

# From tax avoidance to aggressive tax planning Outlining the path towards international tax fairness

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# Outline

1. The dividing line between tax avoidance and legitimate tax savings
2. International tax avoidance and the need for international tax fairness
3. Going beyond mere formal compliance: countering aggressive tax planning
4. The action plan for international tax coordination: some selected issues
5. International tax coordination and the international tax dimensions of fairness
6. For a global dimension of international tax fairness



## Tax avoidance and the loopholes in international taxation

- Tax minimization (legitimate tax saving) and tax avoidance: two conceptually close categories with different positive boundaries that open up loopholes and inconsistencies in international taxation
- Lack of coordination to international tax avoidance: inefficient and with overkill effects
- International tax planning thrives due to an implicit complicity between States and business
  - After the ban of harmful tax competition, States have engaged in smart tax competition by shaping their tax systems in a way that enhances unintended tax advantages across the borders
  - Business invests in international tax planning, which brings down taxes to unacceptable levels (e.g. double Irish with and without Dutch sandwich)
- A thin line divides tax competition from international tax fairness



# International tax avoidance and tax fairness across the borders

- Tax avoidance is usually depicted as a problem of friction between form and substance steered at obtaining tax savings
- International tax avoidance presents an additional feature, not always tackled by the positive dimension of anti-avoidance measures: unintended benefits can be obtained in the gaps between tax systems of the various countries
- Should taxpayers be allowed to exploit these gaps?
  - Taxpayers have the right to do all that is not prohibited
  - Exploitation of gaps leads to an unfair outcome
- A problem of fairness and equity arises for
  - global tax players shift the tax burden on other taxpayers (national and international dimension)
  - States, insofar as tax systems are inconsistent: protecting residence-based taxation, while attracting international capital through tax appealing measures



## On fairness, its legal and tax dimension

- What is fairness?
  - Related values: justice, equity, honesty, solidarity (?), old English = beauty
- Is there a legal dimension of fairness beyond its ethical one?
  - Different visions of fairness according to legal positivism and naturalism
  - Fairness and human rights
- What are the tax implications of fairness?
  - Fair contribution to the budget of the entity with taxing sovereignty
    - => free-riders increase the contribution of other taxpayers
    - => sheltering free-riders lowers the contribution of other taxpayers
  - Fair distribution of wealth within a community
    - => may taxation be used for redistributive purposes?
  - The rule of law, the legitimation to determine its content and the international coordination of sovereignties to counter aggressive tax planning



**FORMAL COMPLIANCE WITH NATIONAL SYSTEMS IS  
INSUFFICIENT TO AVOID INTERNATIONAL TAX  
UNFAIRNESS:**

**THE GREY ZONE BETWEEN LEGITIMATE TAX  
SAVINGS AND INTERNATIONAL TAX AVOIDANCE**

**=> THE NEED TO TACKLE AGGRESSIVE TAX  
PLANNING**



## From international tax avoidance to aggressive tax planning

- Formal compliance with each positive tax system has secured international tax planning to keep clear off the boundaries of tax avoidance
- Different rules on tax avoidance across the systems, but also their constant upgrading to catch new forms of undesirable tax savings achieved through international tax planning schemes
- The new dimension: formal compliance is not sufficient to determine the boundaries of legitimate tax planning
- Tax planning may no longer allow taxpayers yield payment of little or no taxes
- Aggressive tax planning: paying little or no taxes by exploiting the loopholes and inconsistencies across tax systems is unacceptable
- A moral dimension for the fight against aggressive tax planning?



# The new boundaries for measures against aggressive tax planning

- European Union law: general incompatibility of all measures aimed at preventing tax avoidance due to their overkill and disproportionate effects
- Global fiscal transparency gives tax authorities a better insight of schemes entered by taxpayers
- Broader category: look across the borders as to the taxation in the other countries. How far can this go? See example of tax incentive given by developing country, action 5 BEPS and right to respect of international tax policy of developing country
- Measures against international tax planning cannot turn into instruments for pursuing capital export neutrality.
- Reshaping anti-avoidance measures into effective measures to counter aggressive tax planning: the example of CFC legislation





# DOES INTERNATIONAL TAX FAIRNESS REQUIRE TO GO BEYOND THE RULE OF LAW?

...of course not, but...it requires to go beyond mere formal compliance with one legal system.



## The relation between global fiscal transparency and fairness

- The path to international tax fairness started in the late 1990s with the fight against harmful tax competition
- The 2009 London G20 declared the death of tax havens and the general commitment to pursue global fiscal transparency
- Global fiscal transparency as the gateway to a new approach to tax avoidance
- Dharmapala and Fuest (2011): international tax planning keeps using tax havens for multinational enterprises to significantly reduce the tax burden and obtain unintended benefits by structuring business activities across the borders
- The path to the BEPS report and the fight against aggressive tax planning
- The political endorsement by the St. Petersburg G20 (2013): the era of global fiscal transparency sheds light on the darkness within which formally compliant international tax planning has thrived across the loopholes
- BEPS and the other countries: the meeting of 26-27.9.2013 and the future challenges



## Towards international tax fairness: from tax avoidance to aggressive tax planning

- International tax fairness is desirable and requires a reconsideration of tax sovereignty in the global scenario with a view to achieving stronger coordination
- Countering loopholes between the exercise of taxing jurisdictions can achieve global consistency in the levying of taxes and secure international tax fairness
- The international tax community acts together: from countering tax avoidance to countering aggressive tax planning (BEPS project as an encouraging starting point)
- Each player genuinely commits to fair playing:
  - Taxpayers undergo taxation of their economic activities in a genuine way, i.e. where substance of their business is
  - States consistently exercise their tax jurisdictions and stop the beggar-thy-neighbour strategies



# International tax coordination is THE solution to achieve a fair global tax outcome

## Some Issues:

Does it bring national sovereignty in tax matters to an end?

Is there a legitimation to catalyse international tax coordination?

Which entity or group of countries have such legitimation?

How broad can this mandate be?



## On fairness and its international tax dimensions

- Tax fairness requires also fair allocation of taxing rights with developing countries
- 2 issues: fair allocation of taxing rights and fair contribution of international players
- Fair allocation of taxing rights and the connecting factors to taxing jurisdiction
  - interjurisdictional allocation of taxing powers => the impact of worldwide taxation on the allocation of wealth among countries (relations with developing countries)
  - respect international tax policy decisions of other countries, in particular when wealth is produced on the territory of capital importing countries
  - secure a fair share of taxation in global tax law for all countries
  - fairness in international taxation and tax competition
- MNEs and cross-border tax minimization: a fairness issue vis-à-vis other taxpayers
  - the traditional dimension of international tax planning and tax avoidance
  - The need for an international concept of tax fairness for business



## For a global dimension of international tax fairness: general issues

- Global tax law demands to go beyond formal compliance in a positive system to achieve international fairness
- A global dimension of international tax fairness may recuperate the validity (Habermas) of international tax rules if introduced with broad consensus of States
- International tax coordination can steer the world towards global fiscal transparency and effectively counter aggressive tax planning in such context
- International tax coordination transforms national tax sovereignty and positive tax systems into mirrors reflecting foundation values of taxation for States and taxpayers
  - State should consistently exercise their tax jurisdiction and refrain from attracting taxpayers with smart measures aimed at facilitating unintended advantages across the borders
  - Taxpayers should contribute to fund the budget of the State(s) with taxing sovereignty having a genuine jurisdiction upon them



## For a global dimension of international tax fairness: specific issues

- International tax coordination can be achieved also without a hard law approach through voluntary compliance by States (consistent exercise of their tax jurisdiction) and taxpayers (refrain from undergoing no-taxation policies)
- International tax fairness also requires a fair allocation of taxing rights among the States, including in particular developing countries and their right to have their international tax policy preserved at the global level
- The EU supranational coordinated or harmonized structure of tax law can be a good laboratory for international tax fairness: against the exploitation of tax disparities



Muito obrigado pela sua atenção!

Thanks for your attention!

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