal of practices for prejudicial tax competition; the customary introduction of effective information exchange mechanisms and fiscal assistance for developing economies<sup>124</sup>. This entails that governments should not be negatively impacting other tax jurisdictions for the purpose of creating attractiveness to their territory in the already-described “*race to the bottom*”. As we have seen, the implementation of proper systems of exchange of information between tax authorities is needed to uphold ethical relationships amongst states and assure the knowledge of taxpayers’ activity and potential harmful tax practices. Finally, it is the responsibility of the States to assist developing countries in their economic growth and fiscal harmonization, with a character of global solidarity, in line with the commitments we analyzed.

The international scene is, thus, the undeniable setting for the most impactful measures to be created and applied in order to achieve a globalized economy that entices competition and fairness. This being the case, in this part, we can attest to the efforts of various international organizations in minimizing the practice and effects of tax avoidance through limitations of financial, economic, and ethical characteristics.

### **3.1. Organization for Economic Cooperation and Development**

The OECD is at the forefront of tax avoidance issues and was an important organization to first define aggressive tax planning and try to tackle its impacts. In 2006, the Forum on Tax Administration published the Seoul Declaration, in which the main topics of tax non-compliance were discussed.

The members expressed concerns as the Revenue Bodies, with a multitude of functions, struggle to adequately ensure compliance with national legislation: “*While this more open*

---

<sup>123</sup> Dos Santos (2009) *op.cit.*; p.7

<sup>124</sup> Calçada Pires, Rita (2011) *Ética e imposto. Reflexo de uma preocupação com a valorização da Sociologia e da Psicologia Fiscais* in Pres, Manuel, *Ética Fiscal*; pp.26-27

*economic environment is good for business and global growth, it can lead to structures which challenge tax rules, and schemes and arrangements by both domestic and foreign taxpayers to facilitate non-compliance with our national tax laws*<sup>125</sup>. The outcome of this Conference was mainly the necessity for a concerted response from both national and international institutions to strengthen information channels and practical cooperation.

The capacity of the OECD to congregate various countries and share the experiences of their tax system, the different problems they experience and the solutions they have applied makes the organization ideal to *“support countries’ efforts to ensure effectiveness and fairness of tax rules and, at the same time, provide a certain and predictable environment for business”*<sup>126</sup>.

The Organization has a comprehensive guideline on the definition of a cohesive and efficient tax system and strategy, which is a required first step to facilitate disclosure and incentivize compliance.

Focusing on the OECD’s guidelines<sup>127</sup>, governments should define tax strategies as a basis for a cohesive system that focuses on tax compliance; there must be a design of prevention, monitoring, combat, and punishment policies that work in parallel and simultaneously to assure tax collection to the fullest.

To ensure taxpayers are fulfilling their responsibilities, the first and most important requirement is the clarity and efficiency of the tax system. Thus, a government’s strategy should always start with clarification and support for willing and compliant taxpayers. The need for simplicity in the tax system and regulations extends as well to the efficiency of compliance with such regulations.

First, there is the question of tax administration efficiency<sup>128</sup>. Invariably, tax administrations bear costs related to tax collection, such as in the assessment of the due fees, in the review of returns declared and in the pursuit of evaders. The balance is difficult for the majority of governments looking to reduce the activity costs of tax authorities

---

<sup>125</sup> OECD (2006) *op.cit.*; p.2

<sup>126</sup> OECD (2013) Addressing Base Erosion and Profit Shifting. Available in: <https://www.oecd.org/tax/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm> (last accessed February 2024)

<sup>127</sup> OECD (2004) *Compliance Risk Management: Managing and Improving Tax Compliance*

<sup>128</sup> Sandmo (2005) *op.cit.*; p.3

while improving the service these authorities provide to the population. As such, clarity and simplicity in the tax system and collection allow for efficiency gains for the tax authority itself.

On the other hand, there are also costs relating to the *taxpayer's tax compliance*, especially when we are discussing corporations' wide range of tax types. And when there are significant discrepancies in the costs of tax compliance with regard to industry, organization, or occupation, it is justifiable that these have serious implications for people's choices. As this is the case, a country's tax system (or lack of efficiency thereof) may influence the economic scene.

As important is the distribution of tax authority officers to distinct business sectors and the recurrent assessment of tax policies and risks with the purpose of monitoring tax avoidance practices. The feedback from the ongoing tax planning operations is necessary to anticipate the risks and further legislate to strengthen the legal system.

The status of tax acts or omissions derives from legal prevention relating to the principle of equality before the law—every person must pay their fair share—and also to the idea of deterring future non-compliance<sup>129</sup>. In this perspective, devising a Communication Strategy is of great significance in order to have these objectives reach the community, acting as a reminder of the consequences of failing tax responsibilities as well as bringing confidence in the enforcement of tax laws.

Nonetheless, as effective as these measures may be, within the legal structures and licit schemes, the taxpayers still find very *imaginative* ways of avoiding tax liability and tax planning ends up finding a more casuistic approach, a more unpredictable group of actions with no standard protocol. For this reason, in 2015, the OECD's involvement with aggressive tax planning became a lot more intrinsic with the Action Plan on Base Erosion and Profit Shifting (BEPS) in order to find a wider solution.

The program consists of an action plan for combating of tax base erosion and profit shifting to low-tax jurisdictions in the context of a digitally globalized economy. The objectives are clear: build robust international standards; organize tax cooperation through effective multilateral information exchange, and restore trust in the tax system. Moreover, the Action Plan's measures are focused on *assuring multinationals pay their*

---

<sup>129</sup> OECD (2017) *Fighting Tax Crime: The Ten Global Principles*; p.15

*fair share of taxes wherever they do business*. The plan aims at raising the standard of best practices to be implemented as the level of fair share to be borne in terms of tax payments, by guiding the ways to tackle tax avoidance, improve the coherence of international tax rules, and ensure a more transparent tax environment.

The Plan consists of 15 actions designed for flexibility and compliance with the consensus of the G20 and a total of 135 countries for the implementation and update of the BEPS Package. This is a soft law instrument since they are mere recommendations.

However, there are Minimum standards that constitute mandatory measures subject to peer review, and, as a result, States members of the Inclusive Framework on BEPS will be qualified according to their level of compliance with the minimum standards. Actions 5 (Harmful tax practices), 6 (Prevention of Tax Treaty Abuse), 13 (Country-by-Country Reporting) and 14 (Mutual Agreement Procedure) are the measures in this scope. Also to note is Action 15 (Multilateral Instrument) which enables governments to adjust current bilateral tax agreements in a coordinated and effective fashion to integrate the tax treaty provisions devised during the BEPS Project, eliminating the necessity to allocate resources to renegotiate each treaty individually. In general, the adoption of a multilateral instrument allows for a uniform application of the BEPS Plan and helps with the difficulty that some states would face in renegotiating their treaties in order to include the measures of this Plan.

Alongside and in the same framework as BEPS, the Two-Pillar Solution to Address Tax Challenges Arising from the Digitalization of the Economy was agreed upon by almost 140 jurisdictions and it includes measures to restrict tax avoidance and ensure the coherence of tax rules. This project is applicable to corporations with turnover and profitability over a specified threshold, namely €20 billion of consolidated revenue in the first pillar and €750 million in the second pillar, which confirms the target for MNEs.

Pillar One aims at profit allocation to jurisdictions with a nexus in a “revenue-based allocation key”<sup>130</sup>. This measure wants to mandate in-scope corporations pay a fair amount in the markets they interact with and from which they derive their wealth.

---

<sup>130</sup> OECD (2021) *Statement on a Two- Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*; p.2

Pillar Two has its goal in a Global Minimum Tax which will demand a minimum tax rate of 15% for the in-scope corporations, which means that whenever the effective tax rate within a jurisdiction is below that rate, the group must pay a top-up tax under the Income Inclusion Rule. The OECD has presented an optimistic output on these rules, and it's estimated that shifted profits will fall by half and differences in taxation cross-border will accompany this trend, whereas global corporate income tax revenues are estimated to increase<sup>131</sup>.

This becomes one of the most ambitious measures of tax avoidance since it implicates not only a fairer distribution of the tax revenue but a minimum that is imposed to assure an effective tax rate. It is important to consider there is a challenging timeline in place for the Pillars' applicability to corporations.

Anticipating the deep involvement of the EU with the OECD measures, there is already a Council Directive defining all the mechanisms on the subject and translating into hard law this Two Pillar Approach<sup>132</sup>. In January 2024, the Minimum Tax Rate came into effect<sup>133</sup>.

### 3.2. European Union

The European Union, under the Union's Treaty<sup>134</sup>, upholds fundamental freedoms for its constituents within the territory of the Member States, ensuring free movement and self-determination. This is most evident in the economic efforts of the Union to assure a free competitive market with freedom of establishment. As this is the case, there must be a careful look at the abusive practices within this framework, for it can be contradictory to have restrictions on the very goal of the constitution of the Union —the Single Free Market —but counterproductive to have “*artificial capital flows and movements of taxpayers within the internal market and thus [harming] its proper functioning as well as erode Member States' tax bases*”<sup>135</sup>.

---

<sup>131</sup> OECD (2024) *Economic Impact Assessment of the Global Minimum Tax: Summary*; p.2

<sup>132</sup> Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union

<sup>133</sup> European Commission, *Minimum corporate taxation*. Available in [https://taxation-customs.ec.europa.eu/taxation-1/corporate-taxation/minimum-corporate-taxation\\_en](https://taxation-customs.ec.europa.eu/taxation-1/corporate-taxation/minimum-corporate-taxation_en) (last accessed March 2024)

<sup>134</sup> See Treaty on European Union, art.3°.

<sup>135</sup> Commission Recommendation 2012/772/EU of 6 December 2012 on aggressive tax planning

The European Commission uses the following definition for these practices: “*Aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability*”<sup>136</sup>. The EC affirms that national efforts are not sufficiently effective to combat tax base erosion and, thus, claims the need for cross-border action to diminish the current distortions.

In 2015, the Commission reiterated its intention to promote a fairer Single Market with corporate taxation as an essential element for fairness and efficiency of the tax system and recognized that the lack of tax coordination amongst Member States creates heavy burdens on corporation compliance, providing space for the exploitation of legislation mismatches while also creating double-taxation situations, especially for small businesses<sup>137</sup>. The competition for attractiveness we discussed is also seen in the 28 states and has created a decrease in tax rates, even though it is still a relevant share of countries’ revenue.

In 2016, the Commission proposed the Anti-Tax Avoidance Package with a coordinated stance against common methods of tax avoidance and in favor of information sharing amongst the 28 Members. Valdis Dombrovskis, current vice-president of the EC, promoted the initiative by claiming that “*people have to trust that the tax rules apply equally to all individuals and businesses. Companies must pay their fair share of taxes, where their actual economic activity is taking place. Europe can be a global leader in tackling tax avoidance. This requires coordinated European action, avoiding a situation of 28 different approaches in 28 Member States*”<sup>138</sup>.

The measures in question apply in order to have the profits of corporations duly taxed in the state of the source of said profits and these include both binding rules in the Directives and Recommendations for best practices in the protection of tax treaties. Once again, the objectives are clear: more tax transparency, a level playing field in the international tax network and the fairness and effectiveness of the tax systems.

---

<sup>136</sup> Commission Recommendation 2012/772/EU, *op.cit.*

<sup>137</sup> European Commission (2016) *A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*; p.2

<sup>138</sup> European Commission (2016) Fair Taxation: Commission presents new measures against corporate tax avoidance. Available in [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_159](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_159) (last accessed January 2024)

ATAD I was published in 2016<sup>139</sup> with rules “*in order to contribute to achieving that objective: limitations to the deductibility of interest, exit taxation, a general anti-abuse rule, controlled foreign company rules and rules to tackle hybrid mismatches*”. The main goal was to tackle the distortions of the internal market and thus, these 5 rules are legally binding for all Member States.

In 2017, ATAD II<sup>140</sup> was published to amend the hybrid mismatch article of the first Directive in order to include hybrid mismatches that emerge from interactions with third countries. The Directive states that the “*rules on hybrid mismatches should address mismatch situations which result from double deductions, from conflict in the characterisation of financial instruments, payments and entities, or from the allocation of payments*”.

Hybrid mismatch arrangements define situations where corporate taxpayers take advantage of disparities between national tax systems in order to reduce their overall tax liability, for instance, through double deduction (i.e. deduction on both sides of the border) or a deduction of the income on one side of the border without its inclusion on the other side. Through the exploration of differences in the fiscal treatment of instruments or entities between two or more countries, taxpayers minimize illegitimately their tax base, resulting in a substantial erosion of taxable bases and having an “*overall impact on competition, efficiency, transparency and fairness*”<sup>141</sup>.

Hybrid entities are, thus, utilized for avoidance purposes, for they are treated in one jurisdiction as a taxable entity and in another jurisdiction as a “transparent” one, which means the income is taxed at the level of the members. As well, hybrid instruments or transactions may affect tax liability because the nature of the instrument is different considering the jurisdiction in question.

---

<sup>139</sup> Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market

<sup>140</sup> Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries

<sup>141</sup> OECD (2015) *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 - 2015 Final Report*; p.11

Also an important part of EU tax law on this ground are the Parent Subsidiary Directive<sup>142</sup>, the Interest and Royalty Directive<sup>143</sup> and the Merger Directive<sup>144</sup>. This group of legislation, the Corporate Tax Directives, tries to promote the economic freedom and facilitation of corporate establishments anywhere within the Single Market by allowing tax exemption in specific situations. As the ECJ explained the aim is to “*introduce tax rules which are neutral from the point of view of competition in order to allow enterprises to adapt themselves to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level*”<sup>145</sup>.

These are examples of situations in which the legislator allows for tax exemption for the promotion of sound commercial activity within the Union. The Parent Subsidiary Directive allows companies to be exempt from withholding tax and corporate income tax on intra-group dividends. The Interest and Royalties Directive allows for withholding tax exemption on royalties and interest when the beneficial owner of the interest or royalties is a corporation of another MS. The Merger Directive’s goal is to remove the fiscal obstacles to corporate group restructuring in two or more Member States, namely through deferral of taxes. In common, these directives have the inclusion of an anti-abuse provision that when confirmed, before an abusive situation, it can deny the application of the exemption.

As per non-legally binding instruments, the Commission issued a recommendation during the Covid-19 pandemic to grant possible financial support to undertakings that do not have links with countries present in the EU non-cooperative list—tax haven jurisdictions. This list is also part of the EU’s effort “*to promote and strengthen tax good governance mechanisms, fair taxation and global tax transparency in order to tackle tax fraud,*

---

<sup>142</sup> Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

<sup>143</sup> Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States

<sup>144</sup> Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States

<sup>145</sup> Judgment 17 July 1997, *Leur-Bloem*, Case C-28/95, EU:C:1997:369; para.45

*evasion and avoidance*<sup>146</sup> and it includes 12 countries that have not fulfilled commitments to good tax governance.

Further, the Commission provided an Action Plan for Fair and Simple Taxation. Following Covid-19 pandemic, the Commission promoted the recovery from the crisis with a sense of solidarity through a set of 25 Actions: it included measures for tax simplification for businesses in the Single Market and measures to enforce the tax rules and tax compliance. Once again, the same motivation for this communication is clearly indicated: “*Fair, efficient and sustainable taxation is central in delivering on those ambitions: EU tax policies have to ensure that everyone from individuals to corporations pays their fair share*”. Adding as aims: “*a well-designed tax system plays an important role in supporting the green transition*” and “*a deep reform of the corporate tax system to fit our modern and increasingly digitalized economy*”<sup>147</sup>.

Also to note is the Code of Conduct (business taxation)<sup>148</sup> as an EU instrument to promote fair tax competition within the EU and outside its border. If adopted by the Member State, it mandates that there will be no introduction of harmful tax measures or amendments to existing tax law that violates the principles laid out on the Code.

### **3.3. European Court of Justice**

Even though the Member States of the EU hold sovereignty over national tax matters, the ECJ has been an actor in harmonization, mainly through the mandatory compliance by the States of the EU’s primary law<sup>149</sup>—here most especially the freedom of establishment. It is important to check the ECJ understanding of ATP and the limitations its judgements’ impose for current and future EU and Member States’ legal action.

The Court is called upon to interpret two different situations: national legislation that may be restricting fundamental freedoms and EU directives. The competence of the ECJ is

---

<sup>146</sup> European Council, Council of the European Union, EU list of non-cooperative jurisdictions for tax purposes. Available in <https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/> (last accessed March 2024)

<sup>147</sup> Communication from the Commission to the European Parliament and the Council: Action Plan for fair and simple taxation supporting the recovery strategy. Available in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0312> (last accessed March 2024)

<sup>148</sup> European Council, Council of the European Union, *Code of Conduct Group (Business Taxation)* <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/> (last accessed March 2024)

<sup>149</sup> Judgment 14 February 1995, Schumacker, C-279/93, EU:C:1995:31; para.21

restricted and so, when evaluating national measures against tax avoidance, it only interprets the aim of the measure and the type of discrimination it implies. The Court is not in a position to determine if there is tax avoidance in the given situation, for that is the national court's competence.

Tax avoidance is not *per se* defined in the EU's legal texts, which opens space for the possibility of misinterpretation of these concepts and, adding to that, the doctrine is not aligned with tax avoidance conceptualization on a national or European level.

Based on the definitions provided in the Corporate Tax Directives, the benefits of the Directives can be refused when the taxpayer has a principal motive of tax avoidance, like a GAAR. Specifically in the Merger Directive, we see an additional concept of "valid commercial reasons". This, therefore, lays the possibility of accepting that there may be restrictions on such freedoms and benefits when individuals and corporations take advantage of them improperly<sup>150</sup>.

In *Leur-Bloem*, the Court analyzed the anti-abuse article of the 1990 Merger Directive, in which the concept of "valid commercial reasons" was already in use. It clarified that "*the competent national authorities cannot confine themselves to applying predetermined general criteria but must subject each particular case to a general examination (...) it is for the Member States, observing the principle of proportionality, to determine the provisions needed for the purposes of applying this provision*"<sup>151</sup>. The Court finished its judgement by stating that the concept must be understood as an obligation for there to be more than purely fiscal advantages within the operations. Similarly, in the *Foggia* case, the Court states, "*the concept involves more than the attainment of a purely fiscal advantage. A merger by way of exchange of shares having only such an aim cannot therefore constitute a valid commercial reason (...) Consequently, a merger operation based on several objectives, which may also include tax considerations, can constitute a valid commercial reason provided, however, that those considerations are not predominant*"<sup>152</sup>. For that reason, exclusive tax reasons or predominant tax reasons are both considered enough to impose restrictions on the benefits<sup>153</sup>.

---

<sup>150</sup> O'Shea, Tom (2010) *Tax Avoidance and Abuse of EU Law*; p.8

<sup>151</sup> C-28/95, *op.cit.*; para.41-43

<sup>152</sup> Judgement 10 November 2011, *Foggia*, C-126/10, EU:C:2011:718; para.34-35

<sup>153</sup> Dourado, Ana Paula (2012) Portugal: The *Foggia* (C-126/10) and *Amorim* (C-38/11) Cases in Lang, Michael, *ECJ Recent Developments in Direct Taxation 2011*, p.220

In further decisions, the Court comes to define the economic reasons in a more densified manner, namely through the idea that there cannot be a “purely artificial arrangement” with no economic substrate nor actual activity in the EU<sup>154</sup>. It evidences that there is justification for restriction when it aims “*to exclude from a tax advantage purely artificial schemes designed to circumvent [national] tax law*”<sup>155</sup>.

The Court extends in Case C-9/02 on the possibility of a restriction of fundamental freedoms: “*simple loss of receipts suffered by a Member State because a taxpayer has moved his tax residence to another Member State, where the tax system is different and may be more advantageous for him, cannot in itself justify a restriction on the right of establishment*”<sup>156</sup>. The Court also argued in *Inspire Art Ltd.* that the reason for incorporation of a company in a Member State, with the exception of fraud, is irrelevant; thus, “*the sole purpose of enjoying the benefit of more favourable legislation does not constitute abuse even if that company conducts its activities entirely or mainly in that second State*”<sup>157</sup>.

The idea is that there is a justification for restriction when, applying a proportionality canon, the “*safeguard of the cohesion of a tax system*”<sup>158</sup> is directly affected by the unrestricted arrangement. It is important to notice that the ECJ also mandates a controlled restriction on the part of the MS whenever that restriction is justified, in order to comply with the proportionality principle. The purpose is to avoid situations in which the “*rules went beyond what was necessary to achieve that objective*”<sup>159</sup> and the economic freedom of the company was wrongfully deprived.

Correlating back to our initial breakdown of tax avoidance, the ECJ understands and supports, based on the foundational principles of the Union, that tax planning is a normal activity of a taxpayer and beneficial for a commercial activity: “*taxpayers may choose to structure their business so as to limit their tax liability*”<sup>160</sup>. For that reason, the restriction

---

<sup>154</sup> Judgement 5 November 2002, *Überseering*, C-208/00, EU:C:2002:632; para.75

<sup>155</sup> Judgement 21 November 2002, X and Y, C-436/00, EU:C:2002:704; para.61

<sup>156</sup> Judgement 11 March 2004, *de Lasteyrie du Saillant*, Case C-9/02, EU:C:2004:138; para.60

<sup>157</sup> Judgement 30 September 2003, *Inspire Art Ltd.*, C-167/01, EU:C:2003:512; para.95-96

<sup>158</sup> Case C-436/00, *op.cit.*;para.52

<sup>159</sup> O’Shea (2010) *op.cit.*,p.108

<sup>160</sup> Judgement 21 February 2006, *Halifax and others*, C-255/02, EU:C:2006:121,para.73

on tax planning, for the Court, is only justified whenever the arrangement is a pure artificial scheme to obtain a tax advantage and it disrupts the cohesion of the tax system.

The ECJ resorts to the general principle of abuse of rights to assess some of these measures, recognizing that there may be a restriction of a fundamental freedom whenever there is a situation of reliance on EU law for fraudulent or abusive ends. When considering abuse, the Court agrees there are objectives of protection and control of abuse of national rules that justify restrictions on fundamental EU rights. This principle is not close to a synonym for tax avoidance since it is but a global concept that encompasses tax avoidance and it is also applicable to cases of evasion, fraud or abusive practices in general.

This was the case in *Halifax*, where the Court determined that “*to be found that an abusive practice exists, it is necessary, first, that the transactions concerned, notwithstanding formal application of the conditions (...), result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions*<sup>161</sup>.”

This principle means to find a balance between the free establishment and movement of taxpayers and the efficiency and fairness of the tax system, evaluated through proportionality. Cross-border profit shifting is a disruptive practice and represents a revenue loss for Member States based on the avoidance of taxation through artificial but legal means; thus, it can constitute an abusive practice and be justifiable for restriction by the national law.

The ECJ used the abuse doctrine again in *Cadbury-Schweppes*, which became a landmark case for both the question of conflict with freedom of establishment and the abuse doctrine, especially in how the Court broke down the elements to evaluate a justification for restricting abusive practices. In this case, the Cadbury parent company, incorporated in the UK (a 33% effective tax rate), had two fully owned subsidiaries in Ireland (a 10% effective tax rate) whose purposes were to raise finance for other subsidiaries in the Cadbury Group. The UK applied its Controlled Foreign Corporation (CFC) rules which determined the profits of the foreign subsidiaries incorporated in “lower level of taxation” countries would be taxed in the UK. The UK Commissioners’ allegations were based on the primary purpose of the subsidiaries being favorable tax rates, whereas the Corporation argued the CFC Rules are incompatible with freedom of establishment.

---

<sup>161</sup>Ibid., para.86

The ECJ clarified that the establishment of a subsidiary in Ireland should not alarm a “general presumption” of tax avoidance or justify a restriction to a fundamental freedom, therefore, there needs to be an abusive practice to justify such a measure. In order to assess if there was an abusive practice that allowed for the restrictive measure on the grounds of prevention, the Court laid out a guideline with cumulative elements of analysis:

- (i) **Objective:** freedom of establishment finds its purpose when “*it presupposes actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity here*” which ties back to the evaluation of the ECJ on “valid commercial reasons” that the legislation demanded. Indeed, the economic substrate and the effectiveness of an administration are reiterated and it confirms that there cannot be abuse if there is an underlying economic reality (even if the motivation of establishment was tax benefits) in a “*stable and continuing basis*”. The Court understands there is a justification when “*the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax*”<sup>162</sup>.

A wholly artificial arrangement sustains the idea that the establishment did not have economic or commercial purposes. The factors to objectively determine if the arrangement is manufactured for tax purposes include evaluating the physical presence, the workforce, and the equipment invested, which would be contrasting to a company with only a letterbox or a front or brass-plate company<sup>163</sup>.

- (ii) **Subjective:** Court also described a subjective element of motivations for the establishment being purely tax-related. This was in line with the existing jurisprudence on *Leur-Bloem* and *Foggia* concerning the predominantly or purely tax reasoning for establishing a company in a different territory.

---

<sup>162</sup> Judgement 12 September 2006, Cadbury Schweppes, C-196/04, EU:C:2006:544; para.53-55

<sup>163</sup> *Ibid.*, para.67-68

The foreign company must be able to prove that the reduction in tax liability achieved by the transactions being routed through the low-tax country was not the main purpose of the establishment<sup>164</sup>.

These practices “*undermine the right of the Member States to exercise their tax jurisdiction in relation to the activities carried out in their territory and thus to jeopardise a balanced allocation between Member States of the power to impose taxes*”<sup>165</sup>.

As a guarantee, the resident company must have the opportunity to produce evidence that there is genuine economic activity and a commercial reason for the establishment<sup>166</sup>.

It is clear that the Court did not rely on a conceptualization of tax avoidance, nor did it try to forge a notion to follow. This would be a rather difficult position for the ECJ, considering there is no definition of the concept in any EU law and the power in tax matters is still very limited. Moreover, not being able to specifically identify tax avoidance in the given national case, the conceptualization of it could cause a conflict of competences. Oppositely, the abuse of rights principle is autonomous and used by the Court in an undefined manner; hence, it's a preferred recourse for the judgments.

#### **4. Domestic Law: some examples**

Aggressive tax planning can thwart the tax law and disrupt the tax system<sup>167</sup>. The aggressive behavior taints the justice and equality principles and even if the means are legal, the results are considered inadmissible when they weaken the whole tax structure. There is a *fine line* of legality since the spirit of the law is seriously contradicted with the avoiding practices with no consequences, but individual autonomy and economic freedom must be guaranteed.

The state must assure that the free market may act on its own; however, it may intervene in order to protect the balance of competition and to repress abusive practices negatively affecting the common interest. This opens up the possibility of using tax law in order to incentivize or model economic behaviors.

---

<sup>164</sup> Ibid., para.62

<sup>165</sup> Ibid., para.56

<sup>166</sup> Ibid., para.70

<sup>167</sup> Saldanha Sanches, José (2006) *Os Limites do Planeament Fiscal – Substância e Forma no Direito Fiscal Português, Comunitário e Internacional*; p.99

This situation further rationalizes the *fine line* on which aggressive tax planning walks. The political power is entitled to use tax legislation in order to guarantee the combat against disparity and inequality within the market and among taxpayers; nonetheless, the need to ensure economic order and competition balance is too vehement, as is allowing for individual freedom to plan.

Most jurisdictions have, thus, legislated anti-abuse clauses to help with the balance of both duties. These aim to include situations in which the form of a transaction or an act is legal but the results derived from them are abusive to the tax system.

The *raison d'être* lies in the necessity of devising suitable measures for ensuring adherence to the principle of equitable distribution of the tax burden and the fulfillment of the financial requirements of the State and other public entities.

This is argued to be the finest measure of tax avoidance control non-dependent of international acceptance and coordination: *“With such a legislative provision in place there would be a clear indication from the legislature that the courts were entitled to go further than the ordinary rules of statutory construction permitted in negating artificial tax avoidance schemes which abused the wording of the legislation”*<sup>168</sup>. The general anti-abuse clause regulates the possibility of managing an uncertainty because there is legal text to justify the tax authority and the judicial entities questioning of the schemes. Courts are not allowed to make judgements based on morality, therefore, this is the greatest asset of the general anti-abuse rule – to allow for the schemes to be legally analyzed on their economic substance and artificial form and to give legitimacy to a judge’s decision to be influenced by ethical grounds that are now statutory – *“It should provide legal content to the corporate social responsibility concerns about tax avoidance which cannot be supported by morality alone”*<sup>169</sup>.

#### **4.1. General Anti Abuse Clauses - US**

Unlike EU countries, there is no general anti-abuse clause but rather anti-abuse doctrines of judicial basis and specific anti-abuse clauses, both national and international character. Because jurisprudence plays a significant role and the IRS has resorted to these, anti-abuse doctrines are relevant for analysis. Of course, doctrines mostly emanating from

---

<sup>168</sup> Freedman (2006) *op.cit.*,p.333

<sup>169</sup> *Ibid.*,p.357

Courts hold a considerable degree of uncertainty<sup>170</sup> since they open a lot of situations up to interpretation. Specific and complex tax rules, such as those of the Income Revenue Code, assure the person of the legality of any transaction and the following action of the tax authority, however, they are only applicable in explicit transactions. It is argued that the simplicity of a legal rule applied to all abuse cases would be a more efficient approach for the States; however, the complexity of tactics in tax abuse would imply an (at least) equally complex provision, raising the costs of tax authority assessment and application<sup>171</sup>.

In broad terms, when these doctrines are applied, there is consideration of not only the literal form of a transaction but also its substance and underlying purpose and [they] “collectively permit the Service [IRS] to reject a taxpayer's characterization of a business transaction arguably meeting the precise terms of a tax statute, but simultaneously seeking tax benefits Congress did not intend”<sup>172</sup>. Not only this, but when the case goes to court, the non-textualist approach, “permits courts to ignore or override the text of statute”<sup>173</sup>.

The Anti-Abuse Doctrines had their dawn in the 1935 Supreme Court case *Gregory v. Helvering*, with special regard to the Business Purpose Doctrine. This case saw a claim for the reorganization of corporations in order to reduce tax liability when the Service identified this reorganization as only a tax scheme. Even though there was a literal match to the form of reorganization, the Court argued there was “no business or corporate purpose—a mere device which put on the form of a corporate reorganization”<sup>174</sup>. The Court, in the case, agreed with the IRS that, otherwise, it would be accepting that the artificiality of the transaction could strip the law of any purpose. The transaction analyzed as a possible avoidance of tax collection must have a business purpose or a non-tax purpose; it must be proven to be a business decision with a non-primary tax objective<sup>175</sup>.

---

<sup>170</sup> The Courts' decisions have been documented to have discrepancies and irregular conjugations of doctrines. See Ruchelman, Stanley C. et al. (2022) *United States: The Economic Substance Doctrine: A U.S. Anti-Abuse Rule*. Available in: <https://www.mondaq.com/unitedstates/tax-authorities/1190152/the-economic-substance-doctrine-a-us-anti-abuse-rule> (last accessed January 2024); and Madison, Allen D. (2003) *The Tension Between Textualism and Substance-over-form Doctrines in Tax Law*; p.722

<sup>171</sup> Weisbach, David (2004) *Corporate Tax Avoidance* p.12-13

<sup>172</sup> Jellum (2014) *op. cit.*, p.590

<sup>173</sup> Madison (2003) *op. cit.*, p.699

<sup>174</sup> US. Supreme Court, *Gregory v. Helvering*; 293 U.S. 465 (1935)

<sup>175</sup> Weisbach (2004) *op. cit.*; p.11

It is essential to find the *nexus* between the tax advantage and the avoidance practice. In reality, the business purpose is not hard to exist and the transaction will sustain itself as long as there is at least one true economic or corporate purpose.

The Court and the Service have employed the Substance over Form Doctrine as well, which has been understood rather as a *background principle*<sup>176</sup> for various interpretative tools that allow these two entities to focus on the substance of the transaction rather than on its form.

The doctrines consist of an exaltation of the substance of the transaction in question to evaluate if the used form of transaction was solely to reduce tax liabilities. Arose from this idea, the Economic Substance Doctrine, in which the economic substrate of a transaction must be far more relevant than the tax benefits of the form of the transaction. The Court has used this idea to illegitimize a transaction because there was no evident economic profit—economic profit that occurred independent of tax benefits and could be expected prior to taxation—and only through tax deductions. This doctrine has become most notably used in court cases and the IRS’ decisions in conjugation with the business purpose principle—the two prongs<sup>177</sup>—“*while the business purpose prong focuses on the taxpayer's intent, the economic substance prong focuses on the transaction's effect*”<sup>178</sup>.

Indeed, this *two-prongs test* was codified by Congress with section 7701(o), included as a “Clarification of the Economic Substance Doctrine” and Treasury developed regulation 1.701-2 as “the anti-abuse rule” and consequently, “*the Treasury and Congress increased the government's power to recast abusive transactions*”<sup>179</sup>.

Another significant theory developed is the Step Transaction in which, “*a series of transactions designed and executed as parts of a unitary plan to achieve an intended result ... will be viewed as a whole regardless of whether the effect of so doing is imposition of or relief from taxation*”<sup>180</sup>. To assess if this doctrine can be employed, the

---

<sup>176</sup> Jellum (2014) *op.cit.*,p.595

<sup>177</sup> Varma, Amanda P. et al.(2010) *Tax treaties and tax avoidance:application of anti-avoidance provisions*;p.828

<sup>178</sup> Jellum (2014) *op.cit.*,p.600

<sup>179</sup> *Ibid.*;p.622

<sup>180</sup> US Court of Appeals for the Fifth Circuit, *Kanawha Gas & Utilities Co. v. Commissioner*, 214 F.2d 685, 691(1954)

court has established three different tests: the end results test, the mutual interdependence test and the binding commitments test<sup>181</sup>.

#### 4.2. General Anti-Abuse Clauses - Europe

In continental Europe, the legislation corresponding to the above is based on the notion of abuse as *abus de droit* and *fraus legis*<sup>182</sup>. The outcome of the doctrines used on both sides of the Atlantic is practically identical, evaluating the economic reality of the transaction<sup>183</sup>.

Already in 2012, the European Union set out the importance of General Anti-Abuse rules, precisely in cases falling outside the scope of the existing specific anti-avoidance rules. The recommendation of the European Commission<sup>184</sup> introduces the following text:

*“An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored. National authorities shall treat these arrangements for tax purposes by reference to their economic substance”.*

Once again, the *economic substance* is the key element to be considered by tax authorities when determining the artificiality of an arrangement. Here, the authorities are to pay attention to the ordinary employment of an arrangement in reasonable business conduct, to the elements of an arrangement canceling each other, to the circular character of transactions, to the business risk undertaken in the arrangement, and to the pre-tax profit being irrelevant when compared to the tax benefit obtained with the arrangement. In conclusion, the Commission determined the anti-abuse rule applies where the *“arrangement consists in avoiding taxation where, regardless of any subjective intentions of the taxpayer, it defeats the object, spirit and purpose of the tax provisions that would otherwise apply”*.

---

<sup>181</sup> See Jellum (2014) *op.cit.*,p.603 and Office of Chief Counsel Internal Revenue Service, Memorandum No.200826004 (2008) Available in <https://www.irs.gov/pub/irs-wd/0826004.pdf> (last accessed January 2024)

<sup>182</sup> Vanistendael, Frans (1996) Legal Framework for Taxation in Thuronyi, Victor, *Tax Law Design and Drafting*

<sup>183</sup> Vogel(1986) *op.cit.*;p.81

<sup>184</sup> Commission Recommendation 2012/772/EU, *op.cit.*

The abuse practices are characterized by the intentional alteration of the activity of the taxpayer for the sole objective of obtaining the tax advantage, but they are engaged in with imaginative and creative alternatives for which the legislator cannot elaborate sufficient specific rules. Therefore, the EU launched, in coherence with ATAD I, the necessity for nationally transposed GAARs “*to tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions*”<sup>185</sup>. The purpose is to fill in gaps in tax legislation by analyzing non-genuine transactions and arrangements of a taxpayer and evaluating the economic and financial motivations for the business.

In Portuguese law, the General Anti-Abuse Clause follows this concept. It confirms that the tax authority may consider ineffective the transaction in which there is no business or economic justification and in which the result is just the tax benefit that would not be available without said transaction<sup>186</sup>. Consequently, abuse as per Portuguese law is defined as the adoption of artificial operations with intent of obtaining tax benefits that are not present in the objectives of the tax rule<sup>187</sup>.

Ultimately, it is evident that the general anti-abuse rule permits a more general but objective overview of a transaction or arrangement and its commercial purpose, even when all legal rules are respected. This provides an indispensable legal mechanism for responsible corporate behavior on tax matters, namely by applying pressure on corporations to abide by ethical or moral principles but integrated in legal, certain, and manageable means.

### **4.3. Double Tax-Treaties as tackling instruments**

With the effects of globalization, as we have seen, the economy is now regarded as global and faces greater opportunities for corporate expansion and innovation. For that reason, governments must assure their constituents are able to take advantage of the globalized market without the unruly burden of double taxation. Domestic legislation in many developed countries includes the unilateral relief of double taxation, yet these rules may not act as the most adequate to eliminate double taxation or alleviate its impact again due to the differences in tax legal systems and their enforcement.

---

<sup>185</sup> Council Directive (EU) 2016/1164, *op.cit.*

<sup>186</sup> Lei Geral Tributária (1998) Lei n°389/98; art.38°/2

<sup>187</sup> Caldas (2015) *op.cit.*; p22

Therefore, it should be noted that bilateral (or multilateral) tax treaties are put in place to reconcile differences in legislation and establish common measures of taxation and analysis. These are fundamental for the so needed communication and assistance's procedures between tax authorities.

A double tax treaty is an “act to waive tax claims” as the parties involved agree to “divide the tax sources and taxable objects amongst themselves”. This agreement between states amounts to a set of rules defining the taxing jurisdiction for income flows (dividends, royalties, capital gains, and other income) when conflict arises and encouraging international investment. As well, it may be advantageous in reducing the administrative and compliance costs of assessing each transaction; and in reducing the tax externalities. As double tax treaties act as international law amongst two or more countries, they are considered here as part of a national decision to engage in this type of protection.

The UN defines treaties' goals as “*firstly, to encourage economic growth by mitigating international double taxation and other barriers to cross-border trade and investment, and secondly, to improve tax administration in the two Contracting States by reducing opportunities for international tax evasion*”<sup>188</sup>.

The provisions of this type of treaty must provide security and clarity to taxpayers who operate across borders. There has been discussion, however, on the existence of tax treaties allowing for improper use by tax planners rather than helping prevent such practice. Indeed, treaty shopping is a common issue in this context, bringing more abusive operations and unjustified tax reductions.

The OECD describes this form of tax treaty abuse as involving “*the attempt by a person to indirectly access the benefits of a tax treaty between two jurisdictions without being a resident of one of those jurisdictions*”<sup>189</sup>. The elements of abuse consist in the existence of a violation of the intended purposes of the treaty's provisions (for it applies to a third-country person) and of the purpose of obtaining tax benefits, while using structural maneuvers.

---

<sup>188</sup> United Nations' Department of Economic and Social Affairs (2003) *op.cit.*; p.1

<sup>189</sup> OECD, BEPS Action 6: Prevention of tax treaty abuse. Available in: <https://www.oecd.org/tax/beps/beps-actions/action6/> (accessed last February 2024)

The term “shopping” derives from the fact that the taxpayer is free to choose from a variety of treaties, only having to consider the most beneficial for their interests<sup>190</sup>, this since they intend to abuse the provisions regardless of their direct application to the taxpayer. The (in)existence of significant operations in the country party to a treaty is irrelevant for the taxpayer in question, only focusing on the reduction of tax liability.

The most common tactic of treaty shopping is the use of intermediaries, in which the taxpayer creates a new entity with the advantages of a favorable DTA. In most cases, a MNC routes its investment by introducing a new legal entity incorporated in a third state within its structure and assigning the control of its investment to this entity. The creation herein must be found to be a complete sham instead of a *bona fide* commercial arrangement.

This possibility stems from the vagueness of the treaty’s provisions or loopholes in them, and the ease of the incorporation of legal entities in the given country. Plus, there are clear consequences to treaty shopping: income taxation will be put into question or it will be inadequate; the principle of reciprocity, disincentives for treaty negotiation and the balance of concessions between the States is affected<sup>191</sup>.

For this reason, the response from legislators has been to increase control through general anti-avoidance rules, transparency, information agreements which we have seen, and Limitation on Benefit Clauses.

*“Every country should develop anti-treaty-shopping provisions and encourage other countries to adopt similar provisions that limit the benefits of the treaty to bona fide residents of the treaty partner (...) each provision must to some extent be tailored to fit the facts and circumstances of the treaty partners’ internal laws and practices”*<sup>192</sup>. With no doubt, even though the Treaties are nationally decided, there have been efforts on part of the international organizations to include these provisions in their models and projects, for it is clear there must be *“shared solutions to common problems”*.

As for Limitation on Benefit, this type of clause allows for reduced withholding tax to only be applied if the person receiving it is the beneficial owner and satisfies one of the

---

<sup>190</sup> Avi-Yonah, Reuven D. et al. (2010) Rethinking Treaty Shopping: Lessons for the European Union, in *Tax Treaties: Building Bridges between Law and Economics*, p.21

<sup>191</sup> Ibid., p.26

<sup>192</sup> United Nations’ Department of Economic and Social Affairs (2003) *op.cit*, p.36

tests under the article. The main objective of the clauses in all texts is to mandate the economic nexus with the contracting states by defining a direct connection to the beneficial owner.

The OECD Model Tax Convention introduced this measure in relation to dividends, and in its comments, it explains that a resident of a contracting state receiving the income as an agent or intermediary is “*inconsistent with the object and purpose of the Convention*” since a “conduit company” only benefits from limited power over the income, acting as a mere fiduciary on behalf of the interested parties.<sup>193</sup>

The BEPS Action Plan of the OECD also included Action 6 for prevention of tax treaty abuse as a minimum standard to minimize the undesirable abuse of tax treaties.

The US Model also anticipates the existence of non-deserving claimants of the Treaties; therefore, it restricts the applicability of the benefits to qualified persons and, if requested, mandates proof: “*Contracting State may, nevertheless, grant the benefits of this Convention (...) only if such resident demonstrates to the satisfaction of such competent authority a substantial nontax nexus to its Contracting State of residence and that neither its establishment, acquisition or maintenance, nor the conduct of its operations had as one of its principal purposes the obtaining of benefits under this Convention*”<sup>194</sup>.

Overall, double tax treaties are fundamental to avoid double taxation and other forms of meddling in the free market, but they must be used by the appointed persons and not provide any further distortion when they are already trying to combat one.

---

<sup>193</sup> OECD (2017) *Model Tax Convention on Income and on Capital: Condensed Version 2017*, p.234

<sup>194</sup> US Department of the Treasury (2016) *United States Model Income Tax Convention*, art 22/6

## **Part IV**

### **The Role of Tax Responsibility**

## 1. Tax Responsibility

After seeing the legal effort and contribution to the limitation of ATP, we come back to the idea of Tax Morality, but now from the angle of the other taxpayers/consumers—the social standard. Not founded on legal considerations, the conduct that taxpayers impose on corporations may be effective through tax responsibility and reputation.

Tax responsibility, as a universal value of the tax system, also affects corporations and justifies the public criticism over the ATP practices growing in the last few decades that, as a consequence, deteriorates the reputation of MNEs.

For that reason, considerations of tax responsibility have been finding inclusion in a broader movement of corporation accountability—Corporate Social Responsibility. If fulfilling their fair share is considered a responsible manner of business, taxation becomes the social responsibility of corporations. Moreover, empirical work has shown a positive correlation between CSR performance and lower levels of tax avoidance<sup>195</sup> which gives a bright outlook on this relationship and confirms there is an “*increasing pressure to frame and approach corporate taxation as a component of corporate social responsibility*”<sup>196</sup>.

Our scope of analysis will focus on understanding how the taxpayer perspective of tax morality can find ground on CSR and engage in its existing framework or, in the future, more localized in tax matters. As CSR focuses on the internal and ethical perception of corporate responsibility and ESG on concrete measures for external evaluation, we will later consider ESG in specific policies rather than in the ethical discussion.

## 2. Corporate Social Responsibility

The European Commission’s definition of CSR in 2011 included the view that “*whereby companies integrate social and environmental concern in their business operation and in their interactions with their stakeholders on a voluntary basis*”. This approach relied on corporations understanding that their action was needed for societal improvement and, therefore, their private activity could include policies that benefited the involving communities.

---

<sup>195</sup> Bird (2018) *op.cit.*; p.1012

<sup>196</sup> Scarpa, Francesco et al. (2023) *Understanding corporate tax responsibility: a systematic literature review*;p.180

In 2014, a new communication by the Commission introduced CSR as “*the responsibility of enterprises for their impacts on society*”. This newer concept reflects the urgency of companies owning their negative impact on society and holds private activity accountable for the needed improvements. This new perspective faces little voluntary factor and asserts an obligation. From our point of view, the urgency of CSR applicability turned the definition from “*action beyond expectations*”, in which companies can wonder whether these policies are relevant to them and act on a basis of corporate benefit, to a “mandatory minimum” for most enterprises with serious brand or economic repercussions.

From all practical stances, CSR must act at the intersection of economic growth and social and environmentally sustainable development since there is a proven symbiosis between financial and economic growth and human and environmental capital<sup>197</sup>.

Conceptually, CSR meets a “*triple bottom line approach: i.e. economic, social and environmental*”<sup>198</sup>. The policies herein should include attentive action on economic impact, social issues, and environmental protection. Having these areas work together assures sustainable, growing, and ethical business activity.

CSR concerns overall stakeholder protection, which is to say that it upholds the need for a firm’s ethical and responsible treatment of all involved parties in the activity it develops. Stakeholders in this context include shareholders, managers, employees, customers, partners or suppliers, the community, and the environment itself for they are all indispensable pieces of the company’s venture. These duties exist because, like stockholders, these other stakeholders also make investments in enterprises: “*employees invest their time and their intellectual capital. Customers invest their “franchise”, that is, their trust and repeated business. Communities provide infrastructure and education of future employees, in addition to more direct investments of tax support. And so on*”<sup>199</sup>.

CSR has undergone an interesting evolution in recent years, but its concept has been around for a long time. Chaffee links the origins of corporate responsibility with the very origin of the corporate form in Roman law, different from the individuals that constituted

---

<sup>197</sup> Da Silva Faria, Maria José (2015) *Responsabilidade Social Empresarial, Relato e análise económica e financeira*; p18

<sup>198</sup> European Commission (2002) *Corporate Social Responsibility Main Issues*, Available in: [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_02\\_153](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_02_153) (last accessed February 2024)

<sup>199</sup> Graves, Samuel P. et al. (2001) *How do you measure corporate citizenship*

the entity and with a social purpose.<sup>200</sup> The idea of corporate responsibility, from the 19<sup>th</sup> century, was seen in the philanthropic attitude of the richest men in a community. Not long after, it reached the Courts of the United States with the question of the admissibility of corporations reverting private funds for better wages and reserve funds, without shareholder approval<sup>201</sup>.

In the 1950s, Howard Bowen, titled by many as the father of CSR, defined the purpose of CSR as the lever for improving social welfare and he believed the impact a corporation could have on society mandated the decision making of an executive to include the considerations of such impact<sup>202</sup>. Keith Davis also considered that there was pressure on managers to examine their role on society<sup>203</sup>.

In 1972, the *Limits to Growth*<sup>204</sup> was published by the Club of Rome and it touched on very important topics of unviable pollution speed, ecological footprint, and the future economic scene with current rates of population growth. The topics sparked discussion on business practices' responsibility in the aforementioned problems and the next decade saw the emergence of alternative terms and theories for the core concerns of CSR.

In 1979, Archie B. Carroll developed a CSR pyramid based on a very well accepted description of the responsibilities of a company: "*The social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point in time*"<sup>205</sup>. The pyramid hierarchized these expectations, with economic duty as the most prominent in business, followed by legal, ethical, and discretionary/philanthropic. Carroll also defended that economic and social objectives are not incompatible trade-offs and can be integrated within the same framework.

In the latter half of the 20<sup>th</sup> century, the corporate social contract was developed with the idea that business and society exist jointly through the needs and expectations of each other. Parallel to Locke's Social Contract Theory, the existence of business relies on the community; therefore, there are obligations of social responsibility to be fulfilled,

---

<sup>200</sup> Chaffee, Eric C. (2017) *The Origins of Corporate Social Responsibility*;p.351

<sup>201</sup> Supreme Court of Michigan, Dodge v. Ford Motor Co., 170 N.W. 668, 684(1919)

<sup>202</sup> Agudelo, Mauricio A.L et al. (2019)*A literature review of the history and evolution of corporate social responsibility*;p.4

<sup>203</sup> Davis, Keith (1960) *Can business afford to ignore social responsibilities?*

<sup>204</sup> Meadows, Donella H et al. (1972) *The Limits to Growth*.

<sup>205</sup> Carroll, Archie B. (1979) *A three-dimensional conceptual model of corporate performance*;p.500

whereas society depends on business to have products, services, jobs, etc.; therefore, it must protect the freedom of profit pursuit. This allows for a CSR underline in which business and society are equally and reciprocally responsible<sup>206</sup>.

Globalization and the expansion of transnational corporations raised the issue of negative impacts of activity in not only the incorporation country of the head office but everywhere there was activity of the enterprise. The decisions of the group in distribution, production, technology, transfer of capital and skilled labor influenced the communities in which they operate and assumed social and political consequences.

Craig Smith defined, in the beginning of this century, CSR as a set of obligations of the corporation towards its stakeholders, which we defined prior as all the parties affected by business. In his words, “*these obligations go beyond legal requirements and the firm’s duties to its shareholders*”<sup>207</sup> and should be intended to minimize the existing negative impacts and maximize communities’ benefit from that company’s business activity.

For this reason, the current state of the economy and commercial activity on a global scale gave rise to a more attentive attitude of society towards the repercussions of companies in society and in the environment and, therefore, its obligations and responsibilities towards these stakeholders.

The concept of CSR finds numerous opposers, namely in the US, with names such as Theodore Levitt, Milton Friedman, Albert Carr, David Henderson, and Elaine Sternberg<sup>208</sup>. The reason behind it is normally the conceptualization of the corporation solely as a means to shareholders’ profit but there is also mention of the existing responsibility of a company as a job creator and the state being the one adequately capable of keeping such responsibilities.

In the EU, the foundational Treaty previews the existence of *sustainable development of Europe* with a *social market economy* and the goal of *social progress*. Not only this socially embedded rule but also the clear mention of *climate protection and improvement*.

---

<sup>206</sup> Lantos, Geoffrey P. (2001) *The boundaries of strategic corporate social responsibility*; p.7

<sup>207</sup> Smith, N. Craig (2001) Changes in corporate practices in response to public interest advocacy and actions in Bloom, Paul N et al., *Handbook of Marketing and Society*;p.142

<sup>208</sup> See Levitt, Theodore(1958) *The Dangers of Social Responsibility*; Friedman, Milton(1970) *The Social Responsibility of Business Is to Increase It Profits*; Carr, Albert Z.(1968) *Is Business Bluffing Ethical?*; Henderson, David (2001) *The case Against Corporate Social Responsibility*; Sternberg, Elaine (2009) *Corporate Social Responsibility and Corporate Governance*.

As explained prior, the Union's efforts on a free economic market are notorious throughout its legislation and court rulings, being the very intention for the formation of such a Union. Nonetheless, since the birth of this project, there has been a clear vision for a socially concerned and environmental protective market<sup>209</sup>. The very constitution of the Union expects CSR which confirms (and perhaps justifies) the fundamental differences between CSR agreement and prosecution in Europe and in the US.

The Union has in place a series of mandatory and voluntary acts for the promotion of CSR. The EU presented in 2001 the Green Paper *Promoting a European framework for Corporate Social Responsibility*; in 2006 it published the *European Alliance for CSR* which identified 8 areas of priority for the Union; in 2010 the Commission published Europe 2020 for a sustainable growth strategy; in 2011 promoted the *Renewed EU Strategy for Corporate Social Responsibility* in which it devised the next steps and the important points of public disclosure of ESG parameters and CSR education and training. In 2014, there the was implementation of the 2014/95/EU Directive on disclosure of non-financial information “*with a view to identifying sustainability risks and increasing investor and consumer trust*”<sup>210</sup>.

According to a report on due diligence requirements on a supply chain<sup>211</sup>, there are significant limitations to soft law recommendations and the voluntary engagement of corporations in accounting for the environmental and human rights' respect of the suppliers, mainly assessing only the first tier. Companies in its majority preferred to have hard law on due diligence to provide a single harmonized standard and to level the playing field, obliging the same investment for all companies in due diligence teams and processes, providing legal certainty.

In 2022, the Commission presented the Proposal for Directive on Corporate Sustainability Due Diligence, which establishes a corporate due diligence duty through a form of *trickle-down effect* in which the responsibility flows vertically from the top structure down the supply chain. The aim is to assure that European enterprises fulfill their CSR obligations

---

<sup>209</sup> The Treaty of Lisbon, art.3°

<sup>210</sup> 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

<sup>211</sup> European Commission (2020) *Study on due diligence requirements through the supply chain: Final report*

not only within their structure but also with their foreign business partners. This would be applicable to specific industries or very large corporate groups, and it would consider the reasonable standard of due diligence of a company when assessing the suppliers' compliance.

The mention of tax in CSR has been more recent in CSR-related topics. In the OECD Guidelines for Multinational Enterprises, there is a dedicated chapter on recommendations on tax governance and management, reinforcing that “*enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate*”<sup>212</sup>. The 2013 resolution of the European Parliament leaves no doubt when it considers tax concerns in business as part of corporate responsibilities: “*The European parliament believes that a business's tax policy should be considered part and parcel of CSR and that socially responsible behaviour consequently leaves no room for strategies aimed at evading tax or exploiting tax havens*”<sup>213</sup>.

### **3. Social Responsibility Motivations and Managers' role**

As Adam Smith theorized in the classic *Wealth of Nations*, the free capitalist market would provide the perfect environment for competition, innovation, efficiency and wealth creation, which would, in turn, allow free choice of employment, purchase, and investment. This would be considered good corporate practice by itself; free economic choices would ultimately promote society's welfare.

Notwithstanding, the evolution of the free market, associated with technology and globalization, allowed for the unmeasured growth of multinational enterprises that negatively impacted factions of society with ill work conditions, unsafe production and products, abusive environmental practices, etc. The reality is that business decisions, in context to company size, impact a very large number of individuals and institutions, not only the shareholders and, therefore, it is not enough anymore that companies provide those forms of free choice; society understands they must do more to account for the repercussions of their activity on the stakeholders.

---

<sup>212</sup> OECD (2023) *Guidelines for Multinational Enterprises on Responsible Business Conduct*; p.51

<sup>213</sup> European Parliament resolution of 6 February 2013 on corporate social responsibility: accountable, transparent and responsible business behavior and sustainable growth

With the responsibility demands that populations have put forward and the reputational risks of CSR-non-compliant enterprises, managers' inclusion of CSR policies in the organization and activity of their companies has become a *requirement*. But under what conditions do companies have to fulfill this *requirement*?

There is no question regarding CSR obligations when it heavily costs companies to perform them. The goal of the company is, primarily, to profit from a business activity and it is unreasonable to require a private holding to invest in an enterprise in order to lose funds. This is to say that there may be initial investment in a new CSR plan, but there can't be a request for continuous or permanent loss of money for a company :“*we are not talking about altruism – CSR should be good for long-term business success as well as good for wider society*”<sup>214</sup>.

Trying to answer this question, Professor Chaffee applies the principle and duty of good faith to the government based on his own theory of collaboration<sup>215</sup>. Ultimately, the idea is that there is a *sufficient nexus* between the goals of the government and shareholders (and relevant stakeholders) to justify the very existence of the corporation: “*to achieve more than they could on their own*”.

Based on his theory, he explains companies should always engage in socially responsible behavior if it is to maximize their benefits, for obvious reasons. In his theory, a cost neutral option (there is no profit or loss with the CSR implementation) must always oblige the engagement in CSR behavior since the duty of collaboration that accredits the corporation justifies the efforts towards the well-being of the State. For when there's uncertainty, Chaffee concludes:“*when doubt exists, corporations should behave in a socially responsible way*”<sup>216</sup>.

The fourth face of CSR described by Archie Carroll—the *philanthropic responsibility*—also touches on the topic. Within this theory, the *good corporate citizen* should employ responsible behavior towards society in the form of voluntary acts of service, even in situations where there is no prior business consequence to remediate or where there will be no financial reap. The capability of the company sets the tone—the company has the resources to do social good and, therefore, should do it. There are companies that choose

---

<sup>214</sup> UK Government (2004) *Corporate Social Responsibility: A Government Update*;p.3

<sup>215</sup> Chaffee (2017) *op.cit*;p.365

<sup>216</sup> *Ibid.*,p.372

to pursue social and philanthropic endeavors, yet the philanthropic activity is also criticized as it is not a corporate's mandate; and in a lot of cases it promotes a subjective consideration of ethical good. There is a rather difficult implication of corporations finding themselves acting in areas outside their initial purpose and even being requested to do more than their commercial endeavors. This is an argument utilized by critics of CSR and it finds a reasonable standing point.

A way of going around this issue is by engaging in a strategic approach to CSR. A strategic approach entails the inclusion of the topics of environmental and societal protection in the managers' plans for generating profits; as Lantos put it, "*it creates a win-win situation in which both the corporation and one or more stakeholder groups benefit*"<sup>217</sup> which confirms that the interests of shareholders can be the motivation for CSR employment. Investment in socially responsible business may entail a short-term sacrifice; however, it has shown positive returns in the long run.

Therefore, it is unreasonable to say that the manager's responsibility towards the employees and the customers should be ignored in favor of the shareholders'. Indeed, agreeing with the famous Friedman's doctrine<sup>218</sup>, this CSR strategy, concurs with his view that managers should prioritize shareholders' interest; however, it defies his belief that the means for profit could also benefit other stakeholders. His point of view disregards the possible juxtaposition of benefits of social responsibility that also increase the profitability of the company, which is proven to be possible<sup>219</sup>. As the corporate executive is indeed serving private shareholders and their objective should be to make profit, there can be public concerns close to the company that permit a greater benefit to the community and gains to the owners.

Lantos questions the critics of the idea that CSR could be utilized by entities to pursue their financial ends and capitalize on CSR policies. The professor argues that a good deed is good regardless and companies cannot be asked to seek or maintain a commercial activity responsibly that does not (also) ultimately benefit shareholders. "*Corporate*

---

<sup>217</sup> Lantos (2001) *op.cit*;p16

<sup>218</sup> Friedman (1970) *op.cit*.

<sup>219</sup> Bollier, David (1996) *Aiming Higher: 25 Stories of How Companies Prosper by Combining Sound Management and Social Vision*

*generosity can grow the size of the economic pie and thereby contribute to generating new wealth*<sup>220</sup>.

Overall, the benefits of CSR engagement are not only felt by the involved community but can also be felt by the corporation itself, *vis-à-vis* its shareholders. Shareholders' interests may well be in focus when a manager employs CSR procedures, thus failing to meet Milton Friedman's argument of *abusive taxation of shareholders' profits by the managers*.

Howard Schultz, the CEO of Starbucks at the time of the Transformation Agenda that employed successful CSR measures in the company, recognized the significance of maintaining equilibrium between offering consumers a satisfying experience and attaining profitability. This balance is realized through Starbucks' commitment to providing fair wages and benefits to its partners, alongside efforts to enhance the utilization of fair trade coffee and intensifying endeavors to promote their social responsibility initiatives. By 2010, just two years after the initiation of the Agenda, the company's stock had surged by 400%<sup>221</sup>.

This is just one of the examples of successful enterprises that decided to invest in CSR in order to embrace a new management approach while developing their brand in a positive direction.

When it comes to employees, the effects of globalization are felt in corporations as well through the free movement of human capital. In the face of the generation of the most educated and qualified individuals, companies must attract the workforce and further compete for their skills with not only national but international enterprises. The realization that more than ever, employees are concerned with more than just salaries obligates their social policies to protect rights, free time, provide training, develop soft skills, and care for their community and families.

A strategic approach to CSR can also benefit the competitiveness of enterprises, for it allows for the anticipation of risk and changing societal expectations and conditions and allows for better customer and human resources relationships. The perceived care for the community is also essential to building trust amongst the company and the customers, whilst employees are more attracted to a workplace concerned with its social and

---

<sup>220</sup> Lantos (2001) *op.cit*;p34

<sup>221</sup> Schultz, Howard et al. (2011) *Onward: How Starbucks Fought for Its Life without Losing Its Soul*; p.326

environmental impact. Trust is surely a component of corporate relationships and should be perceived by CEOs as a tool to engage consumers and employees in companies' growth.<sup>222</sup>

As the manager elaborates strategies for business growth and development, taxation planning should also be considered in the strategic CSR approach. *“The wider aim of social responsibility is to create higher and higher standards of living, while preserving the profitability of the corporation, for peoples both within and outside the corporation”*<sup>223</sup>.

The inclusion of adequate (non-aggressive) tax planning as a corporate social responsibility is understandable when we consider the current paradigm of corporate social life, including the perception of the public in all aspects of the organization and arrangement of the corporation: reputation.

### **3.1. Reputation, brand, and responsibility**

*“The appropriateness of aggressive tax planning and tax minimisation may be reappraised through the lens of CSR as companies that do not pay their ‘fair share of taxes’ risk hostility from the public and ultimately reputational damage”*<sup>224</sup>.

Society is demanding a different attitude from companies and a change in the benchmarks that existing tax laws haven't been able to sustain. As CSR is seen as complementary to the values of moral decision-making, the current efforts to integrate taxation topics into its social and environmental management integration strategies seem appropriate. And this was also the undertone of the UK Hearing we previously discussed.

During the Hearing, the Committee's member, Jackie Doyle-Price, raised an interesting question on the decision for Starbucks to continue in the UK (even with year-after-year loss) due to its “long-term establishment as the global leading player” and the multinational's emphasis on ethics and fair trade: *“Would you consider making a commitment to the British marketplace about the degree to which you will have a fair approach to taxation here?”*. With this remark, Jackie Doyle-Price puts on the table, once again, the importance of tax fairness for the perception the market has of the degree of

---

<sup>222</sup> PwC (2013) *op.cit.*; p.10

<sup>223</sup> Hopkins, Michael (2004) *Corporate social responsibility: an issues paper*;p.1

<sup>224</sup> Lavermicocca, C. et al.(2015) *Role of reputational risk in tax decision making by large companies*, p.8

compliance of a company with its fiscal obligations. The Chair of the Committee finishes the query with “*It does not surprise me that the YouGov brand index, which used to have a three-point positive, now has a 26-point negative. Are you happy with that?*” to which the CFO replied negatively.

Coming back to our previous question since it still remains in two situations: why should managers engage in socially responsible behavior when no profit is obtained (*cost neutral*) or when profit or loss is uncertain?<sup>225</sup>

Regardless of how you look at it, CSR is, nowadays, established in investment rationale and branding. Investors are more attentive to good practices that benefit the reputation of a brand, while its customers search for more sustainable and socially aware businesses. Edward Bowen proposes the effect of a *neo-invisible hand* that affects the market price of a company in consequence of its social behavior, and investors consider non-compliant companies as riskier investments<sup>226</sup>.

Another idea to consider here is that of legitimacy. Dowling and Pfeffer stated that there are two value systems in which organizations operate: the group of values associated with corporate activity and the norms of the social system in which the corporation is included. Disparities between these two realities leave the corporation’s legitimacy at risk<sup>227</sup>. The perception of legitimacy to Maurer was a process of justification of the existence of the corporation towards its peers and society<sup>228</sup>. Dowling and Pfeffer agreed and added that a corporation is legitimized when society finds it worthy of support. Hence, this theory postulates that legitimacy is the social perception of a corporation’s appropriate behavior. “*Achieving legitimacy is necessary for an organization to maintain its social license to continue*”<sup>229</sup>.

It is clear that non-compliance with corporate responsibility, regardless of legal mandate, has become a point of focus for consumers, and the truth is that tax avoidance has become an increasing threat to legitimacy. And, when speaking of tax conformity, society overall devalues irresponsible companies. So much so, Starbucks, fearing a boycott in the British

---

<sup>225</sup> Chaffee (2017) *op.cit*;p.370

<sup>226</sup> Bowman, Edward H. (1973) *Corporate Social Responsibility and the Investor*;p.10

<sup>227</sup> Dowling, John et al. (1975) *Organizational Legitimacy: Social Values and Organizational Behavior*

<sup>228</sup> Maurer, John G. (1971)*Readings in Organizational Theory: Open System Approaches*

<sup>229</sup> Holland, Kevin et al. (2016) *Tax Avoidance: A threat to corporate legitimacy? An examination of companies’ financial and CSR reports*; p.4

market, pledged to pay 20 million GBP in corporate tax over the two years following the hearing<sup>230</sup>.

Starbucks, in fact, is a very active company in CSR matters and has benefited from a good reputation in that regard. For instance, Starbucks' tax planning may be considered *immoral* but their actions on community stores, diversity and inclusion hiring policies, training opportunities, ethical sourcing of coffee and other products, structural strategies to address climate change, conservation of water, and energy efforts is highly commendable and it showed positive repercussions over the years in CSR ratings<sup>231</sup> and financial reinvigoration of the enterprise.

Yet the tax irresponsibility testified in the UK may leave a spot in its brand. The fear of reputational harm is considerable in these cases since the public creates the image of a careless company, which goes against the corporations' prevailing statements of "consumer care and trust".

The perspective of a responsible company may differ on the subject-matter at hands or on the jurisdiction considered. Reputation is a central topic in corporate evaluation of strategy and overall success in the market; however, there are some activities more susceptible to reputational harm and attract public scrutiny more easily, such as non-first-need products and services that could easily be replaced by other brands. There is also the case of publicly listed companies who, when dealing in the retail sector, feel the impacts of negative tax avoidance reported in severe share reduction since customers have an immediate reaction to scandal<sup>232</sup>.

Responsibility as a moral element in and of itself does not mandate an action on the corporation's part; yet law will and reputation can. The legal obligations of CSR, as we saw, are justified by social and ethical standards and specify the needed engagement of

---

<sup>230</sup> See the announcement in <https://www.accountingweb.co.uk/tax/hmrc-policy/starbucks-pledges-ps20m-corporation-tax>. As well, Amazon reported the change of its business structure in 2015 that resulted in an effective corporate tax rate in other sales' jurisdictions other than Luxembourg. See the statement in <https://postandparcel.info/65285/news/amazon-changes-european-sales-reporting-structure/>

<sup>231</sup> Starbucks has been named one the "World's Most Ethical Company" by the Ethisphere Institute 15 times. See Ethisphere (2023) *2023 World's most ethical companies*. Available in: <https://magazine.ethisphere.com/wp-content/uploads/Ethisphere-Magazine-Spring-2023.pdf> (last accessed March 2024)

<sup>232</sup> Hanlon, Michelle et al. (2009) *What does tax aggressiveness signal? Evidence from stock price reactions to news about tax shelter involvement*

companies with their community and the consequences of their actions. And so, reputation can provide for a motivation for compliance with said standards<sup>233</sup> and brand benefits of the measures can condition *the mind of managers* whenever profitability is reduced or in question.

Considering how a lack of reputation can have dire repercussions on the company's profits, managers can choose to be involved in tax responsibility matters and dissociate from ATP schemes. Customers' trust will justify their engagement in CSR policies even in cost neutral or doubtful circumstances. This was also the idea of the OECD when, upon the Seoul Declaration of 2006, it reinforced one of its efforts to encourage "*top management and audit committees of large enterprises (e.g. CEOs and boards of directors) to take greater interest in, and responsibility for, their tax strategies*"<sup>234</sup>.

Additionally, managers motivations for their strategies may also fall under a more individualistic outlook. A tax strategy involves a systematic approach to decision-making and actions regarding tax planning, aiming to optimize after-tax returns and enhance the overall value of the firm. Managerial incentives and practices may influence the tax-strategy choice, which in turn gives insight on how tax planning may improve firm value.

Following the agency theory<sup>235</sup>, the manager will only look to maximize the returns of shareholders when there are appropriate structures of control, which are usually the board of directors and the figure of the chairman. As well, there's normally an adequate incentive system in place to align the manager's and the shareholders' interests: obtaining shares at a reduced price or tying executive compensation to shareholder returns.

Some investigations<sup>236</sup> suggest there is a relationship between managers compensation and tax planning practices in which the existence of managers' returns based on company performance is linked to a tendency to engage less in tax avoidance. There is a bigger

---

<sup>233</sup> John Graham found in its study that companies executive find reputation to be an "important" concern and these rate close to judicial concerns in managers' perspective. See Graham, John R. et al.(2013) *Incentives for Tax Planning and Avoidance: Evidence from the Field*

<sup>234</sup> OECD (2006) *op.cit.*; p.3

<sup>235</sup> "*This theory assumes that both the agent and principal are self-interested and boundedly rational (...), consequently, individual utility-maximizing behavior is likely to emerge if proper incentives and controls to align the goals of the entrepreneur with the VC are not enacted*" - Arthurs, Jonathan D. et al.(2003) *The Boundaries and Limitations of Agency Theory and Stewardship Theory in the Venture Capitalist/Entrepreneur Relationship*; p.147

<sup>236</sup> Panayi (2015) *op.cit.*; p.553

focus on improving the overall performance of the firm than seeking tax minimization. Thus, the structure of their compensation and the governance environment of the corporation influence their tax planning strategies; *stronger corporate governance can mitigate tax avoidance behavior within firms.*

In 2014, the OECD made a reference to corporate boards' action on oversee tax risk strategies and control management report on tax compliance matters since “a *comprehensive risk management strategy that includes tax will allow the enterprise to not only act as a good corporate citizen but also to effectively manage tax risk, which can serve to avoid major financial, regulatory and reputation risk for an enterprise*”<sup>237</sup>.

Additionally, 40% of the 250 largest companies (G250) are using sustainability-based goals as a measure for compensation for leadership roles within corporations<sup>238</sup>. This is also a great indicator of the role of the manager in responsibility perception and the incentives they receive to include good practices in their structure, including tax strategy.

The top managers are in charge of the wide spread of ethics and social responsibility throughout the firm—*tone at the top*<sup>239</sup> —, therefore, the understanding of how managers approach this responsibility is important. As the manager creates and/or develops the company's strategy, it must be within his scope to promote CSR policies and an adequate tax plan that benefits the overall activity of the company.

As reputation becomes intrinsically connected to the behavior and impact of the company in its community and environment, it becomes indispensable for shareholders' profit that the managers accept the notion that an avoidant enterprise can suffer societal pressure and boycott and, consequently, that the corporation's tax strategy should include a fair overview of the opportunities in the tax systems and not an abusive exploit of the legal loopholes.

#### **4. Examples of measures of Tax Responsibility into CSR and ESG framework**

Transparency, as previously noted, is a relevant principle and measure for preventively tackling issues of ATP and is also an important tool of corporate responsibility. There are

---

<sup>237</sup> OECD (2023) *op.cit.*; p.52

<sup>238</sup> KPMG(2022) *Global Survey of Sustainability reporting 2022*;p.72

<sup>239</sup> Payne (2015) *op.cit.*; p.11

already specific recommendations for disclosure of CSR and ESG implementation and how the corporation deals with the ethical obligations of responsibility.

Due to the importance and visibility of the topics, these obligations caught on. It takes only a quick search to find publications of sustainability reports, ESG indexes, subsidiary audits, social or environmental campaigns, values disclosure, and ethics conduct in any MNE's website.

KPMG has reported, in 2013, 93% of the 250 largest companies were reporting on corporate responsibility<sup>240</sup> and this number rose to 96% in 2022<sup>241</sup>. This report also included a note on the representation at board level of a dedicated member to sustainability and responsibility matters.

For this reason, it is pertinent to wonder if taxes could influence society's legitimization process and if tax strategy disclosure should be included in a similar manner. As much as CSR reporting, this practice could benefit the companies' perception among consumers and facilitate authorities scrutiny.

In the UK, there is the example of the Finance Act of 2016 that foresees mandatory group tax strategy information for companies within a certain threshold. The report should be published with information on *“the approach of the group to risk management and governance arrangements in relation to UK taxation; the attitude of the group towards tax planning (so far as affecting UK taxation); the level of risk in relation to UK taxation that the group is prepared to accept, and the approach of the group towards its dealings with HMRC”*<sup>242</sup>.

Moreover, taxation, faced as a shared responsibility, finds in taxpayers a great assistance in compliance, as we just saw with the influence on corporations of reputation concerns. To consider next are other measures/behaviors capable of influencing those engaging with tax planning strategies—*pressure* from taxpayer to taxpayer.

As Professor Calçada Pires emphasizes, relationships between the taxpayers amongst themselves are very relevant and noteworthy when facing avoidance of tax. With the shared morality comes the realization of each and everyone's responsibility in society and

---

<sup>240</sup> KPMG(2013) *The KPMG Survey of Corporate Responsibility Reporting 2013*; p. 11

<sup>241</sup> KPMG (2022) *op.cit.*; p.9

<sup>242</sup> Finance Act 2016, 2016 c.24, Content of group tax strategy

that some responsibility is being avoided – “*more awareness of everyone’s rights and the impact the exercise of those rights may have in the state tax action and common good*”<sup>243</sup>.

Indeed, it is known that innovation, price reduction and sector-wide changes come frequently from the corporations within that sector and the competition they endorse. The power and influence that companies have over each other in economic vectors exists and the tax pressure could very well be an additional pressure with ethical nature. We may discuss the topic of complementary companies and suppliers or of competing companies.

Many industries rely on a supply chain in which there is specialization in the business, and *each layer of the chain* contains at least one corporation attending to the specific part of the process in question. CSR policies have endorsed control of the biggest corporation not only on their subsidiaries but also on their suppliers, and the existing proposal of the European Commission (Proposal for Directive on Corporate Sustainability Due Diligence) already includes this concept of pressure amongst companies in the same supply chain to see the development of more environmentally and socially beneficial strategies.

This can be particularly significant in developing countries where there are known social and economic complications and local workers do not gain access to the benefits of CSR policies applied in the head offices. This practice may have also a tax solidarity concern, where the top companies mandate not only respect for human rights or environmental protection but also tax compliance and disclosure.

This relationship with the companies of the supply chain and with the workers of local production lines are also understood as a form of responsible behavior promoted by the UN’s goals of the 2030 Agenda and in line with the belief that the international tax system must care for the developing countries’ economic growth, upholding the solidarity principle.

The same can be done with complementary products and services. If, in an industry dependent on complementary products, a company demands the company of the service/product with which they bundle to follow a specific code of sustainability and

---

<sup>243</sup> Translation: “maior consciencialização dos direitos de cada um e pelo impacto que o exercício desses direitos pode ter de positivo na acção tributária estatal e no bem comum”; Calçada Pires (2011)*op.cit.*:p.24

workforce protection plus tax compliance policies, there is substantial company-on-company pressure to follow CSR practices and tax transparency.

In the case of competing companies, the current paradigm plays a massive role since more and more the search for environmentally friendly corporations with sustainable production is rising. For this reason, companies engaging seriously in CSR and ESG policies find themselves a better reputation with the public. When there is more demand for companies with a deeper concern for their impact on society, their interest in engaging with such issues will consequently increase.

The same can be said for benefits conceived by a country or the EU for corporations implementing policies that influence the economic power of a company—either for expansion of production or geographical reach, augmenting the range of activity, etc. Every possibility the benefits may provide for a company develops into pressure for other companies to follow the example in order to reap equivalent profits.

Finally, sustainability agreements and efforts are great allies to tax system fairness since they can extend obligations to deter abusive practices for the purpose of building tax capacity. As we saw, sustainable development requires a tax system that is capable and strong enough to sustain all the needed policies and investments, accelerate growth and improve the quality of institutions<sup>244</sup>.

The UN 2030 Agenda has expanded on the need for sustainability to be implemented in organizations and corporations, enticing good governance and the promotion of environmental and social causes. Following the publication of the agenda, the relation with ESG became undeniable, and its implementation was seen as a mandate for corporations to have a role in being *agents of change* in their interactions with society and the environment.

ESG was already in discussion within the UN after its Principles for Responsible Investment 2006 publication<sup>245</sup>. This is an external indicator, mainly used by investors, of corporate risk and responsibility in a sustainable objective; it demands efficient, fair,

---

<sup>244</sup> Benitez, Juan Carlos et al.(2023) *Building Tax Capacity in Developing Countries*;p.4

<sup>245</sup> UN Principles for Responsible Investment, available in <https://www.unpri.org/> (last accessed March 2024)

responsible, and risk-based decisions and actions, which should include a responsible approach to tax strategy and use of aggressive tax planning.

Not only that, but the ESG factors become important to promote external and foreign investment, and when said investment is necessary, companies find motivation to engage. ESG indexes are a resource for socially responsible investors to navigate risks and promote more company assessment relevant for reputational and litigation risks. By rating companies on their ESG dynamics, there are extra motivations for companies to compete not only in their commercial activity but also in the implementation of such measures. The inclusion of tax responsibility or the creation of a parallel list that classifies tax strategies advocates for clearer investing decisions.

Furthermore, it is noticeable that sustainability has been widely accepted in the private sector, and reporting on the exercise of sustainable development, as documented, is now a common practice in corporations. The G250 reports include the Sustainable Development Goals of the 2030 Agenda as part of their responsibility efforts, but mostly the positive impacts on the identified areas, and only 6% report on both positive and negative impacts. *“By disclosing both positive and negative impacts on the SDGs, a company can increase transparency with its stakeholders, including its workforce”*<sup>246</sup>.

KPMG’s 2022 analysis considered for the first time ESG factors in corporations’ reports, concluding that environmental elements are the most reported risks. Nonetheless, companies are addressing social risk more routinely, covering *“community engagement, safety and labor issues”*<sup>247</sup>. As per governance risks, covering the organization’s legal and ethical management and transparency on performance, this is still the least reported, with only 44% of G250 companies acknowledging them.

Concurring with our conclusion, Global Tax Lead of KPMG International, Loek Helderma, stated that *“various stakeholder groups consider tax as an important part of ESG and having a sustainable, transparent approach to tax are key in today’s world. It is important that companies take the first steps to think about what tax transparency looks*

---

<sup>246</sup> KPMG(2022) *op.cit.*;p.60

<sup>247</sup> KPMG(2022) *op.cit.*;p.65

*like for their organization as we expect this to be an important area of governance disclosure in the years to come”<sup>248</sup>.*

---

<sup>248</sup> KPMG(2022) *op.cit.*;p.69

## Conclusions

Aggressive Tax Planning's negative impacts on the tax system and its distortions on fairness and competition are what justify the existence of limitations. The lack of adequate tax collection and the social effects, both economic and social consequences, bring to light the need for better control of the practices. As tax avoidance must exist in a free economic and competitive environment, these limits should only be imposed when there is unfair misuse of legislation to find not intended tax benefits and avoid paying a share of taxation that adequately sustains state funding.

The responsibility of corporations to the basic motivations of taxation must be reminded and effective in a fair tax system, not only by law but by society, when legality finds its own limits. This social and ethical tax responsibility, as basis for ATP limitations, provides for a tax system with a free but fair context and ready to assist in sustainable development.

It becomes indisputable that ATP constitutes a problem for state funding, economic competition with small companies, and the overall perception of tax fairness. The avoiding tactics disrupt the effectiveness of the tax system, providing for nefarious impacts on social welfare with a greater focus on developing countries. People's perception of tax avoidance as *criminal* is sustained by these negative impacts, even though the legality of the practices is unquestioned. The idea that there are those avoiding taxes with no repercussions and causing harm to the fairness of the tax system justifies public attention and the recent volume of legislation to tackle it.

Social and ethical standards prove to be part of the basis for all types of measures we analyzed, including hard law, soft law, CSR policies, and sustainability developments. These standards constitute the common fabric of a society and are part of the legal system itself. As there is a free space outside of the law, morality can play a significant role in aligning behaviors and influencing tax compliance.

As tax responsibility is a shared responsibility, it includes corporations; thus, the importance of upholding a fair system that demands a fair share is crescent in the face of ATP. Organizations and governments are stepping up to their responsibilities through legal action, and other taxpayers are finding tax responsibility a great tool. Here, social and ethical standards play a large role in persuading corporate action through responsibility and reputation.

The legal limitations are the first measures to be discussed, for they provide both the needed restriction and security to taxpayers. Corporations benefit from clarity in their obligations, and tax authorities and courts can clearly define aggressive tax behavior. Corporations should be protected with a predictable degree of tax compliance, with enough room to adjust their economic choices, and with free management of their activities.

International action is vital for the alignment of corporate tax understanding due to the cross-border characteristics of ATP. A coordinated response was urged, and it has been shown to be fruitful in the context of the OECD and the EU. Their efforts in defining models of action and directives to be implemented by member States are being well received and finding positive repercussions in society.

General Anti-Abuse Clauses are of utmost importance due to their general overview of artificial schemes and lack of economic substance, providing the needed legal space for evaluation of the tactics but without a strict and limiting framework of specific anti-abuse clauses. As well, information disclosure and transparent reports of tax strategies play an important role in corporate compliance, acting as limitations to anticipate ATP's negative implications.

As CSR incorporates the value of sharing responsibilities, the claims to see tax responsibility within the framework of CSR and to find common points of application seem justified. As well and as the public tool, corporations' reputation can become dependent on the tax responsibility testified by consumers. Thus, tax responsibility needs to be a concern for corporate managers and engaging with this standard can benefit corporations in the long term, just as CSR practices have found to benefit over the years.

Nonetheless, it is not possible to rely on corporate responsibility or ethical conduct without legal implementation. It's undesirable for legislators to reduce or ignore proper legislative action and their primary role in the functioning of the tax system.

For this reason, legislation is the primary and vital tool for tackling ATP practices and for the implementation of further measures for controlling tax inequalities. Tax morality's action in this free space is very important but must be seen as complementary and as a device for extra motivation for corporations to uphold social and ethical standards of responsible behavior.

## Bibliography

- **Adams**, Charles (1999) *For Good and Evil: The Impact of Taxes on the Course of Civilization*; 2<sup>nd</sup> edition, Lanham: Madison Books
- **Almendra**, Violeta Ruiz (2005) Tax Avoidance ant the European Court of Justice: What is at stake for European General Anti-Avoidance Rules?, Vol. 33, Issue 12, pp. 560-582. Available in: <https://e-archivo.uc3m.es/rest/api/core/bitstreams/1d7b9a93-23ba-492e-ad43-bcfada84c615/content> (last accessed in March 2024)
- **Agudelo**, Mauricio A.L.; Jóhannsdóttir, Lara; Davídsdóttir, Brynhildur (2019) *A literature review of the history and evolution of corporate social responsibility*. International Journal of Corporate Social Responsibility; Volume 4, No.1. Available in: [https://www.researchgate.net/publication/330563745\\_A\\_literature\\_review\\_of\\_the\\_history\\_and\\_evolution\\_of\\_corporate\\_social\\_responsibility](https://www.researchgate.net/publication/330563745_A_literature_review_of_the_history_and_evolution_of_corporate_social_responsibility) (last accessed in February 2024)
- **Arthurs**, Jonathan D.; Busenitz, Lowell W. (2003) *The Boundaries and Limitations of Agency Theory and Stewardship Theory in the Venture Capitalist/Entrepreneur Relationship*. Entrepreneurship Theory and Practice. Volume 28, No.2, pp. 145-162. Available in: [https://www.researchgate.net/publication/227761037\\_The\\_Boundaries\\_and\\_Limitations\\_of\\_Agency\\_Theory\\_and\\_Stewardship\\_Theory\\_in\\_the\\_Venture\\_CapitalistEntrepreneur\\_Relationship](https://www.researchgate.net/publication/227761037_The_Boundaries_and_Limitations_of_Agency_Theory_and_Stewardship_Theory_in_the_Venture_CapitalistEntrepreneur_Relationship) (last accessed in March 2024);
- **Avi-Yonah**, Reuven S. (2004) *Corporations, Society, and the State: a defense of the corporate tax*. Virginia Law Review, Volume 90, No. 5, pp. 1193-1255. Available in: [https://repository.law.umich.edu/law\\_econ\\_archive/art6/](https://repository.law.umich.edu/law_econ_archive/art6/) (last accessed in January 2024)

- **Avi-Yonah**, Reuven D., Panahi, C.H. (2010) Rethinking Treaty Shopping: Lessons for the European Union, in *Tax Treaties: Building Bridges between Law and Economics*, 21-50. Amsterdam: IBFD. Available in: [https://repository.law.umich.edu/book\\_chapters/78](https://repository.law.umich.edu/book_chapters/78) (last accessed in January 2024)
  
- **Benitez**, Juan Carlos; Mansour, Mario; Pecho, Miguel; Vellutini, Charles (2023) *Building Tax Capacity in Developing Countries*. Staff Discussion Notes No. 2023/006. International Monetary Fund. Available in <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2023/09/15/Building-Tax-Capacity-in-Developing-Countries-535449> (last accessed in March 2024)
  
- **Bird**, Robert; Davis-Nozemack, Karie (2018) *Tax Avoidance as a Sustainability Problem*. Journal of Business Ethics, Volume 151, No. 4, pp. 1009-1025. Available in: [https://www.researchgate.net/publication/303904792\\_Tax\\_Avoidance\\_as\\_a\\_Sustainability\\_Problem](https://www.researchgate.net/publication/303904792_Tax_Avoidance_as_a_Sustainability_Problem) (last accessed in March 2024)
  
- **Bollier**, David (1996) *Aiming Higher: 25 Stories of How Companies Prosper by Combining Sound Management and Social Vision*. The Business Enterprise Trust. New York. AMACOM
  
- **Bowman**, Edward H. (1973) *Corporate Social Responsibility and the Investor*, Working Paper Alfred P. Sloan School of Management. Massachusetts Institute of Technology. Available in: <https://dspace.mit.edu/bitstream/handle/1721.1/47111/corporatesocialr00bowm.pdf?sequence=1&isAllowed=y> (last accessed in March 2024);
  
- **Calçada Pires**, Rita (2011) *Ética e imposto. Reflexo de uma preocupação com a valorização da Sociologia e da Psicologia Fiscais* In Pires, Manuel, *Ética Fiscal*. Coleção Ensaios. Lisboa: Universidade Lusíada Editora, pp.26-27.
  
- **Caldas**, Marta (2015) *O Conceito de Planeamento Fiscal Agressivo: Novos Limites ao Planeamento Fiscal?*, (Cadernos IDEFF), Edições Almedina

- **Carr**, Albert Z.(1968) *Is Business Bluffing Ethical?* Business Ethics. Available in <https://hbr.org/1968/01/is-business-bluffing-ethical> (last accessed in February 2024)
- **Carroll**, Archie B. (1979) *A three-dimensional conceptual model of corporate performance*. Academy of Management Review, Volume 4, No.4, pp.497-505. Available in: <https://www.jstor.org/stable/257850?seq=4> (last accessed in February 2024)
- **Casalta Nabais**, José (1998) *O dever fundamental de pagar impostos*, Coimbra: Edições Almedina
- **Casalta Nabais**, José (1995) *Por um Estado Fiscal Suportável*, Estudos de Direito Fiscal, Coimbra: Edições Almedina
- **Casalta Nabais**, José (2008) Reflexões sobre quem paga a conta do Estado Social, in *Ciência e Técnica Fiscal*, n.º 421.
- **Chaffee**, Eric C. (2017) *The Origins of Corporate Social Responsibility*. University of Cincinnati Law Review, Volume 85, pp. 347-373. Available in: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2957820](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2957820) (last accessed in February 2024)
- **Christensen**, John; Coleman, Pete; Kappor, Sony (2004) *Tax Avoidance, Tax Competition and Globalisation: making tax justice a focus for global activism*. Global Tax Workshop, Finland, 18-20 November 2004. Available in: [https://www.researchgate.net/publication/237424665\\_Tax\\_Avoidance\\_Tax\\_Competition\\_and\\_Globalisation\\_making\\_tax\\_justice\\_a\\_focus\\_for\\_global\\_activism](https://www.researchgate.net/publication/237424665_Tax_Avoidance_Tax_Competition_and_Globalisation_making_tax_justice_a_focus_for_global_activism) (last accessed in March 2024)
- **Christensen**, John; Murphy, Richard (2004) *The Social Irresponsibility of Corporate Tax Avoidance: Taking CSR to the bottom line*. Society for International Development, Volume 47, No.3, pp. 37-44. Available in: [https://www.researchgate.net/publication/5219565\\_The\\_Social\\_Irresponsibility\\_of\\_Corporate\\_Tax\\_Avoidance\\_Taking\\_CSR\\_to\\_the\\_bottom\\_line](https://www.researchgate.net/publication/5219565_The_Social_Irresponsibility_of_Corporate_Tax_Avoidance_Taking_CSR_to_the_bottom_line) (last accessed in February 2024)

- **Christian Aid** (2019) *Trapped in Illicit Finance How abusive tax and trade practices harm human rights*. Available in: <https://www.christianaid.org.uk/resources/our-work/trapped-illicit-finance> (last accessed in March 2024)
  
- **Christians**, Allison (2014) *Avoidance, Evasion, and Taxpayer Morality*, Washington University Journal of Law & Policy, Volume 44, No.39, pp. 39-59. Available in: [https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol44/iss1/8/](https://openscholarship.wustl.edu/law_journal_law_policy/vol44/iss1/8/) (last accessed in March 2024)
  
- **Chylak**, Anna (2018) *International Tax Avoidance-Attempt to Define the concept and to distinguish it from International Tax Evasion and International tax planning*, Torun Business Review (17)
  
- **Commission of the European Communities** (1996) *Taxation in the European Union: Report on the development of tax systems*. COM(96) 546 final. Available in: <https://aei.pitt.edu/38300/> (last accessed in December 2023)
  
- **Commission Recommendation** 2012/772/EU of 6 December 2012 on aggressive tax planning. Available in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012H0772> (last accessed in January 2024)
  
- **Communication from the Commission to the European Parliament and the Council: Action Plan for fair and simple taxation supporting the recovery strategy**. Available in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0312> (last accessed in March 2024)
  
- **Council Directive** 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States. Available in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0049> (last accessed in January 2024)
  
- **Council Directive** 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States. Available in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32009L0133> (last accessed in January 2024)

- **Council Directive** 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC. Available in: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32011L0016> (last accessed in March 2024)
- **Council Directive** 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast) Available in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0096> (last accessed in January 2024)
- **Council Directive** (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market. Available in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016L1164> (last accessed in January 2024)
- **Council Directive** (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries. Available in: <https://eur-lex.europa.eu/eli/dir/2017/952/oj> (last accessed in January 2024)
- **Council Directive** (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. Available in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018L0822> (last accessed in March 2024)
- **Council Directive** (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union. Available in: <https://eur-lex.europa.eu/eli/dir/2022/2523/oj> (last accessed in March 2024)
- **Cressey**, Donald (1953) *Other People's Money: a study of the social psychology of embezzlement*. Glencoe, IL: Free Press
- **Da Silva Faria**, Maria José (2015) *Responsabilidade Social Empresarial, Relato e análise económica e financeira*. Porto: Vida Económica
- **Datt**, Kalmen Hyman (2014) *Paying a fair share of tax and aggressive tax planning - A tale of two myths*. eJournal of Tax Research, Volume 12, No. 2, pp. 410-432.

- Available in:  
[https://www.researchgate.net/publication/286045956\\_Paying\\_a\\_fair\\_share\\_of\\_tax\\_and\\_aggressive\\_tax\\_planning\\_-\\_A\\_tale\\_of\\_two\\_myths](https://www.researchgate.net/publication/286045956_Paying_a_fair_share_of_tax_and_aggressive_tax_planning_-_A_tale_of_two_myths) (last accessed in March 2024)
- **Davis**, Keith (1960) Can business afford to ignore social responsibilities? *California Management Review*, Volume 2, No.3, pp.70–76.
  - **Department for International Trade** (2021) *The role of United States-owned businesses in the United Kingdom*. Available in:  
<https://www.gov.uk/government/publications/us-owned-businesses-and-their-impact-in-the-uk/the-role-of-united-states-owned-businesses-in-the-united-kingdom-executive-summary> (last accessed in March 2024)
  - **Devereux**, Michael P.; Sørensen, Peter Birch (2006) *The Corporate Income Tax: international trends and options for fundamental reform* in *European Economy, Economic Papers* 264. Available in:  
[https://ec.europa.eu/economy\\_finance/publications/pages/publication\\_summary540\\_en.htm](https://ec.europa.eu/economy_finance/publications/pages/publication_summary540_en.htm) (last accessed in March 2024)
  - **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. Available in:  
<https://eur-lex.europa.eu/eli/dir/2014/95/oj> (last accessed in March 2024)
  - **Dos Santos**, António Carlos (2009) Planeamento fiscal, evasão fiscal, elisão fiscal: o fiscalista no seu labirinto; in *Fiscalidade: Revista de Direito e Gestão Fiscal* n.38; Instituto Superior de Gestão. Available in: <https://www.isg.pt/revista-fiscalidade-no-38/> (last accessed in March 2024)
  - **Dourado**, Ana Paula (2012) Portugal: The Foggia (C-126/10) and Amorim (C-38/11) Cases in Lang, Michael, *ECJ Recent Developments in Direct Taxation 2011*, Serie on International Tax Law, Wien: Linde. Available in:  
<https://www.cideeff.pt/pt/publicacoes/outras-publicacoes/portugal-the-foggia-c-12610-and-amorim-c-3811-cases-2012/6190/> (last accessed in March 2024)
  - **Dourado**, Ana Paula (2019) *Direito Fiscal*, 4ª edição; Coimbra: Edições Almedina,

- **Dowling**, John; Pfeffer, Jeffrey (1975) *Organizational Legitimacy: Social Values and Organizational Behavior*. The Pacific Sociological Review, Volume 18, Issue 1, pp.122-136
  
- **Eskelinen**, Teppo; Laitinen, Arto (2015) *Taxation: its justification and application to global contexts*; Helmut P. Gaisbauer, Gottfried Schweiger & Clemens Sedmak (eds.), *Philosophical Explorations of Justice and Taxation. National and Global Issues*. Springer. pp. 219-236. Available in: [https://www.academia.edu/6386946/Taxation\\_its\\_justification\\_and\\_application\\_to\\_global\\_contexts](https://www.academia.edu/6386946/Taxation_its_justification_and_application_to_global_contexts) (last accessed in January 2024)
  
- **European Commission**, *Administrative cooperation in (direct) taxation in the EU*. Taxation and Customs Union. Available in [https://taxation-customs.ec.europa.eu/taxation-1/tax-co-operation-and-control/administrative-co-operation-and-mutual-assistance/enhanced-administrative-cooperation-field-direct-taxation\\_en](https://taxation-customs.ec.europa.eu/taxation-1/tax-co-operation-and-control/administrative-co-operation-and-mutual-assistance/enhanced-administrative-cooperation-field-direct-taxation_en) (last accessed in March 2024)
  
- **European Commission** (2002) *Corporate Social Responsibility Main Issues*. MEMO/02/153 Available in: [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_02\\_153](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_02_153) (last accessed in February 2024)
  
- **European Commission** (2016) *A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*. SWD(2015) 121 final; (2015) 302 final. Available in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0302> (last accessed in January 2024)
  
- **European Commission** (2016) *Fair Taxation: Commission presents new measures against corporate tax avoidance*, Press Release from 28.01.2016. Available in [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_159](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_159) (last accessed in January 2024)
  
- **European Commission** (2020) *Study on due diligence requirements through the supply chain: Final report*; Available in <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> (last accessed in March 2024)

- **European Commission**, *Minimum corporate taxation*. Available in [https://taxation-customs.ec.europa.eu/taxation-1/corporate-taxation/minimum-corporate-taxation\\_en](https://taxation-customs.ec.europa.eu/taxation-1/corporate-taxation/minimum-corporate-taxation_en) (last accessed in March 2024)
- **European Council**, Council of the European Union, *Code of Conduct Group (Business Taxation)* <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/> (last accessed in March 2024)
- **European Council**, Council of the European Union, EU list of non-cooperative jurisdictions for tax purposes. Available in <https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/> (last accessed in March 2024)
- **European Parliament** resolution of 6 February 2013 on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth (2012/2098(INI)). Available in: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013IP0049> (last accessed in March 2024)
- **Ethisphere** (2023) *2023 World's most ethical companies*. Available in: <https://magazine.ethisphere.com/wp-content/uploads/Ethisphere-Magazine-Spring-2023.pdf> (last accessed in March 2024)
- **Evertsson**, Nubia (2016) *Corporate tax avoidance: a crime of globalization*. Crime Law and Social Change, Volum 66, No. 2, pp. 199-216. Available in: [https://www.researchgate.net/publication/301703099\\_Corporate\\_tax\\_avoidance\\_a\\_crime\\_of\\_globalization](https://www.researchgate.net/publication/301703099_Corporate_tax_avoidance_a_crime_of_globalization) (last accessed in January 2024)
- **Finance Act 2016**, 2016 c.24, Content of group tax strategy. Part 10: Tax Avoidance and evasion, Schedule 19, Part 2. Available in <https://www.legislation.gov.uk/ukpga/2016/24/contents> (last accessed in March 2024)
- **Friedman**, Milton (1970) *The Social Responsibility of Business Is To Increase Its Profits*. The New York Times. Available in: <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> (last accessed in January 2024)

- **Freedman** Judith (2006) *Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle*, British Tax Review, pp. 332-357. Oxford Legal Studies Research Paper Series, No. 14/2006. Available in: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=900043](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=900043) (last accessed in January 2024)
  
- **Gardner**, Matthew; Wamhoff Steve (2021) *55 Corporations Paid \$0 in Federal Taxes on 2020 Profits*; April 21, 2021 Report. Institute on Taxation and Economic Policy. Available in: <https://itep.org/55-profitable-corporations-zero-corporate-tax/> (last accessed in February 2024)
  
- **Goyette, Nathalie** (2014) *L'évitement fiscal et la fraude fiscale au Canada* Revue Paris: Française de Finances Publiques, no.127; p. 88 apud Caldas, Marta (2015) *O Conceito de Planeamento Fiscal Agressivo: Novos Limites ao Planeamento Fiscal?*, (Cadernos IDEFF), Edições Almedina
  
- **Graham**, John R. et al. (2013) *Incentives for Tax Planning and Avoidance: Evidence from the Field*. The Accounting Review, Volume 89, No.3, pp. 991-1023. Available in: [https://www.researchgate.net/publication/256034744\\_Incentives\\_for\\_Tax\\_Planning\\_and\\_Avoidance\\_Evidence\\_from\\_the\\_Field](https://www.researchgate.net/publication/256034744_Incentives_for_Tax_Planning_and_Avoidance_Evidence_from_the_Field) (last accesses in February 2024)
  
- **Graves**, Samuel P.; Waddock, Sandra; Kelly, Marjorie (2001), How do you measure corporate citizenship?. Business Ethics: The Magazine of Corporate Responsibility, Volume 15, No. 2. Available in: <https://philpapers.org/rec/GRAHDY> (last accessed in February 2024)
  
- **Gribnau**, Hans (2017) *The Integrity of the Tax System after BEPS: A Shared Responsibility*. Erasmus Law Review, Volume 10, No. 1, pp. 12-28. Available in: [https://www.erasmuslawreview.nl/tijdschrift/ELR/2017/1/ELR\\_2017\\_10\\_01\\_003](https://www.erasmuslawreview.nl/tijdschrift/ELR/2017/1/ELR_2017_10_01_003) (last accessed in March 2024)
  
- **Hanlon**, Michelle; Slemrod, Joel, (2009) *What does tax aggressiveness signal? Evidence from stock price reactions to news about tax shelter involvement*. Journal of Public Economics, Volume 93, No. 1-2, pp. 126-141

- **Henderson**, David (2001) *The case Against Corporate Social Responsibility*. Policy: A Journal of Public Policy and Ideas, Volume 17, No.2, pp.28–32. Available in: <https://search.informit.org/doi/abs/10.3316/ielapa.200113933>
  
- **Holland**, Kevin; Lindop, Sarah; Zainudin, Fatimah (2016) *Tax Avoidance: A threat to corporate legitimacy? An examination of companies' financial and CSR reports*; British Tax Review Number 3, Forthcoming. Available in: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2811599](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2811599) (last accessed in March 2024)
  
- **Honoré**, Tony (1993) *The Dependence of Morality on Law*. Oxford Journal of Legal Studies, Volume 13, No. 1, pp. 1-17. Available in: <https://www.jstor.org/stable/764645> (last accessed in March 2024)
  
- **Hopkins**, Michael (2004) *Corporate social responsibility: an issues paper*. Policy Integration Department World Commission on the Social Dimension of Globalization. International Labour Office Working Paper No. 27. Available in: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=908181](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=908181) (last accessed in March 2024),
  
- **IBE (Institute of Business Ethics)** (2013) *Tax avoidance as an ethical issue for business*; available at: [www.ibe.org.uk/resource/tax-avoidance-as-an-ethical-issue-for-business.html](http://www.ibe.org.uk/resource/tax-avoidance-as-an-ethical-issue-for-business.html) (last accessed in March 2024)
  
- **Jellum**, Linda (2014) *Codifying and Miscodifying Judicial Anti-Abuse Tax Doctrines*. Virginia Tax Review Volume 33, No. 579, pp. 579-627. Available in: [https://digitalcommons.law.uidaho.edu/cgi/viewcontent.cgi?article=1567&context=faculty\\_scholarship](https://digitalcommons.law.uidaho.edu/cgi/viewcontent.cgi?article=1567&context=faculty_scholarship) (last accessed in February 2024)
  
- **KPMG** (2013) *The KPMG Survey of Corporate Responsibility Reporting 2013*. Available in: <https://assets.kpmg.com/content/dam/kpmg/pdf/2013/12/corporate-responsibility-reporting-survey-2013.pdf> (last accessed in March 2024)
  
- **KPMG** (2022) *Global Survey of Sustainability reporting 2022*. Available in: <https://assets.kpmg.com/content/dam/kpmg/se/pdf/komm/2022/Global-Survey-of-Sustainability-Reporting-2022.pdf> (last accessed in March 2024)

- **Lantos**, Geoffrey P. (2001) The boundaries of strategic corporate social responsibility. *Journal of Consumer Marketing*, Volume 18, No.7, pp.595-632. Available in: <https://www.emerald.com/insight/content/doi/10.1108/07363760110410281/full/html> (last accessed in March 2024)
- **Lavermicocca Dr.**, Catriona; **Buchan Dr.**, Jenny M. (2015) *Role of reputational risk in tax decision making by large companies*. *eJournal of Tax Research* (2015) volume 13, no.1, pp.5-50. Available in: [https://www.researchgate.net/publication/282053164\\_Role\\_of\\_reputational\\_risk\\_in\\_tax\\_decision\\_making\\_by\\_large\\_companies](https://www.researchgate.net/publication/282053164_Role_of_reputational_risk_in_tax_decision_making_by_large_companies) (last accessed in February 2024)
- **Lei Geral Tributária** (1998) Lei nº389/98
- **Levitt**, Theodore(1958) *The Dangers of Social Responsibility*. *Harvard Business Review*, Volume 36, pp. 41-50. Available in: <https://pt.scribd.com/document/403719922/The-dangers-of-social-responsability> (last accessed in February 2024)
- **Levitt**, Theodore (1983) *The Globalization of Markets*. *Harvard Business Review*. Available in: <https://hbr.org/1983/05/the-globalization-of-markets> (last accessed in December 2023)
- **Lopes Courinha**, Gustavo (2009) *Cláusula Geral Anti-abuso no Direito Tributário: Contributos para a sua compreensão*. Coimbra: Edições Almedina.
- **Madison**, Allen D. (2003) *The Tension Between Textualism and Substance-over-form Doctrines in Tax Law*. *Santa Clara Review*, Volume 43, No.3, pp. 699-750. Available in: <https://digitalcommons.law.scu.edu/lawreview/vol43/iss3/2/> (last accessed in January 2024)
- **Maurer**, John G. (1971), *Readings in Organizational Theory: Open System Approaches*. New York: Random House
- **Meadows**, Donella H.; **Meadows**, Dennis L.; **Randers**, Jørgen; **Behrens III**, William (1972) *The Limits to Growth*. A Report for the Club of Rome's Project on the Predicament of Mankind. New York: Universe Books. Available in <https://www.clubofrome.org/publication/the-limits-to-growth/> (last accessed in February 2024)

- **Michalowski**, Raymon J.; Kramer, Ronald C. (2006). *State-corporate crime: Wrongdoing at the intersection of government and business*. New Brunswick: Routledge University Press
- **Musgrave**, Richard A. (1959) *The Theory of Public Finance: A Study in Public Economy*, New York: McGraw Hill
- **National Geographic**, Globalization. Available in: <http://education.nationalgeographic.org/resource/globalization> (last accessed in January 2024)
- **Neumark**, Fritz (1994) *Principios de la Imposicion*, Instituto de Estudios Fiscales, 2<sup>nd</sup> edition, Madrid, *apud* Albano Santos (2003) *Teoria Fiscal*, Universidade Técnica de Lisboa
- **Oats**, Lynne; Tuck, Penelope (2019) *Corporate tax avoidance: is tax transparency the solution?*. Accounting and Business Research, Volume 49, No. 5, pp. 565-583  
Available in: <https://www.tandfonline.com/doi/full/10.1080/00014788.2019.1611726> (last accessed in March 2024)
- **OECD**, BEPS Action 6: Prevention of tax treaty abuse. Available in: <https://www.oecd.org/tax/beps/beps-actions/action6/> (accessed last in February - 2024)
- **OECD**, *Tax Transparency*, available in: <https://www.oecd.org/tax/beps/tax-transparency/> (last accessed on March 2024)
- **OECD**, *Who we are*, available in: <https://www.oecd.org/about/>, (last accessed in March 2024)
- **OECD** (2004) *Compliance Risk Management: Managing and Improving Tax Compliance*. Forum on Tax Administration. OECD Publishing. Available in: <https://www.oecd.org/tax/administration/33818656.pdf> (last accessed in December 2023)
- **OECD** (2006) Third Meeting of OECD Forum on Tax Administration, 14-15 September 2006, Final Seoul Declaration. Forum on Tax Administration. Available in: <https://www.oecd.org/tax/forum-on-tax->

- [administration/news/oecd-tax-administratorstojoinforcesinfightingtaxnon-compliance.htm](#) (last accessed in January 2024)
- **OECD** (2008) *Study into the role of tax intermediaries*. OECD Publishing. Available in: [https://www.oecd-ilibrary.org/taxation/study-into-the-role-of-tax-intermediaries\\_9789264041813-en](https://www.oecd-ilibrary.org/taxation/study-into-the-role-of-tax-intermediaries_9789264041813-en) (last accessed in March 2024)
  - **OECD** (2013) *Addressing Base Erosion and Profit Shifting*, OECD Publishing. Available in: <https://www.oecd.org/tax/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm> (last accessed in February 2024)
  - **OECD** (2014) *Addressing the tax challenges of the Digital Economy*; OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing. Available in: <https://www.oecd.org/ctp/addressing-the-tax-challenges-of-the-digital-economy-9789264218789-en.htm> (last accessed in February 2024)
  - **OECD** (2015) *Measuring and Monitoring BEPS, Action 11- 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing. Available in: <https://www.oecd.org/ctp/measuring-and-monitoring-beps-action-11-2015-final-report-9789264241343-en.htm> (last accessed in February 2024)
  - **OECD** (2015) *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing. Available in: <https://www.oecd.org/ctp/neutralising-the-effects-of-hybrid-mismatch-arrangements-action-2-2015-final-report-9789264241138-en.htm> (last accessed in January 2024)
  - **OECD** (2017) *Fighting Tax Crime: The Ten Global Principles*. OECD Publishing. Available in <https://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles-first-edition-63530cd2-en.htm> (last accessed in January 2024)
  - **OECD** (2017) *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD Publishing. Available in: <https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm> (last accessed in February 2024)
  - **OECD** (2017) *Standard for Automatic Exchange of Financial Account Information in Tax Matters*. Available in: <https://www.oecd.org/tax/exchange-of-tax->

- [information/standard-for-automatic-exchange-of-financial-account-information-in-tax-matters-second-edition-9789264267992-en.htm](https://www.oecd.org/tax/automatic-exchange/standard-for-automatic-exchange-of-financial-account-information-in-tax-matters-second-edition-9789264267992-en.htm) (last accessed in March 2024)
- **OECD** (2021) *International Compliance Assurance Programme: Handbook for tax administrations and MNE groups*. Forum on Tax Administration. OECD Publishing. Available in: <https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-handbook-for-tax-administrations-and-mne-groups.pdf> (last accessed in February 2024)
  - **OECD** (2021) *Statement on a Two- Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Base Erosion and Profit Shifting Project. Available in: <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm> (last accessed in March 2024)
  - **OECD** (2023) *Guidelines for Multinational Enterprises on Responsible Business Conduct*. OECD Publishing. Available in: <https://www.oecd.org/publications/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct-81f92357-en.htm> (last accessed in March 2024),
  - **OECD** (2023) *Revenue Statistics 2023, Tax Revenue Buoyancy in OECD Countries*; OECD Publishing; Available in: <https://www.oecd.org/tax/tax-policy/revenue-statistics-highlights-brochure.pdf> (last accessed in March 2024)
  - **OECD** (2024) *Economic Impact Assessment of the Global Minimum Tax: Summary*; OECD Publishing, Available in: <https://www.oecd.org/tax/beps/summary-economic-impact-assessment-global-minimum-tax-january-2024.pdf> (last accessed in March 2024)
  - **Office of Chief Counsel Internal Revenue Service**, Memorandum No. 200826004 (2008) Available in <https://www.irs.gov/pub/irs-wd/0826004.pdf> (last accessed in January 2024)

- **Office of Chief Counsel Criminal Tax Division** (2009) *Tax Crimes Handbook*; Internal Revenue System. Available in [https://www.irs.gov/pub/irs-utl/tax\\_crimes\\_handbook.pdf](https://www.irs.gov/pub/irs-utl/tax_crimes_handbook.pdf) (last accessed in January 2024)
- **Oliveira, António Fernandes** (2009) *A Legitimidade do Planeamento Fiscal, As Cláusulas Gerais Anti-Abuso e os Conflitos de Interesse*, Coimbra: Coimbra Editora
- **O’Shea, Tom** (2010) *Tax Avoidance and Abuse of EU Law*, The EC Tax Journal, Volume 11, Part 2.3., Available in: <https://www.khplc.co.uk/client-area/review/466/ECTJ-Vol11-Part-23-Tax-Avoidance-and-Abuse-of-EU-Law-Tom-OShea> (last accessed in March 2024)
- **OXFAM Australia** (2016) *The Hidden Billion. How Tax Havens impact Lives at Home and Abroad*. Oxfam Research Reports. Available in: <https://www.oxfam.org.au/wp-content/uploads/2016/06/OXF003-Tax-Havens-Report-FA2-WEB.pdf> (last accessed in March 2024)
- **Parliamentary Assembly** (2016) *Lessons from the “Panama Papers” to ensure fiscal and social justice*, Report Committee on Social Affairs, Health and Sustainable Development; Doc. 14141. Available in: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23150&lang=en> (last accessed in March 2024)
- **Panayi, Christiana H.** (2015) *Is Aggressive Tax Planning Socially Irresponsible?*. Intertax, Volume 43, No. 10, pp. 544-558. Available in: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2668922](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2668922) (last accessed in February 2024)
- **Payne, Dinah M.; Raiborn, Cecily A.** (2018) *Aggressive tax avoidance: a conundrum for stakeholders, governments and morality*. Journal of Business Ethics, Volume 147, No. 3, pp. 469–487. Available in: <https://www.jstor.org/stable/45022388> (last accessed in February 2024)
- **Prawira, Ida Farida Adi; Sandria, Jeffry** (2021) *The Determinants of Corporate Tax Aggressiveness*. Estudios de Economía Aplicada, Vol. 39 No. 4. Available in:

- <https://ojs.ual.es/ojs/index.php/eea/article/view/4482> (last accessed in February 2024)
- **Public Accounts Committee** (2012) Minutes of Evidence HC716, UK Parliament. Available in <https://publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/121112.htm> (last accessed in March 2024)
  - **PwC** (2013) *Tax strategy and corporate reputation: ~~a tax issue~~, a business issue* in 16th Annual Global CEO Survey: Dealing with disruption Focus on tax. Available in: <https://www.pwc.com/gx/en/tax/publications/assets/pwc-tax-strategy-and-corporate-reputation-a-tax-issue-a-business-issue.pdf> (last accessed in March 2024)
  - **Rawls**, John (1971) *A Theory of Justice*. Revised Edition. Cambridge, Massachusetts, The Belknap Press of Harvard University Press.
  - **Regime Geral de Infrações Tributárias** (2001) Lei nº15/2001
  - **Roberts**, John (2018) *Managing only with transparency: the strategic functions of ignorance*. Critical Perspectives on Accounting, Volume 55, pp.53-60.
  - **Ruchelman**, Stanley C.; Rastogi, Neha (2022) *United States: The Economic Substance Doctrine: A U.S. Anti-Abuse Rule*. Available in: <https://www.mondaq.com/unitedstates/tax-authorities/1190152/the-economic-substance-doctrine-a-us-anti-abuse-rule> (last accessed in January 2024)
  - **Sá Gomes**, Nuno (2005) *Manual de Direito Fiscal*, Vol. II, 12.ªed, Lisboa: Rei dos Livros
  - **Sachs**, Jeffrey (2016) Oxfam's open letter "Tax havens serve no useful economic purpose". Available in <https://www.oxfam.org/en/press-releases/tax-havens-serve-no-useful-economic-purpose-300-economists-tell-world-leaders> (last accessed in March 2024)
  - **Saldanha Sanches**, José (2006) *Os Limites do Planeamento Fiscal – Substância e Forma no Direito Fiscal Português, Comunitário e Internacional*, Coimbra: Coimbra Editora

- **Saldanha Sanches**, José (2010) *As duas Constituições: nos dez anos da cláusula geral antiabuso* in coord. Amorim, José Campos, *Planeamento e evasão fiscal*. Jornadas de Contabilidade e fiscalidade, Instituto Superior de Contabilidade e Administração do Porto. Lisboa: Vida Económica.
- **Sandmo**, Agnar (2005) *The theory of tax evasion: A retrospective view*; *National Tax Journal*, Vol. 58, No. 4, pp. 643-663. The University of Chicago Press. Available in: <https://www.journals.uchicago.edu/doi/abs/10.17310/ntj.2005.4.02> (last accessed in January 2024)
- **Scarpa**, Francesco; Signori, Silvana (2023) *Understanding corporate tax responsibility: a systematic literature review*. *Sustainability Accounting, Management and Policy Journal* Vol. 14 No. 7, pp. 179-201. Available in: <https://www.emerald.com/insight/content/doi/10.1108/SAMPJ-04-2022-0200/full/html> (last accessed in February 2024)
- **Scherer**, Anna-Lena; Schmiel Ute (2021) *Ethical and Legal Responsibility of Multinational Corporate Groups for a Fair Share of Taxes*. Sciendo, *Nordic Tax Journal*, Volume 2021, No. 1, pp. 32-46. Available in: <https://ideas.repec.org/a/vrs/notajo/v2021y2021i1p32-46n1.html> (last accessed in March 2024)
- **Schnackenberg**, Andrew K.; Tomilson, Edward C. (2016) *Organizational transparency: a new perspective on managing trust in organization-stakeholder relationships*. *Journal of Management*, Volume 42, No. 7, pp.1784-1810. Available in: [https://www.researchgate.net/publication/275441822\\_Organizational\\_Transparency\\_A\\_New\\_Perspective\\_on\\_Managing\\_Trust\\_in\\_Organization-Stakeholder\\_Relationships](https://www.researchgate.net/publication/275441822_Organizational_Transparency_A_New_Perspective_on_Managing_Trust_in_Organization-Stakeholder_Relationships) (last accessed in January 2024)
- **Schultz**, Howard; Gordon, Joanne (2011) *Onward: How Starbucks Fought for Its Life without Losing Its Soul*. Minneapolis: High Bridge
- **Sepúlveda**, Magdalena Carmona (2014) *Report of the Special Rapporteur on Extreme poverty and human rights*. United Nations, Human Rights Council 23<sup>rd</sup> Session. Available in: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2534341](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2534341) (last accessed in March 2024)

- **Skinner**, Quentin (1990) *The Republican Ideal of Political Liberty* in Bock, Gisela; Skinner, Quentin; Viroli, Maurizio (eds.) *Machiavelli and Republicanism*. Cambridge University Press, pp. 293-309.
- **Smith**, Adam (1776) *Wealth of Nations*. Available in: [www.adamsmithworks.org](http://www.adamsmithworks.org) (last accessed in March 2024)
- **Smith**, N. Craig (2001) Changes in corporate practices in response to public interest advocacy and actions In Bloom, Paul N; Gundlach, Gregory T., *Handbook of Marketing and Society*. Thousand Oaks: Sage
- **Sternberg**, Elaine (2009) *Corporate Social Responsibility and Corporate Governance*. *Economic Affairs*, Vol. 29, Issue 4, pp. 5-10. Available in: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4368728](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4368728) (last accessed in February 2024)
- **Tax Foundation** (2022) *Corporate Tax Rates around the World, 2022*, available in: <https://taxfoundation.org/data/all/global/corporate-tax-rates-by-country-2022/#Distribution> (last accessed in January 2024)
- **Tax Justice Network**, *What is a tax haven?*. Available in: <https://taxjustice.net/faq/what-is-a-tax-haven/> (last accessed in March 2024)
- **Tax Justice Network** (2023) *State of Tax Justice*. Available in: <https://taxjustice.net/reports/the-state-of-tax-justice-2023/> (last accessed in March 2024)
- *The Town That Took on The Taxman*; Directed by Tom Costello, starring Prowse Heydon (2016) Available in [https://www.youtube.com/watch?v=ipV\\_GU7YaQg&t=6s](https://www.youtube.com/watch?v=ipV_GU7YaQg&t=6s)
- **Thomson Reuters** (2023) *The Willfulness requirement for tax evasion in Federal Tax Coordinator*, Second Edition; Research Institute of America. Available in: <https://www.justsecurity.org/wp-content/uploads/2023/04/V-4203-THE-WILLFULNESS-REQUIREMENT-FOR-TAX-EVASION.pdf> (last accessed in January 2024)

- **United Nations** (2015) *Transforming our world: the 2030 Agenda for Sustainable Development*. Resolution adopted by the General Assembly on 25 September 2015. Available in <https://digitallibrary.un.org/record/809145> (last accessed in March 2024)
- **United Nations** (2015) *Third International Conference on Financing for Development (FfD)*. Resolution adopted by the General Assembly on 27 July 2015. Available in: <https://www.un.org/esa/ffd/ffd3/conference.html> (last accessed in March 2024)
- **United Nations' Department of Economic and Social Affairs** (2003) *Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries*. New York : United Nations. Available in: <https://www.un-ilibrary.org/content/periodicals/26642654> (last accessed in February 2024)
- **United Nations' WCED** (World Commission on Environment and Development) (1987) *Report of the World Commission on Environment and Development: Our Common Future*; Available in: <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> (last accessed in March 2024)
- **UNDP** (United Nations Development Programme) (2011) *Summary: Human Development Report 2011. Sustainability and Equity: A better future for all*; Available in: <https://hdr.undp.org/system/files/documents/human-development-report-2011-summary-english.human-development-report-2011-summary-english> (accessed last in March 2024)
- **UN Principles for Responsible Investment**, available in <https://www.unpri.org/> (last accessed in March 2024)
- **US Department of the Treasury** (2016) *United States Model Income Tax Convention*. Available in: <https://home.treasury.gov/policy-issues/tax-policy/treaties> (accessed last in March 2024)
- **UK Government** (2004) *Corporate Social Responsibility: A Government Update*; Available in: <https://www.yumpu.com/en/document/view/19763380/corporate-social-responsibility-a-government-dti-home-page> (last accessed in February 2024))

- **Vanistendael**, Frans (1996) Legal Framework for Taxation in Thuronyi, Victor, *Tax Law Design and Drafting*, International Monetary Fund, Volume 1. Available in: <https://www.elibrary.imf.org/display/book/9781557755872/9781557755872.xml> (last accessed in February 2024)
- **Varma**, Amanda P.; West, Philip R. (2010) *Tax treaties and tax avoidance: application of anti-avoidance provisions*. A Cashiers de droit fiscal international, Volume 95a. International Fiscal Association, 2010 Rome Congress. Available in: <https://www.steptoec.com/a/web/159/4334.pdf> (last accessed in January 2024)
- **Vasques**, Sérgio (2005) Capacidade contributiva, rendimento e património, in *Fiscalidade: Revista de Direito e Gestão Fiscal* n.23; Instituto Superior de Gestão. Available in: <https://www.isg.pt/revista-fiscalidade-no-23/> (last accessed in March 2024)
- **Vaz Antunes**, Francisco (2006) A Evasão Fiscal e o Crime de Fraude Fiscal no Sistema Fiscal Português in Teixeira, Glória, *Estudos de Direito Fiscal - Teses Seleccionadas do I Curso de Pós-Graduação em Direito Fiscal*. CIJE - Centro de Investigação Jurídico-Económica, Faculdade de Direito da Universidade do Porto. Coimbra: Edições Almedina.
- **Vogel**, Klaus (1986) *Double Tax Treaties and Their Interpretation*. Berkeley Journal of International Law, Volume 4, No. 1 Available in: <https://lawcat.berkeley.edu/record/1112555?v=pdf> (last accessed in January 2024)
- **Von Stein**, Lorenz (1967) On Taxation In: Musgrave, Richard A.; Peacock, Alan T.; *Classics in the Theory of Public Finance*. 1967 Reprint; International Economic Association; New York: St. Martin's Press. Available in: <https://desmarais-tremblay.com/Resources/Musgrave%20Peacock%201958%20Classics%20in%20the%20Theory%20of%20Public%20Finance.pdf> (last accessed in March 2024)
- **Walzer**, Michael (1983) *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books, Inc
- **Weisbach**, David (2001) *Ten truths about tax shelters*; John M. Olin Program in Law and Economics Working Paper No. 122. Available in:

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=268831](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=268831) (last accessed in January 2024)

- **Weisbach**, David (2004) *Corporate Tax Avoidance*. John M. Olin Program in Law and Economics, Paper No. 202 (2d series). University of Chicago Law School. Available in: [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1137&context=law\\_and\\_economics](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1137&context=law_and_economics) (last accessed in January 2024)
- **Xavier**, Alberto (2014) *Direito Tributário Internacional*, 2ª edição, Coimbra: Edições Almedina
- **Zucman**, Gabriel (2014) *Taxing across borders: Tracking Personal Wealth and Corporate Profit*, Journal of Economic Perspectives—Volume 28, Number 4, pp. 121–148. Available in <https://www.aeaweb.org/articles?id=10.1257/jep.28.4.121> (last accessed in February 2024)

#### **ECJ Cases:**

Judgment 14 February 1995, Schumacker, C-279/93, EU:C:1995:31

Judgement 5 November 2002, Überseering, C-208/00, EU:C:2002:632;

Judgement 21 November 2002, X and Y, C-436/00, EU:C:2002:704

Judgement 30 September 2003, Inspire Art Ltd, C-167/01, EU:C:2003:512

Judgement 11 March 2004, de Lasteyrie du Saillant, Case C-9/02, EU:C:2004:138

Judgement 21 February 2006, Halifax and others, C-255/02, EU:C:2006:121

Judgement 12 September 2006, Cadbury Schweppes, C-196/04, EU:C:2006:544

Judgement 10 November 2011, Foggia, C-126/10, EU:C:2011:718

**Portuguese Jurisprudence:**

Tribunal da Relação de Coimbra, 03/12/2009, processo n.º 995/05.8TBFND Acórdão do Tribunal Constitucional n.º 430/2016, processo n.º 367/13 or Acórdão

**US Jurisprudence:**

Supreme Court of Michigan, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (1919)

US. Supreme Court, Gregory v. Helvering; 293 U.S. 465 (1935)

US Court of Appeals for the Fifth Circuit, Kanawha Gas & Utilities Co. v. Commissioner, 214 F.2d 685, 691 (1954)