



# **Reflections on the EU objectives in addressing aggressive tax planning and harmful tax practices**

Final Report

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Unit D-1 Company Taxation Initiatives

*European Commission  
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# **Reflections on the EU objectives in addressing aggressive tax planning and harmful tax practices**

Final Report

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## List of acronyms, abbreviations and terms used in the Report

BEPS	Base erosion and profit shifting
CCCTB	Common Consolidates Corporate Tax Base
CCTB	Common Corporate Tax Base
CEPS	Centre for European Policy Studies
CFC	Controlled foreign corporation
DAC	Administrative Cooperation Directive
DG COMP	Directorate-General for Competition, European Commission
DG DEVCO	Directorate-General for International Cooperation and Development, European Commission
DG JUST	Directorate-General for Justice and Consumers, European Commission
DG TAXUD	Directorate-General for Taxation and Customs Union, European Commission
DG TRADE	Directorate-General for Trade, European Commission
EU	European Union
G20	Group of Twenty
GAAR	General anti-abuse rule
IMF	International Monetary Fund
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
Report	Reflections on the EU objectives in addressing aggressive tax planning and harmful tax practices
Research Team	Team of researchers led by CEPS
SECGEN	Secretariat-General, European Commission
SME	Small and medium-sized enterprise(s)
TAXUD	Directorate-General for Taxation and Customs Union, European Commission
UN	United Nations



## **ABSTRACT**

This Report analyses the EU's instruments to tackle aggressive tax planning and harmful tax practices. Based on desk research, interviews with stakeholders and expert assessments, it considers the coherence, relevance, and added value of the EU's approach. The instruments under analysis are found to be internally coherent and consistent with other EU policies and with the international tax agenda, in particular with the OECD/G20 BEPS framework. The Report also confirms the continued relevance of most of the original needs and problems addressed by the EU's initiatives in the field of tax avoidance. There is also EU added value in having common EU instruments in the field to bolster coordination and harmonise the implementation of tax measures. One cross-cutting issue identified is the impact of digitalisation on corporate taxation. Against this background, the Report outlines potential improvements to the EU tax strategy such as: making EU tax systems fit for the digital era; leading the international debate on tax avoidance; enabling capacity building in Member States and developing countries; strengthening tax good governance in third countries; ensuring a consistent approach at home and abroad; achieving a level playing field for all companies; and increasing tax certainty and legal certainty.

## ***CITIZENS' SUMMARY***

Tax avoidance reduces the public money available for important state responsibilities such as social services, healthcare, and infrastructure. It may also favour large multinational companies over smaller, local businesses. The EU's main measures to combat tax avoidance are in line with international rules, are internally coherent and in keeping with other EU policies that aim to ensure fair competition between all companies, help developing countries and foster international trade, for example. The objectives of these EU measures are still relevant. EU taxation rules increase coordination between Member States and make sure that companies pay their fair share of tax, wherever they are located and whatever their business. Yet more could be done to tackle tax avoidance in the EU, such as:

- updating the tax system because the digital era means that companies could have more room to pursue tax avoidance strategies;
- helping national tax authorities and non-EU countries fight against tax avoidance;
- making sure the same rules apply within the EU and abroad;
- ensuring fair treatment of companies operating in the EU; and
- setting out tax rules that are easy to understand and apply.

## **EXECUTIVE SUMMARY**

### **1 Context and scope**

The role of the EU in **combating aggressive tax planning and harmful tax practices** has increased substantially in recent years. Globalisation, digitalisation of the economy and the mounting pressure on domestic budgets following the financial and economic crisis have, along with various revelations on Member States' dubious tax practices, increased overall awareness of the need for a more coordinated approach to tax matters. These realities are reflected in the EU instruments that have been adopted in the field.

Against this background, this Report provides some **reflections on the objectives of the EU's instruments** to tackle tax avoidance issues, and suggests potential improvements. The analysis focuses on three research criteria: i) **coherence**, which looks at the degree to which the EU instruments under analysis are consistent with each other, with other EU policies and with the international framework; ii) **relevance**, which considers whether the rationale underlying the instruments is still appropriate or requires revision to account for changing needs and problems; and iii) **EU added value**, which assesses the additional impacts of addressing tax avoidance issues and setting objectives at the EU level rather than leaving the matter solely in the hands of Member States. The Report focuses on a set of specific instruments, divided into three categories:

- **Aggressive tax planning and harmful tax practices**, comprising: the Anti-Tax Avoidance Directive; the Directive on Administrative Cooperation; the Commission Recommendation on aggressive tax planning; the Commission Recommendation on the implementation of measures against tax treaty abuse; the Commission Recommendation relating to the corporate taxation of a significant digital presence; the Code of Conduct for Business Taxation; and the tax avoidance provisions in the European Semester.
- **Business facilitation**, focusing on the Parent Subsidiary Directive and the Joint Transfer Pricing Forum.
- **External policies**, including the Commission Recommendation on minimum standards of good governance in third countries and the Communication on an External Strategy for Effective Taxation.

### **2 Methodology**

The Report relies on a **mix of sources** – desk research, interviews, expert assessments – to ensure a sound evidence base for the analysis. Interviews targeted international, EU-level and national stakeholders in 10 Member States (Belgium, Cyprus, Germany, Hungary, Ireland, Italy, Luxembourg, Romania, Sweden, and the Netherlands). The team of researchers preparing this Report was assisted by **10 technical experts**, one for each selected Member State.

The collected data were **validated via triangulation** to ensure the robustness of evidence. Nevertheless, some limitations need to be acknowledged. First, the recent implementation of some of the instruments makes it difficult to assess their impact. Second, the Report accounts for, *inter alia*, the views of 27 stakeholders including public institutions, business associations and non-governmental organisations. The key findings, however, do not necessarily represent the views of consulted stakeholders. Third, the scope of the “external policies” analysis is limited to the two instruments listed above, which constitute only a subset of the EU instruments affecting tax policy in third countries.

### 3 Key observations

#### 3.1 Coherence

The analysis of the 'internal coherence' confirms that the **objectives of the EU tax instruments** covered by this Report are consistent to a large extent, while overlaps, gaps and contradictions are limited. Where present, the overlaps are due to maintained soft law measures that have been formalised into hard law. In addition, the stakeholders consulted consider the absence of an EU approach to digital taxation to be the main gap in the current EU tax framework. This gap could lead to double taxation, should Member States introduce their own measures at national level.

EU tax instruments are broadly consistent with **EU policies in other fields** such as state aid, internal market, financial services, development, criminal justice, and trade. In terms of overlaps, one of the aspects that resulted from the analysis concerns the list of high-risk third countries connected to the Anti-Money Laundering Directive and the list of non-cooperative tax jurisdictions. The implementation of the two lists and their two distinct, parallel processes, has caused some tension in relations with third countries in the past.

Finally, the EU tax instruments are generally consistent with the **international tax agenda**, most notably the OECD/G20 BEPS framework and the UN Model Tax Convention. Importantly, the EU and its Member States are considered to be leading actors in the OECD/G20 BEPS process, as they are among the first to implement the agreements and go beyond the minimum BEPS requirements.

#### 3.2 Relevance

The Report confirms the **continued relevance** of most of the original needs and problems addressed by the EU instruments under analysis. Some new needs have been identified. First, there is a need for **international tax rules fit for the digital era**, as current corporate tax rules are no longer fit for the challenges of digitalisation and globalisation. Second, increasing **tax fairness between companies** is essential. Third, in order to combat tax avoidance practices, tax administrations would benefit from **technical assistance**, for example to analyse the tax information they receive from other Member States.

From the perspective of business facilitation, all the needs and problems originally addressed by the EU rules under assessment are still relevant. For instance, **transfer pricing** is still one of the main channels used by multinational companies to shift profits; aggressive tax planning via **interest payments** is still a salient issue. **Tax certainty** and **legal certainty** remain priorities for both taxpayers and tax administrations.

Some needs have been stressed with regard to third countries and tax good governance. First, while the room for shifting profits using third countries is shrinking, multinational companies are still able to put in place aggressive tax-planning strategies involving countries outside the EU, which may lead to a **dangerous 'race to the bottom'** on corporate tax. Second, to ensure compliance with tax good governance, third countries need more support in their efforts to reduce tax avoidance.

#### 3.3 EU Added Value

A common EU approach brings **results that would otherwise not be achieved through individual national measures**. The EU added value is most significant for measures that require strong coordination, including the EU's implementation of the OECD/G20 BEPS and promoting tax good governance principles in the relationship with third countries. In general, hard-law instruments bring more added value than soft-law instruments.

Nevertheless, it is difficult to determine the precise added value of the EU tax instruments as **most Member States would probably have taken some measures on their own** due to their commitments within the framework of the OECD tax work and other global

developments. Reportedly, the lack of public transparency in some of the soft-law tax instruments, such as the Code of Conduct for Business Taxation, may limit how far external stakeholders can assess and support the policy process that leads to new measures against aggressive tax planning and harmful tax practices.

#### **4 Suggested improvements**

Based on the analysis, the following actions could be considered to increase the coherence, relevance and EU added value of the current EU instruments in the field of aggressive tax planning and harmful tax practices.

- **Making EU tax systems fit for the digital era** by ensuring a common EU approach to digital taxation and considering the international developments taking place in the OECD/G20 framework. The EU should ensure that the issue is swiftly addressed at the OECD/G20 level, and that the proposed solutions will be promptly implemented, in a consistent manner, by all Member States.
- **Leading global solutions.** Tax avoidance is a global issue. The potential for EU instruments to bring about the desired outcomes in this field is greater the more countries subscribe to the same standards. The EU should therefore lead the international discussions, in particular within the OECD/G20 BEPS framework, and contribute to global solutions. Importantly, when the EU adopts a leading role in this process it seems to engender more effective measures at international level. In addition, the EU should act as a coordinator for the implementation at the Member State level of internationally agreed-upon measures.
- **Enabling capacity building.** Most tax measures require administrative capacity for them to be fully effective; capacity constraints are affecting national tax administrations. In this regard, by relying on existing EU programmes such as the Fiscalis 2020 Programme and the Structural Reform Support Programme, the EU could provide targeted technical assistance based on a detailed assessment of capacity constraints at the national level.
- **Strengthening tax good governance in third countries.** As some developing countries lack the capacity to implement tax good governance reforms, support for countries willing to introduce such reforms should continue in the framework of the Official Development Assistance, as emphasised in the New European Consensus on Development.
- **Ensuring a consistent approach at home and abroad.** There may be a need to infuse more transparency and coherence into the EU's approach to internal and external corporate tax issues. Further development of policies on tackling aggressive tax planning and harmful tax practices inside the EU is thus needed to render more effective the policies promoting tax good governance externally.
- **Achieving a level playing field for all companies.** Despite major efforts to combat tax avoidance, effective tax rates still vary according to company size, location, level of internationalisation and sector of operation. Introducing a common, minimum corporate tax rate and a common corporate tax base could level the playing field considerably.
- **Increasing tax certainty and legal certainty.** Legal certainty may be increased by performing regular fitness checks of the relevant EU instruments to detect and remove any inconsistencies in the EU tax framework. Similar exercises could be conducted at Member State level to preserve the consistency of the national tax systems; in this respect, the Structural Reform Support Programme may offer valuable assistance to Member States to review and consolidate their corporate tax laws.

## ***REPORT***

## **Introduction**

Using desk research, interviews with stakeholders and expert assessments, this Report analyses the coherence, relevance and EU added value of the objectives of the EU instruments that aim to tackle aggressive tax planning and harmful tax practices. The Report is structured as follows:

- Chapter 1 discusses the **main developments in the field of aggressive tax planning and harmful tax practices**, thus providing the background for the analysis that follows. It considers the trends in corporate taxation and introduces the rationale for EU action in the field and identifies the EU instruments under analysis.
- Chapter 2 outlines the **methodology deployed**. First, it provides an overview of the research framework and questions that this Report aims to answer, as well as the different data source and data collection methods used.
- Chapters 3 to 5 represent the main body of the Report, **addressing the research criteria** that are part of the research framework. More specifically, the analysis is structured in three chapters that correspond to the following research criteria:
  - Coherence (Chapter 3);
  - Relevance (Chapter 4);
  - EU added value (Chapter 5).
- Chapter 6 recaps the **main findings** of this assignment and **suggests a number of actions** to improve the coherence, relevance and EU added value of the EU framework addressing aggressive tax planning and harmful tax practices.

The Final Report also comprises **four annexes**, which are presented in a separate document:

- Annex A, containing the research framework used to structure and guide the analysis in this assignment;
- Annex B, presenting the intervention logics for the EU instruments in the scope of the analysis. Annex B also includes aggregate intervention logics created in order to map the overall EU strategy in the field of aggressive tax planning and harmful tax practices.
- Annex C, featuring the questionnaire used to perform in-depth interviews with selected stakeholders at the international, EU and national levels.
- Annex D, summarising the fieldwork activities and the main takeaways from the stakeholders interviewed.

## 1 Background

Growing internationalisation is putting **pressure on national tax collection**. With the advancement in **automation and digital transformation**, the possibilities for businesses and private individuals to **exploit differences and gaps between tax systems** – including through aggressive tax planning – have increased exponentially in recent decades. Corporate tax avoidance is estimated to reduce the tax revenues of EU Member States by around €50 billion to €70 billion per year.<sup>1</sup> In particular, large and mobile corporations and high-wealth individuals seem to benefit from the ability to escape their tax obligation, forcing countries to shift the tax bill to the remaining corporations and citizens. Conversely, some countries compete in a harmful manner with tax measures aiming to attract targeting these footloose corporations and high-wealth individuals from other countries. Pressure on tax-raising capacity restricts governments' distributional powers.<sup>2</sup>

Increasing (public) awareness has encouraged policymakers at both national and international level to intervene more forcefully in the tax domain in the past few years. The majority of countries around the world, including EU Member States, have realised that in today's world taxation can no longer be treated entirely separately. It requires cooperation across countries and policy fields. Indeed, there is a growing awareness of the impact of tax policies on socio-economic, environmental and development policies. Moreover, policymakers are now cooperating more at international level to ensure fair and effective taxation.

Against this background, the EU plays an increasingly important role in overseeing national tax rules and coordinating between Member States. The EU's interventions are primarily to ensure the functioning of the Internal Market. Traditionally, agreeing tax measures at EU level has been complicated due to the requirement for unanimity, which could either not be achieved or would demand lengthy negotiations. In recent years, the decision-making process has eased considerably: less than six months were required to agree the Anti-Tax Avoidance Directive and about 40 days to adopt the country-by-country reporting between tax authorities.

### 1.1 Aggressive tax planning and harmful tax practices

In the context of this assignment, aggressive tax planning and harmful tax practices are defined as follows:

- **Aggressive tax planning** constitutes a form of tax avoidance behaviour on the part of corporations. Tax planning is to some extent a consequence of the complexity of tax systems that provide multiple options for compliance. This form of tax planning, where taxpayers choose the least costly option and comply with the rules and the spirit of the law, is generally accepted. However, aggressive tax planning is not accepted as it entails the deliberate exploitation of the loopholes and mismatches within and between national tax systems. Debt shifting, transfer mispricing and/or location change are prime examples of aggressive tax planning.
- **Harmful tax practices** refer to the competition between nation states with preferential tax regimes. Attempts by countries to attract corporate investment or national profit through such preferential tax regimes is one of the main reasons behind harmful tax practices. Harmful tax practices proliferate as corporations become more mobile. At the international level, attempts have been made to limit

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<sup>1</sup> Dover, R. et al. (2015), Bringing transparency, coordination and convergence to corporate tax policies in the European Union.

<sup>2</sup> Inchauste, G. & Karver, J. (2018), Fiscal Redistribution in the European Union. Available at: <http://pubdocs.worldbank.org/en/632981520461235859/EU-IG-Report-Fiscal-Redistribution.pdf>



harmful tax practices, which do not necessarily reduce aggressive tax planning but may make it less attractive for corporations to engage in.

## 1.2 Trends in corporate taxation

The **popular support for anti-tax avoidance and evasion measures** has grown substantially in recent years. On the one hand, there were the 2007-09 global financial and 2010-12 Eurozone economic crises that created pressure on public budgets. On the other hand, there were the revelations of numerous tax schemes such as **LuxLeaks**, **Panama Papers** and **Paradise Papers**.<sup>3</sup> In particular, LuxLeaks placed the issue of corporate tax avoidance and evasion on the global political agenda. In November 2014, the International Consortium of Investigative Journalists<sup>4</sup> unveiled the secret tax deals struck by about 350 multinational corporations with the Luxembourg authorities, which allowed them to reduce their corporate income tax (CIT) bill. The corporations used **mismatches in the tax systems** and **deals with the authorities** to reduce both the effective tax rate and the tax base. LuxLeaks came on the heels of the public outrage provoked two years earlier in the UK over reports that the US coffee-shop chain Starbucks had substantially reduced its tax bill by paying royalties to its regional headquarters in the Netherlands, which has a regime with low rates on royalties.

Many EU Member States still have tax systems with specific features such as Intellectual Property regimes, notional interest deduction and tax credits that allow corporations to lower their tax bills. There are also large differences in the headline corporate income tax rates, ranging between 10% in Bulgaria and 35% in Malta (see Figure 1). These corporate income tax rates are substantially lower than some years ago, taking the simple average for the EU Member States. The average rate has come down from as high as 35.2% in 1997 to 21.7% in 2019. In fact, all EU Member States except Malta have decreased their rates in the past two decades (Figure 2).<sup>5</sup>

Overall, harmful tax practices in one Member State or jurisdiction have spill-over effects in other Member States. Although some Member States or jurisdictions might temporarily or permanently benefit from higher tax revenues due to these practices, they are likely to decrease the tax revenues for all EU Member States combined.<sup>6</sup>

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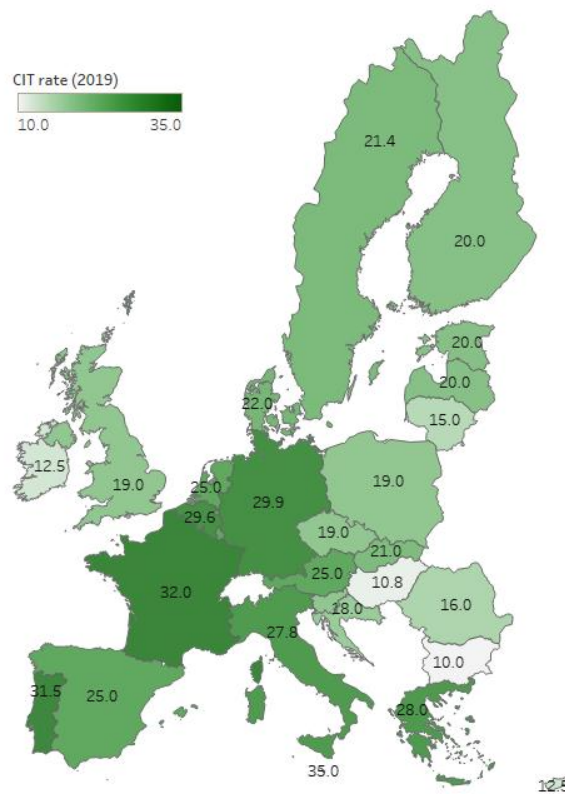
<sup>3</sup> The latest large tax scandal Paradise Papers (2017), revealed an intricate network of the operations and transactions used to conceal profits. In particular, the International Consortium of Investigative Journalists disclosed that tax avoidance and evasion had outgrown its origins on the margins of the financial system. At the very least, a total of \$8.7 trillion (around €7.7 trillion) remains hidden offshore, which equals around 11.5% of global wealth. In Europe, 10% of the total wealth is still overseas. See Fitzgibbon, W. & Starkman, D. (2017), The Paradise Papers and the long twilight struggle against offshore secrecy. Available at: <https://www.icij.org/investigations/paradise-papers/paradise-papers-long-twilight-struggle-offshore-secrecy/>.

<sup>4</sup> For further details see: [www.icij.org/project/luxembourg-leaks/lux-leaks-revelations-bring-swift-response-around-world](http://www.icij.org/project/luxembourg-leaks/lux-leaks-revelations-bring-swift-response-around-world)

<sup>5</sup> See European Commission (2019), Taxation Trends in the European Union. Statutory rates, available at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/taxation\\_trends\\_report\\_2019\\_statutory\\_rates.xlsx](https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_trends_report_2019_statutory_rates.xlsx)

<sup>6</sup> European Commission (2017), European Semester Thematic Factsheet: Curbing Aggressive Tax Planning. Available at: [https://ec.europa.eu/info/sites/info/files/file\\_import/european-semester-thematic-factsheet-curbing-aggressive-tax-planning\\_en.pdf](https://ec.europa.eu/info/sites/info/files/file_import/european-semester-thematic-factsheet-curbing-aggressive-tax-planning_en.pdf).

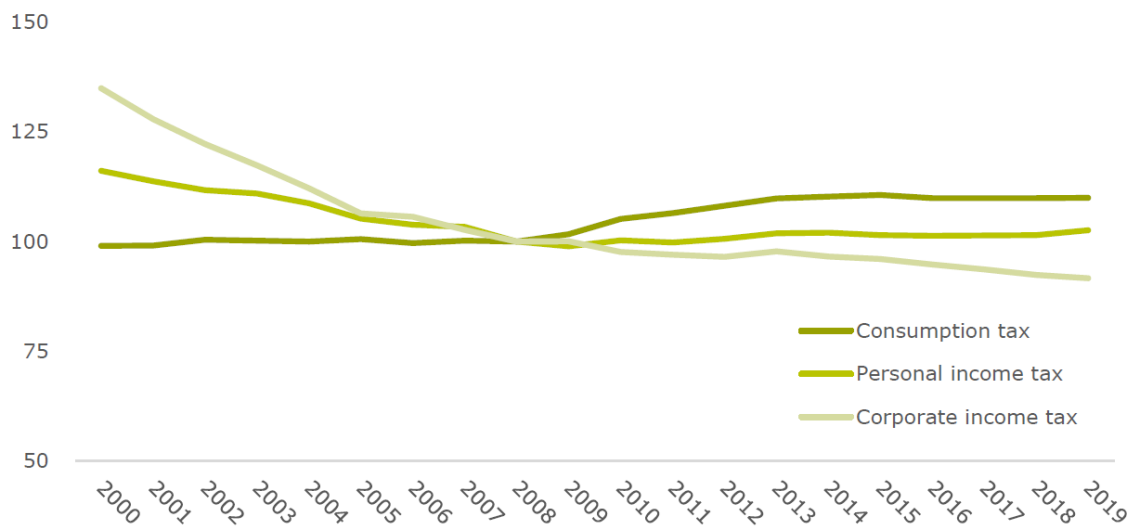
**Figure 1 Corporate income tax rates across EU Member States (% , 2018)**



*Note: Corporate income tax rate in the figure below is the adjusted top statutory tax rate on corporate income.*

*Source: Authors' elaboration based on Eurostat (2018).*

**Figure 2 Relative development of tax rates in the EU28 (2008=100), 2000-19**



*Note: The figure above shows the index of the EU28 simple average (base year=2008) for three different types of tax: consumption tax: standard value-added tax (VAT); personal income tax: top personal income tax rate; and CIT: adjusted top statutory tax rate on corporate income.*

*Source: Authors' computation based on Eurostat (2019).*

The **competition based on tax schemes** presses other Member States to make their tax systems also more attractive for corporations, to preserve their competitive position. This tax competition is especially relevant in integrated markets with high capital mobility such as the EU, which puts additional pressure on other Member States to compete on tax rates.<sup>7</sup> In order to avoid a drop in tax revenues, Member States need to **broaden the tax base** and **shift the tax burden to other corporations or private individuals** that are less mobile and as such have fewer means to avoid taxes (see Figure 2). The consumption of European citizens is hampered by the increase in the average rate of value-added tax (VAT) in recent years.<sup>8</sup> The top personal income tax rates remained stable but might have decreased if a higher (or more effective) CIT rate could be charged. The higher-than-necessary labour costs made it less attractive or more difficult for employers to hire new personnel, raise net salaries and/or improve profitability.<sup>9</sup>

Additionally, part of the (multinational) corporations use mismatches and gaps between tax systems for aggressive tax planning strategies. Besides the location of intellectual property rights and intangible assets in jurisdictions with preferential regimes, **debt shifting and mis(use) of transfer pricing** are traditionally considered as the main channels for aggressive tax planning strategies.<sup>10</sup> Debt shifting is used to move profits artificially from high to low tax jurisdictions by – in simple terms – increasing the debt costs in the high tax jurisdiction and registering financial revenues in the low tax jurisdiction. Similarly, transfer pricing is (mis)used with intra-group transactions in which the costs in the high tax jurisdiction are increased through high import intragroup prices and the revenues in the low tax jurisdiction are increased through high export intragroup prices or vice versa to lower the tax base in the high tax jurisdiction. The multinationals might further benefit from bilateral tax treaty provisions to minimise their tax bill (including the repatriation of dividends).<sup>11</sup> Indeed, these bilateral tax treaties were in the past mainly concluded to avoid **double taxation** rather than double non-taxation. Overall, multinationals in high-tax jurisdictions are estimated to pay 30% less tax than similar domestic companies.<sup>12</sup>

Going forward, **environmental, social and corporate governance factors** are likely to become increasingly important in the corporate tax domain in coming years. Corrective taxation could potentially contribute to achieving the objectives of such factors, noting also the ongoing discussion on CO<sub>2</sub> taxation.

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<sup>7</sup> Dover, R. et al. (2015), op. cit., p.27; Genschel, P. et al. (2011), Accelerating Downhill: How the EU Shapes Corporate Tax Competition in the Single Market. Available at: <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-5965.2010.02136.x>

<sup>8</sup> VAT increases are likely to have a negative impact on the quantity of goods and services sold. Although sales might initially increase due to an announcement effect, they fall thereafter to a greater extent. The extent of the impact is found to be different across various types of goods and services (Buettner, T. And B. Madzharova, 2019, Sales and Price Effects of Pre-announced Consumption Tax reforms: Micro-level Evidence from European VAT. Available at: <http://eureka.sbs.ox.ac.uk/7423/>).

<sup>9</sup> De Groen, W.P. (2015), Corporate Taxation in Europe: Let's get it together! Available at: <https://www.ceps.eu/ceps-publications/corporate-taxation-in-europe-lets-get-it-together/>

<sup>10</sup> Ramboll Management Consulting and Corit Advisory (2015), Study on Structures of Aggressive Tax Planning and Indicators, Taxation Paper No 61. Available at: <https://op.europa.eu/en/publication-detail/-/publication/b936799c-d60a-11e5-a4b5-01aa75ed71a1/language-en>.

<sup>11</sup> European Commission (2017), European Semester Thematic Factsheet: Curbing Aggressive Tax Planning. Available at: [https://ec.europa.eu/info/sites/info/files/file\\_import/european-semester-thematic-factsheet-curbing-aggressive-tax-planning\\_en.pdf](https://ec.europa.eu/info/sites/info/files/file_import/european-semester-thematic-factsheet-curbing-aggressive-tax-planning_en.pdf).

<sup>12</sup> Egger, P., W. Eggert and H. Winner (2010), Saving Taxes through Foreign Plant Ownership, *Journal of International Economics*, 81: 99-108.

### **1.3 EU instruments addressing aggressive tax planning and harmful tax practices**

Although the room for the EU to act in the area of taxation has grown substantially in the past few years, **direct taxation remains largely a prerogative of the Member States**.<sup>13</sup> Hence, Member States are free to choose, design and implement their own tax systems insofar as the increasingly comprehensive EU rules are respected. The EU tax rules are primarily focused on ensuring the functioning of the Internal Market: i) free flow of capital, goods and services; ii) level-playing field between businesses from various EU Member States; and, iii) equal treatment of tax measures for consumers, workers and businesses (non-discrimination).

The current **EU strategy in taxation** is largely derived from the EU overarching policy strategy, most recently the Europe 2020 strategy for smart, sustainable and inclusive growth in the EU and the Single Market Act. In line with previous strategies, it is predominately focused on the Internal Market. In particular, it aims to **eliminate obstacles for individuals and corporation when conducting cross-border business**. These include discrimination, double taxation, difficulties with tax refunds and information on foreign tax systems.

In the last decade or so, the focus of the EU strategy in taxation has shifted towards tackling **tax avoidance and ensuring fair tax competition**, including **international policy measures and deeper EU coordination and tackling of common challenges** (for further details see Box 1). Both the international initiatives and the EU aim to ensure that generated economic value is taxed where it is generated and actually taking place. Part of the EU policy measures are based on **international agreements such as the OECD Base Erosion and Profit Shifting (BEPS)**<sup>14</sup> Action Plan and information exchange.

The **United Nations (UN) with its Committee of Experts on International Cooperation in Tax Matters** is also active in the area of international policy coordination. However, it primarily targets national bilateral tax treaties and tax cooperation among tax authorities of developed and developing countries.

The EU has an important role in the **negotiations of the agreements and afterwards translating the internationally agreed principles in hard law**. The main advantage of the implementation at EU-level is that it provides the possibility **for common standards for the entire Union**, which enhances the effectiveness of the measures, but also reduces the uncertainty, administrative burden, risk of double taxation and legal challenges for businesses. The joint implementation of the agreements allows the EU to go beyond what has been agreed at international level. For example, the EU transparency requirements go beyond the OECD BEPS agreements. Member States are required to share pre-defined information on their cross-border tax rulings and pricing arrangements with other Member States.

The international agenda is also important because **tax avoidance is a global challenge**. The EU aims to motivate third country jurisdictions to close their loopholes, obey the good governance principles and avoid engaging in harmful tax competition. It contributes to this within the international fora, but also with its own initiatives under the External Strategy for Effective Taxation. In the context of this strategy, the EU will use a wide range

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<sup>13</sup> In March 2019 the European Commission launched a discussion with Member States, the European Parliament and all stakeholders on the possibility to change decision-making in the tax area from unanimity to qualified majority voting.

<sup>14</sup> For further details see: <http://www.oecd.org/tax/beps/>.

of tools (e.g. trade agreements, EU funds, list of non-cooperative jurisdictions) when necessary to encourage third countries to adopt higher standards of tax good governance.

### **Box 1. International initiatives in the field of aggressive tax planning and harmful tax practices**

#### **The OECD/G20 BEPS Action Plan**

The OECD/G20 BEPS Action Plan was launched in 2013, encompassing 15 Actions designed to provide governments with domestic and international instruments to tackle tax avoidance issues.<sup>15</sup> The OECD and G20 countries developed the BEPS Package of actions over the course of two years, and the main aspects of the package were finalised and delivered in 2015.

Given the global dimension of tax avoidance, participation in the implementation of the BEPS outcomes was opened to over 100 countries committed to applying the standards. In this regard, the OECD/G20 Inclusive Framework on BEPS was launched in July 2016 in Kyoto, Japan, with 82 countries as members of the framework. Currently, 134 countries are part of this initiative, amounting to approximately 70% of the non-OECD countries, together with 14 observer organisations. Non-OECD countries participate as 'Associates', being on an equal footing with the OECD members of the framework.<sup>16</sup>

#### **UN Committee of Experts on International Cooperation in Tax Matters**

The UN Committee of Experts on International Cooperation in Tax Matters is responsible for reviewing and updating the United Nations Model Double Taxation Convention between Developed and Developing Countries<sup>17</sup> and the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries.<sup>18</sup> The Committee has 25 members, experts in the field of tax administration and policy.<sup>19</sup>

### **1.4 EU tax instruments in scope**

The **EU tax policy** to fight against aggressive tax planning and harmful tax practices is a **combination of hard and soft law**, summarised in Table 1. Hard law in the context of this assignment refers to EU instruments (e.g. Directives and Regulations) that are legally binding for the parties involved, while soft law refers to all non-legally binding EU instruments (e.g. Communications, Recommendations, Advisory bodies). Most of the EU hard and soft law instruments primarily target aggressive tax planning but also limit the room for harmful tax practices. For example, the application of anti-abuse provisions and transparency measures can neutralise some harmful practices in Member States.

The analysis only considers tax instruments that were **adopted at EU level at the start of the assignment (December 2018)**. This means that, for instance, the proposed Directives for a common consolidated corporate tax base (CCCTB) and common system of a Digital Services Tax on revenues resulting from the provision of certain digital services are not considered among the tax instruments under analysis.

<sup>15</sup> OECD (2017), Background Brief. Inclusive Framework on BEPS, OECD Publishing. Available at: <http://www.oecd.org/tax/beps/background-brief-inclusive-framework-for-beps-implementation.pdf>.

<sup>16</sup> See: OECD (2019), BEPS. Inclusive Framework on Base Erosion and Profit Shifting, <https://www.oecd.org/tax/beps/about/>.

<sup>17</sup> See: [https://www.un-ilibrary.org/economic-and-social-development/united-nations-model-double-taxation-convention-between-developed-and-developing-countries-2017-update\\_cc8f6035-en](https://www.un-ilibrary.org/economic-and-social-development/united-nations-model-double-taxation-convention-between-developed-and-developing-countries-2017-update_cc8f6035-en)

<sup>18</sup> See: [https://www.un-ilibrary.org/economic-and-social-development/united-nations-manual-for-the-negotiation-of-bilateral-tax-treaties-between-developed-and-developing-countries-2019\\_37b3acb6-en](https://www.un-ilibrary.org/economic-and-social-development/united-nations-manual-for-the-negotiation-of-bilateral-tax-treaties-between-developed-and-developing-countries-2019_37b3acb6-en)

<sup>19</sup> See: <https://www.oecd.org/ctp/47651851.pdf>

Most of the **EU tax instruments** that have been implemented in recent years address tax transparency, enhance international tax cooperation, and contribute to convergence and coordination of EU cooperate taxation.

**Table 1 EU tax instruments under analysis**

Title	Type	Date	Main elements related to aggressive tax planning and/or harmful tax practices
<b>Anti-Tax Avoidance Directive (ATAD) 1 &amp; 2</b>	Hard law	<i>Adoption:</i> July 2016 (I), May 2017 (II) <i>In force:</i> January 2020 (I), January 2022 (II)	<ul style="list-style-type: none"> <li>• Interest limitation</li> <li>• Exit taxation</li> <li>• Hybrid mismatches</li> <li>• Controlled foreign company rule</li> <li>• General Anti-Abuse Rule</li> </ul>
<b>Parent-Subsidiary Directive (PSD)</b>	Hard law	<i>Adoption:</i> July 1990, November 2011 (recast), July 2014 (amendment) <i>In force:</i> January 1992, January 2012 (recast), December 2015 (amendment)	<ul style="list-style-type: none"> <li>• Anti-abuse rule</li> <li>• Withholding tax exemption for dividends</li> <li>• Mechanism for the elimination of double taxation of dividends</li> <li>• List of companies</li> </ul>
<b>Administrative Cooperation Directive (DAC) 3, 4 &amp; 6</b>	Hard law	<i>Adoption:</i> December 2015 (III), May 2016 (IV), May 2018 (VI). <i>In force:</i> January 2017 (III), June 2017 (IV), July 2020 (VI).	<ul style="list-style-type: none"> <li>• Automatic exchange of information (cross-border rulings, cross-border tax planning arrangements, pricing arrangements)</li> <li>• Country-by-country reporting</li> <li>• Mandatory disclosure rules for intermediaries</li> </ul>
<b>Commission Recommendations to Council</b>	Soft law	<i>Publication:</i> December 2012 (2012/771/EU), December 2012 (2012/772/EU), January 2016 (COM(2016)271), March 2018 (C(2018)1650)	<ul style="list-style-type: none"> <li>• Minimum standards of good governance in tax matters for third countries</li> <li>• Addressing aggressive tax planning</li> <li>• Measures against tax treaty abuse</li> <li>• Corporate taxation of a significant digital presence</li> </ul>
<b>Code of Conduct for Business Taxation</b>	Soft law	<i>Established:</i> December 1997	<ul style="list-style-type: none"> <li>• Rollback</li> <li>• Standstill</li> <li>• Geographical extension</li> </ul>
<b>European Semester (limited to measures related to aggressive tax planning)</b>	Soft law	<i>First recommendations:</i> June 2011 <i>Inclusion of aggressive tax planning in country-specific recommendations:</i> May 2018	<ul style="list-style-type: none"> <li>• Addressing/reducing aggressive tax planning among Member States via Assessment of national reform programmes</li> <li>• Economic policy coordination</li> <li>• Recommendations for Member States</li> </ul>
<b>Joint Transfer Pricing Forum (JTPF)</b>	Soft law	<i>Established:</i> June 2002 <i>Finished:</i> April 2019	<ul style="list-style-type: none"> <li>• Common interpretation and application of OECD transfer pricing rules across the EU</li> </ul>
<b>Communication on an External Strategy for Effective Taxation</b>	Soft law	<i>Published:</i> January 2016	<ul style="list-style-type: none"> <li>• Re-examining EU good governance criteria</li> <li>• Enhancing agreements with third countries on tax good governance</li> <li>• Assistance for developing countries to meet tax good governance standards</li> <li>• Developing an EU process for assessing and listing third countries</li> <li>• Reinforcing the link between EU funds and tax good governance</li> </ul>

*Note: The assignment does not cover instruments that have been proposed by the Commission but have not yet been adopted by Member States.*

*Source: Authors' elaboration.*

## 2 Methodology

### 2.1 Research framework

The Report is based on a research framework consisting of six research questions, grouped around three research criteria, which can be summarised as follows (the full research framework appears in Annex A):

- **Coherence** is a measure of the degree to which the EU instruments addressing aggressive tax planning and harmful tax practices (Table 1) are consistent with each other ('internal coherence') and with the EU ('external coherence') and international ('international coherence') policy framework.
- **Relevance** is intended as the alignment between the original objectives of the EU instruments under analysis and the current needs and problems experienced by stakeholders and the EU at large. In other words, the relevance criterion checks whether the rationale underlying the instruments is still appropriate or requires a revision to account for changing needs and problems.
- **EU-Added Value** assesses the additional impacts generated by addressing aggressive tax planning and harmful tax practices and setting relevant objectives at the EU level, as opposed to leaving the subject matter in the hands of Member States.

To lay the foundation of the analysis, the Research Team first constructed the intervention logics of all the EU instruments of interest for this Report (these intervention logics are presented in Annex B.2). The intervention logic is a tool that aims to clarify the reasoning followed by EU decision-makers when introducing a new policy or law. In a nutshell, it includes a detailed description of:

- The **rationale for the intervention** in terms of needs and problems addressed, drivers affecting such problems as well as general, specific and operational objectives to be achieved.
- The **intervention components**, i.e. the means (inputs/activities) used by the intervention to address the relevant needs and problems and achieve its objectives.
- The **expected results** of the intervention in terms of (expected) outputs, outcomes, and impacts.

Based on the individual intervention logics, the Research Team then constructed three aggregate intervention logics, which facilitated the analysis of the interaction between the instruments in the scope of this Report (the list of instruments is available in Table 1). The aggregate intervention logics revolve around three thematic areas (the aggregate intervention logics are presented in Annex B.1):

- **Aggressive tax planning and harmful tax practices**, comprising the following instruments: the Anti-Tax Avoidance Directive, the Directive on Administrative Cooperation (DAC 3, 4, and 6), the Commission Recommendation on aggressive tax planning (2012/772/EU), the Commission Recommendation on the implementation of measures against tax treaty abuse (COM(2016)271), the Commission Recommendation relating to the corporate taxation of a significant digital presence (COM(2016)271), the Code of Conduct for Business Taxation, and the tax avoidance provisions in the European Semester.
- **Business facilitation**, focusing on the Parent Subsidiary Directive and the Joint Transfer Pricing Forum.



- **External policies**, including Commission Recommendation on minimum standards of good governance in third countries (2012/771/EU) and the Communication on an External Strategy for Effective Taxation (COM/2016/024 final).

## 2.2 Data collection

The Report relies on a **mix of sources** – scoping interviews with Commission officials, in-depth interviews with stakeholders, expert assessment and literature – to ensure a sound evidence base to address the relevant research questions. In line with the requirements set by the Commission for the Report, in-depth interviews and expert assessment targeted not only the international and EU level but also the Member States listed in Table 2. The mix of countries ensures adequate coverage of different EU regions (Central-Eastern Europe, North-Western Europe and Southern Europe), different degrees of economic development, different corporate tax rates and different qualities of legislation when it comes to fighting aggressive tax planning.

**Table 2 Member States selected for country-level analysis**

Member State	Geographical region	GDP per capita (€, 2017)	Corporate Income Tax (main rates, 2018)	Room for aggressive tax planning (European Semester 2018)
Belgium	NWE	38,500	29.6%	yes
Cyprus	SE	22,800	12.5%	yes
Germany	NWE	39,600	29.9%	no
Hungary	CEE	12,700	10.8%	yes
Ireland	NWE	61,200	12.5%	yes
Italy	SE	28,500	27.8%	no
Luxembourg	NWE	92,800	26.01%	yes
Netherlands	NWE	43,000	25%	yes
Romania	CEE	9,600	16%	no
Sweden	NWE	47,200	21.4%	no

*Note: CEE=Central-Eastern Europe, NWE=North-Western Europe and SE=Southern Europe.*

*Source: Authors' elaboration on Eurostat and European Semester Country Reports.*

Four **scoping interviews** were conducted with Commission officials (DG TAXUD, DG COMP and SECGEN). The scoping interviews were used to validate the intervention logics prepared for the EU instruments of interest (all intervention logics are presented in Annex B), thus ensuring the soundness of the framework later on used for the in-depth interviews and expert assessments. The fieldwork also included **in-depth interviews** with institutional stakeholders, NGOs, and business associations at the international, EU, and national levels (see Table 3). These interviews were based on a questionnaire agreed upon with the Commission and structured in four main parts (the questionnaire is presented in Annex C): i) overall coherence; ii) aggressive tax planning and harmful tax practices; iii) business facilitation; and iv) external policies. Each interviewee was asked to provide his/her answers limited to one or more specific parts of the questionnaire, thus ensuring



an appropriate duration of the interviews and maximising participation. Out of a total number of 31 invited organisations, 27 stakeholders agreed to provide their input on time. No interview was conducted in Hungary; nevertheless, a thorough expert assessment was carried out for this country (see Table 4).

**Table 3 Overview of in-depth interviews**

Level	Type	Organisation	Part I Overall coherence	Part II Aggressive tax planning and harmful tax practices	Part III Business facilitation	Part IV External policies
BE	NGO	CNDC - 11.11.11	✓	✓	-	✓
BE	Tax Authority	Ministry of Finance	*	*	*	*
CY	NGO	Cyprus Integrity Forum	✓	✓	-	✓
CY	Tax Authority	Ministry of Finance	✓	✓	✓	✓
DE	NGO	Netzwerk Steuergerechtigkeit (Tax Justice Network)	✓	✓	-	✓
DE	Tax Authority	Tax Authority	✓	✓	✓	✓
EU	Institution	DG TAXUD	✓	✓	-	-
EU	NGO	Oxfam International - EU Advocacy Office	✓	✓	-	✓
EU	Institution	DG COMP	✓	✓	-	-
EU	Business association	BusinessEurope	General remarks			
EU	Institution	DG TRADE	✓	-	-	✓
EU	Institution	DG DEVCO	✓	-	-	✓
EU	NGO	TaxJustice	✓	General remarks	-	General remarks
EU	Professional association	Confédération Fiscale Européenne (CFE) - Tax Advisers Europe	✓	✓	✓	-
EU	Institution	DG JUST	✓	✓	-	-
Global	Institution	UN Committee of Experts on International Cooperation in Tax Matters	✓	✓	-	-
Global	Institution	OECD	✓	✓	-	✓
HU	Tax Authority	Ministry of Finance	*	*	*	-
HU	Business association	MGYOSZ – BUSINESSHUNGAR Y; Hungarian Chamber of Commerce and Industry	**	**	**	**
IE	Business association	ISME - Irish SME Association	✓	✓	✓	-
IE	Tax Authority	Department of Finance	✓	✓	✓	General remarks

Level	Type	Organisation	Part I Overall coherence	Part II Aggressive tax planning and harmful tax practices	Part III Business facilitation	Part IV External policies
IT	Business association	UnionPMI	✓	✓	✓	-
IT	Tax Authority	Ministry of Economy and Finance	✓	✓	✓	✓
LU	Business association	Union des Entreprises Luxembourgeoises	✓	✓	General remarks	-
LU	Tax Authority	Ministry of Finance	✓	✓	✓	✓
NL	Tax Authority	Ministry of Finance	✓	✓	✓	✓
NL	NGO	Centre for Research on Multinational Corporations (SOMO)	✓	✓	-	✓
RO	NGO	Transparency International Romania <sup>20</sup>	✓	-	-	-
RO	Tax Authority	Ministry of Finance; National Agency for Fiscal Administration	✓	✓	✓	✓
SE	Business association	Företagarna (Swedish Federation of Business Owners)	✓	✓	✓	-
SE	Tax Authority	Ministry of Finance	*	*	*	*

Notes: "General remarks": Some stakeholders chose to offer only general remarks rather than fill in the questionnaire. \*Stakeholders unable to take part in the interview. \*\*No answer received.

Source: Authors' own elaboration.

The Research Team also featured **10 technical experts**, one for each selected Member States (see Table 4). By relying upon guidelines agreed upon with the Commission, the experts performed: i) an assessment of the main developments and trends in the field of aggressive tax planning and harmful tax practices at the national level; ii) an analysis of the internal and external coherence of the instruments; and iii) suggestions for future adjustments based on the recent political and economic developments.

**Table 4 List of experts by country**

Country	Expert
Belgium	Luc De Broe
Cyprus	Christiana HJI Panayi
Germany	Ekkehart Reimer
Hungary	Éva Erdős
Ireland	Emer Hunt
Italy	Carlo Garbarino
Luxembourg	Werner Haslehner
Romania	Mihaela Tofan

<sup>20</sup> Transparency International Romania was invited to respond to parts I, II, and IV of the questionnaire. Given their expertise, their answers were most relevant to part I, hence part II and part IV were not covered.

Country	Expert
Sweden	Asa Gunnarsson
The Netherlands	Dennis Weber

Source: Authors' own elaboration.

### 2.3 Data analysis

The questionnaire for the in-depth interviews included a mix of Likert-scale questions<sup>21</sup> and open questions. Given this structure, the Research Team computed **descriptive statistics** for available quantitative data (the stakeholders' opinions collected based on a 1 to 5 scale); in addition, the **qualitative information** provided during the interviews was aggregated, compared and summarised in order to support and complement quantitative indicators. The findings from the data collection were then arranged to match the **success criteria** defined in the research framework. Beyond the results of the interviews, evidence from desk research and expert assessments was used to answer the various **research questions** and assess the four **research criteria** covered by this Report.

The collected data were **validated via triangulation** in order to ensure the robustness of evidence. In fact, for all research criteria and questions data were **collected from multiple sources, using different tools** to ascertain that all the findings of the Report are based on well-grounded evidence. Triangulation allows for increased confidence in collected data, reveals unique findings and provides a clearer understanding of the problem.

The Better Regulation Toolbox defines triangulation as "the application and combination of several research methodologies in the study of the same phenomenon".<sup>22</sup> **Triangulation** ensures the validity of the results. Validity requires checking whether the findings of a study are true and certain: "true" in the sense that research findings accurately reflect the situation; and "certain" in the sense that research findings are supported by evidence".<sup>23</sup> In this respect, the Research Team relied on three different types of triangulation to provide a solid basis for the findings of this Report:

- **Triangulation of data.** Data and information were collected from multiple sources and stakeholders.
- **Triangulation of methods.** Data and information were collected via at least two different data collection methods (interviews, desk research, expert feedback).
- **Triangulation of analysts.** Several members of the Research Team were involved in data collection activities; in addition, each research question and criterion was addressed by at least two members of the Research Team, and conclusions were agreed upon by at least two researchers.

<sup>21</sup> Likert-type questions help structure the answers of respondents based on a given scale. In this Report, respondents were thus asked to provide their feedback by referring to a scale from (1) to (5), where the scores have the following significance: 1 - not at all; 2 - to a limited extent; 3 - to some extent; 4 - to a high extent; 5 - to the fullest extent.

<sup>22</sup> European Commission (2017), Better Regulation "Toolbox", [https://ec.europa.eu/info/sites/info/files/better-regulation-toolbox\\_2.pdf](https://ec.europa.eu/info/sites/info/files/better-regulation-toolbox_2.pdf), p. 20.

<sup>23</sup> Lisa A. Guion, David C. Diehl, and Debra McDonald (2011), Triangulation: Establishing the Validity of Qualitative Studies.

## 2.4 Limitations

Before presenting the key findings of this Report, it is worth stressing that the analysis performed faced **the following limitations**.

- The recent implementation of some of the instruments makes it difficult to assess their impact. To understand the full effects of such instruments, another assessment relying on the same research framework could be performed in the future.
- In the case of Hungary, no interviews were performed with national stakeholders. The analysis for this country was therefore based on the assessment provided by professor Éva Erdős, the Hungarian expert that is part of the Research Team (see Table 4).
- The Report relies, *inter alia*, on the views of 27 stakeholders active at the EU level and in the Member States, from the public sector, business associations and NGOs. The findings of the Report, however, do not necessarily reflect the views of the consulted stakeholders.
- In line with the requirements set by the Commission for the Report, the scope of the “external policies” section in the chapters on Relevance and EU Added Value is limited to two instruments, namely the Commission Recommendation on minimum standards of good governance in third countries (2012/771/EU) and the Communication on an External Strategy for Effective Taxation (COM/2016/024 final). Other instruments relevant for the assessment of external policies in the field of taxation (e.g. the Cotonou Agreement) are only covered when assessing the external coherence criterion in Chapter 3.

### 3 Coherence

#### KEY OBSERVATIONS

Are the objectives of the EU instruments under analysis consistent with the EU's agenda for fair and effective taxation? (Internal coherence)

- Most stakeholders believe that the objectives of the EU tax instruments are to a large extent consistent, with only a few overlaps/contradictions/gaps.
- There is some overlap in the policy measures, which only to a very limited extent has led to inconsistencies. Most of the overlap is due to soft law that has been followed-up by hard law and similar hard law provisions applied in different fields.
- Stakeholders consider the absence of an EU approach to digital taxation to be the main gap in the current EU tax framework.
- The use of minimum standards in the hard law instruments might limit the possibilities to achieve the full harmonisation objective. The extent to which there are inconsistencies in national implementation is still to be assessed as not all Member States have already implemented all the instruments under analysis.

Is there coherence between the objectives of the EU instruments under analysis and the objectives of instruments in other policy areas? How could this be improved? (External coherence)

- EU tax instruments are broadly consistent with other EU policies such as state aid, internal market, financial services, development, criminal justice, and trade.
- In the absence of an EU measure on digital taxation, Member States are considering or have already introduced their own measures, which might give rise to double taxation and harm the functioning of the Internal Market.
- The differences in the lists and processes for addressing the issues associated with high-risk third countries under the anti-money laundering Directive and non-cooperative tax jurisdictions has in the past created some tension in relations with third countries;
- Some of the developing countries identified as non-cooperative tax jurisdictions might be penalised too heavily, as they do not – according to several stakeholders - have the institutional capacity to implement tax good governance principles.

Are the objectives of the EU instruments under analysis coherent with international objectives for fair taxation? (International coherence)

- EU tax instruments are generally consistent with the international tax agenda (OECD BEPS, UN Model Tax Convention, etc.).
- The EU and its Member States are considered as leading actors in the OECD BEPS process, as they are among the first to implement the agreements and go beyond the minimum requirements defined by the OECD BEPS.

#### 3.1 Introduction

The coherence analysis assesses whether the EU instruments are internally, externally and internationally coherent. The **internal coherence** assesses whether the various elements of the EU tax instruments in scope operate together to achieve their general, specific and operational objectives. Similarly, the external coherence assesses whether the various elements of the EU instruments and those of other policy areas work together to achieve

the EU policy objectives. The broadest form of **external coherence** – with international initiatives – has been singled out from the external coherence assessment and is assessed separately. The **international coherence** accounts for the interaction with international initiatives from the OECD, the G20 and UN. In this context, the coherence criterion is translated into **three research questions**:

- Are the objectives of the EU instruments under analysis consistent with the EU's Agenda for Fair and Effective Taxation?
- Is there coherence between the objectives of the EU instruments under analysis and the objectives of instruments in other policy areas? How could this be improved?
- Are the objectives of the EU instruments under analysis coherent with international objectives for fair taxation?

The internal, external and international coherence in line with the research framework (see Annex A) are assessed by relying on **three success criteria**, respectively:

- Extent of coherence among the EU instruments under analysis ('Internal coherence');
- Extent of coherence between the EU instruments under analysis and other EU policy areas (e.g. competition, financial services, development, justice, trade, employment) ('External coherence');
- Extent of coherence between the EU instruments under analysis and the international tax agenda (e.g. G20, OECD, UN) ('International coherence').

Based on the analysis this chapter, some suggestions to increase the relevance of the EU framework in the field of aggressive tax planning and harmful tax practices are discussed in Chapter 6.

## **3.2 Analysis**

The analysis in this section is based on a combination of data obtained through interviews with stakeholders and data gathered via a literature review and expert assessments. This approach allows a **cross-validation of the key findings**.

### **3.2.1 Internal coherence**

The internal coherence assesses whether the various elements of the EU instruments in scope are consistent. Many of the EU tax instruments in scope have been launched during the 2014-2019 legislature of the European Commission, the collection of tax instruments initiated during this period are in some cases referred to as the EU's Agenda for Taxation<sup>24</sup> or the EU's Agenda for Fair and Effective Taxation.<sup>25</sup> The set of instruments<sup>26</sup> initiated in the field of corporate taxation after 2014 was the EU's response to a surging public and political demand for action to address harmful tax practices and aggressive tax planning, owing to pressure on domestic public budgets in the aftermath of the financial and economic crises as well as various tax scandals (e.g. LuxLeaks, Offshore Leaks, Swiss Leaks, Bahamas Leaks, Panama Papers, Paradise Papers). Most notable was LuxLeaks in 2014, which exposed tax rulings of the Luxembourg authorities involving more than 340

<sup>24</sup> European Commission (2016), An EU Agenda for Taxation. Available at: [https://ec.europa.eu/commission/sites/beta-political/files/2-years-on-taxation\\_en\\_0.pdf](https://ec.europa.eu/commission/sites/beta-political/files/2-years-on-taxation_en_0.pdf).

<sup>25</sup> European Commission (2018), A Fair Share. Available at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/a\\_fair\\_share\\_brochure\\_taxud\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/a_fair_share_brochure_taxud_en.pdf).

<sup>26</sup> European Commission (2015), Communication from the Commission to the European Parliament and the Council: A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0302&from=EN>.

multinational enterprises. These rulings reduced taxes on profits that multinational enterprises shifted to Luxembourg. Although such deals are legal, they can constitute aggressive tax planning practices.<sup>27</sup> Tax fraud, evasion and avoidance are estimated to reduce the tax revenues in the EU by around €50 billion to €70 billion per year.<sup>28</sup> Moreover, they reduce the distributive capabilities of EU Member States, create competition between Member States, distort the level playing field within the Internal Market and reduce the trust of citizens in the State.<sup>29</sup>

The **general objective** of the EU Agenda is to build a fair society, with a strong Internal Market and robust economy that contributes to economic growth, job creation and public investment. Fair taxation is according to the Agenda important as sufficient tax raising capacity is critical to allow the society to function (education, health care, etc.), maintain taxpayer morale, and contribute to the level playing field between domestic and multinational companies and between Member States as well as in relation to third countries.

According to the **specific objectives** spelt out in the Agenda, more transparent, effective and accountable tax systems should contribute to this general objective. The policy instruments in the Agenda closely relate to the specific objectives and can be grouped under three pillars:

- **Tax transparency** covers initiatives with the aim to enhance the openness and cooperation between Member States on tax issues. The Administrative Cooperation Directive (DAC) including automatic information exchange on tax rulings (DAC 3), country-by-country reporting for multinationals (DAC 4) and transparency requirements for intermediaries (DAC 6) under this pillar are in the scope of the present assignment.
- **Effective taxation** covers initiatives to ensure that taxes are paid in the country where the profits are generated. The anti-abuse rules (included in the Anti-Tax Avoidance Directive) and transfer pricing rules under this pillar are within the scope of this assignment.
- **Global good governance** covers initiatives with the aim to create a global level playing field. EU's External Strategy for Effective Taxation and the EU's list of non-cooperative jurisdictions under this pillar are covered by this assignment.

Additionally, the Commission has presented the CCCTB and two proposals in the context of the digital taxation package (Digital Services Tax and Significant Digital Presence), which have not yet been adopted under the Agenda. At the time of writing the CCCTB is still under negotiation<sup>30</sup> and the proposals on digital taxation<sup>31</sup> were not agreed by the ECOFIN Council, as the Member States decided to wait for the results of the work performed in the context of the OECD. Neither of these instruments (not yet adopted) is covered within the context of this assignment.

The assessment of internal coherence also considers several EU taxation instruments not referenced in the EU's Agenda for Fair and Effective Taxation, which almost exclusively

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<sup>27</sup> ICIJ, Luxembourg Leaks. Available at: <https://www.icij.org/investigations/luxembourg-leaks/about-project-luxembourg-leaks/>

<sup>28</sup> Dover, R. et al. (2015), Bringing transparency, coordination and convergence to corporate tax policies in the European Union.

<sup>29</sup> European Commission (2018), A Fair Share, op. cit.

<sup>30</sup> European Parliament, Common Consolidated Corporate Tax Base. Available at: [http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-taxation/file-common-consolidated-corporate-tax-base-\(ccctb\)](http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-taxation/file-common-consolidated-corporate-tax-base-(ccctb))

<sup>31</sup> European Parliament, Digital Services Tax. Available at: <http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-taxation/file-digital-services-tax-on-revenues-from-certain-digital-tax-services>

covered initiatives that are new or have been re-launched by DG TAXUD during the 2014-2019 legislature. For this reason most of the following initiatives were not explicitly referenced in the context of the Agenda: Parent Subsidiary Directive, Code of Conduct for Business Taxation, European Semester, EU Joint Transfer Pricing Forum, Commission Recommendation on measures intended to encourage third countries to apply minimum standards on good governance in tax matters (2012/771/EU), Commission Recommendation on aggressive tax planning (2012/772/EU), and Commission Recommendation on the implementation of measures against tax treaty abuse (2016/271/EU).

Most of the interviewees believe **there is some degree or even a high degree of complementarity and synergy between the objectives of the EU instruments** in scope, while in general they see few overlaps/contradictions/gaps. This is confirmed by the experts consulted for this assignment. The EU is considered by several interviewees to act as a defensive coalition. Internally, the EU instruments against aggressive tax planning ensure a coordinated approach aiming to limit negative tax externalities, for instance by avoiding that profits generated in a Member State are artificially shifted to another Member State or that profits generated in the EU are artificially moved elsewhere. Externally, the EU instruments allow the Member States to act as a single unit, by promoting tax good governance principles and incentivising third countries to implement such principle.

Most of the stakeholders consulted for this assignment believe that the instruments are much more complementary than contradictory. The Anti-Tax Avoidance Directive provides the legal base for fighting against aggressive tax planning, whereas the Directive on Administrative Cooperation addresses harmful tax practices. Moreover, the Code of Conduct for Business Taxation creates peer pressure on Member States to take measures in those areas that are not covered by hard law.

The **sequencing of the instruments** can also reveal synergies over time in the taxation agenda. The instruments under analysis have been issued at different moments in time and some of them represent the follow-up to pre-existing instruments. This is primarily the case with soft-law instruments that were eventually followed by more specific or even hard-law instruments. For instance, the Anti-Tax Avoidance Directive adopted in 2016 is the follow-up of the Commission Recommendation on aggressive tax planning (2012/772/EU), and the Communication on External Strategy of an External Strategy for Effective Taxation published in 2016 followed-up on the Commission Recommendation on measures intended to encourage third countries to apply minimum standards on good governance in tax matters (2012/771/EU). The Code of Conduct for Business Taxation has in the past discussed the exchange of rulings and treatment of dividends, which have been realised by the third amendment to the Directive on Administrative Cooperation and the Parent Subsidiary Directive. The effects stemming from this sequencing of the instruments is further discussed in the chapter on EU Added Value (Chapter 5).

In some cases, **existing overlaps may reinforce certain measures**. For example, there are general anti-abuse rules (GAAR) and hybrid instrument rules included both in the Anti-Tax Avoidance Directive and the Parent Subsidiary Directive.<sup>32</sup> The Anti-Tax Avoidance

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<sup>32</sup> The open-ended general anti-abuse rule of the Anti-Tax Avoidance Directive and the Parent Subsidiary Directive might be complementary, they however bear some technical complications. In recent cases dealing with the (old version of the) general anti-abuse provisions of the Parent Subsidiary Directive, it was reiterated that such provisions should still be targeted against wholly artificial arrangements and should not be too broadly phrased. In the *Eqiom & Enka* case (Case C-6/16 *Eqiom & Enka*, ECLI:EU:C:2017:641), it was emphasised that there cannot be an initial presumption of abuse where an EU parent company was controlled by shareholders in third states. A similar conclusion was reached in the *Diester Holding* case (Joined Cases C-504/16 *Diester Holding* and C-613/16 *Juhler Holding*, ECLI:EU:C:2017:1009). Moreover, recent cases of the ECJ involving Denmark (Joined cases C-116/16 and C-117/16; Joined cases C-115/16, C-118/16, C-119/16 and C-299/16) confirm that Member States must refuse to grant the benefit of EU law provisions (e.g. the Parent Subsidiary Directive) in cases of abuse, i.e. where those provisions are relied upon in a manner which is not consistent with their objectives. The decisions are innovative because they state that, given the general legal principle that EU law



Directive confines the intervention of the controlled foreign corporation (CFC) rules to cases in which the actual corporate tax paid on its profits by the entity or permanent establishment is lower than the difference between the fictitious corporate tax in the Member State of the taxpayer and the actual corporate tax paid on its profits. In general, it ensures the necessary coherence with the Parent Subsidiary Directive by restricting the application of the CFC rules. However, a possible incoherence with the Parent Subsidiary Directive becomes apparent in case of an artificial construction where both the sub-subsidiary and subsidiary lack a substantive economic activity and are both residents in low-taxing foreign countries.

In addition, **there are also gaps between the various instruments**. The main gap identified by nearly all interviewees is in the field of **digital taxation**. More specifically, the Commission Recommendation relating to the corporate taxation of a significant digital presence (2018/1650/EU) cannot be applied effectively without an EU approach to digital taxation. Indeed, the Recommendation refers to a legislative proposal concerning a significant digital presence that is still pending. Moreover, especially the interviewees representing businesses indicated that the EU measures should focus not only on the level-playing field inside the EU, but also on the **global level**. For this the EU would have to become more active within international fora such as the OECD and G20 (see the section 3.2.3 on International coherence below). Additionally, several NGO representatives as well as tax experts indicate the need for more far-reaching initiatives to let EU Member States form a joint block for tax matters to counter external instances of aggressive tax planning and harmful tax practices. In theory this would require a global taxation of profits of companies based in the EU together with a foreign tax credit.<sup>33</sup>

There might also be some differences between the intentions behind the EU tax instruments and how they are meant to be actually implemented that could lead to inconsistencies. One of the experts noted that **the use of Directives** (Anti-Tax Avoidance Directive, Parent Subsidiary Directive, Directive on Administrative Cooperation) for the hard-law instruments leaves room for national discretion, i.e. differences in implementation by Member States. Under the current provisions in Article 115 of the Treaty on the Functioning of the EU (TFEU) hard law instruments in the field of direct taxation can exclusively be implemented through Directives.

Finally, several of the interviewees representing national administrations and businesses indicated that it is not possible to fully assess the internal coherence of all the tax measures. Some of the measures have only been implemented recently or still have to be implemented and might give rise to contradictions or overlap (see Table 1). For example, one of the business representatives consulted for this assignment believes that the CFC rules under the Anti-Tax Avoidance Directive might potentially lead to double taxation, if Member States implement the rules that are applicable since January 2019 differently.

### **3.2.2 External coherence (other EU policies)**

The external coherence assesses whether the objectives of various EU instruments in scope are consistent with those of other EU policy areas. Nearly all interviewees identified other EU policies that have synergies/complementarities and/or overlaps/contradictions with the objectives of the EU tax instruments. These include, but are not limited to, state aid, internal market, financial services, development, criminal justice, and trade. Broadly speaking, the EU tax instruments discussed in this assessment are **consistent with other EU policies**.

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cannot be relied on for abusive ends, the requirement to refuse such benefits applies even in the absence of anti-abuse provisions in the domestic law or tax treaties of the Member State concerned.

<sup>33</sup> An example of this is Article 74 of the CCCTB Proposal launched in 2011 about the computation of income of a foreign permanent establishment of a consolidated group in a third country. Indeed, the revenues, expenses and other deductible items are determined according to the same rules as applicable to revenues, expenses and other deductible items for EU Member States.

The EU tax instruments affect **Internal Market** policy, including the Digital Single Market. The Digital Single Market aims to maintain a level playing field, foster innovation and strengthen the digital economy.<sup>34</sup> The Commission Recommendation related to the corporate taxation of a significant digital presence (2018/1650/EU) – that complemented the digital taxation package with two as yet not adopted proposed Directives – aims to ensure fair taxation for all companies in the EU, regardless of their size and degree of digitalisation. Establishing fair taxation for the Digital Single Market could increase certainty for business investment and spur innovation.<sup>35</sup> DG TAXUD worked together with DG GROW to ensure that any tax would be compatible with the objectives of the Digital Single Market strategy. The 2018 Recommendation aims to promote the revision of tax treaties of Member States based on the proposed Directive on significant digital presence.<sup>36</sup> However, this Directive has not been adopted. One interviewee representing an NGO emphasised that without the adoption of the Directive there remains a distorted playing field between digital and other companies as well as multinational and local companies. More specifically, and as an illustration of this, one of the business representatives stressed that several Member States have taken unilateral measures in the field of digital taxation on their own.<sup>37</sup> This might give rise to double taxation. In turn, a stakeholder from a business association emphasised that the proposal has a one-sided focus on tax avoidance, which does not sufficiently consider the overarching objectives of the Commission policies to create jobs and economic growth (a more extensive analysis on the issues related to digital companies is presented in the chapter on Relevance – Chapter 4).

There are also complementarities between the objectives of the **state aid** rules and those of the tax instruments in the scope of this assignment. Whilst the EU tax instruments are forward-looking, fiscal **state aid examines existing legislation and tax rulings, with the aim of assessing whether a particular taxpayer or group of taxpayers are treated better than others in a comparable situation. The aim is to prevent unfair advantage in comparable factual and legal situations.** There are **strong complementarities between state aid rules and the Code of Conduct for Business Taxation.** The Commission has a broad mandate to choose which state aid cases to pursue. In principle, the cases chosen focus on incorrect application of transfer pricing rules and on cases that deal with selective domestic non-taxation. Although the priorities of the Commission in this area are not communicated, there is some coordination between the experts working under the Code of Conduct and the Commission (DG COMP). Whenever a potential case of aggressive tax planning is detected by both the Code of Conduct and DG COMP, priority is given to the DG COMP investigations to avoid different outcomes on the same instance of aggressive tax planning. A representative of an NGO argued that state aid rules are being used to fix some of the major limitations existing on the tax policy side. State aid rules often address abuses that were not tackled directly by the tax framework in place at the time of the abuse, as indicated by a consulted

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<sup>34</sup> European Commission, Shaping the Digital Single Market. Available at: <https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market>

<sup>35</sup> European Commission (2017), Communication from the Commission to the European Parliament and the Council. A Fair and Efficient Tax System in the European Union for the Digital Single Market, pp. 3, 7. Available at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/communication\\_taxation\\_digital\\_single\\_market\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/communication_taxation_digital_single_market_en.pdf)

<sup>36</sup> European Commission (2018), Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence. Available at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/proposal\\_significant\\_digital\\_presence\\_21032018\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/proposal_significant_digital_presence_21032018_en.pdf).

<sup>37</sup> The governments of various EU Member States, including France, Hungary, Italy, Romania, Slovakia have decided since the launch of the proposal in 2018 to implement a digital tax similar to the Commission proposal. See also KPMG (2019), Taxation of the digitalized economy, available at <https://tax.kpmg.us/content/dam/tax/en/pdfs/2019/digitalized-economy-taxation-developments-summary.pdf>.

stakeholder from the Commission. The Commission addresses tax avoidance through state aid instruments to avoid unfair tax competition between multinational companies receiving tax advantages not available to their competitors.

The EU instruments to tackle tax avoidance are largely complementary to **criminal justice** policies as tax evasion can qualify as a criminal offence in some Member States.<sup>38</sup> The absence of tax transparency creates favourable conditions for tax evasion, avoidance and criminal activities.<sup>39</sup> For example, opaque transactions routed through tax havens facilitate money laundering.<sup>40</sup> The Directive on Administrative Cooperation aims to facilitate information sharing between Member States to reduce tax avoidance, while the Anti-Money Laundering Directive (4 & 5) aims to facilitate information sharing between Member States to combat illicit financial flows.<sup>41</sup> However, there are some differences between the high-risk third countries under the Anti-Money Laundering Directive<sup>42</sup> and non-cooperative tax jurisdictions.<sup>43</sup> Although there are quite a few third countries on both lists, there are also jurisdictions on just one list due to the different objectives, criteria and identification processes. The process to define the EU list of non-cooperative tax jurisdictions is led by the Council, whereas the selection process for the high-risk third countries is led by the Commission. According to representatives of the Commission, this difference created some tension in relations with third countries. In the Commission, anti-money laundering and tax cooperation are considered distinct policy areas, whereas third countries do not necessarily make this clear distinction. In practice, this means that third countries may be approached by two different Commission Directorates at different moments in time on issues that they view as connected.

According to one of the interviewees following the **process within the Commission**, the coordination concerning the listing of non-cooperative tax jurisdictions has improved over time and is now working well. In fact, initially the communication with third countries took an EU domestic revenue perspective with very hard deadlines for third countries to comply with. The approach has changed, however, and it now focuses more on tax good governance. This shift in focus means that the communication with third countries on tax issues revolves around explaining why it would be in the interest of third countries to take certain measures to restore their tax base, but also how tax measures impact neighbouring countries and the EU. Moreover, there is more technical assistance to implement EU demands.

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<sup>38</sup> Thirion, E. & Scherrer, A. (2017), Member States' capacity to fight tax crimes, p. 23. Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603257/EPRS\\_STU\(2017\)603257\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603257/EPRS_STU(2017)603257_EN.pdf)

<sup>39</sup> Rameur, C. (2015), Tax transparency. Openness, disclosure and exchange of information. Available at: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565902/EPRS\\_IDA\(2015\)565902\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565902/EPRS_IDA(2015)565902_EN.pdf)

<sup>40</sup> Rameur, C & Dobрева, A. (2019), The fight against tax fraud. Available at: [https://what-europe-does-for-me.eu/data/pdf/focus/focus03\\_en.pdf](https://what-europe-does-for-me.eu/data/pdf/focus/focus03_en.pdf)

<sup>41</sup> European Commission (2015), Directive on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015L0849>

<sup>42</sup> The EU list of high-risk third countries consisted as of February 2019 of 12 jurisdictions listed by the Financial Action Task Force (The Bahamas, Botswana, Democratic People's Republic of Korea, Ethiopia, Ghana, Iran, Pakistan, Sri Lanka, Syria, Trinidad and Tobago, Tunisia, and Yemen) and 11 additional jurisdictions identified by the European Commission (Afghanistan, American Samoa, Guam, Iraq, Libya, Nigeria, Panama, Puerto Rico, Samoa, Saudi Arabia, and US Virgin Islands). See European Commission (2019), EU Policy on High-Risk Third Countries. Available at: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/anti-money-laundering-and-counter-terrorist-financing/eu-policy-high-risk-third-countries\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/anti-money-laundering-and-counter-terrorist-financing/eu-policy-high-risk-third-countries_en).

<sup>43</sup> The EU list of non-cooperative jurisdictions for tax purposes consist as of October 2019 of 9 jurisdictions (**American Samoa**, Belize, Fiji, **Guam**, **Samoa**, Trinidad and Tobago, **US Virgin Islands**, and Vanuatu). The countries in **bold** are both among the additional jurisdictions identified by the European Commission for the list of high-risk third countries and on the EU list of non-cooperative jurisdictions for tax purposes published by the Council. See: [https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:52019XG0621\(01\)](https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:52019XG0621(01)). For the latest version of the list, see: <https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/>.

EU tax instruments also relate to **socioeconomic policies**. Tax evasion and avoidance can undermine the tax revenues of Member States.<sup>44</sup> EU tax revenues play a crucial role in – among others – **social protection and inclusion policies**, which aim to reduce poverty and inequality.<sup>45</sup> The Anti-Tax Avoidance Directive, the Parent Subsidiary Directive and the Commission recommendations regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters (2012/771/EU), aggressive tax planning (2012/772/EU) and relating to corporate taxation of a significant digital presence (2018/1650/EU) all aim to secure tax revenues of Member States. Securing tax revenues is highly important for poverty reduction.<sup>46</sup> Reduced tax revenues could disproportionately impact vulnerable households, which rely more on social transfers. Securing tax revenues is also important to combat gender inequality.<sup>47</sup> According to a report from the European Parliament, on average women rely more on social transfers than men; reduced tax revenues can negatively and disproportionately affect the economic security of women, lowering their income and access to public services.<sup>48</sup>

Looking at the coherence between the EU tax instruments and **trade policy**, the interviewees agreed that **both policy areas primarily work in parallel**. Indeed, most of the trade policy does not interfere with international taxation rules. Trade policy is in general defined so as not to restrict the scope of taxation policy. For this purpose, there is a tax exemption in trade agreements, whereby for instance double tax treaties of Member States with third countries are considered to take precedence over the trade agreement. Otherwise trade agreements feature only very few taxation aspects, except for the promotion of international standards such as the **tax good governance standards**. Tax good governance standards together with other provisions such as those promoting international standards on financial regulations and anti-money laundering are part of the EU bilateral/regional agreements with third countries. While the provisions are binding, they follow the best endeavour formula, meaning that the countries involved endeavour to promote international standards.

The EU tax instruments under consideration are also linked to **development policy**. According to Article 208 of the TFEU, EU policies likely to affect developing countries need to be coherent with the objectives of development cooperation. To reduce poverty in the world and ensure sustainable development, DG DEVCO works on domestic revenue mobilisation (tax administration, tax policy, international tax good governance, etc.) in developing countries. **Domestic tax revenues** form the largest and most reliable source of finance for third countries and they also have the greatest potential to generate own resources for developing countries. Countering tax avoidance and evasion plays a key role to ensure that states can rely on enough revenues, but also that there is a fair distribution of the tax burden. Domestic revenues allow third countries to finance their public services, but also their broader development (public investments, etc.). This requires creating a well-functioning governance system that provides tax certainty to improve the investment climate.

Some of the EU tax instruments in the scope of this assignment affect developing countries as a couple of measures explicitly address **third countries**. For example, the Commission Recommendation on the measures against tax treaty abuse (2016/271/EU) aims to counter treaty shopping and other abusive strategies. The recommendation encourages Member States to include provisions on a GAAR and updated definition of permanent establishment in their tax treaties concluded with third countries. **Treaty abuse** impacts

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<sup>44</sup> Carter, A. & Matthews, S. (2012), How tax can reduce inequality. Available at: [http://oecdobserver.org/news/fullstory.php/aid/3782/How\\_tax\\_can\\_reduce\\_inequality.html](http://oecdobserver.org/news/fullstory.php/aid/3782/How_tax_can_reduce_inequality.html)

<sup>45</sup> Inchauste, G. & Karver, J., Fiscal Redistribution in the European Union. Available at: <http://pubdocs.worldbank.org/en/632981520461235859/EU-IG-Report-Fiscal-Redistribution.pdf>

<sup>46</sup> Carter, A. & Matthews, S. (2012), op. cit.

<sup>47</sup> Ibid.

<sup>48</sup> European Parliament (2018), Report on gender inequality and taxation policies in the EU, pp. 11, 13, 14. Available at: [http://www.europarl.europa.eu/doceo/document/A-8-2018-0416\\_EN.pdf?redirect](http://www.europarl.europa.eu/doceo/document/A-8-2018-0416_EN.pdf?redirect)

all contracting parties but has a **larger influence on developing countries** that rely more heavily on tax revenues for their public budget.<sup>49</sup> Moreover, DG TAXUD responsible for the tax instruments and DG DEVCO responsible for development policy are cooperating to ensure that, among others, the Tax Good Governance standards are included in all cooperation agreements and association agreements. In the same vein, when it comes to external investments, the **financial regulation has been amended** so that the EU only invests in third countries that are cooperative. These requirements pose significant problems in the cooperation of DG DEVCO with international organisations as these are not in a position to accept EU-specific legislation and standards.

Nevertheless, several interviewees argued that development policy and the EU tax instruments are not fully consistent. Some of the jurisdictions identified as non-cooperative might be penalised too heavily. More specifically, when developing countries are struggling to implement complex rules and effective administrative infrastructure to apply the international tax agreements, denying access to funding from the European Investment Bank (EIB) and other International Financial Institutions operating with a guarantee from the EU might thwart the objectives of development policy.

Indeed, there are certain third countries that do not have the domestic capacity to implement the tax measures, which require outside support for institutional development and capacity building. Although developing countries without a financial center are allowed more time to deliver on their commitment, they might still end up on the list of non-cooperative jurisdictions. Certain EU instruments take the development policy objectives into account (e.g. the Communication on an External Strategy for Effective Taxation, which refers to the Addis Ababa Action Agenda and the 2030 agenda for sustainable development), but they still limit the financing in the least developed countries recognised as non-cooperative. There might thus still be some potential to better align the tax policies and development policies for third countries that do not have the institutional capacity to deliver on the expected commitments in the area of taxation.

It must be noted, however, that, this report focuses particularly on the 2012 Recommendation and the 2016 Communication when it comes to third countries and tax good governance. Therefore, other instruments of development policy, covering aspects related to tax good governance are not covered. An example is the Cotonou Agreement,<sup>50</sup> which was signed in June 2000, ratified in 2003 and is re-examined every five years, having been revised in 2005 and 2010. The agreement supports the African, Caribbean and Pacific countries, among others, in their institutional development and capacity building. The cooperation aims to assist in the reform, rationalisation and modernisation of the public sectors. Looking at the cooperation in the field of taxation, the agreement must contribute to the improvement of public finance and fiscal management, allowing the African, Caribbean and Pacific countries to increase their tax revenues (i.e. enhance domestic revenue management capacities, promote participation in international organisations facilitating tax cooperation, and support implementation of international best practices).

### ***3.2.3 International coherence***

The international coherence assesses whether the objectives of the EU instruments in scope are consistent with international policies and instruments. Nearly all interviewees identified international policies and instruments that have synergies/complementarities and/or overlaps/contradictions with the objectives of the EU tax instruments. The main

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<sup>49</sup> Eurodad (2015), Fifty shades of tax dodging. Available at: <https://eurodad.org/files/pdf/1546494-fifty-shades-of-tax-dodging-the-eu-s-role-in-supporting-an-unjust-global-tax-system.pdf>

<sup>50</sup> The Cotonou Agreement. Available at: [https://ec.europa.eu/europeaid/regions/african-caribbean-and-pacific-acp-region/cotonou-agreement\\_en](https://ec.europa.eu/europeaid/regions/african-caribbean-and-pacific-acp-region/cotonou-agreement_en)



international policies considered are the **OECD Base Erosion and Profit Shifting (BEPS) Action Plan** and **UN Model Tax Convention**.<sup>51</sup>

OECD, together with the G20, regularly analyse international practices and instruments in the field of taxation. Based on the analysis they develop international standards and guidelines to efficiently address global corporate tax issues. Although OECD/G20 provisions are not binding, most countries follow the agreed standards.

The OECD tax framework is built on **four pillars**: i) enhancing transparency in taxation; ii) reducing tax avoidance; iii) promoting sustainable and inclusive growth; and iv) ensuring that taxation contributes to the development purposes.<sup>52</sup> The most notable initiatives by the OECD are **BEPS** and the **Transfer Pricing Guidelines**. The OECD BEPS Action Plan<sup>53</sup> was developed in response to large tax revenue losses due to base erosion and profit shifting. The OECD estimated that countries are losing \$100 billion to \$240 billion (between €90 billion and €215 billion) in tax revenues per year.<sup>54</sup>

The EU tax instruments under consideration are generally consistent with the international tax agenda. Many of the instruments have been initiated to ensure a coherent EU approach in implementing the OECD BEPS Action Plan. BEPS has the **general objective** to address the weaknesses in the international tax framework that allow firms to engage in base erosion and profit-shifting practices. It also has a set of **specific objectives**, which aim to reduce tax avoidance and evasion, ensure coherence of international tax rules and ensure transparency of tax environment. In the EU, the OECD BEPS Action Plan was adopted across several EU tax instruments.

Most of the interviewees believe that the EU is **reinforcing the work of the OECD BEPS Action Plan**. In fact, the EU is often the first or among the first to implement the actions agreed within the context of the OECD. The EU implementation is mostly quite close to the OECD BEPS Action Plan. Although the OECD BEPS Action Plan is, according to the interviewees, largely in line with the interests of the larger Member States, there are some slight differences of opinion. For example, there are different views both within the EU and at international level on where tax should be collected, i.e. at source or sales.

In **some areas**, the **EU even goes beyond the OECD BEPS** framework. For example, the EU has, in agreement with all Member States, adopted a measure to actively promote tax good governance in third countries. Similarly, the EU has adopted, in agreement with all Member States, mandatory country-by-country reporting for multinationals through the Directive on Administrative Cooperation, which goes beyond the minimum disclosure required by the OECD. According to an interviewee representing an international organisation, this sometimes causes problems for Member States in review processes, as there are two different processes and two different standards they must adhere to. At the same time, the EU initiatives also contributed to more ambitious international standards. For example, the automatic exchange of information was initially used by the EU for saving accounts and was afterwards adopted by the OECD for all tax areas.<sup>55</sup>

The **need for further efforts** was emphasised by several interviewees (especially NGOs) and experts. One interviewee (representing an NGO) indicated that the OECD BEPS Action Plan is an important driver of EU tax reforms but is sometimes rather weak. This requires the EU to go beyond the agreement reached within OECD BEPS, which has happened as

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<sup>51</sup> The international trade agreements have been excluded as the WTO General Agreement on Trade in Services (GATS) and General Agreement on Tariffs and Trade (GATT) basically exempt taxation issues.

<sup>52</sup> OECD (2018), OECD work on taxation. Available at: <https://www.oecd.org/tax/exchange-of-tax-information/centre-for-tax-policy-and-administration-brochure.pdf>

<sup>53</sup> OECD (2017), Inclusive framework on BEPS. Available at: <https://www.oecd.org/tax/beps/background-brief-inclusive-framework-for-beps-implementation.pdf>

<sup>54</sup> OECD (2018), OECD work on taxation, op. cit., p. 9.

<sup>55</sup> See: <https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/>.

mentioned in the previous paragraph, but is not always the case. For example, the OECD BEPS Action Plan does not cover special economic zones regimes and the norms are in many cases considered not very stringent and advantageous to developed countries. In practice, most of the requirements were already applied before the reforms by EU Member States.

A closer look at the EU instruments that implement the OECD BEPS actions reveals additional elements of coherence. **The Anti-Tax Avoidance Directive** aims to ensure the coherent implementation of Actions 2, 3 and 4 of OECD BEPS Action Plan. More specifically, it aims to reduce base erosion and profit-shifting practices and achieve a uniform implementation of the Action Plan across the EU and Member States.<sup>56</sup> Although this directive is considered to be generally consistent with the objectives of the Action Plan, there are some provisions that are not fully aligned. For example, some of the tax experts argue that the GAAR in the Anti-Tax Avoidance Directive is more general than the principal purpose test<sup>57</sup> under Action 6 of the OECD BEPS Action Plan. Some national administrations take the view that the GAAR under Action 6 of the OECD BEPS Action Plan only concerns the Parent Subsidiary Directive that also has a GAAR provision, which limits its effect. According to an interviewee from a national tax administration, the prevention tax avoidance only works well if it also covers tax treaties. Especially multinationals are using provisions in the bilateral tax treaties for their aggressive tax planning strategies (including the repatriation of dividends).<sup>58</sup>

The **Parent Subsidiary Directive** was **amended** in 2015 **and incorporated some parts of the OECD BEPS Action Plan**. Originally, the objective of this Directive was to avoid double taxation of corporate profits in the EU. As this led to increasingly double non-taxation, the Directive was amended for the transposition of the OECD BEPS Actions 2 and 6.<sup>59</sup> Actions 2 and 6 of OECD BEPS Action Plan aimed to neutralise the effects of hybrid mismatches and to prevent treaty benefits from being granted in inappropriate circumstances.

The third amendment to the Directive of Administrative Cooperation implements Action 5 of the OECD BEPS Action Plan on harmful tax practices in EU Member States. The Directive aims to discourage the use of aggressive cross-border rulings and advance pricing arrangements. This includes secret multilateral tax agreements, such as those that were exposed by the Lux Leaks<sup>60</sup> or old rulings. The Directive deviates from Action 5 in a number of technical areas such as timelines, some exclusions, the scope for SMEs, types of rulings covered, different definitions, and timing for the exchanges. This means that all EU Member States, except for Bulgaria, Croatia, Cyprus, Malta and Romania that are not members of the OECD, need take two different standards into account in their implementation, which might lead to inefficiencies.

The Commission Recommendation on the implementation of measures against tax treaty abuse (2016/271/EU) was developed to accommodate Actions 6 and 7 of the OECD BEPS Action Plan in tax treaties concluded by EU Member States. Action 6 aims to prevent tax treaty abuse and Action 7 addresses the definition of permanent establishment in tax

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<sup>56</sup> EY (2017), The latest on BEPS – 2017 in review. A review of OECD and country actions in 2017, page, 5, 9, 10. Available at: [https://www.ey.com/Publication/vwLUAssets/EY-the-latest-on-BEPS-2017-in-review/\\$FILE/EY-the-latest-on-BEPS-2017-in-review.pdf](https://www.ey.com/Publication/vwLUAssets/EY-the-latest-on-BEPS-2017-in-review/$FILE/EY-the-latest-on-BEPS-2017-in-review.pdf)

<sup>57</sup> The principle purpose test assesses whether bilateral treaties are abused based on the purposes of transactions or arrangements.

<sup>58</sup> European Commission (2017), European Semester Thematic Factsheet: Curbing Aggressive Tax Planning. Available at: [https://ec.europa.eu/info/sites/info/files/file\\_import/european-semester-thematic-factsheet-curbing-aggressive-tax-planning\\_en.pdf](https://ec.europa.eu/info/sites/info/files/file_import/european-semester-thematic-factsheet-curbing-aggressive-tax-planning_en.pdf).

<sup>59</sup> Hemels, S. (2018), Implementation of BEPS in European Union hard law, page 93-94. Available at: [http://ritsumeikeizai.koj.jp/koj\\_pdfs/67205.pdf](http://ritsumeikeizai.koj.jp/koj_pdfs/67205.pdf)

<sup>60</sup> ICIJ (2014), An ICIJ investigation Luxembourg leaks: global companies' secrets exposed. Available at: <https://www.icij.org/investigations/luxembourg-leaks/>

treaties. The Commission Recommendation aims to contribute to a common minimum level of protection against tax avoidance in the EU.<sup>61</sup>

**Transfer Pricing Guidelines**<sup>62</sup> were further developed within the context of the OECD BEPS Action Plan for multinationals and national tax administrations to provide guidance on the application of the “arm's-length principle”.<sup>63</sup> Transfer-pricing constitutes a large part of the profit shifting by multinationals. The **general objective** of the Transfer Pricing Guidelines is to reduce profit shifting stemming from transfer pricing activities. The **specific objectives** of the guidelines are to assist governments in ensuring that taxable profits of multinationals are not artificially shifted, and the reported tax base reflects their economic activity and that the arm's-length principle is applied correctly.

The consistent application of Transfer Pricing Guidelines is promoted through the **EU Joint Transfer Pricing Forum**, which between June 2002 and April 2019 aimed to advise the European Commission on transfer pricing issues. Its guidance was found to be consistent with the OECD BEPS Transfer Pricing Guidelines, which cover Actions 8, 9 and 10 of OECD BEPS Action Plan on transfer pricing for intangibles, risks and capital, and other high-risk transactions respectively.<sup>64</sup> Once the OECD agreed on the concrete actions to tackle transfer pricing, the Forum sought to assist Member States in consistently applying them across the EU.<sup>65</sup>

The **OECD list of uncooperative tax havens** and EU list of non-cooperative tax jurisdictions show certain contradictions. The OECD list includes jurisdictions that refuse to make a formal commitment to the OECD standards of transparency and exchange of information. As of August 2019, there were no jurisdictions considered as uncooperative tax havens by the OECD.<sup>66</sup> By contrast, the EU list of non-cooperative tax jurisdictions contained nine jurisdictions as of October 2019: American Samoa, Belize, Fiji, Guam, Oman, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu.<sup>67</sup> Several interviewees stressed that the Code of Conduct for Business Taxation is more stringent in the assessment of the commitments of non-cooperative tax jurisdictions than the OECD.

Beyond the OECD, there were a few interviewees that considered the initiatives of the **UN Committee of Experts on International Cooperation in Tax Matters** relevant as they primarily target national Member States. Indeed, the work of the Committee focuses on bilateral tax treaties between developed and developing countries as well as cooperation between national tax administrations. Although largely outside the scope of the EU tax instruments, some of the soft-law instruments target the bilateral tax treaties.

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<sup>61</sup> European Commission (2016), COMMISSION RECOMMENDATION of 28.1.2016 on the implementation of measures against tax treaty abuse, 2016/271/EU, pp. 2, 4. Available at: <https://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-271-EN-F1-1.PDF>

<sup>62</sup> OECD (2017), Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. Available at: <https://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm>

<sup>63</sup> The arm's-length principle is the base to determine the transfer pricing for related party transactions. The idea is that the price in the related party transaction is the same as if the transaction was between two unrelated parties.

<sup>64</sup> Hemels, S. (2018), op. cit., pp. 89, 90, 93.

<sup>65</sup> European Commission (2014), Communication on the work of the EU Joint Transfer Pricing Forum during July 2012 – January 2014, pp. 2, 3, 6. Available at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/com%282014%29315\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/com%282014%29315_en.pdf).

<sup>66</sup> See: <https://www.oecd.org/countries/monaco/list-of-unco-operative-tax-havens.htm>

<sup>67</sup> See: <https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/>



## 4 Relevance

### KEY OBSERVATIONS

To what extent are the objectives of the EU instruments under analysis still relevant, taking into account any changes in the political and economic environment since they were set?

- The Report confirms the continued relevance of most of the original needs and problems addressed by the EU instruments in the field of aggressive tax planning and harmful tax practices.
- Introducing an international taxation system fit for the digital era and adapting double tax conventions accordingly are the most pressing needs according to consulted stakeholders. In fact, international corporate tax rules are no longer adequate in the digital era.
- Some of the needs that were originally addressed by the EU instruments under assessment are now perceived as less prominent, namely the need for coordinating the implementation of OECD/G20 BEPS reports and Common Reporting Standard across Member States, the need for ensuring more transparency and a more binding approach to information exchange, and the need for introducing national feedback processes between tax administrations. This is mostly because they have been effectively addressed at the EU level by the Anti-Tax Avoidance Directive and the Directive on Administrative Cooperation. Nevertheless, the objectives of the two instruments are still fully relevant insofar as the EU rules must be properly implemented and applied by Member States and new challenges and loopholes may emerge in these areas.
- Focusing on business facilitation, all the needs and problems originally addressed by the EU rules under assessment are still relevant. For instance, transfer pricing is still one of the main channels used by multinational companies to shift profits; and aggressive tax planning via interest payments is still very prominent. Tax certainty remains a priority issue for both taxpayers and tax administrations and double taxation issues may still arise.
- Two of the needs and problems originally addressed by the EU rules covered by this assignment that affect external policies in the field of taxation are still considered highly relevant by consulted stakeholders. First, while the room for shifting profits in third countries is becoming smaller, multinational companies are still able to put in place aggressive tax planning strategies involving countries outside the EU and this may lead to a dangerous 'race to the bottom' on corporate tax. Second, to ensure compliance with tax good governance, third countries still need support in their efforts to reduce tax avoidance. Tax laws and policies have become increasingly complex and globally intertwined; their effective implementation and enforcement require sufficient skills and expertise, sophisticated IT and administrative systems and international cooperation.

Should the objectives of future EU instruments to tackle aggressive tax planning and harmful tax practices be adjusted, in light of new political or economic developments?

- The objectives of EU instruments to tackle aggressive tax planning and harmful tax practices should be progressively adjusted to address the outstanding issues related to digital taxation.
- The objectives of future EU instruments should also account for additional needs and problems that are currently experienced by EU stakeholders, such as:

- The need for providing more technical assistance to national tax authorities to analyse the data and information they receive from other Member States; and, more generally, the problems linked to the limited capacity of national tax authorities in addressing aggressive tax planning and harmful tax practices, which is affecting both EU Member States and third countries.
- The increasing tax and legal uncertainty for corporates due to the frequent changes in tax rules, which are also linked to the piecemeal approach adopted so far at the EU level and may increase the complexity of the national tax systems.

#### **4.1 Introduction**

Based on the research framework prepared for this assignment (see Annex A), the **relevance** criterion aims to assess the alignment between the original objectives of the EU instruments under investigation and the current needs and problems experienced by key stakeholders and the EU at large. More specifically, the analysis performed in this chapter revolves around **two main research questions** selected by the Commission:

- To what extent are the objectives of the EU instruments under analysis still relevant, taking into account any changes in the political and economic environment since they were set?
- Should the objectives of future EU instruments to tackle aggressive tax planning and harmful tax practices be adjusted, in light of new political or economic developments?

To answer these questions, the following **success criteria** are considered:

- Degree of alignment between stakeholders' perception of current needs and problems at the international, EU and national levels and the objectives of the EU instruments under analysis.
- Degree of alignment between the current international and EU political and economic priorities and the objectives of the EU instruments under analysis.

In line with the methodology proposed for this assignment (Chapter 2), the present chapter focuses on three thematic areas: i) aggressive tax planning and harmful tax practices ; ii) business facilitation; and iii) external policies. For each area, it looks at the alignment between the original needs and problems the instruments under investigation intended to address (for the full list of needs and problems and the intervention logics of these instruments, see Annex B) and the current needs and problems experienced by EU stakeholders, in light of the political and economic developments affecting aggressive tax planning and harmful tax practices in the EU. The Report then investigates whether achieving the objectives of the EU instruments under analysis (for the full list of objectives of the instruments, see Annex B) can contribute to address the current needs and problems, or whether such objectives should be revised. Based on the key findings of this chapter, some suggestions to increase the relevance of the EU framework in the field of aggressive tax planning and harmful tax practices are discussed in Chapter 6.

#### **4.2 Analysis**

As detailed in Chapter 2, the analysis of the relevance criterion relies on **three main sources**: i) relevant literature; ii) assessments conducted by technical experts in 10 Member States; and iii) in-depth interviews with institutional stakeholders, representatives of NGOs and business associations. The variety of sources consulted for

this assignment ensures the **cross-validation** of conclusions and accounts for potentially different perspectives on the issues at hand.

For each of the three thematic areas within the remit of the assignment, the analysis in this chapter first looks at whether the **original needs and problems** that the EU instruments intended to address are still experienced by stakeholders. Then, it identifies **new needs and problems** (if any) affecting EU stakeholders. Finally, it checks the **alignment between the proposed objectives** of the EU rules under assessment **and outstanding needs and problems**.

#### **4.2.1 Aggressive tax planning and harmful tax practices**

##### ***Current needs and problems***

Given the rapid economic and political developments affecting corporate taxation, it is necessary to check whether the **needs and problems** originally targeted by the different EU instruments under investigation are still relevant (for the list of identified needs and problems and the intervention logics of these instruments, see Annex B).

The evidence collected in the context of this assignment appears to confirm the **continued relevance of most of the original needs**. In light of the increasing digitalisation of the economy, it is no surprise that **introducing an international taxation system fit for the digital era** is among the most pressing needs, according to the stakeholders consulted. In this respect, the Commission emphasises that digital businesses may underpay taxes; on average, traditional business models are subject to an effective tax rate of 20.9%, whereas digital businesses may face a rate of 8.5%.<sup>68</sup> More specifically, as confirmed by some of the technical experts contributing to this Report, digital technologies allow enterprises to sell goods or provide services in the territory of a given country without any physical presence. As tax rules are traditionally based on physical presence, it is often impossible for that country to levy a tax on the income generated from those activities. This conclusion is confirmed by the Commission,<sup>69</sup> which emphasised the need to adapt the current tax framework to the globalised and digitalised economic environment. This remains one of the main outstanding needs, which would require an international agreement, for instance at OECD level. This opinion is shared by some institutional stakeholders<sup>70</sup> as well as NGOs interviewed for this assignment. Introducing an international taxation system fit for the digital era would also entail the revision of existing **double tax conventions**.

National corporate taxation rules, policies, and approaches to address aggressive tax planning and harmful tax practices still require **coordination at the EU level**. In some cases, for instance with regard to the Anti-Tax Avoidance Directive, it is still too early to capture the impact of EU instruments on meeting the need for coordination because of the very recent implementation by EU Member States. In addition, some institutional stakeholders consulted for this assignment argued that even those rules that are commonly defined at the EU level may not be applied in the same way at Member State level. By way of example, and as confirmed by some of the experts contributing to the Report, the fact that the Anti-Tax Avoidance Directive contains minimum requirements

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<sup>68</sup> European Commission (2017), Communication from the Commission to the European Parliament and the Council, A Fair and Efficient Tax System in the European Union for the Digital Single Market, p.6. Available at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/1\\_en\\_act\\_part1\\_v10\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/1_en_act_part1_v10_en.pdf). The estimations of the effective tax rate are based on PwC & ZEW (2017), Digital Tax Index. Available at: <https://www.pwc.de/de/industrielle-produktion/executive-summary-digitalisierungsindex-en.pdf>.

<sup>69</sup> European Commission (2017), A Fair and Efficient Tax System in the European Union for the Digital Single Market, op. cit.

<sup>70</sup> See for instance the political statement issued by three Denmark, Finland and Sweden: EU Tax News Issue 2018 – nr. 004 May – June 2018 – PwC, pp.11-13. Available at: <https://www.pwc.com/qx/en/tax/newsletters/eu-direct-tax-newsletters/assets/pwc-eudtg-newsletter-may-june-2018.pdf>

and often provides for optional exceptions allows for different interpretations across EU countries; this could still leave some room (albeit more limited) for tax competition. In the same vein, De Groot and Larking show that, due to the options available to Member States, the CFC rules laid down in the Anti-Tax Avoidance Directive may not result in a fully consistent approach across the EU.<sup>71</sup>

**Ensuring a level playing field for all companies active in the EU** is another original need that is still experienced by consulted stakeholders. Most of the NGOs interviewed for this assignment emphasised that there are still large discrepancies when it comes to aggressive tax planning between SMEs and large companies, especially multinational entities. The OECD points out that insufficient coordination in the design of tax policies might give rise to tax avoidance on a global scale since multinational entities might take advantage of gaps between tax systems, and especially from low-tax jurisdictions.<sup>72</sup> Aggressive tax planning not only affects tax fairness between EU Member States but also between companies operating in the same jurisdiction. A business association argued that levelling the playing field would require, among others, the introduction of a common, minimum corporate income tax rate in all EU countries. In the same vein, an institutional stakeholder stressed that a level playing field cannot be adequately achieved without a common corporate tax base.

Finally, also the need to **tackle tax treaty abuse**, which was mainly addressed by the 2016 Recommendation,<sup>73</sup> is still central. This is partially because a soft law approach tends to be less effective than a hard law approach when it comes to countering aggressive tax planning and harmful tax practices. The relevance of this need is confirmed by the literature on the topic. Van't Riet & Lejour<sup>74</sup> estimate that treaty shopping can reduce the average withholding tax rates on dividends by 6%. In the same vein, a study prepared by EY shows that treaty shopping is one of the main drivers of aggressive tax planning.<sup>75</sup>

Stakeholders consulted for this assignment believe that three of the needs that were originally addressed by the EU instruments under assessment are now less salient:

- the need for **coordinating the implementation of OECD/G20 BEPS reports and Common Reporting Standard across Member States**;
- the need for **ensuring more transparency and a more binding approach to information exchange on tax rulings as well as on internal transactions within multinational groups**; and
- the need for **introducing national feedback processes within tax administrations and between tax administrations and their national reporters** (such as banks, employers and pension companies).

These needs are perceived to be less relevant now because they have been effectively addressed at the EU level by two hard law instruments, i.e. the Anti-Tax Avoidance Directive and the Directive on Administrative Cooperation. It is worth remarking, however, that the objectives of the two instruments are still fully relevant for a number of reasons:<sup>76</sup>

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<sup>71</sup> De Groot, I., and Larking, B. (2019), "Implementation of Controlled Foreign Company rules under the EU Anti-Tax Avoidance Directive (2016/1164)", European Taxation 2019.

<sup>72</sup> OECD Business and Finance Outlook 2017, p.151 and OECD (2013), Policy Brief, Taxing Multinational Enterprises. Available at: [https://www.oecd.org/policy-briefs/PB-Base-Erosion-Profit-Shifting-\(BEPS\)-Nov-2013.pdf](https://www.oecd.org/policy-briefs/PB-Base-Erosion-Profit-Shifting-(BEPS)-Nov-2013.pdf)

<sup>73</sup> Commission Recommendation on the implementation of measures against tax treaty abuse (2016/271/EU), C(2016) 271 final, Brussels, 28.01.2016.

<sup>74</sup> Van't Riet, M. & Lejour, A. (2014), Ranking the stars. Network analysis of bilateral tax treaties, p.31. Available at: [https://www.cpb.nl/sites/default/files/publicaties/download/cpb-discussion-paper-290-ranking-stars\\_0.pdf](https://www.cpb.nl/sites/default/files/publicaties/download/cpb-discussion-paper-290-ranking-stars_0.pdf)

<sup>75</sup> EY (2017), The latest on BEPS – 2017 in review. A review of OECD and country actions in 2017, p.14

<sup>76</sup> It is worth remarking, as presented in Figure 1 of Annex B that the EU instruments under analysis aimed to achieve three main general objectives when it comes to aggressive tax planning and harmful tax practices: i) to improve the functioning of the Single Market by ensuring a fair, efficient and growth-friendly corporate taxation, discouraging the use of aggressive cross-border tax planning and protecting Member States against cross-border

for instance, EU rules still have to be properly implemented and applied by Member States, and new challenges and loopholes may emerge in the future.

The stakeholders consulted confirmed that **all the problems originally tackled by the EU instruments in the scope of this assignment are still relevant**, at least to some extent. In line with the analysis of the needs presented above, the most pressing problem relates to the digital economy. In fact, **international corporate tax rules are no longer adequate in the digital area**, and EU measures have so far been ineffective at solving this problem. In particular, NGOs and institutional stakeholders surveyed for this Report believe that one of the most crucial issues to be tackled in the near future is the taxation of digital activities. As previously stated, the effective tax rate paid by digital companies in the EU is likely to be lower than the one paid by traditional business models.<sup>77</sup> Policymakers are struggling to find adequate solutions to ensure that tax policy keeps pace with globalisation and digitalisation, and there is still no international agreement on the point. This is a pressing issue due to the growing magnitude of the problem. In 2017, nine out of the 20 most capitalised companies in the EU were technology companies, accounting for about 54% of the total top-20 capitalisation; and the top five e-commerce retailers have sustained their revenue growth rates at around 32% per year between 2008 and 2016, while the entire EU retail sector has registered on average a 1% growth rate in revenues per year in the same period.<sup>78</sup> In addition, digital platforms are projected to capture around 30 to 40% of the value created in industrial value chains.<sup>79</sup>

**Potential tax losses due to aggressive tax planning** continue to represent a considerable problem. In fact, a representative from an NGO consulted for this assignment stressed that tax losses are real and experienced in several Member States. Institutional stakeholders also emphasised that the magnitude of the problem varies from country to country. On a more general note, it seems that more should be done to reduce such losses. Empirical studies confirm that losses in tax revenues due to tax base erosion are an ongoing issue, rather common in many EU Member States.<sup>80</sup> In a report for the European Parliament, Janský<sup>81</sup> shows that estimated losses in tax revenues vary markedly among available studies and country income groups; on average, however, 1 to 10% of total corporate income tax revenues are lost due to aggressive tax planning strategies. In OECD countries, roughly \$400 billion (around €300 billion) of long-run revenue losses are attributable to tax avoidance and evasion.<sup>82</sup> On a global scale, in 2015 multinational companies were estimated to shift around 40% of their total profits, which results in \$600

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tax fraud and avoidance; ii) to reduce harmful tax competition; iii) to address issues related to taxing the digital economy among the Member States.

<sup>77</sup> European Commission (2017), Communication from the Commission to the European Parliament and the Council, A Fair and Efficient Tax System in the European Union for the Digital Single Market, p.6. Available at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/1\\_en\\_act\\_part1\\_v10\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/1_en_act_part1_v10_en.pdf). The estimations of the effective tax rate are based on PwC & ZEW (2017), Digital Tax Index. Available at: <https://www.pwc.de/de/industrielle-produktion/executive-summary-digitalisierungsindex-en.pdf>.

<sup>78</sup> European Commission (2017), op. cit., p.4. The estimations are based on Global Top 100 Companies by market capitalisation' PWC, 2017. Available at: <https://www.pwc.fr/fr/assets/files/pdf/2017/06/pwc-etude-global-top-100.pdf>

<sup>79</sup> Recommendations of the Strategic Policy Forum on Digital Entrepreneurship (2016), Big data and B2B digital platforms: the next frontier for Europe's industry and enterprises, p.6. Available at: <http://edz.bib.uni-mannheim.de/daten/edz-h/qdb/16/Big%20data%20and%20B2B%20digital%20platforms.pdf>

<sup>80</sup> Institute for Advanced Studies, CPB, DONDNA (2017), Aggressive Tax Planning Indicators – final report, Taxation paper No. 71, European Commission, pp.29, 67, 70, 84. Available online at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/taxation\\_papers\\_71\\_atp.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_papers_71_atp.pdf)

<sup>81</sup> Janský, P. (2019), European Parliament, TAX3 Committee: Hearing on Evaluation of Tax Gap. Available at: [http://www.europarl.europa.eu/cmsdata/161049/2019%2001%2024%20-%20Petr%20Jansky%20written%20questions%20-%20Ev\\_TAX%20GAP.pdf](http://www.europarl.europa.eu/cmsdata/161049/2019%2001%2024%20-%20Petr%20Jansky%20written%20questions%20-%20Ev_TAX%20GAP.pdf)

<sup>82</sup> Crivelli, E. et al. (2015), Base Erosion, Profit Shifting and Developing Countries, p.21. Available at: <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Base-Erosion-Profit-Shifting-and-Developing-Countries-42973>



billion (around €480 billion) of tax revenue losses per year.<sup>83</sup> The reduction in tax revenues mostly hits those countries that rely relatively more on fiscal income and where there is weak tax enforcement. The solution to the problem is far from simple. The OECD<sup>84</sup> shows that diverging national corporate income tax rates lead to tax competition and may contribute to a surge in tax avoidance. In this context, while some NGOs<sup>85</sup> argue that a minimum effective tax rate is needed to limit the ‘**race to the bottom**’, other NGOs interviewed for this assignment explained that a minimum tax rate may act as a focal point, leaving no room for Member States to set higher rates.

Interviewed stakeholders also identified some **additional needs and problems** related to combatting aggressive tax planning and harmful tax practices that were not originally addressed by the EU instruments under assessment and are currently experienced by EU stakeholders. For instance, the need for **providing technical assistance to national tax authorities to analyse the data and information they receive** from other Member States was mentioned by both technical experts and stakeholders. A study conducted in 2018 on tax administration capacity and tax avoidance highlights that some EU countries make limited use of the data and information transmitted by foreign tax authorities.<sup>86</sup> This may happen due to limited skills and expertise (tax authorities are still missing the relevant tools to understand and analyse the data received) and limited capacity (tax authorities are understaffed and do not have personnel to deal with the large amount of data they receive), which lead to ‘mock compliance’ (i.e., tax administrations fulfil the formal requirements of the OECD/G20 BEPS regarding the exchange of country-by-country reports but fail to make any use of the information received). The Commission confirmed that while the exchange of information linked to the Directive on Administrative Cooperation is working well and generates a large amount of data,<sup>87</sup> there is no clear evidence of the actual use of such information. In fact, tax administrations did not increase the number of tax staff dedicated to EU administrative cooperation, and IT resources to use the received information are still to be developed. The Commission concluded that “without adequate resources at Member States tax administrations, little can be done even with more data”.<sup>88</sup>

The increasing **tax uncertainty for corporates** seems to be another notable problem. An institutional stakeholder interviewed for this assignment reported that the changes in tax rules introduced by EU legislation generated some uncertainty for corporates. The OECD emphasises that tax uncertainty discourages investments and impinges on economic growth.<sup>89</sup> One of the consulted experts also highlighted that, in Belgium, advance tax rulings were requested with regard to the Anti-Tax Avoidance Directive even before its implementation, which shows that taxpayers are seeking more certainty about

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<sup>83</sup> Torslov, T., Wier, L. & Zucman, G. (2018), The missing profits of nations, p.22. Available at: <https://gabriel-zucman.eu/files/TWZ2018.pdf>

<sup>84</sup> OECD (2015), Measuring and Monitoring BEPS, Action 11, p.180. Available at: <https://www.oecd.org/ctp/measuring-and-monitoring-beps-action-11-2015-final-report-9789264241343-en.htm>

<sup>85</sup> See for instance: Weyzig, F., Oxfam, “Why a Minimum Effective Tax Rate is Urgently Needed?”, April 4, 2019. Available at: [http://kluwertaxblog.com/2019/04/04/why-a-minimum-effective-tax-rate-is-urgently-needed/?doing\\_wp\\_cron=1564245749.0264079570770263671875](http://kluwertaxblog.com/2019/04/04/why-a-minimum-effective-tax-rate-is-urgently-needed/?doing_wp_cron=1564245749.0264079570770263671875).

<sup>86</sup> Heitmüller, F., Harari, M. & Meinzer, M. (2018), Tax administrations’ capacity in preventing tax evasion and tax avoidance, pp.68-70. Available at: <https://www.taxjustice.net/wp-content/uploads/2018/11/Tax-administrations%E2%80%99-capacity-in-preventing-tax-evasion-and-tax-avoidance.pdf>

<sup>87</sup> European Commission (2017), Commission Staff Working Document on the application of Council Directive (EU) no 2011/16/EU on administrative cooperation in the field of direct taxation, pp.3-8,11. Available at: <https://op.europa.eu/en/publication-detail/-/publication/6af83b56-e402-11e7-9749-01aa75ed71a1>

<sup>88</sup> European Commission (2017), Report from the Commission to the European Parliament and the Council on the application of Council Directive (EU) 2011/16/EU on administrative cooperation in the field of direct taxation. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0781>

<sup>89</sup> OECD/IMF (2019), Progress Report on Tax Certainty. Available at: <http://www.oecd.org/fr/ctp/g20-report-on-tax-certainty.htm>.

the application of future rules.<sup>90</sup> Furthermore, the problem of tax uncertainty was also reiterated by another consulted expert, who was also concerned by the additional dose of uncertainty for multinational entities introduced by the Brexit process.

In addition to tax uncertainty, several stakeholders and experts also referred more generally to **legal uncertainty**. In this respect, the piecemeal approach adopted so far at the EU level may increase the complexity of the national tax systems, as Member States are required to introduce additional tax rules to counter aggressive tax planning and harmful tax practices, which are not necessarily aligned with their existing national rules.<sup>91</sup> In this context, one of the experts contributing to this Report indicated that although a GAAR is crucial to combat tax avoidance, it is unclear when the GAARs introduced by EU rules apply and how they interact with similar national rules, thus still leaving room for tax avoidance. The perceived legal uncertainty also seems to be rooted in a more fundamental question concerning the overall objectives of the EU intervention in the field of aggressive tax planning and harmful tax practices. In fact, some of the consulted stakeholders reported that it is not clear whether the main objective is to increase the competitiveness of the EU vis-à-vis other trade blocks or if EU rules just seek to achieve a greater harmonisation of national tax policies, irrespective of any competitiveness consideration. This fundamental question reflects two conflicting goals pursued by national tax policies: on the one hand maximising tax revenues and on the other attracting capital by lowering tax rates.

### ***Alignment between objectives and needs and problems***

When asked about the alignment between the objectives of the EU instruments under assessment (for the full list of objectives and the intervention logics of these instruments, see Annex B) and the original needs they intended to address, participants in the targeted consultation activities identified the strongest alignment with the following needs:

- Ensuring more transparency and a more binding approach to information exchange on tax rulings as well as on internal transactions within multinational groups.
- Coordinating the implementation of OECD/G20 BEPS reports and Common Reporting Standard across Member States and, more generally, coordinating national corporate taxation rules, policies, and approaches to addressing aggressive tax planning and harmful tax practices.

The Anti-Tax Avoidance Directive and the Directive on Administrative Cooperation are key to explaining the **strong alignment between the objectives of the EU rules in the scope of this assignment and these needs**. The Anti-Tax Avoidance Directive complements and reinforces the OECD/G20 BEPS Action Plan and creates a framework within which Member States can deliver on their BEPS commitments in a coordinated manner.<sup>92</sup> In the same vein, Knobel<sup>93</sup> concludes that the third amendment to the Directive on Administrative Cooperation (DAC 3) goes beyond the OECD/G20 BEPS Action 5 and offers a framework in which each EU country is compelled to exchange information. In this

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<sup>90</sup> Advance tax rulings were requested to the Belgian Ruling Commission with regard to the hybrid mismatch provision (decision no. 2018.0521 of 14 July 2018) and the CFC rules (decision no. 2018.0231 of 24 April 2018).

<sup>91</sup> The high complexity of the Member State corporate tax system is confirmed by the impact assessment accompanying the proposals on a Common Corporate Tax Base (CCTB) and a Common Consolidated Corporate Tax Base (CCCTB) (Commission Staff Working Document Impact Assessment Accompanying the document Proposals for a Council Directive on a Common Corporate Tax Base and a Common Consolidated Corporate Tax Base (CCCTB), 2016. Available at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/swd\\_2016\\_341\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/swd_2016_341_en.pdf)

<sup>92</sup> EY (2017), The latest on BEPS – 2017 in review. A review of OECD and country actions in 2017, p.5. Available at: [https://www.ey.com/Publication/vwLUAssets/EY-the-latest-on-BEPS-2017-in-review/\\$FILE/EY-the-latest-on-BEPS-2017-in-review.pdf](https://www.ey.com/Publication/vwLUAssets/EY-the-latest-on-BEPS-2017-in-review/$FILE/EY-the-latest-on-BEPS-2017-in-review.pdf)

<sup>93</sup> Knobel, A. (2018), Reporting taxation: Analysing loopholes in the EU's automatic exchange of information and how to close them, p.4. Available at: <http://extranet.greens-efa-service.eu/public/media/file/1/5729>

respect, EU rules are essential for those EU countries that are not members of the OECD. For instance, an EY report acknowledges that the transposition of the Anti-Tax Avoidance Directive in Cyprus is expected to significantly amend the national tax system.<sup>94</sup> Consulted stakeholders and experts argue, however, that achieving full coordination is a very complex issue that requires accounting for many additional elements not currently covered by any EU instruments. By way of example, the CFC rule set by the Anti-Tax Avoidance Directive does not set minimum taxation for profits and this can generate a ‘race to the bottom’. This issue might open the way to aggressive tax planning and harmful tax practices.

Consulted stakeholders believe that the objectives of the EU instruments **are not aligned with the need for an international taxation system fit for the digital era**. At the same time, this is considered to be one of EU stakeholders’ most pressing needs (see the previous section). This would call for a revision of some of the objectives of EU rules in the field of aggressive tax planning and harmful tax practices. Nevertheless, the EU has decided to await the results of the OECD discussions on the topic before further intervening. For the time being, this appears to be a meaningful approach, especially if one considers that most of the digital companies operate in a global context, therefore a global solution would be better than a regional one. In this respect, CIOT<sup>95</sup> and PWC<sup>96</sup> argued that a long-run and sustainable solution to avoiding double taxation and significant compliance burdens for digital businesses will only emerge from a multilateral approach. By contrast, an EU level solution might adversely affect EU competitiveness and stifle economic growth and innovation. Both CIOT and PWC advocate for more cooperation between the EU and the OECD on the topic. Given the global dimension of the issues, some of the technical experts participating in this assignment suggest aligning future EU measures with the OECD/G20 initiatives in the field, especially the first pillar of the OECD’s recent work in this area, i.e. the revised nexus and profit allocation rules.<sup>97</sup>

Interestingly, consulted stakeholders argue that by achieving their objectives, **the EU instruments under analysis will only partially be able to address the problems that are currently experienced by EU stakeholders**. In line with the discussion above, stakeholders are particularly concerned by the very limited alignment between the current EU rules’ objectives and **taxation issues in the digital era**. In addition, they also identify a significant mismatch between the current objectives and the fact that **national corporate tax rules are no longer adequate and allow for tax avoidance** strategies. In this respect, they argue that the lack of progress on the CCTB and CCCTB proposals is illustrative of the issue, especially if one considers that the general objective of these proposals was to enhance “the fairness of the tax system by addressing some of the root causes of corporate tax avoidance by multinational companies”.<sup>98</sup> However, one expert contributing to this Report emphasised that tax remains an area of national competence, and while more EU legislation would be necessary in order to counter tax avoidance,

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<sup>94</sup> EY (2017), op. cit., p.10.

<sup>95</sup> CIOT (2018), EU Commission Recommendation relating to the corporate taxation of a significant digital presence Response by the Chartered Institute of Taxation. Available at: <https://www.tax.org.uk/sites/default/files/180516%20EU%20Corporate%20taxation%20of%20a%20significant%20digital%20presence%20CIOT%20comments%20FINAL.pdf>

<sup>96</sup> PWC (2018), European Commission Proposals for Directives regarding fair taxation of the digital economy (“Digital Tax Package”). Available at: <https://www.pwc.com/gx/en/about/assets/reponse-ec-proposals-digital-tax-package.pdf>

<sup>97</sup> OECD (2019), Addressing The Tax Challenges Of The Digitalisation Of The Economy. Public consultation document. Available at: <https://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf>; OECD (2019), Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy. Available at: <https://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.pdf>

<sup>98</sup> Commission Staff Working Document Impact Assessment Accompanying the document Proposals for a Council Directive on a Common Corporate Tax Base and a Common Consolidated Corporate Tax Base (CCCTB), 2016, p. 23. Available at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/swd\\_2016\\_341\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/swd_2016_341_en.pdf)



unanimity voting makes it more difficult to introduce substantial and timely changes to tax rules.<sup>99</sup>

On more a general note, when it comes to problems related to **tax treaty abuse and specific exceptions to the definition of permanent establishment** as well as to the **potential tax losses due to aggressive tax planning**, some of the stakeholders interviewed in the context of this assignment emphasised that while some of the objectives of EU soft law are in line with such problems, it is likely that these objectives will not be achieved and, in turn, the problems will not be addressed. This is because soft law tends to be less effective than hard law. In fact, a hard law approach induces swifter compliance and allows for the desired effects to materialise quicker in comparison to a soft law approach, where the voluntary action of Member States and their reaction time could delay the uniform application of tax standards. For instance, some representatives from NGOs and public institutions indicated that tax treaty abuses are now mainly targeted by the 2016 Recommendation and there is no guarantee this will lead to major changes in bilateral treaties, especially if one considers that some Member States may fear that any change in tax treaties will lead to multinational enterprises relocating part of their activities beyond the EU borders.

Finally, most of the stakeholders interviewed for this assignment argued that achieving the objectives of the EU instruments under analysis **would hardly meet additional needs and address new problems** currently experienced in the EU, such as the need for technical assistance to national tax authorities and tax and legal uncertainty due to changes in EU and national rules (as discussed above, in the previous section of this chapter). It is worth noting, however, that other EU instruments that are not analysed in this assignment may tackle these needs and problems. For instance, the Fiscalis 2020 Programme allows the Commission to support the administrative capacity of national tax authorities.<sup>100</sup> In the same vein, the Structural Reform Support Programme helps Member States introduce institutional, administrative and growth-enhancing reform in several areas, including tax revenues and public finance management.<sup>101</sup> An institutional stakeholder also made the point that the Joint Transfer Pricing Forum and the Double Taxation Dispute Resolution Mechanism<sup>102</sup> may help increase tax certainty.

#### **4.2.2 Business facilitation**

##### ***Current needs and problems***

Focusing on the Joint Transfer Pricing Forum and the Parent Subsidiary Directive (i.e. the two pieces of legislation covered by this assignment under the business facilitation thematic area, see Chapter 2 for further details), consulted stakeholders agreed that, at least to some extent, **all the needs and problems originally addressed by these two EU instruments are still relevant** (for the full list of needs and problems and the intervention logics of the instruments, see Annex B).

In addition to the broad need to **avoid double taxation**, stakeholders consulted for this assignment stressed that also the specific need to **broaden the definition of parent company and the types of legal entities covered by the Parent Subsidiary Directive** was largely met at the EU level. In fact, annex I to this Directive provides an

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<sup>99</sup> For further details, please see "Decision making on EU Tax Policy", European Commission: [https://ec.europa.eu/taxation\\_customs/taxation/decision-making-eu-tax-policy\\_en](https://ec.europa.eu/taxation_customs/taxation/decision-making-eu-tax-policy_en)

<sup>100</sup> For further details, please see: [https://ec.europa.eu/taxation\\_customs/fiscalis-programme\\_en](https://ec.europa.eu/taxation_customs/fiscalis-programme_en)

<sup>101</sup> For further details, please see: [https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes/structural-reform-support-programme-srsp\\_en](https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes/structural-reform-support-programme-srsp_en)

<sup>102</sup> Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union OJ L 265. Available at: <https://eur-lex.europa.eu/eli/dir/2017/1852/oj>

“exhaustive list”<sup>103</sup> of the legal entities covered by the law, and Article 3 of the Directive provides a clear definition of parent company. The types of companies are either expressly named or broadly determined based on national law, depending on the Member State.

By contrast, more should be done when it comes to **aggressive tax planning via inter-group dividend payments**. While the Anti-Tax Avoidance Directive addresses the double non-taxation related to this issue, the Parent Subsidiary Directive mainly aims to solve the problem of double taxation of dividends at the level of the parent company. In this respect, a recent study led by the Institute for Advanced Studies explains that “since zero tax countries are outside the EU, the lack of a binding CFC rule and the ability to repatriate the dividends without additional repatriation taxes become more relevant”.<sup>104</sup> The study, by relying on firm-level data to build aggregated aggressive tax planning indicators, argues that some EU countries may play a role when it comes to dividend repatriation routes.<sup>105</sup> Van’t Riet and Lejour<sup>106</sup> investigate worldwide treaty shopping and conclude that the potential avoidance of dividend repatriation taxes is around 6% for multinational enterprises. Van’t and Lejour<sup>107</sup> also estimate bilateral repatriation tax rates for each country pair and show that the Netherlands applies the lowest average inward repatriation tax rate (3.4%) for dividends. At the other end of the spectrum, Slovakia relies on the highest rate (13.1%). Nonetheless, the recent change of focus in the Parent Subsidiary Directive from avoiding double-taxation to countering double non-taxation may **reignite the risk of double taxation**. This **potential obstacle to business facilitation** is emphasised by both the business associations interviewed for this assignment and some literature on the topic.<sup>108</sup> The impact assessment of the Directive on Double Taxation Dispute Resolution Mechanisms also identifies this aspect as a crucial problem.<sup>109</sup> In fact, double taxation issues may still arise, in spite of the adoption of tax treaties and double taxation conventions. This is likely to happen when Member States have a different interpretation of such instruments.

The relevance of the needs and problems addressed by the Joint Transfer Pricing Forum is confirmed by the main literature on the topic. **Transfer pricing** is one of the main channels used by multinational enterprises to shift profits. Based on Commission estimates,<sup>110</sup> the pricing of intra-firm transactions and the strategic relocation of intellectual property rights account for about 70% of profit shifting. Davies et al. confirm the existence of transfer pricing issues by using French firm-level data.<sup>111</sup> The intra-firm

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<sup>103</sup> Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. See Annex I. Available at: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32011L0096>

<sup>104</sup> Institute for Advanced Studies, CPB, DONDNA (2017), Aggressive Tax Planning Indicators – final report, Taxation paper No. 71, European Commission, p.32. Available online at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/taxation\\_papers\\_71\\_atp.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_papers_71_atp.pdf)

<sup>105</sup> Institute for Advanced Studies (2017), op. cit., Chapter 3 and p.12.

<sup>106</sup> Van’t Riet, M. and Lejour, A. M. (2014), Ranking the stars. Network analysis of bilateral tax treaties, CPB Discussion Paper No. 2014-290. Available at: [https://www.cpb.nl/sites/default/files/publicaties/download/cpb-discussion-paper-290-ranking-stars\\_0.pdf](https://www.cpb.nl/sites/default/files/publicaties/download/cpb-discussion-paper-290-ranking-stars_0.pdf).

<sup>107</sup> Van’t Riet, M. and Lejour, A. M. (2017), Optimal Tax Routing: Network Analysis of FDI Diversion, CPB Discussion Paper No. 2017-022.

<sup>108</sup> Lang, M., Owens, J., Pistone, P., Rust, A., Schuch, J., and Staringer, C. (2016). GAARs - A Key Element of Tax Systems in the Post-BEPS World, IBFD, Chapter 2.2.

<sup>109</sup> Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union, pp.14-17. Available at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/swd\\_2016\\_343\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/swd_2016_343_en.pdf).

<sup>110</sup> European Commission (2015), Commission Staff Working Document, Corporate Income Taxation in the European Union Accompanying the document Communication from the Commission to the European Parliament and the Council on a Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action. Available at: [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/resources/documents/taxation/company\\_tax/fairer\\_corporate\\_taxation/swd\\_2015\\_121.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/fairer_corporate_taxation/swd_2015_121.pdf).

<sup>111</sup> Davies, R.B., Martin, J., Parenti, M. and F. Toubal (2014), Knocking on Tax Haven’s Door: multinational firms and transfer pricing, Oxford University Center for Business Taxation, Working Paper 15/01.

prices appear to be significantly lower than arm's length prices if the receiving country has lower taxes. Also, 70% of exports were sent to tax havens by relying on transfer-pricing and then further resold. The relevant underreporting by French firms in 1999 was estimated at €333 million. Davies et al. also found that most companies engaging in transfer pricing were large multinationals. Similar results were found by Egger et al.: in high tax countries, foreign subsidiaries showed lower profits than domestic companies; by contrast, in low tax countries, the opposite is bound to happen.<sup>112</sup> Egger concluded that profit shifting through transfer pricing and abuses of intellectual property regimes is the primary origin of tax avoidance for foreign-owned firms operating in the EU.

On a more general note, according to several consulted representatives from business associations, **tax certainty remains a priority issue for business facilitation**. This issue can be seen from two perspectives: on the one hand, EU and national institutions aim to protect the tax base of national governments, and on the other hand companies wish to have **a good business climate** relying on tax and legal certainty. In the same vein, a recent OECD/IMF report<sup>113</sup> stresses that tax certainty is a priority **for both taxpayers and tax administrations**.

### ***Alignment between objectives and needs and problems***

When it comes to business facilitation, consulted stakeholders confirmed the **general alignment between the objectives of the pieces of legislation in the scope of the analysis and the needs and problems they originally intended to tackle** (for the full list of objectives and the intervention logics of the instruments, see Annex B). In addition, most of the interviewees emphasised that the objectives of the Joint Transfer Pricing Forum and the Parent Subsidiary Directive are particularly aligned with:

- The need to broaden the definition of parent company and the types of legal entities covered by the Parent Subsidiary Directive.
- The problems related to transfer pricing that affect cross-border business activities in the Single Market.

First, **the Parent Subsidiary Directive includes a list of legal entities covered by the Directive**, and this explains the stakeholders' feedback. Second, consulted stakeholders consider that the objectives of the Joint Transfer Pricing Forum have the potential to address the issues related to transfer pricing in the Single Market. In this respect, a tax authority and an institutional stakeholder interviewed for this assignment stressed that base erosion caused by **harmful transfer pricing practices** can artificially shift GDP from one Member State to another and that achieving the Joint Transfer Pricing Forum's objectives may contribute to solving the problem. In their study, Lohse and Riedel<sup>114</sup> collected data on transfer price legislation from 26 EU Member States and multinational firms and investigated whether rules are efficient at reducing multinational income shifting behaviour. Their findings show that sound legislation can reduce profit shifting by 50%. In this respect and in order to tackle this problem to the highest extent, a consulted stakeholder suggested that more should be done to intervene in those complex situations where companies may rely on entities based in third countries as an intermediary for intra-company transactions between EU Member States. KPMG confirms that in some cases the nature of the relations between entities is not based on any justified

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<sup>112</sup> Egger, P. et al. (2019), The taxing deed of globalization, American Economic Review, vol. 109, no. 2. Available at: <https://www.aeaweb.org/articles?id=10.1257/aer.20160600>

<sup>113</sup> OECD/IMF (2019), Progress Report on Tax Certainty. Available at: <http://www.oecd.org/fr/ctp/q20-report-on-tax-certainty.htm>.

<sup>114</sup> Lohse, T., Riedel, N. (2013), Do Transfer Pricing Laws Limit International Income Shifting? Evidence from European Multinationals, CESifo Working Paper Series No. 4404. Available at: [https://www.ifo.de/DocDL/cesifo1\\_wp4404.pdf](https://www.ifo.de/DocDL/cesifo1_wp4404.pdf)

economic reasons; this might include structures aiming to circumvent transfer pricing regulations.<sup>115</sup>

### **4.2.3 External policies**

#### **Current needs and problems**

Two of the needs and problems originally addressed by the EU rules covered by this assignment that affect external policies in the field of taxation are still considered highly relevant by consulted stakeholders (for the list of identified needs and problems and the intervention logics of the instruments, see Annex B):

- The problem generated by low/no income taxes in some third countries that limit the possibilities for Member States to enforce their tax policy.
- The need to support developing and other third countries in the fight against tax avoidance and their integration in the international good governance tax agenda.

First, when it comes to **low/no income taxes in some third countries**, the stakeholders interviewed in the context of this assignment acknowledged that, while the room for shifting profits in third countries is shrinking, multinational companies are still able to put in place aggressive tax planning strategies involving countries outside the EU. The rise of phantom investments – defined as “investments that pass through empty corporate shells” – shows that some tax policy strategies, such as offering very low or zero effective corporate tax rates, are still effective when it comes to attracting fictitious foreign direct investments that allow the global tax bill of multinational enterprises to be minimised.<sup>116</sup> In a similar vein, reportedly, some notorious tax schemes still enable multinationals to shift profits from the EU to tax havens.<sup>117</sup> Torslov et al. estimated that multinational companies artificially shift around 45% of their profits into tax havens.<sup>118</sup> The authors concluded that profit-shifting and low enforcement accelerate a ‘race to the bottom’ with regard to corporate income tax rates.

The **dangerous race to the bottom** on corporate tax was also emphasised by Oxfam,<sup>119</sup> which pointed out that this is impinging not only on developed countries but also on those developing countries that are deprived of the tax revenues they would need to address poverty and invest in infrastructure, healthcare, education, etc. Kar and Spanjers<sup>120</sup> estimate that over the period 2003-2012, the opacity linked to tax haven jurisdictions, among other factors, might have deprived developing countries of up to \$6.6 trillion. More specifically, the Conference on Trade and Development (UNCTAD) estimated that tax avoidance alone costs developing countries between \$70 billion and \$120 billion per

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<sup>115</sup> KPMG (2018), TP Alert: Significant changes in transfer pricing regulations in 2019. Available at: <https://home.kpmg/pl/en/home/insights/2018/11/tp-alert-significant-changes-in-transfer-pricing-regulations-in-2019.html>

<sup>116</sup> Damgaard, J., Elkjaer, T., Johannesen, N. (2019), IMF, FINANCE & DEVELOPMENT, VOL. 56, NO. 3. Available at: <https://www.imf.org/external/pubs/ft/fandd/2019/09/the-rise-of-phantom-FDI-in-tax-havens-damgaard.htm>

<sup>117</sup> Bloomberg Tax (2019), Google Cuts Taxes By Shifting Billions to Bermuda—Again, Available at: <https://news.bloombergtax.com/transfer-pricing/google-cuts-taxes-by-shifting-billions-to-bermuda-again>

<sup>118</sup> Torslov, T. et al. (2017), €600 Billion and Counting: Why High-Tax Countries Let Tax Havens Flourish. Available at: <https://gabriel-zucman.eu/files/TWZ2017.pdf>

<sup>119</sup> Oxfam (2016), Tax battles. The dangerous global race to the bottom on corporate tax. Available at: <https://www-cdn.oxfam.org/s3fs-public/bp-race-to-bottom-corporate-tax-121216-en.pdf>

<sup>120</sup> Kar, D., and Spanjers, J. (2014), Illicit Financial Flows from Developing Countries: 2003-2012. Available at: <https://secureservercdn.net/45.40.149.159/34n.8bd.myftpupload.com/wp-content/uploads/2014/12/Illicit-Financial-Flows-from-Developing-Countries-2003-2012.pdf>

year.<sup>121</sup> This issue was also stressed at the Third Conference on Financing for Development in July 2015.<sup>122</sup>

In this context, it is worth mentioning however that the introduction of an **EU list of non-cooperative jurisdictions for tax purposes**<sup>123</sup> contributed to raising the standards of tax good governance on a global scale.<sup>124</sup> Some of the interviewees also stressed that digital companies may have more room for manoeuvre insofar as most EU and international tax systems still rely on the notion of physical rather than digital presence. Aggressive tax planning strategies based on digital presence are scrutinised by both the OECD<sup>125</sup> and the Commission.<sup>126</sup> In fact, in order to tackle new tax challenges stemming from the digitalisation of the economy, the OECD/G20 framework is now also considering establishing new international rules for a minimum tax rate for multinationals.<sup>127</sup>

Second, to ensure compliance with tax good governance, third countries need support in their efforts to reduce tax avoidance. While the EU is stepping up pressure on third countries to comply with minimum standards of good governance in tax matters, some of the consulted stakeholders and technical experts contributing to this Report have pointed to **issues of limited capacity and need for assistance to help developing countries** ensure they meet and maintain their obligations. In fact, developing countries may be **missing basic administrative infrastructures** to abide by tax good governance standards. A report by Eurodad<sup>128</sup> shows that, while the need to support developing countries is still central, EU Member States have rather different views and approaches to the topic. In this respect, the IMF emphasised that due to their difficulties in mobilising revenues, international tax issues are not necessarily a priority for low income countries and pressures to comply with global standards may detract scarce talent and resources from more pressing revenue needs and reform efforts.<sup>129</sup> The IMF, OECD, UN and World Bank Group could therefore play a role as leading providers of capacity building via e.g. the Platform for Collaboration on Tax.<sup>130</sup>

Against this background, the **limited capacity of national tax authorities** is one of the additional problems that, according to the institutional stakeholders and NGOs consulted for this assignment, is affecting some EU Member States and third countries. Tax laws and policies have become **increasingly complex and globally intertwined**; their effective implementation and enforcement require sufficient skills and expertise, sophisticated IT

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<sup>121</sup> UNCTAD. (2015). World Investment Report 2015: Reforming international investment governance, p. 200-20. Available at: [http://unctad.org/en/PublicationsLibrary/wir2015\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf)

<sup>122</sup> European Commission (2015), A Contribution to the Third Financing for Development Conference in Addis Ababa. Available at: [https://ec.europa.eu/europeaid/sites/devco/files/com\\_collectmore-spendbetter\\_20150713\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/com_collectmore-spendbetter_20150713_en.pdf)

<sup>123</sup> For further details, please see: <https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/>

<sup>124</sup> European Commission (2019), Questions and answers on the EU list of non-cooperative tax jurisdictions, available at: [https://europa.eu/rapid/press-release\\_MEMO-19-1629\\_en.pdf](https://europa.eu/rapid/press-release_MEMO-19-1629_en.pdf)

<sup>125</sup> OECD (2019), Tax and digitalisation, p.1. Available at: <https://www.oecd.org/going-digital/tax-and-digitalisation.pdf>

<sup>126</sup> European Commission (2016), Commission Staff Working Document Accompanying the document 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, COM/2016/023, p.30.

<sup>127</sup> Bloomberg Tax (2019), OECD'S Global Minimum Tax Aims to Protect Countries' Tax Bases, available at: <https://news.bloombergtax.com/daily-tax-report-international/oecd-s-global-minimum-tax-aims-to-protect-countries-tax-bases>; and OECD (2019), Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy, OECD/G20 Inclusive Framework on BEPS, OECD, Paris, p.27.

<sup>128</sup> Eurodad (2015), Fifty shades of tax dodging. Available at: <https://eurodad.org/files/pdf/1546494-fifty-shades-of-tax-dodging-the-eu-s-role-in-supporting-an-unjust-global-tax-system.pdf>

<sup>129</sup> IMF (2019), Corporate Taxation in the global economy, p. 43. Available at: <https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/03/08/Corporate-Taxation-in-the-Global-Economy-46650>

<sup>130</sup> IMF (2019), op. cit., p. 45.



and administrative systems and international cooperation. The OECD has acknowledged the need to measure and analyse capacity constraints in tax administration systems as a first necessary step to build additional capacity.<sup>131</sup> However, some stakeholders have stressed that the limited capacity of national tax authorities may also serve as a pretext to leave room for aggressive tax planning.

Fostering third countries to adopt tax good governance principles and supporting them in building capacity is a complex issue. In this respect, there are mechanisms that can be further harnessed to provide assistance. The EU is engaged in initiatives at the international level, the regional level, and the bilateral level. Examples are the involvement in a number of domestic revenue mobilisation initiatives aiming to strengthen the participation of countries to international standards and increase their administrative capacity, such as the Addis Tax Initiative, IMF Trust Funds, the Tax Administration Diagnostic Assessment Tool, EU regional programme on fiscal transition in West Africa and other global, regional and national domestic revenue mobilisation initiatives.<sup>132</sup>

### ***Alignment between objectives and needs and problems***

When it comes to the alignment between the objectives of the EU instruments under assessment (for the full list of objectives and the intervention logics of the instruments, see Annex B) and the needs and problems currently experienced by stakeholders, most of the representatives of national tax administrations and NGOs interviewed for this assignment emphasised that the problems stemming from low/no income taxes in some third countries and the need to provide support to developing countries are only **partially targeted by the current soft law approach**.

For instance, one technical expert contributing to this Report argued that the 'name-and-shame' approach used to foster tax havens to exchange information for tax purposes tends to fail due to complex aggressive tax planning strategies undertaken by multinational enterprises. While the EU list of uncooperative jurisdictions is seen as a step forward, as it introduces more comprehensive criteria than those used by the OECD, an NGO points out that issues such as transparency could dent the impact of the list. It is important to note, however, that the transparency issues signalled by civil society in 2017 when the first list was published<sup>133</sup> have been improved through, for instance, the publishing of letters sent to "grey-listed" countries. Nevertheless, civil society still raises concerns about the transparency of the negotiations taking place in the Code of Conduct Group as the list is prepared and updated.<sup>134</sup> Furthermore, the instruments under investigation in this assignment do not contribute to addressing the capacity constraints experienced by national tax authorities. According to Majdanska,<sup>135</sup> inter-agency cooperation is the missing milestone in fostering global tax good governance. As mentioned above, other EU and international instruments for development policy may bridge this gap.

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<sup>131</sup> OECD (2011), Supporting the Development of More Effective Tax Systems, Chapter 4. Available at: <https://www.oecd.org/ctp/48993634.pdf>

<sup>132</sup> See for instance: European Commission, Achieving the 2030 Sustainable Development Goals: Putting together the means of implementation: Highlights on EU early achievements in three key areas, [https://ec.europa.eu/europeaid/sites/devco/files/oda-light-touch-report-11042017\\_en\\_0.pdf](https://ec.europa.eu/europeaid/sites/devco/files/oda-light-touch-report-11042017_en_0.pdf).

<sup>133</sup> Oxfam (2017), Blacklist or Whitewash? What a real EU blacklist of tax havens should look like, Oxfam Briefing Note, pp. 6-7. Available at: [https://www-cdn.oxfam.org/s3fs-public/file\\_attachments/bn-blacklist-whitewash-tax-havens-eu-281117-en\\_0.pdf](https://www-cdn.oxfam.org/s3fs-public/file_attachments/bn-blacklist-whitewash-tax-havens-eu-281117-en_0.pdf)

<sup>134</sup> Oxfam (2019), Off the Hook: How the EU is about to whitewash the world's worst tax havens, p. 13. Available at: <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620625/bn-off-the-hook-eu-tax-havens-070319-en.pdf>.

<sup>135</sup> Majdanska, A. (2018), How to effectively promote tax good governance in third countries: A missing touchstone on the EU Agenda, Chapter 3 in *Inter-agency Cooperation and Good Tax Governance in Africa*. Available at: [http://www.pulp.up.ac.za/images/pulp/books/legal\\_compilations/good\\_tax\\_governance/Chapter%203%20GOD%20TAX%20GOVERNANCE.pdf](http://www.pulp.up.ac.za/images/pulp/books/legal_compilations/good_tax_governance/Chapter%203%20GOD%20TAX%20GOVERNANCE.pdf)

Interestingly, consulted stakeholders also believe that the EU instruments addressing external taxation are not sufficiently geared towards **creating a level playing field for all businesses**, a need that is considered still relevant at the EU level. As further discussed in Chapter 3 on Coherence, a number of concerns have been expressed regarding the alignment between the EU approach and the OECD approach to the problem, especially as some have suggested that international cooperation in tax matters may require a global rather than a regional approach.

## 5 EU Added Value

### KEY OBSERVATIONS

Was there added value to setting these objectives at EU level, rather than at national level? Could the same objectives be achieved through a purely national approach by the Member States?

- Most stakeholders believe that the results of the EU tax instruments would only have been achieved to some extent by national interventions if the EU had been absent.
- It is difficult to determine the precise added value of the EU tax instruments as most Member States would most likely also have taken some measures on their own, because of their commitments within the framework of the OECD tax work and other global developments.
- The EU added value is most significant for measures that require strong coordination, including the EU implementation of the OECD/G20 BEPS Action Plan and imposing tax good governance principles in the relationship with third countries.
- The hard-law instruments bring, in general, more added value than the soft-law instruments.
- Reportedly, the lack of public transparency in some of the soft law tax instruments such as the Code of Conduct for Business Taxation may limit how far external stakeholders can assess and support the policy process leading to new measures against aggressive tax planning and harmful tax practices.

### 5.1 Introduction

The **EU added value criterion** assesses whether the EU approach generated more results than what could have been reasonably expected from Member States' actions at national level (an overview of the expected results of the EU instruments in the scope of analysis is presented in Annex B). More specifically, the analysis presented in this chapter aims to **answer the following questions:**

- Was there added value to setting these objectives at EU level, rather than at national level? Could the same objectives be achieved through a purely national approach by the Member States?

As further discussed in the Methodology chapter (Chapter 2), the remainder of this chapter is structured around three thematic areas: i) aggressive tax planning and harmful tax practices; ii) business facilitation; and iii) external policies. In line with the research framework prepared for this assignment (see Annex A), the **two following success criteria** were used for the analysis of the EU added value for each of the three thematic areas:

- Achievement of results that could not otherwise be attained by national interventions.
- Stakeholders' perception of the role of EU instruments vis-à-vis national instruments.

Based on the main findings of this chapter, suggestions for improving the EU added value of the instruments under analysis are presented in the last chapter of this Report (Chapter 6).



## 5.2 Analysis

The analysis in this section is based on data and information obtained through interviews with stakeholders, literature review and expert assessments. This approach allowed us to **cross-validate the key findings** of this chapter by triangulating multiple sources.

### 5.2.1 Aggressive tax planning and harmful tax practices

#### **Results that could not otherwise be attained by national interventions**

Most interviewed stakeholders believe that **most of the results of the EU instruments in scope would only have been achieved to a limited extent or to some extent by national interventions**. This observation is most evident for the results of initiatives that have been agreed within the context of the OECD/G20 BEPS framework and are implemented by the EU. However, there are some nuanced differences across the various results. Some interviewees believe that Member States would have been better suited to deliver the results from the OECD initiatives that require less coordination. Especially country-by-country reporting by multinational groups and instances of double non-taxation would probably have been addressed, even without the EU. By contrast, the interviewees believe that several results would have been less likely without the EU, for instance those that require more coordination or need to be undertaken at central level such as the creation of a central directory database with information on tax rulings and pricing arrangements.

These general observations from the interviewees are confirmed by international organisations such as the OECD and IMF. According to the OECD,<sup>136</sup> **international coordination of multilateral changes is more effective in combatting tax avoidance**. Unilateral policy changes are unlikely to lead to the same results as internationally coordinated measures. Maximum harmonisation and coherence with the OECD/G20 BEPS Action Plan are strongly preferred in order to resolve loopholes and mismatches facilitating aggressive tax planning. The IMF<sup>137</sup> agrees that uncoordinated anti-avoidance provisions are likely to create uncertainties and, in some cases, lead to double taxation. The EU has an important role in pushing these international processes as well as contributing to effective and harmonised implementation across Member States.

Looking at individual EU instruments, previous research has found that the EU interventions would not have been strictly necessary to attain certain results. However, unilateral initiatives would quite likely have been less effective and **Member States would have been less likely to take the measures on their own**. In particular, the Anti-Tax Avoidance Directive and the Directive on Administrative Cooperation stand out: the former has played a central role in the coordinated implementation of the OECD/G20 BEPS outputs across the Member States, and the latter instrument has brought harmonised progress to obtaining information about potentially aggressive tax planning arrangements.

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<sup>136</sup> OECD, Combating International Tax Avoidance, available at: <http://www.oecd.org/about/impact/combatinginternationaltaxavoidance.htm>.

<sup>137</sup> IMF (2019), Corporate Taxation in the Global Economy, op. cit.

That said, in some cases, Member States could have at least partly reached the desired outcome through **individual measures**. Ruf and Weichenrieder<sup>138</sup> and a ZEW study<sup>139</sup> found that unilateral CFC rules could effectively restrict tax planning on their own. Nevertheless, the effectiveness of such measures across the EU is likely to be greater when organised at the **multilateral level**. Before the introduction of the Anti-Tax Avoidance Directive, CFC rules varied across Member States; for instance, while royalty and interest income were considered as CFC income in some Member States, in other Member States they were not. These mismatches allowed for the avoidance of CFC rules and facilitated tax avoidance schemes. Most Member States did not have effective measures in place before the introduction of the Anti-Tax Avoidance Directive. In fact, only three Member States had rules addressing hybrid mismatches and six Member States had a GAAR in place before the Directive was adopted.<sup>140</sup> This does not necessarily mean that Member States would not have taken any measures. The **global developments** that supported the decision-making at EU and international level might also have encouraged Member States to take tax measures at national level. Moreover, according to the OECD,<sup>141</sup> the automatic exchange of information (DAC 3, 4 and 6) is more beneficial when the model adopted is standardised across jurisdictions. The standardised model reduces the costs and complexity of information exchange, which enhances the effectiveness of the process. In practice, Heitmüller et al.<sup>142</sup> concluded that, in the absence of international initiatives, no information would have been exchanged. The effective use is, according to various interviewed tax administrations, likely to be higher when the exchange follows common standards as was indeed provided by the EU intervention.

The **importance of multilateral initiatives** is even more pronounced in the field of digital taxation, as technology companies are less tied to a specific location. Currently, there are many uncoordinated national interventions in this domain. In the EU, ten out of the 28 Member States have taken concrete steps towards or have already implemented a digital tax. As of October 2019,<sup>143</sup> five Member States have issued a proposal (Austria, Belgium, Czechia, Sweden, United Kingdom) and another five Member States have already implemented a digital service tax (France, Hungary, Italy, Romania, Slovakia). In addition, several Member States have indicated that they will launch a digital service tax, while others have indicated they will await the OECD process. According to the IMF, the lack of multilateral cooperation when taxing the digital economy increases compliance costs and potentially leads to double taxation. The IMF calls for more thorough reforms in taxing digital businesses.<sup>144</sup> While awaiting measures at the international level, the European Commission has issued the Commission Recommendation (2018/1650/EU) and proposed a Directive laying down rules related to tax digital business models.<sup>145</sup> Discussions on the

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<sup>138</sup> Ruf, M., Weichenrieder, A. (2013), CFC Legislation. Passive Assets and the Impact of the ECJ's Cadbury-Schweppes Decision.

<sup>139</sup> ZEW (2016), The Impact of Tax Planning on Forward-Looking Effective Tax Rates, Taxation Papers, Working Paper No. 64 – 2016, European Commission, pp. 60, 61.

<sup>140</sup> European Commission (2016), Commission Staff Working Document accompanying the document 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, SWD/2016/06 final, p. 23.

<sup>141</sup> OECD (2014), Standard for Automatic Exchange of Financial Account Information in Tax Matters, p. 11.

<sup>142</sup> Heitmüller, F. et al. (2018), op. cit., p. 68.

<sup>143</sup> KPMG (2019), Taxation of the digitalized economy, available at <https://tax.kpmg.us/content/dam/tax/en/pdfs/2019/digitalized-economy-taxation-developments-summary.pdf>.

<sup>144</sup> IMF (2019), Corporate Taxation in the Global Economy, op. cit.

<sup>145</sup> European Commission (2018), Staff Working Document 81, pp. 20-21.

proposal have been postponed, as some Member States prefer to wait for initiatives at international level than to take interim measures.

### ***Stakeholders' perception of the role of EU instruments vis-à-vis national instruments***

Some of the interviewees indicated **several differences between EU measures and national approaches in the absence of a common EU intervention**. For example, one of the respondents mentioned that the Member States had not taken any measures to publish their tax rulings before this was arranged at EU level. Some Member States have taken measures for hybrid mismatches, but these are often pursued in the own interest of securing higher tax revenues. Most of the interviewees believe that Member States needed international initiatives to unlock national initiatives. In this respect, the interviewees representing international organisations and the national administrations considered the OECD as the main actor to unlock the initiatives in the corporate tax area. Even though the OECD/G20 BEPS agreements are not binding, national administrations indicated in the interviews that they are very **committed to the OECD process**. Indeed, one of the representatives of the national administrations indicated that without the EU's interventions, Member States would fall back on the OECD/G20 BEPS process, but most interviewees see the added value of the EU in this process.

The added value of having instruments at the EU level resides in the fact that such instruments facilitate the harmonious implementation of the OECD/G20 BEPS outputs across the Union. It is worth stressing that the Anti-Tax Avoidance Directive was agreed upon in record time – the Commission released the proposal for a Directive in January 2016<sup>146</sup> and political agreement in the Council on the Directive was reached on 12 July 2016. The advancement in EU legislation on the matter could be rooted in two aspects. First, the necessity, recognised by Member States, for a common EU approach to tackling certain tax avoidance practices. Second, the **global developments in the field facilitated by the OECD/G20 BEPS platform**, which increased the sense of urgency and could have prompted more Member States to implement measures against tax avoidance, thus allowing for discussions at the EU level to progress as well.

When looking at the **strong link between the EU instruments against tax avoidance and OECD developments**, one important aspect is the way the EU and the OECD developments were mutually reinforcing. The OECD/G20 BEPS outputs came at a time when various actions were already underway in the EU – primarily soft law approaches. **The BEPS outputs were thus "embraced quickly" in the EU**, having an impact on the EU hard law in the field.<sup>147</sup> Furthermore, it can be said that the **"political momentum" generated by the OECD/G20 BEPS workings** allowed the EU to effectively introduce more instruments for the harmonisation of rules against aggressive tax planning and harmful tax practices among Member States<sup>148</sup> and to implement **more stringent provisions** than those internationally agreed upon. For example, some of the options have become obligatory within the EU. More specifically, the EU has taken a common approach to supporting the convergence in measures to address hybrid mismatches (Action 2), elements of effective CFC rules (Action 3), restricting the interest deductibility of intra-group and third-party loans (Action 4), and obligatory disclosure of aggressive tax

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<sup>146</sup> European Commission (2016), Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, COM/2016/026 final, Brussels, 28.1.2016, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0026>.

<sup>147</sup> Hemels, S. (2018), op. cit., p. 111.

<sup>148</sup> HJI Panayi, C. (2018), The Europeanisation of Good Tax Governance, 36 (2018) 1 Yearbook of European Law 442-495, p.492.

planning arrangements and structures (Action 12).<sup>149</sup> Moreover, the EU contributes to a **more uniform application of the OECD/G20 BEPS agreements**.

However, there are some interviewees that **questioned the results of the EU instruments in some domains**. A consulted stakeholder from an international organisation believed that the Member States would also have been able to implement the OECD measures successfully through national interventions. Nevertheless, the coordination role played by the EU is relevant. In fact, one of the business representatives believed it was important to have sufficiently detailed harmonised measures at EU level to avoid differences in national implementation, which is in line with the EU's motivation to act. Moreover, there are also several stakeholders emphasising that the **national interventions would have been able to deliver the results, but not necessarily to the same degree as the EU measures**. This was stressed, for example, with regard to measures to reduce double non-taxation. Consulted stakeholders from NGOs argue that while national interventions could achieve some results in this respect, one must take into account that the reduction of double non-taxation requires an international approach, as tax avoidance goes cross border.

Finally, some of the stakeholders indicate that there are **issues preventing a full assessment of the EU added value**. They believe that several of the EU initiatives are insufficiently transparent for outsiders to provide a comprehensive assessment of their performance. For example, the Code of Conduct for Business Taxation does not publish detailed minutes, which precludes externals from following and evaluating the initiative. Several NGOs argue that more public transparency on tax measures could also contribute to improving the assessment possibilities. Indeed, currently the reporting rules effectively provide transparency to tax authorities but not to the public, which according to the interviewee reduced effectiveness and political pressures. The country-by-country reporting (especially if made public) and a recording of tax rulings could potentially increase accountability at the EU level.

### **5.2.2 Business facilitation**

#### ***Results that could not otherwise be achieved by national interventions***

Most of the interviewees believe that **the expected results of the EU instruments contributing to business facilitation would have been achieved by national interventions, but only to a limited extent**. More specifically, the interviewees explained that Member States, through individual actions, would have succeeded only to a limited extent to avoid situations of double taxation and double non-taxation within the EU; this is equivalent to saying that the Commission's actions have, according to most interviewees, been essential to achieving key results in terms of business facilitation. Moreover, the EU instruments played a pivotal role in coordinating the harmonised implementation of the OECD/G20 BEPS Actions concerning transfer pricing.

The interviewees and national experts consider that **also soft-law EU instruments can exert a high level of influence and generate results** that would otherwise not be achieved by national interventions. However, the extent of the effect is more difficult to assess in comparison to hard law instruments. For example, the Joint Transfer Pricing Forum has clearly influenced the Belgian approach regarding transfer pricing. Most notably, the 2006 Belgian Circular Letter on transfer pricing documentation, which is one

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<sup>149</sup> See: <http://www.oecd.org/tax/beps/inclusive-framework-on-beps-progress-report-july-2017-june-2018.pdf>

of the main instruments of administrative guidance on transfer pricing matters in Belgium, explicitly refers to the Forum and includes the text of the 2006 Resolution on a Code of Conduct on transfer pricing documentation for associated enterprises in the EU (2006/C 176/01) as an annex. In addition, the Belgian tax authorities have recently released a draft of a new Circular Letter on transfer pricing, which refers to the report of the Joint Transfer Pricing Forum on the use of comparables.

### ***Stakeholders' perception of the role of EU instruments vis-à-vis national instruments***

Interviewees that elaborated on their answers indicated that the **Joint Transfer Pricing Forum and the Parent Subsidiary Directive contribute to a more harmonised implementation of the OECD/G20 BEPS Action Plan across the EU**. The OECD BEPS recommendations in the scope of the two instruments cover the neutralising hybrid mismatches (recommendation 2), addressing inappropriate granting of treaty benefits (recommendation 6), and alignment of the transfer pricing outcomes with value creation (recommendation 8 to 10). In the absence of EU interventions, Member States (23 out of 28 are Member of the OECD) would have relied on the individual implementation of the OECD/G20 BEPS Action Plan. Sweden is one of the few exceptions; the amendments to the Parent Subsidiary Directive did not require any changes to the legislation on the treatment of outbound dividends. The new anti-tax evasion provisions were not considered more comprehensive than the Swedish general tax evasion law.<sup>150</sup> These would probably also have been implemented but in a less coordinated manner.

### ***5.2.3 External policies***

#### ***Results that could not otherwise be achieved by national interventions***

The Commission Recommendation of 2012 on minimum standards of good governance in third countries launched a discussion on a common approach to tax good governance, while the 2016 Communication on an External Strategy for Effective Taxation developed a framework for minimum standards of good governance in tax matters. The Recommendation led to **patchwork national implementation of the various provisions**,<sup>151</sup> which was at least partially addressed with the Communication. Without these measures, most of the interviewees believe that the external tax policies would have been achieved only to a limited extent by national interventions.

Nevertheless, there are some notable differences regarding the extent to which the interviewees believe the results would have been achieved. Four aspects stand out from the point of view of consulted stakeholders, in the sense that they consider national interventions would not be able to achieve them without EU intervention. These four results include: i) a common EU stance on tax good governance criteria, serving as base for all EU external tax policies and discussions on tax good governance with international partners; ii) a clear and coherent EU approach to identify third countries that do not comply with the good governance standards; iii) unified response to third countries that are non-compliant with the good governance standards; and iv) the inclusion of tax good governance standards into the revised Financial Regulation. What these four expected results have in common is the **need for strong coordination between**

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<sup>150</sup> Lagen (1995:575) mot skatteflykt.

<sup>151</sup> European Commission (2016), Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation, COM/2016/024 final, p. 4.

## **Member States, action from the Commission and/or the display of a joint EU front.**

When it comes to tax good governance, many Member States were at first reluctant to move towards harmonisation. The 2012 Recommendation has helped overcome this reluctance by **forming a common front** to encourage third countries to import the EU minimum standards of good governance in tax matters, thus producing results that would not otherwise have been reached without EU soft law intervention.<sup>152</sup> Indeed, the 2016 Communication on an external strategy for effective taxation builds on the 2012 Recommendation and set the way for the adoption, in the Council conclusions of 8 November 2016, of the criteria for tax transparency and tax good governance used to prepare the lists of non-cooperative tax jurisdictions.

Then there are several results that require strong coordination but are only likely to be **effective with the support of Member States**. This applies to four results specifically: i) fostering third countries to implement principles of good governance in the tax area; ii) debate on fair treatment of developing countries in bilateral treaties within the Platform on Tax Good Governance;<sup>153</sup> iii) efficiency and effectiveness in fighting against aggressive tax planning and harmful tax practices by addressing international tax challenges at EU level; and, iv) inclusion of an updated tax good governance clause and state aid provisions in negotiations of all relevant bilateral and regional agreements with third countries. Indeed, these results are only likely to be successful when there is a strong cooperation between the EU and its Member States.

Finally, the interviewees believe that national interventions could potentially help developing countries secure domestic revenues and fight off threats to their tax base. Indeed, national development and support programmes would contribute to delivering these results, also in the absence of the EU interventions.

## ***Stakeholders' perception of the role of EU instruments vis-à-vis national instruments***

One interviewee from the Commission indicated that larger Member States also have the potential to foster third countries to implement principles of tax good governance. In practice, however, most Member States do not use this opportunity. Moreover, a **united front from all Member States together can give a more forceful signal than individual Member States**. This is also suggested by the fact that the Commission initially identified many jurisdictions that were non-cooperative, but throughout the process some jurisdictions were no longer classified as such, having complied with the necessary criteria. If the previously existing national lists had been fully effective there might have been fewer countries on this initial EU list. The third countries on the list would have already taken measures to adhere to the tax good governance principles, compelled by the national blacklisting process. One interviewee from an NGO indicated that the interventions of the EU are necessary. Member States are unlikely to advocate tax good governance principles, as national interests usually prevail in negotiations.

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<sup>152</sup> HJI Panayi, C. (2018), The Europeanisation of Good Tax Governance, 36 (2018) 1 Yearbook of European Law 442-495, op. cit., pp. 460, 464, 466.

<sup>153</sup> See: [https://ec.europa.eu/taxation\\_customs/business/company-tax/tax-good-governance/platform-tax-good-governance\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/tax-good-governance/platform-tax-good-governance_en).



Although the consulted stakeholders representing NGOs agreed that the EU initiatives carry more weight, they also indicated that the **EU requirements are sometimes weaker than those set by some Member States**. For example, Belgium and the Netherlands are more demanding towards third countries and they usually put non-cooperative jurisdictions earlier on their national lists than they appear on the EU list. The Belgian list with low-tax and non-cooperative jurisdictions published on 31 December 2018 consists of 21 jurisdictions.<sup>154</sup> The Dutch list makes explicit reference to the EU list with non-cooperative jurisdictions,<sup>155</sup> which means that it covers all the jurisdictions on the EU list plus additional jurisdictions that it considers low-tax jurisdictions (i.e. corporate income tax below 9%). In December 2018 there were 21 jurisdictions on the Dutch list, including the five jurisdictions that were on the EU list at that time.<sup>156</sup>

The role of the Commission in the debates on the bilateral trade agreements with developing countries is very much to ensure that they are treated fairly. Several interviewees including consulted stakeholders from NGOs and the Commission emphasised that **developing countries could be treated more fairly**. Countries in Africa, especially, sometimes lose out when bilateral tax treaties reallocate taxing rights. Similarly, another consulted stakeholder from the Commission made the point that Member States could contribute more to the domestic revenue generation of developing countries. The development of a more elaborate framework on tax good governance could contribute to **limiting the leeway for Member States in the treatment of developing countries**. In addition, one interviewee representing an NGO argued that the EU could also do more to advance the agenda on taxation and development policies.

Without the contribution from the EU, the identification of third countries that do not comply with the tax good governance standards would not be clear and coherent, according to an interviewee from the Commission. At the same time, several stakeholders from national administrations and international organisations argued that **the importance of the EU is somewhat restrained due to the work already performed within the OECD**. Moreover, because of the overlapping initiatives, the EU efforts could to some extent go against the work of the OECD. By contrast, representatives from NGOs argued that the EU interventions were necessary as those of the OECD were not binding and not far-reaching enough.

Finally, in order to enhance the leverage on third countries and use all the tools the EU has in its toolbox, the inclusion of tax good governance standards in the financial legislation agreed at the EU level might be logical step. This was emphasised by an interviewee representing the Commission.

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<sup>154</sup> Besluit van de Staatssecretaris van Financiën van 31 december 2018, DB 2018/216528, Stcrt. 2018, 72064.

<sup>155</sup> European Council (2019), Taxation: EU list of non-cooperative jurisdictions, available at: <https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/>.

<sup>156</sup> Ministry of Finance (2018), Nederland stelt zelf lijst laagbelastende landen vast in strijd tegen belastingontwijking. Available at: <https://www.rijksoverheid.nl/actueel/nieuws/2018/12/28/nederland-stelt-zelf-lijst-laagbelastende-landen-vast-in-strijd-tegen-belastingontwijking>.

## 6 Conclusions and suggested improvements

The role of the EU in fighting aggressive tax planning and harmful tax practices has grown substantially in the past couple of years. Ongoing digitalisation and pressure on domestic budgets following the financial and economic crisis have, together with various tax scandals, increased awareness at all levels of the need for a more coordinated approach on tax matters. This is also reflected in the EU's interventions, which have increased and become more far-reaching in the past few years.

In this report, the coherence, relevance and EU added value of a set of three hard law and five soft law instruments were assessed (for further detail see Table 1), drawing on both stakeholder interviews and literature study.

Based on the feedback from stakeholders, the objectives of the eight EU tax instruments under analysis are largely internally **coherent**. However, the stakeholders pointed to some overlap in the policy measures, which to a very limited extent lead to inconsistencies. Most of the overlap is due to soft law that has been followed by hard law that is going beyond the soft law or similar requirements applied in different fields. Various stakeholders considered the lack of a common EU approach to digital taxation to be the main missing element in the current EU tax framework. In this respect they also pointed to the two proposed Directives on Digital Services Tax and Significant Digital Presence respectively.

Looking at the external coherence between the objectives of the tax instruments and other EU policy areas, the objectives of the EU tax instruments are found to be broadly consistent with other EU policies such as state aid, internal market, financial services, development, criminal justice, and trade. Most concerns are on the potential political implications of the stringent EU policies towards third countries, as well as coordination between the various policies affecting the least developed countries in particular. For example, the lists anti-money laundering Directive and non-cooperative tax jurisdictions created in the past some tension in the relations with third countries. Additionally, a few developing countries identified as non-cooperative tax jurisdictions might be penalised too heavily as they lack the institutional capacity required to deliver on the reforms for good governance on tax matters.

Turning to international coherence, the EU tax instruments are considered to be generally consistent with the international tax agenda (OECD BEPS, UN Model Tax Convention, etc.). In fact, the EU and its Member States are viewed as leading actors among international tax fora. This is partly because the EU Member States are among the first to implement the agreements. However, it is thought that the international agreements sometimes do not go far enough, and this can lead to an implementation of the agreements that goes beyond the minimum requirements agreed.

The Report confirms the **continued relevance** of most of the EU instruments in the field of **aggressive tax planning and harmful tax practices** under analysis. Given the increased digitalisation of the economy, there is a pressing need to introduce an international taxation system fit for the digital era. Second, and linked to the issue of digitalisation, there is also a need to adapt double-tax conventions to account for digital taxation. Third, aggressive tax planning affects not only tax fairness between EU Member States but also between companies operating in the same jurisdiction. As such, another need that was mentioned frequently is that of ensuring a level playing field for all companies. Stakeholders also identified additional needs and problems related to combatting aggressive tax planning and harmful tax practices. For instance, the need to provide technical assistance to national tax authorities to analyse the data and information they receive from other Member States. Increasing tax and legal uncertainty for corporates seems to be another salient problem.

Regarding **business facilitation**, all the needs and problems originally addressed by the EU rules under assessment are still relevant. For instance, transfer pricing is still one of



the main channels used by multinational companies to shift profits; and aggressive tax planning via interest payments is still prevalent. Tax certainty and, more generally, legal certainty remain priority issues for both taxpayers and tax administrations.

Several outstanding needs have also been expressed concerning **tax good governance and external policies**. While the room for shifting profits in third countries is shrinking, multinational companies are still able to put in place aggressive tax planning strategies involving countries outside the EU, thus leading to a 'race to the bottom' in corporate taxation. In this context, the introduction of an EU list of non-cooperative jurisdictions for tax purposes contributed to raising the standards of tax good governance on a global scale. The OECD/G20 framework is now also considering establishing new international rules for a minimum tax rate for multinationals. At the same time, implementing and enforcing tax good governance measures in third countries is heavily dependent on local capacity. In fact, developing countries may be missing basic administrative infrastructures to comply with tax good governance standards. Tax laws and policies have become increasingly complex and globally intertwined; their effective implementation and enforcement require sufficient skills and expertise, sophisticated IT and administrative systems and international cooperation. Therefore, countries still need support in their efforts to reduce tax avoidance.

Most of the results of the EU tax instruments are unlikely to have been achieved with just national interventions, which means that the EU instruments have a clear added value. However, determining the exact extent of the **EU added value** is not straightforward as the actions that Member States would have taken without the EU are not observed. Neither are all results visible to external observers. Most Member States would have implemented the OECD/G20 BEPS Action Plan, for instance, but it is unlikely that all Member States would have implemented the Action Plan in such a coordinated, far-reaching and rapid manner as has been the case so far. EU added value is considered to be most evident for measures that require strong coordination, including the EU implementation of the OECD/G20 BEPS Action Plan and imposing tax good governance principles on relations with third countries. The importance of international fora and the EU in coordinating the implementation has become especially apparent in the field of EU digital taxation, where the non-adoption of two proposed Directives awaiting agreement at international level has led to a large number of Member States introducing their own measures, which is likely to distort the functioning of the Internal Market. Moreover, legally binding Directives (hard law) adds more value to national interventions than soft-law instruments such as communications, recommendations and advisory bodies.

Against this background, the following actions could be considered to increase the coherence, relevance and EU added value of the current EU instruments in the field of aggressive tax planning and harmful tax practices.

- **Making the EU tax systems fit for the digital era.** Digital taxation and the many challenges to traditional tax systems posed by the growing digitalisation and globalisation of the economy are the 'elephant in the room'. Modernising the EU instruments in the field of aggressive tax planning and harmful tax practices to account for such challenges is key to underlining their relevance. A common EU approach to digital taxation would address the main gaps identified by several stakeholders consulted for this assignment. It might also contribute to more uniform tax rules across Member States, as currently several of them have decided to implement their own digital tax, thus creating potential distortions to the functioning of the Single Market. At the same time, any action in this direction should consider the international developments taking place in the OECD/G20 framework. The EU should ensure that the issue is swiftly addressed at the OECD/G20 level, and that the proposed solutions will be promptly implemented, in a consistent manner, by all Member States. The time frame for action in this regard

is short- to medium-term, considering on the one hand the urgency of the matter and potential impacts in terms of market fragmentation, and on the other hand the need for a shared, global solution. In the absence of such a global approach by the end of 2020, an EU solution should be relaunched without further ado.

- **Leading global solutions.** Tax avoidance is a global issue. The potential for EU instruments in the field to bring about the desired outcomes is greater the more countries subscribe to the same standards. Therefore, the EU should lead the international discussions and contribute to finding global solutions to the problem. In particular, Member States attach great value to the OECD/G20 BEPS tax agenda, which is the main international driver in the process to eliminate strategies for aggressive tax planning and harmful tax practices. Importantly, a leading role of the EU in this process seems to contribute to more effective measures at the international level. As such, the EU as a whole could assume a more active role and contribute to a truly unified implementation with more detailed and more standardised measures rather than minimal measures. In addition, the EU should act as a coordinator for the implementation at the Member State level of internationally agreed-upon measures. The EU delivers most value with central initiatives and strong coordination of own or international initiatives. Continual engagement and involvement of the EU is necessary in this regard to ensure the coordination role as new measures are discussed or agreed upon at the international level.
- **Enabling capacity building.** Sound rules are fundamental to combatting tax avoidance. Making the most of the opportunities offered by enforcing such rules is equally important. Most tax measures require administrative capacity for them to be fully effective. Capacity constraints affect both the EU (e.g. limited skills and resources to analyse data exchanged with other tax authorities) and third countries (e.g. limited capacity for tax collection and/or implementation of good governance standards). In this respect, the EU could provide targeted technical assistance based on a detailed assessment of relevant capacity constraints at the national level. Capacity building may rely on the Fiscalis 2020 Programme,<sup>157</sup> which aims to support administrative cooperation and enhance the administrative capacity of participating countries, as necessary. By conducting studies to identify capacity constraints, the EU can ensure the targeted provision of assistance to Member States through Fiscalis 2020. In addition, the Structural Reform Support Programme<sup>158</sup> could offer additional assistance to Member States' authorities for tax reforms. EU action to support capacity building in Member States is a task for the short- to medium-term to ensure that the desired outcomes are delivered, especially considering that mechanisms are already in place to provide the necessary assistance.
- **Strengthening tax good governance in third countries.** The EU list of non-cooperative jurisdictions for tax purposes and its accompanying process is considered by stakeholders to be much more powerful than similar national lists of Member States. In using the list, special attention must be paid to those developing countries that lack the capacity to implement tax good governance principles, while also ensuring that the list carries enough weight to compel third countries to comply with the principles. Against this background, support for countries willing to

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<sup>157</sup> For further details, please see: [https://ec.europa.eu/taxation\\_customs/fiscalis-programme\\_en](https://ec.europa.eu/taxation_customs/fiscalis-programme_en)

<sup>158</sup> For further details, please see: [https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes/structural-reform-support-programme-srsp\\_en](https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes/structural-reform-support-programme-srsp_en)

introduce tax good governance reforms should continue in the framework of the Official Development Assistance, as emphasised in the New European Consensus on Development.<sup>159</sup> For instance, within the development framework, the “Collect More – Spend Better”<sup>160</sup> initiative of the EU can be further harnessed, as it directly refers to domestic revenue mobilisation and enhancing capacity in third countries to tackle tax avoidance among others. Promoting tax good governance in third countries and supporting capacity building are complex tasks, involving multiple stakeholders (including, *inter alia*, third country institutions, international organisations involved in development and tax avoidance issues, etc.), which can be fully accomplished in the medium- to long-term.

- **Consistent approach at home and abroad.** There may be a need to infuse more transparency and coherence into the EU’s approach to internal and external corporate tax issues. Further development of policies focusing on tackling aggressive tax planning and harmful tax practices inside the EU is needed to render more effective similar policies promoting tax good governance externally. The outcomes of an external strategy designed to tackle tax avoidance on a global scale are expected to be enhanced if third countries fully understand that these issues are equally addressed within the EU.
- **Ensuring a level playing field for all companies.** In spite of the major efforts to fight against tax avoidance, effective tax rates still vary depending on the company size, location, level of internationalisation and sector of operation. EU tax instruments should ultimately aim to ensure a level playing field for all businesses. This will most likely require more coordination in tax policy at both the EU and international level. Introducing a common, minimum corporate tax rate and a common corporate tax base could provide a major contribution to levelling the playing field. Preparing new legislative proposals to address such issues could be considered in the short- to medium-term.
- **Increasing tax certainty and legal certainty.** Tax certainty may benefit from cooperative compliance programmes between tax administrations and taxpayers, in particular multinationals, as recommended by the OECD and IMF.<sup>161</sup> Legal certainty may be increased by performing fitness checks<sup>162</sup> of the relevant EU instruments on a regular basis in order to detect and remove any inconsistencies in the EU tax framework. Similar exercises may be conducted at Member State level to preserve the consistency of the national tax systems; in this respect, the Structural Reform Support Programme<sup>163</sup> may offer the required assistance to Member States to review and consolidate their corporate tax laws. EU action to increase legal and tax certainty can be taken in the medium term, considering that it would entail the coordination and joint efforts of several stakeholders, e.g. Commission, national tax administration, EU support programmes.

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<sup>159</sup> European Commission (2016), *Collect More – Spend Better. Achieving Development in an Inclusive and Sustainable Way*, pp. 49-50. Available online: [https://ec.europa.eu/europeaid/sites/devco/files/european-consensus-on-development-final-20170626\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/european-consensus-on-development-final-20170626_en.pdf).

<sup>160</sup> See: <https://ec.europa.eu/europeaid/sites/devco/files/swd-collect-more-spend-better.pdf>

<sup>161</sup> OECD/IMF (2019) *Progress Report on Tax Certainty*, op. cit.

<sup>162</sup> For further details, please see Chapter VI of the *Better Regulation Guidelines* at: <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-evaluation-fitness-checks.pdf>

<sup>163</sup> For further details, please see: [https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes/structural-reform-support-programme-srsp\\_en](https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes/structural-reform-support-programme-srsp_en)

***ANNEXES TO THE FINAL REPORT***

## **List of acronyms and abbreviations used in the Annexes**

AEOI	Automatic Exchange of Information
ATAD	Anti-Tax Avoidance Directive
ATAF	African Tax Administration Forum
BEPS	Base erosion and profit shifting
CEPS	Centre for European Policy Studies
CIAT	Inter-American Center of Tax Administrations
CREDAF	Exchange and Research Centre for Leaders of Tax Administrations
DG TAXUD	Directorate-General for Taxation and Customs Union, European Commission
EU	European Union
G20	Group of Twenty
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
SMEs	Small and medium-sized enterprises
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

## ANNEX A: Research framework

Research criteria	Research questions	Success criteria	Indicators	Data sources	Data collection methods
Coherence	<ul style="list-style-type: none"> <li>Are the objectives of the EU instruments under analysis consistent with the EU's agenda for fair and effective taxation?</li> <li>Is there coherence between the objectives of the EU instruments under analysis and the objectives of instruments in other policy areas? How could this be improved?</li> <li>Are the objectives of the EU instruments under analysis coherent with international objectives for fair taxation?</li> </ul>	<ul style="list-style-type: none"> <li>Degree of coherence among the EU instruments under analysis ('Internal coherence')</li> <li>Degree of coherence between the EU instruments under analysis and other EU policy areas (e.g. competition, financial services, development, justice, trade, employment) ('External coherence')</li> <li>Degree of coherence between the EU instruments under analysis and the international tax agenda (e.g. G20, OECD, UN) ('International coherence')</li> </ul>	<ul style="list-style-type: none"> <li>Qualitative assessment of complementarities/synergies/overlaps/contradictions/gaps between the objectives of: <ul style="list-style-type: none"> <li>the EU instruments under analysis;</li> <li>other relevant EU policies;</li> <li>the international tax agenda.</li> </ul> </li> <li>Share of stakeholders identifying complementarities/synergies/overlaps/contradictions/gaps between the objectives of: <ul style="list-style-type: none"> <li>the EU instruments under analysis;</li> <li>the EU tax agenda;</li> <li>other relevant EU policies;</li> <li>the international tax agenda.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Primary information on complementarities/synergies/overlaps/contradictions/gaps from: <ul style="list-style-type: none"> <li>Commission services;</li> <li>International institutions;</li> <li>International associations:</li> <li>EU associations and NGOs;</li> <li>Member State authorities;</li> <li>National associations and NGOs.</li> </ul> </li> <li>Secondary information on objectives from official documents of EU and international institutions.</li> <li>Expert opinions.</li> </ul>	<ul style="list-style-type: none"> <li>Desk research</li> <li>Interviews</li> <li>Feedback from technical experts</li> </ul>

Research criteria	Research questions	Success criteria	Indicators	Data sources	Data collection methods
Relevance	<ul style="list-style-type: none"> <li>To what extent are the objectives of the EU instruments under analysis still relevant, taking into account any changes in the political and economic environment since they were set?</li> <li>Should the objectives of future EU instruments to tackle aggressive tax planning and harmful tax practices be adjusted, in light of new political or economic developments?</li> </ul>	<ul style="list-style-type: none"> <li>Degree of alignment between the current international and EU political and economic priorities and the objectives of the EU instruments under analysis.</li> <li>Degree of alignment between stakeholders' perception of current needs and problems at the international, EU and national levels and the objectives of the EU instruments under analysis.</li> </ul>	<ul style="list-style-type: none"> <li>Qualitative assessment of the alignment between the objectives of the EU instruments under analysis and current political and economic priorities.</li> <li>Qualitative assessment of the alignment between the objectives of the EU instruments under analysis and current needs and problems.</li> <li>Qualitative assessment of the alignment between needs and problems addressed by the EU instruments under analysis and current needs and problems.</li> <li>Share of stakeholders confirming the alignment between the objectives of the EU instruments under analysis and current needs and problems.</li> <li>Share of stakeholders confirming the alignment between needs and problems addressed by the EU instruments under analysis and current needs and problems.</li> </ul>	<ul style="list-style-type: none"> <li>Primary information on current needs and problems from: <ul style="list-style-type: none"> <li>Commission services;</li> <li>International institutions;</li> <li>International associations</li> <li>EU associations and NGOs;</li> <li>Member State authorities;</li> <li>National associations and NGOs.</li> </ul> </li> <li>Secondary information on original objectives, needs and problems from official documents of EU and international institutions.</li> <li>Secondary information on current political and economic priorities from official documents of EU and international institutions.</li> <li>Secondary information on current needs and problems from relevant literature.</li> <li>Expert opinions.</li> </ul>	<ul style="list-style-type: none"> <li>Desk research</li> <li>Interviews</li> <li>Feedback from technical experts</li> </ul>

Research criteria	Research questions	Success criteria	Indicators	Data sources	Data collection methods
EU added value	<ul style="list-style-type: none"> <li>Was there added value to setting these objectives at EU level, rather than at national level? Could the same objectives be achieved through a purely national approach by the Member States?</li> </ul>	<ul style="list-style-type: none"> <li>Achievement of results that could not be otherwise attained with national interventions.</li> <li>Stakeholders' perception of the role of EU instruments vis-à-vis national instruments.</li> </ul>	<ul style="list-style-type: none"> <li>Qualitative assessment of results generated by EU instruments compared with results generated by national instruments.</li> <li>Share of stakeholders confirming the need for EU intervention to achieve expected results.</li> </ul>	<ul style="list-style-type: none"> <li>Primary information on results achieved by EU and national instruments from: <ul style="list-style-type: none"> <li>Commission services;</li> <li>EU associations and NGOs;</li> <li>Member State authorities;</li> <li>National associations and NGOs.</li> </ul> </li> <li>Secondary information on results achieved by EU instruments from relevant literature.</li> <li>Expert opinions.</li> </ul>	<ul style="list-style-type: none"> <li>Desk research.</li> <li>Interviews</li> <li>Feedback from technical experts</li> </ul>

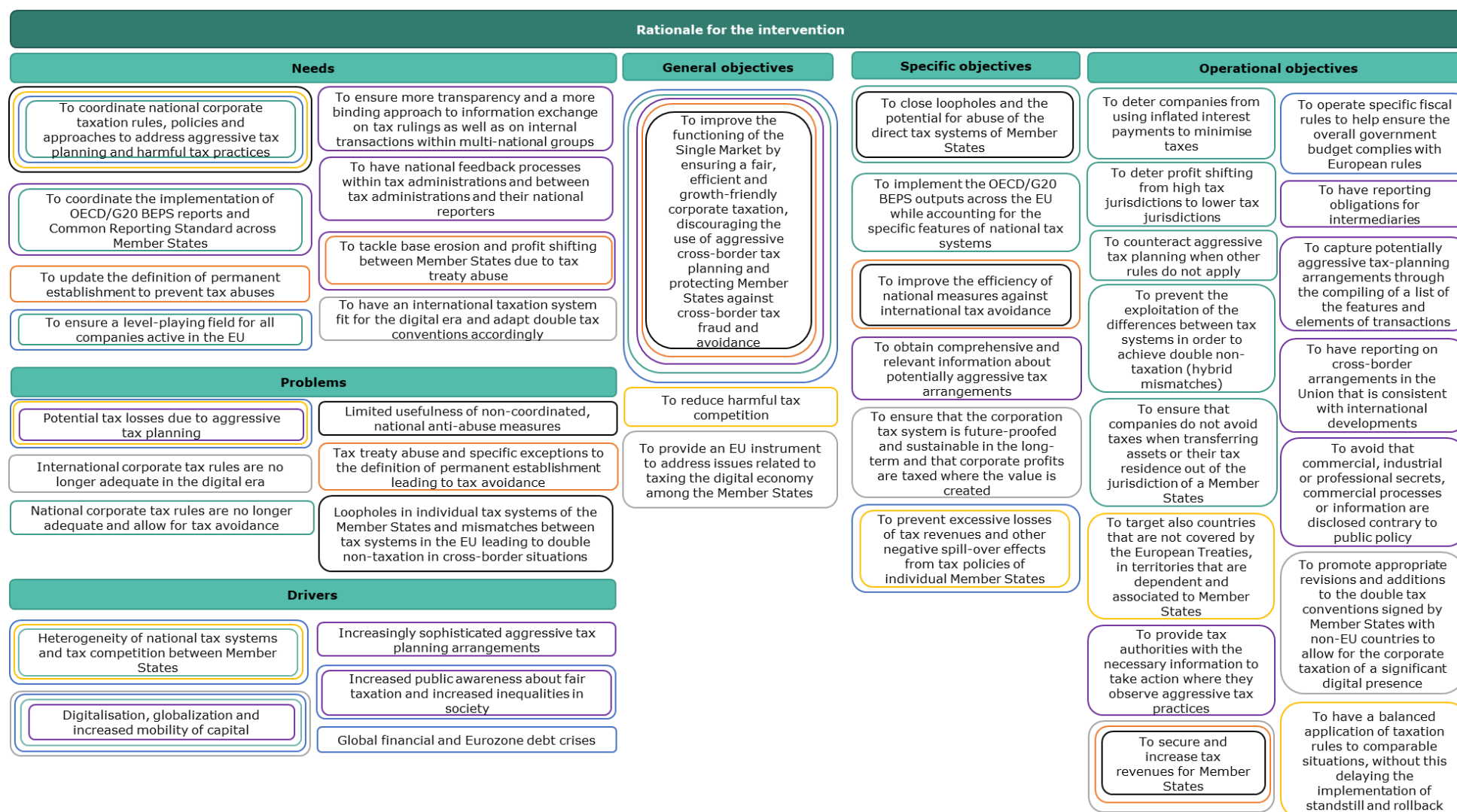
*Source: Authors' elaboration*



## ***ANNEX B: Intervention logics***

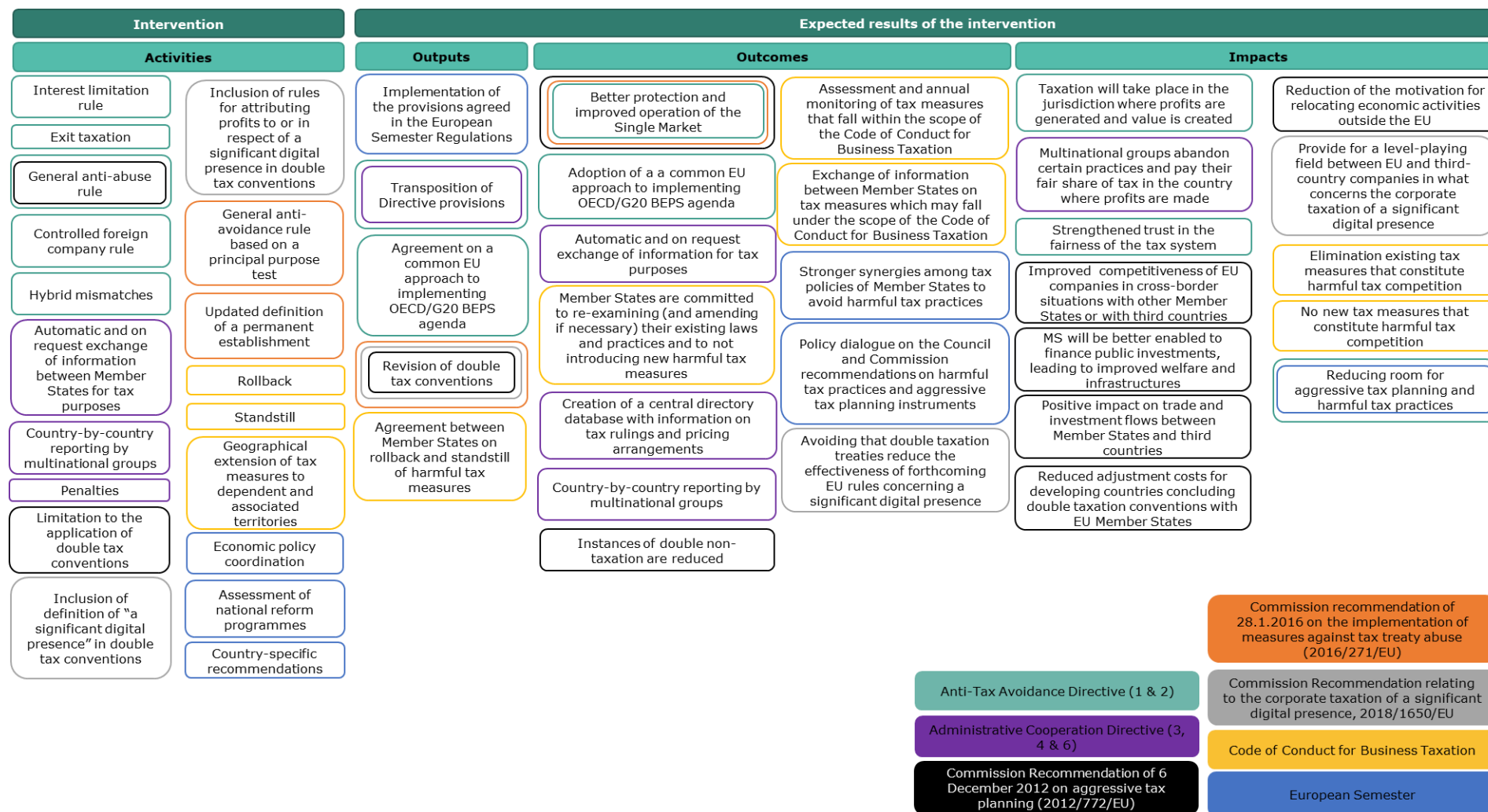
### ***B.1 Aggregate intervention logics***

**Figure 3 Aggressive tax planning and harmful tax practices: Aggregate intervention logic (1/2)**



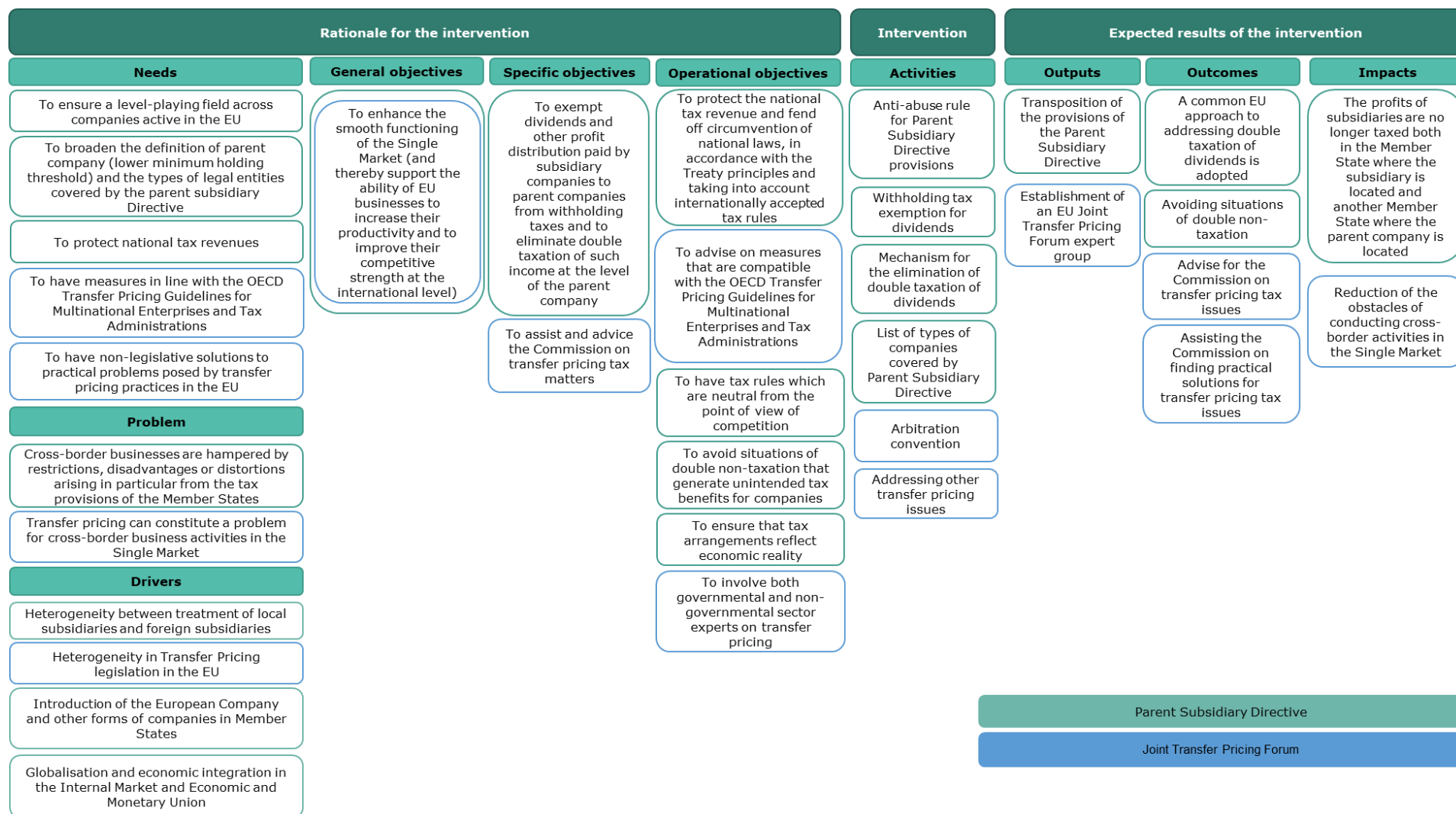
Source: Authors' elaboration on EU official documents.

**Figure 4 Aggressive tax planning and harmful tax practices: Aggregate intervention logic (2/2)**



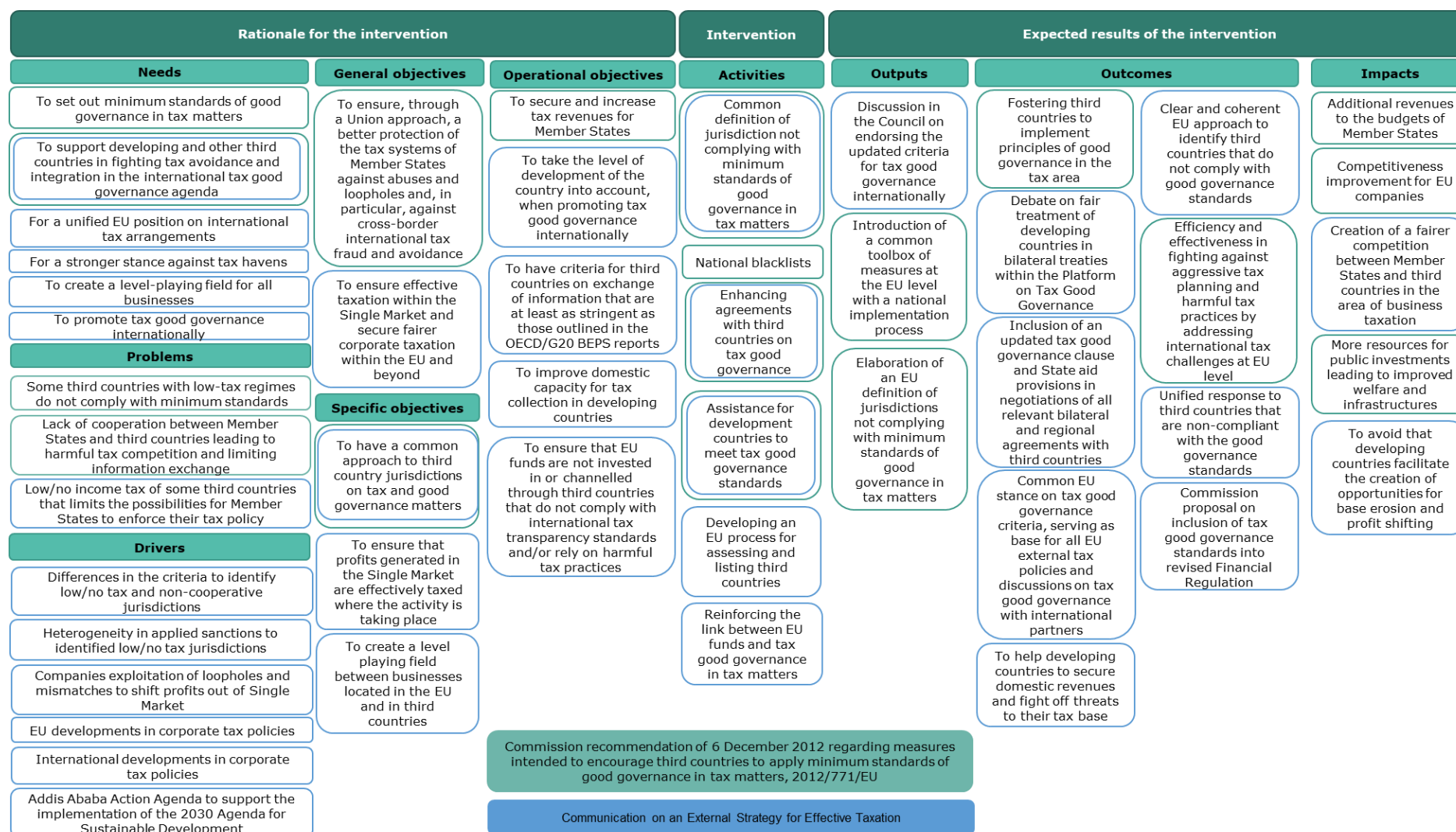
Source: Authors' elaboration on EU official documents.

**Figure 5 Business facilitation: Aggregate intervention logic**



Source: Authors' elaboration on EU official documents.

**Figure 6 External policies: Aggregate intervention logic**



Source: Authors' elaboration on EU official documents.

## **B.2 Individual intervention logics**

### **1 Anti-Tax Avoidance Directive (1 & 2)**

#### **Needs, problems, and drivers**

The Commission Proposal for an Anti-Tax Avoidance Directive (ATAD; and the amendment to the Directive),<sup>164</sup> together with the Commission Staff Working Document accompanying the Communication on the Anti-Tax Avoidance Package<sup>165</sup> identified **four main needs** linked to tax avoidance. ATAD (1 & 2) aims to address these needs:

- The need to reform existing corporate taxation rules;
- The need to coordinate the implementation of the OECD/G20 BEPS reports<sup>166</sup> across Member States;
- The need to coordinate corporate tax policies in the Member States;
- The need for a level-playing field across companies active in the EU.

The Commission Staff Working Document accompanying the Communication on the Anti-Tax Avoidance Package identifies **one main problem**, namely the fact that corporate tax rules are no longer adequate, rendering the EU susceptible to exploitation by companies looking to reduce the amount of taxes they owe. Such exploitation is made possible by mismatches between the tax systems of the Member States, as well as by the increasing level of digitalisation and globalisation. Going more in detail, **four main drivers** feed into this problem, as identified in the Commission Staff Working Document accompanying the Communication on the Anti-Tax Avoidance Package Commission Staff Working Document accompanying the Proposal for an amendment to ATAD<sup>167</sup>:

- Heterogeneity of national tax systems;
- Tax competition between Member States;
- Increasingly digitised companies;
- Financial incentives for companies to reduce taxes paid.

#### **Objectives**

ATAD (1 & 2) aim to contribute to the coordination of Member States' tax policies, especially in the context of the implementation of the OECD/G20 BEPS outcomes. The Directives directly address the issue of taxpayers exploiting disparities between the tax systems of Member States in order to reduce their tax expenses. The Commission Staff Working Document accompanying the Communication on the Anti-Tax Avoidance Package<sup>168</sup> identifies the following general objective:

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<sup>164</sup> European Commission, Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, COM(2016) 26 final, Brussels, 28.1.2016; European Commission, Commission Staff Working Document Accompanying the document Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, SWD(2016) 345 final, Strasbourg, 25.10.2016.

<sup>165</sup> European Commission, Commission Staff Working Document Accompanying the document 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, SWD(2016) 6 final, Brussels, 28.1.2016

<sup>166</sup> OECD (2015), OECD/G20 Base Erosion and Profit Shifting Project. Final BEPS Package, available online at <http://www.oecd.org/ctp/beps-2015-final-reports.htm>.

<sup>167</sup> European Commission, Commission Staff Working Document Accompanying the document Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, SWD(2016) 345 final, Strasbourg, 25.10.2016.

<sup>168</sup> European Commission, Commission Staff Working Document Accompanying the document 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, SWD(2016) 6 final, Brussels, 28.1.2016



- **General objective:** To enhance the smooth functioning of the Single Market and thereby support the ability of the Single Market to secure sustainable growth, employment and competitiveness, considering a fair, efficient and growth-friendly corporate taxation as a key element of a strong Single Market.

The Commission Proposal for an ATAD<sup>169</sup> emphasises the specific objective targeted by ATAD 1:

- **Specific objective #1:** To improve the legal framework for the taxation of company profits through measures against unacceptable tax planning, profit shifting and base erosion that directly affect the functioning of the Single Market.
- **Specific objective #2:** To achieve a balance between the need for a certain degree of uniformity in implementing the OECD/G20 BEPS outputs across the EU and Member States' needs to account for the special features of their tax systems.<sup>170</sup>

Building on the provisions of ATAD 1, the amendment to the Directive aims to broaden the scope of ATAD 1 with regard to hybrid mismatches. Whereas ATAD 1 focuses on mismatches within the Single Market, ATAD 2 addresses external risks. Thus, the specific objective of ATAD 2 can be summarised as follows<sup>171</sup>:

- **Specific objective #3 (ATAD 2):** To provide for rules regarding hybrid mismatches involving third countries which are consistent with and no less effective than the rules recommended by the OECD/G20 BEPS report on Action 2.

In addition, five operational objectives can be identified:

- **Operational objective #1:** To deter companies from using inflated interest payments to minimise taxes;
- **Operational objective #2:** To ensure that companies do not avoid taxes when transferring assets or their tax residence out of the jurisdiction of a Member State;
- **Operational objective #3:** To counteract aggressive tax planning when other rules do not apply;
- **Operational objective #4:** To deter profit shifting from high tax jurisdictions to lower tax jurisdictions;
- **Operational objective #5:** To prevent the exploitation, within the Single Market<sup>172</sup> and with regard to third countries, of the differences between tax systems in order to achieve double non-taxation.

## Inputs

The adopted Directives contain **five measures targeting tax avoidance practices**:

- Interest limitation rule, aiming to discourage profit shifting based on inflated interest payments by limiting the deductibility of taxpayers' net financial costs.
- Exit taxation, aiming to specify the cases in which companies are subject to exit tax rules;

<sup>169</sup> European Commission, Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, COM(2016) 26 final, Brussels, 28.1.2016.

<sup>170</sup> European Commission, Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, COM(2016) 26 final, Brussels, 28.1.2016.

<sup>171</sup> European Commission, Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, COM(2016) 687 final, Strasbourg, 25.10.2016.

<sup>172</sup> Hybrid mismatches were addressed initially by ATAD 1 only in the context of the Single Market. ATAD 2 broadened the scope of the measure to address third countries as well.

- General anti-abuse rule, covering the gaps in the legislation against tax avoidance practices in a uniform manner across the Member States.
- Controlled foreign company rule, aiming to deter profit shifting out of the parent company based in a high-tax country to subsidiaries in either a low- or no-tax country.
- Hybrid mismatches:
  - The provision included in ATAD 1 targets hybrid mismatches arising from differences in the legal characterisation of an entity or a financial instrument between a taxpayer in a Member State and an associated enterprise in another Member State or from a structured arrangement between parties in Member States.
  - The provisions of ATAD 2 include rules on hybrid transfers, imported mismatches and dual resident mismatches, in order to prevent taxpayers from exploiting remaining loopholes.

## Results

The following **outputs** (i.e. immediate results) related to the Directives can be identified:

- Transposition of the Directive provisions;
- A common EU approach to implementing the OECD/G20 BEPS agenda is agreed upon.

The expected short to medium-term results (**outcomes**) largely correspond to the specific objectives of the Directives and can be formulated as follows:

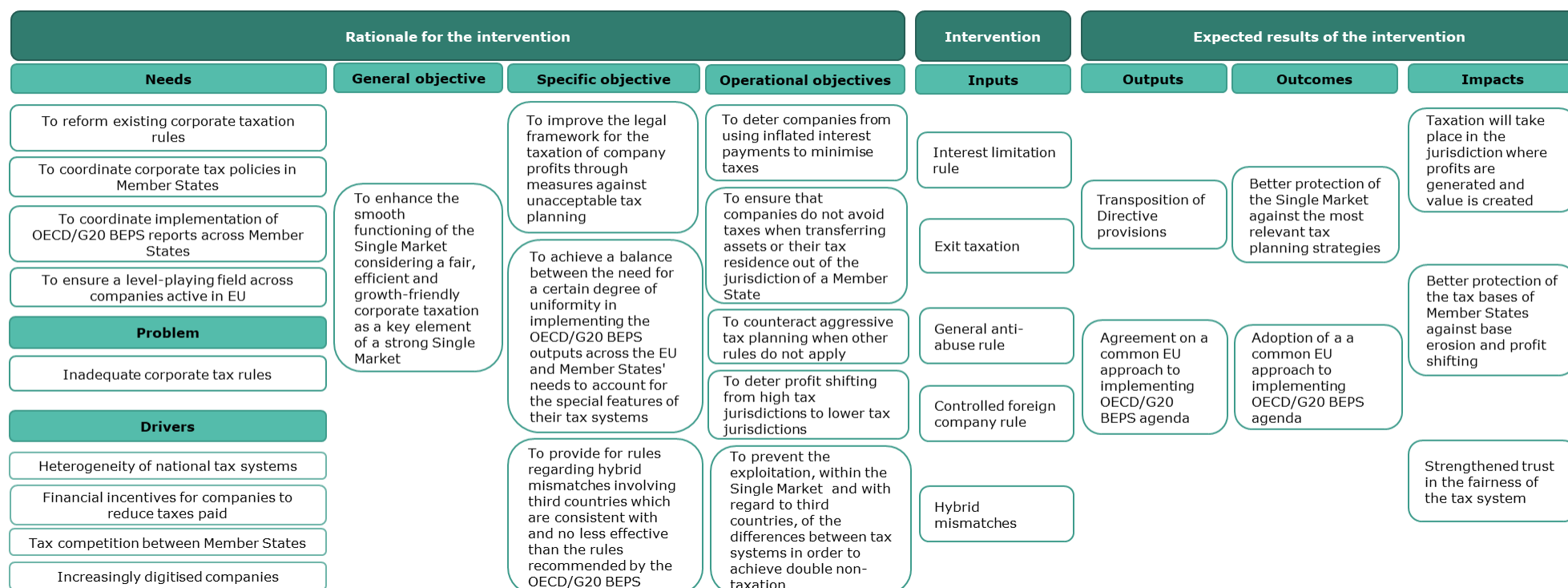
- The Single Market is better protected against the most relevant tax planning strategies;
- A common EU approach to implementing the OECD/G20 BEPS agenda is adopted.

Regarding the long-term results, the Commission Proposal for an ATAD lists three global **impacts** of the Directive:

- Taxation will take place in the jurisdiction where profits are generated, and value is created. This will enhance fairness in attributing the tax burden between companies in the EU. Thus, internationally active groups of companies will no longer benefit from tax planning opportunities which are not available to taxpayers (in particular, SMEs) who are only domestically active.
- The tax bases of the Member States will be better protected against practices of base erosion and profit shifting.
- The trust of the public, citizens and other taxpayers in the fairness of the tax systems will be strengthened.



**Figure 7 Anti-Tax Avoidance Directive (1 & 2): Intervention logic**



Source: Authors' elaboration on EU official documents.

## 2 Parent-Subsidiary Directive

### Needs, problems, and drivers

The Parent Subsidiary Directive (and the amendment to the Directive)<sup>173</sup> identified **three main needs** linked to double taxation:

- The need for a level-playing field across companies active in the EU;
- The need to broaden the scope of the existing corporate taxation rules;
- The need to protect national tax revenues.

The Parent Subsidiary Directive identifies **one main problem**, namely the fact that cross-border businesses are hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States. These arise from double taxation of the taxes on dividends paid by subsidiaries located in another Member State to the parent company. Going more in detail, **three main drivers** feed into this problem:

- Heterogeneity between the treatment of local subsidiaries and foreign subsidiaries;
- Introduction of the European Company and other forms of companies in Member States;
- Globalisation and economic integration in the Internal Market and Economic and Monetary Union.

### Objectives

The Parent Subsidiary Directive aims to contribute to reducing double taxation of profits of subsidiaries. The Directive directly addresses the issue of taxation of dividends in both the Member State where the subsidiary is located and another Member State where the parent company is located. The Directive identifies the following general objective:

- **General objective #1:** To enhance the smooth functioning of the Single Market and thereby support the ability of the Single Market to increase their productivity and to improve their competitive strength at the international level.

The Directive and amendments emphasise the specific objective targeted by this piece of legislation:

- **Specific objective #1:** To exempt dividends and other profit distribution paid by subsidiary companies to parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company.

In addition, four operational objectives can be identified:

- **Operational objective #1:** To protect the national tax revenue and fend off circumvention of national laws, in accordance with the Treaty principles and taking into account internationally accepted tax rules;
- **Operational objective #2:** To have tax rules which are neutral from the point of view of competition;

<sup>173</sup> Council Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, Brussels, 30.11.2011, available online at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:345:0008:0016:EN:PDF>; Council Directive 2014/86/EU amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, Brussels, 8.7.2014, available online at <https://publications.europa.eu/en/publication-detail/-/publication/fb19de7b-13cc-11e4-933d-01aa75ed71a1/language-en>; Council Directive 2014/86/EU amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, Brussels, 27.1.2015, available online at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L0121&from=EN>.

- **Operational objective #3:** To avoid situations of double non-taxation and generate unintended tax benefits for companies;
- **Operational objective #4:** To ensure that tax arrangements reflect economic reality.

## Inputs

The Directive (and the amendment to the Directive) contain **four measures** targeting the removal of tax obstacles for cross-border business:

- List of companies – Aims to determine the coverage of the rules to certain company statuses, including private companies, co-operatives, mutual companies, savings banks, investment funds, European Company, etc.
- Withholding tax exemption for dividends – Aims to determine the condition for the application of the provision which exempts dividends paid by a subsidiary located in another Member State to its parent company from withholding tax.
- Mechanism for the elimination of double taxation of dividends – Aims to impute tax on dividends of cross-border subsidiaries against the profits of the parent company.
- Anti-abuse rule – Aims to prevent misuse of the Directive and ensure greater consistency in its application across Member States.

## Results

The following **output** (i.e. immediate results) related to the Directive can be identified:

- Transposition of the Directive provisions;

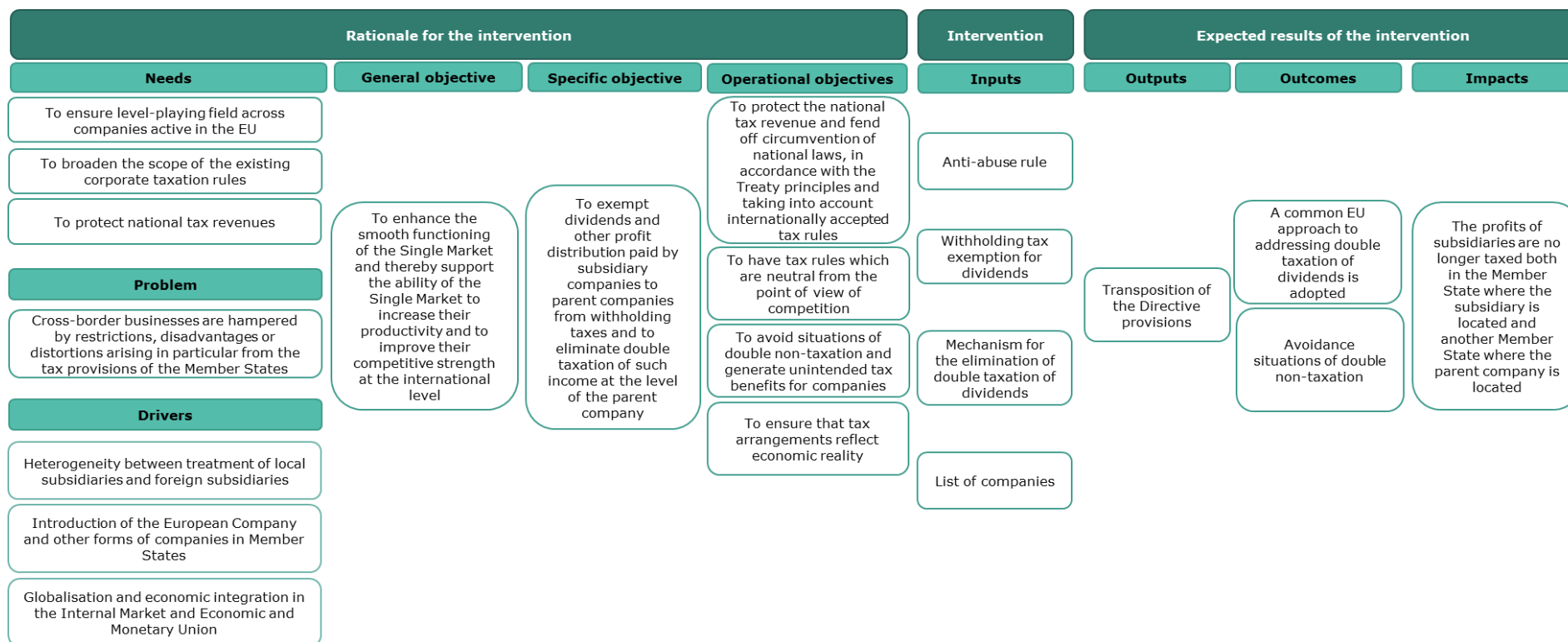
The expected short to medium-term results (**outcomes**) correspond to the specific objectives of the Directive and can be formulated as follows:

- A common EU approach to addressing double taxation of dividends is adopted;
- Avoidance situations of double non-taxation.

Regarding the long-term results, the Parent Subsidiary Directive lists one global **impact**:

- The profits of subsidiaries are no longer taxed both in the Member State where the subsidiary is located and another Member State where the parent company is located.

**Figure 8 Parent-Subsidiary Directive: Intervention logic**



Source: Authors' elaboration on EU official documents.

### 3 Administrative Cooperation Directive (3, 4 & 6)

#### Needs, problems, and drivers

The Directive on Administrative Cooperation and the amendments to the Directive, together with the Commission Staff Working Documents<sup>174</sup> cover both companies and individuals as well as taxation and anti-money laundering. This intervention logic covers only the Directive and amendments that cover corporate taxation (i.e. Directive on Administrative Cooperation 3, 4 & 6)<sup>175</sup>. The Directive, amendments and Q&A accompanying the amendments identified **six main needs** linked to corporate taxation:

- The need to protect the national tax bases from erosion;
- The need to have more transparency about tax rulings and internal transactions with related parties of multinational enterprise groups;
- The need for a more binding approach to information exchange on tax rulings;
- The need for national feedback processes, not only within tax administrations but also between tax administrations and their national reporters, such as banks, employers and pension companies;
- The need to coordinate the implementation of the OECD Common Reporting Standard<sup>176</sup> across Member States;
- The need to coordinate and monitor the implementation of the OECD/G20 BEPS reports<sup>177</sup> across Member States and multinational enterprise groups respectively.

The Directive, amendments and Commission Staff Working Documents pinpointed **one main problem**, namely the fact that Member States experience considerable reductions in their tax revenues due to aggressive tax planning arrangements. Such exploitation is made possible by using tax structures across multiple jurisdictions to exploit mismatches between two or more tax systems for the purpose of reducing or avoiding tax liabilities. Going more in detail, **two main drivers** feed into this problem:

- Globalisation and increasing mobility of capital in the Single Market;
- Aggressive tax-planning arrangements are becoming increasingly complex and are responsive to defensive countermeasures by the tax authorities;
- Increased public awareness about fair taxation.

#### Objectives

<sup>174</sup> COM(2015) 135 final, Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, 13.3.2015; European Commission, Brussels; COM(2016) 25 final, Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, 28.1.2016; ; SWD(2016) 6 final, Commission Staff Working Document accompanying the document 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, 28.1.2016; SWD(2017) 462 final, Commission Staff Working Document on the application of Council Directive (EU) no 2011/16/EU on administrative cooperation in the field of direct taxation, 18.12.2017.

<sup>175</sup> Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, 15.2.2011; Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, 2015/2376, 8.12.2015; Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, 2016/881, 25.5.2016; Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, 2018/822, 25.5.2018.

<sup>176</sup> OECD (2014), Standard for Automatic Exchange of Financial Account Information in Tax Matters, available online at <http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/>.

<sup>177</sup> OECD (2015), OECD/G20 Base Erosion and Profit Shifting Project. Final BEPS Package, available online at <http://www.oecd.org/ctp/beps-2015-final-reports.htm>.

The Directive on Administrative Cooperation aims to contribute to the exchange of comprehensive and relevant information about potentially aggressive tax arrangements. The Directive and amendments identify the following general objective:

- **General objective #1:** To improve the functioning of the Internal Market by discouraging the use of aggressive cross-border tax-planning arrangements.

Two specific objectives are targeted by this piece of legislation:

- **Specific objective #1:** To obtain comprehensive and relevant information about potentially aggressive tax arrangements, including cross border rulings and advance pricing arrangements;
- **Specific objective #2:** To contribute to the efforts for creating an environment of fair taxation in the Single Market.

In addition, five operational objectives can be identified:

- **Operational objective #1:** To provide tax authorities with the necessary information to enable them to take action where they observe aggressive tax practises;
- **Operational objective #2:** To have reporting obligations for all actors that are usually involved in designing, marketing, organising or managing the implementation of a reportable cross-border transaction or a series of such transactions, as well as those who provide assistance or advice;
- **Operational objective #3:** To capture potentially aggressive tax-planning arrangements through the compiling of a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse rather than to define the concept of aggressive tax planning;
- **Operational objective #4:** To have reporting on cross-border arrangements in the Union that is consistent with international developments;
- **Operational objective #5:** To avoid that commercial, industrial or professional secrets, commercial processes or information are disclosed contrary to public policy.

## Inputs

The Directive contains **five measures** targeting exchange of information:

- Spontaneous exchange of information – Aims to ensure that information is spontaneously exchanged when a country discovers information on possible tax evasion relevant to another country, which is either the country of the income source or the country of residence.
- Exchange of information on request – Aims to ensure that countries can obtain additional information from another country for tax purposes if needed.
- Automatic exchange of information – Aims to provide automatically tax information including rulings and pricing arrangements to the residence country of the taxpayer in a cross-border situation, where a taxpayer is active in another country than the country of residence.
- Country-by-country reporting – Aims to have multinational enterprise groups with a consolidated revenue of €750 million or more to report (annually and for each tax jurisdiction in which they are conducting business) the amount of revenue, profit before income tax, income tax paid and accrued, number of their employees, stated capital and accumulated earnings and tangible assets.

- Penalties – Aims to ensure that the conditions in the Directive are effectively implemented by multinational enterprise groups and countries.

## Results

The following **output** (i.e. immediate results) related to the Directive can be identified:

- Transposition of the Directive provisions.

The expected short to medium-term results (**outcomes**) can be formulated as follows:

- Spontaneous exchange of information between countries on possible tax evasion;
- Exchange of information on request for tax purposes;
- Creation of a central directory database with information on tax rulings and pricing arrangements;
- Automatic exchange of tax information between countries, including tax rulings;
- Country-by-country reporting by multinational enterprise groups.

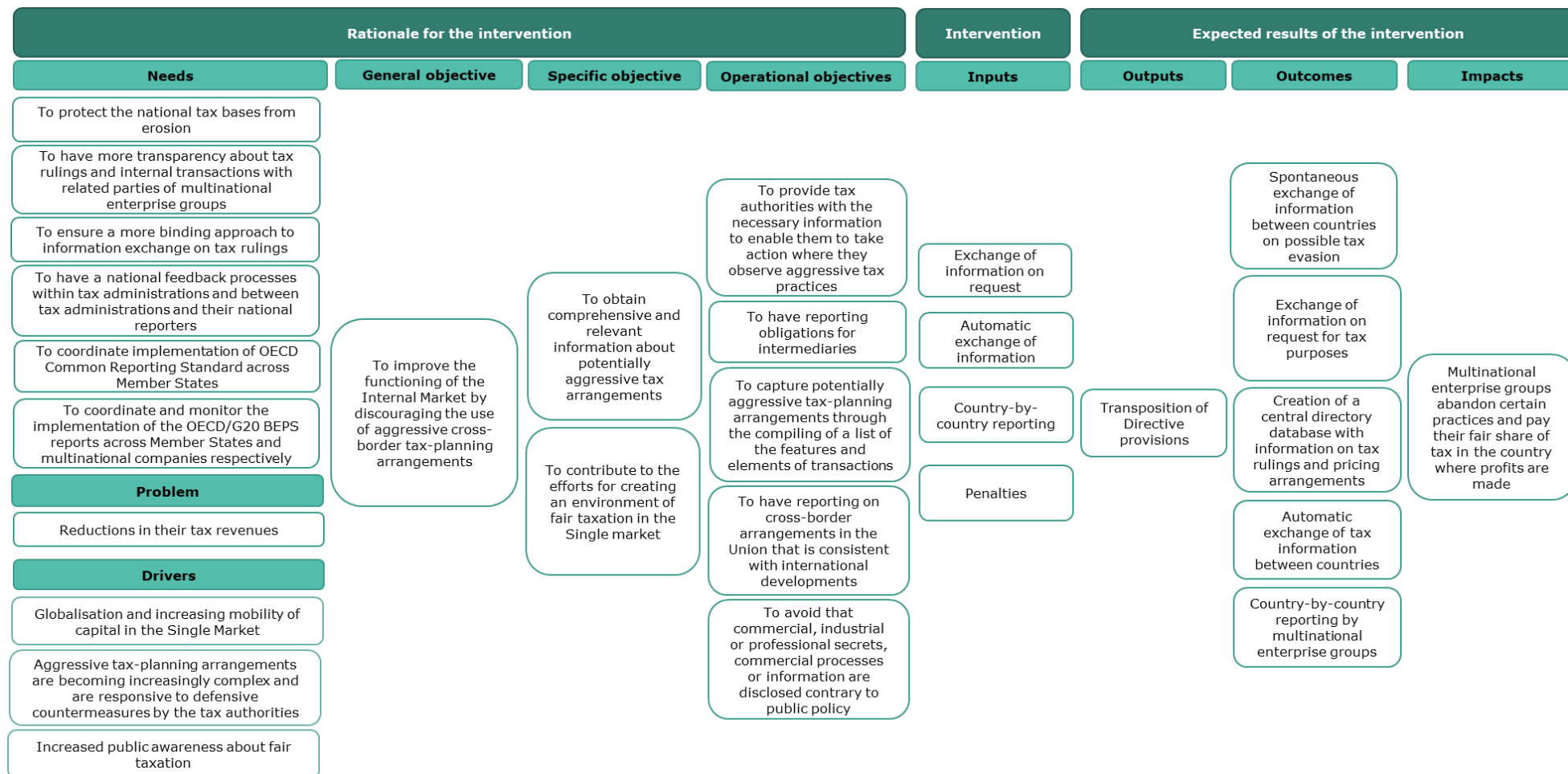
Regarding the long-term results, the Directive on Administrative Cooperation and the amendments to the Directive<sup>178</sup> envisage one global **impact**:

- Multinational enterprise groups abandon certain practices and pay their fair share of tax in the country where profits are made.

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<sup>178</sup> Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, 15.2.2011; Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, 2015/2376, 8.12.2015.; Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, 2016/881, 25.5.2016; Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, 2018/822, 25.5.2018.

**Figure 9 Administrative Cooperation Directive (3, 4 & 6): Intervention logic**



Source: Authors' elaboration on EU official documents.



#### **4 Commission Recommendation of 6 December 2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters (2012/771/EU)**

##### **Needs, problems, and drivers**

The preamble of the Recommendation<sup>179</sup> 2012/771/EU and the accompanying Impact Assessment<sup>180</sup> identify **two main needs**:

- The need to set out minimum standards of good governance in tax matters, with regard to both exchange of information (more transparency) and harmful tax practices;
- The need to encourage third countries to comply with minimum standards of good governance.

The Impact Assessment highlights **two main problems** that the Recommendation 2012/771/EU is meant to address:

- Some countries, which engage in a low level of taxation and base their attractiveness on opacity and harmful tax competition, are reluctant to cooperate in tax matters, thus limiting the exchange of information;
- Third-country jurisdictions with low-tax regimes that do not comply with minimum standards of good governance harm tax revenues of EU Member States.

##### **Objectives**

The Impact Assessment accompanying the Recommendation 2012/771/EU identifies a set of specific, general and operational objectives:

- **General objective:** Ensuring, through a Union approach commensurate with the need to ensure the functioning of the Internal Market, better protection of Member State tax systems against abuses and loopholes and, in particular, against cross-border international tax fraud and avoidance.
- **Specific objective:** Improving in an EU context the leverage that Member States have towards third countries in tax matters, thus contributing to address the issue of jurisdictions not complying with minimum standards of good governance.
- **Operational objective:** To secure and increase tax revenues for Member States.

##### **Inputs**

The Recommendation 2012/771/EU revolves around two main measures (or group thereof):

- The introduction at the EU level of a common definition of jurisdiction not complying with minimum standards of good governance in tax matters.
- A set of national measures *vis-à-vis* third countries according to their compliance with minimum standards of governance:
  - Measures directed against third countries not complying with minimum standards – Member States should publish national blacklists of countries not complying with the defined minimum standards and renegotiate/suspend/terminate their double taxation conventions concluded with such countries.

<sup>179</sup><sup>179</sup> The Commission Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters (2012/771/EU), C(2012) 8805 final, Brussels, 06.12.2012.

<sup>180</sup> European Commission, Impact Assessment Accompanying the Communication from the Commission to the European Parliament and the Council -An Action Plan to strengthen the fight against tax fraud and tax evasion, the Commission Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters, and the Commission Recommendation on aggressive tax planning, SWD(2012) 403 final, Brussels, 6.12.2012.

- Measures in favour of third countries complying with minimum standards – Member States should remove third countries complying with minimum standards from the national blacklists and start negotiating a double taxation convention with such countries.
- Measures in favour of third countries which are committed to complying with minimum standards – Closer cooperation and assistance between Member States and third countries that commit to complying with minimum standards is facilitated in order to assist those third countries in fighting effectively against tax evasion and aggressive tax planning.

## Results

The **outputs** (i.e. the most immediate results) of the intervention, are:

- The elaboration of an EU definition of jurisdictions not complying with minimum standards of good governance in tax matters.
- The introduction of a common toolbox of measures to be used by all Member States.

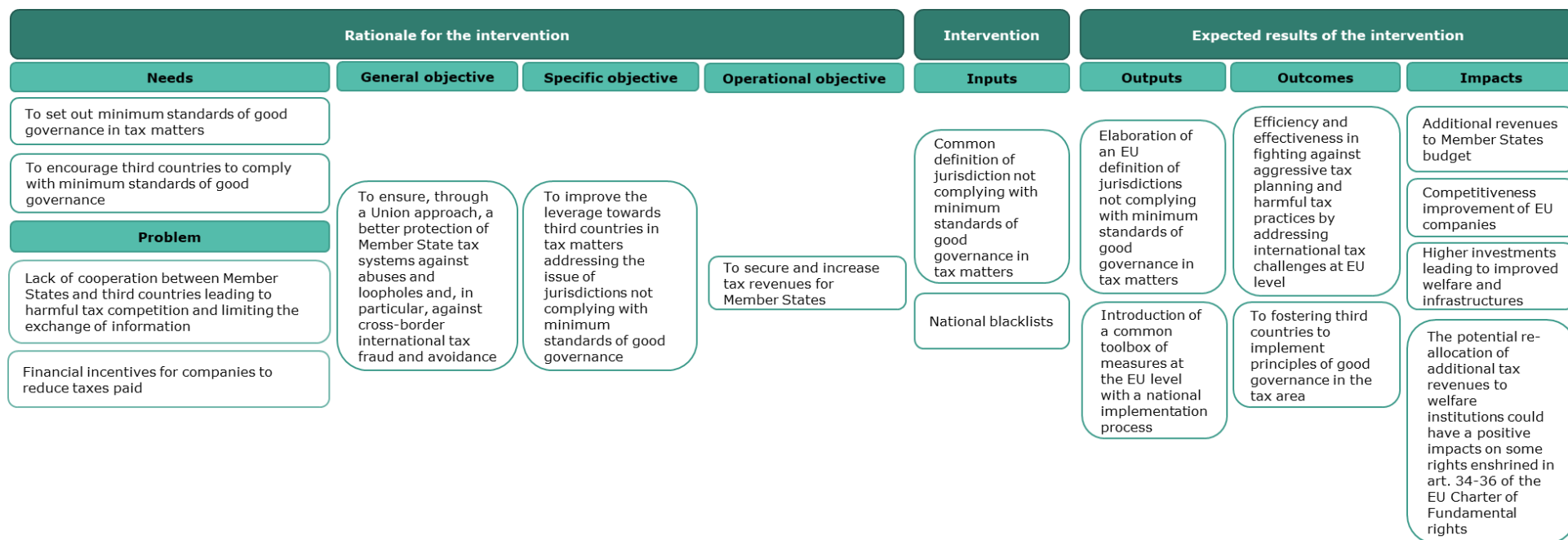
**Outcomes** (i.e. short to medium-term results) can be summarised as follows:

- Higher efficiency and effectiveness in fighting against aggressive tax planning and harmful tax practices by addressing international tax challenges (i.e., convincing third countries to cooperate with EU Member States) at the EU level.
- Fostering third countries to implement principles of good governance in the tax area.
- Strengthening the integrity and fairness of third-country tax structures and encouraging tax compliance by all taxpayers.

In the long run, the Recommendation is expected to achieve the following **impacts**:

- The implementation of these measures will bring additional revenues to Member States budget.
- The competitiveness of EU companies will improve by broadening the geographical scope of tax requirements.
- As indirect benefits, the Member States will have more resources to finance public investments, leading to improved welfare and infrastructures.
- As a result of the potential re-allocation of additional tax revenues to welfare institutions, a positive impact could be expected with regard to some rights, such as those enshrined in art. 34 (social security and social assistance), art. 35 (health care) and art. 36 (access to services of general interest) of the EU Charter of Fundamental Rights.

**Figure 10 Commission Recommendation 2012/771/EU: Intervention logic**



Source: Authors' elaboration on EU official documents.

## **5 Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU)**

### **Needs and problems**

As emphasised in the preamble of the Recommendation and in the related Impact Assessment,<sup>181</sup> this instrument addresses **two main needs** at the EU level:

- The need for EU Member States to follow the same general approach in addressing aggressive tax planning;
- The need to enhance the efficiency of national tax systems.

In addition, the Impact Assessment identifies **two main problems** that the Recommendation is meant to address:

- Loopholes in individual tax systems of the Member States and mismatches between tax systems in the EU leading to double non-taxation in cross-border situations;
- Limited usefulness of national measures.

### **Objectives**

The Impact Assessment accompanying the Recommendation identifies the following set of general, specific, and operational objectives.

**General objective:** To come, through a Union approach commensurate with the need to ensure the functioning of the Internal Market, to better protection of Member State tax systems against abuses and loopholes and, in particular, against cross-border international tax fraud and avoidance.

#### **Specific objectives**

- **Specific objective #1:** To close loopholes and the potential for abuse of Member States' direct tax systems (regarding national legislation and double tax conventions).
- **Specific objective #2:** To improve the efficiency of measures taken at the national level to counter international tax avoidance.

**Operational objective:** To secure and increase tax revenues for Member States.

### **Inputs**

The Recommendation contains **two main provisions targeting aggressive tax planning practices**:

- Limitation to the application of rules intended to avoid double taxation – the provision aims to encourage Member States to amend their double taxation conventions concluded with other Member States or with third countries in order to resolve specific types of double non-taxation and to thus ensure that a given item of income is taxed in one of the parties to the specific convention.
- General anti-abuse rule – the provision aims to encourage Member States to adopt a general anti-abuse rule adapted to domestic and cross-border situations both at the EU level and involving third countries, with a view to curbing practices of

<sup>181</sup> European Commission, Impact Assessment Accompanying the Communication from the Commission to the European Parliament and the Council - An Action Plan to strengthen the fight against tax fraud and tax evasion, the Commission Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters, and the Commission Recommendation on aggressive tax planning, SWD(2012) 403 final, Brussels, 6.12.2012.

aggressive tax planning that are not covered in the specific legislation of the Member States.

## Results

The short to medium-term results, i.e. the **outputs** and **outcomes**, stemming from the instrument are captured in the table below.

**Table 5 Expected outputs and outcomes of Commission Recommendation 2012/772/EU**

Specific objectives	Expected outputs	Expected outcomes
<b>Specific Objective 1:</b> To close loopholes and the potential for abuse of Member States' direct tax systems (regarding national legislation and double tax conventions).	<ul style="list-style-type: none"> <li>Revision of double tax conventions.</li> </ul>	<ul style="list-style-type: none"> <li>Double non-taxation is reduced.</li> <li>The operation of the Single Market is improved.</li> </ul>
<b>Specific Objective 2:</b> To improve the efficiency of measures taken at the national level to counter international tax avoidance.	<ul style="list-style-type: none"> <li>Adoption by the Member States of the provisions of the Recommendation into national legislation.</li> </ul>	<ul style="list-style-type: none"> <li>A minimum protection standard against aggressive tax planning in Member States is achieved.</li> </ul>

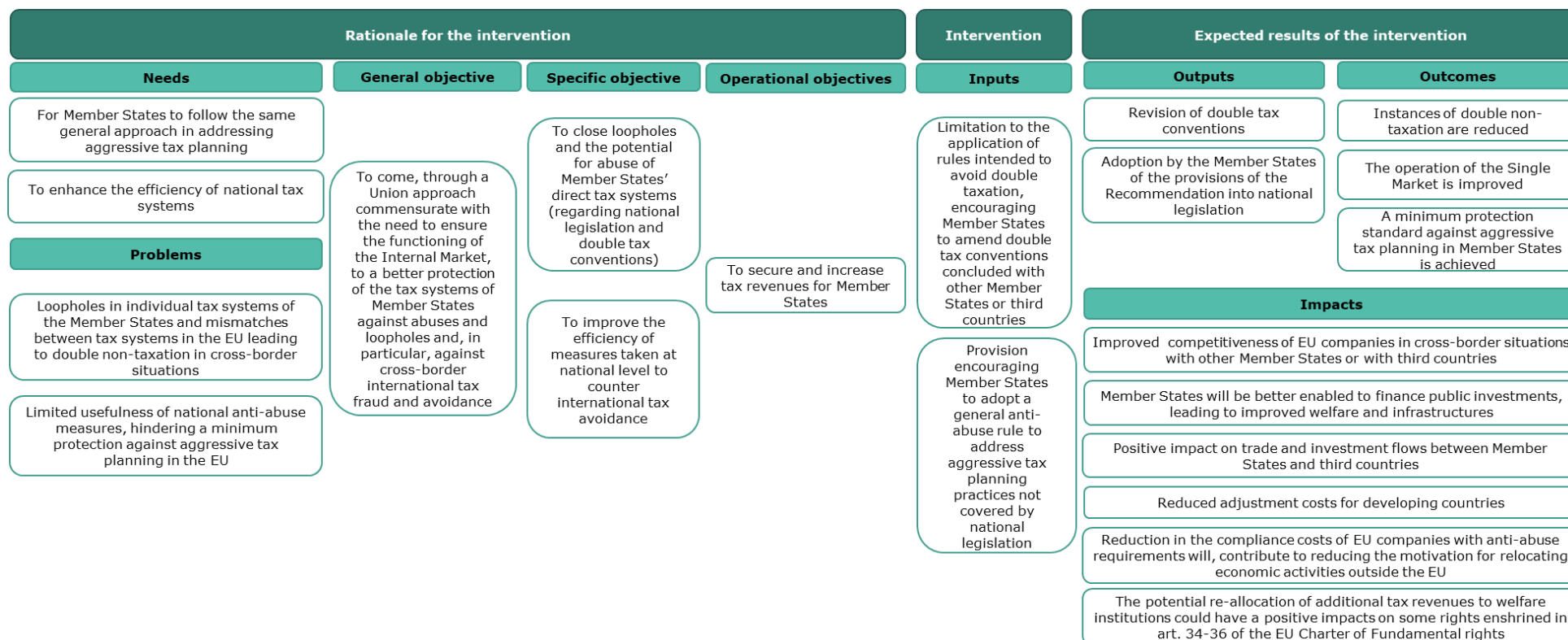
*Source: Authors' elaboration on EU official documents.*

On the longer term, the Recommendation is expected to have the following **impacts**:<sup>182</sup>

- The competitiveness of EU companies (including SMEs) in cross-border situations with other EU Member States or with third countries will be improved;
- Member States will be better enabled to finance public investments, leading to improved welfare and infrastructures;
- Reducing inconsistencies in regulations implemented by Member States towards third countries is expected to have a positive impact on trade and investment flows between Member States and third countries;
- Since national anti-abuse measures of Member States would be more consistent in their design, this will reduce adjustment costs for those developing countries that have not concluded a double taxation convention containing specific provisions on anti-abuse rules with the EU Member States concerned.
- The reduction in the compliance costs with anti-abuse requirements borne by EU companies will, together with other factors, contribute to reducing the motivation for relocating economic activities outside the EU.
- As a result of the potential re-allocation of additional tax revenues to welfare institutions, a positive impact is expected with regard to some rights, such as those enshrined in art. 34 (social security and social assistance), art. 35 (health care) and art. 36 (access to services of general interest) of the EU Charter of Fundamental Rights.

<sup>182</sup>European Commission, Impact Assessment Accompanying the Communication from the Commission to the European Parliament and the Council - An Action Plan to strengthen the fight against tax fraud and tax evasion, the Commission Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters, and the Commission Recommendation on aggressive tax planning, SWD(2012) 403 final, Brussels, 6.12.2012.

**Figure 11 Commission Recommendation 2012/772/EU: Intervention logic**



Source: Authors' elaboration on EU official documents.

## 6 Commission Recommendation of 28 January 2016 on the implementation of measures against tax treaty abuse (2016/271/EU)

### Needs and problems

The Action Plan on BEPS<sup>183</sup>, the final report on Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances<sup>184</sup>) and the Recommendation (2016/271/EU)<sup>185</sup> identify **two main needs**:

- The need for EU Member States to tackle base erosion and profit shifting due to tax treaty abuse;
- The need to update the definition of permanent establishment to prevent tax abuses.

The final reports on Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances) and Action 7 (Preventing the Artificial Avoidance of Permanent Establishment Status<sup>186</sup>) as well as the Commission staff working document accompanying the Anti-Tax Avoidance Directive<sup>187</sup> point at **two main problems** that the Recommendation (2016/271/EU) is meant to address:

- Tax treaty abuse is one of the most important sources of base erosions and profit shifting concerns.
- There are specific exceptions to the definition of permanent establishment leading to common strategies to artificially avoid taxable presence.

### Objectives

Based on the text of Recommendation 2016/271/EU and the Commission Staff Working Document accompanying the Anti-Tax Avoidance Package<sup>188</sup>, the following general and specific objective were identified:

- **General objective:** To contribute to achieving a common minimum level of protection against tax avoidance in the EU.
- **Specific objective:** Improving in an EU context the leverage that Member States have towards tax treaty abuses, thus addressing the issue of treaty shopping or other abusive strategies.
- **Operational objective:** To secure and increase tax revenues for Member States.<sup>189</sup>

### Inputs

The Recommendation (2016/271/EU) includes two main provisions:

- The implementation of a general anti-avoidance rule based on a principal purpose test. The provision aims to encourage Member States to apply in all their tax treaties the principal purpose test suggested by the OECD Model Tax Convention<sup>190</sup>,

<sup>183</sup> OECD (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing.

<sup>184</sup> OECD (2017), BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Peer Review Documents, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris.

<sup>185</sup> Commission Recommendation on the implementation of measures against tax treaty abuse (2016/271/EU), C(2016) 271 final, Brussels, 28.01.2016.

<sup>186</sup> OECD (2015), BEPS Action 7 Preventing the Artificial Avoidance of Permanent Establishment Status – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.

<sup>187</sup> Commission Staff Working Document Accompanying the document Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, SWD (2016) 345 final.

<sup>188</sup> COMMISSION STAFF WORKING DOCUMENT Accompanying the document 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, SWD/2016/06 final.

<sup>189</sup> Commission Recommendation on the implementation of measures against tax treaty abuse (2016/271/EU), C(2016) 271 final, Brussels, 28.01.2016.

<sup>190</sup> OECD, Articles of the model convention with respect to taxes on income and on capital.

in order to “make it more resilient against artificial structures to circumvent its application”.

- An updated definition of a permanent establishment. The provision aims to encourage Member States to adopt in all their tax treaties the standard definition of permanent establishment set out by the OECD Model Tax Convention<sup>191</sup> in order to address artificial avoidance of permanent establishment status.

## Results

On the short to medium-term, the results of the intervention are:

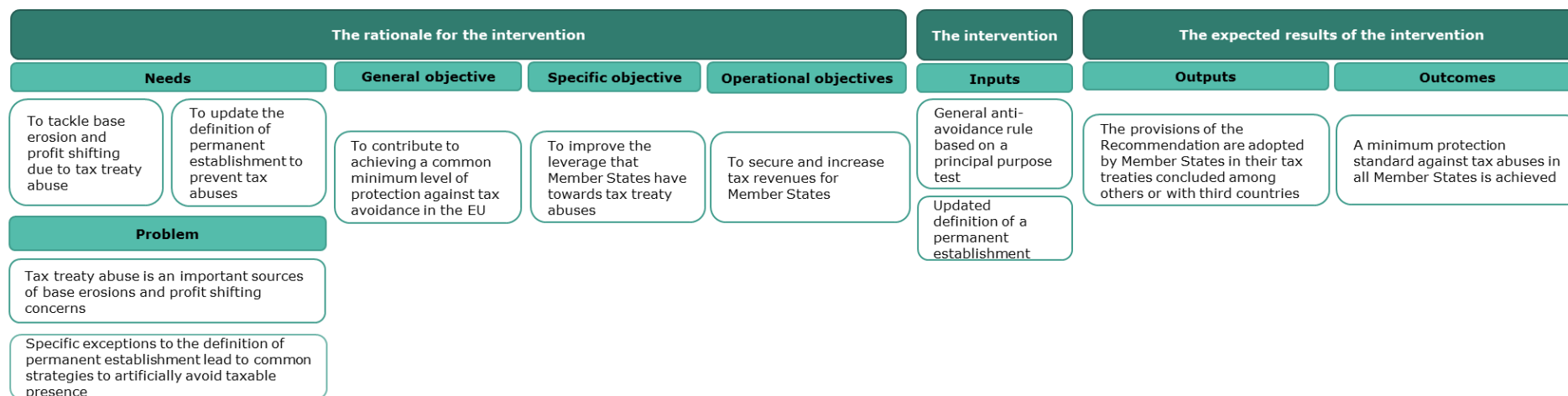
- **Output:** The provisions of the Recommendation are adopted by Member States in their tax treaties concluded among others or with third countries.
- **Outcome:** A minimum protection standard against tax abuses in all Member States is achieved.

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<sup>191</sup> The Recommendation bases this provision on the definition proposed in OECD Model Tax Convention, Article 5.



**Figure 12 Commission Recommendation 2016/271/EU: Intervention logic**



*Source: Authors' elaboration on EU official documents.*

## **7 Commission Recommendation of 21 March 2018 relating to the corporate taxation of a significant digital presence (2018/1650/EU)**

### **Needs, problems, and drivers**

In the context of taxation in the digital era, official documents at the EU level, including the Commission Communication on "A Fair and Efficient Tax System in the European Union for the Digital Single Market"<sup>192</sup> and the European Council Conclusions of 19 October 2017 emphasise **two general needs**:

- The need for new international rules in line with the developments brought by the digital economy with a view to "determine where the value of business is created and how it should be attributed for tax purposes";
- The need for an effective and fair taxation system fitted for the digital era.

In addition, Recommendation 2018/1650/EU stresses **a more particular third need**:

- The need for the double tax conventions signed by Member States with third parties to be appropriately revised in order to ensure the consistency between the Digital Single Market and the global economy.

As noted in a number of official documents<sup>193</sup>, the **main problem** relates to the fact that international corporate tax rules are no longer adequate in the context of the digitalisation. As intangible assets are more difficult to value, the lack of adequate rules creates opportunities for aggressive tax planning, allowing digitalised companies to reduce their tax burden by benefiting from differences in tax regimes<sup>194</sup>. Furthermore, the main **drivers** behind this problem are represented by the increasingly digitised companies, the diverse business models and the complexity of the value creation process.

### **Objectives**

The Recommendation was adopted in the wider context of the proposal for a Council Directive laying down the rules relating to the corporate taxation of a significant digital presence. The Recommendation uses the provisions of the proposal as an example of the amendments Member States could introduce in what concerns the double taxation conventions concluded with non-Union third parties. Against this background, the Recommendation had a number of objectives, as listed below.

**Global objective:** To provide an EU instrument to address issues related to taxing the digital economy among the Member States in the context of slow progress at the international level.<sup>195</sup>

**Specific objectives**<sup>196</sup>

- **Specific objective #1:** To contribute to ensuring that corporate profits are taxed where the value is created. It is necessary to maintain a level playing field and a

<sup>192</sup> Communication from the Commission to the European Parliament and the Council: A Fair and Efficient Tax System in the European Union for the Digital Single Market, Brussels, 21.09.2017, COM/2017/0547 final.

<sup>193</sup> Ibid.; Commission Staff Working Document accompanying the Communication on the Anti-Tax Avoidance Package, SWD/2016/06 final.

<sup>194</sup> Commission Staff Working Document accompanying the document Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence and Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, SWD(2018) 81 final/2, Brussels, 21.3.2018.

<sup>195</sup> Communication from the Commission to the European Parliament and the Council: A Fair and Efficient Tax System in the European Union for the Digital Single Market, Brussels, 21.09.2017, COM/2017/0547 final, p.3.

<sup>196</sup> Ibid, p.8.

system that is resilient against abuse so that all companies pay their fair share whether they are large or small, more or less digitalised, EU or non-EU based.

- **Specific objective #2:** To contribute to ensuring the corporation tax system is future-proofed and sustainable in the long-term. As traditional business models become increasingly digitalised, Member States' tax bases could gradually disappear if the tax rules are not adapted.

#### **Operational objectives:**

- **Operational objective #1:** To promote appropriate revisions and additions to the double tax conventions signed by Member States with non-EU countries, based on the provisions of the proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence (COM(2018) 147 final).<sup>197</sup>
- **Operational objective #2:** To protect the direct and indirect tax bases of Member States.<sup>198</sup>

#### **Inputs**

The Recommendation contains **two main provisions** for proposed adaptations to be made to the double tax conventions of Member States with third countries:

- A definition of a significant digital presence. This provision implies (1) amending the term "permanent establishment" to include "a significant digital presence" and (2) setting thresholds to determine what constitutes "a significant digital presence" by taking into account the provisions of the proposal for a Council Directive laying down the rules relating to the corporate taxation of a significant digital presence.<sup>199</sup>
- A set of rules for attributing profits to or in respect of a significant digital presence.

#### **Results**

The following **output** (i.e. immediate result) related to the Recommendation can be identified:

- Revision of double taxation treaties according to the provisions of the Recommendation.

The expected short to medium-term result (**outcome**) corresponds to the specific objectives of the Recommendation and can be formulated as follows:

- Avoiding that double taxation treaties of Member States will reduce the effectiveness of forthcoming EU rules in the field of corporate taxation concerning a significant digital presence.

When it comes to the **impact** (longer-term results) of the instrument, this recommendation is expected to provide for a level-playing field between EU and third-country companies in what concerns the corporate taxation of a significant digital presence.<sup>200</sup>

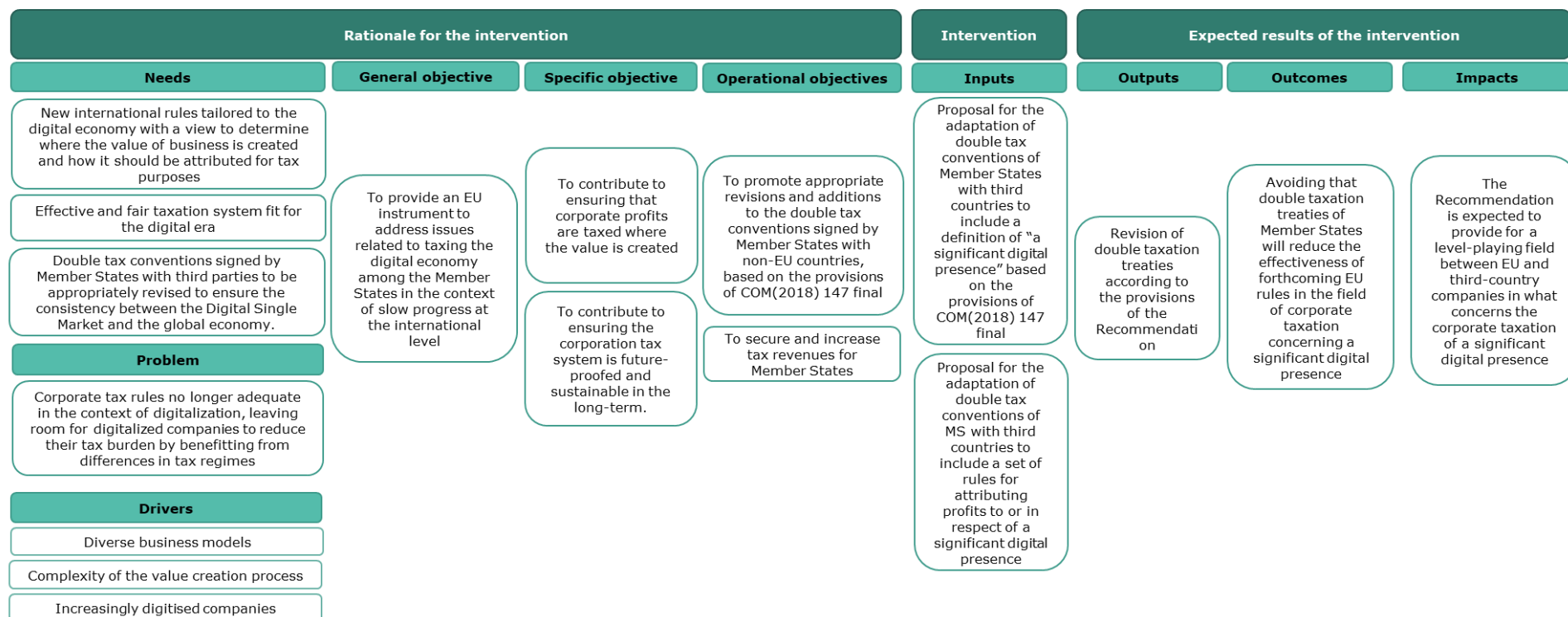
<sup>197</sup> Commission Recommendation relating to the corporate taxation of a significant digital presence, 2018/1650/EU, recitals 5 and 6.

<sup>198</sup> Ibid., p.10.

<sup>199</sup> Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final.

<sup>200</sup> Commission Staff Working Document, Impact Assessment Accompanying the document Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence and Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, SWD(2018) 81 final/2, p. 43.

**Figure 13 Commission Recommendation 2018/1650/EU: Intervention logic**



Source: Authors' elaboration on EU official documents.

## 8 Code of Conduct for Business Taxation

### Needs, problems, and drivers

The Code of Conduct for Business Taxation<sup>201</sup> identified **two main needs** linked to harmful tax competition:

- The need for coordinated action at European level to tackle harmful tax competition;
- The need to consolidate the competitiveness of the European Union and the Member States at the international level.

The Conclusions of the Economic and Financial Affairs Council Meeting on the Code of Conduct for Business Taxation identifies one main problem, namely the fact that there are losses in tax revenues due to tax harmful tax competition. Going more in detail, **two main drivers** that feed into this problem:

- Commission's launch of a comprehensive approach to taxation policy;
- Harmful tax competition between Member States.

### Objectives

The Code of Conduct for Business Taxation aims to contribute to reducing harmful tax competition. It demands Member States to undo or take no new measures that give businesses from other Member States a preferential treatment. The Code of Conduct identifies the following general objective:

- **General objective #1:** To reduce harmful tax competition;

Two specific objectives are targeted by this intervention:

- **Specific objective #1:** To reduce the continuing distortion in the Single Market;
- **Specific objective #2:** To prevent excessive losses of tax revenue.

In addition, **two operational objectives** can be identified:

- **Operational objective #1:** To target also countries that are not covered by the European Treaties, in territories that are dependent and associated with Member States;
- **Operational objective #2:** To have a balanced application to comparable situations, without this delaying the implementation of standstill and rollback.

### Inputs

The Code of Conduct contains **three measures** targeting harmful tax measures:

- Rollback – Aims to have Member States undo existing tax measures that constitute harmful tax competition;
- Standstill – Aims to have Member States refrain from introducing any such measures in the future;
- Geographical extension – Aims to ensure that the measures have a geographical base that is as broad as possible, covering, in particular, also dependent and associated territories.

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<sup>201</sup> Resolution of the Council and the representatives of the Governments of the Member States, meeting within the Council of 1 December 1997 on a Code of Conduct for Business Taxation, available online at [https://ec.europa.eu/taxation\\_customs/business/company-tax/harmful-tax-competition\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/harmful-tax-competition_en).

## Results

The following **output** (i.e. immediate results) related to the Code of Conduct can be identified:

- A common agreement between Member States on rollback and standstill of harmful tax measures has been reached.

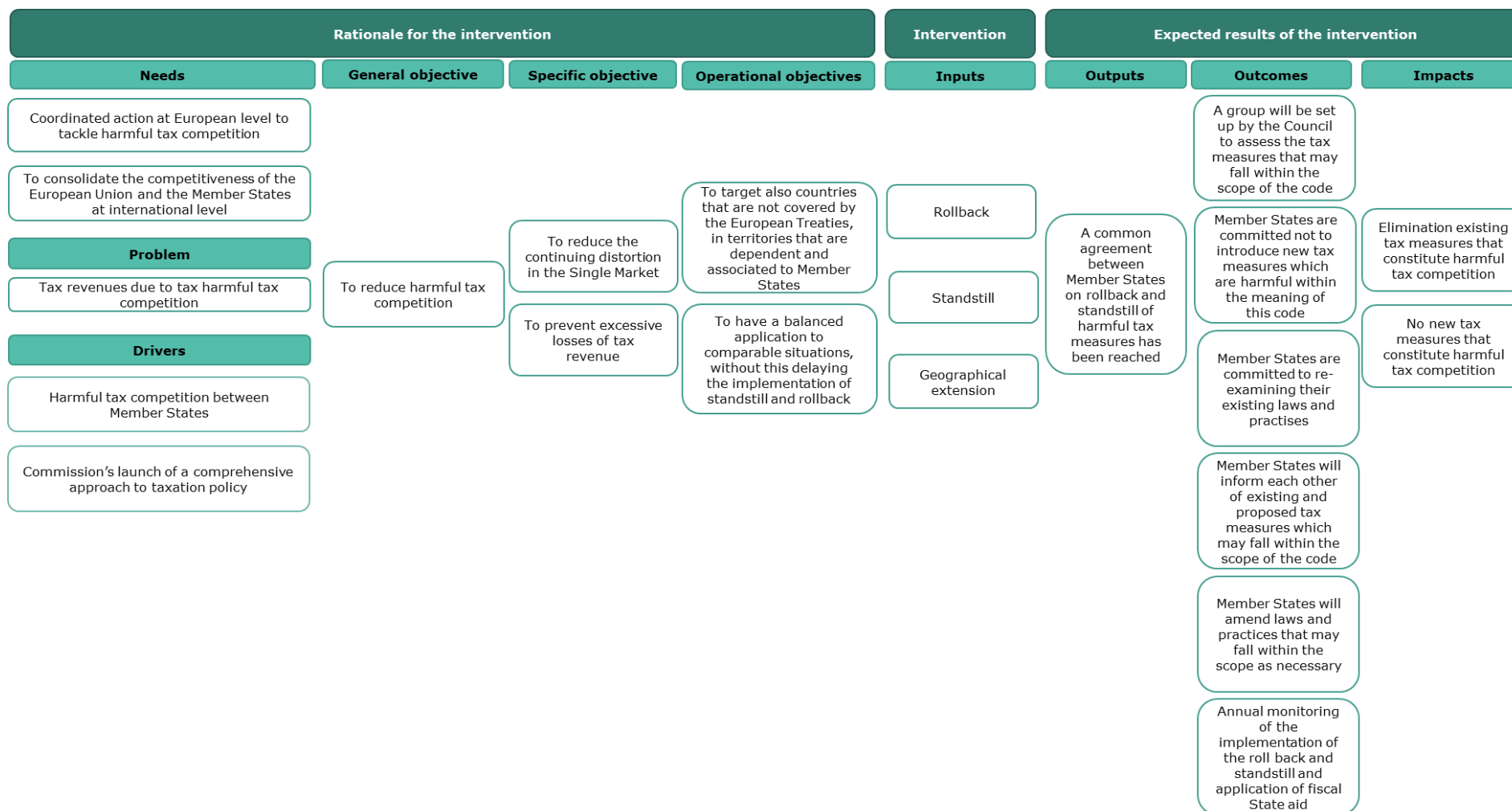
The expected short to medium-term results (**outcomes**) can be formulated as follows:

- A group will be set up by the Council to assess the tax measures that may fall within the scope of the code;
- Member States are committed not to introduce new tax measures which are harmful within the meaning of this code;
- Member States are committed to re-examining their existing laws and practises;
- Member States will inform each other of existing and proposed tax measures which may fall within the scope of the code;
- Member States will amend laws and practices that may fall within the scope as necessary;
- Annual monitoring of the implementation of the rollback and standstill and application of fiscal State aid.

Regarding the long-term results, the Code of Conduct lists **two global impacts**:

- Elimination of existing tax measures that constitute harmful tax competition;
- No new tax measures that constitute harmful tax competition.

**Figure 14 Code of Conduct for Business Taxation: Intervention logic**



Source: Authors' elaboration on EU official documents.

## 9 The European Semester for economic policy coordination (corporate taxation aspects)

### Needs, problems, and drivers

The Regulations on the European Semester for economic policy coordination<sup>202</sup> provide the legal framework for a cycle of economic and fiscal policy coordination within the EU. The regulations as such offer limited detail on the recommendations related to aggressive tax planning, which only forms part of the European Semester. Therefore, also a selection of the recommendations and accompanying Staff Working Documents in which aggressive tax planning was an issue<sup>203</sup> has been used to define the intervention logic for European Semester related to aggressive tax planning. Based on this, **four main needs** linked to the facilitation of corporate tax avoidance and evasion have been identified:

- The need for sound public finances of Member States;
- The need for a level-playing field for all businesses;
- The need to preserve social cohesion;
- The need for coordinated action of national policies to complement EU legislation.

The Regulations on the European Semester identify **one main problem**, namely spill-over effects of aggressive tax planning strategies between Member States. Going more in detail, five main drivers feed into this problem:

- Introduction of the euro as a common currency for several Member States;
- Global financial and Eurozone debt crises;
- Digitalisation and globalization of the economy;
- Increasing inequalities in society;
- Increased tax competition between countries with the development of new tax regimes.

### Objectives

The Regulations on the European Semester aims to contribute to the coordination of tax and other policies among Member States whose currency is the euro. They address this issue by putting in place a process to coordinate fiscal policies. The Regulations identify the following general objective affecting corporate taxation:

- **General objective #1:** To ensure closer coordination of economic policies and sustained convergence of the economic performance of the Member States.

---

<sup>202</sup> Council Regulation on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, No 1466/97 of 7.7.1997; Regulation of the European Parliament and the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, No 473/2013 of 21.5.2013.

<sup>203</sup> COM(2017) 770 final, Council Recommendation on the economic policy of the euro area, Brussels, 22.11.2017; SWD(2017) 660 final, Analysis of the Euro Area economy Accompanying the document Recommendation for a Council Recommendation on the economic policy of the Euro Area, 22.11.2017; COM(2018) 412 final, Council Recommendation on the 2018 National Reform Programme of Cyprus and delivering a Council opinion on the 2018 Stability Programme of Cyprus, Brussels, 23.5.2018; COM(2018) 407 final, Council Recommendation on the 2018 National Reform Programme of Ireland and delivering a Council opinion on the 2018 Stability Programme of Ireland, Brussels, 23.5.2018; COM(2018) 415 final, Council Recommendation on the 2018 National Reform Programme of Luxembourg and delivering a Council opinion on the 2018 Stability Programme of Luxembourg, Brussels, 23.5.2018; COM(2018) 417 final, Council Recommendation on the 2018 National Reform Programme of Malta and delivering a Council opinion on the 2018 Stability Programme of Malta, Brussels, 23.5.2018; COM(2018) 418 final, Council Recommendation on the 2018 National Reform Programme of the Netherlands and delivering a Council opinion on the 2018 Stability Programme of the Netherlands, Brussels, 23.5.2018.



The selected Recommendations on the European Semester emphasises the specific objective targeted by this piece of legislation related to aggressive tax planning and harmful tax practices:

- **Specific objective #1:** To prevent negative spill-over effects from tax policies of individual Member States.

In addition, one operational objective can be identified:

- **Operational objective #1:** To operate specific fiscal rules to help ensure the overall government budget complies with European rules.

## Inputs

The Regulations contain **three measures** that are relevant in the context of aggressive tax planning:

- Economic policy coordination – Aims to include the formulation, and the surveillance of the implementation, of the broad guidelines of the economic policies of the Member States and of the Union. This also includes the monitoring of indicators that might signal facilitation of aggressive tax planning.
- Assessment of national reform programmes – Aims to ensure that Member States consult the Commission and each other before adopting any major fiscal policy reforms with potential spill-over effects. This also includes issues related to the facilitation of aggressive tax planning.
- Recommendations – Council adopted recommendations for Member States to achieve sustainable, inclusive and long-term growth. These recommendations can also cover issues related to the facilitation of aggressive tax planning.

## Results

When it comes to aggressive tax planning, the following **outputs** (i.e. immediate results) stemming from the Regulations can be identified:

- Implementation of the relevant provisions related to fiscal policies agreed in the Regulations.

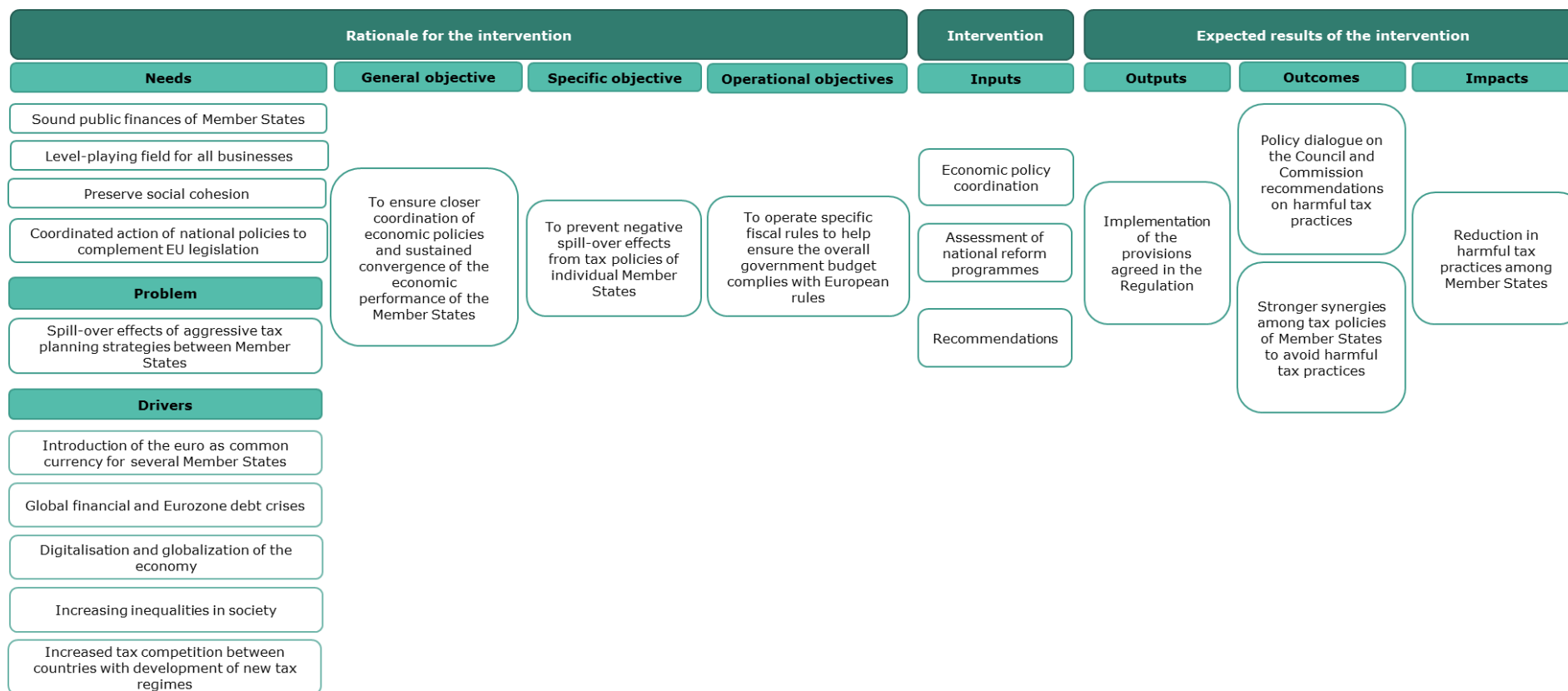
The expected short to medium-term results (**outcomes**) can be summarised as follows:

- Policy dialogue on the Council and Commission recommendations on instruments facilitating aggressive tax planning;
- Synergies among tax policies of Member States to reduce aggressive tax planning.

Regarding the long-term results, the instrument puts forwards **one global impact**:

- Reducing the room for aggressive tax planning among Member States.

**Figure 15 The European Semester for economic policy coordination (corporate taxation aspects): Intervention logic**



Source: Authors' elaboration on EU official documents.

## 10 Joint Transfer Pricing Forum

### Needs, problems, and drivers

The Commission Decision to set-up the EU Joint Transfer Pricing Forum expert group (and preceding Decision)<sup>204</sup> identified **two main needs** linked to tax avoidance:

- The need for non-legislative solutions to practical problems posed by transfer pricing practices in the EU;
- The need to take measures in line with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations<sup>205</sup>.

The Decision identifies **one main problem**, namely the fact that transfer pricing can constitute a problem for cross-border business activities in the Single Market. Going more in detail, **one driver** feeds into this problem:

- Heterogeneity in Transfer Pricing legislation in the EU.

### Objectives

The EU Joint Transfer Pricing Forum aims to contribute to the Commission non-legislative measures concerning transfer pricing tax issues. The Decision to establish this forum identifies the following general objective:

- **General objective #1:** To enhance the smooth functioning of the Single Market.

The Decision emphasises the specific objective targeted by this piece of legislation:

- **Specific objective #1:** To assist and advise the Commission on transfer pricing tax matters.

In addition, two operational objectives can be identified:

- **Operational objective #1:** To involve both governmental and non-governmental sector experts on transfer pricing;
- **Operational objective #2:** To advice on measures that are compatible with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.<sup>206</sup>

### Inputs

The Joint Transfer Pricing Forum works on **two main areas** related to addressing practical problems posed by transfer pricing practices:

- Arbitration Convention – Aims to function as a dispute resolution mechanism for transfer pricing cases;
- Other transfer pricing issues – Aims to address other transfer pricing issues included in its work programme. For example, code of conduct for the effective implementation of the Arbitration Convention, code of conduct on transfer pricing

<sup>204</sup> C(2015) 257 final, Commission Decision on setting up the 'EU Joint Transfer Pricing Forum' expert group, Brussels, 26.1.2015; COM(2011), Commission Decision on setting up the EU Joint Transfer Pricing Forum expert group, 25.1.2011.

<sup>205</sup> OECD (2017), OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, available online at <http://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm>.

<sup>206</sup> OECD (2017), OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, available online at <http://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm>.

documentation for associated enterprises in the EU and guidelines on low-value-adding intra-group services.

## Results

The following **output** (i.e. immediate results) related to the Decision can be identified:

- Establishment of an EU Joint Transfer Pricing Forum expert group.

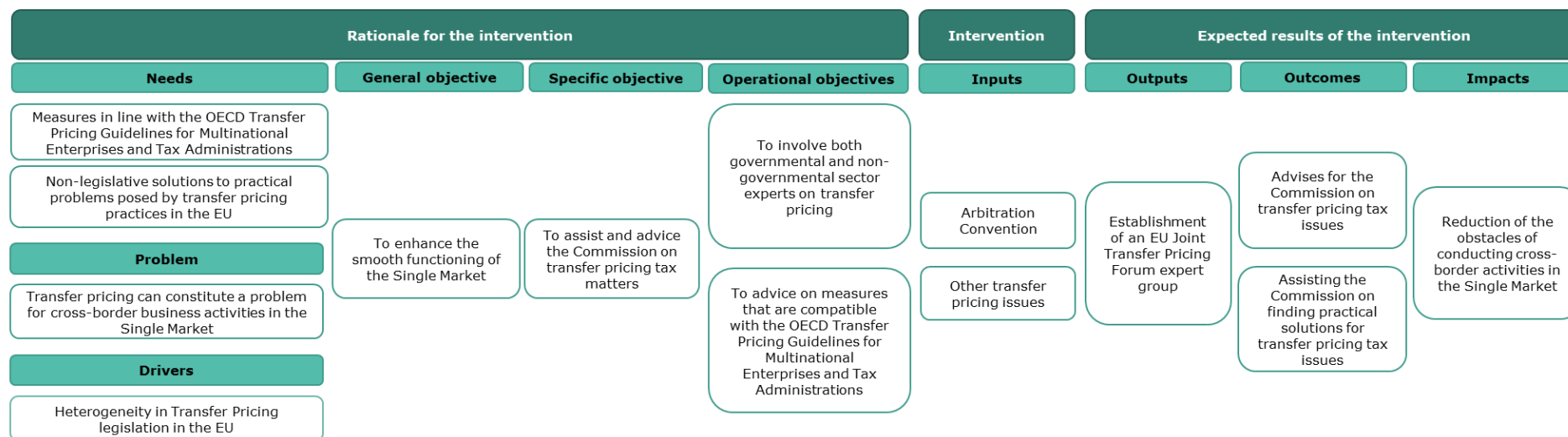
The expected short to medium-term results (**outcomes**) can be formulated as follows:

- Advises for the Commission on transfer pricing tax issues;
- Assisting the Commission on finding practical solutions for transfer pricing tax issues.

Regarding the long-term results, the Decision on the EU Joint Transfer Pricing Forum lists **one global impact**:

- Reduction of the obstacles of conducting cross-border activities in the Single Market.

**Figure 16 Joint Transfer Pricing Forum: Intervention logic**



*Source: Authors' elaboration on EU official documents.*

## **11 Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation (COM/2016/024 final)**

### **Needs, problems, and drivers**

The Commission communication to the European Parliament and the Council on an External Strategy for Effective Taxation<sup>207</sup> identified **five main needs** linked to tax avoidance:

- The need for a unified EU position on international tax arrangements;
- The need for a stronger stance against tax havens;
- The need to support developing countries in the fight against tax avoidance and integration in the international tax good governance agenda;
- The need to create a level-playing field for all businesses.
- The need to promote tax good governance internationally.

The Recommendation<sup>208</sup> on which the Communication is a follow-up step identifies **one main problem**, namely the fact that some third countries have opted for a low level or no income tax that limits the possibilities for Member States to enforce their tax policy. Going more in detail, **six main drivers** feed into this problem:

- Differences in the criteria to identify low/no tax and non-cooperative jurisdictions;
- Heterogeneity in applied sanctions to identified low/no tax jurisdictions;
- Companies exploitation of loopholes and mismatches to shift profits out of Single Market;
- European developments in corporate tax policies;
- International developments in corporate tax policies (e.g. OECD/G20 BEPS reports<sup>209</sup>), particularly the enhanced transparency with automatic exchange of information;
- Addis Ababa Action Agenda to support the implementation of the 2030 Agenda for Sustainable Development.<sup>210</sup>

### **Objectives**

The Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation aims to contribute to the coordination of Member States' tax policies. The Communication addresses this issue by proposing a framework for a new EU external strategy for effective taxation. The Communication emphasises the general objective targeted by this intervention:

- **General objective #1:** To ensure effective taxation within the Single Market and secure fairer corporate taxation within the EU and beyond.

It also identifies three specific objectives:

- **Specific objective #1:** To ensure that profits generated in the Single Market are effectively taxed where the activity is taking place.

<sup>207</sup> COM(2016) 24 final, Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation, Brussels, 28.1.2016.

<sup>208</sup> COM(2012/771/EU), Commission Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters, Brussels, 6.12.2012.

<sup>209</sup> OECD (2015), OECD/G20 Base Erosion and Profit Shifting Project. Final BEPS Package, available online at <http://www.oecd.org/ctp/beps-2015-final-reports.htm>.

<sup>210</sup> UN (2015), Addis Ababa Action Agenda of the Third International Conference on Financing for Development, available online at <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=2051&menu=35>.

- **Specific objective #2:** To have a common approach to third-country jurisdictions on tax and good governance matters.
- **Specific objective #3:** To create a level playing field between businesses located in the EU and in third countries.

In addition, four operational objectives can be identified:

- **Operational objective #1:** To take the level of development of the country into account, when promoting tax good governance internationally;
- **Operational objective #2:** To have criteria for third countries on exchange of information that are at least as stringent as those outlined in the OECD/G20 BEPS reports<sup>211</sup>;
- **Operational objective #3:** To improve domestic capacity for tax collection in developing countries<sup>212</sup>;
- **Operational objective #4:** To ensure that EU funds are not invested in or channelled through third countries that do not comply with international tax transparency standards and/or rely on harmful tax practices.

## Inputs

The Communication contains **five measures** to respond to promote tax good governance globally and respond to external avoidance threats:

- Re-examining EU good governance criteria – Demands the Council to endorse the Commission proposal to update the EU tax good governance criteria related to transparency, information exchange and tax competition.
- Enhancing agreements with third countries on tax good governance – Aims to enhance the number of agreements with third countries including an updated clause on tax good governance that allows reflecting the particular situation of the third country involved and includes provisions for State aid.
- Assistance for developing countries to meet tax good governance standards – Assisting development countries in improving their tax systems and enhancing their domestic resources and inclusion in the global good governance structure (e.g. OECD/G20 BEPS, AEOI, ATAF, CREDAF and CIAT).
- Developing an EU process for assessing and listing third countries – Aims to strengthen the instruments at EU instead of Member State-level to respond to third countries that refuse to respect tax good governance standards.
- Reinforcing the link between EU funds and tax good governance – Aims to extend the good governance requirements with the EU principles for fair tax competition and international financial institutions contracts with financial intermediaries.

## Results

The following **output** (i.e. immediate result) related to the Communication can be identified:

- Discussion in the Council on endorsing the updated criteria for tax good governance internationally;

<sup>211</sup> OECD (2015), OECD/G20 Base Erosion and Profit Shifting Project. Final BEPS Package, available online at <http://www.oecd.org/ctp/beps-2015-final-reports.htm>.

<sup>212</sup> UN (2015), Addis Ababa Action Agenda of the Third International Conference on Financing for Development, available online at <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=2051&menu=35>.

The expected short to medium-term results (**outcomes**) can be summarised as follows:

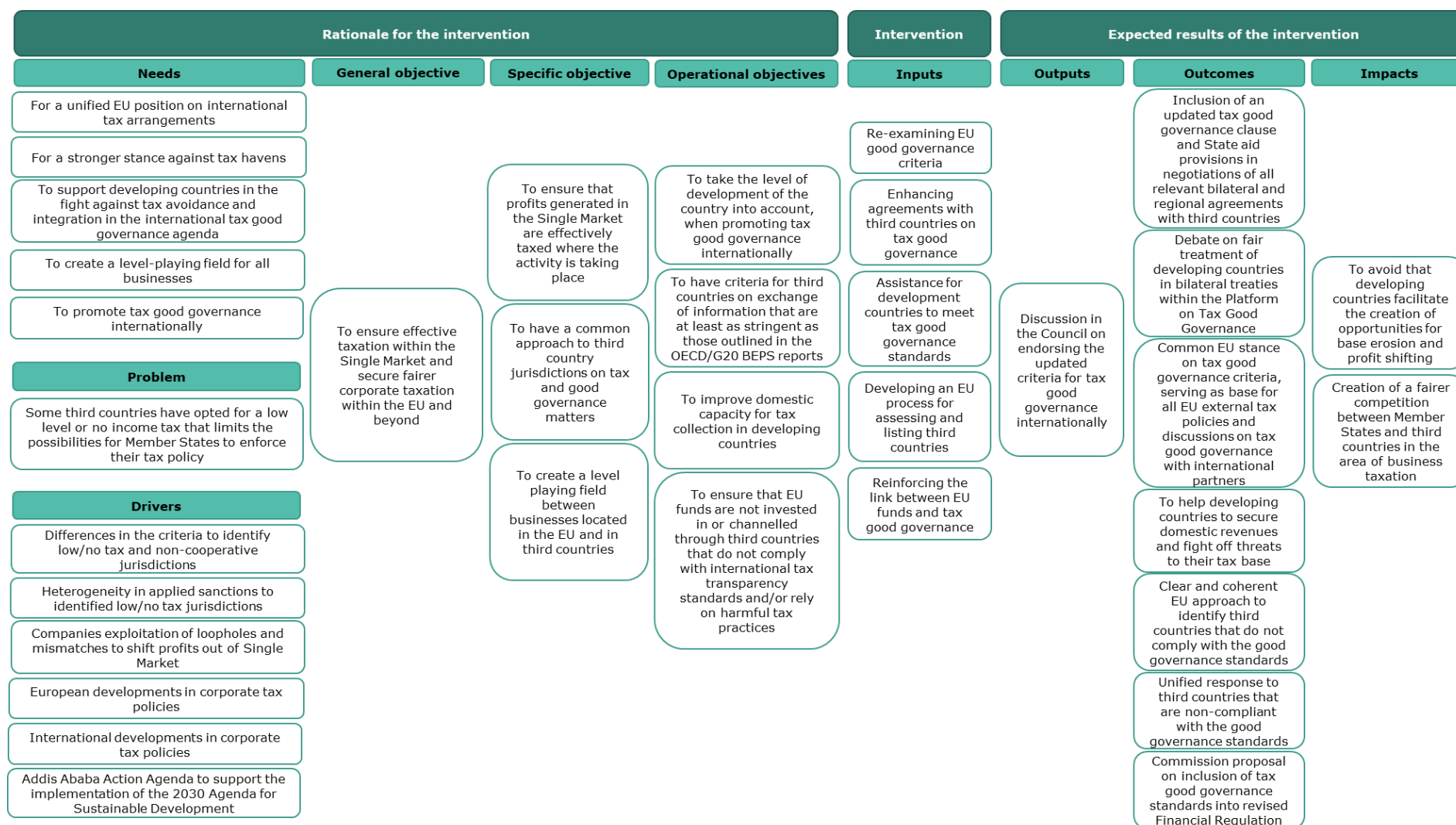
- Inclusion of an updated tax good governance clause and State aid provisions in negotiations of all relevant bilateral and regional agreements with third countries;
- Debate on fair treatment of developing countries in bilateral treaties within the Platform on Tax Good Governance;
- Common EU stance on tax good governance criteria, serving as a base for all EU external tax policies and discussions on tax good governance with international partners;
- Help developing countries to secure domestic revenues and fight off threats to their tax base;
- Clear and coherent EU approach to identify third countries that do not comply with the good governance standards;
- Unified response to third countries that are non-compliant with good governance standards;
- Commission proposal on inclusion of tax good governance standards into revised Financial Regulation.

Regarding the long-term results, the Commission on an External Strategy for Effective Taxation lists two global **impacts**:

- Avoid that developing countries facilitate the creation of opportunities for base erosion and profit shifting;
- Creation of a fairer competition between Member States and third countries in the area of business taxation.



**Figure 17 Communication on an External Strategy for Effective Taxation: Intervention logic**



Source: Authors' elaboration on EU official documents.

### **B.3 Intervention logic of state aid rules**

Whereas state aid rules are not directly covered by the analysis performed in this Report, they are accounted for when assessing the external coherence criterion in Chapter 3 of the main report. In this context, the following intervention logic pinpoints the main elements of the legal basis of state aid which apply to taxation matters, based on the following instruments:

- Article 107, Treaty on the Functioning of the European Union (TFEU)<sup>213</sup>;
- Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, (2016/C 262/01).
- DG Competition, Working Paper on State Aid and Tax Rulings, Internal Working Paper, Background to the High-Level Forum on State Aid of 3 June 2016.

#### **Needs, problems, and drivers**

The Working Paper on State Aid and Tax Rulings<sup>214</sup> outlines **a central need in the field of state aid and taxation**, namely:

- The need to examine the particular effects of aid granted in the form of tax measures by Member States and to assess whether those measures are compatible with the Internal Market.

**One main problem** follows from article 107 TFEU, namely competition being distorted as a result of state aid in the form of tax measures.

**Two drivers** are feeding into the above problem<sup>215</sup>:

- Selective tax measures;
- Discretionary practices of tax administrations, provided that they are selective.

#### **Objectives**

The following **set of objectives** of state aid rules applied to tax measures were identified based on the three main documents listed above:

- **General objective:** To prevent distortions of competition through the granting of special tax advantages that are not available to all similarly situated taxpayers in a given Member State.<sup>216</sup>
- **Specific objective:** To contribute to an easier, more transparent and more consistent application of the state aid rules in order to reduce distortions of competition in the Internal Market.<sup>217</sup>
- **Operational objective:** To clarify whether a tax measure can be qualified as state aid under the provisions of the TFEU.

#### **Inputs**

State aid rules have been primarily based on the provisions of art. 107 TFEU, which have been in place ever since the Treaty of Rome. Article 107(1) includes four conditions that

<sup>213</sup> Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47.

<sup>214</sup> Par. 1.

<sup>215</sup> This follows from article 107 TFEU and the respective case law. The Working Paper on State Aid and Tax Rulings provides additional details on the relevant cases.

<sup>216</sup> DG Competition (2016), Working Paper on State Aid and Tax Rulings, Internal Working Paper, Background to the High Level Forum on State Aid of 3 June 2016, par. 24.

<sup>217</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, (2016/C 262/01), par. 1.

have to be met in order for any aid granted by a Member State to be considered "incompatible with the internal market":

1. It represents an intervention by a Member State or through the Member State's resources;
2. The intervention gives an advantage on a selective basis to the recipient of the aid;
3. The intervention affects trade between Member States;
4. The intervention distorts competition.

The incompatibility with the internal market is further assessed based on Article 107(2) and 107(3).

The application of these conditions in the case of tax measures was outlined in the Commission notice on the notion of State Aid:

1. "Foregoing state revenue" is sufficient for a tax measure to be considered an intervention by a Member State or through the resources of a Member State.<sup>218</sup>
2. Both the granting of positive economic advantages and the relief from economic burden can constitute an advantage conferred to economic operators.<sup>219</sup>
3. In order to classify a tax measure as conferring a selective advantage, it is first necessary to identify the "normal" or common tax regime applicable in the Member State concerned, known as the (tax) reference system, and to examine the operation of the system with reference to its objective.<sup>220</sup> Secondly, it is necessary to assess whether the measure in question deviates or derogates from the reference system on the basis that it differentiates between economic operators who, in light of the objective pursued by the reference system, are in a comparable legal and factual situation. If such derogation exists, the measure will be deemed to be *prima facie* selective. Thirdly, if a measure is considered to be a derogation from the reference system, it may still be justified by the nature and overall structure of the reference system. In that regard, it is up to the Member State concerned to demonstrate that the contested measure results directly from the basic or guiding principles of the reference system, resulting from inherent mechanisms necessary for the functioning and effectiveness of the system. If the derogation from the reference system is justified on these grounds, the measure is not deemed selective.
4. The conditions related to competition and trade between Member States are met if the recipient of the distortive fiscal aid is involved in trade between Member States.<sup>221</sup>

In addition, the Working Paper on State Aid and Tax Rulings provides guidance on the application of state aid rules to tax rulings in the case of transfer pricing rules.

## Results

The expected results of state aid rules related to tax issues, defined by Commission notice 2016/C 262/01, have been the following:

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<sup>218</sup> Par. 51

<sup>219</sup> Par. 68

<sup>220</sup> Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, paragraphs 35 and 36.

<sup>221</sup> Par 185 - 198

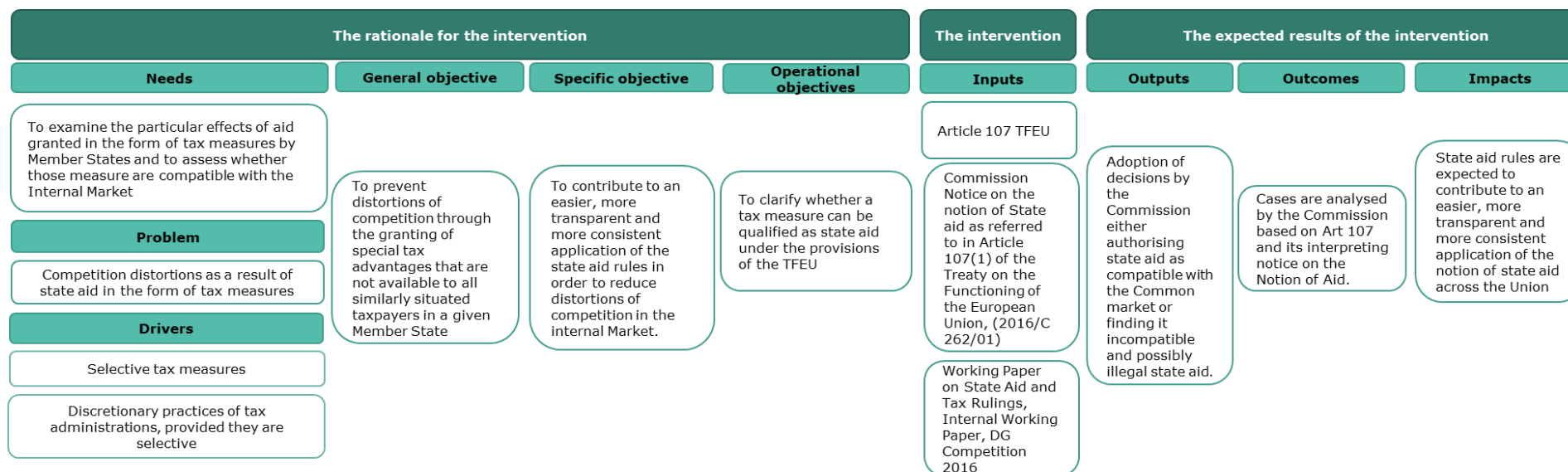
- **Output:** Adoption of decisions by the Commission either authorising state aid as compatible with the Common Market or finding it incompatible and possibly illegal state aid.
- **Outcome:** Cases are analysed by the Commission based on article 107 TFEU and its interpreting notice on the Notion of Aid.

When it comes to the **impact** (the longer-term result), Commission notice 2016/C 262/01 emphasises that state aid rules are expected to contribute to an “easier, more transparent and more consistent application of the notion of state aid across the Union”.<sup>222</sup>

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<sup>222</sup> Par. 1.

**Figure 18 State aid rules: Intervention logic**



Source: Authors' elaboration on EU official documents.

## **ANNEX C: Questionnaire for interviews**

### **Reflections on the EU objectives in addressing aggressive tax planning and harmful tax practices**

#### **Interview guidelines for in-depth interviews**

##### **Background**

DG TAXUD of the European Commission has requested CEPS to prepare a report assessing the coherence of the objectives of existing EU hard and soft law instruments to tackle aggressive tax planning and harmful tax practices. The report considers the potential complementarities or gaps between the relevant EU instruments, as well as their coherence with the international tax agenda and other EU policies and political priorities.

For the purposes of this report, aggressive tax planning and harmful tax practices are briefly defined as follows:

- Aggressive tax planning constitutes a form of tax avoidance behaviour of companies. More specifically, it entails the exploitation of weaknesses and mismatches in tax systems or treaty networks to avoid taxation.
- Harmful tax practices refer to the competition between nation states with preferential tax systems. Attempts by countries to attract corporate investment or national profit through such preferential tax regimes is one of the main reasons behind harmful tax practices.

##### **Instructions**

This interview aims to gather the views of selected stakeholders on the EU instruments against aggressive tax planning and harmful tax practices. The information collected will feed the above-mentioned report. The interview is conducted by CEPS on behalf of DG TAXUD of the European Commission.

For further details on the pieces of legislation covered by this report, please consult Annex A attached to the email accompanying this questionnaire.

If you wish to receive further information regarding this report, please feel free to contact the project manager:

- Felice Simonelli  
Head of Policy Evaluation, CEPS  
Phone: +32.(0)2.229.39.23  
Email: felice.simonelli@ceps.eu

**Thank you for your valuable input.**

##### **Personal data protection**

Data and information provided during this interview will not be disclosed to any third party. Raw data and information may be shared with DG TAXUD of the European Commission. Results will be published so as not to be attributable to any specific respondent unless otherwise agreed upon with the interviewee in written form.

## Registration

REG.1 Name and surname of the interviewer:

\_\_\_\_\_

REG.2 Date and place of the interview:

\_\_\_\_\_

REG.3 Please indicate the name of the **organisation** you are part of:

\_\_\_\_\_

REG.4 Please indicate the **country or level (EU or international)** where the organisation operates:

\_\_\_\_\_

REG.5 Please indicate your **name and surname** and position in your organisation:

\_\_\_\_\_

REG.6 Please indicate your **email address**:

\_\_\_\_\_

*For the following questions, where requested, please provide your best estimate from 1 to 5 based on the following scale: (1) not at all; (2) to a limited extent; (3) to some extent; (4) to a high extent; or (5) to the fullest extent. Select DK/NO if you don't know or you have no opinion.*

REG.7 To what extent are you **familiar with the following EU instruments** relevant for addressing aggressive tax planning and harmful tax practices?

Anti-Tax Avoidance Directive (1 & 2)	1	2	3	4	5	DK /NO
Administrative Cooperation Directive (3, 4 & 6)	1	2	3	4	5	DK /NO
Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU)	1	2	3	4	5	DK /NO
Commission Recommendation of 28 January 2016 on the implementation of measures against tax treaty abuse (2016/271/EU)	1	2	3	4	5	DK /NO
Commission Recommendation of 21 March 2018 relating to the corporate taxation of a significant digital presence (2018/1650/EU)	1	2	3	4	5	DK /NO
Code of Conduct for Business Taxation	1	2	3	4	5	DK /NO
European Semester (measures related to aggressive tax planning and harmful tax practices)	1	2	3	4	5	DK /NO
Joint Transfer Pricing Forum	1	2	3	4	5	DK

						/NO
Parent-Subsidiary Directive	1	2	3	4	5	DK /NO
Communication on an External Strategy for Effective Taxation	1	2	3	4	5	DK /NO
Commission Recommendation of 6 December 2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters (2012/771/EU)	1	2	3	4	5	DK /NO

Please elaborate on your answers: \_\_\_\_\_

## PART I – OVERALL COHERENCE

I.1 To what extent do you identify **complementarities/synergies between the objectives of the EU instruments** listed on page 2, question REG.7 (i.e. they produce a combined effect greater than the sum of their separate effects)?

- Not at all
- To a limited extent
- To some extent
- To a high extent
- To the fullest extent
- Do not know/No opinion

I.1.1 If to some extent, to a high extent or to the fullest extent - Please indicate examples of complementarities/synergies.

\_\_\_\_\_

I.2 To what extent do you identify **overlaps/contradictions/gaps between the objectives of the EU instruments listed** on page 2, question REG.7 (e.g. two instruments try to address the same problem, thus generating duplications or legal uncertainty)?

- Not at all
- To a limited extent
- To some extent
- To a high extent
- To the fullest extent
- Do not know/No opinion

I.2.1 If to some extent, to a high extent or to the fullest extent - - Please indicate examples of overlaps/contradictions/gaps.

\_\_\_\_\_

I.3 Are you aware of **other EU policies** (e.g. competition, development, trade, anti-money laundering, etc.) that may have **synergies/complementarities** and/or **overlaps/contradictions** with the objectives of the EU instruments listed on page 2, question REG.7?

- Yes
- No

I.3.1 If Yes – Please indicate the relevant **EU policies** you have identified.



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I.3.2 If Yes – Please indicate to what extent the objectives of the **EU instruments listed on page 2** (question REG.7) **and the other EU policies** you have identified have **synergies/complementarities** (if any) and elaborate on your answer.

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I.3.3 If Yes – Please indicate to what extent the objectives of the **EU instruments listed on page 2** (question REG.7) **and the other EU policies** you have identified have **overlaps/contradictions** (if any) and elaborate on your answer.

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I.4 Are you aware of **international policies/instruments** (e.g. OECD BEPS, UN Model Tax Convention) that may have **synergies/complementarities** and/or **overlaps/contradictions** with the objectives of the EU instruments listed on page 2, question REG.7?

- Yes
- No

I.4.1 If Yes – Please indicate the relevant **international policies/instruments** you have identified.

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I.4.2 If Yes – Please indicate to what extent the objectives of the **EU instruments listed on page 2** (question REG.7) **and the international policies** you have identified have **synergies/complementarities** (if any) and elaborate on your answer.

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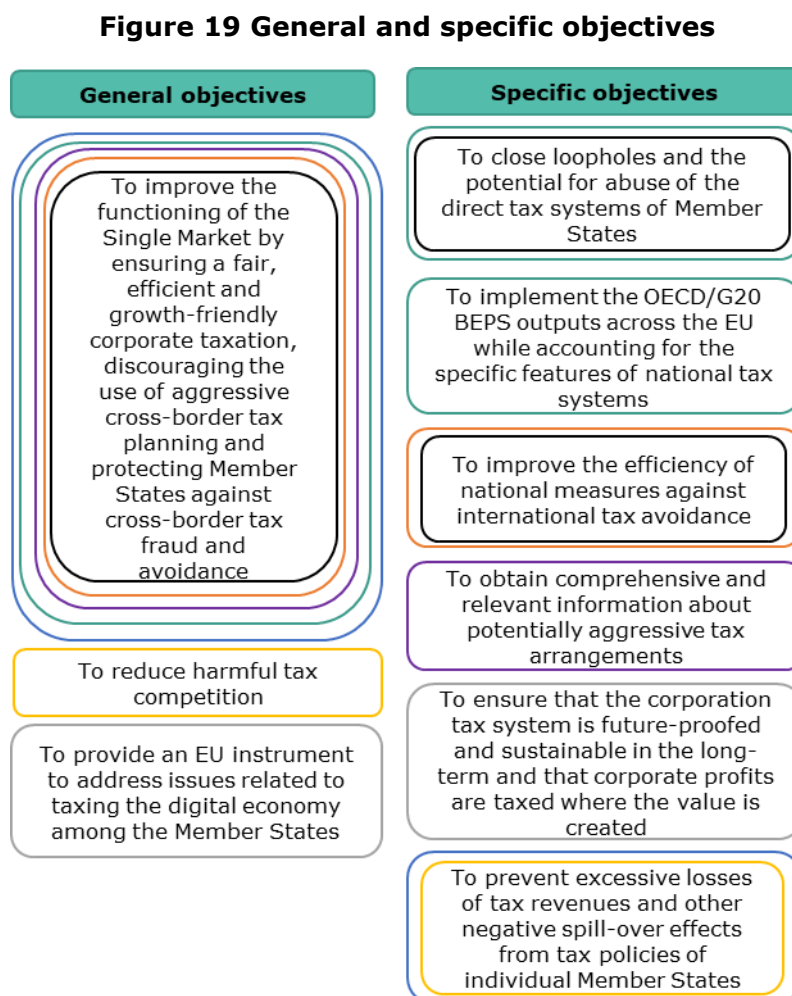
I.4.3 If Yes – Please indicate to what extent the objectives of the **EU instruments listed on page 2** (question REG.7) **and the international policies/instruments** you have identified have **overlaps/contradictions** (if any) and elaborate on your answer.

## PART II - AGGRESSIVE TAX PLANNING AND HARMFUL TAX PRACTICES

**Part II** focuses on the following **EU instruments**:

- Anti-Tax Avoidance Directive (1 & 2)
- Administrative Cooperation Directive (3, 4 & 6)
- Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU)
- Commission Recommendation of 28 January 2016 on the implementation of measures against tax treaty abuse (2016/271/EU)
- Commission Recommendation of 21 March 2018 relating to the corporate taxation of a significant digital presence (2018/1650/EU)
- Code of Conduct for Business Taxation
- European Semester (limited to measures related to aggressive tax planning and harmful tax practices)

The key **objectives** of these instruments are summarised in Figure 19 below.



II.1 To what extent do you believe that by achieving the objectives presented in Figure 19, the selected EU instruments can **address the needs** listed in the table below?

Need 1: To <b>coordinate national corporate taxation rules</b> , policies and approaches to address aggressive tax planning and harmful tax practices	1	2	3	4	5	DK /NO
Need 2: To ensure more transparency and a <b>more binding approach to information exchange</b> on tax rulings as well as on internal transactions within multinational groups	1	2	3	4	5	DK /NO
Need 3: To <b>coordinate the implementation of OECD/G20 BEPS reports and Common Reporting Standard</b> across Member States	1	2	3	4	5	DK /NO
Need 4: To ensure a <b>level-playing field</b> for all <b>companies</b> active in the EU	1	2	3	4	5	DK /NO
Need 5: To <b>tackle base erosion and profit shifting</b> between Member States due to tax treaty abuse	1	2	3	4	5	DK /NO
Need 6: To have <b>national feedback processes</b> within tax administrations and between tax administrations and their national reporters	1	2	3	4	5	DK /NO
Need 7: To have an <b>international taxation system fit for the digital era</b> and adapt double tax conventions accordingly	1	2	3	4	5	DK /NO
Need 8: To <b>update the definition of permanent establishment</b> to prevent tax abuses	1	2	3	4	5	DK /NO

Please elaborate on your answers: \_\_\_\_\_

II.2 To what extent do you believe that by achieving the objectives presented in Figure 19, the selected EU instruments can **address the problems** listed in the table below?

Problem 1: Limited usefulness of <b>non-coordinated, national anti-abuse measures</b>	1	2	3	4	5	DK /NO
Problem 2: Potential <b>tax losses</b> due to aggressive tax planning	1	2	3	4	5	DK /NO
Problem 3: International corporate tax rules are no longer adequate in the <b>digital era</b>	1	2	3	4	5	DK /NO
Problem 4: <b>Tax treaty abuse and specific exceptions to the definition of permanent establishment</b> leading to tax avoidance	1	2	3	4	5	DK /NO
Problem 5: National corporate tax rules are no longer adequate and allow for <b>tax avoidance</b>	1	2	3	4	5	DK /NO

Problem 6: <b>Loopholes</b> in individual tax systems of the Member States and <b>mismatches</b> between tax systems in the EU leading to double non-taxation in cross-border situations	1	2	3	4	5	DK /NO
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Please elaborate on your answers: \_\_\_\_\_

II.3 To what extent do you believe that the **needs** listed in the table below are **still experienced** by EU stakeholders?

Need 1: To <b>coordinate national corporate taxation rules</b> , policies and approaches to address aggressive tax planning and harmful tax practices	1	2	3	4	5	DK /NO
Need 2: To ensure more transparency and a <b>more binding approach to information exchange</b> on tax rulings as well as on internal transactions within multinational groups	1	2	3	4	5	DK /NO
Need 3: To <b>coordinate the implementation of OECD/G20 BEPS reports and Common Reporting Standard</b> across Member States	1	2	3	4	5	DK /NO
Need 4: To ensure a <b>level-playing field</b> for all <b>companies</b> active in the EU	1	2	3	4	5	DK /NO
Need 5: To <b>tackle base erosion and profit shifting</b> between Member States due to tax treaty abuse	1	2	3	4	5	DK /NO
Need 6: To have <b>national feedback processes</b> within tax administrations and between tax administrations and their national reporters	1	2	3	4	5	DK /NO
Need 7: To have an <b>international taxation system fit for the digital era</b> and adapt double tax conventions accordingly	1	2	3	4	5	DK /NO
Need 8: To <b>update the definition of permanent establishment</b> to prevent tax abuses	1	2	3	4	5	DK /NO

Please elaborate on your answers: \_\_\_\_\_

II.4 To what extent do you believe that the **problems** listed in the table below are **still experienced** by EU stakeholders?

Problem 1: Limited usefulness of non-coordinated, <b>national anti-abuse measures</b>	1	2	3	4	5	DK /NO
Problem 2: Potential <b>tax losses</b> due to aggressive tax planning	1	2	3	4	5	DK /NO
Problem 3: International corporate tax rules are no longer adequate in the <b>digital era</b>	1	2	3	4	5	DK /NO

Problem 4: <b>Tax treaty abuse and specific exceptions to the definition of permanent establishment</b> leading to tax avoidance	1	2	3	4	5	DK /NO
Problem 5: National corporate tax rules are no longer adequate and allow for <b>tax avoidance</b>	1	2	3	4	5	DK /NO
Problem 6: <b>Loopholes</b> in individual tax systems of the Member States and <b>mismatches</b> between tax systems in the EU leading to double non-taxation in cross-border situations	1	2	3	4	5	DK /NO

Please elaborate on your answers: \_\_\_\_\_

II.5 Please indicate any **additional needs and problems related to combating aggressive tax planning and harmful tax practices** that are currently experienced in the EU:

\_\_\_\_\_

II.5.1 To what extent do you believe that by achieving the objectives presented in Figure 19 the EU instruments can **address the additional needs and problems** you have identified in II.5?

- Not at all
- To a limited extent
- To some extent
- To a high extent
- To the fullest extent
- Do not know/No opinion

Please elaborate on your answer: \_\_\_\_\_

II.6 To what extent have the EU instruments under analysis contributed so far to **achieving the following objectives?**

General objective 1: To <b>improve the functioning of the Single Market</b> by ensuring a fair, efficient and growth-friendly corporate taxation, discouraging the use of aggressive cross-border tax planning and protecting Member States against cross-border tax fraud and avoidance	1	2	3	4	5	DK /NO
General objective 2: To provide an EU instrument to address issues related to <b>taxing the digital economy</b> among the Member States	1	2	3	4	5	DK /NO
General objective 3: To <b>reduce harmful tax competition</b>	1	2	3	4	5	DK /NO
Specific objective 1: To <b>close loopholes</b> and the <b>potential for abuse</b> of the direct tax systems of Member States	1	2	3	4	5	DK /NO
Specific objective 2: To <b>implement the OECD/G20 BEPS outputs</b> across the EU while accounting for the specific features of national tax systems	1	2	3	4	5	DK /NO
Specific objective 3: To <b>obtain</b> comprehensive and relevant <b>information</b> about potentially <b>aggressive tax arrangements</b>	1	2	3	4	5	DK

						/NO
Specific objective 4: To improve the <b>efficiency of national measures</b> against international tax avoidance	1	2	3	4	5	DK /NO
Specific objective 5: To ensure that the <b>corporate tax system is future-proofed</b> and sustainable in the long-term and that <b>corporate profits are taxed where the value is created</b>	1	2	3	4	5	DK /NO
Specific objective 6: To <b>prevent excessive losses of tax revenues</b> and other negative spill-over effects from tax policies of individual Member States	1	2	3	4	5	DK /NO

Please elaborate on your answer: \_\_\_\_\_

II.7 To what extent do you believe the **EU instruments** listed on **page 5** have **achieved the following results?**

1. <b>Better protection and improved operation</b> of the <b>Single Market</b>	1	2	3	4	5	DK /NO
2. Adoption of a <b>common EU approach</b> to implementing <b>OECD/G20 BEPS</b> agenda	1	2	3	4	5	DK /NO
3. Automatic and on request <b>exchange of information</b> for tax purposes	1	2	3	4	5	DK /NO
4. Creation of a <b>central directory database</b> with information on tax rulings and pricing arrangements	1	2	3	4	5	DK /NO
5. <b>Country-by-country reporting</b> by multinational groups	1	2	3	4	5	DK /NO
6. Instances of <b>double non-taxation</b> are <b>reduced</b>	1	2	3	4	5	DK /NO
7. <b>Avoiding</b> that double taxation treaties <b>reduce the effectiveness of forthcoming EU rules</b> concerning a significant digital presence	1	2	3	4	5	DK /NO
8. Member States are committed <b>to re-examining</b> (and amending if necessary) their <b>existing laws and practices</b> and to <b>not introducing new harmful tax measures</b>	1	2	3	4	5	DK /NO
9. <b>Exchange of information between Member States on tax measures</b> which may fall under the scope of the Code of Conduct for Business Taxation	1	2	3	4	5	DK /NO
10. <b>Assessment and annual monitoring</b> of tax measures that fall within the scope of the Code of Conduct for Business Taxation	1	2	3	4	5	DK /NO
11. <b>Stronger synergies among tax policies</b> of Member States to avoid harmful tax practices	1	2	3	4	5	DK

						/NO
12. <b>Policy dialogue</b> on the Council and Commission recommendations on harmful tax practices and aggressive tax planning instruments	1	2	3	4	5	DK /NO

II.8 Can you **rank** the seven EU instruments listed in the table below **from the most useful to the least useful** when it comes **to achieving the objective and results listed above** and fighting against aggressive tax planning and harmful tax practices?

Anti-Tax Avoidance Directive (1 & 2)	
Administrative Cooperation Directive (3, 4 & 6)	
Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU)	
Commission Recommendation of 28 January 2016 on the implementation of measures against tax treaty abuse (2016/271/EU)	
Commission Recommendation of 21 March 2018 relating to the corporate taxation of a significant digital presence (2018/1650/EU)	
Code of Conduct for Business Taxation	
European Semester (measures related to aggressive tax planning and harmful tax practices)	

Please elaborate on your answers: \_\_\_\_\_

II.9 To what extent do you believe that **national interventions, in the absence of any EU taxation instruments**, would be able to achieve the **following results**?

1. <b>Better protection and improved operation</b> of the <b>Single Market</b>	1	2	3	4	5	DK /NO
2. Adoption of a <b>common EU approach</b> to implementing <b>OECD/G20 BEPS</b> agenda	1	2	3	4	5	DK /NO
3. Automatic and on request <b>exchange of information</b> for tax purposes	1	2	3	4	5	DK /NO
4. Creation of a <b>central directory database</b> with information on tax rulings and pricing arrangements	1	2	3	4	5	DK /NO
5. <b>Country-by-country reporting</b> by multinational groups	1	2	3	4	5	DK /NO
6. Instances of <b>double non-taxation</b> are <b>reduced</b>	1	2	3	4	5	DK /NO
7. <b>Avoiding</b> that double taxation treaties <b>reduce the effectiveness of forthcoming EU rules</b> concerning a significant digital presence	1	2	3	4	5	DK

						/NO
8. Member States are committed <b>to re-examining</b> (and amending if necessary) their <b>existing laws and practices</b> and to <b>not introducing new harmful tax measures</b>	1	2	3	4	5	DK /NO
9. <b>Exchange of information between Member States on tax measures</b> which may fall under the scope of the Code of Conduct for Business Taxation	1	2	3	4	5	DK /NO
10. <b>Assessment and annual monitoring</b> of tax measures that fall within the scope of the Code of Conduct for Business Taxation	1	2	3	4	5	DK /NO
11. <b>Stronger synergies among tax policies</b> of Member States to avoid harmful tax practices	1	2	3	4	5	DK /NO
12. <b>Policy dialogue</b> on the Council and Commission recommendations on harmful tax practices and aggressive tax planning instruments	1	2	3	4	5	DK /NO

II.9.1 Can you refer to any **examples** showing that the EU taxation instruments generate/do not generate better results than similar national initiatives (if any)?

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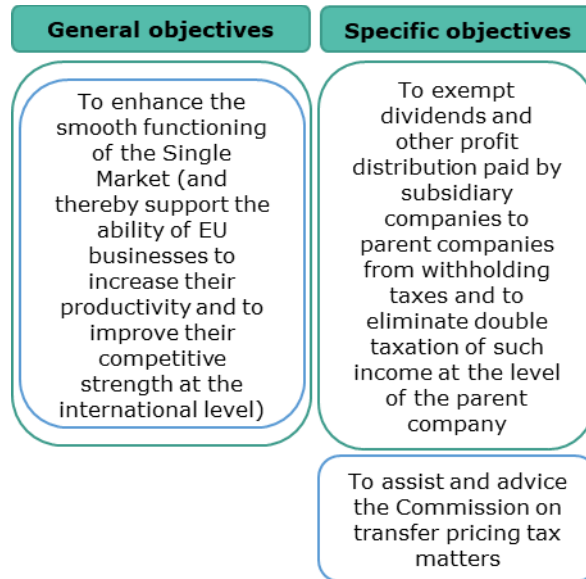
## PART III BUSINESS FACILITATION

**Part III** focuses on the following **EU instruments**:

- Parent Subsidiary Directive
- Joint Transfer Pricing Forum

The key **objectives** of these instruments are summarised in Figure 20 below.

**Figure 20 General and specific objectives**



III.1 To what extent do aggressive tax planning and harmful tax practices jeopardise the competitiveness of EU companies (and especially small and medium-sized enterprises)?

- Not at all
- To a limited extent
- To some extent
- To a high extent
- To the fullest extent
- Do not know/No opinion

Please elaborate on your answer: \_\_\_\_\_

III.2 To what extent do you believe that by achieving the objectives presented in Figure 20, the EU instruments can **address the needs and problems** listed in the table below?

Need 1: To ensure a <b>level-playing field across companies</b> active in the EU	1	2	3	4	5	DK /NO
Need 2: To <b>broaden the definition of parent company</b> (lower minimum holding threshold) and the <b>types of legal entities covered</b> by the parent subsidiary Directive applies activities	1	2	3	4	5	DK /NO
Need 3: To <b>protect national tax revenues</b>	1	2	3	4	5	DK /NO
Need 4: To have <b>measures in line with the OECD Transfer Pricing Guidelines</b> for Multinational Enterprises and Tax Administrations	1	2	3	4	5	DK /NO
Need 5: To have <b>non-legislative solutions</b> to practical problems posed by transfer pricing practices in the EU	1	2	3	4	5	DK /NO
Problem 1: Cross-border businesses are hampered by <b>restrictions, disadvantages</b> or <b>distortions</b> arising in particular from the <b>tax provisions</b> of the Member States	1	2	3	4	5	DK /NO
Problem 2: <b>Transfer pricing</b> can constitute a problem for <b>cross-border business</b> activities in the Single Market	1	2	3	4	5	DK /NO

Please elaborate on your answers: \_\_\_\_\_

III.3 To what extent do you believe that the **needs and problems** listed in the table below are **still experienced** by EU stakeholders?

Need 1: To ensure a <b>level-playing field across companies</b> active in the EU	1	2	3	4	5	DK /NO
Need 2: To <b>broaden the definition of parent company</b> (lower minimum holding threshold) and the <b>types of legal entities covered</b> by the parent subsidiary Directive applies activities	1	2	3	4	5	DK /NO
Need 3: To <b>protect national tax revenues</b>	1	2	3	4	5	DK

						/NO
Need 4: To have <b>measures in line with the OECD Transfer Pricing Guidelines</b> for Multinational Enterprises and Tax Administrations	1	2	3	4	5	DK /NO
Need 5: To have <b>non-legislative solutions</b> to practical problems posed by transfer pricing practices in the EU	1	2	3	4	5	DK /NO
Problem 1: Cross-border businesses are hampered by <b>restrictions, disadvantages</b> or <b>distortions</b> arising in particular from the <b>tax provisions</b> of the Member States	1	2	3	4	5	DK /NO
Problem 2: <b>Transfer pricing</b> can constitute a problem for <b>cross-border business</b> activities in the Single Market	1	2	3	4	5	DK /NO

Please elaborate on your answers: \_\_\_\_\_

III.4 Please indicate any **additional needs and problems related to facilitate cross-border and global business operations while combating aggressive tax planning and harmful tax practices** that are currently experienced in the EU:

\_\_\_\_\_

III.4.1 To what extent do you believe that **by achieving the objectives** presented in Figure 20 the EU instruments can **address the additional needs and problems** you have identified in III.4?

- Not at all
- To a limited extent
- To some extent
- To a high extent
- To the fullest extent
- Do not know/No opinion

Please elaborate on your answer: \_\_\_\_\_

III.5 To what extent have the **EU instruments** listed on **page 10** contributed so far to **achieving the following objectives?**

General objective 1: To enhance the <b>smooth functioning</b> of the <b>Single Market</b> (and thereby support the ability of EU businesses to increase their productivity and to improve their competitive strength at the international level)	1	2	3	4	5	DK /NO
Specific objective 1: To <b>exempt dividends and other profit distribution</b> paid by subsidiary companies to parent companies <b>from withholding taxes</b> and to <b>eliminate double taxation</b> of such income at the level of the parent company	1	2	3	4	5	DK /NO
Specific objective 2: <b>To assist and advise</b> the <b>Commission</b> on transfer pricing tax matters	1	2	3	4	5	DK /NO
Operational objective 1: To <b>protect</b> the <b>national tax revenue</b> and fend off circumvention of national laws, in accordance with the Treaty principles and taking into account internationally accepted tax rules	1	2	3	4	5	DK /NO

Operational objective 2: To <b>advise on measures</b> that are compatible with the <b>OECD Transfer Pricing Guidelines</b> for Multinational Enterprises and Tax Administrations	1	2	3	4	5	DK /NO
Operational objective 3: To have <b>tax rules</b> which are <b>neutral</b> from the point of view of <b>competition</b>	1	2	3	4	5	DK /NO
Operational objective 4: To <b>avoid</b> situations of <b>double non-taxation</b> that generate unintended tax benefits for companies	1	2	3	4	5	DK /NO
Operational objective 5: To ensure that <b>tax arrangements</b> reflect <b>economic reality</b>	1	2	3	4	5	DK /NO
Operational objective 6: To <b>involve</b> both <b>governmental and non-governmental sector experts</b> on <b>transfer pricing</b>	1	2	3	4	5	DK /NO

Please elaborate on your answer: \_\_\_\_\_

III.6 To what extent do you believe the **EU instruments** listed on **page 10** have **achieved the following results?**

1. A <b>common EU approach</b> to addressing double taxation of dividends is adopted	1	2	3	4	5	DK /NO
2. <b>Avoiding</b> situations of <b>double non-taxation</b>	1	2	3	4	5	DK /NO
3. <b>Advice</b> for the Commission on <b>transfer pricing tax issues</b>	1	2	3	4	5	DK /NO
4. Assisting the Commission on <b>finding practical solutions for transfer pricing tax issues</b>	1	2	3	4	5	DK /NO

Please elaborate on your answer: \_\_\_\_\_

III.7 Which of the two EU instruments listed below has been **more useful** when it comes to **achieving the objective and results listed above** and facilitating cross-border and global business operations while combating aggressive tax planning and harmful tax practices?

- Joint Transfer Pricing Forum
- Parent Subsidiary Directive

Please elaborate on your answer: \_\_\_\_\_

III.8 To what extent do you believe that **national interventions, in the absence of the EU taxation instruments**, would be able to achieve the **following results?**

1. A <b>common EU approach</b> to addressing double taxation of dividends is adopted	1	2	3	4	5	DK /NO
2. <b>Avoiding</b> situations of <b>double non-taxation</b>	1	2	3	4	5	DK /NO
3. <b>Advice</b> for the Commission on <b>transfer pricing tax issues</b>	1	2	3	4	5	DK /NO
4. Assisting the Commission on <b>finding practical solutions for transfer pricing tax issues</b>	1	2	3	4	5	DK /NO

III.8.1 Can you refer to any **examples** showing that the EU taxation instruments generate/do not generate better results than similar national initiatives (if any)?

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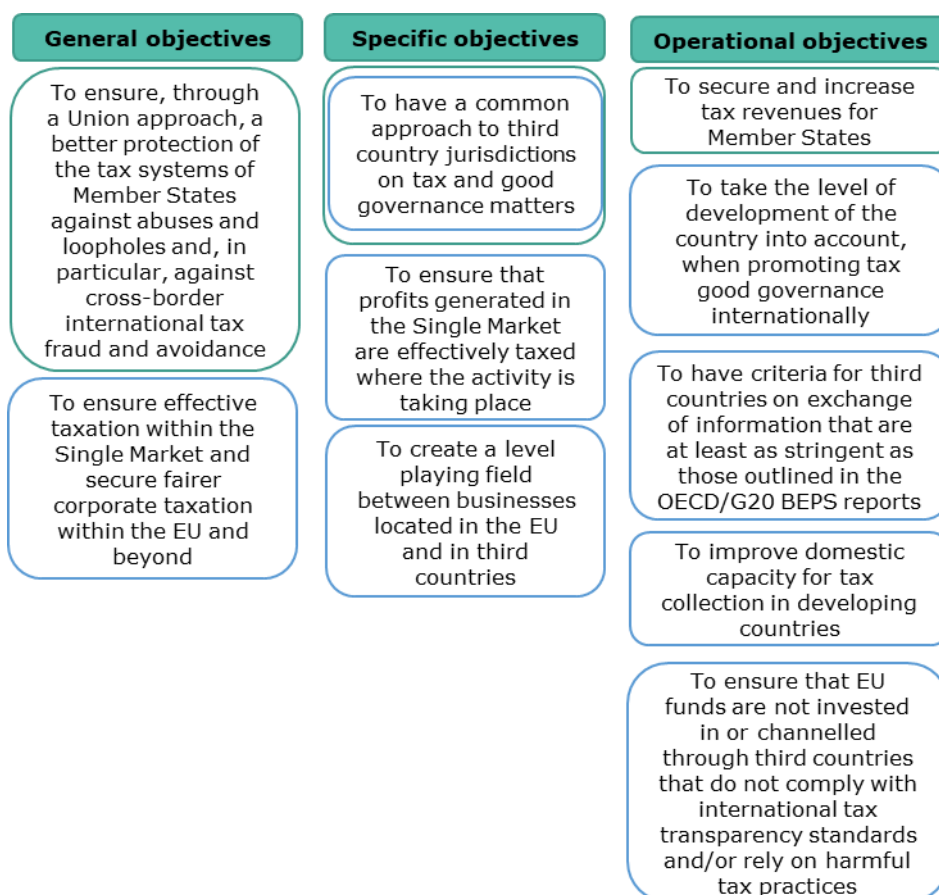
## PART IV External policies

**Part IV** focuses on the following **EU instruments**:

- Communication on an External Strategy for Effective Taxation
- Commission Recommendation of 6 December 2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters (2012/771/EU)

The key **objectives** of these instruments are summarised in Figure 21 below.

**Figure 21 General and specific objectives**



IV.1 To what extent do you believe that by achieving the objectives presented in Figure 21, the EU instruments can **address the needs** listed in the table below?

Need 1: To set out <b>minimum standards</b> of good governance in tax matters	1	2	3	4	5	DK /NO
Need 2: To support <b>developing</b> and <b>other third countries</b> in the fight against tax avoidance and integration in the <b>international tax good governance agenda</b>	1	2	3	4	5	DK /NO
Need 3: For a <b>unified EU position</b> on international tax arrangements	1	2	3	4	5	DK

						/NO
Need 4: For a <b>stronger stance against tax havens</b>	1	2	3	4	5	DK /NO
Need 5: To create a <b>level-playing field for all businesses</b>	1	2	3	4	5	DK /NO
Need 6: To <b>promote tax good governance</b> internationally	1	2	3	4	5	DK /NO
Problem 1: Some <b>third countries</b> with low-tax regimes <b>do not comply with minimum standards</b>	1	2	3	4	5	DK /NO
Problem 2: <b>Lack of cooperation</b> between <b>Member States</b> and <b>third countries</b> leading to harmful tax competition and limiting the exchange of information	1	2	3	4	5	DK /NO
Problem 3: <b>Low/no income tax</b> of some <b>third countries</b> that limits the possibilities for Member States to enforce their tax policy	1	2	3	4	5	DK /NO

Please elaborate on your answers: \_\_\_\_\_

IV.2 To what extent do you believe that the **needs** listed in the table below are **still experienced** by EU stakeholders?

Need 1: To set out <b>minimum standards</b> of good governance in tax matters	1	2	3	4	5	DK /NO
Need 2: To support <b>developing</b> and <b>other third countries</b> in the fight against tax avoidance and integration in the <b>international tax good governance agenda</b>	1	2	3	4	5	DK /NO
Need 3: For a <b>unified EU position</b> on international tax arrangements	1	2	3	4	5	DK /NO
Need 4: For a <b>stronger stance against tax havens</b>	1	2	3	4	5	DK /NO
Need 5: To create a <b>level-playing field for all businesses</b>	1	2	3	4	5	DK /NO
Need 6: To <b>promote tax good governance</b> internationally	1	2	3	4	5	DK /NO
Problem 1: Some <b>third countries</b> with low-tax regimes <b>do not comply with minimum standards</b>	1	2	3	4	5	DK /NO
Problem 2: <b>Lack of cooperation</b> between <b>Member States</b> and <b>third countries</b> leading to harmful tax competition and limiting the exchange of information	1	2	3	4	5	DK /NO

Problem 3: <b>Low/no income tax</b> of some <b>third countries</b> that limits the possibilities for Member States to enforce their tax policy	1	2	3	4	5	DK /NO
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Please elaborate on your answers: \_\_\_\_\_

IV.3 Please indicate any **additional needs and problems related to combating aggressive tax planning and harmful tax practices on a global scale** that are currently experienced in the EU:

IV.3.1 To what extent do you believe that **by achieving the objectives** presented in Figure 21 the EU instruments can **address the additional needs and problems** you have identified in IV.3?

- Not at all
- To a limited extent
- To some extent
- To a high extent
- To the fullest extent
- Do not know/No opinion

Please elaborate on your answer: \_\_\_\_\_

IV.4 To what extent have the **EU instruments** listed on **page 14** contributed so far to **achieving** the following **objectives**?

General objective 1: To ensure, through a Union approach, <b>better protection of Member State tax systems</b> against abuses and loopholes and, in particular, against cross-border international tax fraud and avoidance	1	2	3	4	5	DK /NO
General objective 2: To ensure <b>effective taxation within the Single Market</b> and secure <b>fairer corporate taxation</b> within the EU and beyond	1	2	3	4	5	DK /NO
Specific objective 1: To have a <b>common approach to third-country jurisdictions</b> on tax and good governance matters	1	2	3	4	5	DK /NO
Specific objective 2: To ensure that <b>profits</b> generated in the Single Market are <b>effectively taxed</b> where the activity is taking place	1	2	3	4	5	DK /NO
Specific objective 3: To <b>create a level playing field</b> between businesses located in the EU and in third countries	1	2	3	4	5	DK /NO
Operational objective 1: To <b>secure and increase tax revenues</b> for Member States	1	2	3	4	5	DK /NO
Operational objective 2: To take the <b>level of development</b> of the country into account, when <b>promoting tax good governance internationally</b>	1	2	3	4	5	DK /NO



Operational objective 3: To have <b>criteria for third countries</b> on <b>exchange of information</b> that are at least as stringent as those outlined in the OECD/G20 BEPS reports	1	2	3	4	5	DK /NO
Operational objective 4: To <b>improve</b> domestic capacity for <b>tax collection</b> in <b>developing countries</b>	1	2	3	4	5	DK /NO
Operational objective 5: To ensure that <b>EU funds</b> are not invested in or channelled through third countries that do not comply <b>with international tax transparency standards</b> and/or rely on harmful tax practices	1	2	3	4	5	DK /NO

Please elaborate on your answer: \_\_\_\_\_

IV.5 To what extent do you believe the two **EU instruments** listed on **page 14** have achieved the following **results**?

1. Fostering <b>third countries</b> to implement <b>principles of good governance</b> in the tax area	1	2	3	4	5	DK /NO
2. Debate on <b>fair treatment of developing countries</b> in bilateral treaties within the Platform on Tax Good Governance	1	2	3	4	5	DK /NO
3. Inclusion of an <b>updated tax good governance clause and State aid provisions</b> in negotiations of all <b>relevant bilateral and regional agreements</b> with <b>third countries</b>	1	2	3	4	5	DK /NO
4. <b>Common EU stance on tax good governance criteria</b> , serving as a basis for all EU external tax policies and discussions on tax good governance with international partners	1	2	3	4	5	DK /NO
5. <b>To help developing countries</b> to <b>secure domestic revenues</b> and fight off threats to their tax base	1	2	3	4	5	DK /NO
6. <b>Clear and coherent EU approach</b> to <b>identify third countries</b> that do not comply with good governance standards	1	2	3	4	5	DK /NO
7. <b>Efficiency and effectiveness</b> in fighting against aggressive tax planning and harmful tax practices by <b>addressing international tax challenges at EU level</b>	1	2	3	4	5	DK /NO
8. <b>Unified response to third countries</b> that are non-compliant with the good governance standards	1	2	3	4	5	DK /NO
9. <b>Commission proposal</b> on inclusion of <b>tax good governance standards</b> into revised Financial Regulation	1	2	3	4	5	DK /NO

Please elaborate on your answer: \_\_\_\_\_

IV.6 Which of the two EU instruments listed below has been **more useful** when it comes to **achieving the objective and results** listed above and fighting against aggressive tax planning and harmful tax practices on a global scale?

- Communication on an External Strategy for Effective Taxation
- Commission Recommendation of 6 December 2012 regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters (2012/771/EU)

Please elaborate on your answer: \_\_\_\_\_

IV.7 To what extent do you believe that **national interventions, in the absence of the EU taxation instruments**, would be able to achieve the **following results**?

1. Fostering <b>third countries</b> to implement <b>principles of good governance</b> in the tax area	1	2	3	4	5	DK /NO
2. Debate on <b>fair treatment of developing countries</b> in bilateral treaties within the Platform on Tax Good Governance	1	2	3	4	5	DK /NO
3. Inclusion of an <b>updated tax good governance clause and State aid provisions</b> in negotiations of all <b>relevant bilateral and regional agreements</b> with <b>third countries</b>	1	2	3	4	5	DK /NO
4. <b>Common EU stance on tax good governance criteria</b> , serving as a basis for all EU external tax policies and discussions on tax good governance with international partners	1	2	3	4	5	DK /NO
5. <b>To help developing countries</b> to <b>secure domestic revenues</b> and fight off threats to their tax base	1	2	3	4	5	DK /NO
6. <b>Clear and coherent EU approach</b> to <b>identify third countries</b> that do not comply with good governance standards	1	2	3	4	5	DK /NO
7. <b>Efficiency and effectiveness</b> in fighting against aggressive tax planning and harmful tax practices by <b>addressing international tax challenges at EU level</b>	1	2	3	4	5	DK /NO
8. <b>Unified response to third countries</b> that are non-compliant with the good governance standards	1	2	3	4	5	DK /NO
9. <b>Commission proposal</b> on inclusion of <b>tax good governance standards</b> into revised Financial Regulation	1	2	3	4	5	DK /NO

IV.7.1 Can you refer to any **examples** showing that the EU taxation instruments generate/do not generate better results than similar national initiatives (if any)?

\_\_\_\_\_

**Thank you for your valuable input.**

## ***ANNEX D: Synopsis report of the consultation activities***

### ***1 Objectives of the consultation activities***

The role of the EU in combatting aggressive tax planning and harmful tax practices has increased substantially in recent years. Globalisation, digitalisation of the economy and the mounting pressure on domestic budgets following the financial and economic crisis have, along with various tax scandals, increased overall awareness of the need for a more coordinated approach to tax matters. These realities are reflected in the EU instruments that have been adopted in the field.

The aim of the Report "Reflections on the EU objectives in addressing aggressive tax planning and harmful tax practices" is to analyse the coherence, relevance and EU added value of key EU instruments to tackle tax avoidance. Against this background and in line with the requirements set out by the Commission for this assignment, consultation activities were carried out with key stakeholders in the field in order to achieve two goals:

- Understand the different perspectives of stakeholders; and
- Gather valuable insights to be analysed and presented in the report, alongside information from desk research and input from academic experts.

### ***2 Methodology***

The consultation activities were carried out in two stages. First, scoping interviews were conducted to ensure the soundness of the research framework and to collect preliminary data and information from EU institutional stakeholders. Second, in-depth interviews were performed with a mix of stakeholders active at the national level, the EU level and the international level.

The in-depth interviews were based on a semi-structured questionnaire agreed upon with the Commission, which included a mix of Likert-scale questions and open questions. Likert-type questions help structure the answers of respondents based on a given scale. For this Report, respondents were thus asked to provide their feedback by referring to a scale from (1) to (5), where the scores have the following meaning: 1 - not at all; 2 - to a limited extent; 3 - to some extent; 4 - to a high extent; 5 - to the fullest extent. Given this structure, the Research Team used descriptive statistics for available quantitative data (the stakeholders' opinions collected based on the 1 to 5 scale) to infer main trends arising from the input of the different stakeholder groups. In addition, the qualitative information provided during the interviews was aggregated, compared and summarised in order to support and complement the trends identified through descriptive statistics.

The questionnaire was structured in four main parts:

1. Overall coherence;
2. Aggressive tax planning and harmful tax practices;
3. Business facilitation; and
4. External policies.

Each interviewee was asked to provide his/her answers limited to one or more specific parts of the questionnaire, thus ensuring an appropriate duration of the interviews and maximising participation.

The in-depth interviews targeted not only the international and EU level but also the Member States listed in Table 2. The mix of countries ensures adequate coverage of different EU regions (Central-Eastern Europe, North-Western Europe and Southern Europe), different degrees of economic development, different corporate tax rates and different quality of legislation when it comes to fighting against aggressive tax planning.

**Table 6 Member States selected for country-level analysis**

Member State	Geographical region	GDP per capita (€, 2017)	Corporate Income Tax (main rates, 2018)	Room for aggressive tax planning (European Semester 2018)
Belgium	NWE	38,500	29.6%	yes
Cyprus	SE	22,800	12.50%	yes
Germany	NWE	39,600	29.9%	no
Hungary	CEE	12,700	10.8%	yes
Ireland	NWE	61,200	12.50%	yes
Italy	SE	28,500	27.8%	no
Luxembourg	NWE	92,800	26.01%	yes
Netherlands	NWE	43,000	25%	yes
Romania	CEE	9,600	16%	no
Sweden	NWE	47,200	21.4%	no

*Note: CEE=Central-Eastern Europe, NWE=North-Western Europe and SE=Southern Europe.  
Source: Authors' elaboration on Eurostat and European Semester Country Reports.*

In addition, the questionnaire was designed to be answered by a mix of stakeholders:

- International stakeholders, namely international organisations working in the field of tax avoidance;
- EU-level stakeholders, including
  - Stakeholders from the European Commission;
  - Non-governmental organisations (NGOs) active in the field of tax avoidance; and
  - Business associations.
- Stakeholders from the Member States, comprising:
  - Tax authorities;
  - NGOs;
  - Business associations.

### **3 Results**

The total number of interviews envisaged for the consultation activities was 35: five interviews were planned in the scoping phase and 30 in the fieldwork phase (“in-depth” interviews). A total of 31 interviews were ultimately conducted. Four scoping interviews were conducted with Commission officials (DG TAXUD, DG COMP and SECGEN) who provided feedback on the research framework, ensuring its soundness and helping pave the way to the in-depth interviews. Out of a total number of 31 invited organisations for in-depth interviews, 27 stakeholders agreed to provide their input on time (Table 3). No interview was conducted in Hungary; nevertheless, a thorough expert assessment was carried out for this country.

**Table 7 Overview of in-depth interviews**

Level	Type	Organisation	Part I Overall coherence	Part II Aggressive tax planning and harmful tax practices	Part III Business facilitation	Part IV External policies
BE	NGO	CNDC - 11.11.11	✓	✓	-	✓
BE	Tax Authority	Ministry of Finance	*	*	*	*
CY	NGO	Cyprus Integrity Forum	✓	✓	-	✓
CY	Tax Authority	Ministry of Finance	✓	✓	✓	✓
DE	NGO	Netzwerk Steuergerechtigkeit (Tax Justice Network)	✓	✓	-	✓
DE	Tax Authority	Tax Authority	✓	✓	✓	✓
EU	Institution	DG TAXUD	✓	✓	-	-
EU	NGO	Oxfam International - EU Advocacy Office	✓	✓	-	✓
EU	Institution	DG COMP	✓	✓	-	-
EU	Business association	BusinessEurope	General remarks			
EU	Institution	DG TRADE	✓	-	-	✓
EU	Institution	DG DEVCO	✓	-	-	✓
EU	NGO	TaxJustice	✓	General remarks	-	General remarks
EU	Professional association	Confédération Fiscale Européenne (CFE) - Tax Advisers Europe	✓	✓	✓	-
EU	Institution	DG JUST	✓	✓	-	-
Global	Institution	UN Committee of Experts on International Cooperation in Tax Matters	✓	✓	-	-
Global	Institution	OECD	✓	✓	-	✓
HU	Tax Authority	Ministry of Finance	*	*	*	-
HU	Business association	MGYOSZ – BUSINESSHUNGAR Y; Hungarian Chamber of Commerce and Industry	**	**	**	**
IE	Business association	ISME - Irish SME Association	✓	✓	✓	-
IE	Tax Authority	Department of Finance	✓	✓	✓	General remarks
IT	Business association	UnionPMI	✓	✓	✓	-
IT	Tax Authority	Ministry of Economy and Finance	✓	✓	✓	✓

Level	Type	Organisation	Part I Overall coherence	Part II Aggressive tax planning and harmful tax practices	Part III Business facilitation	Part IV External policies
LU	Business association	Union des Entreprises Luxembourgeoises	✓	✓	General remarks	-
LU	Tax Authority	Ministry of Finance	✓	✓	✓	✓
NL	Tax Authority	Ministry of Finance	✓	✓	✓	✓
NL	NGO	Centre for Research on Multinational Corporations (SOMO)	✓	✓	-	✓
RO	NGO	Transparency International Romania <sup>223</sup>	✓	-	-	-
RO	Tax Authority	Ministry of Finance; National Agency for Fiscal Administration	✓	✓	✓	✓
SE	Business association	Företagarna (Swedish Federation of Business Owners)	✓	✓	✓	-
SE	Tax Authority	Ministry of Finance	*	*	*	*

*Notes: "General remarks": Some stakeholders chose to offer only general remarks rather than following the questionnaire. \*Stakeholders unable to take part in the interview. \*\*No answer received.*

*Source: Authors' own elaboration.*

The input received from stakeholders formed one of three main sources for drafting the report "Reflections on the EU objectives in addressing aggressive tax planning and harmful tax practices". Desk research and expert assessments conducted by ten academic experts,<sup>224</sup> who were part of the Research Team, complemented the insights drawn from the consultation activities. While the consultation activities gathered the views of 27 stakeholders (not counting the scoping interviews) active at the EU level and in the Member States (including public institutions, business associations and NGOs), the findings of the Report do not necessarily represent the views of the consulted stakeholders.

The main feedback received during the consultation activities is summarised and key observations are emphasised in what follows.

### **Overall coherence**

Overall, consulted stakeholders indicated that the EU instruments to address tax avoidance are generally coherent with one another. However, they also pointed out several gaps and

<sup>223</sup> Transparency International Romania was invited to respond to parts I, II, and IV of the questionnaire. Given their expertise, their answer were most suitable in the context of part I, hence part II and part IV were not covered.

<sup>224</sup> One academic expert was selected for each of the ten countries listed in Table 2.

potential overlaps. In particular, the main gap in the current EU tax framework identified is the absence of an EU approach to digital taxation.

Consulted stakeholders also gave feedback on the consistency between the EU instruments under analysis and other EU policies that may be linked to aspects of tax avoidance. In particular, stakeholders emphasised that the EU tax instruments are broadly consistent with other policies such as state aid, internal market, financial services, development, criminal justice, and trade.

Finally, when it comes to international initiatives to tackle tax avoidance, the EU tax instruments are generally consistent with the international tax agenda, according to the stakeholders consulted for this assignment. In particular, most of the interviewees mentioned that the EU is reinforcing the work of the OECD/G20 BEPS Action Plan.

### **Aggressive tax planning and harmful tax practices**

Throughout the interviews, respondents argued that existing EU tax instruments have been relevant in particular with regard to addressing the following two needs:

- The need to ensure more transparency and a more binding approach to information exchange on tax rulings as well as on internal transactions within multinational groups.
- The need to coordinate the implementation of OECD/G20 BEPS reports and Common Reporting Standard across Member States and, more generally, to coordinate national corporate taxation rules, policies, and approaches to addressing aggressive tax planning and harmful tax practices.

At the same time, a majority of respondents pointed out that more could be done in the field of digital taxation. This currently represents a gap in the framework that needs to be addressed. The majority of interviewed stakeholders also believe that most of the results of the EU instruments in scope would only have been achieved to a limited extent or to some extent by national interventions. When it comes to the added value of having common EU instruments rather than individual national measures, the majority of interviewed stakeholders confirmed that EU instruments bring more results than national interventions. This is particularly the case because the EU plays a coordination role, as stakeholders emphasised.

### **Business facilitation**

Regarding business facilitation, consulted stakeholders stressed that the EU instruments have been relevant for solving the issue of double taxation. Still, there are some outstanding needs to be addressed. For instance, as mentioned by stakeholders, more should be done when it comes to aggressive tax planning via inter-group dividend payments.

In addition, the interviewees explained that Member States, through individual actions, would have succeeded only to a limited extent to avoid situations of double non-taxation, advise the Commission on transfer pricing issues and assist the Commission on finding practical solutions for transfer pricing tax issues. This means that the Commission's actions have, according to most interviewees, been essential to achieving such results.

Some interviewees also indicated that the Joint Transfer Pricing Forum and the Parent Subsidiary Directive contribute, *inter alia*, to a more harmonised implementation of the OECD/G20 BEPS Action Plan across the EU.

### **External policies**

With respect to good governance in tax matters and the relations with third countries, stakeholders discussed several aspects. Most of the representatives of national tax administrations and NGOs interviewed for this assignment stressed that there are two main outstanding problems, which are only partially targeted by the current soft law approach:

- The problem generated by low/no income taxes in some third countries that limit the possibilities for Member States to enforce their tax policy.
- The need to support developing and other third countries in the fight against tax avoidance and their integration in the international tax good governance agenda.

At the same time, stakeholders also noted that EU action is needed because the Member States would not be able to achieve the same outcomes through individual measures. In particular, four aspects stand out from the point of view of consulted stakeholders: i) a common EU stance on tax good governance criteria, serving as base for all EU external tax policies and discussions on tax good governance with international partners; ii) clear and coherent EU approach to identify third countries that do not comply with the good governance standards; iii) unified response to third countries that are non-compliant with the good governance standards; and iv) the inclusion of tax good governance standards into the revised Financial Regulation.



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