

# The Integrity of the Tax System after BEPS: A Shared Responsibility

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## Abstract

The international tax system is the result of the interaction of different actors who share the responsibility for its integrity. States and multinational corporations both enjoy to a certain extent freedom of choice with regard to their tax behaviour – which entails moral responsibility. Making, interpreting and using tax rules therefore is inevitably a matter of exercising responsibility. Both should abstain from viewing tax laws as a bunch of technical rules to be used as a tool without any intrinsic moral or legal value. States bear primary responsibility for the integrity of the international tax system. They should become more reticent in their use of tax as regulatory instrument – competing with one another for multinationals' investment. They should also act more responsibly by cooperating to make better rules to prevent aggressive tax planning, which entails a shift in tax payments from very expert taxpayers to other taxpayers. Here, the distributive justice of the tax system and a level playing field should be guaranteed. Multinationals should abstain from putting pressure on states and lobbying for favourable tax rules that disproportionately affect other taxpayers – SMEs and individual taxpayers alike. Multinationals and their tax advisers should avoid irresponsible conduct by not aiming to pay a minimalist amount of (corporate income) taxes – merely staying within the boundaries of the letter of the law. Especially CSR-corporations should assume the responsibility for the integrity of the tax system.

**Keywords:** flawed legislation, tax privileges, tax planning, corporate social responsibility, tax professionals

## 1 Introduction

In recent years international tax law has become a hotly disputed topic. The public outcry over the aggressive tax planning practices of multinational enterprises and the lack of effective rules and cooperation between states to counter these practices with fair and effective rules shows deep concerns about the integrity of the international tax system. Rebuilding public trust in the integrity of the tax system has thus become an urgent matter. OECD's Base Erosion and Profit Shifting (BEPS) Project proposes improvements in order to ensure more

responsible fiscal behaviour of both governments and multinationals to bring the eroding of the integrity of the (international) tax system to a halt.

BEPS aims at improving the integrity of the internal tax system. This integrity has been hollowed out by both multinationals and states. On the one hand, multinationals gaming the tax system, minimising their tax liability, erode this integrity. They do not pay their share though everyone, both citizens and companies, should contribute to the financing of public expenditure everyone benefits from. On the other hand, the rules of the game are set by countries competing for multinationals' investment by lowering corporate tax costs. Both multinationals and states compete at an international level.

Who is to be held responsible for the erosions of the tax system? Multinationals or states? This is the question to be answered in this article. It is a moral question for taxation is a moral phenomenon, as will be argued. Both actors probably interact. Of course, other actors play a role as well. Thus, the integrity of the tax system may appear to be a shared responsibility, but, if so, are these actors equally responsible?

The societal relevance of this issue is out of question. Taxes are the main funding for society and for individual liberty to flourish. Moreover, they are an important means to enhance distributive justice. But the issue at stake is also of theoretical relevance. Tax theory does not provide yet a detailed and balanced view on the question of moral responsibility.

As for methodology, the research question calls for an interdisciplinary approach. This article places itself at the intersection of tax law, fiscal sociology, (business) ethics, economics and legal philosophy. Academic literature is the primary source but incidentally reference will also be made to reports and non-academic articles.

This article is structured as follows. First the concept of responsibility will be applied in tax context. It will appear that both states and multinationals, and their advisers, make choices that affect the international tax system. Freedom of choice, however, entails moral responsibility. They are therefore both responsible for the integrity of the tax system – although states are primarily responsible. Then the behaviour of states and multinational corporations will be evaluated from this perspective on responsibility. States should in a cooperative effort improve the tax system. Companies endorsing corporate social responsibility, and their tax advisers, should avoid acting irresponsibly and therefore not

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engage in aggressive tax planning. The argument will be wrapped up in a conclusion.

## 2 Integer Taxation: A Shared Responsibility

### 2.1 Introduction

The public outcry over aggressive tax planning and the failure of the international tax system regards the distribution of the tax burden over members of society. Many (corporate) taxpayers command the kind of resources that enable them to plan their taxes in a very sophisticated and successful manner – they pay hardly any (income) taxes at all, thus shifting the tax burden to less expert taxpayers. The tax rules put in place by states are apparently unable to prevent this kind of behaviour. Thus one of the fundamental principles of the tax system, i.e. distributive justice, is seriously impaired. The notion of distributive justice entails that society is seen as responsible for the condition of the less well of and capable of changing it. Distributive justice calls on the state – as an intermediary – to guarantee that ‘everyone is supplied with a certain level of material means.’<sup>1</sup> The tax system serves distributive justice. According to the legal philosopher Dworkin the ideal of integrity in law requires a commitment to a coherent set of principles, ‘the promise that law will be chosen, changed and developed and interpreted in an overall principled way’.<sup>2</sup> This also goes for tax law, which therefore should meet the requirement of principled consistency.<sup>3</sup> Unfortunately, it does not, for both legal principles and non-legal principles are often seriously neglected. No wonder, trust in the integrity of the tax system, governments and multinationals is under pressure. This illustrates the foundational nature of tax.

Taxes are paid for the government to secure the functioning of the market and achieve various public goods and services sustaining society. They are payments to the state on behalf of society. Indeed as Thomas Piketty writes: ‘Without taxes, society has no common destiny, and collective action is impossible.’<sup>4</sup> Thus taxation is a moral phenomenon.<sup>5</sup> There are other dimensions, of course, be it economic, legal, political or democratic, to name some, but the moral dimension cannot be dis-

pensed with. Therefore, the behaviour of the law-making and law-applying institutions – legislature, tax administration and courts – that are involved in taxation affects the moral dimension. These actors are responsible for the design and actual workings of the tax system. Their behaviour needs ethical evaluation. The same seems to go for the behaviour of (corporate) taxpayers. Tax evasion and aggressive tax planning entail evidently not contributing a fair share to society. This suggests that the issue of responsibility is at stake.

The integrity of tax law and tax systems is thus of great importance to society. Law makers should therefore act responsibly with regard to tax law. Responsible law making entails adequate rules. As Fuller argues, there must be rules in order to guide human conduct. This minimal requirement of the ‘generality of law is a bulwark against arbitrariness’.<sup>6</sup> The legislature, however, should strive for more than a minimum level of legality. As Machiavelli maintained, laws can man make good (though not perfect).<sup>7</sup> Skinner comments on this famous idea: ‘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>8</sup> An integer system of tax laws thus makes people behave better than a system seriously lacking in fairness. However, there may be other actors bearing responsibility for international tax law, for corporations’ behaviour affect the tax burden of other taxpayers. This raises the question whether there is room for responsibility with regard to this (indirect) interaction with other taxpayers. Note that states by way of taxation determine what citizens have to contribute to the resources needed to sustain society, that is, what they owe to their fellow citizens.

In this context, responsibility is a moral rather than a legal concept. First, the relationship between law and morality has therefore to be explored. Second, the concept of ‘moral responsibility’ should be elucidated – and its relationship with freedom.

### 2.2 Law and Morality

The legal system is distinguished from ethics. The legal system can be seen as a formal public system containing norms regulating (corporate) citizens’ behaviour; it governs behaviour affecting other persons.<sup>9</sup> Like the legal system, morality regulates individuals’ behaviour, it addresses not only the question as to how one ought to live as an individual, but also how individuals should interact with other individuals. Morality is also a public system, in the sense that there is shared understanding

1. S. Fleischacker, *A Short History of Distributive Justice*, Cambridge (MA) / London: Harvard University Press (2004), at 4.
2. R. Dworkin, *Law's Empire*, Cambridge (MA) / London: Harvard University Press (1986), at 300-1.
3. Cf. E.J. McCaffery, ‘Tax’s Empire’, 85 *The Georgetown Law Journal* (1996), at 107.
4. T. Piketty, *Capital in the Twenty-First Century*, Cambridge (MA) / London: The Belknap Press of Harvard University Press (2014), at 493.
5. P. Sloterdijk, *Die nehmende Hand und die gebende Seite*, Berlin: Suhrkamp Verlag (2010). One of the interviews in the book (at 141-5) is titled ‘Steuern sind das zentrale moralische Phänomen unserer Zivilisation.’ Cf. J.L.M. Gribnau, ‘Voluntary Compliance Beyond the Letter of the Law: Reciprocity and Fair Play’, in B. Peeters, J.L.M. Gribnau & J. Badisco (eds.), *Building Trust in Taxation*, Cambridge: Intersentia (2017).

6. L.L. Fuller, *The Morality of Law* [1964], New Haven (CT) / London: Yale University Press (1977), at 46-9.
7. N. Machiavelli, *Discourses on Livy*, Chicago / London: Chicago University Press (1996), I.iii, at 15.
8. Q. Skinner, ‘The Republican Ideal of Political Liberty’, in G. Bock, Q. Skinner & M. Viroli (eds.), *Machiavelli and Republicanism*, Cambridge: Cambridge University Press (1990), at 305.
9. The legal philosopher Hart called these rules ‘primary rules of obligation’. A system of laws consists also of so-called secondary rules that provide for the authoritative recognition of legal rules and for changing the rules, and adjudicating ‘disputes as to whether an admitted rule has or has not been violated’; H.L.A. Hart, *The Concept of Law*, Oxford: Oxford University Press (2012), at 93.

and knowledge about how one should act, and that it is not irrational to be guided and judged by that common morality. This informal public system includes moral rules, principles, values, ideals and virtues, which, however, may entail conflicting and competing demands. Unlike the legal system, morality is an informal public system. There are no judges who have the authority to decide on moral conflicts nor formal decision procedures that provide unique and definite answers to all moral questions.<sup>10</sup> Therefore, though law is one thing, and ethics another, they are connected.

The tax rules should grosso modo reflect public morality, but there is no identicalness between the two. The legal system will never be able to exhaustively codify public morality – neither should it strive for that. Ethical responsibilities are thus not exhaustively codified in the law. The same goes for the tax rules, which have to reflect by and large the prevailing views (public morality) with regard to the fair distribution of the tax burden and the ways tax can be used to enhance the lives of the members of society. These legal rules should also be established and applied in conformity with fundamental legal values – which reflect important social and moral values.

Legal responsibilities reflect a view of ‘codified ethics’ in the sense that they embody basic notions of fair practices as established by law makers.<sup>11</sup> The difference between the existing tax system and morality opens a space that offers many possibilities for action. Thus the actors involved in the tax system enjoy a certain freedom of choice with regard to the design, interpretation, application and use of tax rules. The choices may affect, enhance or undermine the integrity of the tax system vital for a viable society. This means that moral responsibility begins where actions are not completely determined by the tax law, which is often the case, for freedom entails responsibility – taxation being a moral phenomenon.

### 2.3 Freedom and Responsibility

Freedom and responsibility are interdependent. Persons are morally responsible for harms (including unjust benefits) they cause, which are seen as blameworthy, or morally faulty. The wrongdoing causes people to respond negatively. When a rational person could have avoided the blameworthy result by making an appropriate choice, this makes him or her responsible. Thus as Lucas states, responsibility presupposes ‘that there are agents, that agents act for reasons, and that it is up to an agent whether he acts or not.’<sup>12</sup> Persons may lack the particular knowledge requisite for doing otherwise, and, therefore, for being responsible.

10. Cf. B. Gert, *Morality: Its Nature and Justification*, Oxford: Oxford University Press (1998), at 11. Cf. J.L.M. Gribnau and A.-G. Jallai, ‘Good Tax Governance and Transparency: A Matter of Ethical Motivation’, *TLS Working Paper*, 18 May 2016: 2-3.

11. A.B. Carroll, ‘The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders’, *Business Horizons* (July-August 1991) 39-48, at 41.

12. J.R. Lucas, *Responsibility*, Oxford: Oxford University Press (1993), at 12.

Besides this ‘cognitive condition’, one may discern the ‘freedom-relevant condition’, for moral responsibility ‘requires the freedom to pursue alternative courses of action.’<sup>13</sup> Not being in control over an action excuses the person. Moral responsibility presupposes a choice between two events, both of which one has the power to bring freely about. Freedom and capability are necessary for responsibility. ‘But actually having the freedom and capability to do something does impose on the person the duty to consider whether or not to do it, and this does involve personal responsibility.’<sup>14</sup> Responsible behaviour then is behaviour that takes into account the interests of others trying to avoid bringing (disproportionate) harm to others. Clearly, without any reasonable excuse disproportionately impacting or violating the interests of others amounts to irresponsible behaviour. To my mind, there is a bandwidth between perfectly responsible behaviour and clearly irresponsible behaviour. Reasonable people may disagree on the qualification of behaviour within a certain range. However, there will be a general consensus that behaviour crossing a certain lower limit must be qualified as irresponsible. This is for example the case when a company’s aggressive tax strategy policy is completely disembedded from the general business strategy, turning the tax department into a profit centre.

Are multinational corporations different from individuals in this respect? In other words, is responsibility restricted to human being rather than legal actors? I will come back to this question in Section 5.

### 2.4 Tax: Shared Responsibility

This idea of moral responsibility can be applied to fiscal actors. Legislatures have a certain freedom to choose for which policies they want to use the tax system. They make up their minds in a deliberative process. Of course, they should not violate human rights and respect international treaties. However, in many areas they enjoy much freedom to design the tax system according to their (policy) ends. The European Court of Justice, for example, leaves legislatures a wide margin of appreciation when testing (technical aspects of) tax statutes against the principle of equality.<sup>15</sup> Tax legislation leaves tax administrations a certain freedom. Tax administrations face choices when interpreting the tax law and enjoy discretion with regard to the way the tax law is enforced.<sup>16</sup> The same goes – mutatis mutandis – for tax courts supervising the tax administrations and checking the legislative power. With regard to (corporate) taxpay-

13. J.M. Fischer and M. Ravizza (ed.), *Perspectives on Moral Responsibility*, Ithaca (NY): Cornell University Press (1993), at 8.

14. A. Sen, *Development as Freedom*, New York (NY): Alfred A. Knopf (2000), at 284.

15. ECtHR 22 June 1999, Appl. No. 46757/99, *Della Ciaja/Italy*, BNB 2002/398, Cf. J.L.M. Gribnau, ‘Equality, Legal Certainty and Tax Legislation in the Netherlands: Fundamental Legal Principles as Checks on Legislative Power: A Case Study’, 9 *Utrecht Law Review* 2 (2013), at 64; <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2244793](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244793)>.

16. Cf. H. Gribnau, ‘Horizontal Monitoring: Some Procedural Tax Law Issues’, in R. Russo (ed.), *Tax Assurance*, Deventer: Kluwer (2015), at 194-5.

ers, as stated earlier, tax rules are in many ways indeterminate and therefore a matter of choice within the boundaries of the law (see Section 6.5). Especially multinational corporations enjoy much freedom in this respect. The behaviour of all these actors has an impact on the financial resources of the state sustaining society and the way in which the tax burden is spread over the citizens (distributive justice).

All these actors, legislatures, courts, tax administrations and taxpayers, enjoy a degree of freedom and thus can be held responsible for the integrity of the tax system. This integrity is a matter of shared responsibility. Of course, the primary responsibility lies with the state(s), i.e. the legislature(s), for in a democratic state the legislature represents the people, thus being authorised to set the rules of the game. Their responsibility is to establish fair and effective legislation. It is up to the tax authorities to apply and enforce the tax rules set by the legislature. The courts provide legal protection to taxpayers in case of tax disputes – an essential part of any integer tax system. And last but not least, taxpayers bear responsibility for integrity of their tax systems. If they evade or completely minimise their tax payments, government would lack the financial means essential to sustaining society and thus society would be at risk. Though the law should be equally applied to all; some taxpayers manage to escape their obligations by searching every nook and cranny of the tax system. Thus, for some (corporate) taxpayers to pay taxes becomes a matter of choice. This may have dire consequences, as Williams observes: ‘If the system is seen by the general populace as to some extent optional, and open to “abuse” by those who can afford to pay for sophisticated tax advice, then this may engender social discord and discourage compliance by other taxpayers.’<sup>17</sup>

To conclude, the integrity of the tax system is a matter of shared responsibility, even though it is asymmetric. The fact that the legislature has to advance the general interest, whereas taxpayers may advance their own interests, accounts for this normative asymmetry. In the following sections, I will deal with the way tax legislature(s) and (corporate) taxpayers – and their tax advisers – handle their responsibility for the integrity of the tax system.

## 3 States and Their Responsibility

### 3.1 Introduction

As stated earlier, the legislature had the primary responsibility to establish a fair and effective system of taxation. The legislature sets out the total amount of tax to be paid by the members of society, and allocates the payments to the members of society. Hence, the legislature must determine the fair share taxpayers have to

contribute. However, once the legislature has created this legal obligation and translated in legal written rules, the rules will inevitably appear to be imperfect, ambiguous, lagging behind societal, economic and technical developments and taxpayers’ undesirable use of legislation,<sup>18</sup> and so on. The letter of the law may diverge from the spirit of the law.<sup>19</sup> The legislature, of course, has the primary responsibility for narrowing the gap between the letter of the law and the spirit of the law. With regard to the international taxation, states should cooperate to restore the integrity of the international tax system.<sup>20</sup>

Tax legislation should be based on an impartial balancing of the different interests involved. The legislative process should be transparent and unbiased. Interest-groups lobbying for favourable tax rules are influential actors in the decision-making process. Corporate lobbying is often very effective, which may result in tax privileges at the expense of other taxpayers. The prevailing political view on taxation as a regulatory tool, to realise all kind of policy goals, increases the risk of the introduction of privileges – to the prejudice of the integrity of the tax system. The tax system thus stimulates the adoption of a calculating attitude in which rules are seen as opportunities to pay less tax. An ethical attitude, which sees paying tax as contributing to the sustenance of society in a fair way shared by all, is crowded out.

States also use tax vying with each other for investments that companies make within their jurisdiction. They expect that these investments will generate employment and tax revenues.<sup>21</sup> Tax competition has become part and parcel of this regulatory competition. Governments competing for investment take into account the interests of multinational corporations (MNCs) trying to meet their demand for favourable tax rules. Harmful competition results in very favourable tax regimes for corporate taxpayers – shifting the tax burden to other taxpayers. Again a rule-focus is created: tax rules are seen as instruments to lower corporation’ tax liability. With regard to international taxation, states should therefore

17. D.F. Williams, *Tax and Corporate Social Responsibility* (2007), at 4; <[www.kpmg.co.uk/pubs/Tax\\_and\\_CSR\\_Final.pdf](http://www.kpmg.co.uk/pubs/Tax_and_CSR_Final.pdf)>.

18. Cf. OECD, *Study into the Role of Tax Intermediaries*, Paris: OECD (2008), at 87: ‘the often lengthy period between the time schemes are created and sold and the time revenue bodies discover them and remedial legislation is enacted.’

19. Here I use the term ‘letter of the law’ as shorthand with regard to tax planning that exploits the technicalities or differences between tax systems by making use of ‘a bewildering variety of techniques (e.g. multiple deductions of the same loss, double-dip leases, mismatch arrangements, loss-making financial assets artificially allocated to high-tax jurisdictions)’; P. Piantavigna, ‘Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, Despite Linguistic Discrepancies’, 9 *World Tax Journal* 1 (2017), 47-98, at 52.

20. Cf. J. Freedman, ‘The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility’, in J. Holder and C. O’Cinneide (eds.), *Current Legal Problems*, New York (NY): Oxford University Press (2006), at 387: ‘Government has a responsibility to create the right conditions and culture for a generally tax-compliant system which would benefit the entire legitimate business community in keeping costs down and spreading tax burdens fairly.’

21. Cf. M. Koenig-Archibugi, ‘Global Regulation’, in R. Baldwin, M. Cave & M. Lodge (eds.), *The Oxford Handbook of Regulation*, Oxford: Oxford University Press (2010), at 413-16.

cooperate to restore the integrity of the international tax system.

### 3.2 Tax Legislation Too Responsive to Business Interests

#### 3.2.1 Tax Lobbying

Legislative decision-making requires a non-partisan and impartial attitude on the part of the legislatures. Competing interests should therefore be balanced in a reasonable way in order to uphold the integrity of the tax system. However, often, the legislature is too responsive to private or interest-group pressure resulting in legislation lacking impartiality.<sup>22</sup>

This already was one of Adam Smith's concerns: 'The cruellest of our revenue laws, I will venture to affirm, are mild and gentle, in comparison of some of those which the clamour of our merchants and manufacturers has extorted from the legislature.'<sup>23</sup> The economist Walter Bagehot elucidated this concern at the centenary of Adam Smith's *The Wealth of Nations*. The European governments of the time consulted producers. 'But, unhappily, the producer was just the wrong person to consult. What he wanted was a high price for his article, and a monopoly of the market in which to sell it, and the laws he recommended were inevitably framed, more or less, to obtain his wishes.' Consequently, these laws worked badly, because they were framed in the wrong person's interest. In this way, 'the cat had the custody of the cream.'<sup>24</sup>

Consultation is one thing, (actively) lobbying another. Lobbying is the presentation of group's point of view and usually aimed at getting the group's perspective across the legislators and influencing legislative decisions, i.e. to vote their way. They can play a positive role by supplying information to the legislators who then have to assess the credibility of information and cross-check it with information supplied by other lobbyists or interest groups. 'Lobbyists provide policymakers with research, draft-legislation and pass up-to-the-

minute information.'<sup>25</sup> By way of lobbying corporations participate in the public policy making process. This kind of corporate political activity is part of the democratic 'engagement of individuals – and groups of individuals such as corporations – in the full and free expression of their views on matters of public policy'.<sup>26</sup> Lobbyists induce public officials and legislators to adopt a particular position on an issue that benefits business. Business lobbyists will also try to draft legislation containing tax breaks, tax incentives and the like. However, everyday lobbying methods may amount to 'pressure tactics'.<sup>27</sup>

Thus, the democratic legitimacy of tax laws is at risk, for as Piketty argues: 'No one has the right to set his own tax rates.'<sup>28</sup> Influential interest groups, however, may hijack the legislative process to advance their own interests at the expense the general interest. Powerful lobbies may obtain privileges to the detriment of the integrity of the tax system.

#### 3.2.2 The Visible Hand and Corporate Tax Privileges

Corporations are among the most influential lobbyists. Asymmetry of money and expertise enables business lobbyists to influence much of the legislative agenda. Political philosopher Wolin even argues that 'in matters of public policy and governmental decision-making, (corporate) lobbying demonstrates how little the actions of the electorate matter'.<sup>29</sup> The notion that business and government are partners, sharing the same mission, threatens governments' sovereignty over corporations for the latter 'stand next to, rather than under democratic governments'.<sup>30</sup> Just as Adam Smith warned that consultation may result in laws working ill, lobbying by the

22. Tax advisors and their professional organisations often advise the legislature on technical issues in drafting legislation. According to the UK Public Accounts Committee this may give rise 'to a perception that they have an influence on the formulation of tax policy that smaller businesses do not have.' Though this assistance may improve the quality of tax legislation, the Committee is 'concerned that the very people who provide this advice then go on to advise their clients how to use those laws to avoid tax; The (UK) House of Commons, Committee of Public Accounts, *Tax Avoidance: The Role of Large Accountancy Firms*, Forty-fourth Report of Session 2012-13 Report, together with formal minutes, oral and written evidence, London: The Stationery Office Limited (2013), at 5.

23. A. Smith, *An Inquiry in the Nature and Causes of the Wealth of Nations* [1776], Indianapolis (IN): Liberty Fund (1981) IV.viii.4, at 648. Cf. A. Smith, *Lectures on Jurisprudence*, Indianapolis (IN): Liberty Fund (1982), at 529.

24. R. Dudley Edwards (ed.), *The Best of Bagehot*, London: Hamish Hamilton (1993), at 37-8.

25. J. Madrick, 'How the Lobbyists Win in Washington', *New York Review of Books* (7 April 2016), at 50. He quotes Hall and Deardorff: 'Legislators...work hard primarily on behalf of the interests that can afford the high costs, not only of organizing and making campaign contributions, but of paying professional lobbyists and financing the organizations that support them.'

26. A. Stark, 'Business in Politics: Lobbying and Corporate Campaign Contributions', in G.G. Brenkert and T.L. Beauchamp (eds.), *The Oxford Handbook of Business Ethics*, Oxford: Oxford University Press (2009), at 501. Stark discusses the conflict between two ethical principles which should govern corporate political activity: government in which public officials are free from corruption, on the one hand, and robust political engagement of individuals and organisations, on the other.

27. W.N. Eskridge, P.P. Frickey & E. Garrett, *Legislation: Statutes and the Creation of Public Policy*, St. Paul (MN): West Publishing Company (2001), at 285-7. Cf. the warning issued by the Business Roundtable on behalf of 185 chief executives that the EU and its people risk a 'grievous self-inflicted wound' after the European Commission's ruling that Apple must pay back Ireland €13bn in taxes <<http://businessroundtable.org/resources/business-roundtable-letter-eu-heads-state-or-government-regarding-state-aid-investigations>>; see 'Apple tax ruling must be overturned, says US business group', *The Guardian*, 16 September 2016. A. Christians, 'Friends with Tax Benefits: Apple's Cautionary Tale', *78 Tax Notes International* (2015) 11 argues that this 'fiscal state aid' ruling 'is fundamentally an interrogation into what, if anything, governments can or should do to stop the strategic use of national tax systems to lure international trade and investment.'

28. Piketty, above n. 4, at 522.

29. S.S. Wolin, *Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism*, Princeton (NJ) / Oxford: Princeton University Press (2008), at 194.

30. J. Bakan, *The Corporation: The Pathological Pursuit of Power*, London: Constable (2005), at 108.

modern globalising corporation will result in laws ‘inevitably framed, more or less, to obtain his wishes’. As a result it is not the ‘invisible hand’ that guides the individual selfish actor ‘to promote an end which was no part of his intention’, as Adam Smith might seem to suggest.<sup>31</sup> On the contrary, it is the state’s hand very effectively guided by corporate lobbying. In both international and national settings, business can thus ‘influence both the substance of law and how it is enforced through lobbying and negotiating, introducing compromise and weakening control’.<sup>32</sup> Pressure from business (and wealthy citizens) and international (tax) competition has placed pressure on public services and governments’ capacity to regulate business activities.<sup>33</sup> Moreover, large corporations are often able to outsource risks as for example state support of banks in the wake of the financial crisis has shown. This boils down to corporations ‘demanding the socialization of their risks, so that public taxpayers can pay the costs of their business fiascos’.<sup>34</sup>

The serious effects on society of corporate lobbying and shaping government policy builds on the fact that most Western states use their extensive powers to promote and protect people’s welfare.<sup>35</sup> Indeed, government does more than creating trust on which market transactions depend by legal enforcement of contracts and (intellectual) property rights. The state is not merely fixing market failures – reigning monopolies, subsidising public goods, taxing negative externalities (through investment in education and infrastructure), etc. – so as to enable market forces to efficiently allocate resources. The state does even more than playing an active role in managing markets. The ‘state’s very visible hand’ takes on risk, shaping and creating new markets, as the economist Mazzucato maintains, ‘the state is a lead risk taker and

market shaper’.<sup>36</sup> She shows for example that without decades of research efforts and funding support of the federal government, there would not have products like the iPad and iPhone. ‘Apple has mastered designing and engineering technologies that were first developed and funded by the U.S. government and military.’<sup>37</sup> Of course, the state is expected to receive a return on investments by taxing the resulting profits. However, corporations’ aggressive tax planning frustrates this expectation.

The active role of the state, guided by corporate lobbying, includes legislating generous tax incentives, for example to foster innovation (R&D). Business lobbying for creating and preserving expenditures in the form of tax exemptions is often very effective. As a result, ‘the actual hand of government distributes corporate subsidies, tax breaks and the like’.<sup>38</sup> These tax privileges are the result of unchecked political bargaining power. Hence, as Wolin argues: ‘Arguments about taxation are, at bottom, arguments about the distribution of power.’<sup>39</sup> Consequently, lobbying erodes a level playing field, a necessary condition for fair competition. Hence, such tax privileges (tax breaks) are sometimes introduced that violate the principle of equality. These kinds of privileges, which are obvious violations of the impartiality requirement, can be labelled ‘naked preferences’: the distribution of resources or opportunities to one group rather than to another solely on the ground that ‘those favored have exercised the raw political power to obtain what they want’.<sup>40</sup> This lack of legislative impartiality goes at the cost of the principle of equality.

In short, tax policy appears to respond primarily to those with the resources to influence the policy makers. This applies to political decision-making with regard to taxation at a domestic as well as an international level. Critical scholars such as Christians argue that the system becomes increasingly unresponsive to legitimate policy goals and increasingly out of touch with justice. ‘Special interests consistently exert influence on tax policy discourse through their advisors and within a broad

31. Smith (1981), above n. 23, I, ii,12, at 26-7 and IV, ii,9, at 456 and A. Smith, *The Theory of Moral Sentiments* [1759], Indianapolis (IN): Liberty Fund (1976), IV.i.10, at 184-5. The metaphor of the invisible hand reflects the idea of providence as a secular translation of God’s will; N.O. Keohane, *Philosophy and the State in France: The Renaissance to the Enlightenment*, Princeton (NJ): Princeton University Press (1980), at 354.
32. D.J. McBarnet, ‘Corporate Social Responsibility Beyond Law, Through Law, For Law: The New Corporate Accountability’, in D.J. McBarnet, A. Voiculescu & T. Campbell (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge: Cambridge University Press (2007), at 45.
33. D. Tapscott and D. Ticoll, *The Naked Corporation: How the Age of Transparency Will Revolutionize Business*, Toronto: Penguin Canada (2004), at 184. Thus ‘many governments have willingly ceded power to free markets.’
34. B. Barber, *Jihad vs McWorld: How Globalism and Tribalism are Reshaping the World*, New York (NY): Ballantine Books (1996), at 28.
35. This goes also for the United States, often represented as a country with a history of minimum government. This however, ‘requires considerable imagination’; J. Gray, *False Dawn: The Delusions of Global Capitalism*, London: Granta (1998), at 105. S. Pincus, *The Heart of the Declaration: The Founders’ Case for an Activist Government*, New Haven (CT) / London: Yale University Press (2016), argues that the authors of the American Declaration of Independence already advocated a political programme for state-driven economic and social development. The Declaration was ‘a call for the creation of a powerful state that would actively promote the welfare of the people’ (at 134) – paid for by high (progressive) taxes.

36. M. Mazzucato, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths*, New York (NY): Public Affairs Books (2015), at 17.
37. Mazzucato, above n. 36, at 99.
38. Wolin, above n. 29, at 123. Cf. R.R. Reich, *Supercapitalism. The Transformation of Business, Democracy, and Everyday Life*, New York (NY): Knopf (2007), at 207: ‘regulations, subsidies, and tax breaks are justified as being in the “public interest” but are most often the products of fierce lobbying by businesses or industries seeking competitive advantage over one another.’
39. Wolin, above n. 29, at 56. For the influence of Labour-party donors and business owners on Labour’s policy with regard to tax breaks, see R. Brooks, *The Great Tax Robbery: How Britain Became a Tax Haven for Fat Cats and Big Business*, London: Oneworld Publications (2013), at 165-6.
40. C.R. Sunstein, *The Partial Constitution*, Cambridge (MA) / London: Harvard University Press (1993), at 25 and ‘Equality, Consistency, and Impartiality in Tax Legislation’, in J.L.M. Gribnau (ed.), *Legal Protection against Discriminatory Tax Legislation*, The Hague [etc.]: Kluwer Law International (2003), at 7-32.

spectrum of discrete and pooled capacities.<sup>41</sup> Christians argues that this is a governance problem, which must systematically be addressed in order to restore taxpayer trust. To her, transparency and accountability in policy making are part of the solution.

### 3.3 Tax Reduced to Regulatory Instrument

The primary function of taxation is to raise revenue for necessary governmental functions, such as the provision of public goods and services enabling society and markets to flourish. Second, there is the redistributive function, which is aimed at reducing the unequal distribution of income and wealth in order to enhance distributive justice. However, these two functions seem to be overshadowed by the instrumental or regulatory function, for politicians also see taxes as a potential regulatory tool. As Avi-Yonah writes, this third goal of taxation is ‘regulation of private sector activity by rewarding activities that are considered desirable (via deductions or credits) and deterring activities that are considered undesirable (via increased taxation).’<sup>42</sup>

In order to promote desirable behaviour to advance all kinds of economic, social, cultural and health policy goals, governments provide tax incentives, micromanaging the choices of taxpayer. Dutch tax law is notorious for its incentives (tax expenditures), mostly in the form of tax reductions, e.g. for commuting by bike, employee’s training, day-care centres, production of Dutch movies, research and development, ecologically sound investments or the letting of rooms by private persons. These tax incentives are deliberately introduced to stimulate taxpayers to act in a way that actually means paying less (or not more) tax. Tax increases and special levies provide disincentives to discourage taxpayers from engaging in practices deemed undesirable, such as smoking, alcohol consumption or environmentally polluting activities. Examples of disincentives employed include excises and environmental taxes.

Taxation is thus an overly cherished instrument in governments’ regulatory tool kit. The regulatory function is too frequently favoured thereby shirking the responsibility for the distributive justice and fairness of the tax system. However, there are other consequences that should also be of serious concern.

## 4 Effects of Irresponsible Tax Legislative Behaviour

### 4.1 Erosion of Internal Morality

The upshot of the instrumentalist attitude of the tax legislature is that taxpayers, citizens and business alike, are incentivised to take a calculating attitude towards tax.<sup>43</sup> They are seduced to mitigate their tax by carefully attuning their behaviour to the financial impact of (encouraging or discouraging) tax provisions – and in doing so to the legislature’s ends. Thus the legislature creates a good deal of tax planning. De Colle and Bennett aptly call this state-induced tax planning. ‘Citizens, small entrepreneurs and MNEs can avail of these tax benefits in the knowledge that they are not only legal, but actually welcomed by tax authorities, as they are in fact introduced by a legislative body.’<sup>44</sup> The legislature wishes them to behave in a certain way and this behaviour is rewarded with a lower tax liability. Thus, businesses may have a low effective tax rate because they make use of tax incentives (e.g. for R&D). However, measures promoting research and development (and innovation) may imply a risk of profit shifting for intangibles are highly mobile and can be easily be transferred from one country to another.<sup>45</sup> Moreover, sometimes tax legislation incentivises the use of devices that are highly artificial – ‘encouraging a culture of tax avoidance’.<sup>46</sup> Thus, legislatures fuel ‘the growth of tax avoidance culture by relying on the taxation system to deliver a variety of tax unrelated subsidies and economic stimuli and (...) to drive social policy’.<sup>47</sup>

Businesses can also engage in aggressive tax planning by exploiting the letter of the law or loopholes in tax incentives. Thus they re-engineer tax incentives for tax avoidance. Of course, not only businesses but also wealthy taxpayers deploy sophisticated techniques to exploit never intended tax breaks, exemptions, etc.<sup>48</sup>

This state-induced tax planning may not live up to the legislature’s intentions for taxpayers may overreact and

41. A. Christians, ‘Trust in the Tax System: The Problem of Lobbying’, in Peeters, Gribnau & Badisco, above n. 5, at 152. To her mind governments should move towards achieving these aims by supporting and contributing to global, open-access data resources and independent tax policy research in the public interest.

42. R.S. Avi-Yonah, ‘The Three Goals of Taxation’, 60 *Tax Law Review* 1 (2006-2007), at 23. The regulatory function may of course impair the other functions.

43. H. Gribnau, ‘Corporate Social Responsibility and Tax Planning: Not by Rules Alone’, 24 *Social & Legal Studies* 2 (2015a), at 230-31; <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2610090](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610090)>.

44. S. de Colle and A.M. Bennett, ‘State-induced, Strategic, or Toxic? An Ethical Analysis of Tax Avoidance Practices’, *Business & Professional Ethics Journal* 33 (2014) 1, at 53-82 (§ 3.1).

45. E. Gil Garcia, ‘The Effect of Anti-Avoidance Provisions Regarding the Promotion of Innovation: Considerations from a Tax Policy Perspective’, *Bulletin for International Taxation* (October 2016), at 583. Bearing in mind that R&D (&I) schemes and intellectual property regimes may give rise to a risk of base erosion and profit shifting she explores the different possibilities that are used to counter tax avoidance and aggressive tax planning, and noting their effect on fiscal measures that are designed to encourage technological innovation.

46. Freedman (2006), above n. 20, at 371.

47. H. Ordower, ‘The Culture of Tax Avoidance’, *Saint Louis University School of Law Legal Studies Research Paper No. 2010-06*, at 6.

48. For schemes devised as ‘a smoke screen for additional remuneration’ for foreign football players in the UK, see Brooks, above n. 39. He concludes, that as a result of this level playing field ‘British youngsters struggle to find places at the top level and the national team plumbs new depths of under-achievement’ (at 154). He labels this as ‘reverse protectionism’ (at 162).

underreact to new tax incentives due to, e.g. tax complexity and cognitive ability.<sup>49</sup> Overreaction, for example, may have far too big an impact on the treasury. The legislature often underestimates this budgetary impact and therefore often reacts by changing the tax provisions containing the ‘overused’ incentive in order to diminish the budgetary impact. Thus the legislature is permanently looking for optimisation of the use of the tax instrument. Benefits and costs are calculated, and rules deliberately designed and redesigned to influence taxpayer’s behaviour.

The widespread use of – often fiercely lobbied for – tax incentives is one of the major reasons for the ever-growing complexity of the tax system. Complexity goes at the expense of predictability. But also consistency in time is seriously lacking because of the all too frequent changes made by the legislature.<sup>50</sup> Thus legal certainty is seriously eroded, resulting in lower levels of compliance (sometimes uncertainty is even deliberately created to put off taxpayers).<sup>51</sup> Furthermore, important values such as consistency and transparency are treated in a stepmotherly way. Moreover, equality is at risk, for many taxpayers do not have the expertise to deal with tax complexity, which may negatively impact taxpayers’ perception of the distributive justice and fairness of the existing tax system.

Thus, the result of this feverish and instrumentalist legislative activity is that tax legislation regularly violates important legal values and principles, such as legal certainty, equality, neutrality and consistency. To my mind, the tax legislature would do well to show more respect for legal principles, for they constitute the ‘internal morality of law’.<sup>52</sup>

Legal principles are internal standards generated and developed by the legal system itself – although they are strongly influenced by (external) morality. They are thus intimately connected to society’s moral values, and society’s views on the integrity of the tax system.<sup>53</sup> Legislation that shows disdain for important legal and societal values does not command respect. Eroding the internal morality of the law may chip away at tax legislature’s legitimacy, and may produce taxpayers’ decreasing compliance.

#### 4.2 Crowding Out Ethics

As argued earlier, fundamental legal-ethical principles may be crowded out in the taxpayers’ decision-making process, such as the principle of equality and the ability-to-pay principle. These principles are enshrined in the

law, both for the legislature and for the taxpayer. Many tax provisions, however, establish a rule-based context to encourage and even control the behaviour of the taxpayers and the taxpayers will play with the rules. The focus of both legislature and taxpayer is on rules, not on ethical behaviour.

As a result, a dominantly rule-bound regulatory and compliance focus is likely to undermine a more principle-based ethical thinking. This may cause both actors to (consciously) ignore tougher issues that a more ethics-focused approach might demand.<sup>54</sup> Moreover, not only actual ethical thinking is undermined, but even the intrinsic motivation to take into account ethical considerations to comply with the law.<sup>55</sup>

Taxpayers’ tendency of viewing and using tax laws in a mechanistic, rule-based way is reinforced by the complexity and lack of transparency of the law. The resulting uncertainty about their legal rights and responsibilities incites taxpayers to carefully study the rules to improve certainty of their tax position and looking for opportunities to mitigate and even avoid paying their taxes.

In short, tax legislatures and taxpayers share a focus on rules. This mindset prevails in the interaction of these two fiscal actors. Tax statutes establish a rule-based context to control the behaviour of taxpayers and taxpayers will work around and play around with the existing rules.

## 5 International Tax Competition and Cooperation

### 5.1 Tax Competition: Narrow Self-interest vs. Responsibility

At an international level taxes are also used as policy instrument. Again, the state’s hand is very effectively guided by intense corporate lobby activity with the aim of ‘suspending competition between companies by inciting competition between locations competing for locations’.<sup>56</sup> Consequently, states use tax legislation to maintain and increase investment that companies make, which is expected to generate employment and tax revenues. In this way, states competing for investment take into account the interests of MNCs trying to meet their demand for favourable tax rules (in the lexicon, states and thus societies ‘become indistinguishable from cor-

49. J. Abeler and S. Jäger, ‘Complex Tax Incentives: An Experimental Investigation’, *CESifo Working Paper No. 4231*, 2013.

50. S. Steinmo, ‘The Evolution of Policy Ideas: Tax Policy in the 20th Century’, 2 *British Journal of Politics and International Relations* (5 May 2003), at 218.

51. Empirical research has found that continuous changes and complexity in tax law have a negative effect on the level of compliance; E. Kirchner, *The Economic Psychology of Tax Behaviour*, Cambridge: Cambridge University Press (2007), at 39.

52. Fuller, above n. 6, at 200-24.

53. H. Gribnau, ‘Not Argued From But Prayed To. Who’s Afraid of Legal Principles?’, 12 *eJournal of Tax Research* 1 (2014), at 203-6.

54. R.E. Berenbeim and J.M. Kaplan, *The Convergence of Principle- and Rule-Based Ethics Programs: An Emerging Trend*, The Conference Board, Executive Action Series (2007) 3.

55. B.S. Frey and R. Jegen, ‘Motivation Crowding Theory’, 15 *Journal of Economic Surveys* 5 (2002), at 594-5.

56. W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism*, (2nd edition), London: Verso (2017), at xvi.



porations'<sup>57</sup>). As a result 'the tax law market' organised by competition has increasingly affected the state and the choice of its tax policy. Such choices might regard the effective tax rates, the statutory tax rates or the tax structure as a whole.<sup>58</sup> This specific kind of regulatory competition capitalizes on and reinforces businesses' leaning towards tax planning. International tax competition is thus an important cause of the ever-growing complexity of tax rules, which leads to higher compliance costs for multinational corporations and the need for tax planning.

Corporations commonly do not object to this tax competition when it means low (effective) tax rates or other kinds of favourable treatment. Indeed, business lobbyists try to influence (domestic) tax regimes, and sometimes business leaders feel no qualms about point blank threatening (the leaders of) countries with 'adverse effect on foreign investment'.<sup>59</sup> This shows that the instrumental use of taxation has a hotly debated international component. As a result there is a fierce tax competition among states, a form of regulatory competition. The tax legislature seduces taxpayers to behave according to his ends and thus creates a good deal of tax planning. The tax legislature itself is strongly encouraged by business interests.

One of the hallmarks of globalisation is the increased mobility of undertakings and especially capital investments. Companies and entrepreneurs have to compete on a global scale and accordingly consider low tax costs an important factor in deciding where to set up undertakings and invest capital. States respond to this increased mobility. Many states try to compete with their tax system in order to attract economic activities from other states. States see corporation tax as an important instrument in this bid for economic activity; for example, lower corporate taxes might induce multinational corporations not to allocate their profits to other countries.<sup>60</sup>

This international tax competition forces national governments to search for an optimal mix of public goods and services on the one hand, and low tax costs on the other. Of course, such policy competition between national tax systems may lead to budgetary and tax efficiency, which in principle benefits everyone.<sup>61</sup> Nonetheless, tax competition may also be economically counter-productive. Tax incentives commonly used by states in order to attract investment and capital from abroad can often have harmful effects. Such special tax schemes as tax holidays, selective base or rate reductions, and tax breaks may be designed solely to undercut competition. Such harmful tax competition is a far cry from tax efficiency and healthy jurisdictional competition, and it leads to 'fiscal degradation' (excessive erosion of countries' taxable bases on such income),<sup>62</sup> unfair tax advantages for multinational corporations over smaller local enterprises, over-taxation of labour, and a radical reduction of public goods and services and negative consequences for distributive justice.<sup>63</sup>

## 5.2 OECD

Twenty years ago international organisations became acutely aware of the dangers of harmful tax competition. In May 1996, for example the Ministers of the Member countries of the Organisation for Economic Cooperation and Development (OECD) called upon the OECD to 'develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions and the consequences for national tax bases, and report back in 1998'.<sup>64</sup> This request was subsequently endorsed by the G7 countries, who pointed to the fact that globalisation was creating new problems in the field of tax policy. Tax schemes aimed at attracting financial and other geographically mobile activities, such as financial and other service activities, 'can create harmful tax competition between States, carrying risks of distorting trade and investment and could lead to the erosion of national tax bases'.<sup>65</sup>

In 1998, the OECD's Committee on Fiscal Affairs published a report on harmful tax competition. This report addressed tax havens and harmful preferential tax regimes, collectively referred to as harmful tax practices, in OECD Member countries and non-Member countries and their dependencies. The OECD report was intended to develop a better understanding of how these harmful tax practices 'affect the location of financial and other service activities, erode the tax bases of other countries, distort trade and investment patterns and undermine the fairness, neutrality and broad social

57. M. Dobbin, *The Myth of the Good Corporate Citizen: Democracy under the Rule of Business*, Toronto / New York (NY): Stoddart (1998), at 2. Cf. C. Derber, *Corporation Nation: How Corporations Are Taking Over Our Lives and What We Can Do About It*, New York (NY): St Martins Press (1998), at 45: 'Today, global companies pit entire nations against each other, putting overwhelming pressure on unions around the worlds to agree cuts in wages and benefits, and on governments to agree to cuts in corporate regulations and taxes.'

58. C. Peters, *On the Legitimacy of International Tax Law*, Amsterdam: IBFD (2014), at 55. International tax competition thus contributes to the transformation of the tax state to the debt state – that is, 'a state which covers a large, possibly rising part, of its expenditure through borrowing rather than taxation, thereby accumulating a debt mountain that is has to finance with an ever greater share of its revenue'; Streeck, above n. 56, at 72-3. He subsequently points at the impact of this transformation on distribution – favouring affluent citizens.

59. 'Apple tax ruling must be overturned, says US business group', *The Guardian*, 16 September 2016 <<https://www.theguardian.com/business/2016/sep/16/apple-tax-ruling-must-be-overturned-says-us-business-group>>. A true business leader might call this 'political crap.'

60. M. de Wilde, 'Tax Competition within the European Union – Is the CCCTB Directive a Solution?', *ELR* (May 2014) No. 1, at 25-8. For an in-depth study of the political dimension of corporation tax issues, see J. Snape, *The Political Economy of Corporation Tax: Theory, Values and Law Reform*, Oxford / Portland: Hart Publishing (2011).

61. Cf. F. Vanistendael, 'Fiscal Support Measures and Harmful Tax Competition', *9 EC Tax Review* 3 (2000), at 152-61.

62. C. Pinto, *Tax Competition and EU Law*, The Hague / London / New York (NY): Kluwer Law International (2003), at 11.

63. Cf. A.J. Menéndez, 'The Purse of the Polity', in E.O. Eriksen (ed.), *Making the European Polity: Reflexive Integration in the EU*, London: Routledge (2005), at 208.

64. Committee on Fiscal Affairs OECD, *Harmful Tax Competition: A Global Issue*, Paris: OECD (1998), at 8.

65. Communiqué issued by the Heads of State at their 1996 Lyon Summit, quoted in OECD (1998), above n. 6V4, at 8.

acceptance of tax systems generally. Such harmful tax competition diminishes global welfare and undermines taxpayer confidence in the integrity of tax systems.<sup>66</sup> International cooperation demands that governments establish a 'common framework within which countries could operate individually and collectively to limit the problems presented by countries and fiscally sovereign territories engaging in harmful tax practices'.<sup>67</sup>

Since then important steps have been taken to curb harmful tax competition – the BEPS-project being the most recent one. International cooperation to push back negative externalities is hampered by states' sovereignty though. Taxation is at the core of countries' sovereignty, but in my view sovereignty should not be exercised in an irresponsible way, for the interaction of domestic tax rules sometimes leads to gaps and frictions. 'When designing their domestic tax rules, sovereign states may not sufficiently take into account the effect of other countries' rules.'<sup>68</sup> Coordination thus requires not to exercise sovereignty in an irresponsible way.

### 5.3 EU

In the European Union, an intergovernmental organisation, harmful tax competition has also been a serious point of concern for quite a few years.<sup>69</sup> A major achievement was the adoption of a comprehensive package to tackle harmful tax competition by the ECOFIN Council on 1 December 1997.<sup>70</sup> This package was composed of three linked elements: the Code of Conduct for Business Taxation, measures to eliminate distortions in effective taxation of savings income, and measures to eliminate withholding taxes on cross-border payments of interest and royalties between associated enterprises. There is no scientific consensus on the theoretical definition of harmful tax competition and even 'empirical evidence is somewhat disputed by both economists and political scientists'.<sup>71</sup> However, with regard to the European Union (formerly the European Community; EC) Terra and Wattel argue that tax competition is commonly labelled harmful when member states merely damage each other's budget, no creation of economic

activity being at issue, but rather 'artificial cross-border shifts of activities (or at least profit-reporting for those activities), causing a tax loss for the EC as a whole'.<sup>72</sup>

In subsequent years, many steps have been taken to curb harmful tax competition. The EU Code of Conduct for Business Taxation was an early follow up.<sup>73</sup> More recently the European Commission resorted to the EU State aid provisions and proposed the Common Consolidated Corporate Tax Base (CCCTB) of which a relaunch is currently anticipated. In January 2016 the Commission published the Anti Tax Avoidance Package (ATAP).<sup>74</sup>

### 5.4 Responsibility: Self-Restraint and Cooperation

The foregoing shows that harmful tax competition is of serious concern to states. States thus shows awareness that their primary responsibility lies with improving the international tax system. Indeed, cooperation is needed to avoid suboptimal responses by individual states or even a race-to-the-bottom.<sup>75</sup> States will always be reluctant to act unilaterally for being a first mover may result in a competitive disadvantage. The European Commission, for example, recently pointed out that several 'features of the Netherlands' tax system can be used in structures for aggressive tax planning'.<sup>76</sup> Regulatory competition is a fact of life. Countries have the right to compete with each other to attract investments – which are expected to generate employment and tax revenues. However, they should exercise self-restraint by taking into account other countries' interests. Moreover, coordination is also in their own interest. Sovereign countries therefore betray their external and internal responsibility if they do not exercise self-constraint.

It is thus to be expected that the ensuing closer cooperation on the international and European level will result in more responsible law-making and better rules. OECD's BEPS project and the European Commission's ATAP initiative are creating a minimum standard that would make it possible to put a halt to excesses of tax planning. Thus states can be seen as collaboratively

66. OECD (1998), above n. 64, at 9.

67. OECD (1998), above n. 64, at 8. OECD, *Toward Global Tax Cooperation. Progress in Identifying and Eliminating Harmful Tax Practice*, Paris: OECD (2000) constitutes another fundamental step in OECD's fight against harmful tax competition. For recent developments, see M.F. Nouwen, 'The European Code of Conduct Group Becomes Increasingly Important in the Fight against Tax Avoidance: More Openness and Transparency is Necessary', 45 *Intertax* 2 (2017), at 138–49.

68. OECD, *BEPS Action Plan*, Paris: OECD (2013), at 9.

69. In a subsequent report, the Commission underlined the need for a group of high representatives of Member States which should achieve consensus on the tax measures to be considered harmful in the EU context and on the common criteria for the identification with an eye to the establishment of a 'code of good conduct.'

70. This package was based on a proposal put forward by the Commission: see Paper Towards Tax Co-ordination in the European Union – A Package to Tackle Harmful Tax Competition, COM(97) 495, 1 October 1997, and A Package to Tackle Harmful Tax Competition in the European Union, COM(97) 564 final, 5 November 1997. OJ No. C 2, 6 January 1998, at 1.

71. C.M. Radaelli, 'The Code of Conduct against Harmful Tax Competition: Open Method of Coordination in Disguise?', 81 *Public Administration* 3 (2003), at 522.

72. B.J.M. Terra and P. Wattel, *European Tax Law*, Deventer: Kluwer (2007), at 111.

73. See H. Gribnau, 'Soft Law and Taxation: EU and International Aspects', 2008 *Legisprudence* II/2, at 81–5. <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2445018](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445018)>.

74. See Communication from the Commission to the European Parliament and the Council, *Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater tax transparency in the EU*, 28 January 2016, COM(2016) 23 final; <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0023&from=EN>>.

75. Peters, above n. 58, at 58 points at the WTO provisions on subsidies as the legal framework that is in place to curb harmful tax competition.

76. European Commission, *Commission Staff Working Document Country Report The Netherlands 2016 Including An In Depth Review on the prevention and correction of macroeconomic imbalances*, Brussels, 26 February 2016 Swd(2016), at 44. 87 Final; <[http://ec.europa.eu/europe2020/pdf/csr2016/cr2016\\_netherlands\\_en.pdf](http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_netherlands_en.pdf)>. In a footnote, the EC refers to 'an overview of the most common structures for aggressive tax planning and the provisions (or lack thereof) necessary for these structures to work', viz. Ramboll Management Consulting and Corit Advisory (2016), 'Study on Structures of Aggressive Tax Planning and Indicators', *European Commission Taxation Paper No 61*.

engaging in legal engineering in the sense of creating and improving legal regimes or systems by taking away inconsistencies and loopholes – ‘for the benefit of society as a whole’.<sup>77</sup> Consequently, the integrity of the international tax system will gradually improve. Nonetheless, we should not be over-optimistic. A perfect, seamless international tax system is a utopian dream. Further improvements are possible, but tax systems by definition will always be imperfect and incomplete.<sup>78</sup> Moreover, mismatches (disparities or legal gaps) between the tax systems of various states will probably always exist. And with regard to (tax) treaties, treaty shopping, taking advantage of treaty rules, is not easily to be ruled out. The same goes for making use of low-tax jurisdictions. Therefore, whatever tax rules are in place, (corporate) taxpayers will always have some choice with regard to the applicable tax rules and their interpretation. However, as stated earlier, freedom of choice entails (moral) responsibility. Using tax rules therefore is inevitably a matter of exercising responsibility.

## 6 (Ir)responsible Corporate Tax Planning

### 6.1 Tax Planning: Law and Morality

OECD’s BEPS Project is about tax planning, aggressive tax planning.<sup>79</sup> But what exactly is the phenomenon called tax planning? Unfortunately, there is no universally accepted definition of tax planning, nor of aggressive tax planning.

Partly due to the excessive use of tax legislation as a regulatory instrument, taxation regards almost every aspect of human life. This may be labelled the ‘fiscalization’ of our existence. Taxpayers of course want to be in control of their financial affairs of which their (future) tax liability is an important part. Sound decision-making with regard to important life events, such as where to live and work, when to retire and where to carry on an enterprise, must take potential tax consequences into account. In one way or another, (corporate) taxpayers have to plan their tax affairs to plan their life or develop

their business strategy. As shown earlier, tax planning is often deliberately encouraged by tax legislation, accounting for a dynamic and reciprocal relationship between tax planning and tax legislation. Of course, not all tax planning is incentivised this way.

So tax planning is to a certain extent necessary to stay in control of one’s financial affairs because many (possible) actions have tax consequences – for example, taking into account the rules regarding the deductibility of mortgage interest when buying a house. In this sense ‘tax planning’ can be used as a morally neutral term, for tax planning is aimed at providing certainty with regard to an important part of our financial affairs. As stated earlier, corporate governance may require (corporate) tax planning in order to avoid double taxation in an international context.<sup>80</sup> Tax planning may even be aimed at compensating for unreasonable tax liabilities caused by arbitrary laws or (corrupt) tax officials – especially in developing countries.<sup>81</sup> Moreover, individuals and businesses share a tendency to use tax rules to lower their tax bill.

Hence, some tax planning is a common affair for taxpayers and calling for a nuanced approach. Nearly all taxpayers are to some extent tax planners, though the intensity, the aggressiveness of their tax savings activities, differs. Factors determining tax planning behaviour are, e.g. the attitude towards tax, opportunities to avoid, expertise and risk appetite.

Tax planning is thus a very broad term encompassing a continuum ranging from tax mitigation to aggressive tax planning (and may be even tax evasion). To conceptualise tax planning in this broad way is necessary because the conventional distinction made by lawyers between tax evasion and tax avoidance allows by definition for a legal rather than a moral evaluation of tax planning practices. Tax evasion is an illegal activity, involving intentional non-disclosure or concealment, be it fraudulent or not.<sup>82</sup> Taken in its widest sense, the concept of (legal) tax avoidance comprises ‘all arrangements to reduce, eliminate or defer a tax liability’.<sup>83</sup> A moral evaluation of tax planning practices requires broadening the scope of the concept ‘tax planning’ beyond a purely legal perspective, for law as a system of codified ethics is part of the (wider) public morality.

### 6.2 Tax Planning by Degrees

From a moral perspective, it may be useful to add the concepts of ‘tax mitigation’ and ‘aggressive tax planning’ to the legal concepts of ‘tax evasion’ and ‘tax avoidance’. Mitigation is aimed at lowering ‘one’s tax by adopting patterns of economic behaviour that are within the spirit of applicable tax legislation and that may even be

77. Cf. S. Douma, *Legal Research in International and EU Tax Law*, Deventer: Kluwer (2014), at 41. Cf. J. Smits, ‘Legal Engineering in an Age of Globalisation: Is There a Future for Jurisdictional Competition?’, in E. Ritaine-Cashin (ed.), *Legal Engineering and Comparative Law* tome 2, Genève: Schulthess (2009), 51-7, at 52. To Smits legal engineering as such can be seen ‘as the creation of legal structures that fulfil particular functional and practical purposes ... dealing with specific social problems by society as a whole’.

78. The international tax regime has become unfair for it is outdated, flawed, and arbitrary; M.F. de Wilde, ‘“Sharing the Pie” Taxing Multinationals in a Global Market’ (PhD-thesis, Erasmus University Rotterdam 2015), at 15. He develops an alternative framework for taxing multinational business proceeds in a global market.

79. For a critical discussion, see J.M. Calderón Carrero and A. Quintas Seara, ‘The Concept of “Aggressive Tax Planning” Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border between Legitimate and Illegitimate Tax Planning’, 44 *Intertax* 3 (2016), at 208-226.

80. R. Russo and J. van Trigt, ‘Corporate Governance and Taxes’, in R. Russo (ed.), *Tax Assurance*, Deventer: Wolters Kluwer (2015), at 39.

81. VBDO, *Tax Transparency Benchmark 2015*, Utrecht: VBDO (2015), at 11; <www.vbdo.nl>.

82. J. Hasseldine and G. Morris, ‘Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection’, 37 *Accounting Forum* (2013) 1-14, at 5.

83. J. Freedman, ‘Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle’, 4 *British Tax Review* (2004), at 335-6.

encouraged by government policy'.<sup>84</sup> It is not a term of art from a legal perspective, as Prebble and Prebble rightly state. It can be taken to mean 'reducing one's tax in ways that a governing statute clearly encourages or permits; for example, taking a deduction for a gift to charity'.<sup>85</sup>

Aggressive tax planning, on the other hand, is not a rather innocent affair. The European Commission defines aggressive tax planning as '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>86</sup> According to the OECD, aggressive tax planning involves 'a tax position that is tenable but has unintended and unexpected tax revenue consequences'. Thus, according to the OECD, 'tax legislation can be misused to achieve results which were not foreseen by the legislators'.<sup>87</sup> Such a position on tax is taken 'without openly disclosing that there is uncertainty whether significant matters in the tax return accord with the law'. It is added that 'sometimes, revenue bodies would not even agree that the law is in doubt'.<sup>88</sup> The adjective 'aggressive' reflects the 'acknowledgment that MNEs' tax avoidance strategies have become more and more sophisticated, pushing the boundaries of the legislation and exploiting any loopholes in tax laws'.<sup>89</sup> They thus engage in quite an extreme form of legal engineering (or 'creative lawyering'): 'the inconsistencies and loopholes of legal systems are exploited to provide perfectly legal benefits'.<sup>90</sup> The phenomenon of 'stateless income' is a well-known example of aggressive tax planning. Kleinbard describes it

as income derived for tax purposes by a multinational group from business activities in a country other than the domicile of the group's ultimate parent company but which is subject to tax only in a jurisdiction that is neither the source of the factors of production

through which the income was derived, nor the domicile of the group's parent company.<sup>91</sup>

Multinational corporations engaging in aggressive tax planning or on in tax sheltering typically see tax as a profit centre.<sup>92</sup> Thus, according to Kleinbard 'U.S.-domiciled multinational firms have become adroit at moving income that as an economic matter is earned in high-tax foreign countries to very low-taxed ones'.<sup>93</sup> The large investments of these multinationals in aggressive tax planning technologies are very cost effective because, as Kleinbard points out, 'they are unencumbered by any of the antiabuse rules to which non-U.S. multinationals domiciled in jurisdictions with better designed territorial systems might be subject'. In short, aggressive tax planning while remaining within the letter of the law boils down to gaming the international system of rules as much as possible in order to maximise tax benefits.

Thus, tax planning comes in different degrees. It may be very aggressive (or even fraudulent, though the term 'tax planning' is probably better applied to lawful behaviour only) but that need not be the case. Tax planning may entail tax avoidance when taxpayers are arranging their affairs in order to pay less than their due without for example avoiding double taxation. However, one has the right to structure one's tax affairs in a tax-efficient way. Therefore, one cannot dismiss every engagement in tax planning or tax avoidance as unethical out of hand. Consequently, the ethical assessment of tax planning needs careful evaluation, being a matter of degree. It is also a matter of responsibility. One should not exercise a right in an irresponsible way. The same goes for the right to structure one's tax affairs to mitigate the amount of tax to be paid. However, there comes a point where tax planning becomes irresponsible.

As long as mitigation or avoidance regards a relatively small amount of tax, there seems not that much reason to bother from an ethical perspective but when actions become legally contrived, a turning point is reached. As for example Judith Freedman argues, tax avoidance becomes 'reprehensible where the legal analysis deviates from the economic substance and this is the case regard-

84. Z.M. Prebble and J. Prebble, 'The Morality of Tax Avoidance', 43 *Creighton Law Review* 3 (2010), at 707.

85. R. Prebble and J. Prebble, 'Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study', 55 *Saint Louis University Law Journal* (2010), 21, at 22; <[www.slu.edu/Documents/law/Law%20Journal/Archives/Prebble\\_and\\_Prebble\\_Article.pdf](http://www.slu.edu/Documents/law/Law%20Journal/Archives/Prebble_and_Prebble_Article.pdf)>.

86. European Commission, *Recommendation on Aggressive Tax Planning*, C(2012) 8806 final, 6 December 2012, at 2. This recommendation addresses aggressive tax planning in the area of direct taxation.

87. OECD (2008), above n. 18, at 87. At 10 this study states that the term aggressive tax planning evolved from the term 'unacceptable tax minimization arrangements' which lacked a clear definition.

88. OECD (2008), above n. 18, at 87.

89. de Colle and Bennett, above n. 44 (§ 1.3). They are actually referring to 'aggressive tax avoidance'.

90. Smits, above n. 77, at 52 referring to Jeanneret-Druckman. To Smits legal engineering as such can be seen 'as the creation of legal structures that fulfil particular functional and practical purposes.' The activity of lawyers, accountants and other tax professionals to find the best legal solution to a particular problem can however become extremely and, indeed, aggressively focused on providing tax benefits. Cf. Douma, above n. 77, at 27-8 and 41.

91. E.D. Kleinbard, 'Through a Latte Darkly: Starbucks' Stateless Income Planning', *Tax Notes* (24 June 2013), at 1517-1518.

92. Making use of tax shelters – again a term with no universally accepted definition – can be classified as aggressive tax planning. Here, we see a difference in terminology; J. Braithwaite, *Markets in Vice, Markets in Virtue*, Oxford: Oxford University Press (2005), at 16: 'What Australians refer to as the market for aggressive tax planning, Americans refer to as the market for tax shelters.' Cf. M. Hanlon and J. Slemrod, 'What Does Tax Aggressiveness Signal? Evidence from Stock Price Reactions to News About Tax Shelter Involvement', 93 *Journal of Public Economics* 1-2 (2009), at 127, fn 4: 'Our use of the term refers to complex transactions used by corporations to obtain significant tax benefits probably never intended by the tax code; these transactions may not be illegal per se and their use, if detected, may trigger lengthy processes of IRS assessment and judicial appeal.' Cf. Calderón Carrero and Quintas Seara, above n. 79, at 209-10.

93. E.D. Kleinbard, "'Competitiveness'" Has Nothing to Do With It', *Tax Notes* (1 September 2014), at 1055.

less of the wording of the legislation in question'.<sup>94</sup> In short, tax planning aiming at the minimalising or even eliminating their tax liability becomes morally irresponsible.

### 6.3 Aggressive Corporate Tax Planning

The system of public goods and services paid for by taxes contributes to the success of businesses. In order to be competitive and profitable, companies rely on government to educate young people who may become valuable employees, to provide for infrastructure enabling workers to commute and efficient transport of goods, to spark innovation, encourage investment, enhance worker productivity, raise production standards, and foster the efficient use of scarce resources. Nonetheless, taxation is part of businesses' cost-calculation, tax planning being a means of saving in expenses. Corporations deftly play with the rules thereby sharing a rule-focus with the legislature. Complex and unclear rules are carefully studied to be gamed with by businesses, and in turn the legislature supplements the existing body of rules with even more rules to curb this gaming. Thus, international companies seek to eliminate or reduce their tax liabilities. In an international context multinational companies nowadays exploit 'areas where several tax systems must interact and the scope for tax arbitrage, playing the rules of one system off against another, is considerable'.<sup>95</sup> Tax authorities often respond by establishing detailed rules, targeting relatively specific acts. However, taxpayers may react by using the loopholes inevitably present in very specific tax laws. Globalising corporations put complex business structures in place, which are extremely difficult for tax administrations to monitor and control. The result is a downward spiral: 'A smorgasbord of rules engenders a cat-and-mouse legal drafting culture – of loophole closing and reopening by creative compliance,' according to Braithwaite.<sup>96</sup> Unfortunately, the legislature cannot keep abreast of the tax avoidance industry.<sup>97</sup> Moreover, it takes time to appreciate and respond to new tax avoiding structures; the resulting time-lag between detecting and legislating gives the aggressive tax planner a temporal advantage. Businesses may maintain that bending the rules may qualify as compliance, be it creative compliance with the letter of the law. Nevertheless, taxpayers may comply with (the letter of) the law, and still pay no tax at all. In this way, they totally undermine the rationale behind the words.<sup>98</sup> The essence of creative compliance is that it escapes the intended impact of the substantive law.

94. Freedman (2006), above n. 20, at 362.

95. J. Shaw, J. Slemrod & J. Whiting, 'Administration and Compliance', in Institute for Fiscal Studies (IFS) (ed.), *Dimensions of Tax Design: The Mirrlees Review*, Oxford: Oxford University Press (2010), at 1151.

96. Braithwaite, above n. 92, at 147.

97. Cf. C.D. Stone, 'Why the Law Can't Do It', in T.L. Beauchamp and N.E. Bowie (eds.), *Ethical Theory and Business*, Englewood Cliffs (NJ): Prentice Hall (1993), at 163.

98. D. McBarnet, 'When Compliance is not the Solution but the Problem: From Changes in Law to Changes in Attitude', in V. Braithwaite (ed.), *Taxing Democracy: Understanding Tax Avoidance and Evasion*, Aldershot: Ashgate Publishing (2003), at 229-30.

Hence, these taxpayers evidently do not pay any fair share of taxes at all. The right to structure one's affairs in a tax-efficient way is pulled across its moral boundaries; this clearly does not show any sense of responsibility vis-à-vis society for the obligation to contribute financially to society is ducked.

Very expert corporate taxpayers are apparently able to determine the amount of tax they are willing to pay. They are largely free to choose whether and how much tax they want to pay. This violates the ideal of democracy. As shown earlier, corporate lobbying accounts for tax legislation, which is laws inevitably framed to meet corporate demand. Moreover, many expert multinational corporations also work around and play around with the existing tax rules. The latter goes at the expense of public revenue in times of austerity and amounts to a shift of the tax burden to less expert taxpayers, companies and citizens alike (level playing field). Maybe these multinationals do not have the formal right to set their own tax rates, but this is actually what often happens in practice. Some taxpayers are apparently more equal than others. This is a clear violation of one of democracy's basic tenets.

### 6.4 Undermining the Rule of Law

Aggressive tax planning implies dealing with the very basic values of a legal system in an irresponsible way. According to the German legal philosopher Gustav Radbruch, the legal system is aimed at justice with (formal) equality, legal certainty and purposiveness as its core values.<sup>99</sup> The purpose of tax law can be seen as contributing to the maintenance of society consonant with the requirement of distributive justice. Tax legislation serves (formal) legal equality and legal certainty, for the legislature determines the amount of tax to be paid and lays this down in tax laws with the purpose to instantiate the ideal of distributive justice.

The rule of law requires government to function through laws, i.e. general and abstract norms rather than specific and concrete decrees, which would amount to the rule of men. This requirement of general legislation serves as an important protection against arbitrary interferences with individual rights and liberties by the public authorities. This general law is opposed to any kind of individual command. It is an abstract rule that does not mention particular cases or individually nominated persons, but is issued to apply to all cases and persons in the abstract.<sup>100</sup> The capacity of law to provide security depends on a purely formal characteristic of law, namely its abstractness. By contrast, the capacity of law to promote equality stems from another formal characteristic of law, viz. the nature of the general norm as one which applies not just to an individual but to a class of individ-

99. G. Radbruch, *Legal Philosophy* (trans. K. Wilk), in *The Legal Philosophies of Lask, Radbruch, and Dabin*, Cambridge (MA): Harvard University Press (1950), at 99 ff. See Gribnau (2014), above n. 53, at 185-217; <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2461247](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2461247)>.

100. F.L. Neumann, *The Rule of Law. Political Theory and the Legal System in Modern Society*, Leamington Spa: Berg Publishers (1986), at 212-13.

uals and which can even be formed by all the members of a social group or society.<sup>101</sup>

Taxpayers deliberately structuring their affairs with an exclusive focus on the letter of the law exploit these two important formal characteristics of legislation. They appeal to the values of legal certainty and equality derived from the letter of the law, which is not consonant with distributive justice, which the legislature had in mind. They plan towards the inevitable imperfections of a system of tax rules. The legal qualification of their behaviour deviates from the economic substance, which is thus not taxed as it should be. Thus legal certainty and equality, important legal values meant to protect taxpayers against abuse of power of government and other citizens, are used to frustrate distributive justice.

The underlying attitude towards tax law reflects a strict formalistic view on the rule of law, entailing an ethical position based on a strict separation of law and morals.<sup>102</sup> Take for example the legal positivist Raz, who compares law to a knife. 'A good knife is, among other things, a sharp knife. Similarly, conformity to the rule of law is an inherent value of law, indeed it is their most important inherent value.'<sup>103</sup> Like other instruments, 'the law has a specific virtue which is morally neutral in being neutral as to the end to which it the instrument is put.' Aggressive tax planning takes advantage of law's adherence to formality at the expense of the substantive value of distributive justice. The formality of tax law, as Prebble and Prebble argue, 'is an essential prerequisite for contriving artificial transactions that enable the creators of the transactions or their clients to avoid tax'. To their minds, the benefits to society of legal certainty are thus outweighed by its detriments. I fully agree that this irresponsible behaviour 'exploits the formality of the law and, in doing so, exploits the values of the rule of law itself'.<sup>104</sup>

### 6.5 Tax Professionals

If law is seen as a knife, it is open to different uses. Tax law has become a very complex system of rules and principles, studied and applied by highly specialised professionals. Different types of professionals may provide tax advice, e.g. exclusive tax advisers, lawyers, accountants and others – in some jurisdictions the regulatory framework reserves tax advice exclusively to the tax advisory profession.<sup>105</sup> These professionals fulfil an

important function, for many people are not able to meet their tax obligations without professional assistance. However, very expert tax advisers also use the legal knife to minimise the amount of tax paid by their client or employer. Tax professionals are thus involved in aggressive tax planning practices – doing their job in accounting firms, law firms or other tax advisory firms, in financial institutions or in large corporate taxpayers' (internal) tax departments.<sup>106</sup> They set up often very complicated structures – which may have some aesthetic attraction.<sup>107</sup> According to the UK Public Accounts Committee, the four large accounting firms Deloitte, Ernst and Young, KPMG, and PwC have guidelines 'to govern their tax advice, but they are still devising complex schemes that look artificial and their appetite for risk appears high – selling schemes that they consider only have a 50% chance of being upheld in court'.<sup>108</sup> Tax professionals exploit legal indeterminacy 'which is due to the disjuncture between legal form and economic purpose since different legal forms can be devised to achieve the same or a similar economic purpose'.<sup>109</sup> Thus the legislature has regulated certain behaviour based on a set of facts, and the tax professional devises a scheme with a different legal form for about the same economic substance. As Bogenschneider observes, corporate aggressive tax planning typically involves the 'manufacture' of a factually indeterminate transaction based on a purely formalistic understanding of tax laws.<sup>110</sup> In addition, the 'audit lottery' is often played: a favourable position – that the tax administration would likely challenge – is taken in the tax return without disclosure (for it is known that the risk of detection is minimal).<sup>111</sup> In this way, tax law is used as a tool to deconstruct and demolish the system, which distributes the

101. N. Bobbio, 'The Rule of Men or the Rule of Law', in N. Bobbio (ed.), *The Future of Democracy*, Minneapolis (MN): University of Minnesota Press (1987), at 143-4.

102. Gribnau (2015a), above n. 43, at 234-6.

103. J. Raz, 'The Rule of Law and its Virtue' [1977], in J. Raz (ed.), *The Authority of Law*, Oxford: Oxford University Press (2009), at 214. See for a discussion of Raz's position and a comparison with Hayek's and Fuller's position: H. Gribnau, 'Legal Certainty: A Matter of Principle', in H. Gribnau and M. Pauwels (eds.), *Retroactivity of Tax Legislation*, Amsterdam: EATLP (2013); <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2447386](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2447386)>.

104. Prebble and Prebble, above n. 85, at 45.

105. See D. De Widt, E. Mulligan & L. Oats, *Regulating Tax Advisers: A European Comparison of Recent Developments and Future Trends*, FairTax: Working Paper Series nr. 6, 2016; <<http://umu.diva-portal.org/smash/record.jsf?pid=diva2%3A1055242&dsid=-4894>>.

106. Cf. OECD (2008), above n. 17, at 5. Often tax schemes are not developed in response to any request from a company, see P. Sikka and H. Wilmott, 'The Tax Avoidance Industry: Accountancy Firms on the Make', *Working Paper, EBS Working Papers, Colchester* 2013:6 who quote a former Commissioner of the US Internal Revenue Service referring to a senior tax partner instructing 'to ignore a particular set of IRS disclosure rules. The reasoning was that the IRS 'was unlikely to discover the underlying transactions and that even if it did, any penalties assessed would be absorbed as a cost of doing business.

107. This is very well captured by A. Campbell, *On the Floor*, London: Serpent's Tail (2012), at 35: 'He creates complex financial structures like a child dresses a doll in different outfits.'

108. Public Accounts Committee (House of Commons), above n. 22, at 5. Cf. S.T. McGuire, T.C. Omer & D. Wang, 'Tax Avoidance: Does Tax-Specific Industry Expertise Make a Difference?', 87 *The Accounting Review* 3 (2012), at 975-1003 who argue that clients purchasing tax services from their external audit firm engage in greater tax avoidance when their external audit firm is a tax expert. Moreover, the tax-specific industry expertise of external audit firms appears to play a significant role in its clients' tax avoidance.

109. S. Picciotto, 'Indeterminacy, Complexity, Technocracy and the Reform of International Corporate Taxation', 24 *Social and Legal Studies* 2 (2015), at 170.

110. B. Bogenschneider, 'Professional Ethics for the Tax lawyer to the Holmesian "Bad Man"', 49 *Creighton Law Review* (2016) at 779: He explains: 'the corporate tax "planner" takes one set of given facts, where the application of tax law appears to determinatively result in the payment of tax under the law, and prospectively changes these facts to a second set of facts, where the application of the tax law is indeterminate.'

111. Braithwaite, above n. 92, at 114; Sikka and Wilmott, above n. 106.

tax burden over society and reduce it to its technicalities – thus separating its formal legal aspects from the instantiation of distributive justice it embodies. Tax law is disembodied from one of its intrinsic values. The letter of the law is hypostasised. However, the legality of a transaction or structure is not by definition sufficient to label it as morally acceptable. These professionals therefore do not take their responsibility for the integrity of the tax system very seriously. They act just like hired guns neglecting their public responsibility, for like all citizens they have a responsibility not to undermine ‘the public frameworks that sustain our common existence’.<sup>112</sup>

These professionals adhere to and exploit formal characteristics of law. Formal conceptions of (the rule of) law are mistaken in making legal values absolute. However, as Radbruch rightly argues, ‘non-conclusiveness’ is a crucial feature of (legal) values. In practice, these components of justice must be constantly weighed and balanced, for there is no hierarchy between these fundamental legal values. This accounts for their non-conclusiveness (which they have in common with principles).<sup>113</sup> Therefore, invoking values such as legal certainty implies taking other values into account and perform a balancing act. A value disproportionately negatively impacted may be a sound reason to not let it prevail over another value.

To my mind, therefore, morally acceptable tax planning cannot be reduced to a formalistic compliance with tax rules. The ethical stance involved in the interpretation and use of legal rules should be less formalistic. Ethical behaviour cannot be reduced to strict rule-following – deliberately disregarding the underlying values and principles of the tax system.<sup>114</sup> Rules demand interpretation, which in turn should be guided by some ethical view. But even if clear-cut rules are available, formalistic compliance with the rules of two or more different tax jurisdictions may result in the payment of nil corporate tax in each of these countries. Perfectly legal and compliant behaviour, therefore, may lead to a result that might be deemed illegitimate and unethical.<sup>115</sup> Thus, irresponsibility is disguised in the cloak of legality.

## 7 Tax Corporate Irresponsibility

### 7.1 Corporate Moral Agency

As shown earlier, very expert corporate taxpayers are apparently able to determine their tax liability. They are largely free to choose whether and how much tax they will pay. However, responsibility comes with freedom. Corporations are therefore required act, for example in regard to their tax planning, responsibly by confining their pursuit of self-interest. This begs the question: can a corporation act responsibly? Does a corporation have the freedom to act and bear responsibility for its actions like a natural person has freedom and responsibility? It is clear that a corporation has freedom to choose among different options within the boundaries of the law. But how about corporate responsibility?

There is no denying that a corporation differs from a natural person. Individuals are raised in a community. They are made to behave responsibly, i.e. to take into account the interests of others to some extent, e.g. by identification with others brought about by socialisation and external sanctions.<sup>116</sup> Coleman argues that the large modern corporation ‘has none of the encumbrances, responsibilities, and informal community obligations that arose through the personal and family connections of the owner of the old, family-based corporation’.<sup>117</sup> His point is that the modern multinational corporation is not embedded in a community to which it is tied by (informal) obligations. Hence, socialisation and norms applied to natural persons no longer constitute effective means for ensuring responsible corporate action, for corporations are constructed ‘around the positions of which natural persons are merely temporary occupants’.<sup>118</sup>

Nonetheless, in their communication multinationals like Nike convey the image of an ‘actual’ personality rather than just a concrete corporate person. Thus Nike aspires to be one of the few global leaders with an actual personality in which customers believe instead of just buying its goods.<sup>119</sup> This self-image of an ‘actual’ personality reinforces the conviction that morality does not regard only individuals. Corporations qualify as moral agents as well, because they ‘have their own decision-making structures, have choices, and justify them with corporate reasons’.<sup>120</sup> Corporations are legal entities, i.e. artificial persons in law, but also moral entities, i.e. they have agency independent of their members. Companies can refrain from harming others. Moreover, they can account for their behaviour by giving moral reasons and

112. R.W. Gordon, ‘Why Lawyers Can’t Just be Hired Guns’, in D.L. Rhode (ed.), *Ethics in Practice: Lawyers’ Roles, Responsibilities, and Regulation*, New York / Oxford: Oxford University Press (2003), at 47.

113. Gribnau (2014), above n. 53, at 185-217; <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2461247](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2461247)>.

114. Dworkin, above n. 2, at 300-1. Cf. Gribnau (2015a), above n. 42, at 241-5.

115. Cf. R.F. van Brederode, ‘A Normative Evaluation of Tax Law Enforcement: Legislative and Political Responses to Tax Avoidance and Evasion’, 42 *Intertax* 12 (2014), at 768 on the doctrine that recognises ‘the right of an individual to structure his affairs as he sees fit and to lower his taxes as long as this does not violate the spirit of the law.’

116. J. Coleman, *Foundations of Social Theory*, Cambridge (MA) / London: The Belknap Press of Harvard University Press (1990), at 556.

117. Coleman, above n. 116, at 559.

118. Coleman, above n. 116, at 576.

119. Barber, above n. 34, at 67. He makes reference to Nike’s 1992 Annual Report.

120. M.T. Brown, *Corporate Integrity: Rethinking Organizational Ethics and Leadership*, Cambridge: Cambridge University Press (2005), at 123. See Gribnau and Jallai, above n. 10, at 4-5.

assume moral responsibility for their actions affecting others. Thus, corporations have a kind of moral responsibility that differs from the responsibility of the individuals constituting the corporation. Companies engaging in corporate social responsibility (CSR) are an example of moral agency. They are part of society, which entails obligations towards society. It may be more difficult for a multinational corporation to take the morally correct action because operating in many countries affects usually many more stakeholders than a national firm. Nonetheless, the increased difficulty does not change the nature of the moral obligation: ‘multinationals, like nationals, are required to consider the interests of all corporate stakeholders’.<sup>121</sup>

## 7.2 MNCs Engaging in CSR

Multinationals often have a huge impact on society and communities.<sup>122</sup> Many multinational corporations nowadays emphasise their connections with communities. Take for example Starbucks: they believe that they should have ‘a positive impact on the communities we serve’.<sup>123</sup> In the same vein, Kris Engskov, managing director, Starbucks Coffee Company, UK, states: ‘the most important asset we have built is trust. Trust with our partners (employees), our customers and the wider society in which we operate’.<sup>124</sup> So apparently a multinational like Starbucks feels embedded in society and therefore attaches great interest to good relations with stakeholders – implying trust and confidence. It shows concern for society and it claims to have internalised external interests, viz. the interests of society at large. Thus, the OECD pointing at ‘the mutual dependence of business and society’ seemingly perfectly captures Starbucks’ ideas. Actually, Starbucks cannot but endorse the OECD’s point of view that it is all about corporate responsibility, where CSR refers to ‘the actions taken by businesses to nurture and enhance this symbiotic relationship’.<sup>125</sup> The OECD correctly states that this symbiotic relationship is not a given but involves a search for an effective ‘fit’ between businesses and the societies in which they operate. CSR should include tax, for corporate responsibility should cover all corporate behaviour. Selective shopping is out of the question, for it would imply the company lacking integrity. Starbucks, there-

fore, should make sure that it is not an example of corporations that talk ‘about social responsibility, but indulge in tax avoidance and evasion’.<sup>126</sup>

MNCs’ voluntary engagement in CSR is acceptance of ethical obligations beyond (strict) compliance with the law. The acceptance of legal obligations as well as duties that, though not required by law, ‘underscore and reflect the nature of the company as an essentially social entity’.<sup>127</sup> Legal obligations, therefore, should not be narrowed down to the letter of the law nor should MNCs use and manipulate the tax rules without regard for the underlying principles in order to minimise their tax liability.

Companies should thus think in terms of good tax governance whereby tax is not seen as just a cost. Here, there is a role to play for – both in-house and external – tax advisers who have a relationship of trust with their clients, for example by making ‘a clear commercial case for responsible behaviour based on evidence of a “business case” for CSR’.<sup>128</sup> Tax adviser Van Eijsden indeed provides a business case to include tax as a corporate responsibility issue.<sup>129</sup> It follows that tax advisers should make sure that the corporation’s tax practice is aligned with its CSR strategy. The same goes for external tax advisers on whom a company relies, they have to assume responsibility and take care to connect their recommended tax planning structures with the company’s CSR strategy.<sup>130</sup> Very expert tax professionals also have the capacity ‘to play a constructive role in the development of better tax legislation’.<sup>131</sup> They should therefore participate in policy discussions and committees in order to enhance the integrity of the tax system.

Still, the question is what is corporate responsibility with regard to tax? What kind of responsibility has a company in relation to tax? There is no consensus on principles of tax fairness yet, which flesh out the ideal of a fair share in international taxation and offer multinational companies guidance. The ideal of a fair share is therefore too vague, ambiguous and abstract to give clear guidance on the amount of (corporate) tax to be paid by multinational corporations. Moreover, the specific economic nature of the (legal) obligation to pay tax has to be taken into account: everyone has the right to structure one’s tax affairs in a tax-efficient way. This goes for enterprises and citizens alike. Thus self-interested behaviour collides with the interest of society, the

121. N. Bowie, ‘The Moral Obligations of Multinational Corporations’, in Beauchamp and Bowie 1993, at 520.

122. Cf. Tapscott and Ticoll, above n. 33, at 183: ‘When Starbucks opens a store, it may change the character of a neighborhood. When it buys more Fair Trade coffee, it may change the social, political, economic and environmental dynamics of a town in El Salvador. When it puts Wi-Fi into a café, it may become a hub for a local business community – or a peace demonstration.’

123. John Kelly, senior vice president, Global Responsibility and Public Policy at <www.starbucks.co.uk/our-commitment>. He tells us that in ‘2008 we set a series of ambitious goals where we felt we could use our scale for the greatest good in the areas of ethical sourcing, environmental impact and community improvement.’

124. *An Open Letter from Kris Engskov*, 06 December 2012; <www.starbucks.co.uk/blog/an-open-letter-from-kris-engskov/1249>.

125. OECD, *Corporate Social Responsibility: Frequently Asked Questions*, <www.oecd.org/corporate/mne/corporateresponsibilityfrequentlyaskedquestions.htm>, accessed 4 October 2016.

126. P. Sikka, ‘Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance’, 34 *Accounting Forum* (2010), at 153-68.

127. J. Canals, *Building Respected Companies: Rethinking Business Leadership and the Purpose of the Firm*, Cambridge: Cambridge University Press (2010), at 147.

128. H. Ward, *Corporate Responsibility and the Business of Law*, London (2005), at 11; <http://pubs.iied.org/pdfs/G00195.pdf>.

129. A. van Eijsden, ‘The Relationship between Corporate Responsibility and Tax: Unknown and Unloved,’ *EC Tax Review* 1 (2013), at 56-61. Cf. Williams, above n. 17.

130. Cf. M.D. Bayles, ‘The Professional-Client Relationship’, in C. Callahan (ed.), *Ethical Issues in Professional Life*, New York / Oxford: Oxford University Press (1988), at 119.

131. G. Brock and H. Russell, ‘Abusive Tax Avoidance and Institutional Corruption: The Responsibilities of Tax Professionals’, *Edmond J. Safra Research Lab Working Papers*, 2015 No. 56, 17 February, at 34.



results of self-interested actions negatively affect the well-being of other persons (taxpayers).

How should these diverging interests be balanced? As argued earlier, irresponsible behaviour is behaviour that does not sufficiently take into account the interests of others – bringing (disproportionate) harm to them (Section 2.2). To my mind, MNEs do well to avoid aiming to pay a minimalist amount of (corporate income) taxes – thus eroding the integrity of the (international) tax system. Their aim should be to avoid corporate tax irresponsibility: evidently not paying a fair share. In practice, it is far easier to agree on evident instances of injustice than on what counts as justice.<sup>132</sup> So given the right to structure one's affairs so as not to pay too much tax, the primary aim should be to avoid irresponsible and profoundly unfair tax planning rather than to strive for the vague ideal of paying a fair share.

## 8 Conclusion

The international tax system is the result of the interaction of different actors, such as legislatures, tax administrations, courts, taxpayers, tax advisers and international organisations, who share the responsibility for its integrity. This article mainly focused on states and multinational corporations (and their tax advisers). They both enjoy to a certain extent freedom of choice with regard to their tax behaviour – which entails moral responsibility. Making, interpreting and using tax rules therefore is inevitably a matter of exercising responsibility. Both should abstain from viewing tax laws as a bunch of technical rules to be used as a tool without any intrinsic moral or legal value. States bear primary responsibility for the integrity of the international tax system. They should become more reticent in their use of tax as regulatory instrument – competing with one another for multinationals' investment. States should act more responsibly by cooperating to make better rules to prevent aggressive tax planning, which entails a (disproportionate) shift in tax payments from very expert taxpayers to other taxpayers. Here, the distributive justice of the tax system and a level playing field should be guaranteed. Multinationals should abstain from putting pressure on states and lobbying for favourable tax rules, which disproportionately affect other taxpayers – SMEs and individual taxpayers alike. In the same vein, multinationals and their professional advisers should avoid irresponsible conduct by not aiming to pay a minimalist amount of (corporate income) taxes – merely staying within the boundaries of the letter of the law. Shared responsibility should be taken seriously by both states and multinational corporations; they should not pass the responsibility for the integrity of the tax system to the other party. This goes all the more for companies engaging in CSR. Future research could flesh out prin-

ciples of good tax governance for both states and multinational corporations in order to enhance accountability and transparency and enable monitoring by stakeholders.

132. A.-G. Jallai and J.L.M. Gribnau, 'Free to Choose? Responsible Tax planning, Corporate Governance and Corporate Social Irresponsibility', *TLS Working Paper*, forthcoming.