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THE TENDENCIES OF DIRECT TAX HARMONIZATION – TACKLING THE DIGITAL TAX AVOIDANCE

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ABSTRACT: *In the European Union the main tendency in the tax policy is fighting against the tax evasion, tax avoidance, fighting against the harmful tax competition. The tax avoidance appears in the harmful tax competition too, and the digital companies - like Google, Apple, Microsoft, Amazon, are often employing it.The digitalism is very important for the economy, it has a lot of good in it, but it can be harm also. One of the most dangerous side is the aggressive tax planning which is connected with the tax avoidance. There are new ways and forms of the digital tax avoidance like "Double Irish with Dutch Sandwich", or the "Hidden offshore" tax structure which cause double non taxation. The European Union is trying to tackle the tax avoidance and aggressive tax planning with their legal instruments. The OECD BEPS document and the Anti tax avoidance Directive (ATAD), and the Commission's measures fight off the digital tax avoidance. In this study I point out the problems and new structures of the aggressive tax planning by the digital companies, and analyze the legal instruments against it.*

KEYWORDS: *tax avoidance, aggressive tax planning, Double Irish with a Dutch Sandwich, ATAD, OECD BEPS Action Plan, harmful tax competition*
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1. INTRODUCTORY THOUGHTS: NEW TENDENCIES OF TAX COMPETITION AND AGGRESSIVE TAX PLANNING OF THE DIGITAL COMPANIES

The process of harmonizing direct taxes in Europe had been slower and had begun later than indirect tax harmonization. Its results emerged only in the 1990s: for example, the Council's "Directive on Parent Companies and Subsidiaries", "Fusion Directive", or the ECOFIN Council's soft law called "Code of Conduct on Business Taxation" (COUNCIL, 1997) (WATTEL & TERRA, 2012). The reasons for this lagging and late reaction are practical. First, the object of the regulation, which is the taxation of

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companies' income, primarily belongs to national authority and this had not blocked the proper development and functioning of the integrated, single European market for a relatively long time. In the field of tax legislation, maintaining national sovereignty is merely a question of strategy. Its limitation provokes the status of the member states thus they do not easily allow EU institutions to gain authority over this power.

On the other hand, the delay of direct tax harmonization is due to a particularly strict procedural rule stating that unanimity is required to issue any new directive on any subject of taxation. (Roman Treaty, Article 94, TFEU, Article 115) [1] The voting on previous directives had been difficult to settle even with 15 member states, thus it is much more challenging with 28 members.

A good solution to avoid this burdening procedure is to issue rules that are not qualified as official legal sources but contain guidance for taxation and voluntary legal compliance. An example for that is the Code of Conduct for Business Taxation issued by the Council of ECOFIN which document is the first and one of the most essential set of rules concerning the treatment of harmful tax competition and tax evasion.

The direct tax harmonization basically has three main fields that connect to businesses, to the company tax:

- tax competition that includes tax evasion, off-shore activities and the topic of hidden off-shore activities;
- tax avoidance that includes new and aggressive digital methods of tax-planning, double or multiple non-taxation and new methods of profit shifting;
- tax harmonization on income tax for businesses, thus also the regulation on common consolidated corporate tax basis. (EuropeanUnion, 2012) (GÖNDÖR, 2017)

Fundamentally, all three fields conclude the profit-based taxation of companies and other business entities, therefore corporate tax is connected to the EU legislation on direct taxation and business taxes.

My research primarily concerns those challenges that have gained power along with digitalization, therefore the main issues of tax competition and the tax-avoiding techniques of digital companies.

2. THE TAX COMPETITION

Speaking about tax competition, the ultimate question is whether it is harmful or not. What are its advantages or disadvantages how do we differ the harmful competition from fair, non-discriminating competition of companies, where is the line between fairness and unfairness? Is it important at all to separate the terms and can tax competition even be fair in any circumstances?

2.1. MAIN CHARACTERISTICS OF THE HARMFUL TAX COMPETITION

When will be the tax competition unfair?

According to the OECD report and the Code of Conduct on Business Taxation, harmful tax competition occurs when:

- an effective level of taxation is significantly lower than the general level of taxation in the country concerned;
- tax benefits are reserved for non-residents;

[1] TFEU, Article 115.

- tax incentives are given for activities which are isolated from the domestic economy and therefore having no impact on the national tax base;
- granting of tax advantages even in the absence of any real economic activity;
- the basis of profit determination for companies in a multinational group departs from internationally accepted rules, in particular those approved by the OECD;
- there is a lack of transparency.

The way tax competition most commonly occurs is by ignoring the principles of national treatment and indiscrimination. These conditions lead to tax benefits and state benefits for foreign investors and the creation and maintenance of tax havens. Hungarian law calls this phenomenon: allowance of the formation of organizations with foreign activities, thus cases of decreasing the burdens of taxes, thus positive discrimination of foreign investors. In these cases, tax competition causes harmful effects that mislead international capital flow, distort economic competition and incapacitate the manifestation and operation of the inner single market, thus leading to harmful tax competition.

However, when we define harmful tax competition, I think it is important to mention that tax competition can also be fair, if it does not collide with the principle of distributing tax burdens. If there is a contradiction between these factors, tax competition is certainly harmful. The reason for this connects to the fact that taxation is executed on those who benefit from public goods and services. To dissect the theory further: one must participate in sharing the burdens of that country where the individual practically uses the services. The principle of distributing tax burdens is certainly infringed when the individual doesn't pay taxes in the proper state, but in a foreign country/tax haven. Shortly, if one uses public services in a state and then pays taxes in another place, harmful tax competition is very likely to occur. Should the lack of appropriate identification of companies, transparency or change of information furtherly worsen the situation, harmful tax competition manifests.

A highly characteristic case of this is the application of the tax haven rule.[2] (ERDŐS & KOVÁCS, 2010);

Overall, harmful tax competition most typically occurs when the following conditions are met (ERDŐS, 2012):

- Tax discrimination – foreign investors and promoters benefit from tax benefits and positive discrimination in favor of foreign capital
- Tax avoidance, harmful minimization of taxes – tax havens, allowance of the formation of off-shore companies., and offshore' s places (ERDŐS & KOVÁCS, 2010).
- Those benefits that are forbidden by the European Union – benefits by tax manipulations, leading to harmful tax competition.
- Limitation of free capital flow and the right of establishment; issue of moving registered office to another member state
- Application of very low tax rates, differing from usual and neighboring tax rates – results harmful tax competition by extracting capital.

[2] Hungary had also applied a hidden off-shore regulation concerning corporate tax benefits for companies with foreign activity, because foreign companies -as companies with foreign activity- could get a very appealing corporate tax rate of 3% (instead of the 19% and later 18% rate that was applied to national tax-payers). These regulations had to be repealed when Hungary joined the EU in 2004.

In my view, when we disassociate tax competition and harmful tax competition, it is essential to mention that tax competition is generally discriminative and distorts the proper operation of the single, integrated market. However, separating the two terms has practical importance as tax competition comes in different levels and its advantages also coexist alongside the disadvantages.

To sum up, the conditions of a preferential tax system that may hide potential risk to create harmful tax competition are: (significantly) low tax rates for foreign taxpayers; lack of communication and transparency; discrimination of foreign and national taxpayers.

In numerous cases, the lack of transparency also carries tax discrimination, therefore tax havens usually give opportunity for anonym, money-laundering companies to hide profit. This latter action may also result in international fiscal crimes.

To review, why is tax competition harmful?

- because it distracts international capital investments,
- scares off tax-payers from voluntary legal compliance,
- alters the ideal balance between public expenditures and taxes
- infringes the principle of distributing tax burdens
- other countries are forced to increase not profit-based tax rates as companies' profit is allocated
- distorts international capital flow and market competition
- infringes competitional neutrality and the principle of indiscrimination, thus
- distorts the operation of the European single market,
- also fundamentally opposes to the aims of the European Union.

For the assessment of the harmfulness of national tax measures, the Code of Conduct lists the following characteristics, as relevant: (TERRA –WATTEL 2012 p.237.)

- "Off –shore characteristics: availability of the tax advantage only for non-residents, or only for transactions with non-residents,
- Ring-fencing: protection of the domestic market against the tax advantage, so that the measure does not erode the domestic tax base of the State concerned (but only other State' tax bases: beggar thy neighbourhood),
- Lack of substance: granting of the tax advantage irrespective of any real economic activity, and irrespective of substantive economic presence of the tax payer in the State concerned,
- Lack of arm's length dealing: application of rules for the determination and allocation of profits within a group of companies which depart from international standards (especially the OECD transfer pricing guidelines)
- Non –transparency: unpublished advanced rulings possibly derogating from Statue Law, relaxation of legal provisions at administrative level, negotiability of the tax burden..." (TERRA –WATTEL 2012 p. 237)

The Code of Conduct highlights the principle that every action leading to lower tax burden than the usual rate in member states (positive tax discrimination) is harmful. Tax benefits for foreign investors are sorted here.

These undesirable factors are more than enough for the European Union to stand up against harmful tax competition.

3. EUROPEAN AND HUNGARIAN TENDENCIES AND ACTIONS ON HARMFUL TAX COMPETITION

The aim of the European tax harmonization is to solve international tax law conflicts caused by the different legislation of the sovereign states.

I collect the measures of the EU Tax law in the fight against the harmful tax competition. In tax harmonization, EU institutions are focused on these conflicts with the help of soft law, primary and secondary sources of law. To solve the upcoming problems, the following documents and legal instruments are used to combat unfair, harmful tax competition:

- Code of Conduct on Business Taxation a document issued by the Council of ECOFIN. It describes certain behaviors leading to harmful tax competition and gives guidance to counter it. (rules of "standstill" and "roll back"),
- Right of the EU Commission based on the 107th and 109th article of TFEU to threaten with or commence infringement procedure against a state, and apply tax competition fines on tax-evading companies
- Case law of the ECJ[3] ,
- According to my opinion, the OECD report on Harmful tax competition can be also sorted here as it may be called (although OECD is not an EU institution) as the legal predecessor of the Code of Conduct. The report contains descriptions of certain behaviors leading to harmful tax competition and solutions to counter it.

From these documents, I particularly highlight the Code of Conduct on Business Taxation.

3.1. THE MAIN RULES OF THE CODE OF CONDUCT ON BUSINESS TAXATION

The Code of Conduct on Business Taxation was issued in 1997 and implemented in 1998. It is not an obligatory source of law, but a set of rules that member states may voluntarily and individually follow. This method gets around the long-lasting and difficult process of unanimous legislation. It is practically not a legal source, yet an instrument of soft law as it does not bind the states, thus not having sanction and cannot be enforced.

Member states fulfil the requirement of holding back from legislation causing harmful tax competition by voluntary legal compliance, "not to introduce any new tax measures which show these harmful characteristics (rule of standstill") [4].

If a valid national legal source may potentially lead to harmful tax competition, the member state repeals it as soon as possible, " Member States committed themselves and to repeal existing tax measures, which after review, would be labeled harmful (rule of roll back") [5] and does not implement a similar regulation again. (TERA – WATTEL2012. p.238)

[3] For instance: ECJ case C-175/88. Biehl vs. Administration des Contributions (EBHT 1990. p. I.-1779.), Cartesio case, C-196/04. Cadbury Schweppes plc. and Cadbury Overseas Ltd. Contra Commissioners of Inland Revenue case (EBHT 2006.I.- 7995.) In: ERDŐS É: (2012). p. 190-198.

[4] „standstill" rule, therefore not introducing any new regulation that may cause harmful tax competition. TERRA- WATTEL (2012.) p. 238

[5] rollback" rule: member states of the Code of Conduct oblige themselves to repeal any regulation that may potentially lead to harmful tax competition. TERRA- WATTEL (2012.) p. 238.

A great deed of the Code of Conduct is that it thoroughly describes those cases when a state follows a behavior that may result in harmful tax competition and obligates the accepting states which instruments must be avoided.

The Code of Conduct gives attention to the problematic question of state benefits and tax benefits. The European Commission issued a Communication at the end of 1998 which describes which state benefits are harmful and forbidden related to the functioning of the single market. [6] (Őry 2003 pp.313-321)Since then, numerous further EC documents have concerned this topic.

The Code of Conduct on Business Taxation can only be put into practice by the voluntary consent of the states - thus its infringement calls forth no sanction to be enforced-, but its importance is validated by the fact that states who wish to join the EU must implement its rules. The code ensures that states do not legislate rules that may cause harmful tax competition ("standstill") and invalidate all legal sources that may lead to the same result ("rollback") until 2003.

The Code defines harmful tax measures as " measures (including administrative practices) which affect or may effect in a significant way the location of business activity in the Community' and which provide for a significantly lower effective level of taxation than the general level of taxation in the Member State concerned, i.e. departing from the benchmark tax system." (TERRA –WATTEL 2012 p.237)

To conclude, tax competition can be limited if it can potentially lead to unfair competition, distortion of competition, negative alteration of international capital flow or opposes to the fundamental principles of taxation like indiscrimination or distributing tax burdens.

According to the principle of distributing tax burdens, one should contribute to public expenses in the country where the individual uses public services. If a company only relocates its registered office to pay less tax, yet its actual activity is continued in another state, it does not optimize taxes, but evades them, thus fulfilling a condition of harmful tax competition.

3.2. ACCOMPLISHMENTS OF HUNGARIAN TAX HARMONIZATION AGAINST HARMFUL TAX COMPETITION – THE HUNGARIAN MEASURES

The achievements of Hungarian tax harmonization against harmful tax competition have been manifested by fulfilling the accepted obligations and joining the EU in 2004.

Changes of tax benefits for foreign investors briefly:

- Since 2000, new priorities have emerged: actions against harmful tax competition have gained importance and got implemented to the Hungarian national law. EU law had become obligatory, therefore also the regulations of the Code of Conduct on Business Taxation. (stand still and roll back rules)

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[6] Carlo PINTO: EC State Aid Rules and Tax Incentives: AU-Turn in Comission Policy (Part I-II.) *European Taxation* 8-9. (1999) See also: ERDŐS Gabriella - Dr. ŐRY Tamás: Néhány jogharmonizációs és alkotmányossági kérdés a jelenlegi adókedvezményekkel kapcsolatban , *Európai Jog* issue 2002/4. p.,
Éva Erdős-Zoltán Nagy- Zoltán Varga: The Rules of Corporate Tax Advoidance in the Hungarian Law, Curentul Juridic X. No.1.(48),2012, pp.13-24. Éva Erdős-Zoltán Nagy- Varga Zoltán: Hungary, Karen B. Brown (Editor): A Comparativ Look at Regulation of Corporate Tax Advoidance, Springer, New-York, 2012, pp.193-197.

- Tax benefits for small and medium-sized companies are allowed, but tax benefits of foreign investors had to be abolished. New tax benefits couldn't be introduced. Already acquired tax benefits could remain in use until 2011. (stand still and roll back)
- In 2003, a Hungarian hidden off-shore regulation was repealed, (roll back)
- Tax benefits for investments have been removed from the corporate tax. Instead, development tax benefits and strategic agreements remained to compensate foreign investors.(stand still and roll back)
- Until 2008, benefits on local business taxes for companies had to be abolished.(roll back)
- Until the end of the year 2010, all previously acquired, but banned tax benefits had to be withdrawn. (roll back)
- In corporate tax, new priorities have been highlighted, which are compatible with the EU State aids' regulations, as:

Individually submitted development tax benefits, strategic contracts or conditional tax assessment (individual contracts between the government and the investors) .

- Tax benefits for lagging regions, small and medium-sized companies and other restrained corporate tax benefits. For instance, benefits for environmental investments replaced benefits for foreign investors.

Concluding Hungarian results, national regulations have been tuned to EU regulations, although the process still goes on. It also noted that the European Union called member states joining in 2004 to account for complying the Code of Conduct on Business Taxation (rules „stand still" and „roll back") which again is not an obligatory source of law. Regulations opposing to this document had to be repealed and legislation must take its terms into consideration.

The importance of the Code of Conduct is remarkable. Although not a source of law, yet when it comes to application, it is equal to the primary and secondary legal sources of the EU.

However, double standards have remained to be an issue. Western European EU member states still maintain regulations that may give ground to hidden tax benefits and hidden off-shore (Ireland, Netherlands, Belgium). These regulations didn't have to be repealed in 2004 and not even in 2011[7].

In the followings, these issues will be discussed, including new techniques for tax evasion and the latest results of the European tax harmonization.

4. NEW CHALLENGES OF THE EUROPEAN TAX HARMONIZATION: THE DIGITAL TAX AVOIDANCES

As digitalization has been gaining constantly increasing importance, new tendencies have appeared in the field of tax evasion and tax avoidance. One of them is the taxation after cross-border services and another is the lack of any taxation at all. In today's digital economy, multinational companies (Google, Apple Inc., Amazon, RBNB) have come up with new techniques for tax evasion that use profit shifting. The European Union faces with the challenge of identifying these behaviors and combating them with justified instruments of the EU tax law.

[7] See in details in further with the examples of Ireland and the Netherlands.

The new tendencies – like the problem of identifying the practically profit-generating offices and where should the tax be paid; the double non-taxation; aggressive tax-planning; profit shifting and vanishing; or hidden off-shore regulations – are all appeared in the EU tax harmonization as new technical and tax challenges., as harmful tax practices. (See also: DEÁK 2017)

A serious issue is that major digital companies – like Google or Apple - hide a large share of their profit in tax havens or allocate their visible profit from the exploited state in order to skip taxation. An example for the latter method is the case of Apple's subsidiary company in Ireland (Cork) called "Apple Operations International.

4.1. THE NEW DIGITAL TECHNIQUE OF TAX AVOIDANCE: ISSUE OF DOUBLE NON-TAXATION

A typical example for aggressive tax planning and tax evasion is Google's profit shifting carried out by using two Irish and a Dutch subsidiary company. This method is now also called "Double Irish with Dutch sandwich" (Investopedia.com, n.d.) (CSABAI & Dr. CZOBOLY, 2016). The Double Irish with a Dutch Sandwich is a new tax avoidance's technique, which is also an aggressive tax planning.

Google -officially located in the USA- payed "service fees" to its Irish subsidiary. Irish tax system allows service fees (royalty) to come with a very low tax rate - 2% instead of the normal rate of the Irish company tax: 12,5%. This money was then sent to Google's Dutch subsidiary as "income" and then transferred back to another subsidiary that was registered in Ireland, but had its registered office in Bermuda, in a tax haven. The well-known off-shore place allowed Google to avoid taxes, more specifically to skip taxation in the USA, Ireland and the Netherlands. The company had gained thousands of Euros as plus profit by the alibi of "legal profit shifting".

The European Commission has payed attention to these new techniques of digital companies, yet the action against tax evasion is not an easy task and the EU still works on proper strategies.

A few results have already come to life, for instance, the introduction of the Commission's ATAP[8], and the Council's ATAD[9]. The Commission has also started to apply competency fees on companies that evade taxes or hide profit.

4.2. THE CASE OF APPLE INC. – A HIDDEN OFF-SHORE REGULATION – PREFERENTIAL TAX REGIME IN IRELAND

A very commonly used profit shifting method -which then leads to double non-taxation and tax evasion- is to exploit Irish preferential tax regulations.

Apple saved billions of EURs on corporate tax by accounting a major portion of income to Irish companies[10].

One of Apple's Irish subsidiaries (Apple Operations International: AOI). The company is registered in Cork and by profit shifting, Apple is able to skip even the not-too-high 12,5% rate of Irish corporate tax. The secret lies in the Irish tax provisions for foreign

[8] ATAP = Anti- Tax Avoidance Package, issued by the European Commission on 2018/01/28. https://assets.kpmg.com/content/dam/kpmg/pdf/2016/03/European-Commission-presents-H.pdf (2017/12/10.) and see also: http://crwwgroup.net/atap-igy-kuzd-az-eu-cegek-adoelkerulese-ellen/(2017.12.10.)

[9] ATAD = Anti Tax Avoidance Directive, the EU Commission's 201661164/EU Directive, EU HL L 193., 2016.7.19.

[10] European Commission, Press release, State Aid: Ireland gave illegal tax benefits to Apple worth up to 13 billion euro, Brussels 30 August 2016. IP-16-2923_EN.pdf

companies – which are hidden off-shore regulations. In Ireland, these companies have to pay only 2% as corporate tax and even this amount can be avoided if the legal entity has no Irish operator or owner[11]. AOI is a „collector, skeleton company" for Apple that has never had a single Irish employee. Out of its three executives, two live in California and all of them are officially, employed by the California-based Apple, not the Irish AOI. The parent company Apple sourced 30% of its total profit from the AOI between 2009 and 2011. AOI generated it, though the company itself had never paid any tax on profit.

This Irish tax rule is not anything other than a loophole for foreign investors, a hidden off-shore regulation. The loophole consists of two elements. One is the extremely low tax rate of 2% on profit and the other is the preferential rule stating that a foreign company only has to pay taxes if it is led by an Irish legal entity or has an Irish owner or operator. The AOI had neither Irish owner nor operator, thus it was exempt from corporate tax and didn't pay any tax on Apple's profit in Ireland nor in the USA.

The cased was followed by legal consequences as the EU Commission questioned Apple's activity on the basis of competition rules and fined the company for using forbidden state benefits[12]. Exorbitant, discriminative tax benefits stand against the EU's policy on avoiding harmful tax competition and also the 107th and 109th article of TFEU that qualifies Apple's behavior as the exploitation of an unfair competitional advantage.

The threat of an infringement procedure had effect on the Irish legislation[13], the Commission objected the mentioned hidden off-shore rules on the grounds of TFEU's 107th and 109th article. The loophole was filled in 2015; companies are allowed to get those benefits until 2020[14].

5. NEW TENDENCIES OF THE EUROPEAN TAX HARMONIZATION – THE REGULATION OF THE EU AND THE OECD

The EU and the OECD have reacted to these new digital tax evasion techniques, dual or multiple non-taxation and tax exemptions in several ways. The aim is on one hand to eliminate preferential tax systems and on the other is to identify and shut down the tax evasion techniques by proper legal instruments and the principle of "taxation in the place of profit generation".

International and European tax law establish instruments against these challenges in the process of direct tax harmonization. These legal instruments include: the Action Plan of BEPS by the OECD (2015), the EU Council's previously mentioned ATAD (2016) and the Commission's directive proposal of COM (2016) 685 on common corporate tax rate.

The Commission also utilizes other tools against tax evasion such as the competition fine for exploiting banned state benefits and the threat of an infringement procedure against member states with preferential tax regulations.

[11] European Commission, Press release, State Aid: Ireland gave illegal tax benefits to Apple worth up to 13 billion euro, Brussels 30 August 2016. IP-16-2923_EN.pdf
[12] European Commission – Press release: State Aid: Ireland gave illegal tax benefits to Apple worth up to 13 billion euro, Brussels 30. August 2016. IP-16-2923_EN.pdf
[13]Double Irish with a Dutch Sandwich http://investopedia.com/terms/d/double-irish-with-a-dutch-sandwich.asp#ixzz4ue3l1fdv (2018.01.12.)
[14]Double Irish with a Dutch Sandwich http://investopedia.com/terms/d/double-irish-with-a-dutch-sandwich.asp#ixzz4ue3l1fdv (2018.01.12.)

5.1. OECD BEPS ACTION PLAN 2015

The line of reactions had begun by OECD's Action Plan in 2015, known as BEPS[15]. This document consists of 15 steps describing new tax evasion strategies and other malicious behaviors that may cause harm to the tax system. The main intention of the BEPS reports is to halt double non-taxation, aggressive tax planning and tax evasion coming from certain states' dissimilar regulations and legal loopholes. BEPS concerns the latest profit shifting techniques as the present challenges of international taxation. These methods' basis is the artificial allocation of the profit from a state to another where the tax rate is low or zero. BEPS[16] also establishes instruments against activities with harmful effects on taxation. Although it is not a source of law, yet its importance is outlined by the fact that more than 100 states cooperate to execute BEPS reports and implements its tools to the legal system. These include: eliminating tax evasion, modifying the definition of "registered office", establishing directions on transfer pricing, eliminating hybrid structures, halting harmful taxational activities, eliminating off-shore companies and stopping the exploitation of interest subtraction and state benefits.

BEPS prescribes the surveillance of profit allocations by decreasing tax rate, publicity, the change of information, transparency and the issuing of reports by each state. Informing international tax systems has essential role. The report also initiates the improvement of dispute resolution methods and incites states to create a new multilateral document for the modification of bilateral taxation agreements.

A great success of the BEPS is to outline the principle of taxation at the place of profit generation. This means that one must pay taxes at the place where the business activity was carried out and the profit is practically shows up! (ERDOS, 2011) The application of this principle might just become a milestone in the elimination of off-shore activities!

It can be stated that the BEPS report is such a new innovative document and multilateral agreement that has led to the complete review of the international tax regulations in order to halt double and multiple non-taxation, eliminate exploitations and approach possibilities highlighted in the BEPS Action Plan.

5.2. THE EU COUNCIL'S 2016/1164/EU - ANTI TAX AVOIDANCE DIRECTIVE: ATAD – SOLUTIONS OF THE POLICIES AGAINST TAX AVOIDANCE

This Directive – approved by the Council in 2006 July- is similar to the BEPS report as it contains strategies against tax avoidance, thus commonly called as anti-BEPS directive. These strategies can be put into six categories: prescriptions for foreign companies that may allocate their profit to states with low tax rate, halting the double accounting of expenses in case of hybrid structured companies, question of disinvestment tax on companies' resource allocation ("exit tax") and tax on the profit from these resources' increased value, limitation of interest subtraction and the proposal of general tax evasion regulations, known as GAAR[17].

ATAD also stands against double non-taxation. In order to halt it – similarly to the BEPS report-, the directive proposes the review of all agreements on tax avoidance. The

[15] BEPS Action Plan, OECD/G20 Base Erosion and Profit Shifting Project, Explanatory Statement, OECD 2015. p:9, in: http://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf (2018.01.15.)
[16] BEPS = Base Erosion and Profit Shifting
[17] GAAR: General Anti – Avoidance Rules

principle of taxation on the profit at the place of generation is also supported again. However, the greatest virtue of this document is the fact that it is a secondary source of law, thus it can be legally enforced and executed.

Its other notable proposal is to issue a single, consolidated corporate tax basis in the form of a directive. It is not the first time to initiate such an action, as the CCCTB[18] Directive proposal in 2002 (reviewed by the Council in 2011/03/16) and then the Council's proposal on a single, contracted corporate tax basis (COM 2016(685) had also concerned this topic. (GÖNDÖR, 2017)

The approval of this proposal is encumbered by the rule that it has to be accepted unanimously. This is not an easy task for 28 (27 in the future with the UK leaving) member states. The aim of the CCCTB is to encourage cross-border commercial and investment activities without avoiding taxes. The general and basic rule is again to assign income from business activities to the place where it is actually generated[19]. The Commission is constantly making steps to achieve this ideal situation within the EU. To shortly summarize, the aim of the CCCTB is to create a single corporate tax that would apply to all tax-paying individuals with tax burden at least in one EU member state and belong to the same authority.

6. SUMMARY AND CONCLUSION

A large part of harmful tax competition factors is connected to tax avoidance and tax evasion. The EU has been making efficient actions against them as it is the member states' common goal to eliminate these anomalies.

The Code of Conduct on Business Taxation had already contained provisions against off-shore activities, but OECD's BEPS Action Plan and Report, and the ATAD have given a new level of development to international tax law.

The EU Commission's role in initiation and enforcement is gradually increasing and the identification of tax-evading techniques is supported by proper documents (BEPS, Communications from the Commission).[20] ATAD has a major effect as a source of law, because it can be legally enforced and executed. Its provisions have to be implemented by all member states until 2018/12/31.

It seems that the legal harmonization of taxation in the EU has been accelerated, although reaction is not the same in every member state. Double standards are still an issue, as Hungary had to implement the rules of the Code of Conduct on Business Taxation until 2004 and repeal hidden off-shore and foreign discrimination rules, yet such regulations were present in Ireland until 2015 (already obtained rights can be vindicated until 2020).

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[18] CCCTB: Common Consolidated Corporate Tax Base – (KÖTA) COM(2011) 121, Official Journal of the European Union C 54/66 , 2012.2.23 and European Commission Proposal for a Council Directive on a Common Corporate Tax Base (CCTB) 25.10.2016. COM(2016) 685 final 2016/0337 (CNS) and European Commission Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) 25.10.2016. COM (2016) 683 final 2016/0336 (CNS)

[19] COMMUNICATION OF THE COMMISSION Building a fair, competitive and stable corporate tax system for the EU Strasbourg, 2016.10.25. COM(2016) 682 final

[20] T-778/16. (2017/C 038/48) Case Ireland vs. Commission Official Journal of the EU 6.2..2017. C 38/35.

Nevertheless, ATAD is undoubtedly a new step of advancement in direct taxation being a secondary EU legal source after its less-forceful predecessors (Code of Conduct, BEPS). The BEPS project supports this directive by improving the success in the field of identifying new tax-evasion techniques.

The levels of publicity and communication have increased, and EU institutions face current challenges with cooperation and a more powerful attitude.

Overall, the most substantial requirement is the principle stating that one must pay taxes where the business activity is done, the profit is generated, and the public services were used. This condition with proper communication promises a most efficient counteraction against tax avoidances.

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GÖNDÖR, Mihaela 2017: The Common Consolidated Corporate Tax Base in the EU – A new phased approach , Curentul Juridic, Tirgu Mures 4/2017. p. 13.-24.

Hungary had also applied a hidden off-shore regulation concerning corporate tax benefits for companies with foreign activity, because foreign companies -as companies with foreign activity-could get a very appealing corporate tax rate of 3% (instead of the 19% and later 18% rate that was applied to national tax-payers). These regulations had to be repealed when Hungary joined the EU in 2004.

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