Tax evasion and avoidance of transnational companies and big fortunes in the European Union - Preliminary diagnosis and proposals after the PANA Committee

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March 22, 2018

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1. Tax evasion and tax avoidance by transnational conglomerates and high net worth individuals

There are different types of tax evasion and tax avoidance. However, what has been the object of the several leaks that have been made public in the last years (Swiss leaks, Lux Leaks, Panama Papers, Paradise Papers, and in Argentina, JP Morgan’s) relates to cross border tax evasion and avoidance, or tax evasion and tax avoidance achieved by transnational conglomerates and high-net-worth individuals (HNWI) through cross border transactions; and with some exceptions in the case of the Paradise Papers, it refers to Income Tax, Corporate Income Tax, and inheritance tax.

In 2011, TJN estimated the tax evasion and avoidance loss to the EU28 Member States to be of around EUR 1.05 trillion (TJN, 2011).

During the PANA Inquiry Committee a study was conducted which calculated the base erosion considering companies that have a link to tax havens, and the percentage in which they have been able to increase their profits by operating in such tax havens; being such increase in their profit equivalent to the amount of tax loss for the country considered. Such study estimated that the amount of tax revenue lost to national authorities due to schemes involving tax havens to be between EUR 109 and EUR 237 billion in EU 28 Member States in 2015 (Malan, et al., 2017).

Table 1 Total base erosion and revenue loss of eight sample Member States as a result of the schemes revealed by the Panama Papers

<table>
<thead>
<tr>
<th>Member State</th>
<th>Volume of base erosion (billion EUR)</th>
<th>Corporate Income Tax Rate (%)</th>
<th>Assumed Tax Revenues Lost from Panama schemes (CIT only) (billion EUR)</th>
<th>Estimates of Tax Revenue Loss from all tax haven schemes to authorities (billion EUR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cyprus</td>
<td>0</td>
<td>12.5</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>0</td>
<td>19</td>
<td>0</td>
<td>2.1-5.55</td>
</tr>
<tr>
<td>Germany</td>
<td>0.24</td>
<td>29.65</td>
<td>0.07</td>
<td>-</td>
</tr>
<tr>
<td>Denmark</td>
<td>0.05</td>
<td>23.5</td>
<td>0.012</td>
<td>-</td>
</tr>
<tr>
<td>Spain</td>
<td>1.87</td>
<td>28</td>
<td>0.52</td>
<td>-</td>
</tr>
<tr>
<td>France</td>
<td>-</td>
<td>33.3</td>
<td>-</td>
<td>17-19</td>
</tr>
<tr>
<td>Poland</td>
<td>0.13</td>
<td>19</td>
<td>0.03</td>
<td>-</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>6.51</td>
<td>20</td>
<td>1.3</td>
<td>3.99-8.66</td>
</tr>
<tr>
<td>EU 28</td>
<td>351.96</td>
<td>23.12</td>
<td>81.37</td>
<td>109-237</td>
</tr>
</tbody>
</table>

Source: (Malan, et al., 2017)
Companies that can play this game are necessarily multinational, operating cross-border. National Small and medium enterprises (SMEs) operating locally - even when they also engage in tax evasion and avoidance - have less opportunities to benefit from the use of these schemes, and thus have a heavier tax burden, and cannot compete with companies operating cross-border on a level playing field.

The European Parliament’s Report of the Panama Paper’s Inquiry Committee (PANA Report) adopted by the committee in October 18, 2017 observes in its paragraph 1 that one of the problems that prevents the adoption of adequate and effective legislation to counteract tax avoidance, tax evasion and money laundering is the absence of single definitions on what constitutes an offshore financial centre (OFC), a tax haven, a secrecy haven, a non-cooperative tax jurisdiction or a high-risk country in terms of money laundering.

Tax havens have existed since the beginning of the 20th century for tax evasion and avoidance, money laundering and capital flight. OFCs are more recent, as they came into use in the 1980s, and they generally specialized in non-resident financial transactions. The thing is that tax havens do not like being called that way, and the array of secrecy provisions, lax regulation, zero or near-zero taxation, and no capital controls, made it attractive for tax havens to develop an OFC. Many tax havens impose income tax on the worldwide income of their resident populations, while ensuring tax exiles for the non-resident tax payers, and some, like Jersey, have enacted very stringent anti-tax avoidance legislation to penalize their own residents who want to use the services of other tax havens (Palan, Murphy, & Chavagneux, 2010).

In any case, the absence of a definition is not necessarily the most important problem preventing effective legislation to counteract tax avoidance, tax evasion and money laundering.

There have been adequate legislations, or there have been, and still are, tools in different legislations that allow governments to counteract tax avoidance, tax evasion and money laundering.

However, from the great boom of the financialization of the international economy starting in the 1970s, and the movement towards further and further liberalization of the economy, what has happened is that the movement of capital has been favoured in the international political arena.

In the name of the international movement of capital, corporate income tax rates are being lowered in Member States of the Organization for Economic Co-operation and Development (OECD), as well as in non-OECD ones; tax incentives for the very rich or the multinational corporations are being promoted; withholding taxes are being removed; and the OECD

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2 The original OFC developed in London, and became known as “offshore” because it escaped nearly all forms of financial supervision and regulation. (Palan, Murphy, & Chavagneux, 2010)

3 However, GUE/NGL’s initiative to include secrecy among the usual features of an offshore financial centre in paragraph 3 of the PANA Report was rejected by the great anti-progressive alliance in the Committee.

4 See http://www.eurodad.org/tax-games-2017
recommendations for the pricing of intragroup transactions (“transfer pricing”), which are largely based on the “separate entity criteria” and the “arm’s length principle” (which basically unrealistically understands that entities that are part of an economic conglomerate should act as individual separate entities in each country), are being forced upon OECD and non-OECD countries.

The 1995 and 2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations suggest a number of methods which can be used to establish the prices between related parties as if they were between independent parties, based on 5 suggested methods. Except when the Profit Split Method is used, the application of the “arm's length” principle requires a search for operations or financial results of independent companies to be undertaken in order to compare them with the operations conducted by the entity being analysed with its related parties. (Grondona, 2015)

This is the reason why transfer pricing is so generally used for tax avoidance, because it is almost impossible for tax administrations to tackle it with the current legislative framework.

It should be noted that the strategies used for transfer pricing manipulation can also be used for shifting the profits generated by trafficking in persons and labour exploitation. For example, a local entity may “contract manufacture” for another entity located in a low or zero tax jurisdiction. The entity in the low or zero tax jurisdictions (the intermediate entity) will thus obtain the goods at a low cost and retain the profits associated with their sale through another entity which will also receive a limited profit. To distance themselves from the exploitation of humans in sweatshops, corporations create intermediate entities which, instead of being related to the manufacturing activity themselves are characterized as providing purchasing services for other affiliates of the transnational corporation. Manufacturers are said to be non-related entities, although they perform manufacturing activities exclusively for the client as is the case of corporations in the textile industry. Similar examples are observed in agricultural global value chains (Grondona, Bidegain Ponte, & Rodríguez Enríquez, 2016).

In this context, the maintenance of the arm’s length principle is the key reason why the OECD Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan) process has not been successful at effectively reducing corporate global tax avoidance.

Politicians, journalists and sometimes even civil society organization often talk about tax avoidance being legal, while tax evasion being illegal. However, what seems clear is that tax avoidance “has been legalized”. The separate entity criteria together with the arm’s length principle, the prioritization of legal contracts above economic reality, and a very vast set of vehicles, preferential regimes, and benefits provided to investments from non-residents in

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5 Extreme cases of these structures are known as “toll manufacturers” and “stripped distributors”, where even the inventories remain in the hands of the “principal”, and are placed on consignment on the taxpayer’s premises during the manufacturing process or at the time of the sale to the end client. (Grondona, 2015)

6 See http://www.oecd.org/ctp/beps-actions.htm
different jurisdictions have made tax avoidance more and more attractive, and impossible to tackle.

How are tax administrations supposed to tackle it if they can only use arguments that are based on the comparability of the activities performed by related parties to those performed between independent parties? How are they supposed to tackle tax avoidance if they are told by their legislation to trust a written contract between related parties (or a party and another subject to it) above the economic reality of having a company in a jurisdiction with no tax to which profits are being allocated? How are they supposed to tackle tax avoidance if they cannot even have a clear picture of which are the related parties to a transnational conglomerate?

So, being conservative, it could be said that tax avoidance may be difficult to prove to be illegal; while in the current context it would be more accurate to say it is tax evasion guaranteed by the government.

Tax havens play a specific role in the movement of capital, as they facilitate the flow of all types of assets, without asking any question regarding its origin or its destination, and they do so without taxing that capital, or by providing sufficient exemptions or vehicles to avoid taxation.

No wonder some authors (Palan, Murphy, & Chavagneux, 2010) understand that tax havens are at the heart of the globalization that we have witnessed since the 1980s, as they do not work in the margins of the world but are an integral part of modern business practice.

Yes, it is difficult for very small open economies to sort out alternative ways of attracting cash flows. However, financial flows going through tax havens do not benefit the bigger part of their population, among other things because they do not pay taxes (or they pay very small ones) and thus re-distribute wealth. In most cases, they only benefit those working in the financial sector.

Moreover, as it has been noted by Christensen, Shaxson and Wigan (2016), in the same way in which countries that are heavily dependent of natural resources suffer a series of effects from that resource-dependence, such as poor job creation, high inequality, reduction of political freedoms, economic instability and corruption, among others; countries that are excessively dependent of the financial sector have been found to suffer similar problems. Financialization can crowd-out manufacturing and non-financial services, entrench regional disparities, increase economic dependence, increase inequality, and expose the economy to violent crisis.

Tax benefits, in the form of exemptions and incentives targeted to attract foreign investment, not only bring limited benefits for long term sustainable growth, they also place domestic firms at a competitive disadvantage. More perniciously, tax preferences are generally given together with secrecy to enable and encourage tax avoidance and evasion on a massive scale, and in many instances play a role in attracting money laundering operations (Stiglitz J. E., 2016)

There may be certain circumstances in which tax incentives for corporations are justifiable as a policy tool. However, there will always be a risk of abuse or lobbying by politically-connected
sectors for special treatment, or simply that a tax incentive does not justify its cost but remains in place due to inertia and lack of scrutiny. (ICRICT, 2016)

However, the European Commission continues to promote “fair tax competition” as a principle of good tax governance; the only thing seemingly precluded is “special deals” which are treated as State Aid, for which Ireland has been chastised. (ICRICT, 2016)

Taxation is the most sustainable and predictable source of financing for the provision of public goods and services, as well as a key tool for addressing economic inequality, including gender inequality (Grondona, Bidegain Ponte, & Rodríguez Enríquez, 2016).

Moreover, when a state’s ability to collect revenues and control IFFs is more restricted, revenue loss tends to be compensated through higher taxes on compliant taxpayers, such as small and medium-sized companies and individuals or by relying more heavily on indirect taxation. Therefore, if states do not tackle tax abuse, they are likely to be disproportionately benefitting wealthy individuals to the detriment of the most disadvantaged. Also, international tax avoidance, tax havens and the offshore secrecy system have been found to give corporations that make use of these avoidance opportunities very significant competitive advantages over national firms. There is a gender dimension to this, since women are overrepresented in small and medium enterprises (that benefit less from avoidance opportunities) and at the bottom of the income ladder. Women tend to use larger portions of their income on basic goods because of gender norms that assign the responsibility for the care of dependents to them. This means that they bear the brunt of consumption taxes (Grondona, Bidegain, Rodriguez; 2016).

2. Some problems observed in the EU’s legislative framework

This section presents a brief analysis of a few EU Directives that are of interest. The Directives relating to taxation are many more, and there are many others which have not been analysed in this section that are as relevant as the ones chosen for analysis here.

a. Parent-Subsidiary Directive

Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (“the Parent-Subsidiary Directive”) adopted in 2011, was enacted with the purpose of exempting dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company; provided that the parent company holds at least 10% of the subsidiary. The EU Parent-Subsidiary Directive has been adopted by Member States.

A number of Member States required the parent company maintain a holding for an uninterrupted period of up to 2 years. However, the European Court of Justice (ECJ) has clarified that Member States are not entitled to require that the minimum holding period be completed at the time when profits are distributed.⁷

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⁷ See https://www.world.tax/articles/the-eu-parent-subsidiary-directive.php
In November 2013, the Commission proposed to amend the parent-subsidiary directive. The revision had a twofold objective of tackling hybrid loan mismatches (legislation adopted in July 2014) and introducing a general anti-abuse rule. On 2 April 2014, the European Parliament adopted a legislative resolution on the proposal for a Council directive amending Directive 2011/96/EU. And on 9 December 2014, the Council reached a political agreement on a common anti-abuse clause to be included in the EU’s parent-subsidiary directive. The directive was adopted by the Council 27 January 2015, and the general anti-abuse article included reads:

- Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.

This anti-abuse article is too general, and leaves to the interpretation of each Member State, what the "tax advantage" objective is.

Even when in a study conducted by EY for the European Commission (EY, 2014) it is suggested otherwise, the rule should be that all Member States apply a withholding tax and that exceptions are evaluated in case they are sufficiently justified.

Moreover, the ruling of the ECJ is still a problem in a context where transnational conglomerates are continuously transforming, a period of two years such as that defined by some Member States had as an objective to avoid company mergers/acquisitions that had as a sole purpose to take advantage of the directive for tax evasion and avoidance purposes.

b. Interest and royalties directive

The Interest and Royalty Directive was designed in 2003 to eliminate withholding tax obstacles in the area of cross-border interest and royalty payments within a group of companies by abolishing withholding taxes on royalty payments and interest payments arising in a Member State.

This Directive has had as a result the construction of structures such as that observed in the case of Google, where a company settled in Ireland received all royalty payments relating to the use of the search engine algorithm, Google Ireland Holdings, had an administrative centre in Bermuda.

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10 Such study also noted that several Member States applied a withholding tax on dividends at source by 2014: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Spain and Sweden. Cyprus and Germany applied it only for resident taxpayers.

11 Shareholding requirements to establish that companies are associated were reduced from a 25% direct holding to a 10% direct or indirect holding in 2011.

12 While Google had a company, Google Ireland Limited, employing around 2,000 people in Dublin and selling advertising globally, it had an Advance Pricing Agreement (APA) with the Irish Tax Authorities under which it transferred the technology
Payments to Bermuda went through The Netherlands (Google Netherlands Holding BV), without any withholding taxes being paid in Ireland, as they were exempted based on the Interest and Royalty Directive. The company in The Netherlands transferred the 99.8% of what it collected to the entity in Bermuda. (Druker, 2010)

On 11 November 2011, the Commission issued a proposal aimed at reducing the shareholding requirements to be met for companies to qualify as associated; to include a new requirement to ensure that the tax relief is not granted when the corresponding income is not subject to tax and thus close a loophole used by tax evaders; and a technical amendment to avoid situations where payments made by a permanent establishment are denied the exemption on the grounds that they do not constitute a tax-deductible expense.

The Parliament adopted a legislative resolution endorsing the Commission recast proposal on 11 September 2012 with proposed amendments relating in particular to limiting the scope so that the exemption of interest or royalty payments in one Member State only applies when the beneficial owner is a company of another Member State, or a permanent establishment effectively subject to tax on the income deriving from those payments at a rate not lower than 70% of the average statutory corporate tax rate applicable in the Member States (Council of the European Union, 2017).

Following the adoption of the Parent-Subsidiary Directive, a majority of Member States wanted to split the proposal for an Interest and Royalties Directive, and to concentrate first on the insertion of a general anti-abuse provision similar to the one in the Parent-Subsidiary Directive, and later discuss the remaining Interest and Royalties Directive issues. Ten Member States requested a minimum effective taxation on the interest and royalty income, whilst seven Member States did not agree to such a provision. The lack of agreement on this issue blocked the negotiations. And for such reason, the draft directive has been blocked in the Council since 2012.13

In a European Parliament resolution of 16 December 2015 (European Parliament, 2015), a call was made on the Commission to bring forward a proposal on removing the requirement for Member States to give beneficial treatment to interest and royalty payments if there is no effective taxation elsewhere in the Union. Also, the report called for a “Union-wide withholding tax or a measure of similar effect would ensure that all profits generated within, and due to leave, the Union are taxed at least once within the Union before they leave the Union’s borders”.14

of the searching algorithm, publicity and other intangible property to be used in Europe, the Middle East and Africa, to an entity called Google Ireland Holdings.


14 It should be noted that, according to EY (2014), several Member States still applied a withholding tax on interest payments by 2014, Austria, Belgium, Bulgaria, Czech Republic, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom. Cyprus and Germany also applied a withholding tax, though only for resident taxpayers; and Lithuania applied it to non-resident taxpayers.
c. Directive on Administrative Cooperation (DAC)

Council Directive 2011/16/EU as regards administrative cooperation in the field of taxation (‘DAC I’)\(^{15}\) established the procedures for cooperation between tax administrations in the European Union - such as exchanges of information on request, spontaneous exchanges, automatic exchanges, and notifications to each other of tax decisions.

This Directive was extended to include the mandatory automatic exchange of financial account information (Council Directive 2014/107/EU-‘DAC II’\(^{16}\) and cross-border tax rulings and advance pricing arrangements (Council Directive 2015/2376/EU- ‘DAC III’\(^{17}\).

PANA recommendations make a reference, in paragraph 73, to the low level of tax rulings that have been exchanged between Member States. The amount exchanged is in itself secretive, and even when there is very scarce information made public, there are inconsistencies\(^ {18}\). However, what is noticeable, is that the number of tax rulings granted by Member States to multinationals has increased in recent years, notwithstanding the social alarm created by the LuxLeaks scandal\(^ {19}\).

For such reason, the PANA recommendations suggest\(^ {20}\):

75. **Insists that the Commission should have access, in accordance with data protection rules, to all the information exchanged under the DAC in order to properly monitor and enforce the implementation thereof; stresses that this information should be stored in a central registry managed by the Commission, given its exclusive competence in the field of competition;**

However, this information should be public. Tax rulings, particularly, APAs should be made public. If they remain secret deals, then the society cannot know the commitments that the government has made with big multinational companies which have a very important impact in the economy.

The Directive was again amended in 2016 (Council Directive (EU) 2016/881 -‘DAC IV’) to request the mandatory exchange of information of Member States’ Country-by-Country Reporting; and later on the same year to provide tax authorities with access to anti-money laundering information (Council Directive (EU) 2016/2258-‘DAC V’).

\(^{15}\) See http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32011L0016

\(^{16}\) See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0107

\(^{17}\) See https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015L2376

\(^{18}\) The Tax Administrator of Luxembourg mentioned in the PANA Mission to Luxembourg that they had exchanged tax rulings. However the German government appeared to have received no exchange of information from Luxembourg, according to MEP Fabio de Masi in February 2017.

\(^{19}\) See PANA Recommendations Paragraph 74, and Eurodad (2017).

In 2017, the European Commission proposed a new amendment to the DAC in relation to reportable cross-border arrangements (or the regulation of enablers and promoters of tax evasion and tax avoidance - ‘DAC VI’), which was adopted by the European Parliament on March 1, 2018.21

d. Public Country-by-Country Reporting (CBCR)


Both the European Parliament and the European Commission’s proposals limit the application of the CBCR to those ultimate parent undertakings having a consolidated turnover of EUR 750 million or more. This threshold excludes from the reporting obligations between 85-90 per cent of multinationals according to the OECD23.

The information per fiscal jurisdiction that the European Parliament agreed should be included in the CBCR is the following:

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

An important difference between the two proposals is that the EP has voted in favour of making CBCR public, free of charge, in a common template, available for free in an open format and made accessible to the public through the company’s website in at least one of the EU’s official languages. This is relevant, because one of the problems foreseen if CBCR is not made public is that it will require an information exchange agreement to be in place between the different interested countries and the country of the ultimate parent undertakings. Moreover, regarding the format for publication, developing countries have complained in different fora about developed countries not sharing information (claiming that the recipient country does not have effective rules to protect confidentiality) or doing so in a format not accessible in the recipient country (South Centre, 2016).

However, a paragraph got into the CBCR proposal that can turn into a gateway for companies not to comply with CBCR:

22 P8_TA-PROV(2017)0284
In order to protect commercially sensitive information and to ensure fair competition, Member States may allow one or more specific items of information listed in this Article to be temporarily omitted from the report as regards activities in one or more specific tax jurisdictions when they are of a nature such that their disclosure would be seriously prejudicial to the commercial position of the undertakings referred to in Article 48b(1) and Article 48b(3) to which it relates. The omission shall not prevent a fair and balanced understanding of the tax position of the undertaking. The omission shall be indicated in the report together with a duly justified explanation for each tax jurisdiction as to why this is the case and with a reference to the tax jurisdiction or tax jurisdictions concerned.

By March 2018, the negotiation between the European Commission, the European Parliament and the Council of Europe (the Trilogue) had not yet been possible.

However, the Council has already advanced that it will propose that “operating subsidiaries and branches should publish and make accessible the report of the ultimate parent undertaking to the extent that the requested information is available to the subsidiary or branch. If the requested information is not available the subsidiary or branch should explain in the report the reasons of this omission.” (Council of the European Union, 2017)

This is also a problem, as subsidiaries and branches have already stated in the past that they do not have this information because the parent company does not make it accessible for them. Therefore, it is foreseeable that multinational companies will exploit this argument.

3. Some of the problems observed in EU Member States

Corporate income tax rates have been dropping in the EU for the last 35 years, dropping from above 40% in the early 1980s to below 25% in 2015. Moreover, tax cuts seem to have increased after 2015, and multinational corporations already manage to limit their effective tax rates to less than 1% thanks to the generous possibilities provided by some governments. (Eurodad, 2017)

Table 2 Recent and upcoming changes in corporate income tax rates in EU countries and Norway, covering the years (2015-2022) (%)

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>Hungría</td>
<td>19</td>
<td>19</td>
<td>9</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Bélgica</td>
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<td>33</td>
<td>29</td>
<td>29</td>
<td>25</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Francia</td>
<td>33</td>
<td>33</td>
<td>33</td>
<td>33</td>
<td>31</td>
<td>28</td>
<td>26,5</td>
<td>25</td>
</tr>
<tr>
<td>Países Bajos</td>
<td>25</td>
<td>25</td>
<td>25</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Noruega</td>
<td>27</td>
<td>25</td>
<td>24</td>
<td>23</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Luxemburgo</td>
<td>21</td>
<td>21</td>
<td>19</td>
<td>18</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Italia</td>
<td>27,5</td>
<td>27,5</td>
<td>24</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>España</td>
<td>28</td>
<td>25</td>
<td>25</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

24 In Argentina, the tax Authorities passed a resolution (3572/2013) requesting information on related parties (a register of related parties), and subsidiaries there have alleged that they do not have access to such information and for that reason cannot produce it per request of the Tax Authorities. (Grondona, 2015)
<table>
<thead>
<tr>
<th>País</th>
<th>2017</th>
<th>2018</th>
<th>2019</th>
<th>2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>Suecia</td>
<td>22</td>
<td>22</td>
<td>22</td>
<td>20²⁵</td>
</tr>
<tr>
<td>Dinamarca</td>
<td>23,5</td>
<td>22</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>Eslovaquia</td>
<td>22</td>
<td>22</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td>Letonia</td>
<td>15</td>
<td>15</td>
<td>15</td>
<td>20/0²⁶</td>
</tr>
<tr>
<td>Grecia</td>
<td>26</td>
<td>29</td>
<td>29</td>
<td></td>
</tr>
<tr>
<td>Eslovenia</td>
<td>17</td>
<td>17</td>
<td>19</td>
<td></td>
</tr>
</tbody>
</table>

Fuente: (Eurodad, 2017)

On the other hand, in March 2018, the European Commission highlighted the problem of aggressive tax planning opportunities given by 7 EU Member States²⁷:

- **Belgium**: its tax system remains complex, with tax bases eroded by numerous exemptions, deductions and reduced rates.
- **Cyprus**: Cyprus’ CIT rules are used by companies engaged in aggressive tax planning²⁸ because of the absence of withholding taxes on dividend, interest and royalty payments by Cyprus-based companies. This, together with the corporate tax residency rules and notional interest deduction regimes, may lead to those payments escaping tax if they are also not subject to tax in the recipient jurisdiction.
- **Hungary**: Hungary’s tax rules may be used by multinationals in aggressive tax planning structures, as shown by the large capital flows entering and leaving the country as a share of GDP through ‘special purpose entities’²⁹, combined with the absence of withholding taxes. The absence of withholding taxes on dividend, interest and royalty payments made by companies based in Hungary may lead to those payments escaping tax altogether, if they are also not subject to tax in the recipient jurisdiction.
- **Ireland**: Ireland’s high inward and outward FDI stock can only partly be explained by real economic activities taking place in Ireland. The high level of dividend payments and charges for using intellectual property, suggest that the country’s tax rules are used by companies that engage in aggressive tax planning. The absence of withholding taxes on dividend payments made by companies based in Ireland suggest that Ireland’s corporate tax rules may still be used in tax avoidance structures. The existence of some provisions in bilateral tax treaties between Ireland and some other countries may be used by companies to overrule for tax avoidance as well.

²⁵ La reducción fue propuesta por el gobierno pero a Diciembre 2017 no había sido aprobada por el Parlamento.

²⁶ Letonia aumentó su impuesto sobre sociedades al 20%, pero al mismo tiempo introdujo una tasa del 0% para ganancias retenidas y reinvertidas.

²⁷ See https://ec.europa.eu/info/publications/2018-european-semester-country-reports_en

²⁸ The author considers aggressive tax planning equivalent to tax avoidance. However, the wording of the European Commission is respected in this section.

²⁹ A special purpose entity is a legal entity that has little or no employment, operations or physical presence in the jurisdiction where it is located, and is related to another corporation, often as its subsidiary, which is typically located in another jurisdiction.
Luxembourg: its corporate tax reform sought to boost competitiveness by lowering tax rates. In addition to lack of withholding tax on interest and royalty payments, there may be an exemption from withholding tax on dividends paid to a company resident in a country that has a bilateral tax treaty with Luxembourg and is fully subject to an income tax comparable to the Luxembourg corporate income tax.

Malta: Malta’s high inward and outward FDI stock is only partly explained by real economic activities taking place in the country. The high level of dividend, interest and royalty payments as a percentage of GDP suggests that the country’s tax rules are used by companies to engage in aggressive tax planning. Companies might choose to invest in Malta to benefit from these corporate tax rules. The large majority of FDI is held by ‘Special Purpose Entities’. The absence of withholding taxes on dividends, interest and royalty payments made by Malta based companies may lead to those payments escaping tax altogether.\(^{30}\)

The Netherlands: A large share of FDI stocks is held by so-called ‘special purpose entities’. The absence of broad withholding taxes on dividend payments by co-operatives, the possibility for hybrid mismatches by using the limited partnership (CV) and the absence of withholding taxes on royalties and interest payments facilitate aggressive tax planning.

4. Proposals

After the LuxLeaks of November 2014 made public the secret deals between 343 companies and the Grand Duchy of Luxembourg to evade taxes, the European Parliament decided, in February 2015 the creation of a “Special on tax rulings and other measures similar in nature or effect” (TAXE) that would examine practice in the application of EU state aid and taxation law in relation to tax rulings. TAXE ended in November 2015.

In December 2015, the European Parliament decided on the creation of a new special committee (TAXE 2) with a similar mandate to that of TAXE, but that also included a decision to examine harmful corporate tax regimes and practices at European and international level, producing a report which was voted in Plenary on July 2016.

On April 3, 2016, the ICJ revealed the largest leak in offshore history: 11.5 millions of leaked documents, emerging from 2.6 terabytes of internal e mails, documents of all kinds, contacts, banking data and even copies of passports. The documents represented 40 years of records of the Panamanian law firm Mossack Fonseca.

The Panama Papers exposed how some of the world’s wealthiest people have used shell companies to avoid taxes. Celebrities, billionaire company owners, drug smugglers, sport stars, presidents, prime ministers, and public officials coming from 200 different countries used the services of the law firm Mossack Fonseca to create more than 214,000 offshore entities.

\(^{30}\) Malta has introduced a Notional Interest Deduction (NID) regime (available from 2018), which will allow companies and foreign companies with permanent establishments in Malta to claim a deduction on their equity against their tax base. The Commission does not consider this a risk. However, it is probable that it ends up being used for tax avoidance in the same way as interest deduction is.
Given this new leak which revealed information that was different in substance to that of the LuxLeaks, on 8 June 2016, the European Parliament (PANA Committee) adopted the decision of setting up a Committee of Inquiry to investigate the way in which the European regulations regarding money laundering, tax avoidance and tax evasion had been infringed or ill-administered.

Underneath are some of the positive aspects that were included in the PANA Recommendations voted in Plenary on December 13, 2017.

**a. Some positive results of the PANA Committee**

Some of the relevant issues that have made it into the PANA recommendations adopted in Plenary on December 13, 2017 relate to, for example:

a) Requesting the Commission to tackle the issue of freeports in the European Union;

b) Recommending that the EU should make it illegal to maintain commercial relations with legal structures established in tax havens if the ultimate beneficiary cannot be identified;

c) Regarding the EU list of non-cooperative tax jurisdictions, it suggested considering among the criteria the absence of corporate tax or close-to-zero corporate tax rate, and considering EU jurisdictions as well as non-EU ones; and that the Commission launch a broad evaluation of harmful tax measures in the Member States;

d) Recommends the introduction of a withholding tax to avoid profits leaving the EU untaxed;

e) The Recommendations note ‘that the EU’s existing definition of the control required to create a group of companies should be applied to accountancy firms that are members of a network of firms associated by legally enforceable contractual arrangements that provide for the sharing of a name or marketing, professional standards, clients, support services, finance or professional indemnity insurance arrangements, as anticipated by Directive 2013/34/EU;’

f) There is also a request to the EC to produce a proposal for preventing tax advisors from advising both public revenue authorities and taxpayers;

g) Requests to the EC and/or the Council the creation of a public European Business, commercial, beneficial ownership, and land registries, public country-by-country reporting; as well as the interconnection of national bank account registers and the publication of statistics on transactions with tax havens and high-risk countries;

h) For Member States to stop all use of any form of tax amnesties that could lead to money laundering and tax evasion or that could prevent national authorities from using the data provided to pursue financial crime investigations;

i) Several paragraphs refer to the need of considering more severe and deterrent sanctions for banks and other intermediaries, for money laundering, tax evasion and tax fraud;

j) Requests Member States to reinforce their tax administrations with adequate staffing capacity;

k) A request to the Commission to address the transfer of a company’s headquarters within the EU, including rules to counteract letterbox companies; as well as put an end to corporate tax inversions31;

31 As noted in paragraph 56 of the PANA Recommendations ‘whereby a multinational corporation is acquired by a smaller company located in a tax haven and adopts the latter’s legal domicile, so as to ‘relocate’ its headquarters and reduce the combined firm’s overall tax burden, a process that is followed by ‘earnings stripping’ through tax-deductible payments to the
It noted that implementing the CCCTB at EU level only runs the risk of creating a situation in which current losses from Member States to the rest of world could be locked in, as could the exploitation of the rest of the world by some Member States;

m) The EP requests more transparency on the decision-making process and criteria for identifying harmful tax measures adopted by Member States of the Code of Conduct Group (CoCG) on Business Taxation.

b. Policy recommendations

It seems evident, after the analysis performed up to this point that even when the European Union is currently in a continuous and constant effort to reform its rules with the objective of tackling tax evasion and avoidance, such efforts are not enough as they do not attack the structural problems enabling tax evasion and avoidance.

Moreover, European institutions prioritize the attraction of capital at any cost, in particular the Council of Europe, which, through non-transparent decisions, in which the position of the Member States is hidden, continues to benefit European tax havens.

However, there is hope, among other things because recently the Ombudsman of the European Union found that through practices that inhibit scrutiny on the creation of European standards, the Council of the European Union undermines the right of citizens to hold responsible of their acts to the elected representatives. In particular, the ombudsman criticized the systematic failure of the Council of Europe to register the identity of the Member States taking positions during the discussions related to the drafting of European standards.

If the meetings of the Council of Europe were open to the public, decisions on the European regulation against tax evasion and avoidance could take another course.

In this sense, what one might think is a tax system that discusses not only corporation tax, but the taxes that we want to have to achieve the objectives we want, and among them the objective of redistribution of wealth. (Murphy, 2015)

Meanwhile, it is necessary to insist with the following measures:

- Strengthen local tax administrations, since the last years of austerity policies have reduced the size of the European Tax Administrations. \(^{32}\)

- Continue claiming the application of the public country by country report to all companies, and not only those with revenue above 750 million Euros.

- Introduce broad rules regarding what are considered as associated companies, since the economic linkage occurs not only through ownership, but also through other forms of control.

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\(^{32}\) See EPSU (2014)
Legal and tax advisors acting under the same control should be subject to the submission of the country-by-country report.

Apply the withholding tax to dividend, interest and royalty payments so that at least the tax can be collected in one of the countries of the European Union.

Strengthen the rules regarding controlled foreign companies (CFCs), since the current regulations allow companies two alternatives, one of which indicates that taxes will be levied on subsidiaries located in low tax jurisdictions that have as a purpose to obtain a fiscal advantage. These types of paragraphs are in practice impossible to apply because of their lack of objectivity.

Question the arm’s length principle, since it is a system that turns tax avoidance into an evasion guaranteed by the State; and in the same way question the validity of intra-group contracts.

What are the alternatives to the arm’s length principle? Those that consider economic reality over contracts between related parties. An alternative may be unitary taxation, which in the framework of the European Union would be the CCCTB proposal. However, if this proposal leaves the window open for evasion and circumvention to be channelled through the transactions of companies located in the European Union with the rest of the world, then it is useless. Therefore it is necessary to implement the CCCTB with strong rules to control operations with the rest of the world, and lower the threshold of 750 million Euros to extend the application of this standard to all companies.

Other alternatives are those considered by developing countries, such as:

- the 'Sixth Method' for the valuation of commodities using market quotations at the shipment date;
- those based on the 'location specific advantages' used by China and India to assess the profit extracted by multinationals from low cost production in such country; or sell their products in a large and growing market (UN, 2013);
- regarding intangibles, Chinese and Indian the transfer pricing rules consider that marketing intangibles are inexorably linked to the market where the products are sold; and regarding the royalties for the use of "know-how", the Chinese legislation understands that it is not valid to eternally pay a royalty for this concept, since after a time that the company has been producing in the country, it will end up appropriating such knowledge, transforming and improving it (UN, 2013);
- the use of the 2010 United Nations Model tax convention, since it still retains the possibility of using the profit split method.

It is also necessary to extend the application the criterion by which it is understood that the companies are associated so that it does not only consider the companies that share control, but also apply the definition of the Directive 2013/34/EU.

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Control should be based on holding a majority of voting rights, but control may also exist where there are agreements with fellow shareholders or members. In certain circumstances control may be effectively exercised where the parent holds a minority or none of the shares in the subsidiary. Member States should be entitled to require that undertakings not subject to control, but which are managed on a unified basis or have a common administrative, managerial or supervisory body, be included in consolidated financial statements.

Likewise, it is necessary to discuss the possibility of agreeing on a minimum effective rate of corporate tax, and combating European tax shelters.

Finally, it is necessary to empower the United Nations to lead the discussion on international taxation. The OECD has taken the place of the United Nations (by virtue of the economic power of its members), leaving the United Nations in a secondary position. And even when the United Nations has its own model tax agreement, it has weakened it - making it closer to that of the OECD - to satisfy OECD pressures.

5. References


