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Good tax governance

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Good tax governance

International corporate tax planning and corporate social responsibility - Does one exclude the other?

Proefschrift ter verkrijging van de graad van doctor aan Tilburg University
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LIST OF ABBREVIATIONS

ATAD - Anti-Tax Avoidance Directive
ATAP - Anti-Tax Avoidance Package
BEPS - Base Erosion and Profit Shifting
BJR - Business judgement rule
BSDC - Business and Sustainable Development Commission
CCCTB - Common Consolidated Corporate Tax Base
CCTB - Common Corporate Tax Base
CG - corporate governance
CSI - Corporate Social Irresponsibility
CSR - Corporate Social Responsibility
ECJ - European Court of Justice
ESG - Environmental, Social and Governance
EU - European Union
G20 - Group of Twenty
GER - Germany
GRI - Global Reporting Initiative
HMRC - Her Majesty's Revenue and Customs
IMF - International Monetary Foundation
ISO - International Organization for Standardization
MNC - multinational corporation
MNE - multinational enterprise
NL - the Netherlands
OECD - Organisation for Economic Co-operation and Development
OECD MNE Guidelines
PRI - Principles for Responsible Investment
R&D - research and development
RBC - responsible business conduct
SDGs - UN Sustainable Development Goals
SMEs - small- and medium sized enterprises
UK - United Kingdom
UN - United Nations
UNCTAD - United Nations Conference on Trade and Development
US - United States

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1. INTRODUCTION

1.1. Background

International corporate tax planning has become a heavily debated topic in media, politics, and academia. Various investigations and leaks, such as the UK's Parliament's Public Account Committee (HMRC) hearing about the tax behaviour patterns of Starbucks, Google, and Amazon in the UK, [1] 'Lux Leaks', [2] 'Panama Papers', [3] 'Paradise Papers', [4] but also the European Commission State Aid investigations,[5] have concentrated public and political attention on the tax behaviour of multinationals as well as state shortcomings in relation to eliminating the negative effects of tax avoidance on the international arena. Consequently, the necessity for more focused attention on the issue of international corporate tax planning has become inevitable. Extensive attention, a negative public response, and regulatory changes also alert corporate taxpayers themselves, because such negative attention also has its effects on the business.[6]

On the one hand, multinational corporations (MNCs or multinationals) are accused of not paying (enough) tax. The media have published reports on tax planning, generally shining a negative light on the practice and alleging that corporations avoid paying their 'fair share' of taxes.[7] The reports on so-called aggressive tax planning practices have triggered public outcry from politicians sharing this public sentiment and accusing multinationals of immoral behaviour.[8] On the other hand, it can be argued that, since multinationals act in accordance with the law (except in the case of tax evasion) and follow their business interests, there is no basis for such morality-based accusations. In general, tax planning stays within the frame of the existing legal rules and it is often a common and acceptable economic behaviour.

Tax planning is legal and, in principle, there is nothing wrong with tax subjects trying to lower their tax burden: from a business economics viewpoint, tax is seen as a cost and costs should be kept low.[9] Even so, various international organizations, such as the European Union (EU),[10] the Organisation for Economic Co-operation and Development (OECD),[11] the United Nations (UN),[12] the Group of Twenty (G20),[13] and the International Monetary Foundation (IMF),[14] have all added international corporate taxation and tax avoidance to their (priority) agendas. In the international political arena, taxation is considered at an equal level as (or even as a higher priority than) economic crises, tense political situations, and problems of developing countries. Such heightened

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[1] UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited.

[2] International Consortium of Investigative Journalism. (ICIJ). Luxembourg Leaks: Global Companies' Secrets Exposed.

[3] International Consortium of Investigative Journalism. (ICIJ). The Panama Papers.

[4] International Consortium of Investigative Journalism. (ICIJ). An ICIJ Investigation Paradise Papers: Secrets Of The Global Elite.

[5] European Commission. (2015, October 21). Commission Decides Selective Tax Advantages for Fiat in Luxembourg and Starbucks in the Netherlands are Illegal under EU State Aid Rules. Press release; European Commission. *The Fight against Tax Fraud and Tax Evasion*. Overview webpage; EU state aid rulings (Apple case): European Commission. (2014). State aid case: *Ireland Alleged aid to Apple*; European Commission. (2014). State aid: *Netherlands Alleged aid to Starbucks*; European Commission. (2016). State aid case: *Luxembourg granted to Fiat.*

[6] See e.g. Engskov, K. (2012, October 16). Starbucks Coffee Company in the UK; Engskov, K. (2012, December 6). An Open Letter from Kris Engskov; The Guardian. (2015, December 15). MEPs Should Support a Fair Tax Payer Label. Open letter to *The Guardian*.

[7] See e.g. Birrell, I. (2014, January 6). Bill Gates Preaches the Aid Gospel, But Is He Just a Hypocrite? *The Guardian*; The Tax Justice Network comment on this *The Guardian* article: Tax Justice Network (TJN) (2014, January 6). *Bill Gates: Is He Just a Hypocrite*?; Conway, Z. (2015, May 29). BBC Uncovers 'Aggressive' Tax Avoidance Scheme. *BBC News*; Setzler, B. (2014, January 17). The Real Tax Threat to American Businesses. *US News.*

[8] See e.g. UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited; Wintour, P. (2015, February 6). Ed Miliband: I won't back down on tax avoidance. *The Guardian* (online); European Commission. *The Fight against Tax Fraud and Tax Evasion*. Overview webpage.

[9] See also chapter 3, section 5.

[10] European Commission webpage: *Time to Get the Missing Part Back.*

[11] OECD. (2013). *Addressing Base Erosion and Profit Shifting (BEPS).* Paris: OECD Publishing.

[12] UN Global Compact. *Global Compact for Responsible Corporate Citizenship*.

[13] See e.g. G20. (2014, November 15-16). *Leaders' Communiqué.* Brisbane, Australia.

[14] International Monetary Fund. (2014, July 29). *Spillover Report 2014*. Washington D. C. : IMF Policy Paper.

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political attention suggests that various stakeholders and society at large consider some corporate tax behaviour – even if it is legal – (socially) unacceptable at some point.

Tax planning is not a black and white concept; it can and does occur in many different forms and with various gradations, such as making legitimate use of research and development (R&D) incentives or setting up artificial hybrid entities in low-tax countries. In general, tax planning is a legal way to take the tax effects of various laws and rules into account and to adapt corporate actions accordingly. Every taxpayer engages in tax planning to a certain extent, whether it is intentional or not. Corporate tax planning practices vary from legal and legitimate to legal and socially illegitimate or even illegal. As will be explained in chapter 3, tax planning can be carried out through tax mitigation, which makes legitimate use of tax incentives created by the states. Efforts to mitigate the tax burden, however, can easily turn from legal and legitimate tax planning into legal tax planning that is morally[15] questionable and can be called tax avoidance. Tax avoidance can be strictly legal (according to the letter of the law), but it conflicts with the spirit of the law, in which case such corporate tax practices are called into question.[16] Some multinationals even go a step further and artificially create opportunities to reduce their tax obligation by engaging in aggressive tax planning.[17] Both tax avoidance and aggressive tax planning are terms that seem to have negative moral connotations. Aggressive tax planning is not a legal term, but it suggests that certain corporate behaviour in tax planning matters raises a serious degree of public concern. In this research it is conceptualized as a strictly legal yet unethical form of tax planning which goes against a corporation's moral responsibilities towards society. These four gradations of corporate tax planning will be discussed further in chapter 3.

It goes without saying that it is a state's responsibility to develop a legal system, including tax laws, that facilitates justice and fairness. However, the law is imperfect, because it is always subject to interpretation and lawmakers, when writing the law, cannot predict and thus cannot take into account the future behaviour of people.[18] Consequently, some powerful taxpayers, such as multinationals, are able to circumvent the rules. For instance, they can use legal interpretation to broaden the scope of the wording of the law in an effort to legitimize their tax planning practices. However, where these same practices, although legal, can be argued to conflict with the purpose or the spirit of the law, they may be considered to be socially unacceptable.[19] In chapters 3 and 4 the social element of corporate behavior will be discussed. The core of societal unacceptability of corporate tax practices seems to lie in several factors. For instance, corporations that engage in tax avoidance or aggressive tax planning are seen as eroding their fair share of corporate income taxes in the societies in which they operate. Fair share is for the purposes of this research defined in chapter 3 as corporate income tax that multinationals have to pay according to the combination of the letter and the spirit of the law. However, due to the imperfect laws and often unclear legislative intentions, the spirit of the law is not a clearly defined concept. Moreover, socially responsible corporations are not expected to act as perfect (corporate) citizens but stay away from immoral behaviour instead. Therefore, this research starts from the other end by asking what is unfair, suggesting that paying corporate income tax is a legal and moral obligation of corporations. Another important element of social acceptability of corporate tax practices is transparency; various

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[15] Crane and Matten state that "[M]orality is concerned with the norms, values, and beliefs embedded in social process which define right and wrong for an individual or a community. Ethics is concerned with the study of morality and the application of reason to elucidate specific rules and principles that determine morally acceptable courses of action. Ethical theories are the codifications of these rules and principles." According to them, "[E]thics represents an attempt to systemize and rationalize morality, typically into generalized rules that supposedly offer a solution to situations of moral uncertainty." Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. pp. 8-9.
This research uses the terms 'ethics' and 'morality' interchangeably, while largely leaning on this argumentation of Crane and Matten.

[16] See e.g. Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press. p. 385.

[17] Piantavigna, P. (2017). Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, Despite Linguistic. *World Tax Journal* 9 (1), 37-98. p. 54; Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250. p. 227.

[18] Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28. p. 14; See also Chapter 3 on tax planning, section 2.2.

[19] See e.g. Douma, S. (2018). *Miscommunication and Distrust in the International Tax Debate*. Deventer: Wolters Kluwer; The Association of Chartered Certified Accountants (ACCA). (2017, March). *G20 Public Trust in Tax*. ACCA: London.

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stakeholders do not seem to trust multinationals mainly due to vague and not transparent communication on their tax affairs.[20]
The fact that social acceptability of corporate tax practices depends on various elements suggests that the social legitimacy of tax planning is a matter of degree, which in turn complicates finding common grounds for the (non)acceptance of tax planning. Certain degrees of tax planning, such as tax avoidance and aggressive tax planning, are addressed at the national and international level as a growing legal, economic, but also a societal, problem. The reason that corporate tax avoidance or aggressive tax planning can be considered problematic is rooted in the basic functions of taxation, as will be argued in chapter 3 of this research. Most importantly, multinationals that manipulate the legal system for the purpose of avoiding their tax liabilities benefit from public goods and services without contributing to the societal cost of their production and, therewith, act as free-riders.[21] Corporate free-riding has a number of negative consequences: it compromises the national tax systems, distorts competition, and either leads to a decrease in public goods and services or a price increase of these public goods and services for other taxpayers.[22] Corporate tax planning thus becomes unacceptable where core values of society are violated. Tax planning that results in significant reduction of the tax liability in a way that is not intended by the legislator may have a negative impact both on economic development and maintaining a fair society.
As a result, multinationals are even being accused of being immoral while complying with the (letter of the) law.[23] Tax has become a societal debate that inevitably involves moral responsibility. However, it needs to be stressed that, contrary to some interpretations, tax planning, as such, is normal and accepted, but only to a certain degree. It becomes problematic in case the law is abused and stretched to the limits in such a way that certain taxpayers enjoy unjust privileges, such as in the case of tax avoidance or aggressive tax planning. One of the core aims of this research is to help corporations to understand better when and why legal tax planning becomes an issue from a moral perspective. In the corporate context, such moral responsibility can be exercised within the framework of corporate social responsibility (CSR). CSR is a corporate commitment to go beyond the strict compliance with the law and consider how corporate behaviour affects various important social matters. Usually CSR addresses topics such as the environment, human rights, and labour. For instance, Western multinationals that endorse CSR are expected to abstain from using child labour in less developed Asian countries.[24] However, many multinationals that seem to be the forerunners in their positive impact on society are often criticized for their tax planning strategies, such as, for instance, Starbucks, Amazon, and Google.[25] This may raise the question whether it is hypocritical for a corporation that claims to have a strong commitment to CSR and, at the same time, possibly as a result of aggressive tax planning strategies, pays (close to) zero corporate income tax in the countries it operates in. Taxes represent an entity's fundamental contribution to society, since, without taxes, there would be no state nor public goods and services.[26]
Viewing tax as a part of CSR is a growing trend in various related discussions and it is not a new topic.[27] In the context of CSR, tax is now considered in a similar way that the environment was 20

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[20] See chapters 2.5 and 6.3. See also Douma, S. (2018). *Miscommunication and Distrust in the International Tax Debate*. Deventer: Wolters Kluwer; The Association of Chartered Certified Accountants (ACCA). (2017, March). *G20 Public Trust in Tax*. ACCA: London.
[21] Surely, there is no clear direct link between taxes corporations pay and public goods or services they use but this is not the focus of this research. One of the underlying assumptions of this research is that the states have developed tax laws in order to raise the public revenue that will be used for funding public goods and services this states considers necessary. Corporations that operate in certain states make - in one way or another - use of these public goods and services and therefore they should also contribute in to funding them if the law requires so.
[22] See e.g. Hemels, S. J. C. (2014). Fairness: A Legal Principle in EU Tax Law? In Brokelind, D. (Ed.), *Principles of Law: Function, Status and Impact in EU Tax Law* (pp. 413-437). Amsterdam: IBFD. p. 419.
[23] UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited. Q. 485, p. 40.
[24] Fisher, C. and Lovell, A. (2009). *Business Ethics and Values: Individual, Corporate and International Perspectives* (3rd Ed.). Essex: Prentince Hall. p. 46.
[25] See also Hasan, I., et al. (2019). Corporate Social Responsibility and Profit Shifting. SSRN Working paper 19.01.2019.
[26] See chapter 3, section 2.
[27] See e.g. Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press; Avi-Yonah, R. S. (2008). Corporate Social Responsibility and Strategic Tax Behaviour. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp.

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years ago.[28] However, tax is still not truly being seen as a part of CSR.[29] Therefore, this research investigates whether tax planning should be part of CSR and, if so, how does tax planning fit in the context of CSR. This research focuses foremost on the corporate perspective on the social outcry concerning tax planning. Therefore, it also needs to be investigated whether and how corporate boards are able to combine tax and CSR.

Multinationals are complex entities with multidimensional layers of decision-making processes that need to balance conflicting interests. Taxation poses various challenges for corporate decision making. On the one hand, taxes are considered to be a cost that should be kept low in order to keep some stakeholders, such as shareholders, satisfied. On the other hand, taxes represent a crucial contribution to society and, by avoiding their tax liabilities, corporations fail to take responsibility for the other stakeholders, such as society at large. However, there seems to be a certain understanding that corporate boards face some constraints in corporate law that restrict them considering tax as a part of CSR. Some multinationals seem to lean on this argument to justify their clearly unethical tax planning strategies.[30] To understand whether this is the case and how corporate boards balance different interests, corporate decision-making procedures deserve attention. Corporate governance (CG) refers to the way power is distributed within a corporation and to the decision-making process with regard to the use of this power. It is a set of rules and principles for how a (large) company should be regulated and managed.[31] Among corporate law scholars, there are two prevailing theories that refer to the essence of a corporation. Shareholder theory and stakeholder theory address what corporations should be responsible for and to whom they are accountable. It will be argued in chapter 5 that from the legal perspective there is a conversion between these two theories and in the four jurisdictions this research focuses on (UK, US, GER, NL), corporate boards are not obliged to prioritize shareholder value maximization. On the contrary, according to the law, as developed by the legislator and the courts, their focus should be on but the best long-term corporate interests. Nevertheless, corporate decision-making is next to laws also affected by the corporate culture (in which prioritizing shareholder value maximization may prevail). Based on these CG regimes and cultures, this research will analyze whether multinationals that have committed themselves to ethical business practices, for instance through CSR, can also opt for more responsible tax planning. In this research, such tax planning is conceptualized as good tax governance.

Aggressive tax planning can reward multinationals with higher (short-term) returns but, at the same time, it also presents new growing risks for multinationals. For example, regulatory competition on the state level incentivizes corporations to minimize their tax liabilities, which, at the same time, is being combatted on the international level. This creates legal uncertainty.[32] Furthermore, the negative undertone that corporate tax planning has earned in the media and politics, presents a serious threat to the corporate and brand reputation. In addition to such unpredictable threats, corporate tax planning has high transaction costs, since, due to its complexity, it requires various

183-198). Berlin/Heidelberg: Springer-Verlag; Sikka, P. (2010). Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance. *Accounting Forum* 34 (3-4), 153-168; Sikka, P. (2013). Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance—A Reply to Hasseldine and Morris. *Accounting Forum* 37 (1), 15-28; Hasseldine, J. and Morris, G. (2013). Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection. *Accounting Forum* 37 (1), 1-14; Avi-Yonah, R. S. (2014). Just Say No: Corporate Taxation and Corporate Social Responsibility. *University of Michigan Public Law Research Paper No. 402; University of Michigan Law & Econ Research Paper No. 14-010*; Cerioni, L. (2014). International Tax Planning and Corporate Social Responsibility (CSR): Crucial Issues and a Proposed "Assessment" in the European Union Context. *European Business Law Review* 25 (6), 845-875; Panayi, C. H. J. I. (2015). Is Aggressive Tax Planning Socially Irresponsible? *Intertax* 43 (10), 544-558; Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88.

[28] Houlder, V. (2004, November 22). The Tax Avoidance Story as a Morality Tale. *Financial Times* (online).

[29] Schuil, G. et al. (2014). *Good Tax Governance in Transition: Transcending the Tax Debate to CSR*. Report coordinated by the Dutch Association of Investors for Sustainable Development (VBDO) with contributions from Oikos and PwC: "of the sixty-nine companies included in the VBDO review, only four (6%) companies specify tax as a CSR issue. Looking at the extensive debate on tax we have witnessed during recent years, this number indicates that this discussion not yet reflects a real change in the mind-set of companies when it comes to tax." (p. 19).

[30] For instance, during the UK Public Accounts Committee hearing, Google's Vice President for Sales and Operations, Northern and Central Europe, Matt Brittin claimed that (aggressive) tax planning "is not a matter of personal choice" (UK HMRC 2012, Q. 485, p. Ev 40).

[31] Du Plessis J. J. et al. (2015). *Principles of Contemporary Corporate Governance* (3rd Ed.). Melbourne: Cambridge University Press. p. XXV.

[32] Think for example of the recent EU state aid cases where taxpayers such as Starbucks, Fiat, and McDonalds had agreements on a state level that, for different reasons, were reversed at the EU level. With the retroactive effect of such inter-governmental decisions, high monetary sanctions were imposed on corporate taxpayers.

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experts to be hired. Thus, in the end, it might be just a Pyrrhic victory for multinationals. Therefore, as I will further argue in this research, good tax governance is not only necessary from an ethical perspective but also from an economic perspective.

1.2. Motivation to conduct this research

International corporate tax planning is a rich research topic that can fascinate any scholar that is in search of the right balance between economic efficiency and social justice. Without taxation there would be no society; at the same time, an unbalanced tax system is also harmful for society. A fair balance in a tax system has always been part of politics and societal debate. In recent years, however, there has been an intriguing change of focus in public debates with regard to tax. It seems that some multinationals that are using loopholes in various national laws to minimize their tax liability, plan their tax strategy to the extent that it can be seen as abusing the system and circumventing the rules.[33] This causes several negative externalities, such as injustice and inequality but also hindering sustainable development,[34] as I will explain through this research. Therefore, the tax behaviour of multinational corporations is now the eye of the storm, as they are accused of immoral choices on a regular basis. Having said that, no-one should pay more tax than the law requires. Moreover, states can adopt laws that often incentivize MNCs to behave in this way, as they create tax rules to attract multinationals.[35] From the corporate perspective, trying to lower one's tax costs is understandable. However, striving for an absolute minimum by circumventing the laws is not socially responsible, which can for instance result in damaging the reputation of corporations. Consequently, tax avoidance or aggressive tax planning can result in short-term gains but can at the same time negatively affect the best long-term interests of a corporation.

This dilemma highlights many provoking research issues without a one correct answer, and this is very appealing for a legal researcher. Tax laws and corporate laws are complicated and nuanced. Details and technicalities, as well as the international context, add more possibilities for loopholes and errors in laws. This is evident in international tax law, but also in corporate law. Different scandals, such as the 'Lux Leaks', 'Panama Papers', and 'Paradise Papers' have also shown something very important, namely, that there is a gap between what a layperson sees and finds acceptable in tax planning and what some other members of society, such as multinational corporations and wealthy individuals, see and find acceptable. Tax avoidance is an important issue for society, but it exists in a bigger context of complex societal problems. This needs to be acknowledged in order to manage expectations with regard to solving corporate tax planning related problems.

Furthermore, many leaders have publicly criticized tax avoidance schemes that function in a grey area of the law. For instance, former president Barack Obama stated "[M]y attitude is I don't care if it's legal, it's wrong"[36] and the former UN Secretary General Kofi Annan stated that "[I]t is unconscionable that some companies... are using unethical tax avoidance... to maximise their profits while millions of Africans go without adequate nutrition, health and education."[37] Also, the former UK Prime Minister David Cameron condemned tax avoidance stating that it is "morally wrong".[38] As a result of such public judgements and discussions, taxation has inevitably become a subject of public interest, which means that a corporation's behaviour will not go unnoticed in this area.

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[33] Some authors even claim that for some companies tax has become a profit centre. See e.g. Schön, W. (2013). Vorstandspflichten und Steuerplanung. In Krieger, G. (Ed.), *Festschrift für Michael Hoffmann-Becking zum 70. Geburtstag* (pp. 1085-1100). München: Beck: "tax department which may be inclined to act as a profit center".

[34] "Sustainable development has become a top concern for many businesses as it involves meeting the needs of the present without compromising the ability of future generations to meet their own needs." In Europe, sustainability includes both economic and environmental connotations; whereas in the US it is associated more with environment. Ferrell, O. C. et al. (2017). *Business Ethics: Ethical Decision Making and Cases* (11th Ed.). Boston: Engage Learning. p. 347.

[35] Naturally, corporate lobbyists play an important role in creating certain rules.

[36] BBC News. (2014, July 25). Obama Accuses Firms of "Cherry-Picking" Over Tax Rules. *BBC News* (online).

[37] Africa Progress Panel (2013). *Equity in Extractives Africa Progress Report 2013*. The Africa Progress Panel: Geneva. p. 7.

[38] Morris, N. (2012, June 21). David Cameron Joins the Attacks on Jimmy Carr Over 'Morally Wrong' Scheme to Avoid Tax. *Independent*.

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Therefore, corporations cannot ignore that tax includes a moral dimension.[39] The way tax avoidance appears in the media and public debates suggests that corporate behaviour does not meet the expectations in relation to distributive justice.[40] In light of such negative publicity, corporations are often left with empty hands when it comes to solutions.

Aggressive and large-scale tax planning increases inequality. Moreover, tax avoidance potentially has serious consequences for currently well-functioning and sustainable societies and markets,[41] as it undermines sustaining long-term development. What by some stakeholders is seen as free-riding behaviour of certain members of society arguably undermines trust and the well functioning of society.[42] Taxation is a "part of a bigger development picture," which has an important role to play with regard to "a collapse of trust in the functioning of tax regimes but also in the economic system in a wider sense."[43] Discussions around taxation reflect different and conflicting opinions and "this needs to be recognized and accepted if the debate is to be moved forward."[44] It is important to learn to agree to disagree. Nevertheless, a nuanced dialogue, that this research also aims to contribute to, helps to find possible steps towards various solutions.

The role and responsibilities of corporations in society are in constant movement and need to be adjusted over time. How corporations are viewed in a society also shapes the expectations of society at large. The beliefs and expectations of stakeholders change over time.[45] Corporations should change over time if they wish to stay competitive and not risk getting a bad reputation.[46] This is something that can also be witnessed with regard to corporate tax planning. In 2012 PwC concluded that "[W]hat constitutes 'acceptable' tax planning may vary geographically but it's still apparent that attitudes are changing, and that politicians and policy-makers are reacting to these changes."[47] As a result of various public hearings, scandals and media attention addressed in this research, stakeholders' expectations with regard to multinationals' behaviour concerning their tax planning has changed. Such public hearings "may be politically driven, but it reflects a public sentiment."[48] The founder and chief executive of the investment firm BlackRock, Fink, claimed that "[S]ociety is demanding that companies, both public and private, serve a social purpose", and corporations should prove their "positive contribution to society".[49] This statement was not directly related to taxation, nevertheless, it indicates that multinationals need to be alert in their risk management strategy. For instance, major accounting firms are increasingly advising their corporate clients "to re-examine their tax strategies with a view to mitigating reputational risk and to anticipating greater disclosure requirements on where taxes are paid."[50] CSR provides moral guidance on business practices "either by putting limits on what is acceptable behaviour in the short run, or by encouraging companies to pay more attention to long-term performance."[51] Such long-term performance in the context of tax planning, for instance, would be good tax governance, as I will argue in chapter 6.

Motivated by such serious growing issues in society, this research aims to go back to the very basic questions of taxation and place such questions in the context of ethical business practices.

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[39] More empirical research is necessary in order to find out what exactly are the most important factors in relation to the trustworthiness of multinationals' tax behaviour. This, however, is outside the scope of this research.

[40] See e.g. Fairless, T. (2015, April 6). Huge Profit Stokes Concerns over Starbucks's Tax Practices in Europe. *The Wall Street Journal* (online); Rowney, M. (2015, April 20). What's Wrong with Tax Avoidance? *NewStatesman* (online); see also n1.

[41] See chapter 4, section 5.2.

[42] See e.g. Oxford University Centre for Corproate Reputation. (2016). *Rebuilding Trust in Business*. pp. 7-9; Douma, S. (2018). *Miscommunication and Distrust in the International Tax Debate*. Deventer: Wolters Kluwer. pp. 9-10, pp. 26-27, p. 29; The Association of Chartered Certified Accountants (ACCA). (2017, March). *G20 Public Trust in Tax*. ACCA: London.

[43] KPMG (2018). The Role of Responsible Tax Side Event during the Platform for Collaboration on Tax conference "Taxation and SDGs" New York 14-16 February 2018.

[44] KPMG (2018). The Role of Responsible Tax Side Event during the Platform for Collaboration on Tax conference "Taxation and SDGs" New York 14-16 February 2018.

[45] Horrigan, B. (2010). *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices across Government, Law and Business*. Cheltenham: Edward Elgar. p. 6.

[46] Eccles, R. G. et al. (2007). Reputation and Its Risks. *Harvard Business Review* February issue 85 (2), 104-114.

[47] Stamm, R. and Preston, J. (2013). PwC 16th Annual Global CEO Survey Dealing with disruption, Focus on tax: 'Tax Strategy and Corporate Reputation: ~~A Tax Issue~~, a Business Issue'.

[48] Gribnau, J. L. M. et al. (2018). Codes of Conduct as a Means to Manage Ethical Tax Governance. *Intertax* 46 (5), 390-407. p. 391.

[49] Fink, L. (2018). Annual Letter to CEOs: 'A Sense of Purpose'.

[50] MSCI ESG Research. (2013, December). The 'Tax Gap' in the MSCI World. *ESG Issue Brief*.

[51] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. p. 23.

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Companies, especially multinationals, are often seen as greedy monsters blinded by profit. At the same time, many companies are motivated to do more than short-term profit maximization at the cost of society. Here, transparency can be considered as a tool to distinguish good from bad and right from wrong.[52] There are companies that believe in moral leadership but, with regard to tax planning, it is not very clear what is good or bad or right and wrong. For such businesses, this research will help to give some guidance on reshaping their tax strategies. In addition, this research also provides important discussions and guidelines for other actors involved in tax planning, to improve the legitimacy of the international legal system that affects corporate taxation.

1.3. The aim of this study

This research addresses various issues related to international corporate tax planning from a legal and ethical perspective: a) the conceptualization of tax planning; b) taxation as an element of corporate social responsibility; c) tax planning as a part of corporate decision making, and d) the relationship between corporate regulations, CSR, and taxation.

As a first step, the concept of tax planning and its various possible gradations based on morality and social acceptability are discussed. In light of this, the current debate on (aggressive) tax planning (and avoidance) will be analyzed from the perspective of a multinational. Many academic studies thus far have focused on the issues related to tax planning without clearly identifying and considering the role of the actors, such as states, tax advisors, investors, or other stakeholders, that are (to greater or lesser extent) involved in the tax planning process. This is a problem, because tax planning is an issue that can be approached from different perspectives with conflicting objectives. Nevertheless, for a better understanding of the problem in the bigger picture, it needs to be discussed from different perspectives. This research focuses on the corporate perspective. Thus, the criticism but also the justifications behind tax planning will be approached with the aim of trying to understand the business practices and corporate decision-making process better.

Tax planning can have a negative effect on society and the economy, because it potentially leads to unfairness and market distortions. However, this situation is not only created by the profit-driven behaviour of multinationals but also by diverging tax systems, lack of coordination and regulatory competition between the states. So far, the public debate has mainly focused on accusing multinationals of bad behaviour. This, however, is unbalanced, often leaving out the role of states or media, for instance. Therefore, in this research, the topic of corporate tax planning is approached from a different viewpoint, the perspective of a corporation.

After trying to understand the process of corporate tax planning from the corporate perspective, this research zooms in to companies that endorse their responsibilities towards society. Thus, the focus moves beyond strict compliance with the law. First, the concept of corporate social responsibility (CSR) will be studied. The main elements of CSR that could help to better understand the social and moral dimension of taxes will be researched. Based on this, the framework on how tax planning should fit into CSR companies' strategies will be developed. Also, the possible challenges that multinationals might face when trying to make their international tax planning strategies more responsible – in chapter 6 conceptualized as good tax governance – will be discussed. Such possible challenges will be studied by briefly comparing different corporate governance regimes in order to understand whether and what kind of limits could they possibly impose on good tax governance, tax planning that is socially responsible. The brief comparison will focus on the 'market-oriented' Anglo-Saxon model (shareholder approach) and the 'network-oriented' Rhineland model (stakeholder approach) of corporate governance.[53] These models illustrate two diverging regulatory approaches towards stakeholders and shareholders in company management. The comparative approach is expected to show different potential boundaries and incentives posed by company law

[52] See chapter 6, section 3.
[53] Habisch, A. (2005). *Corporate Social Responsibility across Europe.* Berlin / New York: Springer. pp. 367-370.

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on socially responsible taxpaying. This can be especially useful for multinationals that operate in both systems.
The final aim of this research is to provide some guiding principles that could serve as a foundation for developing a framework for a code of conduct for good tax governance. Good tax governance, as conceptualized in this research, consists of substantive and procedural elements and stands for corporate tax planning practices that are in line with the corporation's CSR agenda; corporations that wish to pursue good tax governance do not pay an unfair share and are transparent about it. The substantive part of good tax governance can be seen as ethical behaviour which is pursued as a goal in itself and the use of transparency as means to that end. Transparency is the procedural element of good tax governance. It means that a multinational communicates its internal tax values and a strategy clearly both internally and externally. As a result, a multinational proves to its stakeholders that its tax governance is in order and under control. Transparency serves as a means to achieve good tax governance under the flagship of CSR. In order to implement good tax governance, multinationals could develop a tax code of conduct.

1.4. Methodological choices

It goes without saying that international corporate tax planning raises countless questions, and, as such, it is not feasible to answer all of them in one research. Moreover, international corporate tax planning is a subject that can be studied in many different fields separately and combined. Here, one can think of, for example, law, economics, politics, or sociology. Furthermore, this is a topic that affects and can be affected by many different actors, such as states, corporations, international organizations, consumers, but also society at large. This suggests that any research problem in this area can be approached from different perspectives. In the light of such complexity, this research takes a closer look at the corporate perspective on international tax planning. This means that multinationals are not considered as wrongdoers; instead, this research aims to help coporations to understand better what is expected from them when it comes to CSR and tax strategy. Furthermore, this research briefly analyses corporate law for explaining that corporate boards have sufficient discretion to opt for good tax governance. Lastly, this research provides some practical suggestions for corporations that wish to opt for good tax governance. This research, however, does not provide elaborate answers concerning which tax structures are socially (ir)responsible. This research concerns the societal perception and the groundwork for good (corporate) tax governance rather than the technical aspects of international tax law.[54] It is clear that, even though nobody should pay too much tax, paying (close to) no tax is also not acceptable. This also has some serious negative effects for society at large, but also some specific threats for companies. As this research places corporate tax planning in the context of corporate social responsibility (CSR), it should be most relevant for companies that claim to be socially responsible and have thereby accepted certain responsibilities beyond pure compliance with (the letter of) the law.
This research has a multidisciplinary (mainly law and applied ethics) nature and is conducted from a bottom-up perspective. This means that the concept of tax planning is approached from a company perspective. It will be investigated whether taxes are part of social responsibility and, if so, how socially responsible companies could implement good tax governance.
Following that, the overview of the underlying methodological choices and limitations of this research are provided. Where appropriate, more detailed methodological aspects will be explained in each separate chapter respectively.

[54] As the B-team states (p. 2): "We recognise that public trust in multinationals remains low, and that tax poses an increasing reputational risk for companies." The B Team. (2018). A New Bar for Responsible Tax: The B Team Responsible Tax Principles.
According to the Institute of Business Ethics over recent years, tax avoidance has consistently been the number one concern of the British public when it comes to corporate conduct. See: IBE. (2019). *Attitudes of the British Public to Business Ethics 2019*. Similarly, the Pew Research Center found that 64% of the American public say they are bothered 'to a great extent' by the feeling that some corporations aren't paying a fair amount of taxes. Motel, S. (2015). 5 Facts on How Americans View Taxes. *Pew Research Center*.

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1.4.1. Research questions

Building on the background, aim and motivation of this study, the main research question of this dissertation reads as follows:

How can multinationals opt for socially responsible tax governance while meeting company law requirements?

Supporting sub-questions read as follows (divided according to the pillars of this research):
1. Tax planning: What kind of tax planning is (not) socially responsible?
2. Tax planning and CSR: How does tax planning fit in the context of CSR?
3. Good tax governance and corporate governance: What are possible CG challenges corporations face (internally and externally) when trying to fit their tax planning strategies into their CSR policy?
4. Good tax governance: What is socially responsible tax governance and how can multinationals opt for good tax governance?

1.4.2. Methodology

Taxation is a multidisciplinary field. For example, tax reporting and compliance generally fall under accounting, while questions about tax efficiency concern economics, compliance falls under law, economics and psychology, and discussions about tax competition (state) involve political science.[55] Therefore, based on the (background of the) research questions presented above and with an ambition to fulfil the aims of this dissertation, several research methodologies will be used.
As said, tax planning is legal and often rational from the business perspective. Moreover, tax planning involves different actors and not just multinationals. Therefore, the accusations that multinationals' behaviour is immoral can sometimes be unjust. Nevertheless, there is a (moral) limit for the societal acceptance of tax planning, which multinationals should consider if they wish to be socially responsible corporations. Accordingly, the underlying statement of this research is that companies that claim to be socially responsible should impose restrictions on themselves, based on certain social norms. Based on an analysis of the theories and practices of CSR it will be argued that multinationals that claim to be CSR companies should have a more transparent tax planning system and they should not avoid paying taxes beyond the limits of moral and societal acceptability (thus, no aggressive tax planning). Since every corporation is different, there are no clear-cut criteria to measure whether corporate tax decisions are socially responsible. Nevertheless, based on studying various indicators developed by different organizations, it is possible to identify some criteria that help corporations to adopt good tax governance. For instance, by developing a tax code of conduct that responds to the stakeholder concerns and being transparent about it are two basic criteria for proving the intention to take responsibility, as will be explained in chapter 6.
Depending on the nature of the corporate governance culture (either shareholder or stakeholder approach), company law and securities regulation may impose some restrictions on multinationals to opt for good tax governance.[56] Some businesses often protect their aggressive tax planning practices by arguing that they cannot opt for less aggressive tax planning due to their legal obligations towards shareholders (value maximization).[57] However, whether that is a correct and justified argument is not sufficiently proven yet. Therefore, the aim of this research is to find out whether certain underlying assumprions of CG that are used in public debates, such as, for example, the responsibility of shareholder value maximization, could promote either more aggressive tax

[55] Lamb, M. et al. (Eds). (2005). *Taxation: an Interdisciplinary Approach to Research*. Oxford: Oxford University Press.
[56] See chapter 5.
[57] See e.g. UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited. Q. 485, p. Ev 40.

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planning or good tax governance. For this purpose, a brief doctrinal analysis of four corporate law regimes (UK, US, GER, NL) will be provided. This research suggests that such corporate reasoning that they cannot opt for less aggressive tax planning due to their legal obligations towards shareholders is not justified from the corporate law perspective. Moreover, by analyzing the concept of CSR and its position with regard to corporate tax practices, it will be explained that good tax governance adds to the long-term shareholder value and corporate reputation and is therefore in the best interests of the company, as developed in company law.

Based on corporate law, corporate board has an exclusive discretion (and obligation) to make decisions concerning corporate strategy and tax planning. In the US, UK and Germany such discretion is rooted in the business judgement rule (BJR) principle[58] and in the Netherlands this is known as the board supremacy principle.[59] Surely, one could argue that next to legal discretion, corporate decision-making is affected by the corporate culture. Here one can think of shareholder-oriented and stakeholder-oriented CG models. The stakeholder (Rhineland) model of CG clearly encourages corporate boards to consider a wider spectrum of stakeholder interests and thus leaves room for good tax governance, as will be argued in this research. The shareholder (Anglo-Saxon) model of GG prioritises shareholders' interests but, at the same time, it does not restrict corporate boards from considering a wider spectrum of stakeholder interests, as long as it is in the best interests of the company. Thus, it also leaves room for good tax governance. I will argue that good tax governance is in the best long-term interests of the company because companies benefit from society and state and, by paying their fair share of taxes, corporations are indirectly managing certain fundamental business risks.

The main methodological character of this research is multidisciplinary and exploratory. An exploratory research method is used in situations where "relatively little is known about something, perhaps because of its 'deviant' character or its newness."[60] Consequently, this exploratory research build theory that can further be tested with empirical studies. When I started with this research in 2014, many people were skeptical about combining tax and CSR. Back then also the academic research in this field was scarce. Therefore, I chose to conduct an exploratory research instead of empirical research for example. I do agree that empirical research studying the questions with regard to tax planning, CSR and CG is very valuable for business practice. Nevertheless, a good empirical research requires a solid theoretical basis and this is what I hope to contribute with this research. Moreover, anno 2020 people (business as well as other actors) are much more open to considering tax as a part of CSR. I think that this helps future studies to go deeper than it was possible in 2014.

The question whether and how multinationals should engage in good tax governance will be studied from various disciplinary perspectives such as law, applied (business) ethics and business management (economic perspective). More specifically, from the legal perspective, this study includes tax law and corporate law. Nevertheless, law cannot be studied in a vacuum. Therefore, this study adds a socio-economic perspective on law in order to investigate the limits of economic rationality and decision-making processes in an international corporation. Furthermore, this research combines company law and tax law from a comparative perspective in relation to applied ethics (CSR). To develop a concept of good tax governance, this research is rather exploratory in order to indicate what CSR corporations (but also other actors) could do in order to engage in good tax governance. Future empirical research hopefully will test the hypotheses that will be developed

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[58] In the US it originates from the Delaware case law: see e.g. *Gimbel v. Signal Cos.*, 316 A.2d 599, 608 (Del. Ch. 1974); (only in case of takeovers, the board is responsible for seeking highest value for the shareholders; *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986)); in the UK it is established in the Companies Act 2006 section 172a; In Germany, this principle is firmly vested in *Aktiengesetz* (German Stock Corporation Act), § 93.1.

[59] In the Netherlands, this is vested in the Forum-bank case (Forumbank-arrest (HR 21 januari 1955, NJ 1959, 43). This principle is also confirmed in more recent court cases: HR 13.07.2007, NJ 2007/434 (ABN AMRO); HR 09.07.2010, NJ 2010/544 (ASM International), and HR 20.04.2018, RN 2018/52 (Boskalis / Fugro).

[60] Singleton, R.A. and Straits, B.C. (2005). *Approaches to Social Research* (4th edition). New York: Oxford University Press. p. 68. See also: Van Hoecke, M. (2011). Legal Doctrine: Which Method(s) for What Kind of Discipline? In Van Hoecke, M. (Ed.). *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* Oxford/Portland: Hart Publishing. p. 18.

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in this research. In order to approach the multidisciplinary nature of this research comprehensively, it is built upon three pillars.

1.4.3. Three pillars of the study

Recent years have witnessed a growing number of studies that combine CSR and tax planning.[61] The last decade has also witnessed an increase in (scholarly) attention on the specific relationship between tax planning and morality[62] and tax planning in the light of corporate social responsibility.[63] However, there is no in-depth study connecting the three subjects of this research – tax planning, corporate social responsibility, and corporate governance – which involve different disciplinary perspectives. There are many unanswered questions and debates without clear fundamental principles and direction. The discussions so far seem mainly to focus on criticizing multinationals for behaving incorrectly based on subjective argumentation and a weak theoretical basis. To my best knowledge, there is a research gap with regard to the link between CSR, tax planning, and CG. The existing research does not provide sufficient theoretical basis, nor does it respond to public concerns, needs and discussions, which means that a further in-depth investigation is necessary. To this end, this research is divided into three main pillars. These pillars represent tax planning, corporate social responsibility, and corporate governance and decision making. The aim of these three main pillars is to understand the complex nature of all of these separate areas and to find common grounds for this research.

a) Pillar I - Tax planning

The first pillar conceptualizes tax planning and reveals the complexity of the issue in the light of the various degrees of tax planning, such as tax mitigation and aggressive tax planning. Moreover, the roles of various actors involved in tax planning processes are explained briefly. At the moment, the topic of international corporate tax planning is discussed from different perspectives, usually without clarifying the role of various actors, such as states, advisors, investors, media, NGOs. Academics, however, seem to handle this issue better than practitioners, politicians, media, NGOs, or the public in general.[64] This research focuses on multinational corporations, as explained above. Nevertheless, where possible, the role of other actors will also be mentioned.

Tax planning is a concept which is used to describe the interpretation and application of legal rules in order to mitigate one's tax burden. As opposed to tax evasion, tax planning, in its various forms, is legal; it stays within the frames of the law. Nevertheless, the concept of tax planning poses several challenges. For instance, the academic literature on tax planning often uses an unclear concept of 'aggressive' tax planning, which adds to a vagueness of the topic. It has been argued that the line between tax avoidance (legal) and tax evasion (illegal) has become blurry due to the

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[61] See e.g. Preuss, L. (2012). Responsibility in Paradise? The Adoption of CSR Tools by Companies Domiciled in Tax Havens. *Journal of Business Ethics* 110 (1), 1-14; Hoi, C. K. et al. (2013). Is Corporate Social Responsibility (CSR) Associated with Tax Avoidance? Evidence from Irresponsible CSR Activities. *The Accounting Review* 88 (6), 2025-2059; Van Eijsden, A. (2013). The Relationship between Corporate Responsibility and Tax: Unknown and Unloved. *EC Tax Review* 22 (1), 56-61; Lanis, R. and Richardson, G. (2012). Corporate Social Responsibility and Tax Aggressiveness: A Test of Legitimacy Theory. *Accounting, Auditing and Accountability Journal* 26 (1), 75-100; Davis, A. K. et al. (2016). Do Socially Responsible Firms Pay More Taxes? *The Accounting Review* 91 (1), 47-68; Bird, R. and Davis-Nozemack, K. (2016). Tax Avoidance as a Sustainability Problem. *Journal of Business Ethics (online edition)*, 1-17.

[62] See e.g. Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250; Happé, R. (2015). Ethics and International Tax Planning. In Russo, R. (Ed.), *Tax Assurance* (pp. 49-71). Deventer: Wolters Kluwer.

[63] See e.g. Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press; Avi-Yonah, R. S. (2008). Corporate Social Responsibility and Strategic Tax Behaviour. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 183-198). Berlin/Heidelberg: Springer-Verlag. pp. 183–198; Sikka, P. (2010). Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance. *Accounting Forum* 34 (3-4), 153-168; Hasseldine, J. and Morris, G. (2013). Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection. *Accounting Forum* 37 (1), 1-14; Panayi, C. H. J. I. (2015). Is Aggressive Tax Planning Socially Irresponsible? *Intertax* 43 (10), 544-558. See also: Schuil, G. et al. (2014). *Good Tax Governance in Transition: Transcending the Tax Debate to CSR*. VBDO & PwC; Vellenga, I. and Reijngoud, A. (2015). *Tax Transparency Benchmark 2015: A Comparative Study of 64 Dutch Listed Companies.* VBDO; Verstappen, R. et al. (2016). *Tax Transparency Benchmark 2016: A Comparative Study of 68 Dutch Listed Companies*. VBDO.

[64] For example, prof. Douma has focused more on the role of media and NGOs. Douma, S. (2018). *Miscommunication and Distrust in the International Tax Debate*. Deventer: Wolters Kluwer.

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activities of OECD and the EU, as well as the complexity of literature and regulations.[65] There is a tendency to add new terms, such as 'aggressive tax planning' or 'abusive tax avoidance' in order to cover the blurred area between tax evasion and avoidance. Hence, no uniform definitions exist, and there is a research gap between the letter and the spirit of the law within the context of business taxation. This research does not aim to provide in-depth and uniform definitions but to explain the concepts used by clarifying the definitional nuances for the purposes of this study.

This phase of the study builds a research framework by analyzing the state of art of the different concepts used in academic research as well as media and other non-academic sources for expressing various degrees of tax planning, what it means for different actors and what is meant under the letter and the spirit of the law. The notion of tax planning is analyzed in light of societal acceptability. Societal acceptability is conceptualized based on empirical studies that reflect upon the public perceptions on corporate tax behavior[66] and on how tax planning is discussed in public debates.[67] Based on that the continuum for illustrating different degrees of tax planning will be developed. In chapter 3 I will explain that multinationals that are aware of tax effects on their operations actively plan their taxes to avoid double taxation. The first degree of tax planning is tax mitigation, which is legitimate and socially responsible way to plan taxes. In case of tax mitigation, a corporation, encouraged by the relevant legislation, legitimately makes use of tax laws for tax planning purposes, for example by re-arranging its business-operations. The next degree of tax planning is tax avoidance, that occurs when a multinational intentionally re-arranges its business-operations, by complying with the strict letter of the law while ignoring the spirit of the law, with the main purpose to benefit from various tax rules in the different countries it operates in. Aggressive tax planning is a step further from tax avoidance and takes place when multinationals not only rearrange their existing business activities to achieve more beneficial tax treatment but even set up additional entities that lack any economic or commercial justification. In the case of aggressive tax planning, a corporation intentionally makes use of the mismatches between the national laws on the international level.

Data collection is based on existing research, legal sources, policy documents of the OECD and the EU and other materials. With regard to the OECD and EU, this research agrees to large extent with their proposed technical solutions. However, those alone are not enough because socially responsible tax planning will not be achieved with the mind-set that everything that stays within the frames of the legal rules is acceptable. In order to better understand the moral and societal expectations on corporations, CSR needs to be studied further.

b) Pillar II - Corporate social responsibility

The second pillar of this study will analyze the concept of corporate social responsibility (CSR). The focus lies on the theoretical framework of CSR and on the practical implications and rulemaking in relation to companies that claim to endorse CSR. Such companies have accepted the responsibility to go beyond strict compliance with the law. It will therefore be studied how CSR has evolved in theory and practice and what does it require from the companies that commit to do more than required by the law. This research is largely based on legitimacy theory that "builds on the idea that there is an implicit social contract between companies and society. Hence, society grants legitimacy to companies as long as they comply with societal norms and expectations."[68]

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[65] See e.g. Van Weeghel, S. and Emmerink, F. (2013). Global Developments and Trends in International Anti-Avoidance. *IBFD Bulletin for International Taxation* 67 (8), 428-435.

[66] For instance, Oxford University Centre for Corporate Reputation. (2016). *Rebuilding Trust in Business.* pp 7-9; ACCA. (2017, March). *G20 Public Trust in Tax.* ACCA: London; Hardeck, I. and Hertl, R. (2014). Consumer Reactions to Corporate Tax Strategies: Effects on Corporate Reputation and Purchasing Behavior. *Journal of Business Ethics* 123, 309–326.

[67] For example, public political hearings, such as UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited.

[68] Herzig, C. and Kühn, A.-L. (2017). Corporate Responsibility Reporting. In Rasche, A. et al. (Eds.). *Corporate Social Responsibility: Strategy, Communication, Governance* (pp. 187-219). Cambridge: Cambridge University Press. p. 199.

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Corporate social responsibility can be approached from theoretical and practical perspectives. The theoretical perspective considers CSR as an academic discipline, "a coherent body of knowledge, addressing a central theme."[69] From a practical perspective, CSR can be seen as a management approach, "a technical, instrumental response to business behaviour"[70] that focuses on the application of ideas that ideally are backed by academic research and thought. To understand the role of business in contemporary society, both perspectives are important. Having said that, the aim of this research is not to convince corporations to adopt CSR but rather to understand whether companies that already have CSR strategies in place should rethink their tax planning practices accordingly. Moreover, the aim of this research is not to pick a side in the various dilemmas in the CSR debates but rather to find out some common principles that might help to answer the question whether and how tax should belong to the list of corporate social responsibilities.

CSR is not an easy concept to study. It has a long history and many academic researches that include various understandings and views. One of the seminal academic contributions in the CSR field is the CSR Pyramid developed by Carroll. This CSR Pyramid elaborates on CSR as consisting of four layers: economic, legal, ethical, and philanthropic.[71] Even though Carroll's CSR Pyramid does not mention tax or the tax behaviour of a company, several criteria that he has set for a 'good company' reflects, in my opinion, that the tax behaviour should be counted as one criterion for behaving in a socially responsible manner. According to Carroll, corporations are parties to the 'social contract', which enforces the expectation to pursue corporate economic missions within the framework of the law.[72] Carroll places ethical and philanthropic layers above the economic and legal layers. Ethical responsibilities of a company go beyond the law and profit making and embody those standards, norms or expectations that reflect a concern for what consumers, employees, shareholders, and the community regard as fair, just or moral. Carroll adds that ethical responsibilities are seen as an obligation to do what is right, just and fair. Ethical considerations go beyond strict compliance with the law. The philanthropic layer of Carroll encompasses those corporate actions that are in response to society's expectations of a good corporate citizen, for example actively engaging in activities or programmes to promote human welfare or goodwill.[73]

Carroll's idea of going beyond the law needs some adjustment, however, for the purposes of this research, because currently it is not very applicable in tax practice. Therefore, in the context of this study I will place Carroll's theory in the specific context of international corporate tax planning. Furthermore, next to arguing based on the CSR theory of Carroll that tax planning should be part of CSR, this pillar also places tax planning in the continuum between corporate social responsibility and *ir*responsibility (CSI). The concept of CSI is equally important as CSR, being its inseparable counterpart. The concept of CSI helps to complete the concept of CSR.[74] As it is often not very clear what is meant with acting over and above legal requirements (CSR), corporate social irresponsibility seems to be a more addressable concern. It is even indispensable to remedy certain shortcomings of the CSR theories.[75] Thus, instead of 'what a manager *should* do?', CSI asks what he should *not* do.[76] Clarifying what a corporation should not do probably adds to the effectiveness of CSR.[77] As corporate actions are complicated and there is a nuanced reasoning behind decision making in business, the continuum between CSR and CSI will be introduced. Such a continuum

[69] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. p. 3.

[70] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. p. 3.

[71] Carroll, A. B. (1991). The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders. *Business Horizons* 34 (4), 39-48.

[72] Carroll, A. B. (1991). The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders. *Business Horizons* 34 (4), 39-48.

[73] Carroll, A. B. (1991). The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders. *Business Horizons* 34 (4), 39-48; See also Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88.

[74] Tench, R et al. (2012). The Challenging Concept of Corporate Social Irresponsibility: An Introduction. In Tench, R. et al. (Eds.), *Critical Studies on Corporate Responsibility, Governance and Sustainability*, vol. 4 (pp. 3-20). Bingley: Emerald. p. 19.

[75] Tench, R et al. (2012). The Challenging Concept of Corporate Social Irresponsibility: An Introduction. In Tench, R. et al. (Eds.), *Critical Studies on Corporate Responsibility, Governance and Sustainability*, vol. 4 (pp. 3-20). Bingley: Emerald. p. 5.

[76] Armstrong, J. S. (1977). Social Irresponsibility in Management. *Journal of Business Research* 5 (3), 185-213. p. 185.

[77] Clark T. S. and Grantham K. N. (2012). What CSR is Not: Corporate Social Irresponsibility. In Tench, R. et al. (Eds.), *Corporate Social Irresponsibility: A Challenging Concept* (pp. 23-41). Bingley: Emerald. p. 33.

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would help to position the degree of (ir)responsibility of different corporate actors on a case by case basis. In this way, the degrees of tax planning would also fit better in the context of the social responsibilities of corporations.
CSR is a part of corporate strategy and is therefore part of the discretion of the corporate board.[78] The corporate board is also responsible for the financial performance and tax risk profile of the company.[79] Therefore, in order to better understand the extent corporate boards can combine CSR and tax planning, CG will be studied further.

c) Pillar III – Corporate decision making: corporate governance & good tax governance

The third pillar of this research aims for a deeper understanding of the main perspective of this study – the corporate perspective – by investigating corporate governance regimes of stock-listed firms. It will be studied what influences corporate decision making when it comes to tax planning matters. This part answers whether there is a difference between two different corporate governance regimes (the 'market-oriented' Anglo-Saxon model and the 'network-oriented' Rhineland model[80]) and to what extent they are either supporting or hindering the good tax governance of multinationals. The comparison is based on studying two types of corporate governance regimes and rules that may set diverging boundaries in different jurisdictions to include tax in a CSR strategy.[81]
In order to understand the regulatory effect on the international level, it will be studied whether and to what extent the Rhineland and Anglo-Saxon corporate governance regulatory strategies differ and, moreover, whether and how such differences affect good tax governance. This is an important part of the research, since, if corporate governance regimes would somehow disincentivize good tax governance then either corporate laws or the expectations in regard to corporations' tax planning behaviour should be changed. Thus, it is a crucial step to evaluate the practical viability of good tax governance.
For example, Schön has argued that "there exists a fundamental distinction between the internal rights and obligations of shareholders and the management under company law and the external obligations of the corporation as such, e.g. in the field of tax law."[82] He argued that the relationship between the board of directors and shareholders can have consequences for corporate tax planning behaviour, especially in the US corporate governance regime. Namely, in the business world, there has long been an idea that corporations should generally be run so as to maximize shareholder value.[83] The aim of this third pillar of this research is to find out whether corporations' internal relations are indeed possibly in conflict with good tax governance. The focus is on the boards' role and responsibilities in tax-related decision-making processes.

d) Good tax governance

To sum up, three relevant frameworks are distinguished in this research: a) tax planning, in order to study the central topic of the international tax debates and alleged problems; b) corporate social

[78] See e.g. Martínez-Ferrero, J., Villarón-Peramato, O. and García-Sánchez, I. M. (2017). Can Investors Identify Managerial Discretion in Corporate Social Responsibility Practices? The Moderate Role of Investor Protection. Australian Accounting Review 27 (1), 4-16. pp. 5-6.
[79] Lavermicocca, C. and Buchan, J. (2015). Role of Reputational Risk in Tax Decision Making by Large Companies. eJournal of Tax Research 13 (1), 5-50. p. 8.
[80] See e.g. Reinhardt, F. L. et al. (2008). Corporate Social Responsibility through an Economic Lens. *Review of Environmental Economics and Policy* 2 (2), 219-239. p. 11; Wymeersch, E. (2002). Convergence or Divergence in Corporate Governance Patterns in Western Europe? In McCahery J. A. et al. (Eds.), *Corporate Governance Regimes: Convergence and Diversity* (pp. 230-247). Oxford / New York: Oxford University Press. p. 231; Campbell, K., and Vick, D. (2007). Disclosure Law and the Market for Corporate Social Responsibility. In McBarnet, D. et al. (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (pp. 241-278). Cambridge: Cambridge University Press. pp. 250-252; Habisch, A. (2005). *Corporate Social Responsibility across Europe.* Berlin / New York: Springer. pp. 367-370.
[81] E.g. Board of Directors obligation to maximize shareholders value.
[82] Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin / Heidelberg: Springer-Verlag. p. 33.
[83] Berle, A. A. and Means, G. C. (1968). *The Modern Corporation and Private Property*. New York: Harcourt, Brace & World; See also Avi-Yonah, R. S. (2014). Just Say No: Corporate Taxation and Corporate Social Responsibility. *University of Michigan Public Law Research Paper No. 402; University of Michigan Law & Econ Research Paper No. 14-010.*

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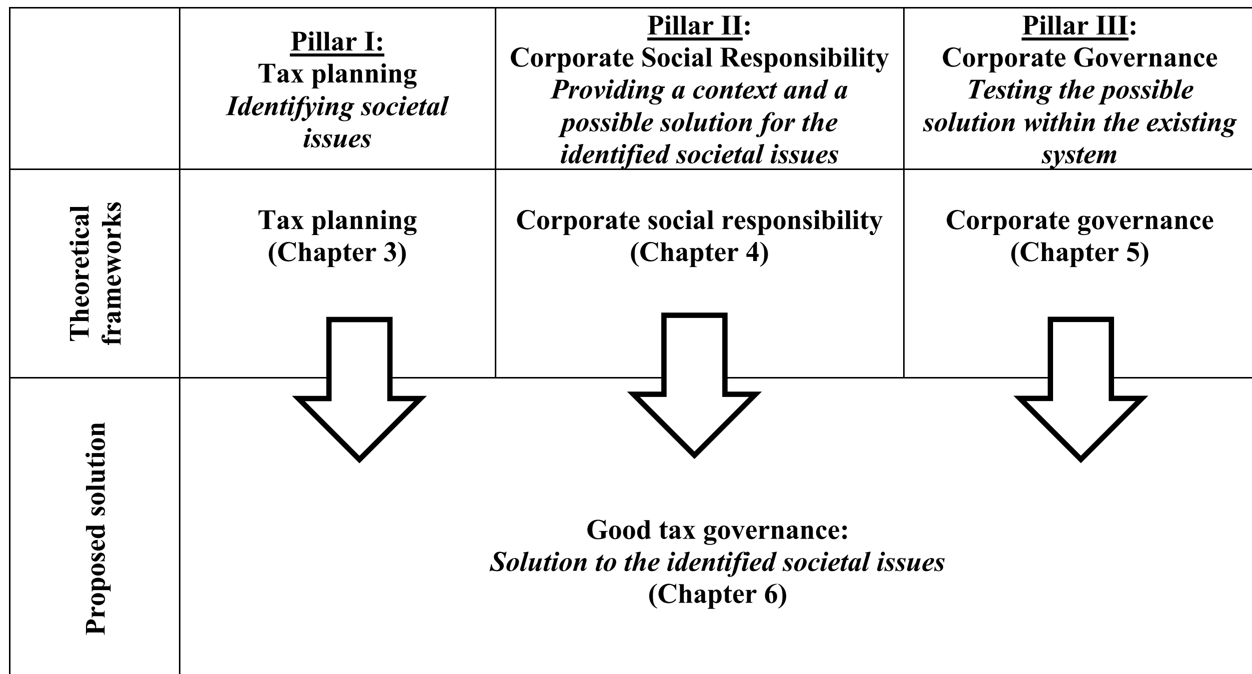
responsibility in order to explore the existing concept of CSR and possibilities for combining tax and CSR; c) corporate governance, in order to examine whether and to what extent corporate governance regimes could pose restrictions in binding corporate tax and CSR in the form of good tax governance. All pillars are fundamental building blocks for good tax governance. Moreover, every pillar needs its own specific methodological approach.



1.4.4. Limitations

Without a doubt, this study is ambitious. The aim to understand the 'bigger picture' by way of multidisciplinary research poses many limitations. The ambition to gain a more general overview of the problem means that many issues will not be as in depth as they at some point might require. Therefore, this research is exploratory to a certain extent, opening several new doors for further research.

The most crucial limitation of this study is a perspective on which this research focuses. As previously noted, international corporate tax planning can be approached from various perspectives. The perspective of this research is that of multinational corporations, more specifically, multinational corporations that endorse CSR. Consequently, the scope of the discussion is usually limited to multinationals. Naturally, international tax planning is a nuanced topic. For instance, there is a role of states and tax regulatory competition (and the role of other actors, as will be briefly explained later).[84] This research focuses on corporations and thus only on one (but one of the most important) perspective of international corporate tax planning. Moreover, this perspective will be put into a social context.

Further, this research leans on more general literature and current developments[85] (media, political statements etc. help to understand the societal perspective) in international corporate tax planning and how it fits in the concept of CSR. This research is not an in-depth study of technical aspects of various tax planning structures or existing law. Instead, this research focuses on the societal perceptions of tax planning activities of multinational corporations that claim to be socially responsible. Having a more general corporate law background helps me to take a step back and

[84] See chapter 3, section 5; chapter 7.

[85] It has to be noted that international corporate tax system is a fast-developing field. This research involves the developments and discussions until November 2019.

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provide a more general and (hopefully) objective evaluation of tax planning. This approach is necessary because international corporate tax planning concerns not only tax experts but also other type of stakeholders, such as politicians, corporate law experts, media, and society at large. Therefore, more a general discussion without focusing on complex tax technicalities should help other actors to understand and take part in the debate on corporate tax practices.

This research will also not simply focus on international corporate tax planning activities, but it will limit itself to these corporations that claim to endorse CSR. This is an important distinction, because this means that these corporations have already accepted certain responsibilities towards the society and can no longer accept that acting purely according to the letter of the law is sufficient. Of course, the discussions and outcomes of this research can also be translated into a broader corporate perspective (perhaps with some additional nuances). For instance, according to the economic approach to CSR, companies are not free to engage CSR (as much as they wish) due to the fierce competition between the companies. According to this approach maximizing profits is more important than serving public interest. For example, Quairel-Lanoizelée has argued that "economists rarely see competition and CSR as compatible."[86] The academic debate on competitive advantage of CSR does not provide one commonly agreed conclusion. The mainstream CSR literature, however, suggests that there is a positive connection between CSR and corporate performance.[87] This research focuses on the corporations that have already decided to engage CSR in their corporate strategy. Therefore, the question whether there is a (positive) link between CSR and corporate performance in the first place will not be discussed in this research. It will be argued that corporations that present themselves as CSR corporations build certain expectations amongst stakeholders and not living up to such expectations can have a negative effect on corporate reputation.[88]

Furthermore, this study focuses only on tax planning activities that stay within the law. Thus, tax evasion and other kinds of corporate fraud will not be discussed in this research. Further, the most important clarification that has to be made is that, unless stated otherwise, all of the discussions in this dissertation concern tax planning, which is legal, as opposed to tax evasion, which is illegal. Nevertheless, this also poses one of the biggest methodological problems, because what in one jurisdiction is considered to be illegal may not have the same status in another jurisdiction. Moreover, the disctinction between legal and illegal tax behaviour is usually not black and white. The legal, legitimate, and moral limits of tax planning and related issues will be discussed further in chapter 3 of this research.

Three key terms of this book are tax planning, corporate governance, and corporate social responsibility. All of these three mainly raise issues on the international and not so much on the state level. Tax planning, CG and CSR are nationally embedded concepts without clear-cut international harmonization. This suggests that on the international level all these concepts raise issues related to a regulatory vacuum.[89] Therefore, this research also examines the international approaches and elements around these concepts. Furthermore, the aim of this study is not to go into the legal details and technicalities of the national corporate tax systems nor complicated tax avoidance schemes. This study takes a 'bird-eye' approach and investigates the fundamental questions around international business and corporate taxes and their relation to society. Moreover, the focus is on corporate income tax and not on other forms of taxation such as for example value added tax (VAT) or labour tax. Existing research suggests that corporate income tax is more vulnerable to tax avoidance than other forms of taxes imposed on multinationals.[90] Moreover, also

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[86] Quairel-Lanoizelée, F. (2011). Are Competition and Corporate Social Responsibility Compatible? The Myth of Sustainable Competitive Advantage. *Society and Business Review* 6 (1), 77-98. p. 80.

[87] Quairel-Lanoizelée, F. (2011). Are Competition and Corporate Social Responsibility Compatible? The Myth of Sustainable Competitive Advantage. *Society and Business Review* 6 (1), 77-98.

[88] See e.g. Tetrault Sirsly, C.-A. and Elena Lvina, E. (2019). From *Doing Good* to *Looking Even Better*: The Dynamics of CSR and Reputation. *Business & Society* 58 (6), 1234-1266.

[89] See e.g. Scherer, A. G. and Palazzo, G. (2008). Globalization and Corporate Social Responsibility. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 413-431). New York: Oxford University Press. pp. 423-425.

[90] Durst, M. C. (2015). Limitations of the BEPS Reforms: Looking Beyond Corporate Taxation for Revenue Gains. *International Centre for Tax and Development Working Paper* 40. p. 10.

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the public discussions related to corporate tax strategies usually focus on corporate income tax. Therefore, it justifies the focus on corporate income taxes.
Mainly for feasibility reasons, there are more elements of the discussion that are left out of this research. Firstly, it should be mentioned that the starting point in this research is that every corporation should pay (corporate income) taxes if so required by the law. Accordingly, this research will not focus on how tax money is specifically spent by governments (e.g. too much or too little government, corruption etc.) or for instance on a state's decision to levy no corporate income taxes. The central idea is that taxes are important building blocks for society by providing funds for public goods and services and the democratically legitimized lawmaker has an exclusive discretion to decide upon the tax system.
Next to that, as this research aims to approach the topic of tax planning from a company perspective, the discussions concerning the state perspective are limited. Nevertheless, when reading this research, it is important to keep in mind that the behaviour of a taxpayer and issues related to non-compliance may also rise due to a lack of trust in the government or due to different opinions on the role of the government's function when it comes to taxation. However, discussions on compliance issues of corporations caused by the distrust and corruption levels in a public sector calls for other research. Therefore, this study leans on the assumption that, in a democratic system, the state is allowed and legitimately able to decide on the best possible use of tax money and regulation. Nevertheless, the role of different actors in the international tax planning process will be discussed briefly.[91]
Tax regulation is important in tax planning discussions as it can either incentivize or disincentivize (harmful) tax planning practices. Nevertheless, it will not be the main focus of this research. The notion of tax regulation raises several discussion points for tax planning – e.g. regulatory competition and corporate lobbying, which can appear in the following forms. Regulatory competition means that states compete with each other by creating a favourable environment for foreign investment through legislative means. The problem with tax competition is that there are no rules for the rule-making process itself. One country's international tax decisions may have spillovers (financial externalities) on other country's macroeconomic stability.[92] Furthermore, even though the harmonization of international tax laws may ideally decrease the negative effects of tax planning to a minimum, one must realize that there are no perfect laws and laws will always remain a subject for interpretation, which suggests that, when desired, taxpayers will find ways to circumvent the rules.[93] That is why the approach in this dissertation is focused more on the (moral) responsibilities of taxpayers (company).
In addition to regulatory competition, corporate lobbying nowadays also often affects the tax-related rulemaking in a state, in addition to the regulatory competition and lack of resourses (caused by financial crisis). Academic research has confirmed that, among other things, lobbying also provides for more favourable tax policies for the companies.[94] The issue of corporate lobbying will be discussed to a limited extent in this research, as the main focus lies on the internal governance of a corporation and its relationship to society.[95]

1.5. Structure of this book

This book is divided into four main parts based on the pillars of this research: Pillar I: Tax planning - identifying societal issue; Pillar II: Corporate social responsibility - providing a context and a possible solution to the identified societal issue; Pillar III: Corporate governance - testing the possible solution within the existing system; and (VI) elaborating on the solution: good tax

[91] See Chapter 3, section 5; Chapter 7.
[92] International Monetary Fund. (2014, July 29). *Spillover Report 2014*. Washington D. C.: IMF Policy Paper.
Naturally, in the EU the four basic freedoms of the free market as well as state aid rules should prevent such negative spillover effects.
[93] See more in chapter 3.
[94] See e.g. Stigler, G. J. (1971). The Theory of Economic Regulation. *The Bell Journal of Economics and Management Science* 2(1), 3-21; Hill, M. D. et al. (2013). Determinants and Effects of Corporate Lobbying. *Financial Management* 42 (4), 931-957.
[95] See e.g. chapter 2.

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governance. All the chapters of this book are built up in a way that they first discuss principal issues, practical nuances and changes in society. This book is structured into chapters within these four main parts as follows.

Chapter 2 focuses on the concept of a multinational corporation. This is one of the main underlying concepts of this research and needs therefore to be clarified. Various features, issues and aspects of corporations with regard to the main perspective of this research are discussed.

Chapter 3 falls under Pillar I, tax planning. The chapter starts with an insight to the philosophical and moral elements of the concept of tax planning. After showing that the distinction between compliance and non-compliance with the law is complicated, the study further elaborates on the concept of aggressive tax planning. This label seems to be given to behaviour of the multinationals that is not illegal, but which nevertheless also does not have a legal or legitimate basis. Trying to understand the concept of aggressive tax planning inevitably involves the discussions concerning the morality and ethics behind the taxation. Moreover, the complexity of debates about the letter of the law and the spirit of the law will be discussed in the context of international tax planning. This leads to the ongoing discussions on legal positivism, on the one hand, and the principles-based legal system, on the other hand. This phase builds a research framework by illustrating tax planning as a matter of degree. This means that there is no black-and-white answer to what constitutes aggressive tax planning and what could be categorized as acceptable. Also, the current works of the OECD and the EU with regard to fighting aggressive tax planning will be touched upon briefly. The reader should not expect a comprehensive analysis of the positions of the OECD and the EU with regard to corporate tax planning. When the OECD or the EU documents or activities are discussed, it is mainly with the aim to illustrate the regulatory context of fast-changing international tax law.

Chapter 4, Pillar II, puts corporate social responsibility into the spotlight. It will be studied what is CSR and how it has evolved historically. Moreover, what are the common elements in different definitions will be addressed. The aim is to understand the core of the CSR and to give the reader an overview and understanding of what the multinational that accepts CSR does; what are the rights and responsibilities and effects and why would companies do that in the first place (legal obligation to report, trust, social legitimacy, reputation). Approached from the law and tax perspectives, the relevant theories in the field of CSR will be studied. The main focus is on the CSR Pyramid, developed by Archie B. Carroll. Furthermore, it will be explored, how CSR works in practice. To this end, other fields that are important from the CSR perspective will be studied in order to compare this with the tax planning practices of companies and to draw some 'lessons learned' for tax. In order to match various gradations of the tax planning continuum (chapter 3) with CSR, the continuum between corporate social responsibility and corporate social *ir*responsibility (CSI) will be illustrated at this stage of the research. The underlying line of reasoning of this chapter is that companies that claim to be CSR companies have accepted responsibility for going beyond the letter of the law and this should also be translated into their tax matters. The main drivers and challenges for corporations to engage CSR will be explained. In this chapter it will be shown that tax planning within the context of CSR is good tax governance (which will be further fleshed out in chapter 6).

Chapter 5 responds to Pillar III and investigates good tax governance and evaluates it from the corporate perspective by focusing on mainly corporate decision making and corporate governance. It will be investigated how and why tax planning fits into the context of CSR and whether CG would hinder that at a certain point. This phase of the research examines whether tax planning could theoretically be involved in CSR strategies, why companies could be incentivized to do this (e.g. reputation protection), and what are the possible effects and challenges for the notion of good tax governance.

Chapter 6 focuses on the elements of good tax governance, both substantive and procedural. The substantive element concerns ethical decision making and paying a fair share of tax, while procedural elements address transparency. The idea of going beyond the law in terms of tax planning will be fleshed out in this chapter.

The last chapter concludes and draws discussion points for further research.

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2. MULTINATIONAL CORPORATION AND MORAL RESPONSIBILITY

2.1. Introduction

In the last few decades, international tax planning has become an increasingly important topic in the corporate world. To a large extent it is because the way of doing business has changed. Most importantly, the amount and size of cross-border commercial activities has increased. For instance, the rapid development of the Internet and technology has made the production, marketing, and cross-boarder exchange of goods, services, and capital very easy and fast. On the one hand, this allows multinationals to be innovative in reducing business costs. On the other hand, this also means that companies are operating in highly competitive markets and (in order to survive) they simply have to use different business strategies.[96]

Such a changed situation, however, has put pressure on the old legal, political and also business principles. Politics and law-making has to be more dynamic in order to respond to fast-developing business practices. This appears, for instance, in the form of regulatory changes that will be discussed later in this research.[97] In addition to regulatory changes, various global developments have accelerated the demand for fair tax balance and the need for transparency. Consequently, companies and their actions are highly visible to stakeholders and society at large. Largely due to media and the fast movement of information, (negative) corporate actions get more attention than ever before. This allows the wider public to debate upon issues related to corporate actions, but also to demand accountability. For instance, Crane et al. claim that large corporations are much more visible and thus more vulnerable to criticism from the public than smaller firms.[98] Moreover, the way the general public perceives the role of business in a society has changed and the public's attitude towards large companies can evolve over time. For instance, a study from 2003 illustrated how the public's attitude towards large corporations changed between the late 1970s and early 2000s. Approximately 80% of the respondents believed that large companies have a moral duty to society. Nevertheless, according to the same respondents (about 60%), large corporations fell short of the expectations for moral behaviour towards society and the environment.[99] As a result, corporations are losing public trust,[100] which in turn may have a negative impact on their reputation. I have not been able to find an update of this research but, considering the rather negative public attention on multinational's tax planning practices, I would expect the results to be comparable or even more negative.[101]

As a result of such various developments, international tax planning also needs to be studied in an international and multidisciplinary context. However, for a well-informed and focused debate, the creature that is called a multinational corporation needs to be better understood. Moreover, understanding the nature of multinationals is necessary too understand what kind of role such business entities play in the societies in which they operate, but also how various stakeholders can affect business practices. This builds a basis for discussing tax planning, CSR, and corporate governance further in this research.

This chapter, therefore, is dedicated to clarifying the concept of a multinational corporation (multinational or MNC) used in this research. First, in section 2 some definitional questions

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[96] See e.g. Detomasi, D. (2015). The Multinational Corporation as a Political Actor: 'Varieties of Capitalism' Revisited. *Journal of Business Ethics* 128 (3), 685-700. p. 686.

[97] See e.g. chapter 3, section 5.

[98] Crane, A. et al. (Eds). (2008). *Corporate Social Responsibility, Readings and Cases in a Global Context*. Abingdon: Routledge. pp. 8-9.

[99] Lewis, S. (2003). Reputation and Corporate Responsibility. *Journal of Communication Management* 7 (4), 356-366. See also Porter, M. (interviewed by Morsing, M.). (2003). CSR – a Religion with Too Many Priests? *European Business Forum* 16. pp. 7-8, Wan-Jan, W. S. (2006). Defining Corporate Social Responsibility. *Journal of Public Affairs* 6 (3-4), 176-184.

[100] Lewis, S. (2003). Reputation and Corporate Responsibility. *Journal of Communication Management* 7 (4), 356-366. See also Porter, M. (interviewed by Morsing, M.). (2003). CSR – a Religion with Too Many Priests? *European Business Forum* 16. pp. 7-8, Wan-Jan, W. S. (2006). Defining Corporate Social Responsibility. *Journal of Public Affairs* 6 (3-4), 176-184.

[101] See for instance: Oxford University Centre for Corporate Reputation. (2016). *Rebuilding Trust in Business*. pp 7-9; ACCA. (2017, March). *G20 Public Trust in Tax*. ACCA: London; Hardeck.

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concerning concepts of a corporation and, more specifically, the multinational corporation will be discussed. Moreover, terms 'endorse CSR' or 'CSR corporations' used in this research will be elaborated upon. Further, questions related to corporate power that multinationals possess and responsibility will be explored in section 3. Next, in section 4, corporate accountability and transparency matters will be addressed.[102] Section 5 focuses on how the use of corporate power can affect corporate reputation and how corporations can (re-)build trust among their stakeholders. Further, other corporate risks and risk management will be investigated briefly in section 6; it will be explained how paying taxes helps multinationals to reduce unnecessary corporate risks. As this research focuses on tax planning in the context of business ethics and morality, the question of moral agency will be clarified in section 7. The specific position of multinationals with regard to tax planning will be clarified further in section 8. The final section (9) provides a conclusion.

2.2. Defining multinational corporation

A corporation is in general seen as an entity or collaboration between individuals, set up for organizing a productive activity, usually for gaining economic returns. Farrar defines corporation aptly as "a legal concept which, through the conferment of separate legal personality, provides legal recognition to bodies of persons, associated together, as distinctive holders of rights under a collective name, with distinct legal consequences."[103] According to Armour et al., a business corporation has five core structural characteristics: legal personality, limited liability, transferable shares, centralized management under a board structure, and shared ownership by contributions of equity capital.[104] The most important element this study focuses on is the centralized management under a board structure of listed corporations, especially in the Pillar III,[105] where corporate governance issues will be discussed. Nevertheless, all these core characteristics make a corporation a form of organizing a productive activity attractive but it also generates trade-offs and tensions that will be addressed through this research.[106] In the following sub-sections, it will be clarified how a corporation in general and a multinational corporation more specifically are understood within this research.

2.2.1. What is a corporation?

Despite quite clear generally agreed characteristics, the concept of corporation can raise certain questions. There is no one clear answer as to what a corporation is in the first place. There are various possible views on the legal concept of a company as well as the goal of business. For instance, economists often view the firm as a nexus of contracts, while "business scholars look at the firm as an organisation, a social body with multiple functions including a financial function."[107] Through the historical transformation of the corporation, three prevailing theories of the corporation can be identified: the aggregate theory, the artificial entity theory, and the real entity theory.[108] According to the aggregate theory, a corporation is defined as an extension of its members or shareholders.[109] The artificial entity theory prescribes the corporation as a creature of the state, as a product of state laws, not as "'citizens', but as extensions of the state."[110] It is argued that, in a

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[102] See also chapter 6, section 3.
[103] Farrar, J. (2005). *Corporate Governance: Theories, Principles, and Practice* (2nd Ed.). Oxford: Oxford University Press. p. 20.
[104] Armour, J. et al. (2017). What is Corporate Law? In Kraakman, R. H. et al. (Eds.). *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd Ed.) (pp. 1-28). Oxford: Oxford University Press. p. 5.
[105] See chapter 5.
[106] See especially chapter 5 on Corporate Governance and chapter 4 on CSR.
[107] Sheehy, B. (2015). Defining CSR: Problems and Solutions. *Journal of Business Ethics* 131 (3), 625-648. p. 630.
[108] Avi-Yonah, R. S. (2005). The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility. *Delaware Journal of Corporate Law* 30 (3), 767-818. pp. 770-771.
[109] See e.g. Lozano R., et al. (2015). A Review of 'Theories of the Firm' and Their Contributions to Corporate Sustainability. Lozano, R. et al. (2015). A Review of 'Theories of the Firm' and Their Contributions to Corporate Sustainability. *Journal of Cleaner Production* 106, 430 – 442. p. 433.
[110] Lozano R. et al. (2015). A Review of 'Theories of the Firm' and Their Contributions to Corporate Sustainability. *Journal of Cleaner Production* 106, 430 – 442. p. 433.

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modern society, this theory could apply for state-owned enterprises.[111] The real entity theory views the corporation as a separate entity controlled by its managers, thus not as the sum of its owners nor an extension of the state.[112] As Chaffee points out, each of these three theories "emphasizes a different aspect of the corporation."[113] According to him, "the artificial entity theory focuses on the role of the government; the real entity theory focuses on the corporation as a distinct entity; and the aggregate theory focuses on the individuals organizing, operating, and owning the business form."[114] Consequently, all of these theories have their limitations.[115]

There seems, however, to be little consensus on which theory of a corporation prevails. Schön, for instance, has argued that a corporation as such – as a taxpayer – does not exist because it is a nexus of contracts; he has, thus, chosen the aggregate view.[116] In the same vein, Avi-Yonah argues that the nexus of contracts theory is the "dominant view amongst contemporary corporate scholars."[117] The idea that a corporation is considered as a nexus of contracts originates from the (law and) economics literature.[118] Economists, however, have a conceptually very different understanding of contracts than lawyers do.[119] Therefore, it is difficult to adapt the nexus of contracts theory in the legal context. For example, it has received some criticism, because it is "inconsistent with corporation's legal status" and it "makes it difficult to determine the corporation's boundaries."[120] In the legal literature, a corporation has a separate legal personality.[121] Armour et al. seem to suggest that the nexus of contracts theory is not very accurate anymore as they define the firm as a "nexus *for* contracts" that "serves, fundamentally, as the common counterparty in numerous contracts" with various stakeholders.[122] A firm, thus, exercises its contractual rights.[123] They argue further that corporate law enables "a firm to serve this coordinating role by operating as a single contracting party that is distinct from the various individuals who own or manage the firm."[124] According to them, a corporation itself is viewed as the owner of the pool of assets that are distinct from other assets owned by shareholders.[125] It seems, thus, that without focusing on any theory exclusively, they opt for a more nuanced view by combining elements from various theories.

Considering the myriad of opinions, it is safe to conclude that the concept of a corporation is a contested one. Even though the theory of a nexus of contracts could be widely advocated by the economists (or law and economics scholars),[126] in my opinion it does not reflect on the

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[111] Lozano R. et al. (2015). A Review of 'Theories of the Firm' and Their Contributions to Corporate Sustainability. *Journal of Cleaner Production* 106, 430 – 442. p. 433.

[112] Avi-Yonah, R. S. (2005). The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility. *Delaware Journal of Corporate Law* 30 (3), 767-818. pp. 770-771. See also: Lozano R. et al. (2015). A Review of 'Theories of the Firm' and Their Contributions to Corporate Sustainability. *Journal of Cleaner Production* 106, 430 – 442. p. 433.

[113] Chaffee, E. C. (2017). The Origins of Corporate Social Responsibility. *University of Cincinnati Law Review* 85, 347-373. p. 362.

[114] Chaffee, E. C. (2017). The Origins of Corporate Social Responsibility. *University of Cincinnati Law Review* 85, 347-373. p. 362.

[115] See more in: Chaffee, E. C. (2017). The Origins of Corporate Social Responsibility. *University of Cincinnati Law Review* 85, 347-373. pp. 362-363.

[116] Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin/Heidelberg: Springer-Verlag. p. 32.

[117] Avi-Yonah, R. S. (2014). Just Say No: Corporate Taxation and Corporate Social Responsibility. *University of Michigan Public Law Research Paper No. 402; University of Michigan Law & Econ Research Paper No. 14-010*. p. 10. Avi-Yonah does not specify whether he means legal or tax scholars but based on his analysis it seems that he focuses on corporate economists and lawyers.

[118] See e.g. Cheffins, B. R. (2005). Corporations. In Tushnet, M. and Cane, P. (Eds), *The Oxford Handbook of Legal Studies*. Oxford: Oxford University Press; Armour, J. et al. (2017). What is Corporate Law? In Kraakman, R. H. et al. (Eds.). *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd Ed.) (pp. 1-28). Oxford: Oxford University Press. p. 5.

[119] Cheffins, B. R. (2005). Corporations. In Tushnet, M. and Cane, P. (Eds), *The Oxford Handbook of Legal Studies*. Oxford: Oxford University Press. p. 7.

[120] Stout, L. A. (2017). The Economic Nature of the Corporation. In Parisi, F. (Ed.). *The Oxford Handbook of Law and Economics: Volume 2: Private and Commercial* Law. Oxford: Oxford University Press.

[121] See e.g. Armour, J. et al. (2017). What is Corporate Law? In Kraakman, R. H. et al. (Eds.). *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd Ed.) (pp. 1-28). Oxford: Oxford University Press. p. 8.

[122] Armour, J. et al. (2017). What is Corporate Law? In Kraakman, R. H. et al. (Eds.). *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd Ed.) (pp. 1-28). Oxford: Oxford University Press. p. 5.

[123] Armour, J. et al. (2017). What is Corporate Law? In Kraakman, R. H. et al. (Eds.). *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd Ed.) (pp. 1-28). Oxford: Oxford University Press. p. 5.

[124] Armour, J. et al. (2017). What is Corporate Law? In Kraakman, R. H. et al. (Eds.). *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd Ed.) (pp. 1-28). Oxford: Oxford University Press. p. 5.

[125] Armour, J. et al. (2017). What is Corporate Law? In Kraakman, R. H. et al. (Eds.). *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd Ed.) (pp. 1-28). Oxford: Oxford University Press. pp. 5-6.

[126] See e.g. Chaffee, E. C. (2017). The Origins of Corporate Social Responsibility. *University of Cincinnati Law Review* 85, 347-373. pp. 361-362; Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin/Heidelberg: Springer-Verlag.

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contemporary nature of corporation that is being discussed within this research. Namely, corporations need to be separate entities apart from their stakeholders.[127] Naturally, a corporation is not physically comparable to a person made of flesh and bones. Nevertheless, in a society, a corporation enjoys similar rights, such as the right to enjoy public services and goods that are financed with tax money. Therefore, corporations should also bear similar obligations as other citizens. Considering a corporation purely as a nexus of contracts would diminish corporate accountability for some of its actions. Corporations "have their own decision making structures, have choices, and justify them with corporate reasons."[128] This means that companies are not only legal entities (artificial persons at law), but also moral ones for they have agency independent of their members as it will be further explained in section 7 of this chapter.[129] Therefore, it can be argued that corporations could refrain from harming others and they can account for their behaviour by giving moral reasons and assume moral responsibility for their actions affecting others.[130] Therefore, in this research, the concept of corporation is to a large extent based on the real entity theory. The corporation is seen as a separate entity and as a moral agent that can be held socially accountable for its behaviour. One of the most central elements of the (listed) corporation for this research is the board of directors that has a fiduciary duty to its shareholders and an exclusive discretion when it comes to corporate decision-making.[131]

The separate legal and moral personality of a corporation raises questions as to the nature of such a legal personality, how should the accountability be understood and divided, but also what kind of implications this has on the decision-making process.[132] How corporations are perceived and how corporate actions are regulated is very dependent on the culture. For instance, CSR leaves more room for corporations in the US, because it is less regulated there than in Europe (whereas in Asia and Africa, for instance, it is more related to religious and cultural traditions).[133] In Europe CSR is understood rather "the choice of constraints", whereas in the US it is rather "the choice within constraints". Moreover, there is a difference between Central-Europe and post-communist countries. In addition, CSR, as a form of business ethics, is also affected by the religious values and history of societies. Nevertheless, it is argued that, due to globalization, there is a convergence of approaches and, therefore, also in Europe there is "a rapid and comprehensive move towards deregulation of business activities, which increasingly puts businesses in contexts similar to the American version of capitalism."[134] This also indicates that CSR can often be coloured by the various cultural backgrounds of countries, which might be challenging for multinationals that operate within such different cultures. "Different cultures emphasize different aspects of CSR" and this means that one multinational may face different expectations in different countries.[135]

Cultural differences are related to different perceptions of the importance and meaning of CSR and to different beliefs about business, organizations and ethics. This impacts how corporations are perceived within societies and to what extent organizations are exposed to institutional pressure and that it has an influence on ethical decision making and moral commitment. Culture is related to societal values and moral judgements. Consequently, it "influences what is perceived as right or

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[127] See also Mayer, C. P. (2013). *Firm Commitment: Why the Corporation Is Failing Us And How To Restore Trust In It.* Oxford: Oxford University Press. p. 173.

[128] Brown, M. T. (2005). *Corporate Integrity: Rethinking Organizational Ethics and Leadership*. Cambridge: Cambridge University Press. p. 123. See also Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88.

[129] See e.g. Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250.

[130] Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88.

[131] See Chapter 5.

[132] Farrar, J. (2005). *Corporate Governance: Theories, Principles, and Practice* (2nd Ed.). Oxford: Oxford University Press. p. 20.

[133] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 53.

[134] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. pp. 22-30.

[135] Arthaud-Day, M. L. (2005). Transnational Corporate Social Responsibility: A Tri-Dimensional approach to International CSR Research. *Business Ethics Quarterly* 15 (1), 1-22. p. 3, p. 9.

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wrong, acceptable or unacceptable, and ethical or unethical" in a certain society.[136] Therefore, culture determines the likelihood of a business to succeed with its CSR strategies.[137] Also, corporate law is attached to the cultural background of legal regimes. For instance, Anglo-Saxon roots place shareholders in a more central position when defining a corporation, while the (Continental-)European model recognizes a corporation rather as a social institution that represents the interests of wider group of stakeholders than just shareholders.[138] Such issues will be discussed in more detail in chapter 5 of this research. For dealing within such a cultural mixture, multinationals should decide upon their corporate values and if possible adopt codes of conduct (a form of self-regulation) in which they make their values and commitments clear, as will be argued in chapter 6 of this research.

In summary, on a very fundamental level, the concept of corporation might pose some challenges. Nowadays, conceptualizing a corporation is even more complex due to the international dimension. There is, namely, "no legally precise and universally accepted definition of the multinational enterprise."[139] Without a doubt, however, a multinational corporation differs from a national corporation and also from small-and medium-sized enterprises (SMEs) because it operates in several jurisdictions and is involved in large-scale business practices. Therefore, it comprises different legal frameworks, (cultural) characteristics related to its operation, decision-making, accountability, but also its effects on the societies in which it operates, as will be discussed next.

2.2.2. Multinational corporation

Arguably, the term 'multinational corporation'[140] was first used in the 1960s in the US context.[141] One of the first research projects studying the phenomenon of a multinational corporation was carried out in Harvard in the 1970s.[142] Note that, despite the definitional attention in the 1960s, the idea of a multinational corporation as such existed in practice already earlier. For instance, in the context of tax, the arm's length principle, which with regard to transfer pricing means that the price charged by one related party (such as enterprises within one multinational corporation) to another for a given product must be the same as if the parties were not related, was introduced already in the 1920s. Nevertheless, back then, "related parties were relatively autonomous and only a relatively small amount of international trade of tangible goods occurred".[143]

The OECD, whose approach is important because of its role with regard to international tax regulation, defines a multinational corporation[144] as "[C]ompany or group of companies with business establishments in two or more countries."[145] Arguably, there are several possibilities for

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136 Gössling T, (2011). *Corporate Social Responsibility and Business Performance: Theories and Evidence about Organizational Responsibility*. Cheltenham: Edward Elgar. p. 65.

137 See further Gössling T, (2011). *Corporate Social Responsibility and Business Performance: Theories and Evidence about Organizational Responsibility*. Cheltenham: Edward Elgar. p. 62-63.

138 See e.g. Farrar, J. (2005). *Corporate Governance: Theories, Principles, and Practice* (2nd Ed.). Oxford: Oxford University Press. p. 21.

139 Ruggie, J. G. (2017). Multinationals as Global Institution: Power, Authority and Relative Autonomy. *Regulation & Governance* 12 (3), 317-333. p. 2.

140 Next to the term multinational 'corporation', 'enterprise' is also often used. Arguably, these terms are not always interchangeable, as the term 'multinational enterprise' is considered to have a wider scope than the term 'multinational corporation'. Naturally, both involve cross-boarder business practices. However, an enterprise is any corporation that "owns (in whole or in part), controls and manages income creating assets in more than one country." Therefore, the term 'enterprise' includes both direct and portfolio investments. This distinction is important, because direct investment usually also gives the enterprise managerial control next to the financial stake in the foreign company, whereas portfolio investment does not. It is notable that economists usually use the term 'multinational enterprise', which might be an important element to keep in mind in conducting interdisciplinary research. (Muchlinsky, P. T. (2007). *Multinational Enterprises & the Law* (2nd Ed.). New York: Oxford University Press. p. 5.) For the purposes of this research, no specific distinction is made between those terms; that is because managerial control is an important element with regard to the corporate governance analysis in chapter 5, but this does not suggest that the findings of this research could not be relevant for portfolio investors. Therefore, the terms 'enterprise' or 'corporation' are used interchangeably within this research.

141 Muchlinsky, P. T. (2007). *Multinational Enterprises & the Law* (2nd Ed.). New York: Oxford University Press. p. 5.

142 Vernon, R. (1971). *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises.* New York / London: Basic Books, Inc.

143 De Wilde, M. F. (2015). *'Sharing the Pie': Taxing Multinationals in a Global Market.* Doctoral Dissertation, Erasmus University Rotterdam. p. 347. See also Li, J. (2002). Global Profit Split: An Evolutionary Approach to International Income Allocation. *Canadian Tax Journal* 50 (3), 823-883.

144 The OECD in general uses the term 'enterprise' instead of 'corporation' in its regulatory materials. However, as it is not further clarified, it is unclear whether this choice of terminology has been intentional or whether it has some specific implementation.

145 OECD Glossary of Tax Terms.

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sub-categorizing a multinational corporation (such as for instance multi-domestic companies or global companies).[146] For the purposes of this research, multinationals that can be described as transnational companies are the most relevant. Such multinationals are "networks and tend to have little specific national identification or base, although they do have a legal base in a particular country."[147] To my mind, this part of the definition can be more nuanced in certain cases; for instance, Volvo, Philips, or Apple often present themselves as Swedish, Dutch and American corporations respectively. Therefore, I believe that a distinction between technical and cultural 'belonging' can be made in this respect. In addition, according to the definition, transnational corporations are said to be "run by international management and are willing to move their capital and operations to any favourable location."[148] The United Nations Conference on Trade and Development (UNCTAD) defines transnational corporations as "incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates" whereas a parent company is "an enterprise that controls assets of other entities in countries other than its home country, usually by owning a certain equity capital stake."[149] Transnational companies, thus, operate in a range of countries but they might not always have a strong connection with a certain home country. This UN definition broadened the previously used definition of multinational corporation now also governing corporations that are "jointly owned and controlled by entities from several countries", such as Unilever or Shell.[150] Transnational corporation and multinational corporation were terms used to refer to different business entities for some time in the UN, but nowadays the distinction does not seem to be made anymore.[151] Therefore, a transnational corporation, as defined by UNCTAD, refers to the same business entities as used in this research.

What some scholars define as a transnational company is referred to within this research as a multinational company, because this is the term that is usually used in the international tax planning debates, even though in essence the main discussions concern transnational corporations. The term multinational (company) used in this research is in corporate law usually referred to as a large international operating stock company. Nevertheless, such a level of technical detail is not necessary to fulfil the aim of this research, which focuses on the more general level of decision making, actions and the public perception of multinational corporations. Thus, as this research does not focus on the specific structure of transnational corporations in comparison to other possible organizational forms, referring to multinational corporations in general should suffice. A multinational is, thus, in this research, a company that consists of different establishments operating under different national and international laws and regulations. Such a multinational consists of a parent company and at least one or more foreign subsidiaries, typically with a high degree of strategic interaction among the units. When the discretion of the corporate board is discussed, the board of the parent company is meant.

Furthermore, multinational organizations could be approached from an economic or legal perspective. From an economic activity perspective, multinationals can be seen as one entity while, from the legal perspective, a multinational consists of separate legal entities.[152] Such a distinction is important because "national law for the most part governs the separate legal entities, not the single economic enterprise."[153] The arm's length principle is an example of how the legal and economic dimensions of a multinational corporation differ and add up to complex nuances. From

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[146] Fisher, C. and Lovell, A. (2009). *Business Ethics and Values: Individual, Corporate and International Perspectives* (3rd Ed.). Essex: Prentince Hall. pp. 472-473. (They are referring to Harzing, A.-W. (2000). An Empirical Test and Extension of the Bartlett and Ghoshal Typology of Multinational Companies. *Journal of International Business Studies* 31 (1), 101-120).

[147] Fisher, C. and Lovell, A. (2009). *Business Ethics and Values: Individual, Corporate and International Perspectives* (3rd Ed.). Essex: Prentince Hall. p. 473. They are referring to Hirst, P. and Thompson, G. (1996). *Globalisation in Question*. Oxford: Polity Press. p. 11.

[148] Fisher, C. and Lovell, A. (2009). *Business Ethics and Values: Individual, Corporate and International Perspectives* (3rd Ed.). Essex: Prentince Hall. p. 473. They are referring to Hirst, P. and Thompson, G. (1996). *Globalisation in Question*. Oxford: Polity Press. p. 11.

[149] UN Conference on Trade and Development (UNCTAD) on Transnational Corporations.

[150] Muchlinsky, P. T. (2007). *Multinational Enterprises & the Law* (2nd Ed.). New York: Oxford University Press. p. 6.

[151] Muchlinsky, P. T. (2007). *Multinational Enterprises & the Law* (2nd Ed.). New York: Oxford University Press. p. 6.

[152] See e.g. Ruggie, J. G. (2017). Multinationals as Global Institution: Power, Authority and Relative Autonomy. *Regulation & Governance* 12 (3), 317-333. pp. 3-4.

[153] See e.g. Ruggie, J. G. (2017). Multinationals as Global Institution: Power, Authority and Relative Autonomy. *Regulation & Governance* 12 (3), 317-333. p. 4.

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an economic point of view, a multinational could be seen as one entity that does business, while from a legal perspective it is important to distinguish between the entities in order to allocate tax obligations. In this sense, this research focuses mainly on the economic perspective[154] on multinationals that engage in foreign direct investment, which also includes certain managerial control.[155] It, therefore, restricts this study to "incorporated business entities and corporate groups based on parent/subsidiary relations."[156] Thus, a more limited definitional framework is used. Nevertheless, it does not imply any specific limitations to reading this research. This choice is simply important because this research focuses on multinational corporations as one entity that can use their internal control and relations for tax planning purposes.[157] For instance, in the case of highly sophisticated tax planning schemes, passive subsidiaries that are often referred to as 'letterbox companies'[158] are also part of an MNC.

Ruggie argues that an "economic organization, acting through one legal 'self' (often called the corporate 'parent'), has the authority to create and structure the other legal 'selves' (which of course are integral parts of the single economic organization) in such a way as to optimize the entire group's interests throughout its transnational sphere of operation, as well as to limit its liabilities."[159] The parent company usually "sets the strategic objectives for the entire enterprise," such as deciding "where and how to allocate its assets, which is based not only on such factors as market size, labor costs, or promising natural resource deposits, but also on selecting or constructing favorable regulatory environments through the global market for legal norms."[160] This is important for the multinational's internal governance structures.

According to Eijsbouts, multinational corporations have their "own internal governance structures that have to be in line with the various external legal regimes and national and international codes governing the group operations worldwide on the one hand and their complex internal structures on the other hand."[161] Such a mixture of systems inevitably includes the possibility of conflicts between these frameworks to which corporate decision-making organs need to respond. As a result, a multinationals' internal and external systems differ from those of a corporation operating in one country, as most national laws focus on corporate entities operating within one country (even if these entities are a part of a multinational). In the context of human rights, Ruggie has argued that national corporate and securities laws are out-dated in the context of multinational business practices, since multinationals have possibilities for structuring their business activities "in up to two hundred states and territories around the world" by setting up legally "separate and independent entity even where the parent company is the sole shareholder."[162] In light of human rights, according to Ruggie, this raises a fundamental question with regard to the multinational's social responsibilities and accountability.[163] This, however, applies in any kind of context, not only human rights.

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[154] Therefore, nuances related to transfer pricing rules and the arm's length principle will also not be further discussed in this research.

[155] Direct investment gives the investor (a multinational in this case) not only a financial stake in the venture but also managerial control (this differs from portfolio investment). Foreign direct investment is a direct investment outside an investor's home country. Muchlinsky, P. T. (2007). *Multinational Enterprises & the Law* (2nd Ed.). New York: Oxford University Press. p. 5.

[156] Muchlinsky, P. T. (2007). *Multinational Enterprises & the Law* (2nd Ed.). New York: Oxford University Press. p. 5.

[157] See also: Muchlinsky, P. T. (2007). *Multinational Enterprises & the Law* (2nd Ed.). New York: Oxford University Press. p. 299 ff.

[158] See e.g. Teichmann, C. (2012). The Downside of Being a Letterbox Company. *European Company Law* 9 (3), 180-184; Werlauff, E. (2010). Pro Forma Registration of Companies: Why a Brass Plate in the Host Country Is Enough in Some Respects, but Not in Others. *European Company Law* 7 (1), 25-30.

[159] Ruggie, J. G. (2017). Multinationals as Global Institution: Power, Authority and Relative Autonomy. *Regulation & Governance* 12 (3), 317-333. p. 12.

[160] Ruggie, J. G. (2017). Multinationals as Global Institution: Power, Authority and Relative Autonomy. *Regulation & Governance* 12 (3), 317-333. p. 12.

[161] Eijsbouts, J. (2011a, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*. Inaugural Lecture, Maastricht University. p. 52.

[162] Ruggie, J. G. (2013). *Just Business: Multinational Corporations and Human Rights*. New York: W. W. Norton & Company. p. 132.

[163] "*How do we get a multinational corporation to assume the responsibility to respect human rights for the entire corporate group, not atomize it down to its various constituent units*?" Ruggie, J. G. (2013). *Just Business: Multinational Corporations and Human Rights*. New York: W. W. Norton & Company. p. 188. The presumption of atomization drives the analysis of Radu Mares, "Responsibility to Respect: Why do core company should act when affiliates infringe human rights" in Mares, R. (Ed.). (2011). *The UN Guiding principles on Business and Human Rights: Foundations and Implementation.* The Raoul Wallenberg Institute Human Rights Library (Vol. 39). Leiden / Boston: Martinus Nijhoff (Brill).

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Also, in the context of taxes, a multinational as such is not one coherent entity that pays or does not pay tax. Different national tax laws are applicable to separate entities in a multinational group. Therefore, different entities in one corporate group have different rules to comply with and thus also different tax burdens. However, in practice, this detail is an important part of international (aggressive) tax planning. Namely, because different entities and their activities are subject to different rules, they can be set up for tax reasons, for instance in the case of aggressive tax planning.[164] The exact way in which parent company control is exercised in a group of companies in taxation matters is, however, not the focus of this research. Within the scope of this research, the relationship among the group of entities is not necessary at this stage. Moreover, as this research does not focus on national laws but on the international element of the issue instead, a multinational is considered as one (economic) entity. Also when it comes to CSR, the location of the subsidiaries can be important for the degree CSR or concrete actions involved but for the purpose of this research it is important that the decision to engage in CSR in the first place comes from the parent company. This indicates what the stakeholders can expect from the multinational and its products or services in a broader perspective.

The special character of multinationals – one entity combining different and often conflicting national laws – allows them to operate on a global level in somewhat a regulatory vacuum. This means that multinationals' actions cannot be controlled on the nation-state level of regulation due to the transnational nature of the activities and transactions. In such transnational situations, global regulatory governance is usually weak.[165] This is also the case with regard to international aggressive tax planning and tax avoidance. Note, however, that multinationals also have to plan their taxes in order to avoid double taxation. Thus, tax planning by multinationals is not always neccessarily an unacceptable practice.[166]

The imperfections of national laws, weakness of global governance, and corporate power (see section 3 of this chapter) are in general the main drivers behind the idea of CSR.[167] Without these drivers, the concept of CSR would probably have a different role in business and society.[168] This is also the reason why this research focuses foremost on the multinational companies that on their official webpage or annual report (or in any other official publicly available source) state that they voluntarily accept either social or moral responsibilities towards the societies in which they operate. Such corporations are referred to as 'CSR corporations' within this research. CSR corporations can be SMEs as well as (large) multinationals. This research focuses mainly on the latter.

It goes without saying that multinationals are complex entities and usually there are various considerations next to tax planning that affect strategic corporate decisions. However, in case of what in this research is classified as aggressive tax planning (see chapter 3), some entities in a multinational group are only set up for tax planning purposes (even though it might be difficult to prove that). Therefore, in this research, multinationals as such are viewed as one entity in a sense that they have the possibility to set up these separate entities in different jurisdictions for tax planning purposes. The question is whether and to what extent CSR corporations should do that, as will be discussed in the following chapters.

2.2.3. Concluding remarks

In conclusion, for this research the most relevant characteristics of a multinational corporation are mobility, many subsidiaries, and the mobility of capital. Mobility provides that a multinational can set up new business units in different jurisdictions. This allows a multinational to have subsidiaries, which, from a tax planning perspective, means that a multinational is, for instance, able to move

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[164] See also chapter 3, section 3.
[165] See e.g. Scherer, A. G. and Palazzo, G. (2008). Globalization and Corporate Social Responsibility. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 413-431). New York: Oxford University Press. pp. 423-425.
[166] See also chapter 3.
[167] See chapter 4 on CSR.
[168] See also chapter 4 on CSR.

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its costs to high-tax jurisdictions and profits to low-tax jurisdictions. Being able to do this means that a multinational has a mobile capital. These three elements also provide multinationals with a specific position of power, as will be discussed in the following section.

2.3. Corporate power

Multinational corporations can enjoy a special powerful position that most individuals and SMEs do not have. This position includes that large corporations can have a significant impact on the societies in which they operate: for instance, corporate banks in the USA that, according to Barkan, engaged in "unsustainable and predatory" lending causing the financial bubble in 2008 or oil companies that failed to meet basic maintenance and environmental oversight that caused the disaster in the Gulf of Mexico in 2010.[169] Next to such extreme examples, large corporations can use their powerful position in various ways, also in relation to tax planning for instance.

As indicated previously, the way of doing business has changed. Globalization has caused an expansion of cross-border commercial activities.[170] Consequently, multinationals have a lot of recourses and opportunities to contend with in competitive global markets. The fact that a multinational is one economic organization means that it is in a position to combine "the most favourable regulations of different countries within a single contract."[171] This has had the result, as also Hirst and Thomson write, that multinational corporations "could no longer be controlled or even constrained by the policies of particular nation states." Instead, such corporations "could escape all but the commonly agreed and enforced international regulatory standards."[172] In other words, such companies are bigger and faster than governments.[173] Already in the 1970s, Vernon was worried about the excessive power of multinationals, wondering weather this is "undermining the capacity of nations to work for the welfare of their people."[174] The power of multinationals to operate beyond states leads to a regulatory vacuum, which means that national regulations cannot tackle international problems and international rulemaking is not sufficiently developed yet.[175] Such a regulatory vacuum of international standards has created a possibility for multinational corporations to use mismatching national (tax) laws to extremes.[176] Already in the 1970s the multinational's freedom to allocate their profits among jurisdictions was seen as one of the tax issues arising from the growth of corporate power, while nowadays it could be categorized as tax avoidance or aggressive tax planning.[177]

Such a situation in which corporations can achieve their goals by circumventing the rules if necessary can be considered as a part of corporate power. Corporate power can be economic (in general, a lot of money to spend) or political. In political science, power is typically defined as "the ability of A to get B to do something that B otherwise would not do."[178] Strange calls this 'direct'

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[169] Barkan, J. (2013). *Corporate Sovereignty: Law and Government under Capitalism*. Minneapolis: University of Minnesota Press. pp. 1-18.

[170] 'Globalization' is a widely used concept, but it is seldom concretely defined. Giddens, for instance, defines globalization as "the intensification of world-wide social relations which link distant localities in such a way that local happenings are shaped by events many miles away and vice versa." (Giddens, A. (1990). *The Consequences of Modernity.* Stanford: Stanford University Press. p. 1.) Richter (2001. p. 1) writes that, despite the definitional vagueness, globalization clearly includes the following aspects: "the internationalization of economy and finance; the expansion of technologies, particularly communication and information technologies; and the contraction of space for democratic decision-making and social well-fare as the role and significance of the nation-state changes." She adds that the key concern of globalization is "how to influence those practices of transnational corporations (TCNs) that conflict with social well-being." For more discussion on the concept of globalization, see also: Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. pp. 18-22.

[171] Ruggie, J. G. (2017). Multinationals as Global Institution: Power, Authority and Relative Autonomy. *Regulation & Governance* 12 (3), 317-333. p. 12.

[172] Hirst, P. and Thompson, G. (1996). *Globalisation in Question*. Oxford: Polity Press. p. 11.

[173] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. p. 184.

[174] Vernon, R. (1971). *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises.* New York / London: Basic Books, Inc. p. 5.

[175] See e.g. Scherer, A. G. and Palazzo, G. (2008). Globalization and Corporate Social Responsibility. In Crane, A.et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 413-431). New York: Oxford University Press. pp. 423-425.

[176] See e.g. Grapper, J. (2019, November 4). Do Global Businesses have too Much Power? *Financial Times* (online). See more on the concept of tax planning in chapter 3, section 3. Of course, with regard to tax planning, corporations do not always act against the will of the government, as states sometimes also provoke tax planning by engaging in tax competition; see chapter 3, section 4.

[177] Vernon, R. (1971). *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises.* New York / London: Basic Books, Inc. pp. 274-277.

[178] Ruggie, J. G. (2017). Multinationals as Global Institution: Power, Authority and Relative Autonomy. *Regulation & Governance* 12 (3), 317-333. p. 5.

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form of power the relational power.[179] Such structural power is rooted in understanding "where the power is derived from."[180] According to Strange, such a structural power is derived from four sources: "control over security, control over production, control over credit, and control over knowledge, beliefs and ideas."[181] In the case of multinational corporations, all these sources of power are present, which, as Strange also claims, indicates the power of (private) markets. Such power of markets (and, therefore, multinational corporations) also affects how policial systems work.

More specifically, in relation to political corporate power, Ruggie identifies three dimensions: instrumental power, structural power, and discursive power.[182] Instrumental power concerns business lobbying, which means that corporations indirectly affect the law-making in a favourable direction for them (for instance, internet companies try to convince politicians to have a less strict regulation of privacy matters).[183] Structural power in terms of Ruggie's definition concerns "locational choice sets, the ability to transfer risks to suppliers, and generally the ways in which business gets things onto or keeps them off the policy agenda."[184] Discursive power refers to "the ability by business and business associations to frame and define public interest issues in their favor."[185] In the context of this research, the first two dimensions of Ruggie's definition – instrumental and structural power – are the most relevant.

I believe that, in the context of tax planning, we can talk about multidimensional corporate power that goes even further than the division of political corporate power proposed by Ruggie and is in line with the reasoning of Strange. It can even be argued that, in the case of tax planning, a multinationals's power has grown and can even overrule the state power. In the context of international tax planning, the multinationals' corporate power appears, for instance, in the form of knowledge and possibilities to (ab)use the mismatching of national tax laws to extremes (Ruggie's structural power)[186] or by lobbying for favourable rules (instrumental power).[187] Thus, multinationals are mobile and they have strong negotiation powers. Next to the possibilities to move business activities around the globe and to lobby for favourable laws, corporations can also use their power in the law enforcement phase. This means that multinationals can negotiate, within the limits of national and international tax law, specific tax rulings with tax authorities.[188] This could be seen as a combination of instrumental and structural power. Accordingly, in my opinion, multidimensional corporate power in the context of tax planning consists of three main categories: lobbying power, knowledge and mobility. These categories are also in line with the sources of structural power as defined by Strange.

First, some authors conclude that multinationals can affect law-making by lobbying for more favourable rules.[189] Multinationals have enough power to affect the law-making process by

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[179] Strange, S. (1994). *States and Markets* (2nd Ed.). London / New York: Continuum. p. 24.

[180] Peters, C. (2014). *On the Legitimacy of International Tax Law.* Amsterdam: IBFD Doctoral Series. p. 200.

[181] Strange, S. (1994). *States and Markets* (2nd Ed.). London / New York: Continuum. p. 26.

[182] Ruggie, J. G. (2017). Multinationals as Global Institution: Power, Authority and Relative Autonomy. *Regulation & Governance* 12 (3), 317-333, p. 5.

[183] See more on corporate lobbying in Ruggie, J.G. (2017). Multinationals as Global Institution: Power, Authority and Relative Autonomy. *Regulation & Governance*.

[184] Ruggie, J. G. (2017). Multinationals as Global Institution: Power, Authority and Relative Autonomy. *Regulation & Governance* 12 (3), 317-333. p. 5.

[185] Ruggie, J. G. (2017). Multinationals as Global Institution: Power, Authority and Relative Autonomy. *Regulation & Governance* 12 (3), 317-333. p. 5.

[186] Even Ruggie places corporate power in the context of tax planning by arguing that "multinationals' structural power is greatly augmented by the existence of tax havens." Even though he does not exactly define 'tax havens' as it is defined for instance by the OECD, he adds that, as long as tax and tariff rates are not harmonized, "this remains a source of structural power for multinationals." See Ruggie, J. G. (2017). Multinationals as Global Institution: Power, Authority and Relative Autonomy. *Regulation & Governance* 12 (3), 317-333. p. 8. It must also be noted that lobbying, as such, may add more knowledge to democratic process and this in turn enhances the quality of better-informed decisions.

[187] For more information about the lobbyist activities in the EU, see e.g. Corporate Europe Observatory webpage. *Exposing the Power of Corporate Lobbying in the EU.*

[188] See e.g. LuxLeaks; EU state aid cases: Apple, Starbucks, Fiat; see also European Commission. (2015, October 21). Commission Decides Selective Tax Advantages for Fiat in Luxembourg and Starbucks in the Netherlands are Illegal under EU State Aid Rules. Press release

[189] See e.g. about the lobbyist activities in the EU: Corporate Europe Observatory webpage. *Exposing the Power of Corporate Lobbying in the EU;* Christians, A. (2017). Trust in the Tax System: The Problem of Lobbying. In Peeters, B. et al. (Eds.), *Rebuilding Trust in Taxation* (pp. 151-173). Antwerpen: Intersentia.

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engaging in corporate lobbying.[190] "Companies lobby because lobbying pays."[191] In relation to corporate tax planning, multinationals often practise corporate lobbying, which according to Christians "results in tax policy as favourable as possible to those who have recourses to shape it."[192] There is evidence that lobbying activities result in significant tax benefits for companies.[193] A clear example of such lobbying is when Unilever and Shell allegedly lobbied in the Netherlands for abolishing dividend taxation.[194] Such a political influence is a clear form of corporate power. Christians argues that, because of the successful corporate lobbying in relation to tax regulation, society is losing trust in the system.[195] Concentration of power causes societal mistrust.[196] Therefore, excessive corporate lobbying power can be described as a negative use of corporate power. For instance, a good example of trying to affect the law-making process is demonstrated by the case of Starbucks that, shortly after tax avoidance scandals in the UK, went on to lobby in the US for having the privilege to benefit from the stateless income strategies of multinational companies.[197]

The second dimension of corporate power is that multinationals can use their knowledge and strong negotiation position in the law enforcement phase when they have to deal with the tax authorities.[198] Some multinationals even go as far as to use their powerful negotiation position when dealing with some developing countries, as Crane and Matten explain that multinationals sometimes "pitch developing countries against each other by allocating foreign direct investment to countries that can offer them the most favourable conditions in terms of low tax rates, low levels of environmental regulation, and restricted workers' rights." Such multinationals are "accused of exploiting workers in developing countries, destroying the environment, and, by abusing their economic power, engaging developing countries in a so-called 'race to the bottom'."[199] This dimension of corporate power can, nevertheless, also occur in more developed countries. For example, the so-called LuxLeaks scandal that revealed how many multinationals (nearly 340), such as Pepsi, IKEA, and Deutsche Bank had "secured secret deals from Luxembourg that allowed many of them to slash their global tax bills."[200] Reality is probably more nuanced than media presents, but in my opinion this example shows that multinationals have the possibility to interact with the lawmaker in a way that SMEs usually do not. The economic power that multinationals possess makes them "influential actors in the decision-making process" and therefore they often succeed in achieving "tax privileges at the expense of other taxpayer."[201] In addition, sometimes the economic situation in a state can simply be so weak that there is no other possibility than to accept any offer a multinational makes. That either indicates that states have a weak negotiation position with respect to the multinational enterprises or that a politician's personal interests lead to certain agreements. Some tax gaps in the

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[190] Blowfield and Murray seem to suggest that lobbying for lower corporate taxes can appear to be in line with an executive's fiduciary duties. Whether this statement has legal grounds, however, needs further research. Nevertheless, they do acknowledge that depriving government of revenues can lead to cuts in public services. See: Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. p. 93. See also Peters, C. (2014). *On the Legitimacy of International Tax Law.* Amsterdam: IBFD Doctoral Series. pp. 201-202.

[191] Christians, A. (2017). Trust in the Tax System: The Problem of Lobbying. In Peeters, B. et al. (Eds.), *Rebuilding Trust in Taxation* (pp. 151-173). Antwerpen: Intersentia. p. 155.

[192] Christians, A. (2017). Trust in the Tax System: The Problem of Lobbying. In Peeters, B. et al. (Eds.), *Rebuilding Trust in Taxation* (pp. 151-173). Antwerpen: Intersentia. p. 152.

[193] Christians, A. (2017). Trust in the Tax System: The Problem of Lobbying. In Peeters, B. et al. (Eds.), *Rebuilding Trust in Taxation* (pp. 151-173). Antwerpen: Intersentia. p. 155.

[194] See e.g. White, J. (2018, August 24). How Shell Manages its Dutch Dividend Withholding Tax. *International Tax Review*. Note that, due to harsh political opposition, this regulation was not succesfully established.

[195] Christians, A. (2017). Trust in the Tax System: The Problem of Lobbying. In Peeters, B. et al. (Eds.), *Rebuilding Trust in Taxation* (pp. 151-173). Antwerpen: Intersentia.

[196] Bradshaw, T. and Vogel, D. (1981). *Corporations and Their Critics: Issues and Answers to the Problems of Corporate Social Responsibility*. New York: McGraw-Hill. p. 223.

[197] See Kleinbard, E. D. (2013). Through a Latte, Darkly: Starbucks's Stateless Income Planning. *Tax Notes*, 1515-1535; Politi, J. and Jopson, B. (2013, April 24). Starbucks Seeks Fresh U.S. Tax Breaks. *The Financial Times.*

[198] See more on knowledge transfer as a corporate power in Muchlinsky, P. T. (2007). *Multinational Enterprises & the Law* (2nd Ed.). New York: Oxford University Press. p. 8.

[199] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 18.

[200] International Consortium of Investigative Journalism. (ICIJ). *Luxembourg Leaks: Global Companies' Secrets Exposed*. Note that some of these structures are investigated by the European Commission as possible state aid cases. See also chapter 3, section 5.

[201] Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28. p. 15.

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laws are not caused by a special reason however; sometimes it is just the sheer complexity, lack of knowledge or overwhelming bureaucracy that pave the way for weak legislation. Nevertheless, when negotiating favourable deals (usually with the help of various corporate advisers[202]), multinationals have a strong position, since they are very mobile, which means that, if they do not get the deal from one state, they can always turn to another state.
This leads to the third dimension of corporate power: possibilities for moving (parts of their operations) to other jurisdictions that would allow them to plan their taxes as they wish. In my opinion, this dimension falls under the structural power as defined by Strange. Multinationals are mobile or they can restructure their business operations in a self-serving way, for instance by setting up a 'letterbox company' in certain states to avoid some applicable rules (think for instance of transfer pricing). Setting up various business entities in different countries for taking advantage of various tax treaty rules is called (tax) treaty shopping.[203] Next to competition distortion, such 'cherry picking' creates a situation that is perceived as unfair.
In summary, due to their specific transnational character, multinationals have various opportunities in their decision-making processes and these choices have a major effect on society. A company that has a financial possibility to establish and be successful in different markets usually has corporate power that in turn can have important consequences on the societies in which it operates. Especially in case of tax planning, multinationals possess powers that may even overrule the state power. Such corporate power is three-dimensional: first, multinationals can lobby for favourable rules and thereby shape the legal and political system in which they operate; second, multinationals have knowledge to assure that they lobby in a certain – for them favourable – direction (this is also linked to an economic power of corporation, which allows them to hire the best advisors); third, due to a high degree of mobility, in a very short period of time, multinationals can operate globally or adjust their structures, which gives them a strong negotiation position in relation to states. All these dimensions are related and mutually non-exclusive.
Multinationals have, thus, various opportunities in their decision-making processes and these choices have an effect on society.[204] Empirical evidence suggests that society is also aware of the strong position of corporations. For instance, "one recent poll revealed that a large majority of the US population believe that lobbyists (71%), major companies (67%), and banks and financial institutions (67%) have too much power."[205] For instance, corporate power provides a multinational corporation with mobility for using the national laws on a global level, which often is a crucial element of tax avoidance or aggressive tax planning. Naturally, this does not mean that all corporations make use of such possibilities. Moreover, companies are economic entities after all and will not actively search for the ways that would require them to pay more tax than they already pay. However, free-riding and making profits at a considerable cost to society's welfare could potentially result in losing social legitimacy. Therefore, multinationals have a role to play in taking into account the effects of their tax planning practices, especially CSR companies, as I will argue later in this research.[206] Furthermore, without society there would be no corporations.[207] Therefore, corporations need to be accountable to the societies in which they operate; corporate power also presumes corporate accountability.

[202] See also chapter 3, section 3.
[203] See e.g. Ault, H. J. (2013). Some Reflections on the OECD and the Sources of International Tax Principles. *Max Planck Institute for Tax Law and Public Finance Working Paper* 2013 – 03.
[204] See also chapter 3, section 2.1; chapter 2.
[205] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 9. They are referring to Saad, L. (2012, April 11). Americans Decry Power of Lobbyists, Corporations, Banks, Feds: Independents Agree with GOP that Federal Government Has Too Much Power. *News Gallup* (online).
[206] Chapter 4.
[207] For example, an American business magnate and investor Warren Buffett has agreed that, for his success, a well-functioning society has been crucial: "I personally think that society is responsible for a very significant percentage of what I've earned. If you stick me down in the middle of Bangladesh or Peru or someplace, you'll find out how much this talent is going to produce in the wrong kind of soil. I will be struggling thirty years later. I work in a market system that happens to reward what I do very well – disproportionately well." As quoted in Chang, H.-J. (2010). *23 Things They Don't Tell You About Capitalism*. London: Allen Lane, p. 30.

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2.4. Corporate accountability and transparency

In order to discuss to whom and why corporations should be accountable, it is important to understand what accountability means in the first place. The business dictionary defines corporate accountability as the obligation "to account for its activities, accept responsibility for them, and to disclose the results in a transparent manner." [208] In addition to accepting responsibility, accountability involves transparency, the continuous, systematic, and public communication of information and reasons designed to justify an organization's decisions, actions, and outputs to various stakeholders; it is "a form of ethical communication directed toward those parties who are affected by corporate activities and effects." [209] Such transparency helps stakeholders to keep corporations accountable.

Based on the literature on political accountability, Valor defines corporate accountability as "corporate control; that is, the establishment of clear means for sanctioning failure." [210] The neoclassical – narrow – vision of corporate accountability suggests that companies should only be accountable to shareholders. [211] From a CSR perspective, accountability should be understood broadly, "as social corporate control" because "corporations are accountable for the creation of organizational wealth for its multiple constituents."[212] Accountability as a tool for control suggests "the establishment of clear means for sanctioning failure."[213] Depending on who should be able to control a company suggests the tension between a corporation's responsibility towards shareholders and a larger group of stakeholders. Such tension will be discussed further in this research in chapter 5 on corporate governance. Nevertheless, as this research focuses on the societal element of tax planning and CSR, accountability is approached in rather wide sense – towards society.

Society, namely, "grants legitimacy and power to business."[214] In case businesses do not use their corporate power responsibly, they lose such social legitimacy.[215] Derived from this, Wood writes that a corporation is "a social institution that must avoid abusing its power."[216] It can be agreed that corporations should avoid abusing their power if they do not want to risk losing their power and social legitimacy. Corporate accountability stands for controlling or taming excessive corporate power. Companies need "social acceptance" or "social legitimacy" to operate. [217] Of course, shareholders are important stakeholders of a corporation but, for long-term business practices, other stakeholders are also crucial.[218] Swift argues, from a CSR perspective, that "organisations should account for their actions through the *provision of information* to stakeholders and society."[219] She claims that "essentially accountability is about the provision of information between two parties where the one who is accountable, explains or justifies actions to the one to whom the account is

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[208] See: Business Dictionary online. Retrieved from: http://www.businessdictionary.com/definition/accountability.html (accessed 03.03.2019).
[209] Pava, M. L. (2008). Corporate Accountability. In Kolb, R. W. (Ed.), *Encyclopedia.* p. 451.
[210] Valor, C. (2005). Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability. *Business and Society Review* 110 (2), 191-212. p. 196.
[211] See chapter 5.
[212] Valor, C. (2005). Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability. *Business and Society Review* 110 (2), 191-212. pp. 196-197.
[213] Valor, C. (2005). Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability. *Business and Society Review* 110 (2), 191-212. p. 196.
[214] Davis, K. (1973). The Case For and Against Business Assumption of Social Responsibilities. *Academy Management Journal* 16 (2), 312-322. p 314.
[215] Davis, K. (1973). The Case For and Against Business Assumption of Social Responsibilities. *Academy Management Journal* 16 (2), 312-322. p 314.
[216] Wood, D. J. (1991a). Corporate Social Performance Revisited. *Academy of Management Review* 16 (4), 691-718. p. 695.
[217] Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 52. On corporate social performance, see also Sethi, S. P. (1975). Dimensions of Corporate Social Performance: An Analytic Framework. *California Management Review* 17 (3), 58-64; Ackerman, R. W. (1973). How Companies Respond to Social Demands. *Harvard University Review* 51 (4), 88-98; Ackerman, R. W. and Bauer, R. (1976). *Corporate Social Responsiveness.* Reston: Reston Publishing; Wood, D. J. (1991). Corporate Social Performance Revisited. *Academy of Management Review* 16 (4), 691-718.
[218] See also chapter 5, section 4.
[219] Swift, T. (2001). Trust, Reputation and Corporate Accountability to Stakeholders. *Business Ethics: A European Review* 10 (1), 16-26. p. 16.

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owed."[220] In other words, "in order to enhance corporate accountability, corporate social performance should be made more visible to those with a stake in the corporation."[221] Therefore, in order to keep multinationals accountable towards the societies in which they operate, transparency is necessary. That is especially important in situations of a regulatory vacuum because in such cases laws fall short in keeping corporations accountable.

It goes without saying that "transparency" is a broad and complicated concept.[222] Transparency not only counts for corporate impact, but also for "how an organization has managed those impacts and the associated stakeholder relationships." In other words, ideally, transparency should serve the stakeholders' "(moral) right to know what is going on when it affects them."[223] Corporate accountability does not only require simple transparency but an "accessible, reasonable, and meaningful" openness.[224]

In the international law context, transparency is "universally perceived as a positive value."[225] Moreover, Bianchi argues that "in contrast, the opposites of transparency, such as secrecy and confidentiality, have taken on a negative connotation" and "although they remain paradigmatic narratives in some areas, overall they are largely considered as manifestations of power and, often, of its abuse."[226] Transparency leads to "a moral obligation to improve performance." Thus, "it is accepted that full transparency is central to ethical behaviour," nevertheless, it is unclear how far reaching corporate transparency should go. For instance, "[T]here is uncertainty about the significance of current reporting practices and doubt about what transparency should actually mean in practical situations."[227] Moreover, how corporate transparency is interpreted (for instance, by media[228]) can pose certain business risks that need to be strategically managed. Especially in the context of corporate tax practices, an absolute transparency can pose various risks because the media and other stakeholders, such as NGOs, can interpret the disclosed information one-sidedly.[229] From the corporate perspective, an absolute transparency is, thus, not always positive. Therefore, I will argue in chapter 6 that in the specific context of corporate tax practices transparency does not only mean disclosing certain information but it also means an open and clear communication. On other words, good tax governance needs a transparent dialogue.[230]

For the purposes of this research, transparency will be considered as a principle of being open about one's tax planning practices, which is a reflection of an ethical value.[231] Transparency is often considered to be a key principle in the fight against a certain type of tax planning.[232] The European Commission, for instance, states that "transparency is a crucial element in securing fairer taxation", adding that the Commission has "given high priority to improving tax transparency in the Single Market".[233] One of the reasons that various international regulatory approaches aim to create more

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[220] Swift, T. (2001). Trust, Reputation and Corporate Accountability to Stakeholders. *Business Ethics: A European Review* 10 (1), 16-26. p. 17. She is referring to Gray, R. et al. (1997). Struggling With the Praxis of Social Accounting. *Accounting, Auditing and Accountability Journal* 10 (3), 325-364.

[221] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press p. 77.

[222] See e.g. Schnackenberg, A. K. and Tomlinson, E. C. (2016). Organizational Transparency: A New Perspective on Managing Trust in Organization-Stakeholder Relationships. *Journal of Management* 42 (7), 1784-1810.

[223] Henriques, A. (2007). *Corporate Truth: The Limits of Transparency.* Sterling: Earthscan. p. 25.

[224] Pava, M. L. (2008). Corporate Accountability. In Kolb, R. W. (Ed.), *Encyclopedia.* p. 451.

[225] Bianchi, A. (2013). On Power and Illusion: The Concept of Transparency in International Law. In Bianchi, A. and Peters, A. (Eds.). *Transparency in International Law*. Cambridge: Cambridge University Press. p. 2.

[226] Bianchi, A. (2013). On Power and Illusion: The Concept of Transparency in International Law. In Bianchi, A. and Peters, A. (Eds.). *Transparency in International Law*. Cambridge: Cambridge University Press. p. 2.

[227] Henriques, A. (2007). *Corporate Truth: The Limits of Transparency.* Sterling: Earthscan. pp. 2-3.

[228] See also chapter 6.

[229] Douma, S. (2018). *Miscommunication and Distrust in the International Tax Debate*. Deventer: Wolters Kluwer.

[230] See also Douma, S. (2018). *Miscommunication and Distrust in the International Tax Debate*. Deventer: Wolters Kluwer. p.43; Hillenbrand, C., Money, K. G., Brooks, C. and Tovstiga, N. (2019). Corporate Tax: What Do Stakeholders Expect? *Journal of Business Ethics* 158, 403-426.

[231] See also chapter 6.

[232] See also Peters, C. (2017). Improving Democratic International Tax Governance: On the Power of Citizens, Transparency and Independent Watchdogs. In Peeters, B. et al. (Eds.), *Rebuilding Trust in Taxation* (pp. 203-234). Antwerpen: Intersentia. pp. 218-231. Also, corporate practice seems to (start to) accept that the demand for tax transparency has grown, see BDO. (2017, 19 May). The Pros and Cons of Tax Transparency. *BDO Scope.*

[233] European Commission. (2015, June 17). *Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*. Communication from the Commission to the European Parliament and the Council.

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transparency in tax planning discussions is to minimize the information gap between corporations and other interested parties, such as tax authorities, states or society at large. Multinationals, namely, often possess more information with regard to possible tax planning structures as well as the reasoning behind those structures. Without such knowledge, it is difficult for lawmakers, as well as investors, (other) stakeholders or society, to assess which structures are acceptable and which need a response, such as changing the laws and how. In economics, such an information gap is referred to as an information asymmetry, which describes situations in which one party to a transaction or agreement has less information than the other.[234] The corporate power allows corporations to create an information asymmetry in their favour. Therefore, transparency is an important door to corporate accountability. Transparency with regard to taxation is not a new phenomenon. However, in light of concentrated attention on corporate tax practices, the understanding of tax transparency is changing. The taxpayer is only not expected to be transparent towards the tax administration but also towards the wider public.[235] Transparency is not only a goal in itself but also a means towards a certain outcome, such as accountability. Transparency with regard to taxation will be discussed in more detail in chapter 6 on good tax governance.
It is understandable that companies, as they are economic entities, will not actively search for possibilities to pay more tax. Moreover, full transparency as a part of social accountability with regard to its payments and tax choices is usually even opposed by companies that have nothing to hide.[236] There can be many downsides to this, such as a threat to the taxpayers' privacy, weakening its competitive position, or risking a misinterpretation of information by a misinformed receiver. Such risks, however, do not justify that some multinationals are using their corporate power at the considerable cost of society's welfare, undermining social values and leading to an increase of inequality. Moreover, such negative effects on society potentially also influence the markets, which in turn can be harmful for corporations themselves in the long run. Therefore, multinationals have their role to play in taking into account the effects of their tax planning practices. Moreover, considering the growing public interest in corporate tax practices, multinationals cannot ignore the need for accountability and transparency because otherwise they risk reputation damage.

2.5. Corporate reputation and trust

Abusing corporate power or diminishing responsibilities towards society in other ways may be a risky business. One of the most relevant corporate risks in the context of this research is the reputational risk, since one of the biggest corporate risks with regard to tax planning is considered to be the risk of getting a bad reputation.[237] Eccles et al. argue that "in an economy where 70% to 80% of market value comes from hard-to-assess intangible assets such as brand equity, intellectual capital, and goodwill, organizations are especially vulnerable to anything that damages their reputations."[238] Reputation can be considered as "one of organization's greatest intangible assets with tangible value."[239] Even though the value of reputation is difficult to quantify, a good reputation can bring with it a competitive advantage.[240]
But what exactly is corporate reputation? Corporate reputation can be defined as "assessments of an organization by a social system,"[241] that is, by its stakeholders. As a corporation has various

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[234] See e.g. Stiglitz, J. E. (2002). Information and the Change in the Paradigm in Economics. *The American Economic Review* 92 (3), 460-501. pp. 469-470.
[235] Hey, J. (2018). Tax Transparency (preparatory materials). EATLP Annual Conference 2018, Zurich.
[236] See e.g. BDO. (2017, 19 May). The Pros and Cons of Tax Transparency. *BDO Scope.* p. 5, p. 23; Peters, C. (2017). Improving Democratic International Tax Governance: On the Power of Citizens, Transparency and Independent Watchdogs. In Peeters, B. et al. (Eds.), *Rebuilding Trust in Taxation* (pp. 203-234). Antwerpen: Intersentia. p. 227.
[237] See e.g. PwC. (2013). *Tax Strategy and Corporate Reputation—a Business Issue*; Lavermicocca, C. and Buchan, J. (2015). Role of Reputational Risk in Tax Decision Making by Large Companies. *eJournal of Tax Research* 13 (1), 5-50.
[238] Eccles, R. G. et al. (2007). Reputation and Its Risks. *Harvard Business Review* February issue 85 (2), 104-114.
[239] Ferrell, O. C. et al. (2017). *Business Ethics: Ethical Decision Making and Cases* (11th Ed.). Boston: Engage Learning. p. 37.
[240] Wickert, C. and Cornelissen, J. (2017). CSR and Reputation: Too Much of a Good Thing? In Rasche, A. et al. (Eds.). *Corporate Social Responsibility: Strategy, Communication, Governance* (pp. 187-219). Cambridge: Cambridge University Press. p. 332.
[241] Deephouse, D. L. and Carter, S. M. (2005). An Examination of Differences Between Organizational Legitimacy and Organizational Reputation. *Journal of Management Studies* 42 (2), 329-360. p. 329.

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stakeholders, its reputation can be different among those different stakeholders.[242] Reputation is the result of judgments in moral terms for it is "the aggregate of many personal judgments about the company's credibility, reliability, responsibility, and trustworthiness."[243] In other words, corporate reputation entails a "value judgement,"[244] as stakeholders take values into account when evaluating a corporation's behaviour. Taking these values seriously reflects a corporation's commitment to stakeholders with whom they interact directly or who may be affected by their corporate actions indirectly.[245] Corporate reputation informs stakeholders about "what products to buy, what companies to work for, or what stocks to invest in."[246] In other words, corporate reputation helps stakeholders to decide whether to engage with this corporation or not.[247] Thus, corporate reputation can be characterized as "a level of familiarity with the organization, beliefs about what to expect from the organization in the future, and impressions about the organization's overall appeal."[248] Stakeholders usually build their judgement "the perceptions of past behaviour and a reflection of future expectations."[249] As a result, corporate reputation is a key to a social license to operate from the local communities;[250] it builds and increases corporate social legitimacy.[251] Consequently, this reflects the trust stakeholders have in a corporation.

Trust is essentially a contested concept.[252] It can mean something else to everybody.[253] Therefore, the literature on trust can often be "piecemeal, under-researched, and fragmented across a variety of disciplines."[254] According to Castaldo et al.[255] who have studied the meaning of trust, the most influential definitions of trust in the market relationships are those of Moorman et al.[256] and Morgan and Hunt.[257] According to Moorman et al., trust is a "willingness to rely" on the other party in whom one has "confidence."[258] Morgan and Hunt identify trust as "confidence in the trustee's reliability." They add that "confidence on the part of the trusting party results from the firm belief that the trustworthy party is reliable and has high integrity, which are associated with such qualities as consistent, competent, honest, fair, responsible, helpful, and benevolent."[259] It is a relationship between parties in which both (or all) give away something that makes them to a certain degree

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[242] Deutsch, Y. and Ross, T. W. (2003). You Are Known by the Directors You Keep: Reputable Directors as a Signalling Mechanism for Young Firms. *Management Science* 49 (8), 1003-1017. p. 1004.
This is also the reason why corporate reputation scholars usually talk about reputation in plural. See for an overview e.g. Barnett, M. L. et al. (2006). Corporate Reputation: The Definitional Landscape. *Corporate Reputation Review* 9 (1), 26-38.

[243] Fombrun, C. J. (1996). *Reputation. Realizing Value from the Corporate Image*. Boston (MA): Harvard Business School Press. p. 72.

[244] Gray, E. R. and Balmer, J. M. T. (1998). Managing Corporate Image and Corporate Reputation. *Long Range Planning* 31 (5), 695-702. p. 679.

[245] Paine, L. S. (1996). Moral Thinking in Management: An Essential Capability. *Business Ethics Quarterly* 6 (4), 477-492. p. 478.

[246] Fombrun, C. J. (1996). *Reputation. Realizing Value from the Corporate Image*. Boston (MA): Harvard Business School Press. p. 5.

[247] Fombrun, C. J. (1996). *Reputation. Realizing Value from the Corporate Image*. Boston (MA): Harvard Business School Press. p. 5.

[248] Lange, D. et al. (2011). Organizational Reputation: A Review. *Journal of Management* 37 (1), 153-184. p. 178.

[249] Ivey, P. (2010). Reputation. In Visser, W. et al. (Ed.), *The A to Z of Corporate Social Responsibility* (pp. 337-339). Chichester: Wiley p. 337.

[250] Lewis, S. (2003). Reputation and Corporate Responsibility. *Journal of Communication Management* 7 (4), 356-366. See also Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 49. See also chapter 4, section 3.

[251] Searcy, C. and Buslovich, R. (2014). Corporate Perspectives on the Development and Use of Sustainability Reports. *Journal of Business Ethics* 121 (2), 149-169; Holland, K. et al. (2016). Tax Avoidance: A Threat to Corporate Legitimacy? An Examination of Companies' Financial and CSR Reports. *British Tax Review* 3, 310-338. See also: Pava, M. L. (2008). Corporate Accountability. In Kolb, R. W. (Ed.), *Encyclopedia.* p. 451; Kurucz, E. C. et al. (2008). The Business Case for Corporate Social Responsibility. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 83-112). New York: Oxford University Press. pp. 90-91.

[252] Garver, E. (1978). Rhetoric and Essentially Contested Arguments. *Philosophy & Rhetoric* 11 (3), 156-172.

[253] See e.g. McAllister, D. J. (1995). Affect- and Cognition-Based Trust as Foundations for Interpersonal Cooperation in Organizations. *Academy of Management Journal* 38 (1), 24–59. p. 709; Castaldo, S. et al. (2010). The Meaning(s) of Trust. A Content Analysis on the Diverse Conceptualizations of Trust in Scholarly Research on Business Relationships. *Journal of Business Ethics* 96 (4), 657-668. p. 658.

[254] Swift, T. (2001). Trust, Reputation and Corporate Accountability to Stakeholders. *Business Ethics: A European Review* 10 (1), 16-26. p. 18.

[255] Castaldo, S. et al. (2010). The Meaning(s) of Trust. A Content Analysis on the Diverse Conceptualizations of Trust in Scholarly Research on Business Relationships. *Journal of Business Ethics* 96 (4), 657-668. p. 662.

[256] Moorman, C. et al. (1992). Relationships between Providers and Users of Market Research: The Dynamics of Trust Within and Between Organizations. *Journal of Marketing Research* 29 (3), 314-328.

[257] Morgan, R. M. and Hunt, S. D. (1994). The Commitment-Trust Theory of Relationship Marketing. *Journal of Marketing* 58 (3), 20-38.

[258] Castaldo, S. et al. (2010). The Meaning(s) of Trust. A Content Analysis on the Diverse Conceptualizations of Trust in Scholarly Research on Business Relationships. *Journal of Business Ethics* 96 (4), 657-668. p. 662.

[259] Morgan, R. M. and Hunt, S. D. (1994). The Commitment-Trust Theory of Relationship Marketing. *Journal of Marketing* 58 (3), 20-38. p. 23. See also Castaldo, S. et al. (2010). The Meaning(s) of Trust. A Content Analysis on the Diverse Conceptualizations of Trust in Scholarly Research on Business Relationships. *Journal of Business Ethics* 96 (4), 657-668, p. 662.

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vulnerable.[260] Tapscott and Ticoll explain that trust is based on "presence of shared norms and values, reciprocity, validation, and transference." Transparency "changes each of these, accelerating the speed at which trust can be strengthened or weakened, consolidated or destroyed."[261] Trust is the basis of every relationship – both business and personal.[262] Therefore, trust is an important asset when addressing ethical issues in business and building a reputation of a good corporation. According to Castaldo et al., trust "provides the cultural basis and the 'glue' that promote ethical behavior, and discourages deviation from ethical norms." [263] Therefore, corporations that are trusted are believed to make moral decisions, and the other way around – corporations that make moral decisions are trusted. Thus, trustworthy behaviour in a society can add up to a corporation's reputation.[264]

Empirical research suggests that businesses face a general trust deficit,[265] which requires reaction from a corporate entity. CSR can be a means to rebuild trust. For instance, CSR is considered as a "core element of reputation" that is an important tool for establishing trust among stakeholders.[266] This proves the relevance of the concept of CSR for this research. However, CSR and trust have a circular relationship. On the one hand, CSR helps corporations to build trust and consequently reputation. On the other hand, trust is a precondition for successful CSR. Perrini et al. suggest that "trust is a key mediator capable of measuring and explaining the success (or failure) of the CSR policies adopted by the company."[267] Corporations, thus, first need to create trust in its CSR strategy. For building trust in this process, transparency is an important tool for it "forces trustworthy behavior" and allows stakeholders to control corporate behaviour.[268] Also, with regard to corporate tax planning practices, a decrease of trust and bad reputation can be witnessed. Here also transparency and CSR provide a possible tool for the improvement of corporate reputation and an increase in trust.

With regard to tax, reputational risk concerns "the impact on the company that may arise from its tax decisions and actions if persons outside the company were to become aware of it."[269] For instance, aggressive tax planning is considered to have a negative impact on corporate reputation.[270] Negative media attention can lead to reputation damage amongst consumers. However, scarce empirical research shows that such negative effect might only be short-term.[271] Responsible tax behaviour, on the other hand seems to enhance corporate reputation amongst the consumers,

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[260] Blair, M. M. and Stout, L. A. (2001). Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law. *University of Pennsylvania Law Review* 149 (6), 1735-1810. p. 1746.

[261] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. p. 78.

[262] Perrini, F. et al. (2010). The Relationship between Corporate Responsibility and Brand Loyalty in Retailing: The Mediating Role of Trust'. In Smith, N.C. et al. (Eds.), *Global Challenges in Responsible Business* (pp. 191-214). Cambridge: Cambridge University Press. p. 195.

[263] Castaldo, S. et al. (2010). The Meaning(s) of Trust. A Content Analysis on the Diverse Conceptualizations of Trust in Scholarly Research on Business Relationships. *Journal of Business Ethics* 96 (4), 657-668. p. 657.

[264] Swift, T. (2001). Trust, Reputation and Corporate Accountability to Stakeholders. *Business Ethics: A European Review* 10 (1), 16-26. See also e.g. Jøsang, A. et al. (2007). A Survey of Trust and Reputation Systems for Online Service Provision. *Decision Support Systems* 43 (2), 618-644. pp. 620-622; Eisenegger, M. (2009). Trust and Reputation in the Age of Globalisation. In Klewes, J. and Wreschniok, R. (Eds.), *Reputation Capital*. Berlin / Heidelberg: Springer. pp. 11-12.

[265] "Only 18 % of the general population trusts business leaders to tell the truth and just 19% trust them to make ethical decisions" Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 12. Referring to 2013 Edelman Trust Barometer. (2013, January 19). Retrieved from: https://www.edelman.com/insights/intellectual-property/trust-2013/ (accessed 03.03.2019).
"For 17 years the Edelman Trust Barometer has surveyed tens of thousands of people across dozens of countries about their level of trust in business, media, government, and NGOs." See: Harringtom, M. (2017, January 16). Survey: People's Trust Has Declined in Business, Media, Government, and NGO. *Harvard Business Review* (online). See also: Oxford University Centre for Corporate Reputation. (2016). *Rebuilding Trust in Business*. pp 7-9; ACCA. (2017, March). *G20 Public Trust in Tax*. ACCA: London; Hardeck.

[266] Wickert, C. and Cornelissen, J. (2017). CSR and Reputation: Too Much of a Good Thing? In Rasche, A. et al. (Eds.). *Corporate Social Responsibility: Strategy, Communication, Governance* (pp. 187-219). Cambridge: Cambridge University Press. p. 329.

[267] Perrini, F. et al. (2010). The Relationship between Corporate Responsibility and Brand Loyalty in Retailing: The Mediating Role of Trust'. In Smith, N. C. et al. (Eds.), *Global Challenges in Responsible Business* (pp. 191-214). Cambridge: Cambridge University Press. p. 192.

[268] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. p. 78. See also chapter 2, section 4.

[269] Lavermicocca, C. and Buchan, J. (2015). Role of Reputational Risk in Tax Decision Making by Large Companies. *eJournal of Tax Research* 13 (1), 5-50. p. 15.

[270] Lavermicocca, C. and Buchan, J. (2015). Role of Reputational Risk in Tax Decision Making by Large Companies. *eJournal of Tax Research* 13 (1), 5-50. p. 15.

[271] Brooks, C., Godfrey, C., Hillenbrand, C. and Money, K. (2016). Do Investors Care About Corporate Taxes? *Journal of Corporate Finance* 38, 218-248.

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empirical research suggests.[272] Having said that, Hardeck and Hertl argue that "consumers are not willing to pay a price premium for products sold by responsible tax-planning companies, but rather punish aggressive tax-planning companies through a slightly lower willingness to pay."[273] Consumer protests against Starbucks provide a good example of how corporate tax planning can affect its reputation.[274] In 2012, Starbucks was accused of aggressive tax planning in the UK.[275] The coffee giant seemed to be well aware that its aggressive tax planning practice was the cause of diminished trust in the multinational in the UK. Its tax planning strategy that was made public was met with extensive negative publicity, 'naming and shaming' campaigns of NGOs, and a customer strike.[276] Stakeholders' behaviour showed that Starbucks's reputation was vulnerable since the multinational decided to respond to such public accusations of unethical behaviour.[277] Starbucks tried to restore public trust by showing a change in its tax practice.[278] Kris Engskov, director of the Starbucks UK, stated that, while Starbucks has always paid taxes "to the letter of the law", to retain public trust more is necessary. In his letter (16 October 2012) Engskov also noted that Starbucks is "doing business to the highest ethical standards" both in sourcing coffee as well as in paying taxes.[279] Later (6 December 2012) he added that "the most important asset" Starbucks has built "in the UK is trust – trust with our employees, customers and the wider society in which we operate."[280] He admitted that "it is vital to listen closely to our customers – and that acting responsibly makes good business sense."[281] Whether this commitment was just a PR strategy or truth, is still up for discussion. Nevertheless, such a public commitment to restore public trust in their tax matters proves that tax planning does include a trust relationship. Starbucks made itself vulnerable by accepting that there have been morally weak decisions in order to show the willingness to change and gain consumers' trust.[282] Surely, this is only one example and more empirical evidence is necessary to test the hypothesis this research proposes.

To some, Starbucks might be considered as an anectotal example in the corporate tax planning discussions because it is widely used. However, in my opinion, this is exactly the reason why Starbucks-case is a good example in the context of this research. It is one of the landmark cases that after the UK HMRC public hearing accelerated public discussions around corporate tax practices in general. Moreover, Starbucks has also been part of the European Commission state aid investigations. Since the name of this multinational appears in various public debates, it is appealing example to different readers of this book. In addition to the Starbucks case, there are various examples of how Apple's and GE's reputations were affected by a New York Times article about their tax practices[283] or how also Amazon and Google reputations were harmed after the UK

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[272] Hardeck, I. and Hertl, R. (2014). Consumer Reactions to Corporate Tax Strategies: Effects on Corporate Reputation and Purchasing Behavior. *Journal of Business Ethics* 123, 309–326.
[273] Hardeck, I. and Hertl, R. (2014). Consumer Reactions to Corporate Tax Strategies: Effects on Corporate Reputation and Purchasing Behavior. *Journal of Business Ethics* 123, 309–326.
[274] See also Christians, A. (2013). How Starbucks Lost its Social License—and Paid £20 million to Get it Back. *Tax Notes International* 71 (7), 637-640.
[275] UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited.
[276] See e.g. BBC News. (2012, December 8). UK Uncut Protests Over Starbucks 'Tax Avoidance'. *BBC News* (online).
[277] See also Gribnau, J. L. M. et al. (2016). Good Tax Governance and Transparency: A Matter of Reputation or Ethical Motivation? *Derivatives and Financial Instruments* 18 (1), 3-24.
[278] Engskov, K. (2012, October 16). Starbucks Coffee Company in the UK. See also Campbell, K. and Helleloid, D. (2016). Educational Case Starbucks: Social Responsibility and Tax Avoidance. *Journal of Accounting Education* 37, 38–60.
[279] Engskov, K. (2012, October 16). Starbucks Coffee Company in the UK. See also Campbell, K. and Helleloid, D. (2016). Educational Case Starbucks: Social Responsibility and Tax Avoidance. *Journal of Accounting Education* 37, 38–60.
[280] Engskov, K. (2012, December 6). An Open Letter from Kris Engskov. See also Campbell, K. and Helleloid, D. (2016). Educational Case Starbucks: Social Responsibility and Tax Avoidance. *Journal of Accounting Education* 37, 38–60.
[281] Engskov, K. (2012, December 6). An Open Letter from Kris Engskov. See also Campbell, K. and Helleloid, D. (2016). Educational Case Starbucks: Social Responsibility and Tax Avoidance. *Journal of Accounting Education* 37, 38–60.
[282] See also Holland, K. et al. (2016). Tax Avoidance: A Threat to Corporate Legitimacy? An Examination of Companies' Financial and CSR Reports. *British Tax Review* 3, 310-338.
[283] Marzilli, T. (2012, May 8). Apple's Reputation Tougher than GE's Based on Recent Tax Avoidance Scandal. *YouGov Brandindex*. See also Gribnau, J. L. M. et al. (2016). Good Tax Governance and Transparency: A Matter of Reputation or Ethical Motivation? *Derivatives and Financial Instruments* 18 (1), 3-24.

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Parliamentary Investigative Committee (HMRC) Public Hearings in 2011.[284] Furthermore, MSCI ESG Research concluded that certain tax strategies of multinationals (such as using tax havens) could cause reputational risks for they "could be viewed as a potential trigger for scrutiny by the media or the public, which is not necessarily informed by a detailed understanding of the intricacies of international tax laws and treaties."[285] Academic empirical research does not yet provide concrete evidence as to what extent and what kind of relationship exists between tax planning and reputation. Nevertheless, a growing number of empirical research on corporate reputation in relation to tax avoidance shows that to a certain extent there is a negative correlation between corporate tax planning practices and its reputation.[286] Nevertheless, there is also research that indicates that there is mixed evidence,[287] which suggests that further in-depth research in this field is necessary. It is, however, clear that aggressive tax planning strategies can increase the risk on corporate reputation and conflicts with CSR, as will be argued later in this research. Any kind of risk can increase corporate costs. Therefore, risk management is a central element of business practices.

2.6. Risk management

In addition to the risk of a bad reputation, corporate tax practices can potentially increase various other risks that might not be that evident at first sight, such as competitive pressure, increase of regulation to comply with, data leakage, political changes in countries in which they operate.[288] The list is endless. Managing risks, which also includes lowering unnecessary risks, is a normal part of business strategy.[289] Corporate risk can be defined as "the uncertainty associated with both a potential gain or loss."[290] Depending on the nature and structure of a company and its operations, it faces different risks. Risk management concerns the prioritization of such various risks; is it the processes through which organizations understand, evaluate and take action on their risks. Doing so helps to increase the probability of a corporation's success and reduces the likelihood of failure.[291] Effective risk management comforts shareholders and other stakeholders and proves that a corporation has a good corporate governance and management that understands its business. Effective risk management adds, thus, to corporate accountability. Such risk management, however, mainly addresses the risks that can be directly addressed by the company, such as the risk of a bad reputation. However, corporations also face risks that cannot be directly managed by themselves. Here, one could think of a safe and stable legal and political system or healthy and educated people who could possibly be a workforce for a company.

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[284] YouGov Brandindex. (2012, November 21). Google is Spared the Public's Anger Over UK Tax Spat. *YouGov Brandindex.* See also HMRC hearings, e.g. UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited.

[285] MSCI ESG Research. (2013, December). The 'Tax Gap' in the MSCI World. *ESG Issue Brief*. p. 4. Also, Erle confirms the relationship between tax planning and reputational risks: Erle, B. (2008). Tax Risk Management and Board Responsibility. In Schön, W. (Ed.). *Tax and Corporate Governance* (pp. 205-220). Berlin/Heidelberg: Springer-Verlag. p. 210.

[286] See e.g Desai, M. A. and Dharmapala, D. (2009). Corporate Tax Avoidance and Firm Value. *The Review of Economics and Statistics* 91 (3), 537-546; Dhaliwal, D. S and Erickson, M. (1998). *Wealth Effects of Tax-Related Court Rulings*. The Journal of the American Taxation 20 (1), 21-49; Seida, J. A. and Wempe, W. F. (2004). Investors' and Managers' Reactions to Corporate Inversions Transactions. *Working Paper, University of Notre Dame*; Brown, T. J. and Dacin. P. A. (1997). The Company and the Product: Corporate Associations and Consumer Product Responses. *Journal of Marketing* 61 (January), 68-84; Hanlon, M. and Slemrod, J. (2009). What Does Tax Aggressiveness Signal? Evidence from Stock Price Reactions to News about Tax Shelter Involvement. *Journal of Public Economics*; Graham, J. R. et al. (2014). *Incentives for Tax Planning and Avoidance: Evidence from the Field*. Accounting Review 89 (3), 991-1023; Kim, J. B et al. (2011). Corporate Tax Avoidance and Stock Price Crash Risks: Firm-Level Analysis. *Journal of Financial Economics* 100 (3), 639-662. p. 639. See also Gribnau, J. L. M. et al. (2016). Good Tax Governance and Transparency: A Matter of Reputation or Ethical Motivation? *Derivatives and Financial Instruments* 18 (1), 3-24.

[287] See e.g. Gallemore, J. et al. (2014). The Reputational Costs of Tax Avoidance. *Contemporary Accounting Research* 31 (4), 1103-1133; Austin, C. R. and Wilson, R. J. (2017). An Examination of Reputational Costs and Tax Avoidance: Evidence from Firms with Valuable Consumer Brands. *Journal of the American Taxation Association* 39 (1), 67-93.

[288] On tax planning and corporate risk profile, see also Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin/Heidelberg: Springer-Verlag. pp. 48-49.

[289] Corporate boards should usually identify corporate risks and risk management strategy.

[290] Solomon, J. F. et al. (2000). A Conceptual Framework for Corporate Risk Disclosure Emerging from the Agenda for Corporate Governance Reform. *The British Accounting Review* 32 (4), 447-478. p. 449.

[291] Kaplan, R. S. and Mikes, A. (2012). Managing Risks: A New Framework. Harvard Business Review June issue.

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For instance, an inefficient legal system may have serious consequences for businesses. The protection of intellectual property is a good example in this case, for this is a concern for many corporations nowadays. Various patent laws ensure that the corporations' "competitive advantages" are protected "by granting to the firm a monopoly for the exploitation of that advantage for a specific period of time." If corporations' patents are protected, it can safely invest in innovation and enjoy returns on such investment. Muchlinsky argues that the state-guaranteed protection of patent rights complements "the firm's protection of its innovation through the market power it enjoys as a result of its integrated international network and from the difficulty of recreating advanced industrial technology."[292] By granting such protection, the legal system complements corporate internal risk management. The legal system is one example of a public good or service that corporations can benefit from.[293] Other similar public goods that help companies to reduce unnecessary risks are for example infrastructure, the military, education, and the health care system, which all help to provide a safe and stable environment, healthy and educated prospective workforce. Moreover, companies also have similar rights and responsibilities towards the state as natural persons do. For example, business organizations have similar possibilities to apply for a court ruling as natural persons, and they also benefit from the state's military protection in case of war situation. All these public goods and services are (normally) funded by taxes.

The availability of public goods, provided by the state, ensures stability and reduces unnecessary (other than business-making) risks for companies. Holmes and Sunstein have, for example, argued that "property is worth little if you, and potential purchasers, do not believe in the future."[294] They argue that "confidence in long-term stability is partly a product of law enforcement."[295] Accordingly, a sustainable business climate depends on taxes. Consequently, "in the absence of government machinery capable of detecting and remedying misrepresentation and false dealing, free exchange would be an even more risky business than it is."[296] For instance, corporate law enables that entrepreneurs have the flexibility to set up business entities to lower the costs of doing business, but it also helps to provide investors with the trust they need in preventing agency costs.[297] Such trust is created by a legal system that provides a safety net when necessary.

Consequently, taxes are (to a certain extent) a means for companies to reduce some risks that are of a more general nature but at the same time are also crucial for supporting long-term business. The existence of public goods and services, but also other functions of taxes, as will be discussed in chapter 3 of this research,[298] are the basis for an equal and stable society, which is integral to a successful business. Hence, companies benefit from society and state and, by paying their fair share of taxes, corporations are indirectly managing certain fundamental risks. In other words, paying taxes can be seen as an indirect way of mitigating business-related risks. Thus, next to mitigating reputational risks, paying a fair share of taxes is an investment into a sustainable political and legal system, infrastructure, or healthy and educated employees. Such an investment is important because a lower quality of public goods and services can, for example, result in poor infrastructure, which may cause higher logistic or transport reparation costs, or less healthy or less educated employees, or using public services operated by less qualified employees, and so on. In other words, business would be seriously hampered if the state would not be able to carry out the functions of taxation.[299] Furthermore, the state also actively supports business success by fostering innovation (for example

[292] Muchlinsky, P. T. (2007). *Multinational Enterprises & the Law* (2nd Ed.). New York: Oxford University Press. p. 34.
[293] See more on public goods and services in chapter 3, section 2.
[294] Holmes, S. and Sunstein, C. R. (2000). *The Cost of Rights: Why Liberty Depends on Taxes.* New York / London: W. W. Norton & Company. p. 70.
[295] Holmes, S. and Sunstein, C. R. (2000). *The Cost of Rights: Why Liberty Depends on Taxes.* New York / London: W. W. Norton & Company. p. 70.
[296] Holmes, S. and Sunstein, C. R. (2000). *The Cost of Rights: Why Liberty Depends on Taxes.* New York / London: W. W. Norton & Company. p. 73.
[297] Kraakman, R. et al. (2009). *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2 edn). Oxford: Oxford University Press. p. 2.
[298] Chapter 3, section 2.
[299] See chapter 3, section 2.

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by funding R&D),[300] encouraging investment, promoting economic growth, boosting worker productivity and stimulating the efficient use of scarce resources. Therefore, corporations also need to invest in innovation by paying their fair share of taxes. In other words, by paying taxes, companies are indirectly investing in their own welfare.[301]
While for the argument related to business-case for paying a fair share of tax is important, it is not the central focus of this research. Corporate decision making motivated by business-case in principle only falls under the economic layer of Carroll's Pyramid, as will be explained in chapter 4 of this research. This research, however, focuses mainly on the ethical layer of the CSR Pyramid.[302] Corporations that avoid paying taxes are free-riding on the societies in which they operate.[303] Such corporate behaviour has negative externalities on its stakeholders and society at large, because it compromises the national tax systems, distorts competition, and either leads to a decrease in public goods and services or a price increase of these public goods and services for other taxpayers. In light of such negative effects of corporate tax avoidance, the increased attention on corporate tax practices should be no surprise. The resulting societal and legislative changes, therefore, inevitably need to be included in the corporate risk profile. Society at large expects multinationals to be (morally) accountable and "to take responsibility for avoiding, reducing, or, at best, compensating for negative externalities as well as contributing to social welfare, while also being accountable for these impacts and explaining them in a transparent manner."[304] This is also true for international corporate tax planning practices. Consequently, tax ethics is part of modern corporate risk management.[305] In order to argue for accountability and corporate responsibility in moral terms, the question of corporate moral agency needs to be clarified.

2.7. Moral agency

As explained above, multinationals have an important role to play in the societies in which they operate, since they form a part of these societies. This research argues further that taxes are an important contribution to a society and that taxes also have a moral dimension next to legal and economic dimensions.[306] Accepting such a moral dimension, however, means that a multinational could be seen as an entity that can bear independent moral responsibilities. Is a corporation a moral agent? Stainer, for instance, wrote that "corporations have neither bodies to be punished, nor souls to be condemned, they therefore do as they like."[307] But is this really the case?
One of the basic assumtions of this research is that society is cooperation between its members. Without such cooperation there would be no society.[308] Such cooperation therefore also presumes a specific kind of relationship between individuals; those engaged in this system of social cooperation should be able to rely on each other to do their part.[309] In other words, being part of society entails moral rights and obligations. It concerns therefore how one should live in relation to other individuals.[310] Law and morality regulate these kinds of relationships between members of a

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[300] This goes even for countries which seemingly do not feature very much government intervention. Chang, H.-J. (2010). *23 Things They Don't Tell You About Capitalism.* London: Penguin, p. 206: "Between the 1950s and 1980s […] the share of government funding in total R&D in the supposedly free-market US accounting for, depending on the year, between 47 per cent and 65 per cent, as against around 20 per cent in Japan and Korea."
[301] See also Bower, J. L. and Paine, L. S. (2017). The Error at the Heart of Corporate Leadership. *Harvard Business Review*, May-June issue. Of course, the question always remains if and how the governments are spending the tax money, but this again is a question for another research.
[302] See chapter 4.
[303] See chapter 3, section 2.
[304] Herzig, C. and Kühn, A.-L. (2017). Corporate Responsibility Reporting. In Rasche, A. et al. (Eds.). *Corporate Social Responsibility: Strategy, Communication, Governance* (pp. 187-219). Cambridge: Cambridge University Press. pp. 187.
[305] Gribnau, J. L. M. et al. (2018). Codes of Conduct as a Means to Manage Ethical Tax Governance. *Intertax* 46 (5), 390-407. p. 399.
[306] See chapter 3 and chapter 6.
[307] Stainer, L. (2004). Ethical Dimensions of Management Decision-making. *Strategic Change* 13 (6), 333-342. p. 334, cited in Friedman, A. L. and Miles, S. (2006). *Stakeholders: Theory and Practice.* Oxford: Oxford University Press. p. 20.
[308] Compare this to the social contract theory of Rawls: Rawls, J. (2001). *Justice as Fairness: A Restatement.* Edited by Kelly, E. Cambridge (MA) / London: The Belknap Press of Harvard University Press. p. 61.
[309] See also Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88.
[310] Bloomfield, P. (2007). Introduction. In Bloomfield, P. (Ed.). *Morality and Self-Interest* (pp. 3-9). New York/Oxford: Oxford University Press. pp. 3-4.

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society.[311] Next to the question of how one ought to live as an individual, morality also addresses how individuals interact with other individuals.[312] In the words of Paine, "moral thinking is about how we ought to live – as a society, as individuals, and as individuals in relation to one another."[313] According to Paine, thinking of dilemmas from the moral point of view calls for a reflection upon one's choices and upon the effect of those choices on others.[314] It is not just about what is normal to do, but what is proper, (morally) right to do. Paine adds that such moral choices can be done "directly by considering the affected parties; or indirectly through the various behavioral norms and ideals, both social and personal, which govern our behavior in relation to others."[315] Moreover, such other individuals are both, "others with whom we interact personally, as well as those more distant who may be affected by what we do."[316]

Thus, the central problem of morality in the context of this research is focused on the question how one should live in a society in relation to other individuals. Society consists of individuals and organizations, also including businesses. Companies contribute to society, for example in the form of products, services, employment, and taxation. Like individuals, businesses interact with other (corporate) persons; they affect others and are affected by the actions of others. Companies benefit from society at large, from all kinds of public goods funded by taxes, as discussed in the previous section. Therefore, in line with Paine's reasoning, corporations should also reflect upon their choices and the effect of those choices from a moral perspective.

Society involves morality but moral norms and values are usually not written down. Here, the law has an important role to play, since the law forms part of the morality of any complex society. The law provides rules that regulate interactions within a society. The law, however, is imperfect, because it is always subject to interpretation and lawmakers, when writing the law, cannot predict and, thus, cannot take into account the future behaviour of people.[317] Therefore, the law leaves sufficient room for choices and the subjects of law, members of a society, have a possibility within the legal rules to make (im)moral choices when interpreting the law.[318] Making a moral choice, however, "requires not that individuals deny their personal needs and aspirations and consider only the interests of others, but rather that individuals see their personal interests and objectives in relation to those of others."[319] It is therefore clear that individuals are moral agents that can make (im)moral choices and consider their personal interests in relation to those of others.

Within the framework of this research, corporations are also seen as moral agents that can make choices. Naturally, corporations are entities that are different from natural persons. Nevertheless, companies "have their own decision making structures, have choices, and justify them with corporate reasons"[320] which suggests that they make independent choices that can involve morality. Moreover, a company "has a reputation that is distinct from the shareholders."[321] This adds to an argument that a corporation is an independent moral agent and not for instance a contractual creation of shareholders.[322] In other words, corporations can make decisions that cannot be traced back to individual persons with personal interests behind the decision. Such decisions are corporate decisions; they belong to the corporation as a legal and moral person that has "whatever privileges, rights and duties as are, in the normal course of affairs, accorded to moral persons."[323] Companies,

[311] On the relationship between law and morality, see also chapter 3, section 2; chapter 4, section 5; chapter 6.
[312] See also Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88.
[313] Paine, L. S. (1996). Moral Thinking in Management: An Essential Capability. *Business Ethics Quarterly* 6 (4), 477-492. p. 478.
[314] Paine, L. S. (1996). Moral Thinking in Management: An Essential Capability. *Business Ethics Quarterly* 6 (4), 477-492. p. 478.
[315] Paine, L. S. (1996). Moral Thinking in Management: An Essential Capability. *Business Ethics Quarterly* 6 (4), 477-492. p. 478.
[316] Paine, L. S. (1996). Moral Thinking in Management: An Essential Capability. *Business Ethics Quarterly* 6 (4), 477-492. p. 478.
[317] See chapter 3.
[318] Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28. p, 14. See also chapter 6.
[319] Paine, L. S. (1996). Moral Thinking in Management: An Essential Capability. *Business Ethics Quarterly* 6 (4), 477-492. p. 478.
[320] Brown, M. T. (2005). *Corporate Integrity: Rethinking Organizational Ethics and Leadership*. Cambridge: Cambridge University Press. p. 123.
[321] Mayer, C. P. (2013). *Firm Commitment: Why the Corporation is Failing us and How to Restore Trust in it.* Oxford: Oxford University Press. p. 111.
[322] See also Lavermicocca, C. and Buchan, J. (2015). Role of Reputational Risk in Tax Decision Making by Large Companies. *eJournal of Tax Research* 13 (1), 5-50. p. 7.
[323] French, P. A. (1979). The Corporation as a Moral Person. *American Philosophical Quarterly* 16 (3), 207-215. p. 207.

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as such, can therefore refrain from harming others and they can account for their behaviour by giving moral reasons and assume moral responsibility for their actions affecting others. They are not only legal persons, but also moral ones, since they have agency independent of their members.[324] That corporations are part of society and have moral agency are two basic premises of the social responsibility concept.[325]

Within corporate thinking, it is not common to consider corporations as moral agents but rather as a means to generate profit. Therefore, Perrini et al. argue that "the moralization of the corporations represents a radical departure from the mechanistic conception that has dominated corporate thinking." Accordingly, "the attribution of moral personality to companies necessitates fundamental changes in internal structure and management." Such a fundamental change would be, for instance, that corporate management should take a lead on moral leadership: "[M]anagement has to bring a dual perspective to their decisions, which must pass the test of both ethical and economic rationality [..] corporate performance has moral as well as financial implications and that the pursuit of excellence requires attention to both."[326] It will be argued in this research that taxation is a moral phenomenon that creates moral responsibilities for taxpayers. Especially corporations that accept moral responsibilities towards society (e.g. in a form of CSR) should test their tax planning strategies, not only according to economic but also moral rationality. Thus, the question of morality and moral agency is about how multinationals behave in relation to the societies in which they operate. In case multinationals pay (almost) no taxes in the societies in which they operate, they are not contributing to this society, which can be considered unfair towards these societies. For instance, by interpreting the law in their own favour in the case of tax avoidance or aggressive tax planning,[327] multinationals make decisions to benefit their own (short-term financial) interests at the cost of the welfare of other members of this society. This proves that corporations can make a moral choice between using their position (corporate power[328]) to pursue their own economic ambitions exclusively while others are (possibly) harmed. This also leads to thinking that such corporate practices, although legal, may arguably conflict with the purpose or the spirit of the law, they may be considered as socially irresponsible.[329] Multinationals need to realize that a purely legal behaviour is not always moral and v*ice versa.* As moral agents, they are also accountable for moral choices. Considering the complex decision-making structures within multinationals, re-thinking such choices can, nevertheless, be challenging.

2.8. Multinationals and tax planning

Multinationals have a very different relationship with the state and other taxpayers in comparison to most individual taxpayers. For instance, multinationals are in a position to make use of various international tax planning possibilities; this makes them key actors in the current tax planning discussions. The fact is that, even if states (would be able to) produce perfect rules that do not facilitate international tax avoidance,[330] possibilities for international tax avoidance could still exist, since it stays within the limits of (the letter of) the law. Law is always subject to interpretation and hence leaves sufficient leeway for multinationals. Interpreting laws is not an exact science and may lead to different meanings dependent on the context in which the laws are interpreted. Ensuring a fair interpretation of tax laws can, therefore, be considered as a shared responsibility between

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[324] See also French, P. A. (1979). The Corporation as a Moral Person. *American Philosophical Quarterly* 16 (3), 207-215; Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. pp. 47-48; Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88.

[325] Wartick, S. L. and Cochran, P. L. (1985). The Evolution of the Corporate Social Performance Model. *Academy of Management Review* 10 (4), 758-769. See also chapter 4.

[326] Perrini, F. et al. (2006). *Developing Corporate Social Responsibility: A European* Perspective. Massachusetts: Edward Elgar Publishing. p. 95.

[327] See more in chapter 3.

[328] See chapter 2, section 3.

[329] See chapter 4, section 3.3.

[330] Durst, M. C. (2015). Limitations of the BEPS Reforms: Looking Beyond Corporate Taxation for Revenue Gains. *International Centre for Tax and Development Working Paper* 40.

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states and corporations.[331] Corporations are in a position to interpret laws in a way that promotes their self-interest, which to a certain extent is also acceptable as it is a part of the tax risk management.[332] Making a moral choice, as explained above, does not require denying one's own personal needs and aspirations. This, however, leads to a difficult dilemma in the international tax planning arena: multinationals may act according to the letter of the law but they fail to meet the spirit of the law, that is, the intention of the lawmaker.[333] Here, Paine's theory is relevant: making a moral choice presumes viewing personal interests and objectives in relation to those of others.[334] While states have the responsibility to create more clarity, legal certainty and a fair distribution of the tax burden, multinationals are responsible for not abusing the flaws in the regulations, especially CSR corporations.[335] Multinationals are responsible for determining their own limits.[336] Their growing role and power also increases their responsibility. Moon et al. argue that "corporations are acquiring an increasing conspicuous and, in some respects, contentious profile."[337] The authors propose various reasons for this: "corporations have acquired a greater share of economic participation following widespread privatizations; they have created new consumer markets; their cross-border activities appear to have increased; and they have assumed greater roles in the delivery of public goods." With such a greater role in the world economy, corporations have also gained greater corporate power, as argued previously (section 3).

Tax planning as such is a part of a multinational's decision making.[338] However, doing business is more complicated than just taking care of taxes or accounting. Managing a multinational corporation inevitably requires a complicated balancing of conflicting interests. For example, corporate decision making is affected by the conflicting interests of various stakeholders, such as customers, employees, suppliers, shareholders, society in general, and also other state institutions other than tax authorities.[339] Sikka sees it as a balancing of "a variety of competing capitals." He claims that "[S]hareholders provide finance capital, employees provide human capital and the state on behalf of society provides social capital in the shape of education, healthcare, transport, security, legal system, subsidies and support for corporations, and public goods."[340] It goes without saying that each 'capital provider' expects a return on its investment. Sikka explains that such a return on investment is in the form of dividends for shareholders, in the form of salaries (or other compensations) for employees, and in the form of taxes for the state.[341] Moreover, a multinational can have stakeholders with different interests, either long-term or short-term.[342] This might affect how aggressive a corporate strategy to increase the after-tax profit will be. Multinationals namely need to keep their shareholders satisfied, because otherwise they simply leave and remove their investment.[343] Consequently, different expectations of different shareholders can affect corporate tax strategies.

Usually, such multidimensional decision-making processes involve many people with different levels of knowledge.[344] Corporate decision making needs to take different interests, rules,

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331 See also chapter 6; chapter 7, section 4.

332 Dourado, A. P. (2015). Aggressive Tax Planning in EU Law and in the Light of BEPS: The EC Recommendation on Aggressive Tax Planning and BEPS Actions 2 and 6. *Intertax* 43 (1), 42-57. p. 44. See also discussions in section 3, *Shades of Tax Planning,* of this chapter.

333 See more in chapter 3, section 2.3; chapter 6.

334 Paine, L. S. (1996). Moral Thinking in Management: An Essential Capability. *Business Ethics Quarterly* 6 (4), 477-492. p. 478.

335 See chapter 4; chapter 5, section 4.

336 Essers, P. (2017). International Tax Justice between Machiavelli and Habermas. In Peeters, B. et al. (Eds.). *Rebuilding Trust in Taxation* (pp. 235-265). Antwerpen: Intersentia. p. 245.

337 Moon, J. et al. (2008). Corporate Power and Responsibility: A Citizenship Perspective. In Conill, J. et al. (Eds.), *Corporate Citizenship, Contractrianism and Ethical Theory: On Philsophical Foundations of Business Ethics.* Farnham, England; Burlington, VT: Ashgate. pp. 13-14.

338 Owens, J. P. (2008). Good Corporate Governance: The Tax Dimension. In. Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 9-12). Berlin/Heidelberg: Springer-Verlag; Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin/Heidelberg: Springer-Verlag. pp. 31-36; Russo, R. and Van Trigt, J. (2015). Corporate Governance and Taxes. In Russo, R. (Ed.). *Tax Assurance* (pp. 23-48). Deventer: Wolters Kluwer.

339 This is based on the behavioral theory of the firm, the theory of coalition of participants (Cyert, R. M. and March, J. G. (1963). *A Behavioral Theory of the Firm.* Malden, Massachusetts: Blackwell Publishers.). See more on balancing between various conflicting interests in chapter 4 and chapter 5.

340 Sikka, P. (2010). Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance. *Accounting Forum* 34 (3-4), 153-168. p. 155.

341 Sikka, P. (2010). Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance. *Accounting Forum* 34 (3-4), 153-168. p. 155.

342 See also chapter 4, section 4.

343 See also chapter 5.

344 West, A. (2017). Multinational Tax Avoidance: Virtue Ethics and the Role of Accountants. *Journal of Business Ethics* 153 (4), 1143-1156.

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situations, and plans into account.[345] Nowadays, corporate boards are expected to explain and defend the consequences and societal impact of tax planning strategies and to take decisions regarding these strategies.[346] Such a complex process inevitably also involves various corporate advisors, since corporate boards simply do not have all the necessary technical knowledge. For instance, tax avoidance is a legal concept and it originates with tax laws, which are often complicated. Therefore, tax advisors play an essential role in interpreting tax laws and "determine its application and to identify tax-related behaviour that is to be classified as tax evasion or tax avoidance."[347] Moreover, tax advisors need to calculate the economic effects and risks of various tax policies. Hence, different experts, such as tax advisors but also public relations professionals, banks, etc.[348], contribute their knowledge to this decision-making process.

For example, some argue that, in the Netherlands, the client is still seen as a king in a sense that tax advisors should help their client to find the most optimal tax planning structure.[349] Consequently, advisory firms are often considered as facilitators of tax avoidance.[350] In addition, generally the exact knowledge of aggressive tax planning structures is confidential and kept between the multinational and its advisers.[351] Such a role also triggers a lot of criticism.[352] Tax advisors are sometimes described as architects of aggressive tax planning.[353] Hasseldine and Morris, however, claim that tax consultants "operate as intermediaries between corporate taxpayers and tax agencies", therefore they "do not just act as 'exploiters' of the tax system but have an active 'enforcer' role to play in tax systems."[354] The truth is probably somewhere in the middle; there are many tax consultants who see their role as advisors differently. Nowadays, next to the obligation to "reduce the tax liability of their clients as much as possible through lawful, strategic planning" tax advisors are expected to consider that 'lawfulness' of their advised strategies "is subject to multi-layered, constantly evolving standards of legality, influenced by considerations of morality, ethics, and government objectives."[355] Such a statement suggests that, even though the legal dimension of Carroll's CSR Pyramid is praised, the ethical dimension is also subject to increased attention.[356] In other words, the role of corporate tax advisors is evolving.[357]

Consequently, legal and accountancy knowledge might not be enough for understanding the broader effects of corporate tax practices and for (not) considering tax as a part of CSR. It makes sense for most multinationals that claim to have a CSR policy to have a person responsible for developing and maintaining corporate CSR policy and public reputation. However, there seems to be little consensus on the question who bears such responsibility. As top managers are the ones who decide upon the values of a company, they are seen as drivers for CSR.[358] On a more practical level, developing and maintaining CSR strategy seems to be a result of a co-operation of different departments such as the legal, public relations (communication), sales and marketing departments,

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[345] See chapter 5.

[346] See also KPMG. (2004). Tax in the Boardroom: A Discussion Paper; Whalen, D. T. (2017, August 3). Social Responsibility and Strategy Meet in the Boardroom. *Forbes* (online).

[347] Hasseldine, J. and Morris, G. (2013). Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection. *Accounting Forum* 37 (1), 1-14. p. 3.

[348] See also Brock, G. and Russell, H. (2015). Abusive Tax Avoidance and Institutional Corruption: The Responsibilities of Tax Professionals. *Edmond J. Safra Working Paper* 56.

[349] Herreveld, H. R. (2017). Rechten & Plichten van de Belastingadviseur. *TFO* 2017/152.6. p. 7.

[350] Sikka, P. (2010). Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance. *Accounting Forum* 34 (3-4), 153-168; West, A. (2017). Multinational Tax Avoidance: Virtue Ethics and the Role of Accountants. *Journal of Business Ethics* 153 (4), 1143-1156; UK PAC HMRC. (2015). Tax Avoidance: The Role of Large Accountancy Firms (follow–up). *Thirty-eighth Report of Session 2014–15*.

[351] Meldgaard, H. et al. (2015, December 23). Study on Structures of Aggressive Tax Planning and Indicators, Final Report. *European Commission Taxation Papers, Working Paper N. 61 – 2015.* p. 25.

[352] Sikka, P. (2010). Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance. *Accounting Forum* 34 (3-4), 153-168. p. 157.

[353] Herreveld, H. R. (2017). Rechten & Plichten van de Belastingadviseur. *TFO* 2017/152.6. p. 9.

[354] Hasseldine, J. and Morris, G. (2013). Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection. *Accounting Forum* 37 (1), 1-14. p. 9. They are referring to: Klepper, S. et al. (2001). Expert Intermediaries and Legal Compliance: The Case of Tax Preparers. *Journal of Law and Economics* 34 (1), 205–229; and National Audit Office (NAO). (2010). *HM Revenue and Customs: Engaging With Tax Agents*. London: The Stationery Office.

[355] Pfeifer, M. G. and Jin Yoon, S. (2016). The Ethical Limits of Tax Planning. *Trusts & Trustees* 22 (1), 159-165. p. 165.

[356] See chapter 4, section 3.1. for Carroll's Pyramid.

[357] See more on the changing societal expectations on corporations in chapter 4.

[358] Swanson, D. L. (2008). Top Managers as Drivers for Corporate Social Responsibility. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 227-248). New York: Oxford University Press.

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but also the board of directors.[359] In the context of this research these experts are recognized as CSR advisors; however, more (empirical) research on how CSR policy making works in corporate practice is necessary. Naturally, the initiative for good tax governance does not necessarily have to come from the CSR-advisors; tax directors or management can also change the course in this respect.

Additionally, next to the profession-based categorization, the advisors can be divided into internal and external advisors. Internal advisors are the in-house advisors that are working in the company and affect the decision-making process internally. External advisors offer their services to multinationals independently. Here, two principal issues arise. First, internal and external advisors have different objectives, and this creates different interests and biases. Second, their mind-set and culture are different.[360] This can create a gap between the various expectations of corporate behaviour. In sum, all corporate advisors can have a different perspective on tax planning. Moreover, here – as with any other actor group – also the personal background, knowledge, and beliefs of individuals play a role. This setting illustrates that decision-making processes in multinational corporations are highly complex.

Corporate boards should understand various elements and make a balanced decision. Specialist tax advisors provide information (specific to their background and role) and corporate managers are in a position to make a decision, based on that information, which is "a matter of commercial judgment falling outside the scope of the duty of care of a person retained specifically to advise on tax."[361] Here, managers have to follow their fiduciary duty to make a decision that is in the best interest of the corporation. As will be explained later in chapter 5 on corporate governance, managers can choose whether they opt for tax avoidance or not. It is clear, however, that, in order to focus on long-term interests, CSR is a helpful tool for corporate decision making.[362]

2.9. Conclusion

The central perspective of this research is that of a multinational corporation. Before delving into the nuanced questions related to tax planning and CSR, the concept of a multinational was clarified in this chapter. This chapter explained the specifics of the concept of a multinational that is used in this research.

First, the definition of a multinational corporation was analyzed. For the purposes of this research, a corporation is considered as a separate entity controlled by its managers and not, for example, as the sum of its owners nor as an extension of the state. Therefore, a corporation, as discussed within this research, is a distinct legal person with rights independent from the rights of the individual stakeholders. Moreover, as a part of society and as an institution that can make (moral) choices, a corporation is considered to have moral agency.

A multinational corporation differs from a national corporation and also from small-and-medium-sized enterprises (SMEs), because it operates in several jurisdictions. Multinationals are networks that, in general, have little specific national identification, despite the fact that they do have a home country. It was further explained that, for the purposes of this research, a multinational as such is considered as one entity, even though it consists of a group of corporate entities. A multinational has the possibility to set up these separate entities in different jurisdictions for tax planning purposes and this is what is most relevant for the purposes of this research. In order to better understand the decision-making process of such a multinational in relation to tax planning, corporate governance is studied in chapter 5 of this research.

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[359] Bonner, J. and Friedman, A. (2012). Corporate Social Responsibility: Who's Responsible? Finding an Organizational Home for an Increasingly Critical Function. *working paper, New York University*; Byrum, K. (2015). The Role of the Public Relations Professional in Corporate Social Responsibility Communication. *CSRWire.*

[360] Sikka, P. (2010). Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance. *Accounting Forum* 34 (3-4), 153-168. p. 157.

[361] Farrer & Co (2013, June 7). *Fiduciary Duties and Tax Avoidance. Opinion*. p. 4.

[362] Mitchell, L. E. (2007). The Board as a Path toward Corporate Social Responsibility. In McBarnet, D. et al. (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (pp. 279-307). Cambridge: Cambridge University Press. p. 283.

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The special characteristics and possibilities that multinationals possess allow them also to enjoy a specific kind of corporate power that is distinct from most individuals and SMEs. Moreover, transnational corporations operate in a sphere where national regulations are weak. For instance, some multinationals have started using mismatching national tax laws to extremes by using their corporate power. Therefore, it was explained that, in the case of tax planning, multinationals often have a power that can even overrule the state power. With regard to tax planning, multinationals possess multidimensional corporate power, which consists of corporate lobbying power, extensive knowledge and a strong negotiation position, and global mobility. Consequently, the corporate power of multinationals puts them in positions where they have a possibility to make (im)moral choices.

The special character of multinationals allows them to operate on a global level where there is often a regulatory vacuum. To keep multinationals accountable towards the societies in which they operate, the need for transparency arises. Transparency is necessary to make corporations accountable for their actions and to reflect on their own decisions and direct them towards moral choices. In case multinationals abuse their corporate power or do not meet their responsibilities toward society in other ways, they may face several corporate risks. One of the most relevant in the context of this research is the risk to their reputation. Reputation reflects stakeholder trust in a corporation and its actions. Trust is a foundation of every relationship – both business and personal relationships.

Naturally, companies are set up to make profit and, from a company perspective, taxes are usually seen rather as costs. In order to make profit, companies should keep their costs low. Therefore, multinational corporations, as any other taxpayers, plan their taxes.[363] However, multinationals have to manage different risks and reduce the unnecessary costs. It was argued in this chapter that taxes are (to a certain extent) a means for companies to manage some important risks related to the creation of a well-functioning society. In order to reduce such risks, multinationals should invest in public goods and services by paying their fair share of tax.

Every member of a society should pay his or her share of tax. This research argues that taxes are an important contribution to a society and that, next to legal and economic dimensions, taxes also have a moral dimension. Morality addresses not only the question as to how one ought to live as an individual, but also how individuals interact with other individuals. Thus, being part of a society entails moral rights and obligations. Society consists of individuals and organizations, including businesses. Like individuals, businesses interact with other members of society and thus affect others and benefit from their actions. Companies benefit from society through all kinds of public goods funded by taxes. Therefore, corporations are expected to contribute to society, because they are moral agents that can make (im)moral choices when it comes to tax planning. The question of morality and fairness is, namely, about how multinationals behave in relation to the societies in which they operate. Thus, in case multinationals pay (almost) no taxes in the societies in which they operate, they are not contributing to this society and this can be considered irresponsible towards these societies. The corporate decision making with regard to tax planning is, nevertheless, a complex process that relys on the input of various advisors and stakeholders.

[363] See chapter 3.

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3. THE SOCIAL LEGITIMACY OF TAX PLANNING UNDER QUESTION

3.1. Introduction

In recent years, scandals such as the so-called 'Panama Papers'[364] and 'Lux Leaks',[365] but also the European Commission State Aid investigations[366] as well as international political responses and regulatory changes,[367] have accelerated discussions around corporate tax planning. International corporate tax planning has become a heavily debated topic in media, politics, and academia, both, in the national and international spheres. On the one hand, multinational corporations are accused of not paying (enough) tax.[368] On the other hand, international tax planning stays strictly within the limits of the law as an acceptable and reasonable business practice.[369]

A range of multinationals such as Starbucks, Google, Apple, and Amazon, have been questioned about their tax planning strategies in different states in which they operate.[370] For instance, during the last few years, Starbucks has appeared in the media headlines as one of the biggest tax avoiders in Europe.[371] This American multinational is accused of paying very low corporate income tax rates in Europe while having various business entities in different countries without solid economic substance (stateless income).[372] Starbucks is a widely used example in various academic papers; however, it is not the only multinational company whose tax practices have been criticized. Also, for example, Google has been questioned about its tax planning strategies all over the world – in the UK, US, and Australia.[373] According to its various representatives, however, Google believes that it pays a lot of taxes according to the law and, if the lawmaker wishes them to pay more, the laws should be changed accordingly.[374] Such cases provide substance for many heated discussions among tax professionals as well as non-professionals.

As a result, there is a range of contradicting opinions and several vague and sometimes even misleading ideas and terminology. For instance, concepts such as tax evasion and tax avoidance

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[364] International Consortium of Investigative Journalism. (ICIJ). The Panama Papers.

[365] International Consortium of Investigative Journalism. (ICIJ). Luxembourg Leaks: Global Companies' Secrets Exposed.

[366] See European Commission. *State Aid: Tax Rulings.* Overview webpage.

[367] See e.g. OECD. (2013). *Addressing Base Erosion and Profit Shifting (BEPS).* Paris: OECD Publishing; European Commission. (2016). Anti Tax Avoidance Package (ATAP).

[368] See e.g. UK: House of Comons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited; Birrell, I. (2014, January 6). Bill Gates Preaches the Aid Gospel, but is He Just a Hypocrite? *The Guardian*; The Tax Justice Network comment on this *The Guardian* article: Tax Justice Network (TJN) (2014, January 6). *Bill Gates: Is He Just a Hypocrite*?; Conway, Z. (2015, May 29). BBC Uncovers 'Aggressive' Tax Avoidance Scheme. *BBC News*; Setzler, B. (2014, January 17). The Real Tax Threat to American Businesses. *US* News.

[369] UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited. Ev 2-3, Ev 6, Ev 24, footnote 2; Bill Gates' response in, see e.g. Birrell, I. (2014, January 6). Bill Gates Preaches the Aid Gospel, but is he Just a Hypocrite? *The Guardian*; Tim Cook's response in Oliver, C et al. (2016, April 4). Apple's Tax Affairs Spark a Transatlantic Face-off. *Financial Times* (online); see also Panayi, C. H. J. I. (2015). Is Aggressive Tax Planning Socially Irresponsible? Intertax 43 (10), 544-558.

[370] UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited; U.S.: Senate, Permanent Subcommittee on Investigations (2012, September 20). Offshore Profit Shifting and the U.S. Tax Code - Part 1 (Microsoft & Hewlett-Packard); Parliament of Australia. List of Public Hearings Related to Tax Avoidance and Aggressive Tax Planning (2015-2016). See also European Commission. (2017, October 4). State aid: Commission Finds Luxembourg Gave Illegal Tax Benefits to Amazon Worth Around €250 Million.

[371] See e.g. Fairless, T. (2015, April 6). Huge Profit Stokes Concerns over Starbucks's Tax Practices in Europe. *The Wall Street Journal* (online).

[372] See e.g. Kleinbard, E. D. (2013). Through a Latte, Darkly: Starbucks's Stateless Income Planning. *Tax Notes*, 1515-1535.

[373] See e.g. Wade, M. (2015, April 9). Tax Avoidance Hearing: Google, Microsoft and Apple Tell Senate Committee They Fully Comply with Australian Laws. *The Sidney Morning Herald*; Aston, H. et al. (2015, April 11). Senate Tax Inquiry: Google, Apple, Microsoft Policies Highlight Golden Days of Tax Laxness. *The Sidney Morning Herald;* UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited. pp. 9-10 (pts. 10-11); Bowers, S. (2016, January 29). Google's Tax Deal with the UK: Key Questions Answered. *The Guardian* (online); Callahan, D. (2010, October 21). Google's Tax Avoidance: So Much for "Don't Be Evil". *The Huffington Post* (online).

[374] Wade, M. (2015, April 9). Tax Avoidance Hearing: Google, Microsoft and Apple Tell Senate Committee They Fully Comply with Australian Laws. *The Sidney Morning Herald*.

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are often mixed up with each other.[375] Moreover, additional concepts such as aggressive tax avoidance or aggressive tax planning are added.[376] In addition, vague and subjective terms such as fair share, fair play, and spirit of the law are used, often without a clear definition.[377] Consequently, tax debates are moving beyond the legal discussion towards morality. "We are not accusing you of being illegal, we are accusing you of being immoral"[378] is the famous statement of that aptly summarises the public rage around this issue.[379] Indeed, on some points, the morality of corporate legal tax planning can be questioned; nevertheless, I do not agree that all kinds of tax planning are immoral *per se*. Based on (business) ethics, it can be argued that certain kinds of tax planning are socially irresponsible, as I will explain later in chapter 4.

In light of such described international discussions and developments, the aim of this chapter is on clarifying the different aspects of the tax planning debate in order to understand the tension points between socially responsible and irresponsible international corporate tax planning practices. Corporate tax planning is, namely, not only a matter of strict compliance with the law, but it also has political, economic, and moral dimensions. Therefore, discussions around tax planning are complex and contain ethical nuances that should not be crowded out. For the purposes of this research, the moral element of tax planning is examined and the societal acceptability, which is a tool to assess corporate (ir-)responsibility, of tax planning is discussed.

This part of the research offers a theoretical framework for understanding the different concepts of minimizing tax while staying within the (letter of the) law, such as tax planning, tax mitigation, tax avoidance, and aggressive tax planning. Clarifying such concepts used in debates helps to better understand the core subject and focus of debates on a more basic level. For example, from a public finance perspective, the distinction between the terms tax avoidance (legal) and tax evasion (illegal) is not very crucial, because both result in less taxes paid to the state. From a legal perspective, the distinction is, nevertheless, important, because illegal action may lead to criminal punishment. Such a distinction is not easy to achieve. Moreover, addressing legal activities that have morally unacceptable results is more complicated than fighting illegal activities (which is also not easy by any means). This has also caused a growing number of new concepts and terms that should cover the grey area between illegal and legal but morally unacceptable practices.

This chapter will, nevertheless, not provide one clear answer to what is the right or wrong position in the issues mentioned. It is also not the aim of this research to provide technical definitions or guidelines or 'check-the-box' lists for multinationals to identify in which category their tax planning practices fall. On the contrary, it will be proposed that tax planning is a matter of degree and that a common factor behind various different terms is that at a certain level international tax planning becomes socially irresponsible. Therefore, the acceptability of tax planning can vary in some situations. To illustrate the gradations of the moral responsibility of legal tax planning, a continuum is developed (section 4).

This chapter is structured as follows. First, the role of taxation in society is discussed and the functions as well as the moral element of taxes and the concept of highly debated 'fair share' will be explained (section 2). Further, in section 3 the various concepts of tax planning used within this research will be defined for the purpose of this research. In section 4, a tax planning legitimacy continuum is developed in order to illustrate the scale on which the societal acceptability of tax planning could be seen. Further, as this research focuses on international corporate tax planning practices, section 5 will provide a brief overview of developments and positions within the OECD

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[375] Hasseldine, J. and Morris, G. (2013). Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection. *Accounting Forum* 37 (1), 1-14.

[376] See e.g. De Colle, S. and Bennett, A. M. (2014). State-induced, Strategic, or Toxic? An Ethical Analysis of Tax Avoidance Practices. *Business & Professional Ethics Journal 33* (1), 53-82; Payne, D. M. and Raiborn, C. A. (2015). Aggressive Tax Avoidance: A Conundrum for Stakeholders, Governments, and Morality. *Journal of Business Ethics* online, 1-19.

[377] See e.g. Fisher, J. M. (2014). Fairer Shores: Tax Havens, Tax Avoidance, and Corporate Social Responsibility. *Boston University Law Review* 94 (1), 337-365; Lanis, R. and Richardson, G. (2015). Is Corporate Social Responsibility Performance Associated with Tax Avoidance? *Journal of Business Ethics* 127 (2), 439-457.

[378] UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited. Q. 485, p. 40.

[379] See also chapter 1, section 6.

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and the EU towards the issue of aggressive tax planning. Last, section 6 provides a short summary and conclusion for this chapter.

3.2. The role of taxes in society

When discussing the nuances of the tax planning debate, it is necessary to take a step back to address some basic elements of taxation. Clarifying the principles and initial ideas behind taxation helps to better understand why taxation is necessary and where the obligation to pay taxes originates. Such a theoretical basis is fundamental for the further discussions in this research. From an economic perspective, it can be debatable whether corporate taxes are justified in the first place.[380] However, the necessity of corporate taxation from an economic tax-technical perspective is outside the scope of this research. Without aiming to provide an in-depth study on the philosophy of tax law, the following sub-sections use some insights from philosophical theories as a helpful tool to try to better understand the different parties and the arguments in the debates about international corporate tax planning. The reasons behind an obligation to pay taxes will be examined closely. It goes without saying that it is not possible to discuss all the basic elements of taxation in depth here. This section focuses therefore more specifically on the role of taxes in a society that is beneficial for companies. The concept of fair share and morality will also be discussed later in this research with regard to the concept of good tax governance.[381] The discussions in the following sub-sections in this chapter focus on clarifying the current discussions related to international corporate (aggressive) tax planning with regard to morality and societal expectations.

3.2.1. Functions of taxes

Taxes have three main functions. First, taxes provide funds for governments to operate and to offer essential public goods. A well-functioning government with sufficient funds is essential for modern state and society to exist. The functioning of a state depends on the quality of the public goods and services provided. Public goods that are necessary are for example the military to protect the country, education, health care, a legal system, and infrastructure. The second objective of taxation is to redistribute wealth between citizens, with the aim to achieve a measure of economic equality, welfare, and satisfaction in society through the redistribution of wealth (distributive justice).[382] Distributive justice can be seen as a principle that provides "moral guidance for the political processes" and affects "the distribution of benefits and burdens in societies".[383] Distributive justice is based on the principle that society is responsible for taking care of the less well off. The state should "guarantee that property is distributed through society so that everyone is supplied with a certain level of material means."[384] Consequently, the tax system is a tool for the state to ensure distributive justice. Thirdly, taxation serves as means for the tax legislature to steer citizens' behaviour to achieve different policy goals.[385] This is an extra value-adding function for a (modern) state. In this way, taxation, for example, provides incentives to regulate the market by fostering innovation and starting up new business enterprises, or disincentives through, for instance, excise taxes regulating the consumption of alcohol or environmentally polluting activities.[386] Generally

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380 See e.g. Bird, R. M. (1996). Why Tax Corporations? W*orking paper no. 96-2 prepared for the Technical Committee on Business Taxation*, Ottawa; Avi-Yonah, R. S. (2004). Corporations, Society, and the State: a Defense of the Corporate Tax. *University of Michigan Law, Public Law Research Paper No. 40; Michigan Law and Economics Research Paper No. 04-006*; Bärsch, S.-E. (2012). *Taxation of Hybrid Financial Instruments and the Remuneration Derived Therefrom in an International and Cross-border Context Issues and Options for Reform*. Doctoral Dissertation Universität Mannheim. Berlin, Heidelberg: Springer-Verlag. pp. 22-24.

381 See chapter 6, section 2.

382 Murphy, L. B. and Nagel, T. (2002). *The Myth of Ownership: Taxes and Justice.* New York: Oxford University Press. pp. 40-42. Even the European Convention on Human Rights states that everyone is "entitled to the peaceful enjoyment of his possessions" but the state may, if neccesay, for instance, impose taxes on the possessions in the public interest. See Council of Europe. *European Convention on Human Rights (ECHR).* p. 33 (Protocol, Art. 1).

383 Lamont, J. and Favor, C. (2017) Distributive Justice. *The Stanford Encyclopedia of Philosophy* Spring Edition. Zalta, E. N. (Ed.).

384 Fleischacker, S. (2004). *A Short History of Distributive Justice*. Cambridge (MA) / London: Harvard University Press. p. 4.

385 Avi-Yonah, R. S. (2006). The Three Goals of Taxation. *Tax Law Review* 60 (1), 1-28. p. 3; Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250. pp. 229–230.

386 See e.g. Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28.

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said, this is a means for governments to regulate the specific behaviour of citizens.[387] Based on these three functions, it can be concluded that "taxes are what we pay for a civilized society… ."[388] To have a well-functioning society, it has to be organized, which in turn presupposes (agreed) rules to coordinate behaviour. In a modern society, such rules are developed by the state. The state thus has a responsibility to determine the share every member should contribute to the cooperative society.[389] Hilling and Ostas aptly argue that "the redistribution of income and wealth involves more than creating tax equality between poor and rich taxpayers." They provide evidence that "the private concentration of wealth eventually threatens the democratic foundation of a modern society, because it confers social and political power to persons who are not elected by the people."[390] Consequently, the effect that taxation has on equality severely affects people's purchasing power or health (e.g. via access to health care).[391] Therefore, states have a responsibility to set up an effective and fair tax system.

While deciding upon the fair share every taxpayer has to contribute, the state also interferes with private ownership of the taxpayers. Private ownership provides that something is owned by a private individual (or organization), as opposed to something public that can be owned (and used) by a larger group of individuals. Money or the work done in order to receive money can be qualified as private ownership. Therefore, some authors see taxes as violating private ownership. The libertarian philosopher Nozick, for example, argued that the initial obligation to pay taxes violates private ownership to an extent that it can be compared to slavery.[392] This view underscores a classical liberal-legalist perspective that accepts corporate tax avoidance or aggressive tax planning that complies with the strict letter of the law only.[393] On the other hand, as liberals Holmes and Sunstein rightly argue, without taxes there would be no private ownership in the first place, because, by means of tax money, states provide protection for private ownership without which it would have no value.[394] Without discussing the extent a state should interfere with private ownership it is clear that the public goods and services the state offers in return are important for every member of the society, and also for corporations. In addition, "[T]he quality and quantity of public goods supplied by the government depends heavily on the amount of taxes the economic agents are willing to pay."[395]

Some believe that the provision of public goods and services should not necessarily be a function of a state. For example, the Nobel Prize-winning economist Friedman strongly supported the free market and minimal tax, stating that all the benefits that governments seem to provide can be achieved by market regulation.[396] His standpoint was that if governments do not build roads, but people see that they do need them, they will do it themselves. Another Nobel Prize-winning economist, Coase, showed for instance that lighthouses, "thought to be the public good *par excellence*" were operated privately in the UK for a long time.[397] Hence, the logic is that, if public goods can be organized without governments interfering with private property, paying taxes is unnecessary. Free market regulation would basically be based on competition without government

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[387] See e.g. Avi-Yonah, R. S. (2006). The Three Goals of Taxation. *Tax Law Review* 60 (1), 1-28. pp. 3-4; Gribnau, J. L. M. (2012). Legislative Instrumentalism vs. Legal Principles. *International Tax Law Review* 3, 9–42. pp. 13-16.

[388] *Compania General de Tobacos de Filipinas v. Collector of Inland Revenue*, 275 US 87 (1972) O.W. Holmes (dissenting). p. 100.

[389] Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28. p. 15.

[390] Hilling, A. and Ostas, D. T. (2017). *Corporate Taxation and Social Responsibility*. Stockholm: Wolters Kluwer. pp. 33-35.

[391] See more on how taxation influences equality in society and people's puchasing power in: Wijtvliet, L. (2018). The Tax Tectonics: Well-being and Wealth Inequality in Relation to a Shift in the Tax Mix from Direct to Indirect Taxes. *Tilburg: CentER, Center for Economic Research*.

[392] Nozick, R. (1974. *Anarchy, State, and Utopia*. Oxford: Basil Blackwell. p. 169. See also Vogel, K. (1988). The Justification for Taxation: A Forgotten Question. *American Journal of Jurisprudence* 33 (1), 19-59. pp. 22-23.

[393] Note that, in this research, the term 'letter of the law' does not only refer to a literal interpretation of the law but is rather used as a reference to tax planning practices that exploit the technicalities or differences between tax systems by making use of different tax planning techniques like mismatch arrangements or loss-making financial assets artificially allocated to high-tax jurisdictions.

[394] Holmes, S. and Sunstein, C. R. (2000). *The Cost of Rights: Why Liberty Depends on Taxes.* New York / London: W. W. Norton & Company. p. 59, p. 66.

[395] Schön, W. (2005). Playing Different Games? Regulatory Competition in Tax and Company Law Compared. *Common Market Law Review* 42 (2), 331-365. p. 335.

[396] Friedman, M. and Friedman, R. D. (1980). *Free to Choose: A Personal Statement*. Orlando: Harcourt. e.g. p. 11, pp. 25-37.

[397] Mackaay, E. (2000). History of Law and Economics. In Bouckaert, B. and De Geest, G. (Eds.), *Encyclopedia of Law and Economics: The History and Methodology of Law and Economics* (vol. 1) (pp. 65-117). Cheltenham: Edward Elgar Publishing. pp. 65-117.

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interference. Nevertheless, Coase did not suggest "any reason to suppose that letting the market deal with externalities will produce a good outcome."[398] Moreover, the question is whether such free market regulation would work for all kinds of public goods, especially considering market failures.

The idea of market self-regulation may seem to work from a pure economic perspective, but there is also a downside to it. Namely, not everybody's needs, interests, morality, common sense, values, and principles are the same nor are they static. This means that in a free-market, without particular norms (that would also stand for the interests of the less well off), parties could be acting based on their own interest or understanding of justice and morality. This, however, could lead, for example, to price discrimination for using the public goods or services. Such self-interested behaviour is not desirable in a modern society, because it may be harmful for the quality and availability of the benefits a society should provide. In a *laissez-faire* economy, goods or services would only be provided for those who are able to pay the market price. It could work with some goods and services, such as Coase's example of lighthouses, but it is questionable whether lighthouses are comparable to education, health care, the legal system, or even infrastructure.

A real-life example of the privatization of public goods should provide an answer. In late 1970s, St. Louis (a city in the USA) had financial difficulties and problems maintaining its streets, a public good *par excellence*.[399] Instead of raising taxes, the streets were privatized, which resulted in well-maintained streets. However, the owners also often refused to open the streets for public use. As a result, commuting in the city became almost impossible. This situation was especially problematic for Washington University, because many of its students could no longer walk to school, as the streets around the campus were privatized. The university was forced to negotiate with the owners of the streets around the campus to create a special corridor that students could use.[400] This example proves that not all public goods or services should be traded in free market conditions, regulated by the actors and their behaviours in this market.[401] The reason that some commodities are considered public goods (or services) is that they are non-rivalrous and non-excludable.[402] Unlike in the case of private goods, people cannot be prevented from using a public good. Moreover, if one person enjoys a public good, the other person's enjoyment of that good is not excluded.[403] Nevertheless, public goods may create a free-rider problem.[404] For example, in the case of national defence, if one person in a state is defended against foreign attack, others are as well. Therefore it would not be possible to charge a fee for this service because many people would not pay if they know that they are defended even without paying.[405] Such a free-rider issue is solved by state-provided public goods funded by taxes that are collected from everyone (equally).[406] Taxation is thus the price paid for the availability and the use of public goods and services but also an investment in a well-functioning society.

Like citizens, corporations that benefit from public goods and services in a state without paying taxes can be considered free-riders. Corporations "need healthy societies in order to become and stay healthy themselves."[407] This is achieved next to the (good quality of) public goods and services, also via effective distributive justice in a state. Next to moral considerations (taking care of the less well), distributive justice is also a prerequisite for a well-functioning society (in the form of educated workforce or purchasing power of consumers). To fulfil such tasks that are essential

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[398] Cassidy, J. (2013, September 3). Ronald Coase and the Misuse of Economics. *The New Yorker*.

[399] Heath, J. (2002). *Efficient Society Why Canada is as Close to Utopia as it Gets*. Toronto: Viking. p. 58.

[400] Heath, J. (2002). *Efficient Society Why Canada is as Close to Utopia as it Gets*. Toronto: Viking. p. 58.

[401] Ver Eecke, W. (2008). *Ethical Dimensions of the Economy: Making Use of Hegel and the Concepts of Public and Merit Goods.* Berlin / Heidelberg: Springer-Verlag. pp. 6-10, pp. 69-78.

[402] Nordhaus, W. D. (2006). Paul Samuelson and Global Public Goods. In Szenberg, M. et al. (Eds.), *Samuelsonian Economics and the Twenty-First Century* (pp. 88-98). New York: Oxford University Press. pp. 88-98.

[403] Stiglitz, J. E. (2000). *Economics of the Public Sector*. New York: Norton. p. 226.

[404] Hardin, R. (2013). The Free Rider Problem. *The Stanford Encyclopedia of Philosophy* Spring Edition. Zalta, E. N. (Ed.).

[405] Cowen, T. (2008). Public Goods. *The Concise Encyclopedia of Economics, Library of Economics and Liberty.*

[406] Stiglitz, J. E. (2000). *Economics of the Public Sector*. New York: Norton. p. 228.

[407] Eijsbouts, J. (2011). International Market Regulation, Corporate Governance, CSR and Multinationals. In Muller, S. et al. (Eds). *The Law of the Future and the Future of Law* (pp. 295-303). Torkel Opsahl Academic EPublisher, Oslo, p. 297, referring to: Porter, M. E. and Kramer, M. R. (2006). Strategy and Society: The Link between Competitive Advantage and Corporate Social Responsibility. *Harvard Business Review* December issue (online).

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for a well-functioning society, states act as intermediary to decide upon the fair share and collection of taxes.[408] The fair share every taxpayer has to pay is determined in the tax laws. As taxation interferes with private ownership, it needs to be justified and regulated by laws.[409] The aim of the laws should be "getting companies to pay a fair share of tax in the jurisdiction in which it produces income."[410] Nevertheless, as Freedman argues, it is inevitable that some taxpayers will "operate closer to the boundaries than others."[411] Freedman further argues, rightly, that "governments have the responsibility to create the right conditions and culture for a generally tax-compliant system which would benefit the entire legitimate business community in keeping costs down and spreading tax burdens fairly."[412]

3.2.2. Coping with the imperfections of the law

Law is a means "to organize life between the members of a given society at a given time" and it "is a tool that allows society to function."[413] It is known for its written rules that form a legal system, which is "a formal public system containing norms regulating (corporate) citizens' behaviour; it governs behaviour affecting other persons."[414] In developing a legal system, economic and political considerations, but also certain principles, moral values that guide the behaviour of members of society play an important role. A legal system regulates relationships between members of society and consequently ensures a degree of mutual trust. Next to the legal system, morality is also a public system that guides individuals' behaviour. However, "it addresses not only the question as to how one ought to live as an individual, but also how individuals should interact with other individuals." As a set of unwritten rules, morality can be defined as an informal public system that consists of "moral rules, principles, values, ideas and virtues, which, however, may entail conflicting and competing demands."[415] Even though the legal system should codify public morality, it will never be able to do so exhaustively.[416]

Taxpayers' rights and obligations are laid down in a system of legal rules. Paying taxes as a moral obligation to contribute to the cooperative society[417] is in this way transformed into an elaborate legal system. The legal system is thus seen as "an institutionalization or codification" of ethics into specific principles, rules, and procedures.[418] However, legal rules in a complex society inevitably leave room for different interpretations and choices with regard to the use of the system of tax rules. This can in turn lead to different outcomes, also to outcomes that might be negative for society as a whole,[419] suggesting that, in case legal rules fall short, morality should help to fill in the gaps. Such existing choices lead to a moral dilemma concerning making the right choices in relation to others.

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[408] See e.g. De Wilde, M. F. (2015). *'Sharing the Pie': Taxing Multinationals in a Global Market*. Doctoral Dissertation, Erasmus University Rotterdam. p. 22; Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28; Stevens, S. (2014). The Duty of Countries and Enterprises to Pay Their Fair Share. *Intertax* 42 (11), 702-708.

[409] Vogel, K. (1988). The Justification for Taxation: A Forgotten Question. *American Journal of Jurisprudence* 33 (1), 19-59; Matsos, G. (2017, May 29). No Taxation without Representation. *Kluwer International Tax Blog*; Schwartz, R. D. and Orleans, S. (1967). On Legal Sanctions. *The University of Chicago Law Review* 34 (2), 274-300.

[410] Hilling, A. and Ostas, D. T. (2017). *Corporate Taxation and Social Responsibility*. Stockholm: Wolters Kluwer. p. 55.

[411] Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press. p. 368.

[412] Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press. p. 387.

[413] Barak, A. (2011). On Society, Law and Judging. In De Visser, M. and Witteveen, W. (Eds.). *The Jurisprudence of Aharon Barak, Views from Europe* (pp. 15-50). Nijmegen: Wolf Legal Publishers. p. 15.

[414] Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28. p. 13.

[415] Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28. p. 14.

[416] Carroll, A. B. (1991). The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders. *Business Horizons* 34 (4), 39-48. p. 41; Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28. p. 14.

[417] Concept developed by John Rawls: Rawls, J. (1972). *Theory of Justice*. Oxford: Oxford University Press. p. 4.

[418] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 5.

[419] Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250. p. 235.

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With respect to tax planning, moral questions have to be addressed, because the legal system is inevitably imperfect. Multinationals' tax practices have proven that legal rules can be used and complied with in different ways, with different moral and societal impacts. This is possible, because tax laws are often complex and unclear. This results in gaps in the law and between different legal systems. These imperfections in the legal rules make circumvention or even manipulation of the rules possible. Interpreting and using the law, therefore, inevitably implies making value judgments.[420] Thus, although both morality and the law should guide the behaviour of the members of a society, they are not interchangeable. The law and morality are interconnected, but the law does not exhaust morality. With regard to tax law, "moral responsibility begins where actions are not completely determined by the tax law"[421] for "[E]ven the best designed and drafted tax laws are not capable of anticipating every new product, service or business model and every taxpayer transaction and structure, particularly those of an aggressive nature or those that are otherwise undertaken for tax avoidance purposes."[422] The law, thus, leaves room for interpretation and actions with various outcomes. Morality is a compass for choosing the right actions.

Morality requires the members of society to make certain value judgements and behave (morally) responsibly when making a choice.[423] To my mind, fairness and making right choices is linked to justice. Sandel has argued that justice is in any case "inescapably judgmental".[424] According to him "questions of justice are bound up with competing notions of honor and virtue, pride and recognition." Consequently, "[J]ustice is not only about the right way to distribute things" but also "about the right way to value things."[425] Thus, morality is individual, but it is bound to society. Holmes and Sunstein have argued that morality is something that comes from inside us and is often also dependent on social norms.[426] That means that morality is something that guides (corporate) persons as individuals (intrinsic motivation) and as individuals in relation to others (social norms).[427] For example, people may act in a good and legal way without it being required by the law. The same is true for multinationals that, for instance, do not make use of child labour in their factories in developing countries, even though child labour is legal in some of these countries.[428] Also companies can thus accept moral obligations towards (internal and external) stakeholders, stretching these obligations beyond the legal obligations.[429] Concerning their tax planning practices, multinationals may also opt for a less aggressive stance than minimization within the boundaries of the (letter of the) law.[430]

Corporate tax planning usually involves a cross-border dimension. Multinationals operate within different legal systems, which leaves them even more room for moral choices. Multinationals are in a position to plan their taxes on the international level and erode their duty to pay a fair share in the societies in which they operate.[431] Accordingly, multinationals may meet the legal requirements on state level while at the same time eroding their moral responsibilities by taking advantage of a lacking international tax law system. Thus, the problem is that, with regard to aggressive tax planning, multinationals can interpret the law in a self-serving way, choosing to comply only with

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[420] Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250. pp. 239-240.

[421] Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28. p. 14.

[422] OECD & IMF. (2017 March). *Tax Certainty: IMF/OECD Report for the G20 Finance Ministers*. p. 20.

[423] See also: Benn, S. and Bolton, D. (2011). *Key Concepts in Corporate Social Responsibility*. London: Sage Publications. p. 13. Schwartz, M. S. (2011). *Corporate Social Responsibility: An Ethical Approach*. Peterborough: Broadview Press. pp. 30-32.

[424] Sandel, M. J. (2010). *Justice: What's the Right Thing to Do?* London: Penguin Books. p. 261.

[425] Sandel, M. J. (2010). *Justice: What's the Right Thing to Do?* London: Penguin Books. p. 261.

[426] Holmes, S. and Sunstein, C. R. (2000). *The Cost of Rights: Why Liberty Depends on Taxes.* New York / London: W. W. Norton & Company. pp. 162-171.

[427] The distinction between moral and social norms is an interesting discussion that falls outside the scope of this research. The underlying starting point in this research is that moral norms and morality are based on personal reasoning in making difference between good and bad, right and wrong. Social norms, on the other hand, are the informal (and usually unwritten) rules that govern behavior in groups and societies. Both moral and social norms influence each other. For an overview of moral and social norms see e.g. Brennan, G. et al. (2013). Moral and Social Norms. In Brennan, G. et al. (Eds.). *Explaining Norms*. Oxford: Oxford University Press.

[428] Fisher, C. and Lovell, A. (2009). *Business Ethics and Values: Individual, Corporate and International Perspectives* (3rd Ed.). Essex: Prentice Hall. p. 46.

[429] Corporations have moral agency. See chapter 2, section 7.

[430] Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88. p. 73.

[431] See more on fair share in chapter 3, section 2.3; chapter 6, section 2.1.

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the letter of the law and crowd out moral responsibility. At the same time, however, "the letter of the law is often a poor instrument for guiding taxpayer behaviour" because "it is often unclear how the letter of the law should be interpreted."[432] Moreover, the interpretation of the law is a task of law enforcers, such as judges[433] or tax administrators. This raises a question whether it is justified to expect a taxpayer, a subject of the law, to interpret the law in a certain way. The short answer would be negative. However, corporate boards usually have to calculate legal interpretation into their decision making (with the help of tax advisers), because they need to consider whether their tax planning strategies can be challenged in the court and, if so, how would the judge interpret the law. Usually tax advisors present their advice with a scale of probability whether the alternative tax planning strategies could end up before the judge and whether it could be successful or not.[434] Thus, the taxpayer interprets law and takes it into account in its decision making.

Typically, in order to set up an international aggressive tax planning structure, the effects of different laws in different countries need to be combined.[435] Thus, international tax planning structures may profit from the interaction between several tax systems.[436] Therefore, tax planning is often not simply a matter of interpreting one specific law but combining various laws. In such a situation, multinationals can, but do not necessarily have to, extort the imperfections of the law while justifying one's position based on pure legality (without underlying morality) of the action (legal-positivist view). In other words, in the case of interpreting laws that are relevant for tax planning (tax laws as well as corporate laws), there is sufficient room for multinationals to opt for an beneficial interpretation of the law, which can lead to acting outside the purpose of various national laws. Nevertheless, in my mind, this does not suggest that all multinationals make use of such a possibility. Such freedom of choice simply indicates that there is room for morality and, thus, for moral responsibility. Gribnau claims that "the tax rules should grosso modo reflect public morality, but there is no identity between the two."[437] Law, being a subject for interpretation, provides choices, which is an essential prerequisite for morality. Therefore, in search for limits and a better understanding of what is acceptable and what is not, or even better, what is defendable and what is not, discussions of morality are inevitable.

It goes without saying that tax laws should ensure that taxpayers are "able to predict with a sufficient degree of certainty the tax consequences of their actions according to the rules created through the legislative process."[438] However, perfection is impossible and laws will always leave room for (aggressive) tax planning.[439] National laws often fall short in an international context because of the mismatches between national legal systems. "The power of a government has traditionally been confined to a certain territory" and "as soon as company leaves its home territory and moves part of its production chain to" another country "the legal framework becomes very different." As a result, "managers can no longer simply rely on the legal framework when deciding

[432] Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250. p. 235.

[433] For example, in the Netherlands' legal system there is a concept of *fraus legis* which leaves judges interpretation room when deciding whether tax planning contradicts the purpose of the law, even though all other legal tools agree that it is in accordance with the letter of the law. See more on *fraus legis* in De Wilde, M. F. and Wisman, C. (2016). EATLP 2016: Tax Avoidance Revisited: The Netherlands. *EATLP National Reports*: "Fraus legis addresses legal arrangements typically lacking real practical meaning, which have predominantly been set-up to avoid tax in contradict the intent of the tax legislation. The doctrine allows courts to eliminate legal facts or to substitute these for constructed ones to discover a tax outcome in line with the purpose of the law." In many other jurisdictions general anti-avoidance rules (GAAR) leave similar room. See also Hilling, A. and Ostas, D. T. (2017). *Corporate Taxation and Social Responsibility*. Stockholm: Wolters Kluwer. pp. 48-51.

[434] See e.g. Bruijsten, C. (2016). *Onzekerheid in Fiscale Rechtsvinding*. Doctoral Dissertation. Deventer: Wolters Kluwer. pp. 355-364. For further research, it would be interesting to try to define the vague concept of aggressive tax planning based on the advice tax advisors give to their clients (e.g. level of probability of surviving tax audit). Brock and Russell argue that "the soundness or legitimacy of these legal opinions is highly dubious." Brock, G. and Russell, H. (2015). Abusive Tax Avoidance and Institutional Corruption: The Responsibilities of Tax Professionals. *Edmond J. Safra Working Paper* 56. p. 38.

[435] Meldgaard, H. et al. (2015, December 23). Study on Structures of Aggressive Tax Planning and Indicators, Final Report. *European Commission Taxation Papers, Working Paper N. 61 – 2015.* p. 51.

[436] Meldgaard, H. et al. (2015, December 23). Study on Structures of Aggressive Tax Planning and Indicators, Final Report. *European Commission Taxation Papers, Working Paper N. 61 – 2015.* p. 51.

[437] Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28. p. 14.

[438] Hilling, A. and Ostas, D. T. (2017). *Corporate Taxation and Social Responsibility*. Stockholm: Wolters Kluwer. p. 38.

[439] See e.g. Hilling, A. and Ostas, D. T. (2017). *Corporate Taxation and Social Responsibility*. Stockholm: Wolters Kluwer. p. 39; Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250.

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on the right or wrong of certain business practices." This is the situation in which morality plays a crucial role; "business ethics begins where the law ends", which means that "globalization increases the demand for business ethics because globalized economic activities are beyond the control of national (territorial) governments."[440] This confirms the space for moral responsibility.
Next to inner moral norms (what is the right thing to do?), in a society there are also wider social norms. Wenzel has argued that, while tax ethics refer to the "respondents' own personal beliefs about the normative appropriateness of tax compliance or noncompliance, social norms refer to their perceptions of what most other people believe is appropriate."[441] This also ensures that the core reason for people's actions may differ from the socially acceptable norms. However, such social norms may be strong enough to affect inner morality. In the context of tax planning, there is nothing wrong with companies planning their taxes, as long as they do not override other welfare and rights of others. In other words, multinationals' decisions need to follow the legal systems as well as moral norms and social expectations. Since law does not exhaustively codify morality and since there are no universal international guidelines (in tax law nor corporate law) for responsible tax behaviour, CSR, as a form of ethical business practices, can be considered to be a helpful tool, as it will be explained in chapter 4 of this research.[442] Tax planning that evidently does not meet the moral and societal norms calls for public outrage.[443] It suggests that such tax planning evaporates a business' moral responsibility towards society or societies.

3.2.3. 'Fair share' and the spirit of the law[444]

Corporations have, in general, a legal obligation to pay corporate income tax. Some argue that this obligation should be considered apart from morality.[445] According to Erle, "the business process need to ensure that taxes are not overpaid but that legal obligations are fulfilled."[446] This seems to be a legal-positivist approach, according to which strictly following the written rules – tax laws – is sufficient to fulfil obligations towards the state and society.[447] However, the question that is often raised concerns whether corporations are paying their fair share if they fulfil only their written legal obligations while engaging in aggressive tax planning.[448] There is much discussion about the concept of fair share, the definition of which is not commonly agreed.
For instance, in the Netherlands, the concept of fair share has resulted in a heated debate.[449] An academic debate between Happé and (Leo) Stevens provides an apt illustration of this discussion. Happé argues that every member of society should pay its fair share, since they are members of a

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[440] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 21.
[441] Wenzel, M. (2005). Motivation or Rationalisation? Causal Relations between Ethics, Norms and Tax Compliance. *Journal of Economic Psychology* 26 (4), 491-508. p. 493.
[442] See chapter 4.
[443] See e.g. Robinson, D. (2010, October 27). Protesters Target Vodafone over Taxes. *Financial Times (online)*; BBC News. (2012, December 8). UK Uncut Protests Over Starbucks 'Tax Avoidance'. *BBC News (online)*; Watson, J. (2013, April 11). Time to Wake Up - Corporate Abuse of Tax Havens. *International Bar Association*; Irvine, J. (2013, March 1). Public Outrage at Tax Avoidance. *Economia* (ICAEW); Rawlinson, K. (2014, June 15). UK Uncut Protesters Blockade Vodafone Stores Across Country. *The Guardian*.
[444] Note that the concept of fair share and morality will also be discussed in chapter 6.2.1. of this research, specifically with regard to the concept of good tax governance. The discussion in this sub-section focuses on clarifying the current discussions and the state of the art related to international corporate (aggressive) tax planning with regard to morality and societal expectations.
[445] See e.g. Friese, A. et al. (2008). Taxation and Corporate Governance – The State of the Art. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 357-425). Berlin / Heidelberg: Springer-Verlag. p. 401.
[446] Erle, B. (2008). Tax Risk Management and Board Responsibility. In Schön, W. (Ed.). *Tax and Corporate Governance* (pp. 205-220). Berlin/Heidelberg: Springer-Verlag. p. 211; Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press; Honoré, T. (1993). The Dependence of Morality on Law. *Oxford Journal of Legal Studies* 13 (1), 1-17.
[447] See a discussion on the legal positivist and principles-based approach e.g. in Braithwaite, J. (2002). Rules and Principles: A Theory of Legal Certainty. *Australian Journal of Legal Philosophy.*
[448] See e.g. Landry, S. et al. (2013). Tax Aggressiveness, Corporate Social Responsibility, and Ownership Structure. *Journal of Accounting, Ethics & Public Policy* 14 (3), 611-645; Oxfam International. (2016). Would You Pay 20 Euros for a Beer? International public campaign on tax avoidance, *YouTube.*
[449] See e.g. Happé, R. H. (2015). Fiscale Ethiek Voor Multinationals. *Weekblad Fiscaal Recht* 2015/938; Happé, R. H. (2015). De Kleren van de Keizer. *Weekblad Fiscaal Recht* 2015/1208; Bender, T. (2017). Tussen Ethiek en Wet: Een Derde Weg. *Weekblad Fiscaal Recht* 146 (7176), 110-119; Gribnau, J. L. M. (2014). Ethische Aspecten van Tax Planning. *Ars Aequi* Maart, 173-183; Gribnau, J. L. M. (2014). Fiscale Ethiek in de Boardroom. *Vakblad Tax Assurance* 2 (1), 42-49; Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250.

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cooperative society and make use of public goods, and that members of the society have an obligation to act according to the legal and moral rules established in the societies in which they operate (*nakomingsplicht*). He emphasizes that a good corporate citizen is self-restraining (*terughoudenheid*) and moderate (*maatgevoel*).[450] Happé's stand-points have been criticized by Stevens who argues that a system that is overly complex and flawed inevitably calls for cynical reactions from the taxpayers. According to him, tax rules are no longer a harmonized basis of a society. Stevens thereby places the responsibility to frame the obligation to pay a fair share on the legislature (which is in line with Freedman in the UK).[451] Stevens' main criticism of Happé's argumentation lies in the vagueness and subjectivity of the moral norms that, according to Stevens, cannot fill the gaps in the laws.[452] Happé answered Stevens' criticism, arguing that Stevens' criticism is out-dated and does not accept the changing nature of international tax law. Happé agrees that both multinationals as well as the lawmaker are not perfect nor is it expected from them to be perfect. Nevertheless, he believes that 'gaming the rules' is unacceptable from a moral perspective.[453] I agree that, from a moral perspective, circumventing or manipulating the laws to minimize one's tax burden to the absolute minimum is unacceptable because it implies free-riding behaviour. At the same time, states also need to be clear on the expectations on taxpayers in order to provide legal certainty. In my opinion, both states and multinationals bear the shared (moral) responsibility for a better (tax) system.

The (un)acceptability of the inclusion of the moral perspective in the tax debate is also discussed at the international academic level. For instance, Österman pleads for "the benefit of '*the rule of law*' basis for taxes", because taxpaying is never voluntary and should be regulated.[454] Besides, Österman seems to claim that accepting the moral dimension of taxation would pass the legislative power over to a society based on ethics. I do agree with Österman that taxes need a strong rule of law. However, as will be shown further, the rule of law is not always perfect. Naturally, this does not mean that the states should lay back and expect society to fix the issue based on ethics. Good tax governance, based on morality, as explained in this research, does not replace the law but accepts a moral responsibility beyond the law, especially in cases where the rule of law falls short. A sustainable tax system is a shared responsibility of various actors, such as states and MNEs but also for instance media that should educate the public and publish an objective picture of the societal problems. States, however, bear the primary responsibility for creating fair legal system and legal certainty.

Freedman, who equates the moral perspective and discussions around fair share with CSR, argues that "companies will engage in CSR only to the extent that it makes business sense for them to do so." Thus, she seems to believe that corporations embrace CSR for reasons of reputation only. Therefore, Freedman is skeptical about corporate moral responsibility and argues that only government regulation could "force companies to make unprofitable decisions, even if they are socially beneficial in a wider sense."[455] Freedman's skepticism in relation to a corporation's motivation to engage in CSR only when a sufficient business case exists is understandable and also widely discussed in the CSR literature.[456] However, in my opinion, here Freedman seems to skip a few nuances with regard to CSR. First, not all companies engage in CSR for profit maximization reasons, just as not all companies engage in tax planning for strict profit maximization reasons. Second, Freedman's conceptualization of CSR seems to be too generalized. She considers CSR in relation to tax as "a question of the relationship with governments rather than problems of natural

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[450] Happé, R. H. (2015). Fiscale Ethiek Voor Multinationals. *Weekblad Fiscaal Recht* 2015/938.

[451] Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press.

[452] Stevens, L. G. M. (2015). Fiscale ethiek voor iedereen. *Weekblad Fiscaal Recht* 2015/1060.

[453] Happé, R. H. (2015). De kleren van de Keizer. *Weekblad Fiscaal Recht* 2015/1208.

[454] Österman, R. P. (2018). Perspectives on Corporate Taxation from a Sustainable Business Perspective. In Arvidsson, S. (Ed.) *Challenges in Managing Sustainable Business: Reporting, Taxation, Ethics and Governance* (pp. 371-397). Lund: Palgarve Macmillan. p. 372.

[455] Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press. p. 382.

[456] See e.g. Carroll, A. B. and Shabana, K. M. (2010). The Business Case for Corporate Social Responsibility: A Review of Concepts. *International Journal of Management Reviews* 12 (1), 85-105; see also chapter 4 on CSR.

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or human resources where a norm can be established without government involvement."[457] Freedman seems, thus, to argue that CSR is only something that corporations do when governments fall short. I do not disagree with Freedman's standpoint that it is the task of governments to define the essence of the tax obligation. At the same time, CSR is not suggested as a moral remedy for government's inactivity. As I will argue further in this research, CSR is a voluntary tool for corporations to meet their moral responsibilities in addition to the legal ones. This is not a responsibility towards the government but a responsibility towards society.

The fair share of tax that multinationals have to pay is a topic that has much to do with the difference between but also interconnectedness of the written law and moral norms. The debates often point out that multinationals can avoid paying their fair share by not following the spirit of the law and focusing only on compliance with the strict letter of the law.[458] This suggests that the definition of the concept of fair share depends on the vaguely defined concept of the spirit of the law. Corporations that fail to comply with the spirit of the law do not pay a fair share. Even though the concept of the spirit of the law lacks a coherent definition, it seems that, in general, not following the spirit of the law could be understood as consciously avoiding the tax consequences of the law that were meant by the lawmaker.[459] Thus, simply fulfilling legal obligations based on a strict interpretation of the written legal rules – strict compliance with the letter of the law only – does not seem to suffice. Due to the imperfect laws, the spirit of the law is not a clearly defined concept. Moreover, socially responsible corporations are not expected to act as perfect (corporate) citizens. Therefore, as I will argue below, it is better to start from the other end by asking what is unfair, suggesting that paying corporate income tax is a legal and moral obligation of corporations. In my opinion, the irresponsible element of tax planning is not just the literal interpretation of the law, but rather an interpretation of the law that leads to tax planning techniques which intentionally exploit the technicalities or differences between tax systems by making use of different tax planning techniques.[460]

Hasseldine and Morris, however, are critical about distinguishing between the letter and the spirit of the law. Making a difference between the letter and the spirit of the tax law "appears to ignore the purpose of the tax code, which among other purposes, is to identify in a reasonably clear manner events that are to be taxed or events that lead to a tax benefit or credit", they write. Thus, Hasseldine and Morris choose the legal-positivist view, suggesting that "there is nothing beyond the tax code."[461] For their argumentation, they rely on Lord Hoffman who claims that the only way in which the lawmaker "can express an intention to impose a tax is by statute, which means that such a tax is imposed. If that is what [the lawmaker] means, the courts should be trusted to give effect to its intention."[462] In my opinion, if courts can give effect to the lawmakers' intention, then this means that the laws are always open to interpretation. Furthermore, if courts can interpret laws, other actors such as companies can also do that. The tension between the spirit and the letter of the law leads, thus, to a question whether governments should take care of clearer laws that reflect the spirit of the law[463] or whether the companies should interpret laws less egoistically.[464] I do agree that

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[457] Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press. p. 383.

[458] Happé, R. (2015). Ethics and International Tax Planning. In Russo, R. (Ed.), *Tax Assurance* (pp. 49-71). Deventer: Wolters Kluwer. Russo & Van Trigit.

[459] See e.g. OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing. p. 60. See also Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press.

[460] As will be explained later, also states have a primary for ensuring that the differences between tax systems do not enable taxpayers to pay an unfair share.

[461] Hasseldine, J. and Morris, G. (2013). Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection. *Accounting Forum* 37 (1), 1-14. p. 11.

[462] Hoffman, L. (2005). Tax Avoidance. *British Tax Review* 2, 197–206. As cited in Hasseldine, J. and Morris, G. (2013). Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection. *Accounting Forum* 37 (1), 1-14. p. 12.

[463] See e.g. Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press; Stevens, L. G. M. (2015). Fiscale ethiek voor iedereen. *Weekblad fiscaal recht* 2015/1060; Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28.

[464] OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing. section XI. 2; Happé, R. (2007). Multinationals, Enforcement Covenants and Fair Share. *Intertax* 35 (10), 537-547; Stevens, S. (2014). The Duty of Countries and Enterprises to Pay Their

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laws should determine how and how much taxes should be paid and that there should be one 'meaning' for every taxpayer. However, in my opinion, this does not mean that, as long as the law does not literally forbid certain behaviour, it should not be criticized, as some legal positivists tend to believe. Legal behaviour does not always equal to legitimate behaviour.
Russo and Van Trigt claim that "fair share in the context of taxes means to pay taxes in a jurisdiction corresponding to the economic benefits that are enjoyed in that jurisdiction."[465] They also add that "ideally, fair share and the letter of the legislation should amount to the same thing."[466] In the same vein, Gribnau argues that ideally "tax legislation serves (formal) legal equality and legal certainty, for the legislature determines the amount of tax to be paid and lays this down in tax laws." Accordingly, the main task of the lawmaker within the framework of tax law is "the distribution of the tax burden over members of society."[467] Thus, there seems to be an agreement on the fact that the legislature is responsible for decreasing the mismatch between the letter and the spirit of the law, which is necessary to establish a fair and effective tax system. Consequently, the fair share every taxpayer should pay is ideally determined in the tax laws.[468] In other words, it is the government's responsibility to produce laws with comprehensible spirit, meaning, or purpose and to make sure that the laws ensure the fair distribution of tax burden among the taxpayers. However, as explained, the law is almost always subject to interpretation.[469] This means that taxpayers (especially multinationals[470]) have the possibility to focus only on the letter of the law and to interpret it in their own favour, ignoring the spirit of the law. It is clear from the public outrage that this is unacceptable and some would say also unfair.
Legal rules should ideally give a concrete form to morality. As explained in the previous section, the legal obligation to pay tax derives from the written legal rules, which are inevitably "imperfect, ambiguous, lagging behind societal, economic and technical developments and taxpayers' undesirable use of legislation."[471] According to Peters, there are taxpayers that have the possibility to engage in international tax planning, such as multinationals, "confronted with two (mutually reinforcing) incentives." They can either "comply with international tax law because they are forced to do so, or they can comply with international tax law because they feel that there are good (normative) reasons to pay their 'fair share'." This implies, in the words of Peters, thus, that "international tax law is either regarded to be a 'fact' that can be objectively understood (and manipulated), or as a social 'norm' that deserves recognition."[472] To this also personal moral norm or living up to a moral responsibility, can be added.
For the purposes of this research, the fair share of tax every taxpayer should pay is understood as a tax burden that derives from the combination of the letter and the spirit of the law. This view is, in general, consistent with the positions of Happé,[473] Gribnau,[474] and (Stan) Stevens.[475] Thus, this research considers paying tax not only a legal but also a moral obligation. However, as the concept

Fair Share. *Intertax* 42 (11), 702-708; Russo, R. and Van Trigt, J. (2015). Corporate Governance and Taxes. In Russo, R. (Ed.). *Tax Assurance* (pp. 23-48). Deventer: Wolters Kluwer. p. 31; Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250; Hilling, A. and Ostas, D. T. (2017). *Corporate Taxation and Social Responsibility*. Stockholm: Wolters Kluwer.

[465] Russo, R. and Van Trigt, J. (2015). Corporate Governance and Taxes. In Russo, R. (Ed.). *Tax Assurance* (pp. 23-48). Deventer: Wolters Kluwer. p. 31. Compare also to Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press. p. 362.

[466] Russo, R. and Van Trigt, J. (2015). Corporate Governance and Taxes. In Russo, R. (Ed.). *Tax Assurance* (pp. 23-48). Deventer: Wolters Kluwer. p. 31.

[467] Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28. p. 13.

[468] See also Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press. p. 361.

[469] See chapter 3, section 2.2.

[470] See chapter 2, section 3.

[471] Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28. p. 15.

[472] Peters, C. (2014). *On the Legitimacy of International Tax Law.* Amsterdam: IBFD Doctoral Series. pp. 306-307. His argumentation is inspired by the work of J. Habermas.

[473] Happé, R. H. (2015). Fiscale Ethiek Voor Multinationals. *Weekblad Fiscaal Recht* 2015/938; Happé, R. H. (2015). De Kleren van de Keizer. *Weekblad Fiscaal Recht* 2015/1208; Happé, R. (2015). Ethics and International Tax Planning. In Russo, R. (Ed.), *Tax Assurance* (pp. 49-71). Deventer: Wolters Kluwer.

[474] Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28.

[475] Stevens, S. (2014). The Duty of Countries and Enterprises to Pay Their Fair Share. *Intertax* 42 (11), 702-708.

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of the spirit of the law is vague, it raises a question whether the fair share is an objective reality that has a sound basis in the legal system or subjective perception of certain actors. Therefore, I believe that it is easier to find common grounds when starting from the other end – what is unfair? Consequently, the concept of 'fair share' in this research then refers not to corporate tax planning practices that do not comply with the 'spirit of the law' but to corporate tax practices that go beyond pure compliance with the letter of the law. Such corporate tax practices are, in my opinion, in general evidently not unfair. This starting point is in line with the argumentation with regard to corporate social *ir*responsibility, as will be explained later in this research.[476] Going beyond pure compliance with the law has procedural[477] and substantial dimensions, as I will explain in chapter 6 of this research, and it involves both the law and underlying morality and social norms.
The substantial dimension is not separate from the procedural one. However, the substantial dimension could be more linked to distributive justice and fair competition. In the context of distributive justice, it can be argued that multinationals that engage in aggressive tax planning are not contributing their fair share of tax to society and its public goods and services. This is because, if multinationals pay almost no tax (especially, as a result of aggressive tax planning techniques), other members of the society have to pay more or they suffer from more expensive or less public goods.[478] As a result, current tax planning practices of several multinationals do result in accusations of paying an unfair share and societal outrage.[479] Failing to pay a fair share of tax in this respect can, for instance, even be linked to an increased wealth gap and inequality in society.[480] For example, in 2013, the MSCI research identified 213 multinationals that (likely, based on aggressive tax planning strategies) pay much less tax than their peers: calling it a 'tax gap'. The research argued that, if these 213 companies would have paid taxes comparable to their peers, they would have paid "an estimated USD 70 billion per year in aggregate" more.[481] This, in turn, "could have reduced aggregate profit after taxes across these companies by approximately 20%." MSCI adds that, even though the economic conditions in the major European markets and the US have improved, "the continuation of fiscal imbalances coupled with distrust of the corporate sector will likely continue to shine a spotlight on companies' inscrutable tax strategies."[482] To improve the general public image, transparency is key, as will be argued in chapter 6.
Both fair play and fair share have moral elements. First, society is a cooperative venture[483] and all the members are expected to contribute fairly to upholding the system; second, the right to benefit from the society creates a (moral) obligation to contribute to this society. In case of international corporate tax planning, a multinational, in essence, has a choice with regard to how it interprets the law (whether it deviates from the spirit of the law or not). As a result, in moral terms, the board of a multinational can choose to what extent it contributes in the societies in which it operates. Operating in a cross-border situation increases the possibility and extent of the choices.[484] Such an international context complicates the national legislators' opportunities (for instance, due to information asymmetry or tax competition between the states) to reduce the gap between the letter and the spirit of the law. Therefore, this issue needs international cooperation (of states), which will be discussed later in this chapter. There can be many theoretical discussions on the relationship between the letter and the spirit of the law in the context of the national legal system. The international context adds a different dimension to this dilemma, however.

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[476] See chapter 4, section 3.3.
[477] Compare with 'fair play' in the words of Rawls as discussed in Gribnau, J. L. M. (2017). Voluntary Compliance beyond the Letter of the Law: Reciprocity and Fair Play. In Peeters, B. et al. (Eds.), *Rebuilding Trust in Taxation* (pp. 173-201). Intersentia, Antwerpen. e.g. pp. 37-43.
[478] See e.g. Hemels, S. J. C. (2014). Fairness: A Legal Principle in EU Tax Law? In Brokelind, D. (Ed.), *Principles of Law: Function, Status and Impact in EU Tax Law* (pp. 413-437). Amsterdam: IBFD. p. 419.
[479] See e.g. UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited.
[480] See e.g. Stiglitz, J. E. (2013). The Price of Inequality. How Today's Divided Society Endangers Our Future. New York / London: W.W. Norton & Company.
[481] MSCI ESG Research. (2013, December). The 'Tax Gap' in the MSCI World. *ESG Issue Brief*. p. 4.
[482] MSCI ESG Research. (2013, December). The 'Tax Gap' in the MSCI World. *ESG Issue Brief*. p. 4.
[483] Rawls, J. (1972). *Theory of Justice*. Oxford: Oxford University Press. p. 4.
[484] See chapter 2.

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3.2.4. Concluding remarks

With tax laws, states decide on the legal obligation to pay tax – what is the fair share every taxpayer has to contribute. Therefore, every member of a society should pay taxes according to the law. The legal rules are, however, inevitably not perfect. This imperfection can lead to unexpected and undesired results, for instance, in the context of international corporate tax planning. Aggressive tax planning practices of some multinationals have resulted in discussions in the field of morality, suggesting that corporations should pay their fair share of tax. The fair share of tax every taxpayer should pay is often understood as a tax burden that derives from the combination of the letter and the spirit of the law. In order to minimize the possible misunderstandings by using vague idealistic terms, this research starts from the other end: what is unfair instead of what is fair? Therefore, the concept of 'fair share' in this research refers to corporate tax practices that go beyond the pure compliance with the letter of the law, which has procedural and substantial dimensions. The procedural dimension concerns investing in public goods and services without free-riding while the substantial dimension is related to distributive justice and fair competition. These dimensions are not mutually exclusive and both include a moral layer.

It goes without saying that the obligation to pay tax comes from the law. However, the law is ambiguous or not internationally harmonized. For instance, in orer to avoid double taxation, taxpayers usually plan their taxes by being aware of the effects of various laws on their tax burden. From an economic point of view, tax is often considered a cost and therefore tax planning plays an important role for corporate entities.[485] Therefore, multinationals need to make choices that take account of their economic needs but at the same time that are not harmful to society at large. It cannot be claimed that any kind of tax planning is immoral. However, a purely legal behaviour is not always ethical and vice versa. Thus, the question is usually not whether to engage tax planning but rather to what extent. Therefore, the degrees of tax planning will be given further attention in the following section.

3.3. Degrees of tax planning

Taxation builds the financial backbone of a society. Tax laws determine the legal obligation to pay tax and the fair share every taxpayer has to contribute. In order not to pay more than the law requires, taxpayers usually plan their taxes by being aware of the effects of various laws on their tax burden. From an economic point of view, tax is a cost and therefore tax planning plays an important role for corporate entities. Also, the MSCI research mentioned above illustrates well the effect of tax planning: it has a potential to increase after-tax business profits by approximately 20%.[486]

Tax planning can be carried out in various ways, which are described in different terms. In legal literature, two main categories used are tax avoidance and tax evasion. In general, tax avoidance is not breaking (the letter of) the law. Tax evasion, on the other hand, is an illegal act, which consists of illegal arrangements where liability to tax is hidden or ignored.[487] Tax avoidance is thus legal, while tax evasion is illegal. Tax evasion violates both the letter and the spirit of the law. This research focuses on tax planning activities that remain within the boundaries of the law, because illegal activities would need a different theoretical approach. Thus, tax evasion will not be given further attention.

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[485] However, it is arguable whether tax should be considered as a cost or for instance as a distribution, similar to dividends. See also Henriques, A. (2007). *Corporate Truth: The Limits of Transparency.* Sterling: Earthscan. p. 114.

[486] MSCI ESG Research. (2013, December). The 'Tax Gap' in the MSCI World. *ESG Issue Brief.* p. 4.
It has to be noted, however, that such estimates should be considered with a certain level of precaution, because it is very difficult, if not possible, to calculate such effects exactly.

[487] OECD Glossary of Tax Terms. Retrieved from: http://www.oecd.org/ctp/glossaryoftaxterms.htm#A (accessed 03.03.2019); Merks, P. (2006). Tax Evasion, Tax Avoidance and Tax Planning. *Intertax* 34 (5), 272-281; Freedman, J. (2004). Defining Taxpayer Responsibility: In Support of a General Anti- Avoidance Principle. *British Tax Review* 4, 332–357. pp. 347-350.

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Tax planning activities that remain within the boundaries of the law can be divided into a number of sub-categories. In this research, which focuses on the corporate decision-making process, the categorizing of tax-planning activities is based on a corporate intention to minimize tax costs. While intention, as such, is often difficult to prove within the legal context, this research aims to point out some general activities that indicate whether corporate tax planning activities simply take tax into account or, for instance, use it for profit maximization purposes. This research differentiates between tax mitigation, tax avoidance, and aggressive tax planning. These concepts are also the most used in the international literature and rule making. Having said that, there is remarkably little consensus in the definition of these terms. For the purposes of this research, these terms thus need some further clarification. The aim of the following sub-sections is not to provide in-depth and uniform definitions but merely to explain the concepts used throughout this research. The aim is to illustrate the existence of corporate behaviour that might be legal but not always legitimate, which is an important distinction in order to understand the further discussions on 'going beyond the law' later in this research.[488]

3.3.1. Tax planning and mitigation

Tax planning is a legal way to take into account the tax effects of various laws and rules. This is something that every taxpayer does to a certain extent whether this is intentional or not. Tax planning means that a taxpayer tries to be in control of his/her finances by being aware of the impacts of taxation and by adjusting behaviour accordingly (e.g. by using tax reliefs and incentives), for instance to avoid double-taxation.[489] For the purposes of this research, tax planning is seen as a general term expressing steps that a taxpayer can take as a response to tax legislation within the boundaries of the law. If a taxpayer simply considers tax as a cost and pays its legal dues without actively seeking possibilities to lower such costs at all, this taxpayer is not engaging in tax planning. Furthermore, tax planning is not always tax avoidance or aggressive, which will be discussed in the following sub-sections. Sometimes tax planning is for example necessary to avoid double-taxation. Nevertheless, any form of tax mitigation or avoidance inevitably includes at least some degree of tax planning.

The first step of tax planning is when a taxpayer adopts "a course of action that is clearly (and, ordinarily, expressly) encouraged by the relevant legislation."[490] This is called tax mitigation.[491] Such tax planning is considered "valid under relevant legislation (including relevant specific anti-avoidance rules), and not vulnerable to a GAAR, either statutory or judge-made."[492] Tax mitigation constitutes legitimate tax planning that uses "tax reliefs for the purpose in which they were intended,"[493] such as the legitimate use of tax reliefs and incentives. Tax mitigation, thus, complies with the letter and the spirit of the law. De Colle and Bennet call it a 'state-induced avoidance' because this kind of tax planning makes use of schemes that are "explicitly introduced by the government to achieve socially desirable ends."[494] Within tax mitigation, the steps taken by the taxpayers that result in reducing the tax burden have a "commercial purpose apart from tax advantage."[495] Tax mitigation occurs, for example, when companies that reduce their negative impact on the environment and they therefore benefit from tax incentives that are introduced for

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[488] See chapter 4, section 3.2; chapter 6.

[489] Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250. p. 226.

[490] Prebble, Z. M. and Prebble, J. (2010). The Morality of Tax Avoidance. *Creighton Law Review* 43 (3), 693-745. p. 706.

[491] See also Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28. p. 22.

[492] Prebble, Z. M. and Prebble, J. (2010). The Morality of Tax Avoidance. *Creighton Law Review* 43 (3), 693-745. p. 706.

[493] UK PAC HMRC. (2012, October 18). Measuring Tax Gaps 2012; Tax Gat Estimates for 2010-11. An Official Statistics Release. p. 8.

[494] De Colle, S. and Bennett, A. M. (2014). State-induced, Strategic, or Toxic? An Ethical Analysis of Tax Avoidance Practices. *Business & Professional Ethics Journal 33* (1), 53-82. p. 68.

[495] Templeman, S. (2001). Tax and the Taxpayer. *Law Quarterly Review* 117, 575–588, p. 579 (as referred to in De Colle, S. and Bennett, A. M. (2014). State-induced, Strategic, or Toxic? An Ethical Analysis of Tax Avoidance Practices. *Business & Professional Ethics Journal 33* (1), 53-82).

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companies that reduce their negative impact on the environment. In this way, tax mitigation can be identified most clearly at the national level.
In the international context, multinationals mitigating their taxes pay according to the applicable tax legislation in the countries in which they operate. In a cross-boarder situation, tax mitigation takes advantage of national tax legislation by setting up corporate operations without re-arranging its global business operations with the (sole) purpose of tax minimization. At a certain point, making use of such tax planning possibilities, however, can no longer be qualified as tax mitigation (especially when intentionally abusing such rights). Tax mitigation can, namely, easily progress from legal and legitimate tax planning into legal tax planning the legitimacy of which is under question – tax avoidance.

3.3.2. Tax avoidance

According to the OECD, tax avoidance is difficult to define, but it means that a taxpayer arranges his affairs with the intention to reduce his tax liability beyond the tax incentives intended by the lawmaker and, even though the arrangement could be strictly legal, it is usually considered to be in contradiction with the intent of the law it purports to follow.[496] This definition is roughly in line with the European Court of Justice's (ECJ) test on unacceptable tax avoidance that includes objective (result of the transaction and the purpose of the law) and subjective (intent) elements.[497] Tax avoidance is understood as a legal way to adapt one's actions intentionally in order to reduce the possible tax effects of various rules. Tax avoidance intentionally seeks out legal gaps for tax planning purposes. Therefore, in this research, tax avoidance is a form of tax planning that takes a step further from tax mitigation.
In general, international tax avoidance is understood as a tax reducing activity that is practiced by operating in compliance with different laws in various countries. The ECJ, for instance, has confirmed that, from a legal perspective, in the EU, a corporation can profit from the Freedoms of the Treaty on the Functioning of the European Union (Treaty Freedoms), such as free movement of persons and goods.[498] In its earlier cases, such as *Centros*[499] or *Avoir Fiscal*,[500] the ECJ accepted that the Treaty Freedoms also guarantee, to a certain extent, the free movement of taxpayers, thereby increasing the risk of tax avoidance in the EU.[501] Under these Treaty Freedoms, corporations could choose to incorporate in a Member State that has a more beneficial tax system.[502] The ECJ has repeatedly confirmed this by stating that "taxpayers may choose to structure their business so as to limit their tax liability."[503] Moreover, EU law does not require a taxpayer to choose an alternative business transaction that involves paying higher tax.[504] Based on the principle of legal certainty[505] the ECJ case law prescribed until recently that, only in case of clear abuse, a taxpayers rights based on Treaty Freedoms can be withdrawn. However, the ECJ's view on tax avoidance

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[496] OECD Glossary of Tax Terms. Retrieved from: http://www.oecd.org/ctp/glossaryoftaxterms.htm#A (accessed 03.03.2019).
[497] Brokelind, C. and Wattel, P. J. (2018). Free Movement and Tax Base Integrity. In Wattel, P. J. et al. (Eds). (2018). *European Tax Law. Volume I – General Topics and Direct Taxation* (pp. 339-360). Deventer: Wolters Kluwer. p. 340.
[498] For an overview of EU tax (case) law see: Weber, D. (2013). Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ - part 1. *European Taxation* 53 (6), 251-264; Weber, D. (2013). Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ - part 2. *European Taxation*, *53*(7), 313-32.
[499] ECJ. (1999, March 9). Case C-212/97. *Centros.*
[500] ECJ. (1983). Case C-270/83, *Commission v. French Republic*.
[501] Brokelind, C. and Wattel, P. J. (2018). Free Movement and Tax Base Integrity. In Wattel, P. J. et al. (Eds). (2018). *European Tax Law. Volume I – General Topics and Direct Taxation* (pp. 339-360). Deventer: Wolters Kluwer. p. 340.
[502] The direct tax rates are not harmonized in the EU and the Member States have the power to levy direct taxes.
[503] ECJ. (2006, February 21). Case C-255/02. *Halifax*. para. 73. (note that this case concerns VAT).
[504] In the area of VAT, see ECJ. (2006, February 21). Case C-255/02 *Halifax*; with regard to the Capital Tax Directive (69/335), see ECJ. (2007, June 7). Case C-178/05, *Commission of the European Communities v. Hellenic Republic*; for direct taxation, see ECJ. (2006, September 12). ECJ. (2006, September 12). Case C-196/04. *Cadbury Schweppes.*
[505] Weber, D. (2013). Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ - part 1. *European Taxation* 53 (6), 251-264.

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seems to be developing in the last years.[506] In more recent cases,[507] the ECJ prohibits unacceptable tax avoidance more actively if objective (result of the transaction and the purpose of the law) and subjective (intent) elements of the Court's test are present.[508] In the so-called Danish beneficial ownership cases, the ECJ even made clear that a Member State should apply the general EU anti-abuse doctrine when it has not implemented specific anti-avoidance legislation in its national legislation.[509]

Based on the development of the EU case law, Brokelind and Wattel suggest that the ECJ has moved from a case-by-case assessment of the presence of actual abuse to general presumptions of abuse, providing the Member States more room to fight aggressive tax planning.[510] In other words, there are some signs that illustrate a change of direction in the ECJ case law. The ECJ is clearly trying to find a new proper balance between respecting the Treaty Freedoms on the one hand and prohibiting the use of the EU law to obtain an unaccepted tax advantage on the other hand.[511] Nevertheless, this does not mean that the taxpayers are not allowed to opt for "the most tax-efficient route if there are several possibilities to attain a (mostly) non-tax aim."[512] Currently there is a lot discussion about the interpretation of the already mentioned Danish beneficial ownership cases which seem to add a new chapter to this discussion.[513] For the purposes of this research it suffices to conclude that the developments in the ECJ's case law illustrate that the boundaries between strictly legal and moral behaviour are shifting. As Freedman states, tax avoidance is "reprehensible where the legal analysis deviates from the economic substance and this is the case regardless of the wording of the legislation in question."[514] In other words, the law is interpreted for the purpose of corporate profit maximization, even if it means ignoring corporate moral and social responsibilities. In contrast to tax mitigation, the social legitimacy of tax avoidance is not clear anymore, because tax avoidance constitutes paying less tax than could be expected when interpreting the law in a way as was intended by the legislator.[515]

Naturally, there are various possibilities for avoiding corporate income tax.[516] For illustration purposes, several countries have introduced tax incentives for research and development (R&D), such as a lower rate of corporation income tax on profits that are earned from using patented inventions or other innovations that include intellectual property (depending on the specific country legislation); this is often referred to as patent box or innovation box.[517] The aim of such incentives is usually to encourage companies to invest more in innovation in a country that uses such a

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[506] See e.g. Brokelind, C. and Wattel, P. J. (2018). Free Movement and Tax Base Integrity. In Wattel, P. J. et al. (Eds). (2018). *European Tax Law. Volume I – General Topics and Direct Taxation* (pp. 339-360). Deventer: Wolters Kluwer. pp. 347-349; Brokelind, C. and Wattel, P. J. (2018). Free Movement and Tax Base Integrity. In Wattel, P. J. et al. (Eds). (2018). *European Tax Law. Volume I – General Topics and Direct Taxation* (pp. 339-360). Deventer: Wolters Kluwer. pp. 344-346.

[507] Such as ECJ. (2017). Case C-39/16, *Argenta Spaarbank NV v Belgische Staat*.

[508] Brokelind, C. and Wattel, P. J. (2018). Free Movement and Tax Base Integrity. In Wattel, P. J. et al. (Eds). (2018). *European Tax Law. Volume I – General Topics and Direct Taxation* (pp. 339-360). Deventer: Wolters Kluwer. p. 340.

[509] The ECJ's judgment in the "Danish Beneficial Ownership Cases": On 26 February 2019 the ECJ rendered two landmark decisions on the interpretation of the beneficial owner concept in cases where the Interest and Royalties Directive (joined cases N Luxembourg, X Denmark, C Danmark and Z Denmark) and the Parent-Subsidiary Directive (joined cases T Danmark and Y Denmark) apply. The four joined cases N Luxembourg 1 (C-115/16), X Denmark (C-118/16) and C Danmark 1 (C-119/16) and Z Denmark case (C-299/16) all involve back-to-back financing transactions, under which a Danish resident subsidiary was financed by its non-resident parent company via a series of loans granted to intermediary holding companies resident in another EU Member State. The two joined cases T Danmark (C-116/16) and Y Denmark (C-117/16) both concern dividend distributions made by a Danish resident company to an intermediate holding company resident in the EU.

[510] Brokelind, C. and Wattel, P. J. (2018). Free Movement and Tax Base Integrity. In Wattel, P. J. et al. (Eds). (2018). *European Tax Law. Volume I – General Topics and Direct Taxation* (pp. 339-360). Deventer: Wolters Kluwer. pp. 347-349.

[511] Brokelind, C. and Wattel, P. J. (2018). Free Movement and Tax Base Integrity. In Wattel, P. J. et al. (Eds). (2018). *European Tax Law. Volume I – General Topics and Direct Taxation* (pp. 339-360). Deventer: Wolters Kluwer. pp. 344-346.

[512] Brokelind, C. and Wattel, P. J. (2018). Free Movement and Tax Base Integrity. In Wattel, P. J. et al. (Eds). (2018). *European Tax Law. Volume I – General Topics and Direct Taxation* (pp. 339-360). Deventer: Wolters Kluwer. p. 346.

[513] It is, nevertheless, out of the scope of this research to go into this discussion.

[514] Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press. p. 362.

[515] See more on legitimacy in chapter 3, section 4.

[516] See e.g. OECD (2013). *Addressing Base Erosion and Profit Shifting.* OECD Publishing, Paris; Ault, H. J. (2013). Some Reflections on the OECD and the Sources of International Tax Principles. *Max Planck Institute for Tax Law and Public Finance Working Paper* 2013 – 03.

[517] See e.g. Gravelle, J. G. (2016, June 13). A Patent/Innovation Box as a Tax Incentive for Domestic Research and Development. *Technical Report R44522, Congressional Research Service.*

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regime.[518] For example, in the UK, companies that meet the following criteria can benefit from such a regime: first, a company has to be liable to Corporation Tax and earn "a profit from exploiting patented inventions"; second, a company has to "own or exclusively license-in the patents and must have undertaken qualifying development on them"; third, in case a "company is a member of a group, it may qualify if another company in the group has undertaken the qualifying development."[519] In addition, it is stated that if a company is a member of a group of companies, such as multinationals as described in this research,[520] "it must also actively own the patented invention by taking a significant role in managing its whole portfolio of eligible patents."[521]
Corporations that have their R&D activities in the UK, according to the regulation, make a legitimate use of the UK patent box regime; this is tax mitigation. However, intangible assets such as intellectual property can be used for shifting income from high tax countries to low tax countries.[522] For instance, in line with the Treaty Freedoms, "none of the IP Box regimes require that the innovative activity underlying the intellectual property be carried out domestically."[523] This means that corporations can carry out the innovative activity in a country that offers the most favourable conditions for that activity, such as a well-educated workforce for the specific innovation development. Following on from this, the intellectual property can be licensed in other (usually high tax) country where it becomes tax deductible. In this case, the initial aim underlying the innovation box regime – encouraging intellectual activity in this certain country – is not met. Within the context of this research, this can be called tax avoidance when such shifting takes place within a multinational that already had subsidiaries in both countries and it simply makes use of such a tax planning possibility.[524] In other words, a multinational that has real business activities in the UK and other countries, in the context of this example, can be considered as avoiding taxes if its R&D activities actually take place in some other country but it ostensibly re-arranges its business operations in order to benefit from the UK R&D tax rules. By doing this, the multinational is ignoring the purpose of this regulation that encourages companies to invest more in innovation in the UK. The multinationals' arrangements might be legal but, in reality, they ignore the spirit (intent) of the law for tax minimization purposes. The OECD BEPS package that will be discussed briefly below, however, aimed at eliminating such a situation and since the BEPS actions are applied in the laws, such situation might not be possible in practice at the time of publishing this research.
The phenomenon of tax avoidance faces contradicting opinions. For instance, Hasseldine and Morris argue that tax avoiders (in contrast to tax evaders) exercise "choice between alternative courses of action, but the tax avoider (not the tax evader) fulfils all obligations and satisfies all 'democratically agreed taxes' imposed by society."[525] While this might be true from a purely legal perspective, the fact that a corporation has alternative choices that add a moral perspective to tax avoidance, as explained previously. Such a moral perspective, however, brings into question whether a multinational fulfils all its obligations imposed, for instance, by society, such as paying its fair share of tax. This dilemma proves that, with regard to tax planning, multinationals have

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[518] Note that there is a variation between the design and tax rates various European countries offer under such innovation box regime: "from 0% in Malta to 15.5% in France". Evers, L. et al. (2015). Intellectual Property Box Regimes: Effective Tax Rates and Tax Policy Considerations. *International Tax Public Finance* 22 (3), 502–530. p. 504.
[519] UK PAC HMRC. (2007, January 1). *Guidance on Corporation Tax: the Patent Box*.
[520] See chapter 2.
[521] A "company doesn't have to make all the decisions regarding the portfolio, but it must undertake a significant amount of the management". UK PAC HMRC. (2007, January 1). *Guidance on Corporation Tax: the Patent Box*.
[522] Note that the OECD BEPS Action Plan has made such shifting of income much more difficult (if not impossible).
[523] Evers, L. et al. (2015). Intellectual Property Box Regimes: Effective Tax Rates and Tax Policy Considerations. *International Tax Public Finance* 22 (3), 502–530. p. 507. Note that the OECD BEPS project (action 5) has set stricter requirements in these kind of cases.
[524] Naturally, innovation box regimes are also states' way of participating in tax competition between the states in order to attract foreign direct investment. For example, the OECD BEPS considers such a preferential tax regime design as a 'key pressure area' in tax policy. See: Evers, L. et al. (2015). Intellectual Property Box Regimes: Effective Tax Rates and Tax Policy Considerations. *International Tax Public Finance* 22 (3), 502–530. p. 522; see also a critical reflection on the UK patent box regime in Mckenna, T. (2013, February 13). The Government's "Patent Box" is the Tax Avoidance Package Companies Have Been Begging For. *The New Statesman* (online); OECD (2013). *Addressing Base Erosion and Profit Shifting.* OECD Publishing, Paris, p. 17. Tax competition between the states is the question of a state's actions legitimacy in tax planning that is not the focus of this research.
[525] Hasseldine, J. and Morris, G. (2013). Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection. *Accounting Forum* 37 (1), 1-14. p. 7.

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room within their legal behaviour to go beyond strict compliance, as will be discussed later in this research.[526]

Multinationals have possibilities (and always will have in my opinion) to organize their international business activities in a way that they choose and consequently which national legal rules apply to their transactions. In this way, multinationals can skilfully manipulate the amount of corporate income tax they have to pay at a world-wide level. In general, the problem of tax avoidance lies not only in what a multinational formally owes in the end, but how it reaches this result, for instance, how aggressively it takes advantage of the legal gaps (by using their corporate power). McBarnet calls it creative compliance with the law.[527] This kind of tax planning stays within the boundaries of the letter of the law (of different jurisdictions), nonetheless it is questionable whether the tax burden of these multinationals should be higher in some jurisdictions in which they operate.[528] The reality today is that, in case of multinationals, the corporate income tax is levied less than once or the amount paid does not seem (responsible) enough for the wider public. Thus, formally such practices might be legal; however, the effect is similar to tax evasion. This can also be one of the reasons why scholars and politicians have introduced a new concept into the discussions – aggressive tax planning – that will be discussed in the next sub-section.

3.3.3. Aggressive tax planning

Aggressive tax planning is a step further from tax avoidance on the tax planning continuum.[529] It is a form of tax planning in which a taxpayer intentionally searches and uses, or even artificially creates, possibilities to lower the possible tax effects of various rules as far as possible. In contrast to tax avoidance that arguably ignores the spirit of the law, it can be said that aggressive tax planning intentionally misinterprets and abuses the spirit of the law for tax minimization (and profit maximization) purposes. It is tax planning that goes as far as exploiting the technicalities or differences between tax systems by making use of "a bewildering variety of techniques (e.g. multiple deductions of the same loss, double-dip leases, mismatch arrangements, loss-making financial assets artificially allocated to high-tax jurisdictions)."[530] Thus, in the case of aggressive tax planning, the taxpayers' decisions and actions are adjusted in a way that the effect of possible tax regulation is avoided.

Sometimes, aggressive tax planning goes as far as creating so-called stateless income.[531] Kleinbard defines stateless income as "the movement of taxable income within a multinational group from high-tax to low-tax source countries *without* shifting the location of externally-supplied capital or activities involving third parties,"[532] which results in corporate income that is in principle not taxed in any state. Often the adjustment of decisions and planning actions are, thus, ostensible and legally correct when using a pure linguistic interpretation of the law. Aggressive tax planning clearly includes the intention to minimize tax in a way that abuses the (imperfection of the) legal system for it lacks "a proper business motive" and it consists of "transactions which do not reflect the economic reality."[533] Therefore, in my opinion, it inevitably includes a moral judgement (whether it is subject to GAARs or not), which has been the grounds for public outrage.

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[526] See chapter 6.

[527] McBarnet, D. (2007). Corporate Social Responsibility beyond Law, Through Law, for Law: the New Corporate Accountability. In McBarnet, D. et al. (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (pp. 9-56). Cambridge: Cambridge University Press. p. 48.

[528] See e.g. Happé, R. (2007). Multinationals, Enforcement Covenants and Fair Share. *Intertax* 35 (10), 537-547; Happé, R. (2015). Ethics and International Tax Planning. In Russo, R. (Ed.), *Tax Assurance* (pp. 49-71). Deventer: Wolters Kluwer. pp. 49-71; Lanis, R. and Richardson, G. (2012). Corporate Social Responsibility and Tax Aggressiveness: A Test of Legitimacy Theory. *Accounting, Auditing and Accountability Journal* 26 (1), 75-100; Stevens, S. (2014). The Duty of Countries and Enterprises to Pay Their Fair Share. *Intertax* 42 (11), 702-708.

[529] In this research, tax avoidance and aggressive tax planning both refer to socially unacceptable corporate tax planning.

[530] Piantavigna, P. (2017). Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, Despite Linguistic. *World Tax Journal* 9 (1), 37-98. p. 52.

[531] Note that the OECD BEPS Action Plan has made creating stateless income much more difficult (if not impossible).

[532] Kleinbard, E. D. (2011). Stateless Income. *Florida Tax Review* 11 (9), 699-774. p. 703.

[533] Cachia, F. (2017). Aggressive Tax Planning: An Analysis from an EU Perspective. *EC Tax Review* 26 (5), 257-273. p. 259.

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Some sources claim that the term aggressive tax planning should in general fit into the grey area between illegal tax evasion and legal but unacceptable tax avoidance.[534] Nevertheless, the concrete meaning of the concept of aggressive tax planning is still open to debate. For example, the OECD's website has a special section on aggressive tax planning.[535] However, in the OECD glossary of tax terms it has not been defined nor explained. The concept should originate from the OECD's Study Into the Role of Tax Intermediaries.[536] In this Study, aggressive tax planning was defined as corporate tax practices with "unintended and unexpected tax revenue consequences", which is often not sufficiently disclosed.[537] Thus, the conflict with the spirit of the law was indicated and the element of the lack of transparency was added. This concept of aggressive tax planning replaced the term used previously by the OECD "unacceptable tax minimization arrangements."[538] Within its BEPS Action Plan, the OECD has naturally created more content to include in this term, for instance, by identifying areas that need stricter regulation.[539] Several scholars are sceptical, however, concerning how the OECD has tried to add content to the concept of aggressive tax planning over the time.[540] The OECD approach is considered vague and difficult to apply in practice, especially because it also proposes that companies should comply with both the letter and the spirit of the law,[541] without further explaining this concept of the spirit of the law that in itself has resulted in many discussions.[542] Moreover, from a practical perspective, it is not clear whether the OECD considers aggressive tax planning as a synonym for tax avoidance.

Next to the OECD, the EU uses the concept of aggressive tax planning.[543] The Commission defines aggressive tax planning as tax planning that "consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability."[544] In other words, the Commission also indicates that aggressive tax planning includes a strict intention to abuse the system.[545] According to the Commission, the consequences of aggressive tax planning include double deductions (e.g. the same loss is deducted both in the state of source and residence) and double non-taxation (e.g. income which is not taxed in the source state is exempt in the state of residence).[546] The European Commission is convinced that aggressive tax planning "includes the use of artificial operations or structures and the exploitation of mismatches between tax systems with the effect of undermining Member States' tax rules and exacerbating the loss of tax revenues."[547] The EU approach focuses mainly on the artificial nature of the arrangements and on the presence of economic substance.[548]

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[534] See e.g. OECD. (2008). *Study into the Role of Tax Intermediaries.* Paris: OECD Publishing; Alm, J. (2014). Does an Uncertain Tax System Encourage "Aggressive Tax Planning"? *Economic Analysis and Policy* 44 (1), 30-38.

[535] OECD. *Aggressive Tax Planning*.

[536] Baker, P. (2015). The BEPS Project: Disclosure of Aggressive Tax Planning Schemes. *Intertax* 43(1), 85-90. p. 86; OECD. (2008). *Study into the Role of Tax Intermediaries.* Paris: OECD Publishing; Calderón Carrero, J. M. and Quintas Seara, A. (2016). The Concept of 'Aggressive Tax Planning' Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border between Legitimate and Illegitimate Tax Planning. *Intertax* 44 (3), 206–226. p. 212.

[537] OECD. (2008). *Study into the Role of Tax Intermediaries.* Paris: OECD Publishing.

[538] OECD. (2008). *Study into the Role of Tax Intermediaries.* Paris: OECD Publishing. p. 10.

[539] OECD (2013). *Addressing Base Erosion and Profit Shifting (BEPS).* Paris: OECD Publishing.

[540] See e.g. Baker, P. (2015). The BEPS Project: Disclosure of Aggressive Tax Planning Schemes. *Intertax* 43(1), 85-90.; Calderón Carrero, J. M. and Quintas Seara, A. (2016). The Concept of 'Aggressive Tax Planning' Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border between Legitimate and Illegitimate Tax Planning. *Intertax* 44 (3), 206–226.

[541] OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing. Section XI.

[542] See also chapter 3, section 2.2.3.

[543] European Commission. (2012, December 6). Commission Recommendation of 6.12.2012 on Aggressive Tax Planning, C(2012) 8806 final.

[544] European Commission. (2012, December 6). Commission Recommendation of 6.12.2012 on Aggressive Tax Planning, C(2012) 8806 final.

[545] For instance, in the Netherlands, the abuse of tax law, which is not illegal, is regulated with the doctrine of *fraus legis*. For more information on *fraus legis* see: De Wilde, M. F. and Wisman, C. (2016). EATLP 2016: Tax Avoidance Revisited: The Netherlands. *EATLP National Reports.*

[546] European Commission. (2012, December 6). Commission Recommendation of 6.12.2012 on Aggressive Tax Planning, C(2012) 8806 final.

[547] European Commission. (2012, June 27). Communication from the Commission to the Council on Concrete Ways to Reinforce the Fight against Tax Fraud and Tax Evasion Including in Relation to Third Countries. p. 3.

[548] European Commission. (2012, December 6). Commission Recommendation of 6.12.2012 on Aggressive Tax Planning, C(2012) 8806 final. para. 4.2, p. 4.

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Even though the European Commission provides more technical details in comparison to the OECD approach, it also relies on the interplay between the letter and the spirit of the law.[549] The concept of the spirit of the law is, as already argued, a vague concept that is difficult to track down in practice. Essers criticizes the European Commissions' Recommendation on Aggressive Tax Planning: "it is very unclear and leaves too much leeway for subjective interpretation by tax inspectors and judges."[550] In other words, the European Commission's approach is also relatively vague and does not provide sufficient clarification for a concrete application in business practice.

Meldgaard et al. have identified several aggressive tax planning structures based on the economic literature.[551] They acknowledge that "[T]he existing body of literature does not necessarily provide granular details concerning the nature and composition of known" aggressive tax planning structures as defined by the European Commission.[552] However, for the aim of their study to analyze causes, drivers, inhibitors, or effects with respect to profit shifting and anti-avoidance rules, they identify "three major, empirically proven channels for profit shifting" that are: debt shifting, the role of intellectual property and intangible assets, and strategic transfer pricing.[553] These three channels have a strong correlation with corporate tax planning and the resulting tax rate. Nevertheless, the exact knowledge of how aggressive tax planning structures are set up is usually "based on tacit knowledge", confidential, and the nature is known only to the multinationals and their advisers.[554]

For instance, based on publicly available information, Starbucks' tax planning practices, that have received much attention, could be categorized as aggressive. In 2012, Starbucks' tax planning schemes were questioned during the HMRC hearing in the UK.[555] The main focus of these investigations were on "three intragroup charges through which Starbucks UK paid substantial amounts to other group companies: (1) royalties and license fees paid to a Dutch affiliate, (2) markups on coffee purchased via another Dutch affiliate and a Swiss affiliate, and (3) interest paid on a loan from the U.S. parent company."[556] These transactions, that were ostensibly set up for tax planning purposes, ensured that on paper Starbucks would generate losses in the UK and erode the UK tax base.[557] As a result of such actions, on comparable sales revenues for example in the UK for 2010–2011, a competitor of Starbucks, Costa, "paid an effective tax rate of 30.5 % while Starbucks' rate was 0 %."[558] Naturally, the tax planning structures that Starbucks used are very nuanced and complex. Studying these structures in detail is a subject for another research. Nevertheless, the existing literature based on the available data and public attention, mixed with secrecy from the multinationals' side, allows one to suggest that Starbucks' tax planning has been aggressive, because it has artificially set up business entities in different countries with the main aim to create stateless income and thereby pay no corporate income tax in the countries in which it has real business operations. Artificially setting up business entities to benefit from favourable tax treatment can, for the purposes of this research, be considered as bending the spirit of the law. In addition, evidence suggests that Starbucks has been using its corporate power in other ways to

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549 European Commission. (2012, December 6). Commission Recommendation of 6.12.2012 on Aggressive Tax Planning, C(2012) 8806 final. para. 4.5, p. 5.

550 Essers, P. (2017). International Tax Justice between Machiavelli and Habermas. In Peeters, B. et al. (Eds.). *Rebuilding Trust in Taxation* (pp. 235-265). Antwerpen: Intersentia. p. 256.

551 Meldgaard, H. et al. (2015, December 23). Study on Structures of Aggressive Tax Planning and Indicators, Final Report. *European Commission Taxation Papers, Working Paper N. 61 – 2015.* pp. 21-22.

552 European Commission. (2012, December 6). Commission Recommendation of 6.12.2012 on Aggressive Tax Planning, C(2012) 8806 final.

553 Meldgaard, H. et al. (2015, December 23). Study on Structures of Aggressive Tax Planning and Indicators, Final Report. *European Commission Taxation Papers, Working Paper N. 61 – 2015.* pp. 21-22.

554 Meldgaard, H. et al. (2015, December 23). Study on Structures of Aggressive Tax Planning and Indicators, Final Report. *European Commission Taxation Papers, Working Paper N. 61 – 2015.* p. 25.

555 UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited.

556 Kleinbard, E. D. (2013). Through a Latte, Darkly: Starbucks's Stateless Income Planning. *Tax Notes*, 1515-1535. p. 1520.

557 Kleinbard, E. D. (2013). Through a Latte, Darkly: Starbucks's Stateless Income Planning. *Tax Notes*, 1515-1535.

558 Dowling, G. R. (2014). The Curious Case of Corporate Tax Avoidance: Is it Socially Irresponsible? *Journal of Business Ethics* 124 (1), 173-184. p. 176.

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achieve beneficial tax treatment,[559] which additionally confirms that Starbucks' behaviour can be categorized as aggressive tax planning in the context of this research.

3.3.4. Concluding remarks

This section provided a brief theoretical framework concerning the corporate tax planning terminology used within this research. The aim of this section was not to provide in-depth and uniform definitions but to explain how the concepts are used throughout this research.
Multinationals that are aware of tax effects on their operations actively plan their taxes to avoid double taxation. A legitimate and socially responsible way to plan taxes is tax mitigation, where a corporation legitimately makes use of tax laws for tax planning purposes, for instance, such as a UK company applying the UK R&D tax rules, as was explained earlier. A multinational that intentionally re-arranges its business-operations, by complying with the strict letter of the law while ignoring the spirit of the law, with the main purpose to benefit from various tax rules in the different countries it operates in can be considered as avoiding tax. For instance, if a multinational has business activities in the UK and other countries, with its R&D activities actually taking place in some other country, re-arranges its business operations in order to benefit from the UK R&D tax rules, it thereby engages in tax avoidance. In case the company actually transfers its R&D activities to the UK, it is considered tax mitigation. Multinationals that not only rearrange their existing business activities to achieve more beneficial tax treatment but even set up additional entities that lack any economic or commercial justification can be considered as aggressive tax planners. In the case of aggressive tax planning, a corporation intentionally makes use of the mismatches between the national laws on the international level.
Aggressive tax planning is a term that is often used in debates on international tax planning but which is seldom clearly defined or conceptualized in the legal debates. The definitional gap causes confusion and misunderstandings in theory and legal uncertainty in practice. Based on the analysis of the OECD and EU approaches, Calderón Carrero and Quintas Seara claim that the concept of aggressive tax planning should not be established in practice as a "new 'legal concept' for preventing abusive tax practices" but considered as a "tax policy 'guiding principle' aimed at shaping the domestic and international tax systems."[560] As a result, the concept of aggressive tax planning is used to bring "a substantial change in the international taxation system" and repair "its faults and loopholes", which should "curtail and constrict the limits of legitimate tax planning."[561] This, however, confirms that, notwithstanding the definitional vagueness, legal corporate tax planning is not always self-evidently legitimate.

3.4. Tax planning social legitimacy continuum

In practice, distinguishing between legitimate and illegitimate tax planning is complicated, as it is not a black and white issue and should be evaluated on a case-by-case basis. However, to illustrate the core of contemporary public discussions, a social legitimacy continuum of tax planning could be a starting point, guiding the debate on international corporate tax planning. For instance, there have been several academic debates around tax planning and its acceptance, morality or (social) legitimacy.[562] However, such debates do not seem to achieve a common ground, because they focus

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[559] See e.g. Campbell, K. and Helleloid, D. (2016). Educational Case Starbucks: Social Responsibility and Tax Avoidance. *Journal of Accounting Education* 37, 38–60; European Commission. (2014). State Aid SA.38374 (2014/C) (ex 2014/NN) (ex 2014/CP) – *Netherlands Alleged aid to Starbucks*, Brussels, 11.06.2014 C(2014) 3626 final.
[560] Calderón Carrero, J. M. and Quintas Seara, A. (2016). The Concept of 'Aggressive Tax Planning' Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border between Legitimate and Illegitimate Tax Planning. *Intertax* 44 (3), 206–226. p. 210.
[561] Calderón Carrero, J. M. and Quintas Seara, A. (2016). The Concept of 'Aggressive Tax Planning' Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border between Legitimate and Illegitimate Tax Planning. *Intertax* 44 (3), 206–226. pp. 210-211.
[562] See e.g. Hasseldine, J. and Morris, G. (2013). Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection. *Accounting Forum* 37 (1), 1-14, in discussion with Sikka, P. (2010). Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance. *Accounting Forum* 34 (3-4), 153-168; Sikka, P. (2013). Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance—A Reply to Hasseldine and Morris. Accounting Forum 37 (1), 15-28.

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on the different points in the tax planning (social) legitimacy continuum. Therefore, it could be that all arguments of the debate are equally right or wrong. This suggests that, in further research, this subject matter needs to be better clarified.[563] This research focuses further on what aggressive tax planning is not; what is good tax governance that responds to (aiming at) going beyond pure compliance with the letter of the law and is, therefore, in general not unfair.[564] Before some concrete suggestions for good tax governance can be made (chapter 6), however, the issues concerning the social legitimacy – the social acceptance – of tax planning should be discussed.

Organizational legitimacy can be defined as the "generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions."[565] Legitimacy, thus, reflects the acceptability or acceptance of certain actors by stakeholders,[566] which is a necessary precondition for a social licence to operate[567] and for trust.[568] The central element of legitimacy is "meeting and adhering to the expectations of a social system's norms, values, rules, and meanings."[569] Holland et al. argue that organizational legitimacy can be divided into components, such as pragmatic, moral, and cognitive legitimacy.[570] For the purposes of this research, moral legitimacy is the most interesting, as it "takes a wider or sociotropic perspective of an organisation's effects on the evaluator's social group or society as a whole."[571] In other words, moral legitimacy concerns the effects of corporate actions from a wider perspective than, for instance, legal rules only. Based on recent attention on corporate tax practices, it can be said that, in this regard, corporations do not always meet or adhere to the expectations of social or moral norms or values.[572] In this respect, aggressive tax planning can be considered socially illegitimate, as it seems to be in conflict with "some socially constructed system of norms, values, beliefs, and definitions", especially from the perspective of a wider group of corporate stakeholders. Such corporate practices can harm obtaining the corporate social licence to operate. In addition, empirical research shows that the corporate managers themselves "appear to perceive tax avoidance as an emerging threat to legitimacy."[573] This proves that legal tax planning has (social) legitimacy gradations that might be harmful for companies and also that social acceptability plays a role in corporate tax planning practices.

Nevertheless, it might not be that simple for a corporation to understand whether its tax planning could be socially legitimate or not. Many corporate decisions have tax consequences and tax planning is necessary in order to stay in control of financial affairs. However, in corporate practice, some tax planning strategies may pose difficult moral challenges for corporate boards. For instance, within a multinational, different transactions and financial needs of subsidiaries (or other entities within a multinational) can be financed by means of various financial instruments, such as debt or equity instruments. In addition to these traditional forms of financing, there are also various hybrid forms of financing. There is no commonly agreed upon definition for hybrid financial instruments,

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[563] Moreover, different arguments in the debate can be justified or declined depending on from whose perspective they are presented. Tax planning namely is a multidimensional issue that involves various actors. This, however, has not received much focus in the debates up to now and deserves further research.

[564] See chapter 6.

[565] Schuman, M. (1995). Managing Legitimacy: Strategic and Institutional Approaches. *Academy Management Review* 20 (3), 571- 610. p. 547.

[566] See also: Deephouse, D. L. and Carter, S. M. (2005). An Examination of Differences between Organizational Legitimacy and Organizational Reputation. *Journal of Management Studies* 42 (2), 329-360.

[567] Holland, K. et al. (2016). Tax Avoidance: A Threat to Corporate Legitimacy? An Examination of Companies' Financial and CSR Reports. *British Tax Review* 3, 310-338. p. 313.

[568] On trust, see chapter 2, section 5.

[569] Deephouse, D. L. and Carter, S. M. (2005). An Examination of Differences between Organizational Legitimacy and Organizational Reputation. *Journal of Management Studies* 42 (2), 329-360. p. 331.

[570] Holland, K. et al. (2016). Tax Avoidance: A Threat to Corporate Legitimacy? An Examination of Companies' Financial and CSR Reports. *British Tax Review* 3, 310-338. p. 313.

[571] Holland, K. et al. (2016). Tax Avoidance: A Threat to Corporate Legitimacy? An Examination of Companies' Financial and CSR Reports. *British Tax Review* 3, 310-338. p. 316.

[572] The distinction between moral and social norms is an interesting discussion that falls outside the scope of this research. The underlying starting point in this research is that moral norms and morality are personal reasoning on making a difference between good and bad, right and wrong. Social norms, on the other hand, are the informal (and usually unwritten) rules that govern behavior in groups and societies. Both moral and social norms influence each other. For an overview on moral and social norms, see e.g. Brennan, G. et al. (2013). Moral and Social Norms. In Brennan, G. et al. (Eds.). *Explaining Norms.* Oxford: Oxford University Press.

[573] Holland, K. et al. (2016). Tax Avoidance: A Threat to Corporate Legitimacy? An Examination of Companies' Financial and CSR Reports. *British Tax Review* 3, 310-338. p. 337.

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but, in general, "hybrid financial instruments are bundled rights and obligations which have legally combined value determining characteristics underlying more than one basic form of financial instruments", such as debt or equity.[574] The OECD defines a 'hybrid mismatch arrangement' as "a profit shifting arrangement that utilises a hybrid element in the tax treatment of an entity or instrument to produce a mismatch in tax outcomes in respect of a payment that is made under that arrangement."[575] The OECD fights against aggressive tax planning by regulating the effects of hybrid mismatches, among other things.[576] Also the EU ATAD aims at closing many of the existing loopholes where hybrid mismatches are used.[577]

However, from an economic point of view, "debt and equity are functionally equivalent and differ only (but widely) in degree of a risk-return continuum, but not in kind."[578] In other words, some forms of financing would trigger certain tax benefits under some national laws, such as interest deduction in the Netherlands and no taxation of the same income in some other countries. Consequently, corporations can have tax reasons for using various hybrid financial instruments.[579]

In the context of this research, the use of hybrid financial instruments by multinationals could be considered as tax avoidance or aggressive tax planning if corporations deliberately structure such arrangements with the (almost) sole purpose to minimize tax. However, if corporations use hybrid financial instruments for valid business purposes, for instance when the loan is given without the repayment obligation of the debtor, then it indeed fulfils the purpose of the specific tax rules and can legitimately benefit from the exemptions. In such a case, the use of a profit participating loan could be considered as tax mitigation.

The OECD also admits that, due to a "wide variety of financial instruments and the different ways jurisdictions tax them, it has proven impossible, in practice, […] to comprehensively identify and accurately define all those situations where cross-border conflicts in the characterisation of a payment under a financing instrument may lead to a mismatch in tax treatment."[580] Nevertheless, as Bärsch illustrates, various non-tax reasons, related to "the different rights and obligations attached to financial instruments" also exist.[581] In other words, such hybrid financial instruments are "simply a function of two countries having, typically unilaterally, decided not to tax a particular cross-border dealing or give some other favourable tax effect (such as a deduction)." Such a situation could be used for aggressive tax planning purposes, but this is not necessarily always the case. The problem with hybrid mismatch arrangements can lie in "the manner in which tax advisers and multinationals have in recent years aggressively sought out and exploited such arrangements."[582] In other words, this refers to how it has been used for aggressive tax planning.

As shown in the previous section, legal tax planning can have various degrees and, sometimes, even though it is legal, it is not always necessarily legitimate or socially acceptable. Consequently, such corporate tax planning might still cause some criticism or even public outrage, as happened with Starbucks in the UK in 2012.[583] Such public outrage may impose some serious costs for

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[574] Bärsch, S.-E. (2012). *Taxation of Hybrid Financial Instruments and the Remuneration Derived Therefrom in an International and Cross-border Context Issues and Options for Reform*. Doctoral Dissertation Universität Mannheim. Berlin, Heidelberg: Springer-Verlag. p. 10. Bärsch also explains different types of hybrid financial instruments.

[575] OECD. (2014). *BEPS Action 2: Neutralise the Effects of Hybrid Mismatch Arrangements (Recommendations for Domestic Laws)*, Public Discussion Draft of 19 March 2014. Paris: OECD Publishing. para. 17.

[576] See OECD BEPS Action Plan, Action 2.

[577] See e.g. Fibbe, G. K. and Stevens, A. J. A. (2017). Hybrid Mismatches Under ATAD I and II. *EC Tax Review* 26 (3), 153-166.

[578] Bärsch Bärsch, S.-E. (2012). *Taxation of Hybrid Financial Instruments and the Remuneration Derived Therefrom in an International and Cross-border Context Issues and Options for Reform*. Doctoral Dissertation Universität Mannheim. Berlin, Heidelberg: Springer-Verlag. p. 15.

[579] For instance, in some cases, the mismatches in national tax treatments of corporate financing instruments can lead to double non-taxation or stateless income, which are desired outcomes from the aggressive tax planning perspective.

[580] OECD. (2014). *BEPS Action 2: Neutralise the Effects of Hybrid Mismatch Arrangements (Recommendations for Domestic Laws)*, Public Discussion Draft of 19 March 2014. Paris: OECD Publishing. p. 49.

[581] Bärsch, S.-E. (2012). *Taxation of Hybrid Financial Instruments and the Remuneration Derived Therefrom in an International and Cross-border Context Issues and Options for Reform*. Doctoral Dissertation Universität Mannheim. Berlin, Heidelberg: Springer-Verlag. p. 12.

[582] Harris, P. (2014). Neutralizing Effects of Hybrid Mismatch Arrangements. *The United Nations Papers on Selected Topics in Protecting the Tax Base of Developing Countries*. p. 3.

[583] See e.g. UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited; Campbell, P. (2012, October 17). Starbucks Facing Boycott over Tax: Protest Groups Threaten to Try and Close Branches over Revelations it hasn't Paid for Three Years. *Daily Mail* (online).

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multinationals, such as losing the social licence to operate or losing trust.[584] Moreover, tax planning that does not comply with moral and social expectations is in conflict with certain corporate responsibilities, such as responsibilities towards society (CSR).[585] Thus, there is a grey, uncertain area between legal tax planning and illegal tax planning (tax evasion). However, it is not an easy task to decide upon where the acceptable lines of legal tax planning lie, as the example of hybrid financial instruments show.

As a first step, the law determines the acceptability of tax planning. Therefore, states have an important role to play, since states often even use taxes as means to regulate taxpayers' behaviour. Tax policies and laws in every state are different and a regulation that imposes tax liability varies per state.[586] Mismatching national laws creates a regulatory vacuum at the international level.[587] Often states facilitate (and sometimes even initiate via tax incentives) tax planning. For instance, states offer tax incentives as a regulatory instrument to steer taxpayer's behaviour. States use tax incentives "to stimulate or discourage taxpayers to act in a way that actually means paying less (or not more) tax."[588] Moreover, in the international setting, states use tax legislation in an instrumental way in order to attract foreign investment, which can lead to tax competition between the states.[589] On the one hand, attracting more businesses can bring new jobs, innovation and investment for a state and its society. On the other hand, making such benefits available for certain companies increases inequality and may cause other taxpayers to pay more. Thus, this distorts fair competition and distributive justice. Therefore, it needs to be decreased. This, however, calls for international cooperation between the states.[590] For instance, in the case of hybrid mismatches, there is often nothing specifically wrong with a law on a state level. The problems may arise from the fact that there is a mismatch between how different states classify a certain tax planning arrangement. In such cases, both states are equally responsible.[591] However, despite the important role of state, corporations also bear responsibility with regard to making use of the imperfections of the legal systems. Corporations that make use of tax incentives and plan their activities according to this act in a legitimate way, in general. They act in a way that states wish them to act. This is categorized as tax mitigation, as explained earlier (section 3.3.1.). Nevertheless, some multinationals either ignore or bend the initial purpose of various laws or take advantage of the imperfections of the system. Such behavior can be considered socially illegitimate.

The social legitimacy of tax planning that was categorized as tax avoidance (section 3.3.2.) is disputable, as such tax planning behaviour brings the intentions of taxpayers into question. Next to (ab-)using tax incentives in a way illustrated in section 3.3.2., some multinationals go even further in trying to minimize their tax burden by engaging aggressive tax planning (section 3.3.3). In such cases, legal tax planning ends up with the taxpayer profiting from the societal common goods

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584 See also chapter 2.

585 See chapter 4, section 5.

586 Hasseldine, J. and Morris, G. (2013). Corporate Social Responsibility and Tax Avoidance: A Comment and Reflection. *Accounting Forum* 37 (1), 1-14. p. 4.

587 See also chapter 3, section 2.2.

588 Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250. p. 229.

589 Tax competition between states means that the nation states compete with each other in attracting and preserving economic activity within their territories by creating favourable tax regimes for multinationals. States that try to beat each other in order to attract foreign investment (Schön, W. (2003). *Tax Competition in Europe*. Amsterdam: IBFD; Schön, W. (2005). Playing Different Games? Regulatory Competition in Tax and Company Law Compared. *Common Market Law Review* 42 (2), 331-365; Peters, C. (2014). *On the Legitimacy of International Tax Law.* Amsterdam: IBFD Doctoral Series). Such competition can lead to harmful tax competition and a so-called 'race to the bottom' (Mendoza, E. G. and Tesar, L. L. (2005). Why Hasn't Tax Competition Triggered a Race to the Bottom? Some Quantitative Lessons from The EU. *Journal of Monetary Economics* 52 (1), 163-204. pp. 165-166.) or 'fiscal degradation' (Gribnau, J. L. M. (2008). Soft Law and Taxation: EU and International Aspects. *Legisprudence* II (2), 67-117. p. 76). Often, such competition between the states takes place at each other's expense, which means that the gain of one state is a loss of the other due to the spill-over effects (De Wilde, M. F. (2015). '*Sharing the Pie': Taxing Multinationals in a Global Market*. Doctoral Dissertation, Erasmus University Rotterdam. p. 6, p. 223).

590 Or for a unitary international approach, which however faces many political obstacles. See: International Centre for Tax and Development (ICTD). Research reports; Durst, M. C. (2015). Limitations of the BEPS Reforms: Looking Beyond Corporate Taxation for Revenue Gains. *International Centre for Tax and Development Working Paper* 40. pp. 7-9; Picciotto, S. (2016). Towards Unitary Taxation: Combined Reporting and Formulary Apportionment. In Pogge, T. and Mehta, K. (Eds.), *Global Tax Fairness* (pp. 221-237). Oxford: Oxford University Press. pp. 232-235. See also chapter 3, section 4.

591 Meldgaard, H. et al. (2015, December 23). Study on Structures of Aggressive Tax Planning and Indicators, Final Report. *European Commission Taxation Papers, Working Paper N. 61 – 2015.* p. 59.

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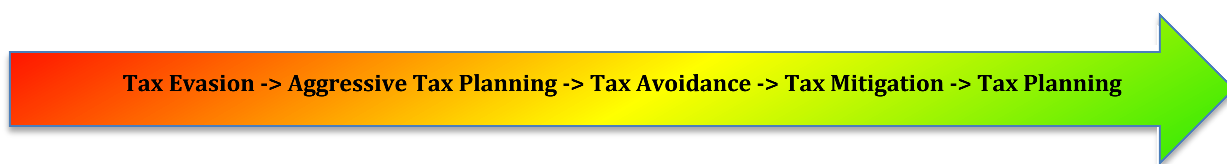
without contributing to this society and, thus, evaporating its moral responsibility.[592] Thereby, the acceptability of tax planning moves beyond the law towards morality and social norms. Hilling and Ostas write that "aggressive tax planning and tax avoidance can be described as excessive utilization of tax benefits intended by the government to generate social good." Such "excessive utilization of tax benefits challenges", according to them, "the social norms that underpin the tax system."[593] Consequently, next to the legal dimension, tax planning can be categorized as either socially legitimate or illegitimate tax planning.

More specifically, tax planning can vary from legitimate tax planning responding to tax incentives to illegitimate tax planning abusing tax laws and free-riding on the societies in which corporations operate. Based on such a distinction, tax planning can be illustrated in a continuum: on the one end there is tax planning that legitimately accepts tax incentives following its business strategy and, on the other end, there is tax planning that searches for the limits of the letter of the law for its own gain without considering the negative externalities of its actions and the intent of the lawmaker, resulting in paying an unfair share of taxes. Since tax evasion is illegal and thus clearly morally unacceptable, this side has a concrete starting point. Tax planning in the context of good tax governance, on the other hand, can always be improved and is therefore illustrated as indefinite line. Between these two ends are various degrees, which should be analyzed case-by-case basis. In chapter 6 I will provide certain elements of good tax governance for companies that wish to move more towards the green side of this continuum.



Good tax governance is at one end of the tax planning continuum,[594] which means that a corporation engages in legal and legitimate tax planning. A multinational that mitigates its tax burden is compliant with the (letter and the spirit of the) law and accepts the social expectations on corporate tax planning practices.[595] Tax planning that is (close to) illegal is on the other end: bad tax governance that exploits the benefits of a society and state without fulfilling its (moral) obligations towards them.[596] It is clear that companies that claim to endorse CSR should stay away from behaviour that could possibly fall within such a definition, as it will be argued later in this research.[597]

For comparison, the European Commission has also represented tax planning in a continuum in its report on aggressive tax planning indicators.[598] The Commission notes, however, that "[W]hile it is theoretically possible to draw a line between acceptable tax planning and aggressive tax planning, the boundaries will in reality be somewhat blurred."[599] The continuum of the Europenan Commisison[600] "ranges from activities, which are clearly in the spirit of the law e.g. claiming tax credits or using loss carry forwards etc., to behaviour which is clearly illegal, i.e. tax evasion."[601]

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[592] See chapter 3, section 2. See also chapter 4, section 5; chapter 6.
[593] Hilling, A. and Ostas, D. T. (2017). *Corporate Taxation and Social Responsibility*. Stockholm: Wolters Kluwer. p. 54.
[594] See more on good tax governance in chapter 6.
[595] What exactly such social expectations are, however, needs further research.
[596] See chapter 6.
[597] Chapter 4; chapter 6.
[598] European Commission. (2017). Aggressive Tax Planning Indicators. Final Report. *Working Paper No 71 – 2017*.
[599] European Commission. (2017). Aggressive Tax Planning Indicators. Final Report. *Working Paper No 71 – 2017*. p. 23.
[600] Note that the continuum of the European Commission starts with tax planning and ends with tax evasion, illustrating tax evasion as indefinite arrow. To my mind, tax evasion is illegal and thus clearly morally unacceptable and therefore I illustrate it as a clear starting point. Companies that wish to engage good tax governance should definitely not engage in tax evasion but their tax planning practices can always be improved. Therefore, the tax planning arrow should be in my opinion indefinite.
[601] European Commission. (2017). Aggressive Tax Planning Indicators. Final Report. *Working Paper No 71 – 2017*. p. 23.

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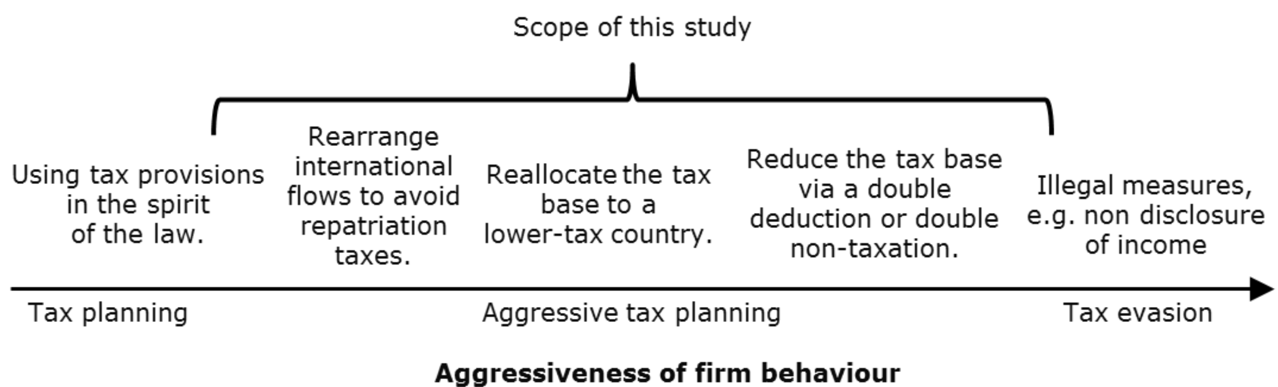

Source: European Commission. (2017). Aggressive Tax Planning Indicators. Final Report. Working Paper No 71 – 2017. p. 23.

Calderón Carrero and Quintas Seara argue that the tax paradigm shift is "heading towards a new international and domestic tax framework that provides a lower tolerance threshold regarding tax planning, in the sense that red line demarcating what is considered acceptable and unacceptable is shifting."[602] For the purposes of this research, such a tax paradigm shift can be illustrated based on some important recent changes in international tax law.

3.5. Changing international tax law

"The state exists for its individuals"[603] and, in a democratic state, individuals choose their representatives that (keeping in mind basic human rights) decide upon the discourse of that state.[604] However, "the methods of determining national priorities vary from one society to another."[605] This applies especially in the context of tax legislation, since taxation undertakes several important functions that are important from a national sovereignty and (socio-)economic development perspective.[606] Nevertheless, it is a regulators' responsibility to "provide citizens with political mechanisms to control firms, because these political means would complement and overcome the flaws of the economic mechanisms consumers can resort to."[607] The state, thus, has a role to play to keep corporations accountable in case they start using their economic power in a way that is not acceptable for the society. On a state level, several responsibilities but also obstacles appear concerning developing tax policies that would facilitate more responsible tax planning. States have to ensure the efficient functioning of the state and provide public goods and services. By serving this public function, states must develop or preserve the living standard of citizens and ensure the underlying accepted principles of society, as was explained in section 3.2 of this chapter.[608]
The legal system contains rights and obligations, which is also true for taxation. The legislature determines the share taxpayers have to contribute to society and translates this into tax laws. The obligation to contribute to society is crystallized in a large number of very complex legal rules that contain taxpayers' obligations and rights. Such complexity and the level of the technical details of tax legislation, however, may undermine legal certainty, equality, consistency, and transparency.

[602] Calderón Carrero, J. M. and Quintas Seara, A. (2016). The Concept of 'Aggressive Tax Planning' Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border between Legitimate and Illegitimate Tax Planning. *Intertax* 44 (3), 206–226. p. 225.
[603] Barak, A. (2011). On Society, Law and Judging. In De Visser, M. and Witteveen, W. (Eds.). *The Jurisprudence of Aharon Barak, Views from Europe* (pp. 15-50). Nijmegen: Wolf Legal Publishers. p. 16.
[604] Barak, A. (2011). On Society, Law and Judging. In De Visser, M. and Witteveen, W. (Eds.). *The Jurisprudence of Aharon Barak, Views from Europe* (pp. 15-50). Nijmegen: Wolf Legal Publishers. pp. 15-16.
[605] Barak, A. (2011). On Society, Law and Judging. In De Visser, M. and Witteveen, W. (Eds.). *The Jurisprudence of Aharon Barak, Views from Europe* (pp. 15-50). Nijmegen: Wolf Legal Publishers. p. 15.
[606] See also chapter 3, section 2.1.
[607] Valor, C. (2005). Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability. *Business and Society Review* 110 (2), 191-212. p. 201.
[608] On the other hand, to meeting these responsibilities, states need financial resources that they receive from tax payments and foreign investment. In case states focus only on such financial opportunities, a threat for unequal treatment of different taxpayers arises. There can be several reasons why states treat certain taxpayers favourably, such as corporate lobbying power. See chapter 2, section 3.

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This also creates problems for the enforcement of such tax rules, especially in the global context.[609] According to Peters states are "expecting the taxpayer to take an objectivating attitude[610] to international tax law", by which he means the coercive power of public authorities to force taxpayers "to comply with the provisions of international tax law even if they do not agree with the normative content of these provisions."[611] It is, however, "impossible for a single taxpayer to match these normative expectations with the factual reality of the tax law market and the patchwork of distortions."[612] Moreover, the complexity of the tax legislation "gives rise to unintentional non-compliance and intentional overcompliance both of which appeared to favour the tax authority in terms of revenue collection."[613] As a result, a complex tax system may catalyze "an unfair burden on taxpayers who are not knowledgeable about the tax system" and this undermines the integrity of the system.[614] On the other hand, such complexity also causes loopholes that can be abused by taxpayers with short-term self-interested intentions. Thus, the international tax law system can give taxpayers a confusing message.[615] In this case, states bear the responsibility to reform their national tax system and cooperate on the international level, which also takes place, for instance, on the OECD and the EU levels.

Corporate tax planning has not only received much attention in the media, but it has also triggered international rule making. Corporate tax planning is not a new phenomenon, "yet globalization and the evolution of the international tax regime have created the conditions for MNEs to maximize their inherent advantages in tax planning."[616] Consequently, various debates around aggressive tax planning and tax avoidance have brought the social legitimacy of international corporate tax practices under question. The OECD was addressing this problem in its BEPS Action Plan and is now developing it further in the follow-up steps, and[617] the EU is also taking the BEPS actions a step further.

According to the OECD, "enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate."[618] Such an expectation on multinationals means that multinationals should try to understand and follow the intention of the legislature. To determine the intention of the legislature, a multinational is expected to interpret "tax rules consistent with that intention in light of the statutory language and relevant, contemporaneous legislative history."[619] Multinationals should thereby not pay more tax than legally required but corporate transactions are expected to be consistent with "the underlying economic consequences

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[609] Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250. p. 531; see also: McKerchar, M. (2003). The Impact of Complexity upon Personal Taxpayers: A Study of Australian Personal Taxpayers. *Sydney: Australian Tax Research Foundation*.

[610] Peters, who studied the legitimacy issues with regard to the legal framework for international tax law, concludes that "[T]axpayers in the international society of states and individuals should be able to take two different attitudes toward international tax law: an objectivating and a performative attitude." While objectivating attitude "is and will continue to be the responsibility of states", performative attitude requires a more active participation of taxpayer for according to this "taxpayers should be able to abide to the norms of international tax law, because they are of the opinion that there is a 'moral' obligation to do so." This performative attitude is in line with this research to the extent that more active participation by the taxpayer is expected. Corporations that wish to maintain or improve their trustworthiness and reputation in the eyes of the lawmaker seem to have a clear incentive for such performative attitude. Nevertheles, this research does not touch upon the concrete relationship between (international) law-making organizations and taxpayers, but the relationship of the taxpayer with society in a broader sense. Peters, C. (2014). *On the Legitimacy of International Tax Law*. Amsterdam: IBFD Doctoral Series. p. 272.

[611] Peters, C. (2014). *On the Legitimacy of International Tax Law.* Amsterdam: IBFD Doctoral Series. p. 272.

[612] Peters, C. (2014). *On the Legitimacy of International Tax Law.* Amsterdam: IBFD Doctoral Series. p. 306.

[613] Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250. p. 531. See also: McKerchar, M. (2003). The Impact of Complexity upon Personal Taxpayers: A Study of Australian Personal Taxpayers. *Sydney: Australian Tax Research Foundation*.

[614] Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250. p. 531. See also: McKerchar, M. (2003). The Impact of Complexity upon Personal Taxpayers: A Study of Australian Personal Taxpayers. *Sydney: Australian Tax Research Foundation*.

[615] Peters, C. (2014). *On the Legitimacy of International Tax Law.* Amsterdam: IBFD Doctoral Series. p. 306. Note that this dissertation was written before the OECD BEPS Action Plan was implemented. The current international tax lawsystem aims at eliminating such mixed messages.

[616] Brauner, Y. (2014). What the BEPS? *Florida Tax Review* 16 (2), 55-115. p. 57.

[617] For a brief overview of other OECD policies, see e.g. Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28. pp. 21-22.

[618] OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing. XI.2.

[619] OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing. XI.2.

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of the transaction unless there exists specific legislation designed to give that result."[620] Thus, according to the OECD, the structure of transactions and the underlying economic outcomes should be tied to each other in order for a company to act according to both the letter and the spirit of the law. In my opinion, this expectation of the OECD on multinational corporations is in line with this research – corporations that wish to improve their tax planning practices in a moral sense should not opt for a strict legal-positivist approach, leaving all moral considerations aside. Nevertheless, in the way it is framed, it is too vague and does not provide any clarity for corporations. Furthermore, it is unclear whether and to what extent these principles of the OECD MNE Guidelines[621] were considered when working out the BEPS Action Plan.

The OECD has given its standpoint with regard to corporate tax avoidance a more practical form in its BEPS Action Plan and its follow-up steps for curbing harmful tax practices by corporations and harmful tax competition between the states.[622] The Action Plan focused on various phases of tax planning for eliminating possibilities for tax avoidance and increasing transparency and cooperation between (the OECD member) states.[623] With its BEPS Action Plan, the OECD was also trying to respond to the recent changes and developments in business practices, such as e-commerce. The BEPS was initiated at the G20 summit in Mexico in June 2012, where the OECD was invited to take steps to prevent base erosion and profit shifting.[624] In November 2015, the G20 endorsed the finalized OECD BEPS Action Plan.[625] Currently the OECD members are working on implementing the BEPS Action Plan.[626]

Implementing BEPS Action plan, however, is not a very simple task because of the various political preferences of various states .[627] For instance, Durst believes that states are "unlikely to implement more than symbolic and minimally incremental BEPS reforms."[628] In addition, because of its unilateral implementation, the BEPS proposal leads to different national measures and leaves room for disparities,[629] which in turn "leave opportunities for multinationals to continue to avoid large volumes of taxes through profit shifting."[630] Therefore it can be said that while BEPS Action Plan has been an important and positive step, it is not a final solution to the problem. Consequently, next to states, other actors, such as multinationals, also need to accept their responsibility. Some of the political difficulties that occur on the OECD level can, however, be overcome on the EU level. According to Essers "it seems that the OECD soft law rules of BEPS will be substituted and complimented by EU hard law."[631]

In light of the economic and financial crisis (2008) the European Commission started to dedicate more targeted attention to international tax cooperation and common standards of business taxation. As a result, in April 2009, the European Commission published a communication Promoting Good Governance in Tax Matters.[632] This Communication identified and positioned the EU concerns and

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[620] OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing. XI.2.

[621] Note that OECD Guidelines for Multinational Enterprises is a broader set of guiding principles and standards of responsible business conduct for multinational corporations, while OECD BEPS Action Plan is an OECD/G20 project to set up an international framework to combat tax avoidance by multinationals.

[622] Currently, the OECD is working on resolving the tax challenges arising from the digitalisation of the economy.

[623] OECD. (2013). *Addressing Base Erosion and Profit Shifting (BEPS).* Paris: OECD Publishing.

[624] G20. (2012, June 19). *Leaders Declaration*. Los Cabos, Mexico.

[625] G20. (2015, November 15-16). *Leaders Communiqué*. Antalya, Turkey; OECD. (2015). *OECD/G20 Base Erosion and Profit Shifting Project Explanatory Statement*. Paris: OECD Publishing.

[626] See OECD. (2019, May 31). International Community Agrees on a Road Map for Resolving the Tax Challenges Arising from Digitalisation of the Economy.

[627] See e.g. Durst, M. C. (2015). Limitations of the BEPS Reforms: Looking Beyond Corporate Taxation for Revenue Gains. *International Centre for Tax and Development Working Paper* 40. p. 6; Christians, A. and Van Apeldoorn, L. (2018). The OECD Inclusive Framework. *Bulletin for International Taxation* 72 (4/5.); Christians, A. and Van Apeldoorn, L. (2018). Taxing Income Where Value is Created. *Florida Tax Review* 22 (1). p. 32, footnote 94; Essers, P. (2017). International Tax Justice between Machiavelli and Habermas. In Peeters, B. et al.(Eds.). *Rebuilding Trust in Taxation* (pp. 235-265). Antwerpen: Intersentia.

[628] Durst, M. C. (2015). Limitations of the BEPS Reforms: Looking Beyond Corporate Taxation for Revenue Gains. *International Centre for Tax and Development Working Paper* 40. p. 3.

[629] Dourado, A. P. (2016). The EU Anti Tax Avoidance Package: Moving Ahead of BEPS? *Intertax* 11 (6 & 7), 440-446. p. 440.

[630] Durst, M. C. (2015). Limitations of the BEPS Reforms: Looking Beyond Corporate Taxation for Revenue Gains. *International Centre for Tax and Development Working Paper* 40. p. 13.

[631] Essers, P. (2017). International Tax Justice between Machiavelli and Habermas. In Peeters, B. et al. (Eds.). *Rebuilding Trust in Taxation* (pp. 235-265). Antwerpen: Intersentia. p. 260.

[632] European Commission. (2009, April 28). Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on Promoting Good Governance in Tax Matters.

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contribution to the G20 and following OECD work on tax avoidance. Keywords such as transparency, exchange of information, and fair tax competition were already in the centre of the discussion.[633] The structure of the EU allows it to take more concrete steps than G20/OECD and install viable enforcement mechanisms to fight aggressive tax planning.[634] However, providing a comprehensive overview and timeline of all the steps taken by various institutions within the EU is outside the scope of this research. For the purposes of this research it suffices to briefly illustrate that the issue of tax good governance, as the Commission framed it, has been given a certain political priority.[635]

In December 2012, the European Commission introduced "An Action Plan to Strengthen the Fight Against Tax Fraud and Tax Evasion"[636] and the "Recommendation on Aggressive Tax Planning".[637] With its Action Plan the Commission set up a Platform for Tax Good Governance, which held its opening meeting in June 2013.[638] This Platform consists of various stakeholders such as business practice representatives, tax professionals, and civil society organizations. In June 2015, the Commission adopted an Action Plan to tackle tax avoidance and aggressive tax planning in the EU.[639] One of the central points of this Action Plan was to re-launch the Common Consolidated Corporate Tax Base (CCCTB) that was a comprehensive set of rules for calculating multinationals' taxable profits in the EU, which faced many political obstacles. In October 2016, the European Commission launched two draft directives on the Common Corporate Tax Base (CCTB)[640] and Common Consolidated Corporate Tax Base (CCCTB).[641] These proposals, however, received much criticism (CCCTB more than CCTB), varying from contradicting the basic EU law principles to problems of achieving political compromise.[642]

Furthermore, in January 2016, the European Commission launched the Anti Tax Avoidance Package (ATAP) that is "part of the Commission's ambitious agenda for fairer, simpler and more effective corporate taxation in the EU."[643] Next to important and informative research, within the ATAP, the European Commission is facilitating seven concrete measures towards a fairer corporate taxation: a Anti-Tax Avoidance Directive (ATAD); a Recommendation on Tax Treaties that should enhance the vision of the OECD BEPS on tax treaty abuse and on permanent establishments; a Revised Administrative Cooperation Directive that follows the OECD BEPS example on country-by-country reporting; a general policy Communication on the ATAP and proposed way forward; a general policy Communication on an EU external strategy for effective taxation; a Staff Working Document; and a Study on Aggressive Tax Planning.[644]

The European Commission has "strongly reaffirmed the OECD's work on BEPS."[645] With the Anti-Tax-Avoidance Directive (ATAD), adopted in 2016 and revised in 2017, the European Commission has become a front-runner with regard to implementing the OECD's BEPS measures within the EU.[646] By implementing some additional measures, such as an exit tax duty and a general anti-avoidance rule (GAAR), the EU has taken a step further than OECD BEPS.[647] The ATAD is

633 European Commission. (2011). A Renewed EU Strategy 2011-14 for Corporate Social Responsibility. *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*.

634 For a comprehensive overview of the EU tax law, see Terra, B. J. M. and Wattel, P. J. (2012). *European Tax Law*. Deventer: Kluwer.

635 The concept of 'good tax governance' or 'tax good governance' is used rather vaguey and not defined or used in the exact same way as this research will propose in chapter 6.

636 European Commission. (2012, December 6). Communication from the Commission to the European Parliament and the Council: An Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion.

637 European Commission. (2012, December 6). Commission Recommendation of 6.12.2012 on Aggressive Tax Planning, C(2012) 8806 final.

638 European Commission. *Information page on Platform for Tax Good Governance*.

639 European Commission. (2015, June). Action Plan on Corporate Taxation.

640 European Commission. (2016, October 26). Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB).

641 European Commission. (2016, October 26). Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB).

642 See e.g. Gutmann, D. and De La Blétière, E. R. (2017). CC(C)TB and International Taxation. *EC Tax Review* 5, 233-245.

643 European Commission. (2016). Anti Tax Avoidance Package (ATAP).

644 European Commission. (2016). Anti Tax Avoidance Package (ATAP).

645 Smit, D. (2018). The Anti-Tax-Avoidance Directive. In Wattel, P. J. et al. (Eds). (2018). *European Tax Law. Volume I – General Topics and Direct Taxation* (pp. 245-175). Deventer: Wolters Kluwer. p. 245.

646 Smit, D. (2018). The Anti-Tax-Avoidance Directive. In Wattel, P. J. et al. (Eds). (2018). *European Tax Law. Volume I – General Topics and Direct Taxation* (pp. 245-175). Deventer: Wolters Kluwer. p. 245.

647 Smit, D. (2018). The Anti-Tax-Avoidance Directive. In Wattel, P. J. et al. (Eds). (2018). *European Tax Law. Volume I – General Topics and Direct Taxation* (pp. 245-175). Deventer: Wolters Kluwer. p. 247.

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an important step towards eliminating unaccepted corporate tax avoidance practices; however, as Smit argues, "the ATAD is only focusing on symptoms instead of the causes of BEPS." The ATAD namely focuses on "legal reality" instead of the "economic reality in which the multinationals operate" and the latter is essentially "the cause of BEPS."[648] Research suggests that, even though ATAD has been an important accomplishment, it is still imperfect, leaving possibilities for aggressive tax planning.[649] This suggests, thus, that even international regulatory frameworks that have been developed by various states working together can be imperfect. Furthermore, the European Commission has been developing the BEPS transparency agenda further with the proposals for the amendment of Council Directive 2011/16/EU on administrative cooperation in the field of taxation, commonly referred to as DAC 6.[650] The scope of this DAC 6 is very broad, requiring the taxpayers and intermediaries report to the tax authorities about cross-border arrangements that meet the criteria of the Directive. The first notifications should be reported in August 2020. The broad scope of the Directive, however, indicates that the tax authorities will probably receive so much information that it is questionable whether they are able to use this for addressing aggressive tax plnning structures.[651] It goes without saying that the efforts on the EU level, such as ATAD as well as DAC 6, are crucial steps but, as also argued earlier, legal rulemaking alone cannot wholly eliminate the problem of aggressive tax planning. Therefore, multinationals also have a responsibility in this matter, as argued through this research.[652]

Since the harmonization of tax legislation or even any other (direct) tax regulation in the EU is politically very complicated, the European Commission has also addressed certain cases of tax avoidance or even aggressive tax planning with the state aid regulation. At this point, the Competition division of the European Commission decided to step into the aggressive tax planning debate. According to the Treaty on the Functioning of the European Union (TFEU), state aid is "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain good."[653] State aid is "in so far as it affects trade between Member States" incompatible with the internal market.[654] In some cases, state aid may, however, be considered to be compatible with the internal market. In the past years, there has been much discussion around whether tax rulings favouring a specific company can be considered illegal state aid.[655] Fighting aggressive tax planning by means of state aid regulation has, nevertheless, resulted in many debates and much criticism.[656] The connection between the European Commissions' state aid investigations and aggressive tax planning is, however, outside the scope of this research. Nevertheless, they prove that certain corporate tax planning practices are highly relevant in several areas in the EU and that the imperfection of the existing legal measures calls for a more creative approach.

To conclude, inter-governmental organizations, such as the OECD and EU, have an important role to play in the tax planning debate, as it is an international issue. Tax planning becomes problematic when multinationals abuse the imperfections of national rules at the global level. Therefore, the role of international regulatory mechanisms is crucial in mitigating this issue. The concrete actions taken on the EU and OECD level prove that the international tax law and the acceptance of the limits of corporate tax planning are constantly changing. Both the EU and the OECD are contributing to improving global regulation for a fairer tax system. Calderón Carrero and Quintas

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648 Smit, D. (2018). The Anti-Tax-Avoidance Directive. In Wattel, P. J. et al. (Eds). (2018). *European Tax Law. Volume I – General Topics and Direct Taxation* (pp. 245-175). Deventer: Wolters Kluwer. p. 275.

649 See e.g. Fibbe, G. K. and Stevens, A. J. A. (2017). Hybrid Mismatches Under ATAD I and II. *EC Tax Review* 26 (3), 153-166; Ginerva, G. (2017). The EU Anti-Tax Avoidance Directive and the Base Erosion and Profit Shifting (BEPS) Action Plan: Necessity and Adequacy of the Measures at the EU Level. *Intertax* 45 (2), 120-137.

650 The Council of the European Union. (2018, May 25). Directive (EU) 2018/822 of 25 May 2018 Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation in Relation to Reportable Cross-Border Arrangements. OJ L 139/1.

651 See also: Stevens, S. (2018, September 14). *Meer transparantie in de vennootschapsbelasting?* Tilburg University. p. 33.

652 See chapter 6.

653 The Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012 P. 0001 – 0390, Art. 107.

654 The Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012 P. 0001 – 0390, Art. 107.

655 See European Commission. *State Aid: Tax Rulings.* Overview webpage.

656 See e.g. De Broe, L. (2015). The State Aid Review against Aggressive Tax Planning: 'Always Look a Gift Horse in the Mouth'. *EC Tax Review* 24 (6), 290-293.

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Seara argue that the OECD and the European Commission initiatives "are pushing the boundaries and redefining narrowly the concept of legitimate tax planning."[657] Both the OECD and the EU are actively fighting against certain types of tax planning, which they themselves often define as aggressive.[658] In general, it seems that both rule-makers address the technical aspects of corporate tax planning (laws) and not the mind-set that leads corporate decision making, which will be discussed further in the following chapters of this research.
Based on the briefly illustrated positions of the OECD and the EU, it can be concluded that, despite the very important accomplishments, international tax law system is not perfect and multinationals have sufficient possibilities for 'going beyond the law'.[659] At the same time, the growing attention on the international regulatory level shows that tax planning is a dynamic issue and that the limits of acceptance of various corporate practices change over time. Moreover, the fact that tax avoidance has explicitly received growing attention after the financial crisis suggests that there is a strong link between taxation, tax avoidance, and society. Therefore, it proves the necessity to consider corporate tax practices in relation to CSR, as will be argued in the next chapters of this research.

3.6. Conclusion

In recent years, international corporate tax practices have become a heavily debated topic. Based on various discussions, the aim of this chapter was to clarify the different aspects of the tax planning debate and the changing nature of international tax law, and to understand the relationship between legal and legitimate and legal but socially illegitimate international corporate tax planning practices. Tax planning contains more than just law, politics, or economics, and therefore tax debates are moving beyond the legal discussion towards morality. Therefore, tax planning can be seen as a matter of degree, which at a certain level becomes socially unacceptable. This part of the research provided an explanation for the different concepts of minimizing tax while staying within the (letter of the) law, such as tax planning, tax mitigation, tax avoidance, and aggressive tax planning, as used in this research.
First, based on the current debates as presented in the media and academic studies, the role of taxation in a society, as well as the moral element of taxes, and the concept of fair share were discussed. Most importantly, taxes provide funds for governments to offer essential public goods and to redistribute wealth among citizens. The obligation to pay taxes comes from the law. Taxpayers' rights and obligations are laid down in a system of legal rules that organize life in a society. Next to the legal system, morality also guides individuals' behaviour. The role of the legal system is to codify public morality; however, it will never be able to do so exhaustively. It was illustrated that even strong and important international steps of the OECD and EU are far from perfect. Therefore, legal rules in a complex society inevitably leave room for different choices with regard to the use of the system of tax rules. This suggests that, in case legal rules fall short, morality should fill the gap.
Morality requires the members of society to make certain value judgements and behave justly or fairly when making choices. Corporations enjoy the right to choose the most favourable way of doing business. Tax planning that evidently does not meet moral and societal norms and results in corporations not paying their fair share towards society or societies, however, calls for public outrage. Having said that, it is not entirely clear what exactly this fair share of tax that corporations should contribute is. In my opinion, corporations that fulfil only their written legal obligations while (intentionally) ignoring the spirit of the law in their tax planning practices evidently do not contribute their fair share. The fair share of tax that multinationals have to pay is the topic that has much to do with the difference but also the interconnectedness of the written law and moral norms. As laws are imperfect, the letter of the law can be interpreted in a way that it violates the spirit of

[657] Calderón Carrero, J. M. and Quintas Seara, A. (2016). The Concept of 'Aggressive Tax Planning' Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border between Legitimate and Illegitimate Tax Planning. *Intertax* 44 (3), 206–226. p. 217.
[658] See more on the OECD and the EU regulatory frameworks in section 6, *International Tax Law and Changing Mind-set*, of this chapter.
[659] See chapter 4, section 3.2.

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the law. Due to various justified standpoints, it is difficult to agree on what is fair and what exactly complies with the spirit of the law; it is easier to start with what is evidently unfair. Therefore, the concept of 'fair share' in this research refers to corporate tax practises that go beyond strict compliance with the letter of the law.

In general, it is a task of the lawmaker to strive for the best legal system that does not leave much room for wishful interpretation. However, a perfect system is impossible. In the case of international corporate tax planning, multinationals have choices concerning how they interpret the law (whether it deviates from the spirit of the law or not) and, as a result, to what extent they contribute to the societies in which they operate. In addition, the international context of corporate tax planning complicates the national legislators' opportunities to reduce the gap between the letter and the spirit of the law because of the different interests or possibilities of states. This suggests that multinationals that present themselves as socially responsible corporations also have a moral responsibility to pay their fair share and to (morally) account for their choices. For the context of this research, the concept of fair share reflects whether multinationals contribute a part to public goods and services without free-riding. How multinationals that wish to engage in responsible tax governance can interpret 'fair share' will be discussed in chapter 6 of this research.

Nevertheless, it goes without saying that multinationals are not expected to fully step away from their right to plan taxes. This research focuses only on tax planning activities that remain within the boundaries of the law. Thus, only tax planning, tax mitigation, tax avoidance, and aggressive tax planning were discussed. Tax planning is a legal way to take the tax effects of various laws and rules into account and to adapt ones' actions accordingly. Every taxpayer plans taxes to a certain extent, whether this is intentional or not. The forms of corporate tax planning practices vary from legal and legitimate to legal and illegitimate (or even illegal). Tax planning is a complex topic with many nuances, varying from legitimate tax planning responding to tax incentives to illegitimate tax planning abusing tax laws and paying an unfair share. As an illustration, a tax planning social legitimacy continuum was developed in this chapter. This continuum helps later in this research to understand the space between corporate social responsibility and irresponsibility.[660]

The first level of tax planning is tax mitigation, legitimate tax planning that makes legitimate use of tax incentives created by the states and differences in tax systems. Tax mitigation can, however, easily turn from legal and legitimate tax planning into legal tax planning the legitimacy, which is under question and is considered tax avoidance. Some multinationals even take a step further and create artificial possibilities to lower the possible tax effects of various rules by engaging in aggressive tax planning. Both tax avoidance and aggressive tax planning include moral judgement; ignoring such moral element with regard to tax practices is in my opinion one of the cornerstones of the public outrage. Aggressive tax planning is not a legal term, but it suggests that corporate behaviour in tax planning matters causes public distrust. It is another strictly legal yet illegitimate form of tax planning in case of which corporations eliminate their moral responsibilities towards society.

Tax planning should, at a minimum, comply with the law. However, nowadays, more is expected from multinationals, especially from the multinationals that present themselves as good corporate citizens. Also, the current works of the OECD and the EU with regard to fighting aggressive tax planning were briefly discussed in this chapter to illustrate the regulatory context of dynamic and fast-changing international tax law. Despite the fact that concepts such as fair share or the spirit of the law are often used in tax planning debates or that complex international regulations do not offer much guidance or content for business practices, corporations are expected to react. International corporate tax practice is in desperate need of being subject to ongoing moral reflection, because the existing tax systems do not seem to prevent aggressive tax planning succesfully. Next to legal tax planning, legitimacy is also expected.[661] Thus, companies decide how they interpret the laws. This

[660] See chapter 4, section 3.3.

[661] See also Pfeifer, M. G. and Jin Yoon, S. (2016). The Ethical Limits Of Tax Planning. *Trusts & Trustees* 22 (1), 159-165. p. 165.

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also means that, in theory, corporations have the freedom to interpret tax laws even in a way that their tax planning strategies could be categorized as aggressive tax planning.
Requiring multinationals to take responsibility does not suggest that corporations have to act as ideal or even altruistic corporate citizens. This research focuses foremost on the multinationals that have voluntarily claimed that they take corporate social responsibilities (CSR) seriously. They have, thus, accepted moral responsibility towards society. This research does not go as far as to claim that tax avoidance or aggressive tax planning is immoral (also not saying that it is moral) but it goes without saying that society has a right to call for moral accountability. However, some multinationals engaging in aggressive tax planning practices do not seem to respect that and this is what makes tax avoidance problematic. Engaging in morally questionable tax practices implies that corporations erode their moral obligations to the society in the countries in which they operate.[662]
Naturally, multinationals are economic entities, whose business interests are to reduce costs and increase profits. It is important to have a balanced view and understand that tax planning, as well as tax legislation, require balancing conflicting interests. This chapter (Pillar I) built a research framework by illustrating tax planning as a question of degrees of moral acceptability. This means that there is no black or white answer to what constitutes as aggressive tax planning and what could be categorized as acceptable. Multinationals that have accepted responsibility towards society should also, thus, include such responsibility in their tax matters. As one of the possible solutions in this case, multinationals could consider tax planning as part of CSR. As the concept of CSR suggests, there is a relationship between business and society. Therefore, it might prove to be useful to test whether and how CSR could help to balance the legal obligations and societal expectations in this complex issue of tax planning.

[662] See also Chang, H.-J. (2011). *23 Things They Don't Tell You About Capitalism*. London: Penguin books. p. 81.

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4. CORPORATE SOCIAL RESPONSIBILITY AND ITS APPLICATION TO TAX

4.1. Introduction

Corporate social responsibility and sustainability[663] are terms that nowadays belong to the every-day business world. Many multinationals claim to have integrated social responsibility strategies in their activities. However, it is not always entirely self-evident what exactly is meant under such corporate responsibilities and whether companies are actually engaging in CSR or whether they just use it to build a better reputation. Some multinationals that claim to endorse CSR (and are even used as positive examples in business ethics books or reports[664]) use complex aggressive tax planning schemes to minimize their tax burden. For instance, Starbucks – an example that I have used through this study – states on its webpage that it is a socially responsible company: "We have always believed Starbucks can – and should — have a positive impact on the communities we serve."[665] Starbucks' business practices allegedly respect human rights, environment, contribute to society, and aim to constantly develop in terms of CSR.[666] Moreover, Starbucks is also claimed to be one of the most ethical companies in the world.[667] Nevertheless, at the same time, Starbucks has been heavily criticized about its tax planning practices.[668]

Multinationals that claim to be socially responsible but at the same time avoid paying taxes raise questions related to the moral responsibilities of corporations. It is not yet commonly accepted whether corporate tax planning practices should form a part of a corporations' responsibilities towards society or not.[669] However, there is growing interest in this matter.[670] As shown in the previous chapter of this research, taxes are important contributions towards society, which is grounds to consider paying taxes is a part of corporate social responsibilities. However, it is not entirely clear what kinds of responsibilities corporations have towards society and how to ensure that they meet those responsibilities. In general, in order to hold corporations accountable for their actions, three solutions are suggested: market competition, legal sanctions, and CSR.[671] Market competition should address economic issues, and legal sanctions protect parties from abuse and remove restrictions on factors that are necessary for perfect competition. CSR highlights moral concerns of the society in situations where other solutions fall short.[672] Having said that, CSR is a

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[663] Sustainable development is according to the Brundtland Commission "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." (United Nations. (1987). *Our Common Future: Report of the World Commission on Environment and Development.* Retrieved from: https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf (accessed 14.11.2019). In the context of this research *sustainability* refers to long-term socially responsible behavior. In the context of good tax governance (chapter 6) it means, thus, that good tax governance is excercised in long-term perspective.

[664] See e.g. IKEA in Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 184; Starbucks in Morsing, M. (2017). CSR Communication: What Is It? Why Is It Important? In Rasche, A. et al. (Eds.), *Corporate Social Responsibility: Strategy, Communication, Governance* (pp. 281-306). Cambridge: Cambridge University Press. CSR Communication: What Is It? Why Is It Important? In Rasche, A. et al. (Eds.). *Corporate Social Responsibility: Strategy, Communication, Governance* (pp. 281-306). Cambridge University Press, Cambridge. p. 288; Apple in Greenpeace (2017, October 17). Guide to Greener Electronics 2017.

[665] Starbucks website: http://www.starbucks.com/responsibility (accessed 03.03.2019).

[666] Starbucks website: http://www.starbucks.com/responsibility (accessed 03.03.2019).

[667] See Etisphere: The World's Most Ethical Companies 2018.

[668] Guardian, the (2012, October 17). Starbucks Tax Avoidance: HMRC to Face Parliamentary Committees. *The Guardian* (online).

[669] See e.g. discussion in chapter 4, section 5. See also: Schuil, G. et al. (2014). *Good Tax Governance in Transition: Transcending the Tax Debate to CSR.* Report coordinated by the Dutch Association of Investors for Sustainable Development (VBDO) with contributions from Oikos and PwC: "of the sixty-nine companies included in the VBDO review, only four (6%) companies specify tax as a CSR issue. Looking at the extensive debate on tax we have witnessed during recent years, this number indicates that this discussion not yet reflects a real change in the mind-set of companies when it comes to tax." (p. 19). However, four years later this was 71%, according to the Tax Transparency Benchmark 2018 (p. 35).

[670] For example, CSR scholars also start to use tax avoidance as a negative example with regard to corporate social responsibilities. See e.g. Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 52. Earlier CSR books, in general, have not really focused on tax planning in this context.

[671] See more Friedman, A. L. and Miles, S. (2006). *Stakeholders: Theory and Practice.* Oxford: Oxford University Press. p. 20.

[672] See e.g. Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press; Scherer, A. G. and Palazzo, G. (2008). Globalization and Corporate Social Responsibility. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 413-431). New York: Oxford University Press; Friedman, A. L. and Miles, S. (2006). *Stakeholders: Theory and Practice.* Oxford: Oxford University Press. pp. 20-22.

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essentially contested concept.[673] Thus, it can mean something different to everybody and can therefore have various definitions depending on the context.[674] Mandatory public disclosure rules enable a basis for information that is necessary for various stakeholders to hold corporations accountable based on these three named solutions.

In order to understand the extent of corporate moral responsibilities beyond profit maximization, a discussion of the theoretical framework of CSR is necessary. Having said that, there is quite a range of branches of CSR and it is not the aim of this research to provide a comprehensive literature review in this area. Therefore, this chapter focuses on the expectations on corporations beyond the strict legal obligations. Whether corporate tax practices should be considered under CSR is a question that has received much attention in the last years.[675] For instance, there is increasing (scholarly) attention on the specific relationship between tax planning and morality[676] and tax planning in the light of CSR.[677] However, since both taxation and CSR are complicated and nuanced fields in academic research as well as for business practice, existing works trying to combine those two usually do not pay sufficient attention to the complexity and the nuances of terms used in both fields. For instance, as discussed in the previous chapter, the existing literature in general does not provide a coherent definition of tax avoidance nor aggressive tax planning, which is confusing. Also, the definitions and theoretical framework of CSR used in the context of taxation fall short; tax professionals often use the concept of CSR too simplistically. Non-tax experts make the same mistake the other way around. In order not to replicate such flaws in this research, this chapter will dive deeper into the theory and practice of CSR before analyzing whether, why, and how tax planning and CSR fit together. Therefore, the objective of this chapter is to explore the expectations (moral and legal) on multinationals with regard to CSR and whether and how multinationals (are able to) respond to these expectations. It will be explored what CSR means, how it has evolved, and how it is enforced in practice.

This chapter is structured as follows. First, the underlying reasons for CSR development from practice will be explored briefly (section 4.2). Next, section 4.3 analyzes the extent of CSR more closely. It will be explained that CSR entails going beyond mere compliance with the law. As also explained in the previous chapter,[678] it is difficult to agree upon what an ideal good corporate citizen should do; it is, therefore, reasonable to start from the other end. Therefore, in section 4.3 of this chapter the counterpart of CSR – corporate social *ir*responsibility – will also be introduced. Further, in section 4.4, the challenges and limitations of CSR are discussed. It willbe explained, for example, that corporations have to manage the conflicting interests of various stakeholders with regard to

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[673] See more about the notion of 'essentially contested concept': Garver, E. (1978). Rhetoric and Essentially Contested Arguments. *Philosophy & Rhetoric* 11 (3), 156-172. See more about CSR as an essentially contested concept e.g.: Crane, A. et al. (2008). The Corporate Social Responsibility Agenda. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 3-15). Oxford: Oxford University Press. p. 5.

[674] For an overview of the term 'Corporate Social Responsibility', see Carroll, A. B. (2008). A History of Corporate Social Responsibility: Concepts and Practices. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 19-46). Oxford: Oxford University Press; Benn, S. and Bolton, D. (2011). *Key Concepts in Corporate Social Responsibility*. London: Sage Publications. pp. 56-63; Carroll, A. B. (1999). Corporate Social Responsibility: Evolution of a Definitional Construct. *Business & Society* 38 (3), 268-295; Williams, C. A. and Aguilera, R. V. (2008). Corporate Social Responsibility in a Comparative Perspective. In Crane, A. et al. (Eds.). *The Oxford Handbook of Corporate Social Responsibility* (pp. 452-473). Oxford: Oxford University Press; Dahlsrud, A. (2008). How Corporate Social Responsibility is Defined: an Analysis of 37 Definitions. *Corporate Social Responsibility and Environmental Management* 15 (1), 1-13; Votaw, D. (1972). Genius Became Rare: A Comment on the Doctrine of Social Responsibility Pt 1. *California Management Review* 15(2), 25–31. p. 25.

[675] See e.g. Schuil, G., et al. (2014). *Good Tax Governance in Transition: Transcending the Tax Debate to CSR*. Report coordinated by the Dutch Association of Investors for Sustainable Development (VBDO) with contributions from Oikos and PwC.

[676] See e.g. Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250; Happé, R. (2015). Ethics and International Tax Planning. In Russo, R. (Ed.), *Tax Assurance* (pp. 49-71). Deventer: Wolters Kluwer.

[677] See e.g. Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press; Avi-Yonah, R. S. (2008). Corporate Social Responsibility and Strategic Tax Behaviour. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 183-198). Berlin / Heidelberg: Springer-Verlag; Avi-Yonah, R. S. (2014). Just Say No: Corporate Taxation and Corporate Social Responsibility. *University of Michigan Public Law Research Paper No. 402; University of Michigan Law & Econ Research Paper No. 14-010*; Cerioni, L. (2014). International Tax Planning and Corporate Social Responsibility (CSR): Crucial Issues and a Proposed "Assessment" in the European Union Context. *European Business Law Review* 25 (6), 845-875; Panayi, C. H. J. I. (2015). Is Aggressive Tax Planning Socially Irresponsible? Intertax 43 (10), 544-558; Ylönen, M. and Laine, M. (2015). For Logistical Reasons Only? A Case Study of Tax Planning and Corporate Social Responsibility Reporting. *Critical Perspectives on Accounting* 33, 5-23; Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88.

[678] Chapter 3, section 3.

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CSR. As a result of many conflicting interests, corporations can have various reasons to engage in CSR. In section 4.5, CSR will be connected to tax planning. The last section draws conclusions for this chapter.

4.2. CSR as a response to amoral business

By definition, CSR restricts corporations in their actions from focusing only on raising profits and market share at any cost (for example, at the cost of the welfare of a wider group of stakeholders). CSR, which draws from business ethics for its philosophy,[679] means that, in general, companies take (moral) responsibility for the effect of their actions on society. It is a business strategy that shows the areas in which the company (aims to) step beyond pure compliance with the letter of the law.[680] CSR and ethical business practices are on the agendas of many corporations but they are also relevant for law and policy framing institutions. For example, since the introduction of EU Directive 2006/46/EU in 2006,[681] all listed companies in the EU are obliged to publish their CSR statement. Nevertheless, it is questionable whether these published strategies also contribute to the meaning of a socially responsible company or whether they are simply formalities that can be met by 'ticking the box'.[682]

CSR is a contested concept, it can be understood as legal responsibility or liability, as a responsible behaviour towards the society in an ethical sense, as "'responsible for' in a causal mode," for instance, in form of charitable contribution, as being socially conscious, as "a mere synonym for legitimacy in the context of belonging or being proper or valid", or as a fiduciary duty that sets higher standards on businessmen and so forth.[683] To some, CSR might be an out-dated concept.[684] Nowadays, many alternative theoretical concepts, such as corporate citizenship[685] or sustainability, are used.[686] In theory, there is probably sufficient justification to use such different concepts. In this research, the concept of CSR is nevertheless used as a general term referring to corporate ethical responsibilities, because the concept of CSR is the most used and best-understood term for the wider public. Moreover, for this research, it is not necessary to fill in the details of definitional theories of various terms, because the main focus of this research is on the principal fact that, on moral and societal grounds, the expectations on corporate behaviour go beyond strict compliance with the letter of the law. Thus, the concept of CSR used in this research focuses on the role of multinationals and their relationship with society.

The idea of modern CSR was born after the Great Depression and the Second World War as a rejection of "the devastating consequences of imbalance of corporate power such as environmental degradation, unhealthy and even deadly consumer products, inhumane working conditions, and so on." [687] Certain corporate actions undermined moral values that led to a debate on the

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[679] Goel, M. and Ramanathanb, P. E. (2014). Business Ethics and Corporate Social Responsibility – Is there a Dividing Line? *Procedia Economics and Finance* 11, 49-59. p. 50.

[680] See e.g. McBarnet, D. (2007). Corporate Social Responsibility beyond Law, Through Law, for Law: the New Corporate Accountability. In McBarnet, D. et al. (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (pp. 9-56). Cambridge: Cambridge University Press. pp. 48-50.

[681] European Parliament. (2006). Directive 2006/46/EC: Amending Council Directives 78/660/EEC on the Annual Accounts of Certain Types of Companies, 83/349/EEC on Consolidated Accounts, 86/635/EEC on the Annual Accounts and Consolidated Accounts of Banks and other Financial Institutions and 91/674/EEC on the Annual Accounts and Consolidated Accounts of Insurance Undertakings.

[682] See e.g. Goel, M. and Ramanathanb, P. E. (2014). Business Ethics and Corporate Social Responsibility – Is there a Dividing Line? *Procedia Economics and Finance* 11, 49-59. pp. 53-55.

[683] Votaw, D. (1972). Genius Became Rare: A Comment on the Doctrine of Social Responsibility Pt 1. *California Management Review* 15(2), 25–31. p. 25.

[684] See e.g. Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. p. 12.

[685] "The term corporate citizenship is often used to express the extent to which business strategically meet the economic, legal, ethical, and philanthropic responsibilities placed on them by various stakeholders." Ferrell, O. C. et al. (2017). *Business Ethics: Ethical Decision Making and Cases* (11th Ed.). Boston: Engage Learning. p. 37. Referring to: Maignan, I. et al. (1999). Corporate Citizenship: Cultural Antecedents and Business Benefits. *Journal of Academy of Marketing Science* 27 (4), 455-469. p. 457.)

Moon et al., for instance, describe corporate lobbying as a process of citizenship. See Moon, J. et al. (2008). Corporate Power and Responsibility: A Citizenship Perspective. In Conill, J. et al. (Eds.), *Corporate Citizenship, Contractrianism and Ethical Theory: On Philsophical Foundations of Business Ethics.* Farnham, England; Burlington, VT: Ashgate. pp. 16-20.

[686] See e.g. Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. pp. 12-13.

[687] Friedman, A. L. and Miles, S. (2006). *Stakeholders: Theory and Practice.* Oxford: Oxford University Press. p. 21, they are referring to Logsdon, J. M. and Wood, D. J. (2002). Business Citizenship from Domestic to Global Level of Analysis. *Business Ethics Quarterly* 12 (2), 155-

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responsibilities that could reasonably be expected from business entities.[688] Consequently, CSR was mainly related to human rights and environment.[689] For instance, the discussions concerning the responsibilities of corporations in relation to human rights became prominent in the 1990s when big oil, gas, and mining companies expanded into less developed areas, and the production of consumer goods in less developed areas took place under poor working conditions.[690] One of the seminal cases that concentrated attention on corporate responsibilities with regard to human rights was the Union Carbide case in 1984 when the Bhopal chemical gas leak killed thousands of people in India. It was one of the world's first industrial disasters.[691] At this point, corporate action, or rather a lack of care, resulted in a violation of the most important human right, the right to life. As a result of this disaster, the "concept of multinational enterprise liability" was developed.[692]

In general, human rights can be considered "relevant to the economic, social and environmental aspects of corporate activity."[693] For example, the economic aspect is related to fair wages for employees, the social aspect is related to non-discrimination, and environmental aspects are related to pollution (e.g. people's right to clean drinking water).[694] Human rights are "those fundamental moral rights of the person that are necessary for a life with human dignity" and are therefore a "means to a greater social end."[695] The universal nature of human rights suggests that the protection of human rights is not solely a task of states[696] but also corporations.[697] The corporate responsibility not to violate human rights is based on various international reports,[698] such as the "Protect, Respect and Remedy" Framework (also called as the Ruggie Report by the name of its author). This Framework, as the name suggests, rests on three pillars. First, the state has a duty to protect people against human rights abuses through appropriate policies, regulation, and judicial processes. Second, corporations have the responsibility to respect human rights; they must act responsibly in order not to infringe the rights of others and, if such harm occurs, it must be addressed. Third, the Framework requires that victims of human rights abuses have better access to effective judicial and non-judicial remedies.[699]

According to Ruggie's Framework, both states and corporations have an important role with regard to ensuring the protection of human rights. Thus, there is a shared responsibility between the states and multinationals: while states have the primary responsibility to ensure the effective (legal) system, the corporations must respect the system and its underlying principles. The reason that multinationals became the central focus of business and human rights concerns was the corporate scope and power that "expanded beyond the reach of effective public governance systems, thereby

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187; Carroll, A. B. (2008). A History of Corporate Social Responsibility: Concepts and Practices. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 19-46). Oxford: Oxford University Press. p. 25.

[688] Lee, M.-D. P. (2008). A Review of the Theories of Corporate Social Responsibility: Its Evolutionary Path and the Road Ahead. *International Journal of Management Reviews* 10 (1), 53-73. p. 57, referring to Bowen, H. (1953). *Social Responsibilities of the Businessman.* New York: Harper and Row; See also Carroll, A. B. (2008). A History of Corporate Social Responsibility: Concepts and Practices. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 19-46). Oxford: Oxford University Press. p. 25.

[689] Arthaud-Day, M. L. (2005). Transnational Corporate Social Responsibility: A Tri-Dimensional approach to International CSR Research. *Business Ethics Quarterly* 15 (1), 1-22. pp. 11-12.

[690] Ruggie, J. G. (2010, September). *The UN "Protect, Respect and Remedy" Framework for Business and Human Rights*. A brief explanation of the Framework by Special Representative Ruggie.

[691] See e.g. BBC News. (2010, June 7). Bhopal Trial: Eight Convicted Over India Gas Disaster. *BBC News (online)*; Business & Human Rights Centre: Business & Human Rights - A Brief Introduction.

[692] Eijsbouts, J. (2011a, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*. Inaugural Lecture, Maastricht University. p. 53.

[693] Australian Human Rights Commission (2008). *Corporate Social Responsibility & Human Rights*.

[694] Australian Human Rights Commission (2008). *Corporate Social Responsibility & Human Rights*.

[695] Forsythe, D. P. (2012). *Human Rights in International Relations* (3rd Ed.). Cambridge: Cambridge University Press. p. 3.

[696] See e.g. Horrigan, B. (2010). *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices across Government, Law and Business*. Cheltenham: Edward Elgar. p. 303.

[697] According to the preamble of the Universal Declaration of Human Rights "every individual and every organ of society" has to promote and respect human rights. See UN. (1948). *The Universal Declaration of Human Right*. Such responsibility nowadays excludes, thus, "no one, no company, no market, no cyberspace." *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F.Supp.2d 289. p. 318, as quoted: Business & Human Rights Centre: Business & Human Rights - A Brief Introduction.

[698] Such as Global Sullivan Principles; Caux Round Table Principles for Business; OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing.

[699] See Ruggie, J. G. (2013). *Just Business: Multinational Corporations and Human Rights*. New York: W. W. Norton & Company; See also Ruggie, J. G. (2010, September). *The UN "Protect, Respect and Remedy" Framework for Business and Human Rights*. A brief explanation of the Framework by Special Representative Ruggie.

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creating permissive environments for wrongful acts by companies." [700] Furthermore, for accountability reasons, Ruggie was convinced that corporations should "know and show" that they are meeting this responsibility. In other words, companies should "become aware of, prevent, and address their adverse human rights impacts." Such "due diligence" is "a statement of commitment to respecting rights and supporting policies" that consists of the assessment of "human rights impacts", integrates "respect for human rights across relevant internal functions and processes" and tracks and communicates performance.[701] Similar expectations of transparency by corporations as well as shared responsibility of various actors will also be discussed with regard to taxation in chapter 6 of this research.[702]

Next to human rights, CSR is often also linked to the effect of corporate actions on the environment – most importantly because of rapid climate change. A radical change in business practices that harms the environment was needed. Corporations can have two types of effects on the environment – extraction and pollution – both of which concern using up natural resources; pollution can destroy air and water and extraction exhausts minerals.[703] Environmental regulations respond to such corporate actions, especially in developed countries, but many corporations "in dirty sectors" respond to this by moving to "poor countries with low environmental regulation."[704] In other words, corporations search for possibilities to reduce their production costs (as a result of environmental regulations), even if it would be at the cost of environmental harm (but then in another state). Corporate effects on the environment are, however, general and affect everybody, regardless of the location of the corporate actions. Therefore, migration to other countries to reduce the costs at the cost of the effects on the environment is considered morally irresponsible.[705] Corporations that avoid environmental regulation, but at the same time present themselves as socially responsible, are sometimes accused of 'greenwashing', which means the manipulation of the image of the company by the media and advertising industry. Companies engaged in greenwashing are publicly claiming that they undertake good 'green' practices but they hide the additional negative effects.[706] Such a situation where corporations behave apparently (legally) correctly while still having negative effects on society can be compared to aggressive tax planning.[707]

To summarize, various examples from practice show that the concept of CSR has developed as a response to corporate activities that reduce corporate moral responsibilities towards society. Multinationals are in a position to harm the (quality of) human life regardless of regulations. In order to restrict corporations to focus on financial returns at any costs, CSR is aimed at keeping corporations accountable in a moral sense, since they have moral responsibilities towards society. The bottom line of such responsibility is that not everything that is (legally) possible should be done. Therefore, CSR expects corporations to go beyond pure compliance with the law.

4.3. CSR as moral responsibilities to take distance from irresponsible behaviour

Corporations have first and foremost economic and legal responsibilities. CSR begins where the law ends, and where the company goes beyond pure compliance with the letter of the law.[708] CSR concerns responsibilities that corporations have with regard to certain moral values and legal shortcomings; it concerns "making positive contribution to society above and beyond that which

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[700] Ruggie, J. G. (2013). *Just Business: Multinational Corporations and Human Rights*. New York: W. W. Norton & Company. p. xxiii.

[701] Ruggie, J. G. (2010, September). *The UN "Protect, Respect and Remedy" Framework for Business and Human Rights*. A brief explanation of the Framework by Special Representative Ruggie; Ruggie, J. G. (2013). *Just Business: Multinational Corporations and Human Rights*. New York: W. W. Norton & Company. p. 90ff.

[702] See e.g. chapter 6, section 3.

[703] Chamberlain, N. W. (1973). *The Limits of Corporate Responsibility*. New York: Basic Books New York. p. 32.

[704] Dam, L. and Scholtens, B. (2008). Environmental Regulation and MNEs Location: Does CSR Matter? *Ecological Economics* 67 (1), 55-65. p. 56. See also Chamberlain, N. W. (1973). *The Limits of Corporate Responsibility*. New York: Basic Books New York. pp. 40-46.

[705] Especially in light of the Paris Climate Agreement corporations cannot escape their crucial role in protecting the environment.

[706] See Benn, S. and Bolton, D. (2011). *Key Concepts in Corporate Social Responsibility*. London: Sage Publications. pp. 115-119.

[707] See chapter 3, section 3.3.

[708] Carroll, A. B. (1991). The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders. *Business Horizons* 34 (4), 39-48; McBarnet, D. (2007). Corporate Social Responsibility beyond Law, Through Law, for Law: the New Corporate Accountability. In McBarnet, D. et al. (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (pp. 9-56). Cambridge: Cambridge University Press.

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constitutes their legal obligations."[709] According to Bowen, social responsibility "refers to the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society."[710] Most of the CSR definitions include the idea that businesses "have obligations toward society beyond their economic obligations toward shareholders"[711] and that "actions and decisions by a company do not only concern its own interests but also those of society as a whole, or in economic terms: companies should internalise negative external effects."[712] The underlying reasoning behind CSR is that corporations should "serve society not only by creating wealth, but also by contributing to social needs and satisfying social expectations towards business" because "society gives license to business to operate."[713]

Consequently, CSR is often also conceptualized as the Triple Bottom Line: People, Planet, Profit.[714] The aim of this approach is to protect the long-term sustainability "of systems according to environmental, economic, and social considerations."[715] The key issue of the triple bottom line "in the social perspective on sustainability is that of *social justice*."[716] Social justice refers to a fair relationship between society and its members. This can be linked to distributive justice that is upheld by taxation, as discussed in the previous chapter of this research.[717] The corporate responsibility for society and social justice suggests a relationship between businesses and society, and moral behaviour. CSR means that companies take responsibility for the effects of their actions on society. In case businesses do not use their corporate power responsibly,[718] they lose their social license to operate.[719]

Having said that, it is not very self-evident how corporations should (accept and) carry out their social responsibilities.[720] Despite the conceptual vagueness, there are some theoretical frameworks that help to understand the essence of CSR for the purposes of this research. In the following sub-sections, the CSR Pyramid developed by Archie B. Carroll will be introduced and, based on that, the expectation of going beyond the law will be explained. Also, socially irresponsible corporate behaviour will be addressed.

4.3.1. Theoretical framework of CSR

To understand the substance of corporate responsibilities and the expectations that corporations face, Carroll's CSR Pyramid, developed in 1991, is a helpful tool. Carroll is often considered to be one of the most important academics among the CSR scholars. According to him, CSR consists of four layers: economic, legal, ethical, and philanthropic responsibilities. Based on that, Carroll

[709] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. pp. 12-13.
[710] Bowen, H. (1953). *Social Responsibilities of the Businessman.* New York: Harper and Row. p. 6.
[711] Schwartz, M. S. (2011). *Corporate Social Responsibility: An Ethical Approach*. Peterborough: Broadview Press. p. 19.
[712] Schreck, P. (2009). *The Business Case for Corporate Social Responsibility*. Heidelberg: Physica-Verlag. p. 10.
[713] Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 49. See also chapter 2, sections 3-5.
[714] See e.g. Eijsbouts, J. (2011a, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*. Inaugural Lecture, Maastricht University.
[715] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 33; see also Eijsbouts, J. (2011a, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*. Inaugural Lecture, Maastricht University; see also Valente, M. (2017). Corporate Responsibility Strategies for Sustainability. In Rasche, A. et al. (Eds.), *Corporate Social Responsibility: Strategy, Communication, Governance* (pp. 86-109). Cambridge: Cambridge University Press. p. 87.
[716] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 35.
[717] See chapter 3, section 2.1.
[718] See chapter 2, section 3-5.
[719] Davis, K. (1973). The Case For and Against Business Assumption of Social Responsibilities. *Academy Management Journal* 16 (2), 312-322. p. 314; Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 52. On corporate social performance, see also Sethi, S. P. (1975). Dimensions of Corporate Social Performance: An Analytic Framework. *California management Review* 17 (3), 58-64; Ackerman, R. W. (1973). How Companies Respond to Social Demands. *Harvard University Review* 51 (4), 88-98; Ackerman, R. W. and Bauer, R. (1976). *Corporate Social Responsiveness.* Reston: Reston Publishing; Wood, D. J. (1991b). Toward Improving Corporate Social Performance. *Business Horizons* 34 (4), 66-73. See also chapter 2, section 3.
[720] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. pp. 13-14.

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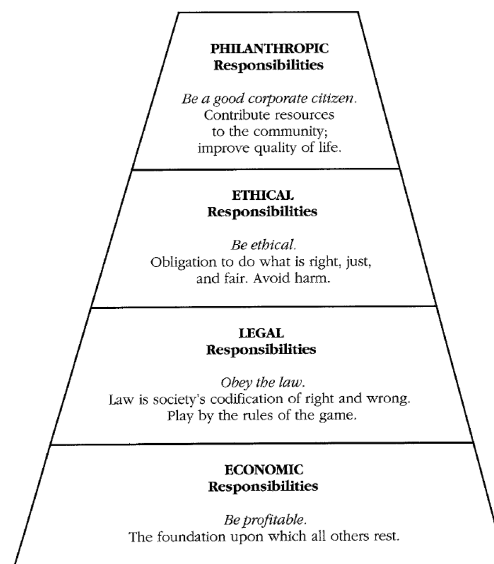
developed a corporate social responsibility pyramid that describes these four building blocks of CSR:[721]



As explained earlier in this research, two basic premises of CSR are that corporations are part of a social contract and have moral agency.[722] This is also Carroll's starting point,[723] which enforces the expectation to pursue corporate economic missions within the framework of the law. Carroll places the ethical and philanthropic layers above the economic and legal layers. Ethical responsibilities of a company go beyond the law and profit making and embody those standards, norms, or expectations that reflect a concern for what consumers, employees, shareholders, and the community regard as fair, just, or moral. Carroll adds that ethical responsibilities are seen as the obligation to do what is right, just and fair. Ethical responsibilities in the context of Carroll's work respond to "the kinds of behaviors and ethical norms that society expects business to follow."[724] This relates back to the moral element of taxation that was discussed in the previous chapter of this research.[725] Interestingly, recently the CSR scholars have also started to use corporate tax planning practices as an illustration of corporate ethical responsibilities where corporations are expected to "do what is right, just, and fair even when they are not compelled to do so by the legal framework."[726] The philanthropic layer of Carroll's pyramid encompasses those corporate actions that are in response to society's expectations of a good corporate citizen, for example by actively engaging in activities or programs to promote human welfare or goodwill.[727] The philanthropic responsibilities are merely desired and not required from a CSR corporation.[728] Some authors consider philanthropy as a marketing investment.[729]

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[721] Carroll, A. B. (1991). The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders. *Business Horizons* 34 (4), 39-48.
[722] Wartick, S. L. and Cochran, P. L. (1985). The Evolution of the Corporate Social Performance Model. *Academy of Management Review* 10 (4), 758-769. See also chapter 2, section 7.
[723] Carroll, A. B. (1991). The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders. *Business Horizons* 34 (4), 39-48. p. 40. This is a Hobbesian view. See e.g.: Rayman-Bacchus, L. and Crowther, D. (Eds.). (2004). *Perspectives on Corporate Social Responsibility*. Abington: Taylor and Francis. pp. 3-5. See also chapter 2, section 7.
[724] Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. pp. 54-55. See also Carroll, A. B. (1979). A Three-Dimensional Conceptual Model of Corporate Performance. *The Academy of Management Review* 4 (4), 497-505. p. 500; Carroll, A. B. (1999). Corporate Social Responsibility: Evolution of a Definitional Construct. *Business & Society* 38 (3), 268-295. p. 283.
[725] See chapter 3, section 2; chapter 6, section 2.2.
[726] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 52.
[727] Carroll, A. B. (1991). The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders. *Business Horizons* 34 (4), 39-48. pp. 40-43.
[728] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 52.
[729] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business.* New York: Penguin. p. 72.

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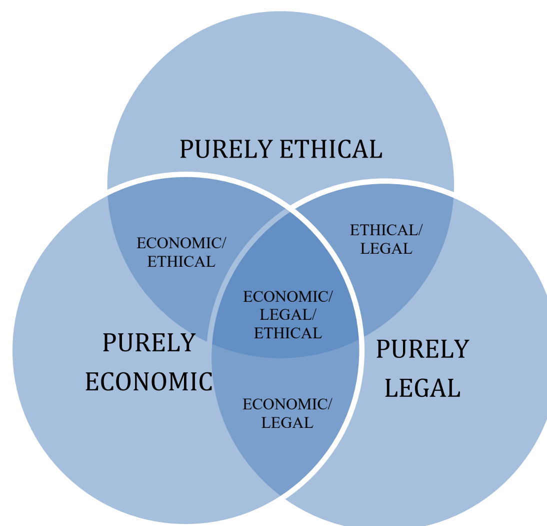
Carroll later added that nowadays many people consider that, in his theory, "the economic component is what the business firm *does for itself* and the legal, ethical, and discretionary (or philanthropic) components are what business *does for others*."[730] Nevertheless, "while this distinction is attractive", he believes that "economic viability is something business does for society as well, in perpetuating the business system, though we seldom look at it in this way."[731] This, Carroll claims, was the initial reason why economic responsibility was included in his CSR theory. It can be agreed with the view that economic viability is something that businesses do in society as well because, by increasing its economic value, a corporation can also improve their services or goods that they produce for society. Furthermore, accepting economic responsibility as a part of CSR also fits well with corporate tax planning: it also usually has economic reasoning behind it and, as explained in the previous chapter, of this research, tax planning is an acceptable business practice.[732]

It has to be noted that the CSR Pyramid of Carroll was later elaborated upon by Carroll and Schwartz.[733] The core elements remain the same but, based on further research, Carroll and Schwartz illustrated the layers as a Venn diagram. Even though Carroll's CSR Pyramid is still actual and relevant, the Venn diagram responded to critics who objected to the pyramid framework as it suggests a hierarchy of CSR layers, which has been found out not too be the case, and because it does not capture the overlapping nature of CSR domains.[734] Moreover, in the form of Venn diagram, the separate philanthropy domain was left out due to the overlap with other (mainly economic and ethical) domains.[735] As a result, Carroll's CSR theory (1991) was adjusted to the Three-Domain Model of CSR:[736]



Both the Pyramid and Venn Diagram are important theoretical frameworks for CSR. However, for the general picture, which is the purpose of this research, the Pyramid theory is the most suitable. Carroll's CSR Pyramid could be translated into the corporate relationship with different stakeholders and society. The economic layer involves the profit maximizing relationship with

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Moreover, in some cases, in the context of tax planning, the motives behind corporate philanthropy can be questionable because of its beneficial tax treatments it could be categorized as a part of tax avoidance. This, nevertheless, is a topic for another research.

[730] Carroll, A. B. (2008). A History of Corporate Social Responsibility: Concepts and Practices. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 19-46). Oxford: Oxford University Press. pp. 33-34.

[731] Carroll, A. B. (2008). A History of Corporate Social Responsibility: Concepts and Practices. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 19-46). Oxford: Oxford University Press. pp. 33-34.

[732] See chapter 3, section 3.1.

[733] Schwartz, M. S. and Carroll, A. B. (2003). Corporate Social Responsibility: A Three-Domain Approach. *Business Ethics Quarterly* 13 (4), 503-530.

[734] Schwartz, M. S. and Carroll, A. B. (2003). Corporate Social Responsibility: A Three-Domain Approach. *Business Ethics Quarterly* 13 (4), 503-530. p. 505.

[735] Schwartz, M. S. and Carroll, A. B. (2003). Corporate Social Responsibility: A Three-Domain Approach. *Business Ethics Quarterly* 13 (4), 503-530. p. 505.

[736] Schwartz, M. S. and Carroll, A. B. (2003). Corporate Social Responsibility: A Three-Domain Approach. *Business Ethics Quarterly* 13 (4), 503-530. p. 509.

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shareholders. Naturally, a company can have many shareholders with different interests; for instance, some shareholders are interested in long-term value maximization, while others are interested in short-term vallue.[737] How these interests should be balanced depends on the management board and the business strategy. The legal layer of the CSR Pyramid represents the corporate relationship with the state and tax authorities by complying with the laws. Ethical and philanthropic layers concern a moral relationship with society at large. Of course, stakeholders can also have different expectations, since shareholders can also be considered stakeholders.

Engaging in CSR, in my opinion, can be driven by intrinsic and extrinsic motivations.[738] Intrinsic motives are a characteristic of an integrity-based approach, where corporations are driven by morality next to economic performance (profits) and compliance with the law. Such intrinsic motivation rests on self-regulation "in accordance with a set of guiding principles."[739] Intrinsic motivation is directly connected to morality, to an internal drive to do what is right, just and fair. Corporations are expected to engage in a social and ethical manner of doing business, "being responsible is doing the right thing."[740] This reflects the intrinsic motivation of CSR that has been related to terms such as 'values of our society', 'social expectation', 'performance expectation'.[741] The main focus of this approach is on whether companies behave respectfully in relation to all people (for instance, by respecting human rights).[742] In the early writings, CSR was considered in the context of "the problems that arise when the corporate enterprise casts its shadow on the social scene, and of the ethical principles that ought to govern the relationships between the corporation and society."[743] In my opinion, in the Venn Diagram, for instance, intrinsic motivation is illustrated in the centre where it considers different interests and results in balanced business decisions and implies, therefore, corporate self-reflection and evaluation of its actions vis-à-vis society.

The extrinsic motivation, on the other hand, indicates that a corporation behaves in a certain way because of some (external) reward, coercion or a desire to avoid penalties or a bad reputation. In terms of extrinsic motivation, CSR serves the corporate business strategy.[744] This would be the instrumental use of CSR, which focuses on "the application of CSR as a means of wealth creation or maximizing shareholder value through seeking competitive advantage."[745] Some would call it the business case for CSR. In the case of external motivation, the societal acceptance of a company's ethical behaviour is exclusively measured by the lack of public resistance.[746] Here, "status" or "good reputation" is a matter of public relations and is thus not guided by an intrinsic

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[737] See more on different shareholders in chapter 5, section 3.

[738] Du, S. et al. (2007). Reaping Relational Rewards from Corporate Social Responsibility: The Role of Competitive Positioning. *International Journal of Research in Marketing* 24 (3), 224-241. p. 226; Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88. Compare the view of CSR as a moral obligation towards society and stakeholders in coontrast to the view of CSR as a pure marketing tool. See e.g. Salazar, J. and Husted, B. W. (2008). Principals and Agents: Further Thoughts on the Friedmanite Critique of Corporate Social Responsibility. In Crane, A. et al. (Eds.). *The Oxford Handbook of Corporate Social Responsibility* (pp. 137-155). Oxford: Oxford University Press. pp. 147-150; Garriga, E. and Melé, D. (2004). Corporate Social Responsibility Theories: Mapping the Territory. *Journal of Business Ethics* 53 (1-2), 51-71; Benn, S. and Bolton, D. (2011). *Key Concepts in Corporate Social Responsibility*. London: Sage Publications. pp. 14-17, 56-62, 112-113, 115-118. See also Gribnau, J. L. M. et al. (2016). Good Tax Governance and Transparency: A Matter of Reputation or Ethical Motivation? *Derivatives and Financial Instruments* 18 (1), 3-24.

[739] Paine, L. S. (1994). Managing Organizational Integrity. *Harvard Business Review* 7 (2), 106-117. p. 111.

[740] Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 50.

[741] See e.g. Bowen, H. (1953). *Social Responsibilities of the Businessman.* New York: Harper and Row; Fredercik, W. C. (1960). The Growing Concern Over Business Responsibility. *California Management Review* 2 (4), 54-61. p. 60; Sethi, S. P. (1975). Dimensions of Corporate Social Performance: An Analytic Framework. *California management Review* 17 (3), 58-64. p. 62. Carroll, A. B. (1979). A Three-Dimensional Conceptual Model of Corporate Performance. *The Academy of Management Review* 4 (4), 497-505.

[742] Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. pp. 54-55.

[743] Eells, R. et al. (1961). *Conceptual Foundations of Business: An Outline of Major Ideas Sustaining Business Enterprise in the Western World.* R.D. Irwin: Homewood. pp. 457-458.

[744] See also: Rasche, A. et al. (2017). *Corporate Social Responsibility: Strategy, Communication, Governance.* Cambridge: Cambridge University Press. p. 29.

[745] Benn, S. and Bolton, D. (2011). *Key Concepts in Corporate Social Responsibility*. London: Sage Publications. p. 57. See more on using CSR as a marketing tool: pp. 112-113; pp. 115-118.

[746] See also Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88.

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drive to be open and transparent.[747] CSR actions can be attributed to both intrinsic and extrinsic motives at the same time.[748] However, if an extrinsic motivation to endorse CSR prevails, the firm's responsible behaviour is not driven by an internal wish to do what is right, just and fair. Absent an intrinsic motivation, a CSR approach is seen as an instrument to purely enhance the firm's reputation (which, in turn, will often be an instrument to achieve something else, for example an increase in market value),[749] and not as a by-product of responsible behaviour.[750] In such cases, CSR is a marketing tool to gain social acceptance.[751] From a business-perspective such strategic approach to CSR is understandable as it is a part of corporate strategy. However, such behaviour can also be compared to corporate hypocrisy and paying lip-service to CSR in the form of "window dressing" or "green washing". Extrinsic motivation is often driven by preserving or enhancing the corporation's reputation to increase shareholders value or receive public praise.[752] When the extrinsic motivation prevails, the firm's responsible behaviour is not driven by an internal wish to do what is right, just and fair. Consequently, the company operates within the economic or economic/legal layers, leaving out the ethical motivation and in such cases, it can be questionable whether corporate boards are willing to truly improve their business practices for the purposes of moral responsibility.

Also the G20/OECD Principles of Corporate Governance seem to implicitly accept the intrinsic and extrinsic motivations of CSR, stating that "even in areas where stakeholder interests are not legislated, many firms make additional commitments to stakeholders, and concern over corporate reputation and corporate performance often requires the recognition of broader interests."[753] It further adds that "[H]igh ethical standards are in the long term interests of the company as a means to make it credible and trustworthy, not only in day-to-day operations but also with respect to longer term commitments."[754] Absent an intrinsic motivation, a social responsibility approach is seen as a mere instrument to enhance the firm's reputation (which in turn will often be an instrument to achieve some other economic goal, for example an increase in market value[755]), and not as a by-product of responsible behaviour.[756] Responsible behaviour means that corporations consider the effects of their actions on society and, where necessary (for instance in case the law leaves much room for interpretation), do not act merely in compliance with legal rules but they go a step further. If the corporations are driven by an extrinsic motivation only, they do not reach above the legal layer of Carroll's Pyramid, as their motivation serves economic goals within the (letter of the) law. This suggests that CSR is not about corporate reputation but about changing the mind-set instead.

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[747] Ulrich, P. (2008). *Integrative Economic Ethics: Foundations of a Civilized Market Economy.* Cambridge: Cambridge University Press. p. 400.

[748] Du, S. et al. (2007). Reaping Relational Rewards from Corporate Social Responsibility: The Role of Competitive Positioning. *International Journal of Research in Marketing* 24 (3), 224-241. p. 226.

[749] Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press. p. 384.

[750] Benn, S. and Bolton, D. (2011). *Key Concepts in Corporate Social Responsibility*. London: Sage Publications. pp. 57-58. This may also be labelled as "passive tax responsibility" versus "passive tax responsibility". See e.g. Cerioni, L. (2014). International Tax Planning and Corporate Social Responsibility (CSR): Crucial Issues and a Proposed "Assessment" in the European Union Context. *European Business Law Review* 25 (6), 845-875; Hilling, A. and Ostas, D. T. (2017). *Corporate Taxation and Social Responsibility*. Stockholm: Wolters Kluwer.

[751] Busch, T. and Shepherd, T. (2014). Doing Well By Doing Good? Normative Tensions Underlying Twitter's Corporate Social Responsibility Ethos. *Convergence* 20 (3), 293-315; See also: Arnold, D. G. et al. (2013). *Ethical Theory and Business* (9th edition). Boston: Pearson. p. 51; Carroll, A. B. (1999). Corporate Social Responsibility: Evolution of a Definitional Construct. *Business & Society* 38 (3), 268-295, p. 143; Ulrich, P. (2008). *Integrative Economic Ethics: Foundations of a Civilized Market Economy.* Cambridge: Cambridge University Press. p. 400, p. 427.

[752] Interestingly, Australian empirical research suggests that "shareholders do not send clear messages concerning the level of tax aggressiveness they believe to be acceptable, and do not demonstrate an interest in 'their' company's income tax strategy ex ante"; Lavermicocca, C. and Buchan, J. (2015). Role of Reputational Risk in Tax Decision Making by Large Companies. *eJournal of Tax Research* 13 (1), 5-50. p. 32.

[753] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 34 (section IV).

[754] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 47.

[755] See Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press. p. 384: "the market provides some incentives for corporate responsibility, mostly around reputation, and it also provides a discipline, with constraints on corporate responsibility."

[756] See Benn, S. and Bolton, D. (2011). *Key Concepts in Corporate Social Responsibility*. London: Sage Publications. pp. 57-58. This may also be labelled as 'passive tax responsibility' versus 'passive tax responsibility'; see Cerioni, L. (2014). International Tax Planning and Corporate Social Responsibility (CSR): Crucial Issues and a Proposed "Assessment" in the European Union Context. *European Business Law Review* 25 (6), 845-875. pp. 851-852.

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For instance, 25 years after developing the Triple Bottom Line, Elkington argues that simply implemeting sustainability policies is not enough; it is the mind-set that needs to be changed: "*none* of these sustainability frameworks will be enough, as long as they lack the suitable pace and scale — the necessary radical intent — needed to stop us all overshooting our planetary boundaries."[757]

4.3.2. Going beyond the law

Perfect laws are a utopia, as laws always remain a subject of interpretation.[758] Therefore, in the case of international tax planning, complying with the letter of the law only can lead to very low or zero effective corporate income tax rates. Such a conflict between the letter and the spirit of the law[759] can also be seen as a legal vacuum[760] or accountability vacuum[761] or a grey area of the law.[762] CSR can be seen as a tool that should fill this unclear space, as it expects corporations to act in accordance with certain moral values.[763] Consequently, CSR entails corporate responsibilities towards society beyond the strictly legal requirements. Going beyond indicates taking a step further and providing something in addition to what is mandated by the written law. In the context of this research, this step further means acting ethically, according to (unwritten) moral and social norms underlying the written laws. This is in contrast to legal positivist behaviour that interprets laws at the cost of moral and social norms underlying these written laws.[764]

As also shown in chapter 3.2.3, the spirit or intent of (tax) laws is a hotly debated issue and there is no consensus on its concrete meaning. It is not the aim of this research to prove the legal-positivist perspective wrong. A strong rule of law is a basis not only for taxes[765] but for a stable society in general. The rule of law should provide legal certainty. Nevertheless, the rule of law is not always perfect and thereby not able to regulate all kinds of (corporate) behavior. That applies especially in the context of powerful multinationals.[766] In order to keep their social legitimacy to operate, multinationals are accountable not only based on the rule of law but they also bear moral responsibility towards society.[767] It goes without saying that the perspective of corporate moral responsibility does not replace the law, nor does it give the lawmaker an excuse to lay back and expect society to organize itself based on ethics. In my opinion, CSR is not a tool for states to put pressure on corporations to be compliant with the laws, as, for example, Österman[768] or Freedman[769] seem to suggest. If states wish to change corporate behavior, they have to react by (improving) legislation. CSR is a voluntary tool for corporations to meet their moral responsibilities in addition to their legal ones. Consequently, the debates around distinguishing the letter and the spirit of the law nor the legal-positivist thinking should be considered as hindering factors for the purposes of this research.

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[757] Elkington, J. (2018, June 25). 25 Years ago I Coined the Phrase "Triple Bottom Line." Here's Why it's Time to Rethink it. *Harvard Business Review*.

[758] See also chapter 3, section 2.2.

[759] See also chapter 3, section 2.

[760] Kinley, D. and Tadaki, J. (2004). From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law. *Virginia Journal of International Law* 44 (4), 931-1023. p. 933.

[761] Stephens, B. (2002). The Amorality of Profit: Transnational Corporations and Human Rights. *Berkeley Journal International Law* 20 (1), 45-90. p. 56.

[762] Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press.

[763] Davarnejad, L. (2010). The Impact of Non-State Actors on the International Law Regime of Corporate Social Responsibility: Blessing or Curse? In Ryngaert, C. and Noortmann, M. (Eds.), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (pp. 41-65). Farnham: Ashgate. pp. 41-65.

[764] Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250; Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28.

[765] Österman, R. P. (2018). Perspectives on Corporate Taxation from a Sustainable Business Perspective. In Arvidsson, S. (Ed.) *Challenges in Managing Sustainable Business: Reporting, Taxation, Ethics and Governance* (pp. 371-397). Lund: Palgarve Macmillan. p. 372.

[766] See chapter 2, section 3.

[767] See chapter 2, section 4 and section 7.

[768] Österman, R. P. (2018). Perspectives on Corporate Taxation from a Sustainable Business Perspective. In Arvidsson, S. (Ed.) *Challenges in Managing Sustainable Business: Reporting, Taxation, Ethics and Governance* (pp. 371-397). Lund: Palgarve Macmillan, S. (Ed.) *Challenges in Managing Sustainable Business: Reporting, Taxation, Ethics and Governance* (pp. 371-397). Lund: Palgarve Macmillan. p. 372.

[769] Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press. p. 382.

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Going beyond strict compliance with the law using CSR is a response to the legal vacuum. With regard to corporate tax planning, by simply fulfilling legal obligations based on a strict interpretation of the written legal rules – strict compliance with the letter of the law only – does not seem to comply with the corporate moral responsibilities towards society, as shown previously.[770] In line with Carroll's Pyramid, this means that corporations should fulfil their legal obligations and also their moral obilgations. Going beyond the law with regard to CSR does not expect a multinational to take over the role of the lawmaker and try to guess the possible intentions behind the law-making process; it rather expects ethical decision making when facing (moral) choices that, for instance, exist due to the imperfections in the legal system.[771]

To understand CSR, Blowfield and Murray suggest three possible general views. The first is a values-based view that is driven by intrinsic motivation to do good, as explained in the previous section. According to this view, "companies, like people, have values that guide their interactions with other society members."[772] This perspective is "concerned with the values of business as a whole and how a company integrates values, such as honesty, trust, integrity, respect, and fairness, into its policies, practices, and decision making."[773] This values-based view is given a more concrete form in the second view that Blowfield and Murray distinguish. This second perspective sees corporate responsibility as a relationship and interaction between business and society. The primary concern of this second view is to regulate and motivate corporations to contribute more to public goods and services by showing that corporations have a broader purpose than simply generating profit. Blowfield and Murray place the Carroll Pyramid framework within this relationship between business and society as an illustration to how business can apply the values-based view and manage its responsibilities towards society.[774] The third view focuses on "the specific areas in which business is now expected to take action",[775] such as environment, animal rights, or corruption.[776] The underlying idea of all of these views that Blowfield and Murray distinguish seems to be the thought that business should contribute to the common public good and be concerned with the underlying norms and values of society.[777] Therefore, for this research, it is not necessary to go into further detail on these views. This research considers CSR as a combination of these three views, which all implicitly expect corporations to go beyond the (letter of the) law by upholding societal and moral values.

In chapter 6, some practical suggestions will be made with regard to what multinationals could do in order to go beyond the law in the context of tax planning. For now, in order to better understand the moral responsibilities that CSR corporations accept beyond the (letter of the) law, it is useful to know what can be considered as irresponsible. Nobody is an ideal citizen and, therefore, also no corporation should be expected to act as an ideal corporate citizen. Having said that, socially responsible coporations should distance themselves from irresponsible behaviour.

4.3.3. Corporate social irresponsibility

While it is difficult if not impossible to decide upon the ceiling of CSR, it is possible to talk about what CSR is not: corporate social *ir*responsibility (CSI). The concept of corporate social irresponsibility is equally important as CSR – being its inseparable counterpart. Neglecting the importance of the CSI concept accounts for an incomplete conceptualization of CSR.[778] As shown above, CSR businesses voluntarily accept the obligation to go beyond compliance with legal requirements. However, some practitioners might be sceptical about CSR, as it is not very clear

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[770] Chapter 3.
[771] Ethical decision making, see chapter 6; morality see chapter 2, section 7 and chapter 3, section 3.
[772] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. pp. 16-18.
[773] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. p. 18.
[774] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. pp. 20- 21.
[775] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. pp. 16-17.
[776] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. pp. 24-36.
[777] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. p. 20.
[778] Tench, R. et al. (2012). The Challenging Concept of Corporate Social Irresponsibility: An Introduction. In Tench, R. et al. (Eds.), *Critical Studies on Corporate Responsibility, Governance and Sustainability*, vol. 4 (pp. 3-20). Bingley: Emerald. p. 19.

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what is meant with acting over and above legal requirements. It does not always provide clear-cut criteria and effective guidance. For instance, it is questionable whether it entails that CSR companies should behave like ideal (corporate) citizens or whether corporations should behave better, according to higher moral standards, than the average citizen. Ideals are the subject of much debate and the same is true for the means (strategy) to realize ideals: consensus is often hard to reach. Thus, the aspirational idea of accepting ethical obligations beyond compliance with the law is discretionary and can be quite abstract. Lacking clarity, defending and prescribing behaviour beyond compliance with the law to inspire corporate action will probably not be very convincing and effective for business practice. Furthermore, for instance with regard to tax planning, corporations enjoy the right to choose the most favourable way of doing business.

In order to add to the effectiveness of CSR and to help managers in their decision-making process, CSI can be a helpful tool, as it seems to be a concern that is easier to address. It is even indispensable to remedy certain shortcomings of the CSR theories. As Tench et al. argue, "without the concept of CSI, CSR is eventually empty."[779] Armstrong has approached CSI as follows: "'Social responsibility'" is difficult to define. What *should* a manager do? It is easier to look at the problem in terms of what he should *not* do - i.e., at "social irresponsibility." A socially irresponsible act is a decision to accept an alternative that is *thought by the decision maker to be inferior to another alternative when the effects upon all parties are considered*. Generally this involves a gain by one party at the expense of the total system."[780] Thus, he argues that it might be easier to find out what companies should not do instead of dictating what they should do.

The extent of CSR can, thus, be clarified by asking the key question: "what is not CSR?"[781] In order to clarify what a corporation should not do, Armstrong argues that corporate managers act irresponsibly if they choose for an alternative decision that has (more) negative effects for other parties. Legal-but-irresponsible business is an example of the exploitation of negative externalities that negatively impact other businesses and society at large. Such behaviour can be viewed "as anticompetitive between firms which also leads to counter-productive outcomes for social welfare."[782] Moreover, such behaviour may be judged as unethical by using the negative golden rule that "exhorts people NOT to do unto others what you would NOT wish done unto you."[783] In the same vein, while it is difficult to agree on what a fair share of tax is, it is probably easier to agree that paying almost no corporate tax as a result of aggressive tax planning is evidently not a fair share.

Clarifying what a corporation should not do probably adds to the effectiveness of CSR; clarity about what not to do may be more effective as guidance to convince businesses to take action than a prescriptive approach. Defining undesirable behaviour will be more successful because "acts which involve negative consequences are much more salient than acts resulting in positive rewards."[784] Of course, CSR and CSI are logically inseparable, they exist in practice and by "eliminating or reducing CSI, CSR will significantly increase and become more effective."[785] Tench et al. illustrate the CSR and CSI relationship with the following continuum:[786]

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[779] Tench, R et al. (2012). The Challenging Concept of Corporate Social Irresponsibility: An Introduction. In Tench, R. et al. (Eds.), *Critical Studies on Corporate Responsibility, Governance and Sustainability*, vol. 4 (pp. 3-20). Bingley: Emerald. p. 5.

[780] Armstrong, J. S. (1977). Social Irresponsibility in Management. *Journal of Business Research* 5 (3), 185-213. p. 185.

[781] Tench, R et al. (2012). The Challenging Concept of Corporate Social Irresponsibility: An Introduction. In Tench, R. et al. (Eds.), *Critical Studies on Corporate Responsibility, Governance and Sustainability*, vol. 4 (pp. 3-20). Bingley: Emerald. p. 8.

[782] Clark T. S. and Grantham K. N. (2012). What CSR is Not: Corporate Social Irresponsibility. In Tench, R. et al. (Eds.), *Corporate Social Irresponsibility: A Challenging Concept* (pp. 23-41). Bingley: Emerald. p. 30.

[783] Clark T. S. and Grantham K. N. (2012). What CSR is Not: Corporate Social Irresponsibility. In Tench, R. et al. (Eds.), *Corporate Social Irresponsibility: A Challenging Concept* (pp. 23-41). Bingley: Emerald. p. 33.

[784] Clark T. S. and Grantham K. N. (2012). What CSR is Not: Corporate Social Irresponsibility. In Tench, R. et al. (Eds.), *Corporate Social Irresponsibility: A Challenging Concept* (pp. 23-41). Bingley: Emerald. p. 33.

[785] Tench, R et al. (2012). The Challenging Concept of Corporate Social Irresponsibility: An Introduction. In Tench, R. et al. (Eds.), *Critical Studies on Corporate Responsibility, Governance and Sustainability*, vol. 4 (pp. 3-20). Bingley: Emerald. p. 5.

[786] Tench, R et al. (2012). The Challenging Concept of Corporate Social Irresponsibility: An Introduction. In Tench, R. et al. (Eds.), *Critical Studies on Corporate Responsibility, Governance and Sustainability*, vol. 4 (pp. 3-20). Bingley: Emerald. p. 9.

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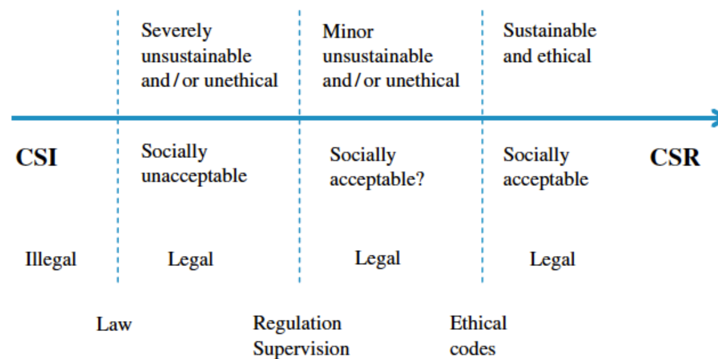

This continuum shows that CSI has a finite endpoint, whereas CSR is illustrated as infinitely scalable. That is because CSI can have a concrete definition (e.g. based on negative effects on society, as shown above) while CSR is an aspirational ideal that leaves room for various corporate activities. First, it is clear that illegal activities are socially irresponsible. Therefore, this is also a starting point of the continuum. Further, this continuum illustrates that not all kinds of legal behaviour are necessarily socially responsible. Tench et al. add that CSI is "always subject to societal norms, traditions, cultures, expectations, conditions and contingent factors."[787] The same is true for CSR, because, in practice, the definition of the concept of CSR can vary from region to region, e.g. between the Europe and US.[788] Therefore, it can be difficult to interpret "legal but severely unsustainable and/or unethical and totally unacceptable is contextually dependent and can be clearly defined by collective agreements in a society."[789] Such a collective agreement in a society can, according to Tench et al., be reached for instance through regulation or tight monitoring by pressure groups. I believe that such an agreement is also a subject for a broader public debate. A continuous debate is crucial, because the boundaries in this continuum are "arbitrary, dynamic and shifting," especially with regard to minor unsustainable and/or unethical issues. In order to contribute to such a debate, I consider CSR as an ideal to strive for and keeping away from CSI that can be seen as a practical starting point for responsible corporations. How this fits with corporate tax planning will be further explained in chapter 6 of this research.

4.3.4. Concluding remarks

This section explained that corporations face various responsibilities, such as economic and legal responsibilities. In addition, corporations also have ethical responsibilities that go beyond the legal and economic ones. This section explained Carroll's CSR theory that is also used as a theoretical framework for CSR in this research. The most important element of this theory in the context of this research is that socially responsible corporations accept their responsibilities beyond the pure compliance with the letter of the law; in other words, their ethical responsibilities. This does not imply that ethical responsibilities should replace legal ones but rather they exist in addition to legal ones. This starting point is also illustrated with the CSI/CSR continuum, which shows that not all kinds of legal behaviour are automatically morally responsible. CSR is a mix of intrinsic and extrinsic motivations. Corporations operate in a dynamic regulatory world where things might quickly change. Moreover, "regulations may fail to address social and environmental concerns and so a minimal step beyond compliance may meet technical definitional requirements but hardly make a firm socially responsible from a broader perspective."[790] CSR is namely "the responsibility of corporations to meet the legitimate expectations of society for the firm to conduct its businesses

[787] Tench, R et al. (2012). The Challenging Concept of Corporate Social Irresponsibility: An Introduction. In Tench, R. et al. (Eds.), *Critical Studies on Corporate Responsibility, Governance and Sustainability*, vol. 4 (pp. 3-20). Bingley: Emerald. p. 9.
[788] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. p. 13. See also chapter 2, section 2.1.
[789] Tench, R et al. (2012). The Challenging Concept of Corporate Social Irresponsibility: An Introduction. In Tench, R. et al. (Eds.), *Critical Studies on Corporate Responsibility, Governance and Sustainability*, vol. 4 (pp. 3-20). Bingley: Emerald. p. 9.
[790] Sheehy, B. (2015). Defining CSR: Problems and Solutions. *Journal of Business Ethics* 131 (3), 625-648. pp. 630-631.

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in ways that produce economic, social and ecological benefits to relevant stakeholders and society at large."[791] For instance, initially, social expectations were rooted in various religious cultures but nowadays the sources of social expectations on business behaviour have changed. Nowadays, media and activist groups play an increasingly important role in shaping public expectations of corporate behaviour.[792] Therefore, corporations need to understand the expectations that society has of their behaviour. To this end, it might be helpful to start by understanding the other end – what it is not (CSI).
The evolution of the business and society relationship has a long history. Through the evolution of CSR theories,[793] two differing views concerning the core of the business and society relationship can be identified. One view follows that the only responsibility of a company is to operate within the framework of the law with minimal ethical constraints,[794] while the other stresses that corporations should behave ethically above law taking account of certain moral responsibilities towards the society in which they operate.[795] These views are are also at the centre of this research. For the purposes of this research, it is necessary to understand whose interests business practice is expected to balance, especially with regard to tax planning.

4.4. Challenges of CSR

Engaging in CSR is a morally responsible strategy for corporations. Nevertheless, it is not self-evident why and to what extent corporations embed CSR in their everyday business activities. In other words, what kind of latitude does CSR leave for corporations? To understand how far corporations could go beyond compliance, it is necessary to analyze more specifically to whom corporations are responsible and what drives CSR. Corporations namely have various stakeholders that have different and often conflicting interests. This can weaken the focus of corporate accountability. All theories supporting the social responsibilities of business are based, to a lesser or greater extent, on the idea that businesses should account for their behaviour to a larger group of stakeholders than only shareholders.[796] Every corporation has a stakeholder web, which is "a network of stakeholders that scrutinizes and attempts to influence a corporation's behaviour."[797] Such webs "actively investigate, evaluate, and seek to change the behaviours of institutions (such as corporations) to achieve better alignment with the values and interests of their participants."[798] Corporations need to balance such conflicting interests, priorities and values. This balancing act, however, is done differently in various corporations, which means that it influences how CSR is applied in corporate practice.[799] The following sub-sections focus on the nuances various corporate stakeholders and their conflicting interests add to CSR and also what drives corporations to embed CSR in their business practices.

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[791] Eijsbouts, J. (2011a, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*. Inaugural Lecture, Maastricht University. p. 31.
[792] Moon, J. et al. (2017). Historical Perspectives in Corporate Social Responsibility. In Rasche, A., Morsing, M., and Moon, J. (Eds). *Corporate Social Responsibility: Strategy, Communication, Governance* (pp. 31-62). Cambridge: Cambridge University Press. p. 42.
[793] See e.g. Wood, D. J. (1991a). Corporate Social Performance Revisited. *Academy of Management Review* 16 (4), 691-718; Frederick, W. C. (1994). From CSR1 to CSR2: The Maturing of Business-and-Society Thought. *Business & Society* 33 (2), 150-164.
[794] See e.g. Friedman, M. (1970, September 13). The Social Responsibility of Business is to Increase its Profits. *New York Times Magazine*; Levitt, T. (1958). The Dangers of Social Responsibility. *Harvard Business Review* 36 (5), 41-50.
[795] See e.g. Carroll, A. B. (1979). A Three-Dimensional Conceptual Model of Corporate Performance. *The Academy of Management Review* 4 (4), 497-505; Epstein, E. M. (1987). The Corporate Social Policy Process: Beyond Business Ethics, Corporate Social Responsibility, and Corporate Social Responsiveness. *California Management Review* 29 (3), 99-114.
[796] See e.g. Freeman, R. E. (1984). *Strategic Management: A Stakeholder Approach.* Boston: Pitman; Friedman, A. L. and Miles, S. (2006). *Stakeholders: Theory and Practice.* Oxford: Oxford University Press; Donaldson, T. and Preston, L.E. (1995). The Stakeholder Theory of a Corporation: Concepts Evidence, and Implications. *Academy Management Review* 20 (1), 65-91; Melé Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 64
[797] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. p. 53.
[798] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. pp. 53-54.
[799] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. p. 16.

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4.4.1. CSR: a matter of balancing conflicting interests

There is no agreement concerning the extent of corporate moral responsibilities. In general, there are two conflicting perspectives with regard to the question to whom corporations are responsible: the stakeholder and shareholder perspective. A stakeholder is "any group or individual who can affect or is affected by the achievement of the organization's objectives."[800] In other words, stakeholders are individuals (or a group of individuals) who have "a commitment to a corporation that stems from the fact that they work for it, supply it, purchase from it, live near it, or are affected in some way by its activities."[801] Also, shareholders are corporate stakeholders. However, considering the specific relationship shareholders have with the corporation, they are considered a separate group. In corporate law, as well as in CSR theories, shareholders' interests are often in conflict with those of other stakeholders.[802]

Stakeholder theory scholars describe a corporation by placing a wider group of stakeholders in the middle of it: "[T]he firm is a system of stakeholders operating within the larger system of the host society that provides the necessary legal and market infrastructure for the firm activities. The purpose of the firm is to create wealth or value for its stakeholders by converting their stakes into goods and services."[803] The basic idea is that value creation is the result of interaction among groups, such as customers, suppliers, employees, financiers (stockholders, bondholders, banks), communities, and managers, which have a stake in the activities that make up business.[804] In these relationships, the principles of reciprocity and responsibility are at play;[805] for instance, "the local community grants the firm the right to build facilities and, in turn, it benefits from the tax base and economic and social contributions of the firm."[806] The stakeholder approach is criticized for its vague but high expectations on corporations that could be prioritized at the expense of profit maximization.[807]

As opposed to stakeholder theory, the view that corporations should be run to increase corporate profits and shareholders' value originates from the writings of Friedman.[808] This neo-classical economic (or neo-liberal)[809] perspective is often presented as the absolute opposite to the idea of possible social responsibilities of businesses. It is also referred to as shareholder value theory or shareholder wealth maximization. Arguably, the supreme goal according to this theory is "increasing the economic value of the company for its shareholders" in the short term.[810] Based on that, all other social activities that corporate boards could think about would only be acceptable if they are obliged by law or if they add to the maximization of shareholder value.[811] Garriga and

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[800] Freeman, R. E. et al. (2010). *Stakeholder Theory: The State of the Art*. Cambridge: Cambridge University Press. p. 207, quoting Freeman, R. E. (1984). *Strategic Management: A Stakeholder Approach.* Boston: Pitman; compare to: Friedman, A. L. and Miles, S. (2006). *Stakeholders: Theory and Practice.* Oxford: Oxford University Press. pp. 25-27.

[801] Mayer, C. P. (2013). *Firm Commitment: Why the Corporation is failing us and How to Restore Trust in it.* Oxford: Oxford University Press. p. 32.

[802] The specific position of shareholders will also be discussed in more detail in Chapter 5.

[803] Clarkson, M. B. E. (1995). A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance. *Academy Management Review* 20 (1), 92-117. p. 105.

[804] Freeman, R. E. et al. (2010). *Stakeholder Theory: The State of the Art*. Cambridge: Cambridge University Press. p. 24.

[805] Jallai, A.-G. and Gribnau, J. L. M. (2018). Aggressive Tax Planning and Corporate Social Irresponsibility: Managerial Discretion in the Light of Corporate Governance. In Mulligan, E. and Oats, L. (Eds.), *Contemporary Issues in Tax Research,* Volume 3 (pp. 51-86). Birmingham: Fiscal Publications.

[806] Freeman, R. E. et al. (2010). *Stakeholder Theory: The State of the Art*. Cambridge: Cambridge University Press. p. 25; See also Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 64.

[807] See e.g. Hansmann, H. and Kraakman, R. (2002). Toward a Single Model of Corporate Law? In McCahery J.A. et al. (Eds.). *Corporate Governance Regimes: Convergence and Diversity* (pp. 56-82). Oxford / New York: Oxford University Press. p. 60.

[808] See e.g. Friedman, M. (1970, September, 13). The Social Responsibility of Business is to Increase its Profits. *New York Times Magazine.*

[809] Weyzig, F. (2009). Political and Economic Arguments for Corporate Social Responsibility: Analysis and a Proposition Regarding the CSR Agenda. *Journal of Business Ethics* 86(4), 417-428.

[810] Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 55; See also Jackson, G. (2010). Understanding Corporate Governance in the United States: An Historical and Theoretical Reassessment. *Hans Böckler Foundation Arbeitspapier* 223. p. 16.

[811] Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 133.

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Melé argue that nowadays "it is quite readily accepted that shareholder value maximization is not incompatible with satisfying certain interests of people with a stake in the firm (stakeholders)."[812] Shareholders form a special group of stakeholders (individuals, group, or organization) that hold shares of a company. Shares are "units of ownership interest in a corporation or financial asset that provide for an equal distribution in any profits, if any are declared, in the form of dividends."[813] Shareholders are often also considered as the owners of a company[814] who either benefit or suffer from the increase or decrease of the share price. This is also the reason why shareholders are considered a specific group of stakeholders – they take direct risks when investing in a company. The idea of shareholder value maximization in general focuses on the predominance of property relations, which means that shareholders, as the owners of their investment (capital), should be protected against unreasonable spending. Managers are agents whose function is to maximize shareholders' value.[815] Such a view is generally backed by a high level of distrust in relation to managers because of their self-serving motivation.[816] Friedman's theory considers shareholder value maximization as "the supreme reference for corporate decision-making."[817]

Shareholder value theory supporters claim that "the only one responsibility of business towards the society is the maximization of profits to the shareholders, within the legal framework and the ethical custom of the country."[818] However, in contrast to this widely-spread understanding, such a view is not in conflict with CSR in its entirity, it is merely supporting a more limited approach to corporate social responsibilities.[819] In Friedman's view, companies are not allowed to "engage in deception or fraud, even if by doing so they are maximizing profits while abiding by the law."[820] Whereas, deception in this context includes "the ethical obligation to act honestly, with sufficient transparency in one's actions such that they can be effectively evaluated by others."[821]

The neo-classical view on corporate social responsibilities, thus, grants CSR an instrumental role by considering "CSR as a mere means to the end of profits."[822] Thus, "the economic aspect of the interactions between business and society is considered" and "any supposed social activity is accepted if, and only if, it is consistent with wealth creation." That means that practicing CSR is allowed if it makes "good business sense."[823] Such an approach is called a business case for CSR, according to which engaging in CSR should enhance (long-term) revenues, reduce (e.g. energy) costs, manage risk and uncertainty (e.g. in relation to reputation), and maintain social license to operate.[824] Such instrumental morality can also be seen as external motivation for CSR, according

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[812] Garriga, E. and Melé, D. (2004). Corporate Social Responsibility Theories: Mapping the Territory. *Journal of Business Ethics* 53 (1-2), 51-71. p. 54.

[813] Investopedia definition of 'shares'. Retrieved form: https://www.investopedia.com/terms/s/shares.asp (accessed 03.03.2019).

[814] This is an economic and not legal perspective. From the legal perspective, shareholders rights are usually limited because they do not have control in the company. This will be further discussed in chapter 5.

[815] Keinert, C. (2008). *Corporate Social Responsibility as an International Strategy*. Heidelberg: Physica-Verlag. p. 60; Logsdon, J. M. and Yuthas, K. (1997). Corporate Social Performance, Stakeholder Orientation, and Organizational Moral Development. *Journal of Business Ethics* 16(12/13), 1213- 1226; See e.g. Sternberg 2000; Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A., Matten, D., McWilliams, A., Moon, J. and Siegel, D. S. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 58.

[816] Keinert, C. (2008). *Corporate Social Responsibility as an International Strategy*. Heidelberg: Physica-Verlag. p. 60.

[817] Garriga, E. and Melé, D. (2004). Corporate Social Responsibility Theories: Mapping the Territory. *Journal of Business Ethics* 53 (1-2), 51-71. p. 54.

[818] Friedman, M. (1970, September 13). The Social Responsibility of Business is to Increase its Profits. *New York Times Magazine*.

[819] Schwartz, M. S. (2011). *Corporate Social Responsibility: An Ethical Approach*. Peterborough: Broadview Press. p. 56.

[820] Schwartz, M. S. (2011). *Corporate Social Responsibility: An Ethical Approach*. Peterborough: Broadview Press. p. 55.

[821] Schwartz, M. S. (2011). *Corporate Social Responsibility: An Ethical Approach*. Peterborough: Broadview Press. p. 55.

[822] Garriga, E. and Melé, D. (2004). Corporate Social Responsibility Theories: Mapping the Territory. *Journal of Business Ethics* 53 (1-2), 51-71. p. 52.

[823] Keinert, C. (2008). *Corporate Social Responsibility as an International Strategy*. Heidelberg: Physica-Verlag. p. 59. To understand this theory, it is important to keep in mind that it is a very economic approach. The main advocates of this shareholder value theory, such as for instance Friedman (1962) and Levitt (1958), are economists. They have argued that the responsibility of a corporation is to maximize shareholder value and social problems should be a concern of politicians and civil society. See Friedman, M. and Friedman, R. D. (1962). *Capitalism and Freedom*. Chicago: University of Chicago Press, see also Friedman, M. (1970, September 13). The Social Responsibility of Business is to Increase its Profits. *New York Times Magazine*; Levitt, T. (1958). The Dangers of Social Responsibility. *Harvard Business Review* 36 (5), 41-50; Lee, M.-D. P. (2008). A Review of the Theories of Corporate Social Responsibility: Its Evolutionary Path and the Road Ahead. *International Journal of Management Reviews* 10 (1), 53-73. p. 56.

[824] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 49.

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to which businesses turn CSR into economic opportunities and benefit.[825] This perspective is, however, criticized as a "value-free" ideology that defends self-serving individualism and is not morally defendable.[826] Stakeholder theory, in comparison with the shareholder theory, is considered to be more ethical, just and "more respectful of human dignity and rights."[827]

In my opinion, these two theories represent different starting points in the CSR Pyramid. Socially responsible corporations should balance such different layers. Moreover, Friedman also argued in 1970 that the only one responsibility of business towards society is the maximization of profits for the shareholders, but he added that it should be done "while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom."[828] This broad view on the basic rules of society is often not taken into account when Friedman is quoted. Nevertheless, this point suggests that Friedman is not against any social responsibilities of a company; he supports a thin theory of CSR.[829] In his opinion, it is justified that managers of a corporation that is a major employer in a small community devote resources to providing amenities to that community or to improving its government, because it is in the long-term interest of that corporation.[830] However, for him, it is a matter of generating goodwill rather than social responsibility.[831] He refers to this as acting from self-interest. Such self-interest may include a commitment to certain social and ethical values – for example in response to public pressure, representing external motivation for CSR. According to Schwartz, Friedman's position could be summarized as a responsibility "to make as much money as possible" (e.g. maximize profits) while complying with the "rules of the game" or "basic rules of the society" in which the firm is operating.[832] Such rules of society include obeying the "law," conforming to "ethical custom" (e.g. business norms where you do business), and acting "without deception or fraud."[833] In other words, even Friedman did not consider corporations separate from society but as a part of societies. Moreover, his view seems also to confirm that corporations benefit from society, which is also one of the hypotheses of this research.

I believe that corporations, as members of the societies in which they operate, are responsible to a wider group of stakeholders. This is mostly because the shares of publicly-held corporations are transferable, which ensures the "liquidity of shareholders' interests and makes it easier for shareholders to construct and maintain diversified investment portfolios."[834] In other words, nowadays shareholders are highly mobile; they have the possibility to reduce their investment at any time.[835] Shareholders can "simply by holding a portfolio of stocks, to 'diversify away' much

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[825] See chapter 4, section 5.
See e.g. Samuelson, P. A. (1971). Love That Corporation. *Mountain Bell Magazine* (Spring Ed.); Drucker, P. F. (1954). *The Practice of Management*. New York: Harper & Row; Drucker, P. F. (1984). The New Meaning of Corporate Social Responsibility. *California Management Review* 26 (2), 53-63. p. 62.

[826] Keinert, C. (2008). *Corporate Social Responsibility as an International Strategy*. Heidelberg: Physica-Verlag. p. 59; Valor, C. (2005). Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability. *Business and Society Review* 110 (2), 191-212. p. 201; See also Rasche, A. (2018, March 9). The Ethical Blindness of Corporate Sustainability. *The Business of Society.*

[827] Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 66.

[828] Friedman, M. (1970, September 13). The Social Responsibility of Business is to Increase its Profits. *New York Times Magazine.* pp. 32-33.

[829] Schwartz, M. S. (2011). *Corporate Social Responsibility: An Ethical Approach*. Peterborough: Broadview Press. p. 56.

[830] Parkinson, J. (2006). Corporate Governance and the Regulation of Business Behaviour. In MacLeod, S. (Ed.), *Global Governance and the Quest for Justice - Volume II Corporate Governance* (pp. 27-46). Oxford/Portland: Hart Publishing. p. 9.

[831] Friedman, M. (1970, September 13). The Social Responsibility of Business is to Increase its Profits. *New York Times Magazine.* pp. 122-126.

[832] Schwartz, M. S. (2011). *Corporate Social Responsibility: An Ethical Approach*. Peterborough: Broadview Press. p. 52.

[833] Schwartz, M. S. (2011). *Corporate Social Responsibility: An Ethical Approach*. Peterborough: Broadview Press. p. 52.
There are, nevertheless, some unclear elements in Friedman's theory for the purposes of this contribution. For one thing, Friedman has not clearly defined what he means by "ethical custom". Schwartz believes that "presumably this consists of what would be considered acceptable behaviour by the corporate community in the place in which the firm is doing business." [Schwartz. (2011). p. 55] However, it could well be the wider society rather than the corporate community for Friedman considers "ethical custom" as part of the basic rules of society. Moreover, as also shown above, according to Friedman, companies should not engage in deception or fraud, even if by doing so they are maximizing profits while abiding by the law. Friedman, M. (1970, September 13). The Social Responsibility of Business is to Increase its Profits. *New York Times Magazine.* pp. 32-33; Schwartz, M. S. (2011). *Corporate Social Responsibility: An Ethical Approach*. Peterborough: Broadview Press. p. 55.
See further also: Clark T. S. and Grantham K. N. (2012). What CSR is Not: Corporate Social Irresponsibility. In Tench, R. et al. (Eds.), *Corporate Social Irresponsibility: A Challenging Concept* (pp. 23-41). Bingley: Emerald. p. 32. Dobson, J. (1999). Is Shareholder Wealth Maximization Immoral? *Financial Analysts Journal* 55 (5), 69-75. p. 72.

[834] Armour, J. et al. (2017). What is Corporate Law? In Kraakman, R. H. et al. (Eds.). *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd Ed.) (pp. 1-28). Oxford: Oxford University Press. p. 10.

[835] See e.g. Chang, H.-J. (2011). *23 Things They Don't Tell You About Capitalism*. London: Penguin books. pp. 17-21.

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of the risk that a corporation might itself find threatening."[836] Affected by globalization, the role of shareholders has changed over time. In former days, shareholders might have been considered as the owners of a corporation of which they owned the shares (the agency theory).[837] Nowadays, however, it is more complicated and therefore shareholders should be considered as the owners of the shares rather than the corporation.[838] This is especially true in the case of multinationals: "shareholders no longer personally identify with the corporation they own."[839] Therefore, "most owners today only consider their ownership in the corporation as an investment."[840] Moreover, from the legal perspective, shareholders are not in control in stock-listed companies.[841]
In addition, even shareholders can have different interests in practice. There are those that invest their money long-term and those who have opposite expectations. Shareholders who wish to maximize short-term returns are free to invest in firms that do not engage in CSR and are more risk-seeking.[842] The shareholder value theory is believed to support short-term profit making rather than long-term corporate value maximization. This is believed to be a rather negative way of running a business.[843] Mitchell has argued that the legal structure of most large modern public corporations is very responsive to the stock market that "has become a place to look only for short-term behaviour."[844] According to Mitchell, under such short-term market pressure the corporate board has two choices: either "bend to the pressure" and focus corporate operations and benefit from on the short-term returns or "resist that pressure" and attract long-term, sustainable investors.[845] Shareholders can decide upon their own ethical agendas by moving money to (less) ethical companies; they have their own responsibilities.[846] Shareholders have different interests and motivations to invest in certain companies. For some companies, attracting investors is the most important driver behind certain decisions. CSR actions, however, (also) have various other drivers that can change over time.

4.4.2. CSR as a voluntary response to various societal expectations

CSR plays an important role in building "competitive advantage by enhancing the reputation and legitimacy of the organization."[847] Therefore, CSR is often also seen as a tool to (re-)build trust and

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[836] Hu, H. T. C. (1996). Behind the Corporate Hedge: Information and the Limits of "Shareholder Wealth Maximization". *Journal of Applied Corporate Finance* 9(3), 39-52. p. 43.
[837] See Van der Schee, P. A. (2011). *Regulation of Issuers and Investor Proteciton in the US and EU: A Translatic Comparison of the Basics of Securities and Corporate Law.* Hoofddorp: Eleven International Publishing. pp. 116-117.
[838] "While many laypersons believe shareholders own corporations, this statement is incorrect as a matter of law. As legal persons, corporations (like natural persons) either own themselves or have no owners." See Blair, M. M. (1995). Ownership and Control: Rethinking Corporate Governance for the Twenty-first Century. Washington, DC: Brookings Institute; Robe, J.-P. (2011). The Legal Structure of the Firm. *Accounting, Economics and Law* 1 (1), 1–86; Stout, L. A. (2012). New Thinking on 'Shareholder Primacy'. In Vasudev, P.M. & Watson, S. (Eds.), *Corporate Governance after the Financial Crisis* (pp. 25-41). Cheltenham: Edward Elgar Publishing. See also Stout, L. A. (2016). Corporate Entities: Their Ownership, Control, and Purpose. *Oxford Handbook of Law and Economics, Forthcoming, Cornell Legal Studies Research Paper No. 16-38*. pp. 22-23.
[839] Molz, R. (1995). The Theory of Pluralism in Corporate Governance: A Conceptual Framework and Empirical Test. *Journal of Business Ethics* 14 (10), 789-804. p. 791.
[840] Molz, R. (1995). The Theory of Pluralism in Corporate Governance: A Conceptual Framework and Empirical Test. *Journal of Business Ethics* 14 (10), 789-804, p. 791; see also Mayer, C. P. (2013). *Firm Commitment: Why the Corporation is Failing us and How to Restore Trust in it.* Oxford: Oxford University Press. p. 34.
[841] See chapter 5.
[842] See also Avi-Yonah, R. S. (2005). The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility. *Delaware Journal of Corporate Law* 30 (3), 767-818. p. 815.
[843] See e.g. Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 61.
[844] Mitchell, L. E. (2007). The Board as a Path toward Corporate Social Responsibility. In McBarnet, D. et al. (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (pp. 279-307). Cambridge: Cambridge University Press. p. 281.
[845] Mitchell, L. E. (2007). The Board as a Path toward Corporate Social Responsibility. In McBarnet, D. et al. (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (pp. 279-307). Cambridge: Cambridge University Press. pp. 281-282.
[846] See also chapter 2, section 4.
[847] Kurucz, E. C. et al. (2008). The Business Case for Corporate Social Responsibility. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 83-112). New York: Oxford University Press. pp. 90-91.

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thereby also a corporations' competitive position.[848] Perrini et al. argue that among consumers[849] a socially-oriented company is associated with a higher level of trust in that company and its products.[850] CSR is a corporate tool to show their moral responsibility. A crucial precondition for CSR in this sense is that corporations have the discretion to decide upon whether they engage in CSR and how they embed this into their business strategies. In other words, CSR is a corporate voluntary responsibility. Such a perspective fits well with the idea of intrinsic motivation for CSR. Nevertheless, considering that corporations also have extrinsic motivations, such as regulatory initiatives, shareholder pressure or fear of reputation damage, it is questionable whether CSR is and can be truly voluntary.

Arguably, one of the core characteristics of CSR is that it should be voluntary and that it constitutes corporate self-regulation rather than being mandated by regulations, laws, or industry codes.[851] Moreover, socially responsible corporate behaviour is expected to internalize or manage externalities, be oriented on multiple stakeholders, align social and economic responsibilities, and consider thereby social practices and values.[852] In other words, CSR expects companies themselves to think about the effect of their actions on society at large. Businesses are important to society; they are moral agencies which are free to make choices and choose their own identity (within the limits of the law).[853] CSR is often "considered to be an integral part of a broadening notion of corporate governance."[854] CSR "as a particular subdivision" of corporate governance is "a container of a regulatory mix consisting of hard law, soft law, self-regulation (collective and individual) and uncodified societal norms (the social expectations, to be judged by the courts of public opinion)."[855] In light of the previous argumentation that CSR developed as a response to regulatory vacuum,[856] CSR can be defined as "international private business regulation."[857] CSR has, thus, a voluntary and self-regulatory nature.[858] However, corporations are obliged to disclose in their annual reports whether and to what extent they engage CSR.

However, CSR is also a dynamic concept. Initially, CSR was simply corporate philanthropy, most probably in the sense of intrinsic motivation. Nowadays, there are different opinions as to what kind of regulation CSR is. That is mainly because the expectations and standards in relation to the social responsibilities of business are increasingly regulated. In general, corporations should be able to decide themselves whether and to what extent they go beyond the law. Nevertheless, the increasing regulatory attention, but also other external drivers of CSR (such as media attention or private international standards), raise questions with regard to whether CSR really is voluntary or not. For instance, some scholars argue that CSR is indeed "responsibility in management of organizations, taking social issues, environmental issues and the economic development of region and society into account" but it is not voluntary because "there are societal institutional pressures that demand such responsibility."[859] In addition to regulation, corporations thus also face informal

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[848] See e.g. Jallai, A.-G. (2016). Restoring Stakeholders' Trust in Multinationals' Tax Planning Practices with Corporate Social Responsibility (CSR). In Peeters, B. et al. (Eds.), *Trust and Taxation* (pp. 173-201). Antwerp: Intersentia; Lewis, S. (2003). Reputation and Corporate Responsibility. *Journal of Communication Management* 7 (4), 356-366. See also Porter, M. (interviewed by Morsing, M.). (2003). CSR – a Religion with too Many Priests? *European Business Forum* 16; Wan-Jan, W. S. (2006). Defining Corporate Social Responsibility. *Journal of Public Affairs* 6 (3-4), 176-184. p. 180.

[849] Naturally, the author is aware that this is just one example of a company's various stakeholder groups.

[850] Perrini, F. et al. (2010). The Relationship Between Corporate Responsibility and Brand Loyalty in Retailing: The Mediating Role of Trust'. In Smith, N.C. et al. (Eds.), *Global Challenges in Responsible Business* (pp. 191-214). Cambridge: Cambridge University Press. p. 192.

[851] See e.g. Porter, T. and Miles, P. (2013). CSR Longevity: Evidence from Long-Term Practices in Large Corporations. *Corporate Reputation Review* 16 (4), 313-340. p. 315.

[852] See Crane, A. et al. (Eds). (2008). *Corporate Social Responsibility, Readings and Cases in a Global Context*. Abingdon: Routledge. pp. 3-20; See also Eijsbouts, J. (2011a, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*. Inaugural Lecture, Maastricht University. p. 13.

[853] See chapter 2.

[854] Eijsbouts, J. (2011b). International Market Regulation, Corporate Governance, CSR and Multinationals. In Muller, S. et al. (Eds). *The Law of the Future and the Future of Law* (pp. 295-303). Oslo: Torkel Opsahl Academic Publisher. p. 297.

[855] Eijsbouts, J. (2011b). International Market Regulation, Corporate Governance, CSR and Multinationals. In Muller, S. et al. (Eds). *The Law of the Future and the Future of Law* (pp. 295-303). Oslo: Torkel Opsahl Academic Publisher. p. 300.

[856] See chapter 4, section 3.2.; see also chapter 2.

[857] Sheehy, B. (2015). Defining CSR: Problems and Solutions. *Journal of Business Ethics* 131 (3), 625-648. pp. 640-643.

[858] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. p. 13.

[859] Gössling T, (2011). *Corporate Social Responsibility and Business Performance: Theories and Evidence about Organizational Responsibility*. Cheltenham: Edward Elgar. p. 1.

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pressure with regard to CSR. Such informal pressure can come either from the outside of the corporation (e.g. NGOs) or from the inside (e.g. employees).
To clarify, to my mind CSR can have both voluntary and involuntary nature. From the legal perspective, CSR is coluntary. Such voluntary corporate-self regulation can be initiated by internal and external drivers, as argued in section 4.3.2. of this chapter. At the same time, there are various expectations on corporations with regard to whether and how they engage CSR. These expectations come in form of regulations, standards, or other informal pressure, which create an involuntary driver for corporations to engage in CSR.[860] CSR, in any case, is not a strict hard-law obligation. Laws do not exactly determine what CSR contains; neither should laws do that because CSR should fill the shortcomings of legal governance. Thus, CSR is a form of voluntary corporate self-regulation. On the other hand, informally, CSR is not entirely voluntary in a sense that corporations are expected to be accountable for their actions. Such expectations derive from public pressure as well as certain standards on CSR that aim at ensuring a level playing field.
To sum, in the context of this research, two conclusions can be offered. On the one hand, from the regulatory perspective corporations have discretion on deciding whether and how they concretely engage in CSR. On the other hand, there are certain expectations on corporations that engage in CSR. The informal pressure to meet such expectations indicate that corporate discretion to voluntary engage in CSR is limited. Furthermore, such expectations are in constant flux, since they respond to the dynamics of business practices. Consequently, corporations cannot ignore their social responsibilities, because the changing nature of the role of corporations in society implies that they have more responsibilities (that e.g. are outside the reach of governments only, e.g. because of globalization).[861] Corporations have a social role, which provides a basis for the conceptualization of corporate citizenship, which implies that corporations take over certain tasks where governments fall short.[862] For this research, CSR is used as a general umbrella term that also includes corporate citizenship. Therefore, the concept of corporate citizenship is not discussed in detail. Nevertheless, the concept of corporate citizenship illustrates well that corporations also have a political role next to the economic role in a society.[863] This role might not always be purely voluntary but as a consequence of the pressure exercised by different activist groups.[864] Hence, corporations are pressured to take responsibility, but they can decide themselves how far such responsibility goes. [865]
The voluntary nature of CSR (in other words, the freedom of the corporate board to engage in CSR at its own discretion) fuels the criticism of CSR from the shareholder theory perspective. It is namely believed that if Friedman's doctrine that the only responsibility of business is to maximize its profits and shareholders' value, then voluntary CSR would breach "the fiduciary duties of management vis-à-vis their shareholders."[866] This argument will be analyzed in more detail in chapter 5 of this research.

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[860] See also Steurer, R. (2009). The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe. *Policy Sciences* 43 (1), 49-72. p. 53.
[861] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 68. See also chapter II on multinational corporations.
[862] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 68.
[863] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 73.
[864] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 73.
[865] Steurer, R. (2009). The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe. *Policy Sciences* 43 (1), 49-72. p. 54.
[866] Eijsbouts, J. (2011a, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*. Inaugural Lecture, Maastricht University. p. 27.

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4.4.3. Concluding remarks

In the previous sub-sections, it was explained, what is expected from corporations in the context of CSR, in theory and in practice. As shown, the expectations are not always clear or self-evident. On the one hand, in the context of stakeholder theory, corporations are expected to behave morally and limit their choices provided by corporate power. On the other hand, the shareholder value view considers corporations as economic actors that should increase the financial returns for their investors. Moreover, corporate boards do not only need to balance between the different interests of shareholders and stakeholders, in general, but also conflicting interests within these groups.[867] Thus, a corporation can have many stakeholders with "competing and inconsistent constituent interests".[868] That leaves corporations with difficult choices. Roselle argues that the conflicting interests of different corporate stakeholders "present perhaps the most difficult management issue for companies that seek to be socially responsible."[869] Stakeholder theory, nevertheless, does not require managers to exclude shareholders' interests; it just considers a wider group of stakeholders than shareholders only.

Consequently, corporations are at first faced with a challenge concerning to whom corporations should be responsible. Further, should that be clear, corporations face a challenge defining the nature of CSR. As argued earlier in this chapter, CSR corporations are expected to go beyond strict compliance with the law. Here, however, the question with regard to the voluntary nature of CSR arises. Namely, considering the increasing societal pressure and standard setting, one might think that CSR is involuntary. It was explained that for this research, it suffices to conclude that corporations have discretion when deciding whether and how they concretely engage in CSR. At the same time, there are certain expectations of corporations that engage in CSR. In addition, as business practices changes over time, societal expectations of CSR corporations also change. This suggests a dynamic nature of CSR, which also clarifies why taxation is increasingly discussed in the context of CSR.

4.5. CSR and taxes

It is evident that corporations have specific responsibilities that reach beyond the pure obligation to follow the laws. The extent of such responsibilities is, nevertheless, debatable. Having said that, corporations that present themselves as socially responsible have accepted to respect moral responsibilities towards society by going beyond pure compliance with the law. The question underlying this research is whether tax should be considered as one such corporate responsibility as, for instance, human rights or environment are; whether and how these examples of responsibility with regard to human rights and environment can be comparable, or serve as an example, to taxation. The following sub-sections will analyze these issues.

4.5.1. Paying taxes as a domain for CSR

From a moral perspective, it would seem difficult to disagree that corporations have responsibilities with regard to human rights. The (quality of) human life has a higher priority than corporate actions or profit. Some critics, however, argue that the effects of corporate tax planning violate certain

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[867] For instance, there are shareholders with long-term expectations in a company performance and shareholders with short-term financial interests; see e.g. Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. p. 23: An oil industry CEO: "On the one hand, you've got Wall Street sqeezing you harder and harder for shorter and shorter term performance. On the other hand, you have a broader constituent base that wants more than financial results…Most CEOs will tell you, 'This is damn hard work'." Long and short termism will also be discussed in chapter 5.

[868] Jensen, M. C. (2000). Value Maximization, Stakeholder Theory, and the Corporate Objective Function. In Beer, M. and Nohria N. (Eds.), *Breaking the Code of Change* (pp. 35-78). Boston: Harvard Business School Press. pp. 44-45; see also Weyzig, F. (2009). Political and Economic Arguments for Corporate Social Responsibility: Analysis and a Proposition Regarding the CSR Agenda. *Journal of Business Ethics* 86 (4), 417-428. pp. 418-419.

[869] Roselle, J. (2011). The Triple Bottom Line: Building Shareholder Value. In Mullerat, R. (Ed.). *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2nd Ed.) (pp. 129-156). Alphen aan de Rijn: Kluwer Law International. p. 148.

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human rights as well.[870] To my mind, aggressive tax planning or tax avoidance do not violate human rights directly but can have a negative effect on human rights.[871] The corporate tax practices that can affect human rights rely mainly on moral reasoning.[872] Human rights that can be negatively affected due to corporate tax avoidance are mainly socio-economic in nature. Such socio-economic human rights are for example the right to education or other elementary public goods and services that should be provided by means of tax money.[873] Such deprivation occurs especially (but not only) with regard to poor (developing) countries when they are involved in tax planning schemes.[874] Approaching corporate tax planning from the perspective of human rights links back to the function of taxes (discussed in chapter 3). By not contributing a fair share to society, a taxpayer violates the principle of distributive justice and limits the state's possibility to provide essential public goods and services.[875] This, in turn, has a negative effect on protecting or ensuring basic human rights. In other words, "tax abuses deprive governments of the resources required to provide the programmes that give effect to economic, social and cultural rights, and to create and strengthen the institutions that uphold civil and political rights."[876] By providing tools for states to ensure individuals' socio-economic rights, taxation can be considered a key tool for "tackling inequality and for generating the resources necessary for poverty reduction and the realization of human rights, and can also be used to foster stronger governance, accountability and participation in public affairs."[877] Consequently, aggressive tax planning might not harm human rights directly, but it has a potential to have a more wide-ranging effect on human rights. Therefore, in my opinion, paying a fair share of taxes is as important a corporate moral responsibility as not violating human rights directly.

Furthermore, aggressive corporate tax planning practices are comparable to both human rights and environment in a sense that they can make use of corporate power with regard to mobility. Namely, also in case of aggressive tax planning, corporations often move their activities to states that apply less socially responsible standards (offshoring), or they act according to the letter of the law and avoid the spirit of the law. Such behaviour might be strictly legal, but it fails to meet the general purpose of the law, which is either paying a fair share of tax or ensuring that corporate practices are not harmful for the environment. In such situations corporate power can make use of a legal vacuum for profit making purposes.

Such (ab-)use of corporate power can be related back to the moral roots. Namely, corporations that, driven by profit maximization, seriously diminish living standards of other members of society and thereby harm society, erode their moral responsibilities towards the societies in which they operate.[878] Thus, in both cases, multinationals can use their corporate power[879] to avoid (or even evade) regulation that would impose higher costs on a company in a situation where the underlying morality can be questioned. Moreover, such situation affects negatively the level playing field vis-à-vis other taxpayers. CSR should overcome the excessive use of corporate power, represented, for

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870 See e.g. Destrooper, T. (2016, April 10). *Belastingontduiking is een schending van mensenrechten*. *Mondiaal Nieuws* (online); Boerrild, T. (2015, December 16). It's Time for Companies to Bring Tax Into Their Human Rights Due Diligence. *Business & Human Rights Recourse Centre*; Kohonen, M. (2017, November 16). Paradise Papers: Corporate Duty to Respect Human Rights in the Spotlight. *Lawyers for Better Business (L4BB) Blog*.

871 International Bar Association. (2013, October). Tax Abuses, Poverty and Human Rights. *A report of the International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights.* p. 95.

872 International Bar Association. (2013, October). Tax Abuses, Poverty and Human Rights. *A report of the International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights.* p. 94.

873 International Bar Association. (2013, October). Tax Abuses, Poverty and Human Rights. *A report of the International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights.* pp. 99-102; See also Destrooper, T. (2016, April 10). *Belastingontduiking is een schending van mensenrechten*. *Mondiaal Nieuws* (online). For an overview of the universal human rights, see the UN. (1948). *The Universal Declaration of Human Rights.*

874 Pogge, T. and Mehta, K. (2016). Introduction: The Moral Significance of Tax-Motivated Illicit Financial Outflows. In Pogge, T. and Mehta, K. (Eds), *Global Tax Fairness* (pp. 1-13). Oxford: Oxford University Press. pp. 2-5.

875 See also chapter 4, section 5.2.

876 International Bar Association. (2013, October). Tax Abuses, Poverty and Human Rights. *A report of the International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights.* p. 2.
Economic, social and cultural rights are social-economic human rights, such as a right to education, housing, adequate standard of living, health, and science and culture. See more in: United Nations Human Rights Office of the High Commissioner (2008). *Frequently Asked Questions on Economic, Social and Cultural Rights*, Fact Sheet No. 33.

877 UN. (2014). *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona*.

878 See chapter 3.

879 See chapter 2, section 3.

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example, by "the businessman's decisions and actions taken for reasons at least partially beyond the firm's direct economic or technical interest … which need to be commensurate with the company's social power."[880] The society has "certain expectations for appropriate business behavior and outcomes."[881] A corporation is considered "a social institution that must avoid abusing its power."[882] Here I would add that corporations must not avoid using power in any sense. In my opinion, moral responsibility entails that corporations avoid abusing their power at the cost of society.

Paying a fair share of taxes is a responsibility of every member of a society, including corporations. However, from the economic perspective, tax is a cost and therefore some powerful corporations engage in tax planning, which in many cases is acceptable but may turn into abuse of corporate power.[883] Various possibilities to engage in international tax avoidance or aggressive tax planning introduced in chapter 3 prove that there is a regulatory vacuum on an issue that has severe consequences for society. In similar situations in other fields, such as environmental damage or human rights abuses, the idea of CSR became important. Thus, the appearance of such similar pattern suggests that tax should be part of CSR. Corporations that avoid paying their fair share of taxes are not socially responsible.[884] Instead, they are, for instance, undermining the socio-economic rights of other members of society. In other words, being socially responsible in other spheres, such as human rights or environmental protection, does not make up for a minimial contribution to society's common good.[885] Distributive justice and public goods are indispensable for a sustainable society and for ensuring human rights, as explained previously.[886]

Aggressive tax planning as a form of creative compliance[887] cannot be tackled by changes to the law alone "because creative compliance is the product not just of limits of the law but of a mind-set which seeks to exploit those limits, and, crucially, which sees this exploitation as perfectly legitimate."[888] General tax systems are based on the expectation that everybody contributes his/her fair share of tax to a well-functioning society. Laws reflect the moral values of society.[889] However, in some cases, written laws fall short of achieving the moral outcome desired of citizens' behaviour. There are also social norms that "exist over and above compliance with laws and regulations."[890] Paying taxes is a contribution to society that is written in the law; moral norms require that such laws are not circumvented by taking advantage of ones' powerful position.

Next to the fact that, in its very essence, tax avoidance or aggressive tax planning does not fit in the same picture with CSR, there are also other reasons for corporations to consider its tax strategy in relation to the notion of CSR. Already in 2008, Hartnett argued that "boards in the U.K. are beginning to realize that taxation disputes cost serious management time and serious money, and they involve serious reputational risk."[891] This is not only the case in the UK but also in other countries. Today, after various scandals and information leaks, the reputation risk seems to be even more relevant. Hartnett argued that, by combining tax and CSR, "business can convince tax administrators that a more trusting tax environment is possible, and high levels of suspicion occurring in tax administrations can be reduced."[892] This position of Hartnett pinpoints two

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[880] Davis, K. (1960). Can Business Afford to Ignore Social Responsibilities? *California Management Review* 2 (3), 70-76.
[881] Wood, D. J. (1991a). Corporate Social Performance Revisited. *Academy of Management Review* 16 (4), 691-718. p. 695.
[882] Wood, D. J. (1991a). Corporate Social Performance Revisited. *Academy of Management Review* 16 (4), 691-718. p. 695.
[883] See chapter 3, section 3.
[884] See also chapter 6, section 2.2.
[885] See also Bowers, S. (2018). Apple Claims to be a Good Corporate Citizen, but is it Really? *International Consortium of Investigative Journalists*.
[886] See more on sustainability and its relation to tax governance in chapter 4, section 5.2.
[887] As argued in chapter 3.
[888] McBarnet, D. (2007). Corporate Social Responsibility beyond Law, Through Law, for Law: the New Corporate Accountability. In McBarnet, D. et al. (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (pp. 9-56). Cambridge: Cambridge University Press. p. 48.
[889] See chapter 3, section 2.
[890] Ruggie, J. G. (2013). *Just Business: Multinational Corporations and Human Rights*. New York: W. W. Norton & Company. p. 91.
[891] Hartnett, D. (2008). The Link between Taxation and Corporate Governance. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 3-8). Berlin / Heidelberg: Springer-Verlag. p. 5.
[892] Hartnett, D. (2008). The Link between Taxation and Corporate Governance. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 3-8). Berlin / Heidelberg: Springer-Verlag. p. 4.

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important factors of tax avoidance that are relevant from the corporate perspective: reputation and trust.[893]

In order to rebuild trust and reputation, corporations can adopt a tax policy as a part of their CSR strategy. As shown previously, the initial idea of CSR arose from the fact that corporations had gained a lot of power, which started to cross some lines that demanded a reaction of society. This gave rise to thoughts on how to keep these powerful corporations morally responsible and accountable for their actions. This is now happening with regard to tax planning. Taxes are an important fundament for society, which implies that CSR companies also have to include such voluntary moral responsibility in their tax planning.[894] Corporations that present themselves as socially responsible should not do away with only applying ethical standards in business operations that are the most convenient to them.

It goes without saying that there are people who do not believe in CSR as a possible solution for certain fundamental issues in society. For instance, Freedman has argued, "but ultimately, although something can be achieved by CSR, it is limited by the profit system that underlies capitalism."[895] Freedman seems to be pessimistic about corporate moral responsibilities. She is correct in that most multinationals are profit driven. Having said that, in addition to public outrage, important investors are also increasingly requiring corporations to live up to their moral responsibilities.[896] Therefore, I refuse to trash corporate moral responsibilities simply by accepting the capitalist roots of business practices. The neo-liberal roots of business making should not be a counter argument to the request for a co-operative and mutually respectful society. CSR is a contested concept, as is explained in this chapter. Therefore, I may have a different understanding of CSR than Freedman does. In the context of this research, combining CSR and tax does not mean "giving part of its profit back to society"[897] but it means that certain members of society should not be earning unfair profits by minimizing their tax burden at the expense of society. Corporate tax planning that is in line with a corporation's CSR agenda is conceptualized as good tax governance in the context of this research.[898] Later in this research,[899] it will be explained in more detail what are the elements of such good tax governance. At the very basic level, good tax governance refers to CSR and at the other extreme bad tax governance refers to the area of corporate social irresponsibility (CSI).[900]

Another critic of the idea of integrating taxation with CSR, Panayi, does not agree that corporations that engage in aggressive tax planning are socially irresponsible.[901] According to her, CSR is a vague concept that is used as a solution to the inadequate existing principles of international tax law.[902] Panayi also claims that "it is a slippery slope for a country to expect to raise or increase corporate tax revenues from CSR."[903] As a consequence of socially responsible tax planning, various states' tax revenues would probably increase, but that should not be the main point. The point is that companies who have already taken the responsibility to engage in CSR should not claim that they are responsible while they erode their tax obligations in this society. Without diving into the relationship between tax and CSR in depth, Panayi argues that CSR is about 'feeling' which is incorrect. CSR is about being responsible towards a cooperative society that CSR companies

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[893] As discussed in chapter 2, section 5.

[894] See also Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88.

[895] Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press. p. 384.

[896] See e.g. Fink, L. (2018). Annual Letter to CEOs: 'A Sense of Purpose'. See also chapter 6.

[897] Eijsbouts, J. (2011a, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*. Inaugural Lecture, Maastricht University. p. 11. Referring to Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. p. 7.

[898] Some sources call a similar idea an "active tax responsibility" (as a contrast to "passive tax responsibility"). See: Beloe, S. et al. (2006). Taxing Issues: Responsible Business and Tax. *SustainAbility Report;* Cerioni, L. (2014). International Tax Planning and Corporate Social Responsibility (CSR): Crucial Issues and a Proposed "Assessment" in the European Union Context. *European Business Law Review* 25 (6), 845-875. pp. 851-852.

[899] Chapter 6.

[900] See more chapter 4, section 3.3.

[901] Panayi, C. H. J. I. (2015). Is Aggressive Tax Planning Socially Irresponsible? Intertax 43 (10), 544-558; on corporate social irresponsibility, see also section 3.3.3. of this chapter.

[902] Panayi, C. H. J. I. (2015). Is Aggressive Tax Planning Socially Irresponsible? Intertax 43 (10), 544-558. p. 544.

[903] Panayi, C. H. J. I. (2015). Is Aggressive Tax Planning Socially Irresponsible? Intertax 43 (10), 544-558. p. 555.

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claim to be. Being a part of society also includes, next to the right to enjoy the fruits of this society, obligations to contribute to that society. Companies that do not fulfil their obligations enjoy their rights at the cost of other members of this society.[904] Naturally, it is a nuanced and complex issue, as Panayi correctly points out. Having said that, even a critical scholar such as Panayi concluded that in the context of tax CSR is the direction for the future. Therefore, she argues that "CSR initiatives should at most be seen as complementary soft law by the international tax community, not an all-pervasive solution to the tax problems faced in today's globalized world."[905] This is a conclusion that is difficult to disagree with. However, claiming that CSR is an unjustified concept in this context is in my opinion misleading.

4.5.2. Regulation and tax governance

While the starting point of this research is that CSR rests upon the relationship between business and society, it does not suggest that the state has no role in this relationship. Both on the national and international level, rulemaking is crucial for steering CSR. Roselle argues that governments should recognize their responsibility "to create an enabling environment for private investment through rules that enhance transparency and reward CSR." "[V]oluntary, flexible and non-coercive partnerships" between corporations and their various stakeholder groups are, according to Roselle, a suitable means for encouraging corporations to meet CSR goals.[906] Also "global governance and the links between commerce, investment and sustainable development are the fundamental questions in the debate about the CSR."[907] International public and private guidelines, such as OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines), The European Union definition on CSR, and Principles for Responsible Investment (PRI) should help corporations to understand what society expects from multinationals with regard to good tax governance.
The UN has developed several guidelines for sustainable corporate practices.[908] For this research, PRI, which are supported by the UN,[909] are the most concrete. The PRI focuses on "the investment implications of environmental, social and governance (ESG) factors" and it provides guidelines for how investors could incorporate these "factors into their investment and ownership decisions."[910] The aim of PRI is to encourage long-term investment decisions that are responsible towards "the financial markets and economies in which they operate and ultimately of the environment and society as a whole."[911] Institutional investors can voluntarily commit themselves to PRI, which then in turn holds them accountable for six principles of responsible investment.[912] It is noteworthy that

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[904] See also Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88.
[905] Panayi, C. H. J. I. (2015). Is Aggressive Tax Planning Socially Irresponsible? Intertax 43 (10), 544-558. p. 558.
[906] Roselle, J. (2011). The Triple Bottom Line: Building Shareholder Value. In Mullerat, R. (Ed.). *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2nd Ed.) (pp. 129-156). Alphen aan de Rijn: Kluwer Law International. p. 156.
[907] Eberhard-Harribey, L. (2006). Corporate Social Responsibility as a New Paradigm in the European Policy: How CSR Comes to Legitimate the European Regulation Process. In Lenssen, G. et al. (Eds), *Corporate Responsibility and Competitiveness* 6 (4) (pp. 358-368). Bradford: Emerald Group Publishing Limited. p. 364.
[908] E.g. Global Compact "of shared values and principles, which will give a human face to the global market" aims at bringing "business together with UN agencies, labor, civil society and governments to advance ten universal principles in the areas of human rights, labor, environment and anti-corruption." Corporations can voluntarily become a part of the UN Global Compact "by incorporating the Global Compact principles into strategies, policies and procedures, and establishing a culture of integrity." By doing that, "companies are not only upholding their basic responsibilities to people and planet, but also setting the stage for long-term success." UN Global Compact offers, thus, voluntary sustainability standards that businesses can follow. The Ten Principles on the UN Global Compact concern human rights, labour conditions, environment, and anti-corruption. The UN Global Compact has more than 8,000 participating companies from more than 170 countries. Therefore, it is considered to be "the world's largest voluntary corporate citizenship initiative." Rasche claims that the Global Compact "is *not* designed as a certification instrument or a tool to regulate and sanction its participants, but instead to foster a dialogue among a diverse set of actors in a non-bureaucratic way." Important keywords constantly recurring within the UN Global Compact are "transparency", "values", "principles", and "dialogue". It seems, therefore, to be a perfect trust-based relationship that aims to educate businesses on the CSR field and helps if necessary. See UN. (1999, February 1). *Secretary-General Address to the World Economic Forum in Davos*; CSR Wire information page on United Nations Global Compact; UN Global Compact. Ten Principles of the UN Global Compact; Rasche, A. (2009). 'A Necessary Supplement' - What the United Nations Global Compact Is and Is Not. *Business and Society Review* 48 (4), 511-537.
[909] UN PRI. Information Page on Principles of Responsible investment (PRI).
[910] UN PRI. Information Page on Principles of Responsible investment (PRI).
[911] UN PRI. Information Page on Principles of Responsible investment (PRI).
[912] UN PRI. *The Six Principles of Responsible investment* (PRI).

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PRI also has separate engagement guidance on corporate tax responsibility,[913] which should incentivize multinationals that wish to attract investors that have committed themselves to PRI to re-think their corporate tax practices.

Also UN Sustainable Development Goals (SDGs), the world-wide supported sustainability agreements, (indirectly) rely on good tax governance.[914] Most of the countries in the world (UN members) and also many corporations have agreed to contribute to SDGs that are aimed at achieving a better future; well-functioning and sustainable societies and markets. Taxation is crucial for achieving SDGs. In recent years, SDGs have received much attention in the context of state as well as corporate responsibilities. SDGs are 17 goals, adopted in 2015 by UN member states, to combat poverty, inequality and climate change. SDGs "call for action by all countries, poor, rich and middle-income to promote prosperity while protecting the planet" and "recognize that ending poverty must go hand-in-hand with strategies that build economic growth."[915] It is to a large extent governments' responsibility to establish regulatory frameworks in order to achieve SDGs by 2030. The SDGs are aimed at achieving well-functioning and sustainable societies and markets. In recent years, SDGs have received much attention in the context of state as well as corporate responsibilities.[916] Thus, such SDGs provide more concreter content for CSR.

Most SDGs, such as ending poverty, developing infrastructure or reducing inequality are (based on) essential public goods that are financed by collecting taxes.[917] Therefore, "taxation has a key role to play in financing the SDGs."[918] Achieving SDGs depends largely on whether and how governments succeed in improving and enforcing their tax systems.[919] At the same time, as a group of leading companies maintain, "fairer, more transparent tax systems, should be supported and upheld by business."[920] As explained previously, perfect laws do not exist and to a certain degree multinationals will always have a choice whether to comply with the (moral) norms or circumvent the system.[921] This usually happens at the expense of public revenue and shifts the tax burden to less expert taxpayers. Tax avoidance has, therefore, to my mind an important influence on achieving SDGs. Taxation is "instrumental to state-building";[922] by not contributing his or her fair share to society, a taxpayer limits the state's possibility to provide essential public goods and services. In other words, "tax abuses deprive governments of the resources required to provide the programmes that give effect to economic, social and cultural rights, and to create and strengthen the institutions that uphold civil and political rights."[923]

Consequently corporate tax avoidance and aggressive tax planning can be categorized as unsustainable because, if corporations "are not willing to fund the political institutional environment (such as schools, hospitals, the police, and the justice system), they erode one of the key institutional bases of their corporate success."[924] In 2017 the Business and Sustainable Development Commission (BSDC) launched a report that explains the necessity of corporate engagement with regard to sustainable development.[925] According to this report, businesses need to regain public trust and, in order to do that, they need to demonstrate that they pay taxes where

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[913] UN. (2017, February 6). *New Recommendations Help Investors Engage on Tax*.
[914] See also chapter 6.
[915] UN. *The Sustainable Development Agenda*.
[916] See more: UN. The Sustainable Development Goals webpagina: https://sustainabledevelopment.un.org/sdgs (accessed 27.07.2019).
[917] UN. (2014). *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona*. p. 1.
[918] Platform for Collaboration on Tax. (2018, February 16). Platform Partners' Statement at the Closing of the Conference. p. 1.
[919] Lustig, N. (2015). A Missing Target in the SDGs: Tax Systems Should Not Reduce the Income of the Poor. *International Growth Centre*.
[920] The B Team. (2018). A New Bar for Responsible Tax: The B Team Responsible Tax Principles. p. 1.
[921] Chapter 2; chapter 3.
[922] Panayi, C. H. J. I. (2017). The Europeanization of Good Tax Governance. In Albors-Llorens, A. et al. (Eds.), *Yearbook of European Law* (pp. 1-54). Oxford: Oxford University Press. p. 22.
[923] IBA International Bar Association. (2013, October). Tax Abuses, Poverty and Human Rights. *A report of the International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights*. p. 2.
[924] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. pp. 33-34.
[925] "The Business and Sustainable Development Commission was launched in Davos in January 2016. It brings together leaders from business, finance, civil society, labour, and international organisations, with the twin aims of mapping the economic prize that could be available to business if the UN Sustainable Development Goals are achieved, and describing how business can contribute to delivering these goals." See Business and Sustainable Development Commission (2017, January). Better Business Better World: The report of the Business & Sustainable Development Commission.

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revenue is earned and are socially aware and responsible in other fields, such as environmental and labour standards: "to build an economy that is more just."[926] Achieving SDGs, however, also includes an extrinsic motivation for corporations by offering new possibilities for companies. For instance, it argued to open up "US$12 trillion of market opportunities in the four economic systems"[927] and create 380 million new jobs.[928] However, in order to "capture these opportunities in full, businesses need to pursue social and environmental sustainability as avidly as they pursue market share and shareholder value." In case businesses fail to do that, "the costs and uncertainty of unsustainable development could swell until there is no viable world in which to do business."[929] Moreover, a responsible mind-set and focus helps to build corporate reputation among different stakeholders.[930] These are clear examples of external motivations to engage good tax governance.

Further, the OECD MNE Guidelines are "the world's most comprehensive multilateral agreement on business ethics and the only international corporate responsibility instrument."[931] The MNE Guidelines "provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards."[932] In recent years, the OECD has decided to abandon the concept of CSR and use the term responsible business conduct (RBC) instead.[933] RBC "means that businesses should make a positive contribution to economic, environmental and social progress with a view to achieving sustainable development and that businesses have a responsibility to avoid and address the adverse impacts of their operations."[934] The OECD MNE Guidelines, that is international soft-law regulation of CSR, "are far-reaching recommendations addressed by governments to multinational enterprises operating in or from adhering countries." These Guidelines provide semi-voluntary "principles and standards for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation."[935] Moreover, according to the Guidelines, multinationals are expected to "refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework" related to taxation, among others.[936] With regard to corporate tax planning, the Guidelines state that multinationals should "contribute to the public finances of host countries" while being transparent and complying with "both the letter and spirit of tax laws," a fair share, thus.[937] Also the G20/OECD Principles of Corporate Governance argue in the same line that "aggressive tax avoidance" does not fit in an "overall framework for ethical conduct [that] goes beyond compliance with the law, which should always be a fundamental requirement."[938]

According to the European Commission, CSR "refers to companies voluntarily going beyond what the law requires to achieve social and environmental objectives during the course of their daily business activities."[939] The effectiveness of CSR initiatives is in the EU "closely associated with

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[926] Business and Sustainable Development Commission (2017, January). Better Business Better World: The report of the Business & Sustainable Development Commission. pp. 7-8.

[927] Business and Sustainable Development Commission (2017, January). Better Business Better World: The report of the Business & Sustainable Development Commission. p 12.

[928] Business and Sustainable Development Commission (2017, January). Better Business Better World: The report of the Business & Sustainable Development Commission. p 18.

[929] Business and Sustainable Development Commission (2017, January). Better Business Better World: The report of the Business & Sustainable Development Commission. p 12.

[930] See e.g. Business and Sustainable Development Commission (2017, January). Better Business Better World: The report of the Business & Sustainable Development Commission. p 12.

[931] Nieuwenkamp, R. (2016, January 22). 2016: CSR is Dead! What's next? *OECD Insights*.

[932] OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing. p. 3.

[933] In January 2016, the OECD had an information page on CSR explicitly (OECD. *Corporate Responsibility*: *Frequently asked questions*), according to which there is "mutual dependence of business and society" whereas corporate responsibility "refers to the actions taken by businesses to nurture and enhance this symbiotic relationship." The core element of CSR goes according to the OECD "beyond the core function of conducting business." Therefore, "businesses are expected to obey the various laws which are applicable to them" and also "respond to societal expectations that are not written down as formal law."

[934] Nieuwenkamp, R. (2016, January 22). 2016: CSR is Dead! What's next? *OECD Insights*.

[935] OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing.

[936] OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing. Article II. General Policies. pt. 5, p. 19.

[937] OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing. Chapter. XI, pt. 1. P. 60.

[938] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 47.

[939] European Commission. *Corporate Social Responsibility (CSR).*

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the effectiveness of broader systems of private and public governance."[940] CSR should, thus, fill in for the insufficiencies of public governance systems. According to the European Commission, CSR "refers to companies taking responsibility for their impact on society" and it "is important for the sustainability, competitiveness, and innovation of EU enterprises and the EU economy."[941] The Commission tries to build a business case for CSR by arguing that CSR helps corporations since it "benefits for risk management, cost savings, access to capital, customer relationships, and human resource management."[942] Moreover, according to EU law, large companies are required to "disclose certain information on the way they operate and manage social and environmental challenges."[943] Thus, clearly EU law leaves corporations room to decide upon the specific content on how corporations integrate responsible conduct (as long as it stays within the law, of course), but this requirement puts corporations under pressure to be transparent about their actions and possibly act according to public pressure.

Also, international private organizations develop different sustainability guidelines and reporting standards for corporations to follow. To name a few: International Organization for Standardization (ISO),[944] Global Reporting Initiative (GRI),[945] Accountability,[946] MSCI,[947] and Dow Jones Sustainability Indices.[948] For instance, MSCI, "the world's most widely used sustainable investment benchmarks", is considering "penalising companies that use aggressive tax avoidance policies."[949] Nevertheless, there seems to be no concrete plans yet. MSCI is one of the world's largest providers of corporate sustainability information to the global investment community.[950] In general, MSCI provides investors with research-based information on CSR;[951] corporations whose investors rely on such MSCI information are pressured to keep up with the standards MSCI endorses.

4.5.3. Concluding remarks

Different fields of CSR have different drivers and reasons for applying certain responsibilities beyond the law on corporations. However, all of them can be linked to the moral dimension of aggressive tax planning;[952] they involve moral behaviour towards other members of society. Moreover, in all cases where CSR is applicable, traces of excessive corporate power in relation to

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[940] Carroll, A. B. (2008). A History of Corporate Social Responsibility: Concepts and Practices. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 19-46). Oxford: Oxford University Press. p. 41.

[941] European Commission. *Corporate Social Responsibility (CSR).*

[942] European Commission. *Corporate Social Responsibility (CSR);* see also Eberhard-Harribey, L. (2006). Corporate Social Responsibility as a New Paradigm in the European Policy: How CSR Comes to Legitimate the European Regulation Process. In Lenssen, G. et al. (Eds), *Corporate Responsibility and Competitiveness* 6 (4) (pp. 358-368). Bradford: Emerald Group Publishing Limited. pp. 361-362.
This EU approach to CSR leans on guidelines and principles developed by other international organizations. See European Commission. *Corporate Social Responsibility (CSR).*

[943] European Commission. *Information page on Non-Financial Reporting*; European Parliament. (2006). Directive 2006/46/EC: Amending Council Directives 78/660/EEC on the Annual Accounts of Certain Types of Companies, 83/349/EEC on Consolidated Accounts, 86/635/EEC on the Annual Accounts and Consolidated Accounts of Banks and other Financial Institutions and 91/674/EEC on the Annual Accounts and Consolidated Accounts of Insurance Undertaking*s.*

[944] International Organization for Standardization (ISO) webpage: "ISO is an independent, non-governmental international organization with a membership of 162 national standards bodies. Through its members, it brings together experts to share knowledge and develop voluntary, consensus-based, market relevant International Standards that support innovation and provide solutions to global challenges."

[945] The Global Reporting Initiative webpage: "GRI helps businesses and governments worldwide understand and communicate their impact on critical sustainability issues such as climate change, human rights, governance and social well-being. This enables real action to create social, environmental and economic benefits for everyone. The GRI Sustainability Reporting Standards are developed with true multi-stakeholder contributions and rooted in the public interest."

[946] The AccountAbility webpage: "AccountAbility is a global consulting and standards firm that works with business, governments and multi-lateral organizations to advance responsible business practices and improve long term performance. We measure our success in terms of our impact on the performance of our clients, our people and our firm."

[947] The MSCI webpage: "We are an independent provider of research-driven insights and tools for institutional investors. We have deep expertise in the areas of risk and performance measurement that is based on more than 40 years of academic research, real-world experience and collaboration with our clients."

[948] Sustainability Indices webpage: "We have developed some of the most sophisticated ESG index solutions available to the asset management industry through our unique and unparalleled methodology for gathering, analyzing, quantifying, and distributing ESG data."

[949] Ram, A. (2016, November 13). MSCI Takes Aim at Corporate Tax Avoidance. *Financial Times* (online).

[950] Skroupa, C. P. (2017, April 24). ESG Reporting Reshapes Global Markets. *Forbes* (online).

[951] MSCI. Information page on CSR.

[952] See chapter 3, section 3.

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a legal vacuum on the international level or lacking state power can be found.[953] The violation of human rights or environmental damages can have more severe and more direct effects on fellow citizens compared to tax avoidance. Nevertheless, taxation is an important building block for protecting and ensuring (the quality of) human rights and life. Aggressive tax planning might not harm human rights directly, but it has the potential to have a more wide-ranging effect on human rights.
To conclude, good tax governance contributes (as will be conceptualized in chapter 6) to CSR's other fields such as human rights and environment. In addition, taxation can be considered as an independent category of CSR, since, in the case of aggressive tax planning or tax avoidance, corporations can use their corporate power to ignore the laws and harm the societies in which they operate. Thus, discussing corporate tax practices under the heading of CSR is certainly justified. In this research, combining CSR and tax represents the idea that certain members of society should not be earning unfair profits at the expense of society. CSR should help to fill the insufficiencies of public governance systems with regard to problems related to corporate moral responsibility towards society.[954]

4.6. Conclusion

Corporate responsibility is a term that nowadays belongs to a normal business practice. Having said that, it is not always entirely self-evident what exactly is meant under such corporate responsibilities and whether companies are actually engaging in CSR driven by an internal desire to do good or just use it to build a better reputation (external motivation). Even more puzzling is the question as to what kind of responsibilities corporations have. For example, this research suggests that from the moral perspective there is a conflict if multinationals claim to be responsible corporate leaders but at the same time avoid paying their fair share of tax. In order to analyze this conflict further, this chapter focused on the concept of CSR.
In this chapter, it was explained how various examples from practice show that the concept of CSR has developed as a response to corporate activities that reduce corporate moral responsibilities towards society. CSR is aimed at controling powerful corporations by keeping them accountable in a moral sense. CSR corporations have explicilty accepted the bottom line of CSR, which expects corporations to go beyond pure compliance with the law. From the legal perspective this might not be enforceable but not meeting such expectations can have negative consequences for corporations (such as reputation damage and losing trust), which can be seen as external driver.
It goes without saying that next to ethical responsibilities, corporations have basic responsibilities, such as economic and legal responsibilities. Ethical responsibilities go beyond the legal and economic ones. In this chapter Carroll's CSR theory was explained. The basic element of Carroll's CSR theory – that socially responsible corporations accept their responsibilities beyond the pure compliance with the letter of the law – forms a theoretical framework for understanding CSR in this research. It is important to note that going beyond pure compliance with the letter of the law does not imply that ethical responsibilities should replace legal ones, but rather they exist in addition to legal ones. This starting point was also illustrated with the CSI/CSR continuum, which shows that not all kinds of legal behaviour is automatically morally responsible.
Corporations have a social role. Not only from a societal but also a regulatory perspective; there are clear expectations on corporations, yet, sometimes corporations can do something that cannot be restricted by the law but that is still not acceptable by society: legal but illegitimate. Therefore, it is not purely voluntary, because there is a lot of social pressure for corporate accountability. However, even though corporations are not purely free do decide whether they engage in CSR or not, they are left with discretion to decide about the content and extent of such responsibilities. This can be seen as a space between corporate social responsibility and corporate social irresponsibility

[953] See more on corporate power in chapter 2, section 3.
[954] See also chapter 3.

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(CSI). Clarifying what a corporation should not do adds to the effectiveness of CSR; clarity about what not to do may be more effective as guidance to convince businesses to take action than a prescriptive approach. Corporations are expected to take responsibility and accept accountability for their actions. Thus, society expects companies to stay away from CSI and engage in CSR. In order to meet such requirements of society with regard corporate accountability and transparency, corporations need to report their strategies. Accountability is way to legitimate the exercise of corporate power. Accountability to society at large requires transparency to enable stakeholders to evaluate tax practices of a multinational company. Therefore, in summary, CSR is a tool to fight excessive corporate power and to endorse corporate moral responsibility where the legal system(s) falls short.

This chapter also discussed two differing views concerning the core of the business and society relationship: the stakeholder view and shareholder view. According to the shareholder value maximization view, the only responsibility of a company is to operate within the framework of the law with minimal ethical constraints. The stakeholder perspective, on the other hand, implies that corporations should behave ethically above the law, accounting for certain moral responsibilities towards the society in which they operate. Both views imply different expectations on corporations with regard to CSR. Corporate boards do not only need to balance between the different interests of shareholders and stakeholders in general, but they must also take into account conflicting interests within these groups. This leaves corporations with difficult choices. In addition, corporations face a challenge defining the nature of CSR. Societal expectations of CSR corporations change together with the developments in business practices. Such a dynamic nature of CSR also clarifies why taxation is increasingly discussed in the context of CSR.

In order to better understand how tax fits within the concept of CSR, other fields of CSR were briefly analyzed in this chapter. Different fields of CSR have different drivers and reasons for expecting certain responsibilities beyond the law from corporations. However, it was concluded in this chapter that all of them involve moral behaviour towards other members of society and concern excessive corporate power in relation to a legal vacuum on the international level. The violation of human rights or environmental damages can have more severe and more direct effects on fellow citizens compared to tax avoidance. Nevertheless, taxation is an important building block for protecting and ensuring (the quality of) human rights and life. Aggressive tax planning might not harm human rights directly, but it has the potential to have a more wide-ranging effect on human rights. Therefore, paying a fair share of taxes can be seen as important in corporate responsibility as not violating human rights directly. It was therefore suggested that taxation can be considered as an independent category of CSR, as, in case of aggressive tax planning or tax avoidance, corporations can use their corporate power to ignore the laws and harm the societies in which they operate.

Combining CSR and tax promotes the idea that certain members of society should not be earning unfair profits at the expense of society. CSR should help to fill in for the insufficiencies of public governance systems with regard to problems related to corporate moral responsibility towards society. This does not mean that corporations should forget their economic responsibilities, which is also in line with the argumentation of Paine that moral behaviour does not require denying one's own personal needs and aspirations.[955] A corporate management board should act in the best interests of the company.[956] The best interest of the company is without a doubt long-term financial stability, which is dependent on corporate reputations among its shareholders as well as stakeholders. It has been suggested that in order to act in "the economic interest of stockholders", corporate managers should often act "in the moral interests of certain stakeholders."[957] In other words, "the market is not antithetical to ethics."[958] The question is whether these best interests are in conflict with the shareholder value maximization. Different cultural and legal systems do burden

[955] See chapter 2, section 8.
[956] See chapter 5.
[957] Dobson, J. (1999). Is Shareholder Wealth Maximization Immoral? *Financial Analysts Journal* 55 (5), 69-75. p. 72.
[958] Dobson, J. (1999). Is Shareholder Wealth Maximization Immoral? *Financial Analysts Journal* 55 (5), 69-75. p. 73.

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corporations with various responsibilities such as "fiduciary duties, duties of care, good faith, adequate management, gross or simple mismanagement."[959] Such obligations might sometimes conflict with corporate moral responsibilities, especially in tax matters. In order to analyze such corporate obligations and their relationship to taxation and CSR, the next chapter will look into different corporate governance theories and practices.

[959] Eijsbouts, J. (2011a, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*. Inaugural Lecture, Maastricht University. p. 39.

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5. GOOD TAX GOVERNANCE AND CORPORATE GOVERNANCE: CONFLICTING INTERESTS?

5.1. Introduction

In the previous chapter I argued that tax fits well within CSR. Only paying taxes according to the letter of the law does not seem to suffice anymore, and stakeholders and society at large seem often to expect corporations to take into account moral considerations in addition to purely legal and economic ones in their tax strategy.[960] Consequently, corporations are confronted with conflicting and evolving expectations with regard to their tax planning behaviour. They have to evolve with the changes in order to survive in a competitive market. Naturally, more empirical research is necessary in order to find out what exactly are the most important factors in relation to the trustworthiness of multinationals' tax behaviour. This detailed analysis is outside the scope of this research. However, considering the political as well as the general public's response to the latest tax avoidance news, it seems that currently certain corporate tax behaviour does not meet the societal expectations in relation to fairness and distributive justice.[961] Consequently, corporations face complex choices in their every-day business practices concerning taxation. Two of the most extreme positions in corporate culture are whether to choose exclusively aiming at paying as little tax as possible to maximize the shareholder value or whether also to consider a moral approach that satisfies a larger group of stakeholders. Here, we see the shareholder approach opposed to the stakeholder approach. For the purposes of this research, it is interesting to focus on these two extreme positions.

The previous chapter briefly introduced the concept of good tax governance and explained various reasons why paying a fair share of tax is a part of corporate social responsibilities. Having said that, there are also arguments against this (in addition to Panayi and Freedman's arguments discussed in the previous chapter[962]). Corporations namely face several legal obligations not (directly) related to tax. Different cultural and legal systems burden corporations with various responsibilities such as "fiduciary duties, duties of care, good faith, adequate management, gross or simple mismanagement."[963] Such obligations might sometimes be considered to be in conflict with corporate moral responsibilities towards society. Especially in tax matters, such conflict can be challenging for tax can be considered both a corporate cost and moral responsibility at the same time.[964]

Some business and tax experts have claimed that various corporate legal obligations, such as the responsibility to promote the interests of shareholders, have an important effect on corporate tax decisions.[965] It is the responsibility of corporate managers to ensure that corporate legal obligations are met. The responsibility to operate in the best interests of the shareholders sometimes even seems to override the interests of other stakeholders, which is in the centre of CSR. Schön, for example, has argued that the corporate management "is not in the position to deviate from the goal to maximize the after-tax profit of the firm without consent from the shareholders in their entirety."[966] According to him, any tax decision that "substantially changes the risk profile of the corporation"

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[960] See chapter 3; chapter 4.

[961] See e.g. Fairless, T. (2015, April 6). Huge Profit Stokes Concerns over Starbucks's Tax Practices in Europe. *The Wall Street Journal* (online); Rowney, M. (2015, April 20). What's Wrong with Tax Avoidance? *NewStatesman* (online).

[962] See chapter 4, section 5.1.

[963] Eijsbouts, J. (2011a, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate.* Inaugural Lecture, Maastricht University. p. 39.

[964] Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin / Heidelberg: Springer-Verlag. In addition, during the UK Public Accounts Committee hearing, Google's European president Matt Brittin claimed that (aggressive) tax planning "is not a matter of personal choice" (UK HMRC 2012, Q. 485, p. Ev 40).

[965] See e.g. Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin / Heidelberg: Springer-Verlag; See also: Amin, M. The Case Against Morality in Tax. *Common Vision Blog post.*

[966] Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin / Heidelberg: Springer-Verlag. p. 47.
It must be mentioned that this line of reasoning was developed more than ten years ago. Much has changed during this time. To the best knowledge of the author of this research, prof. Schön has not recently developed this argumentation further (in English).

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is outside the scope of managerial decision making if it is not directly stated otherwise in the corporate statutes.[967] It has to be noted that Schön made this statement in 2008 and a lot has changed in the last decade. Nevertheless, his position that choosing the tax minimizing strategy is a task of corporate management is still used in public debates. Sikka, for example, is concerned about the "considerable autonomy" that corporate management enjoys "to appropriate economic surpluses for shareholders."[968] This seems to suggest that managers have a choice, but they use it consciously for shareholder value maximization. Corporate management has to follow the applicable laws but, in the words of Sikka, "their discretion to pay democratically agreed taxes and maximise social welfare, is severely constrained by ideologies that preclude corporations from voluntarily embracing policies which subordinate shareholder interests to the advancement of collective social welfare."[969] Opting for good tax governance is, thus, also a question of the discretion of corporate management. Based on these two illustrated views, corporate boards[970] face a certain pressure to opt for (aggressive) tax planning to increase shareholder value. If this is the case, exercising socially responsible tax governance would be greatly hindered. Whether such a position holds true (especially in light of current debates) is not that certain, however.[971] From the corporate law perspective corporate boards enjoy the discretion to set corporate tax strategy and business strategy, under wich falls also CSR, as will be discussed further in this chapter. For instance, the Business Roundtable Guiding Principles for CG state: "the board approves corporate strategies that are intended to build sustainable long-term value".[972] Corporate management has, thus, to operate in the best interests of the company and, in my opinion, good tax governance serves this responsibility, as will be argued in this chapter.

Other than shareholder value maximization, in order to argue for moral responsibility with regard to corporate tax planning practices, it is necessary to understand what affects corporate strategy and decisions with regard to CSR as well as tax. Roselle writes that good corporate governance (CG) is "a key ingredient" for the successful implementation of CSR, because "without it the company will lack the vision, leadership and accountability to develop sustainable profit in a manner that will appropriately consider the needs of all of the company's constituencies."[973] Increasingly, CG should not only "ensure that the company has tools required to comply with applicable laws and regulations" but also "to articulate in a consistent manner how it views its responsibilities and commitments to the people and communities that it seeks to serve."[974] To understand whether multinationals face certain constraints in corporate law that restrict them from considering tax as a part of CSR, this chapter analyzes good tax governance from the perspective of CG principles. It will be studied whether good tax governance can be considered to be in conflict with corporate responsibilities towards shareholders under the CG rules.

This chapter is, however, subject to some methodological limitations. For instance, the term 'shareholders' is addressed as a general group of stakeholders that holds or owns a share of a corporation. The specific characteristics and interests of any particular group of shareholders, such as activist institutional shareholders and hedge funds, are not analyzed in detail. Furthermore, to illustrate the contradictory views on corporate responsibilities, two theoretical models of corporate governance are compared briefly: shareholder orientation (Anglo-Saxon model) and stakeholder orientation (Rhineland model). I will provide a brief overview of four jurisdictions that are

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[967] Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin / Heidelberg: Springer-Verlag. p. 48.

[968] Sikka, P. (2010). Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance. *Accounting Forum* 34 (3-4), 153-168. p. 155.

[969] Sikka, P. (2010). Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance. *Accounting Forum* 34 (3-4), 153-168. p. 155; he refers to Friedman, M. and Friedman, R. D. (1962). *Capitalism and Freedom*. Chicago: University of Chicago Press.

[970] In this research, corporate management and corporate board are used interchangably. When corporate decision making is talked about, it refers to the actions of corporate boards.

[971] See also: Sikka, P. (2010). Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance. *Accounting Forum* 34 (3-4), 153-168. p. 155.

[972] The Business Roundtable. (2016). *Principles of Corporate Governance*.

[973] Roselle, J. (2011). The Triple Bottom Line: Building Shareholder Value. In Mullerat, R. (Ed.). *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2nd Ed.) (pp. 129-156). Alphen aan de Rijn: Kluwer Law International. p. 133.

[974] Roselle, J. (2011). The Triple Bottom Line: Building Shareholder Value. In Mullerat, R. (Ed.). *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2nd Ed.) (pp. 129-156). Alphen aan de Rijn: Kluwer Law International. p. 133.

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considered to reflect these two theoretical models of CG: the US and UK as examples of the Anglo-Saxon model and the Netherlands and Germany as examples of the Rhineland model. Where appropriate, specific examples of certain jurisdictions are provided. Focusing more on the theoretical models of CG instead of comparing the jurisdictions in depth makes it possible to provide a fundamental picture of the expectations of corporate management. At the same time, such an approach limits drawing concrete country-specific conclusions, which leaves room for further research.
This chapter is structured as follows. First, section 2 explains the background of the importance of CG with regard to the corporate tax planning debate that is central for this research. The concept of corporate governance and one of the underlying tools of CG – fiduciary duty – are explained. Furthermore, the underlying corporate law rules of the UK, US, Germany and the Netherlands are described. Section 3 illustrates the possible conflicting interests of various corporate stakeholders and their relevance from the CG perspective. The 4th section connects CG with good tax governance. It is shown that, regardless of various corporate law cultures and regimes, the primary duty of corporate managers is to act in the best long-term interests of the company and that aggressive tax planning or avoiding structures cannot be justified as being in the interest of CSR corporations. CSR is a part of corporate strategy and from the corporate law perspective it is the exclusive power of the board of the publicly listed corporations to decide upon corporate strategy and tax strategy. The last section concludes.

5.2. Corporate governance and arguments against good tax governance

Even though, in theory, tax planning should fit within the concept of CSR, it can be questionable whether and why corporate managers as well as tax advisors should be convinced to imply this in their daily business practices. The fact is that, in order to improve or incentivize the corporate mind-set in relation to tax morale and tie it to the notion of CSR, it is necessary to understand how corporations work. The decision-making processes in a multinational are complex and require compromises to be made between conflicting interests. From this perspective, multinationals can have various internal and external motivations to engage in good tax governance, as explained in the previous chapter. From the corporate law perspective corporate boards enjoy exclusive discretion to decide upon the corporate strategies (board supremacy principle). However, there are also arguments against engaging in good tax governance, which deserve some attention in order to develop a thorough understanding of this concept.
As explained in the previous chapter of this research, multinationals can have intrinsic and extrinsic motivations to switch to good tax governance.[975] In other words, ethical behaviour can be seen as a goal in itself, such as being a 'good corporate citizen' or as ethical behaviour as a means to some other end, such as improving reputation or preventing political risk.[976] Intrinsic motivation is an integrity-based approach, where morality drives the company. Naturally, economic performance (profits) and compliance with the law are relevant factors, as Carroll's CSR Pyramid also suggests,[977] but going beyond the law towards ethical behaviour is driven by a corporate internal drive to do what is right, just and fair. Integrity is based on the concept of self-governance. This motivation considers the effects of corporate actions on others, stakeholders and society at large. Good tax governance is a mix of both motivations but can eventually result in higher costs on corporations in the short term and thereby lower returns for shareholders.

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[975] See chapter 4.
[976] In 1985, Moon and Richardson wrote that motivation for CSR is to offset the threat of regulation. See Moon, J. and Vogel, D. (2008). Corporate Social Responsibility, Government, and Civil Society. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 303-323). Oxford: Oxford University Press. p. 308. This can also be seen to be the case today in relation to tax. This is especially so when we focus on the multinationals that claim to be CSR. If corporations could prove that they do not abuse the imperfections of laws, the legislator does not have to (rush with) make(ing) imperfect laws. Despite the grey areas in international tax planning, there are possibilities for companies to show their good intentions and trustworthiness. One such intention is, thus, reflected in implementing social responsibility policies with regard to taxation.
[977] See chapter 4, section 3.1.

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Tax-as-a-cost argument needs more attention, however, for the purposes of this research, because it can play a crucial role with regard to CG. Namely, as illustrated in the introduction of this chapter, some believe that aggressive tax planning is an obligation of corporate management under the shareholder value maximization CG culture.[978] This is an important position to analyze because, if this holds true, integrating good tax governance could be seriously hindered. In addition, CG is regulated (to a large extent) by (coporate and securities) laws while good tax governance as an element of CSR would (to a large extent) be a subject of voluntary corporate self-regulation. In other words, CG is based on hard law, while CSR is a form of soft law. Consequently, in the case of conflict, legal obligations should be fulfilled first. As a result, corporations face various practical questions such as whether and how would good tax governance fit with other legal obligations. Corporate and securities laws, which concern incorporation and listing requirements, director's duties, reporting requirements, and related policies shape "what companies do and how they do it."[979] Therefore, to analyze corporate managers' general legal obligations, the following sub-sections briefly introduce the theoretical background of CG and the deriving managerial legal obligations.

5.2.1. Understanding corporate governance in the context of this research[980]

'Governance', as such, is a broad concept that applies to the purpose, management and functions of nations, governments, communities, and organizations, such as corporations. The governance of corporations, corporate governance (CG), refers to the way power is distributed within a corporation and to the decision-making process with regard to the use of this power. It sets rules and principles for how a (large) company should be regulated and managed.[981] CG originates with the birth of corporations. Already in 1776, Adam Smith pointed to the need for the supervision of managers because of the (legal) separation of ownership in capital from the control over that capital - i.e. the management of a business.[982]

The concept of corporate governance can have varying definitions. Many theoretical definitions of CG reflect the concern for the supposedly self-serving motivation of managers related to the separation of ownership and control. For instance, Shleifer and Vishny define CG as "the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment."[983] However, there is a need for control by those who have to realize this return on investment. La Porta et al. define CG as "a set of mechanisms through which outside investors protect themselves against expropriation by the insiders."[984] Friese et al. aptly summarize the common general elements as "the sum of all mechanisms of control and supervision that are aimed at ensuring the successful operation of a business in a corporate form and in this respect to remedy the effects of the separation of ownership and management."[985]

Sir Adrian Cadbury, whose work on developing CG in practice is recognized around the world,[986] wrote in his foreword to the World Bank's Corporate Governance Framework for Implementation that CG concerns "holding the balance between economic and social goals and between individual and communal goals." According to him, it is the aim of CG to "align as nearly as possible the interests of individuals, corporations and society" while encouraging "the efficient use of

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[978] Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin / Heidelberg: Springer-Verlag. p. 47.

[979] Ruggie, J. G. (2013). *Just Business: Multinational Corporations and Human Rights*. New York: W. W. Norton & Company. p. 87.

[980] Corporate governance is a broad concept and this research focuses only on certain basic elements of this concept.

[981] Du Plessis J. J. et al. (2015). *Principles of Contemporary Corporate Governance* (3rd Ed.). Melbourne: Cambridge University Press. p. XXV.

[982] "[T]he directors of such companies, however, being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own .... Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company." Smith, A. (1776). *An Inquiry into the Nature and Causes of the Wealth of Nations of 1776.* Indianapolis: Liberty Fund. p. 741.

[983] Shleifer, A. and Vishny, R. (1997). A Survey of Corporate Governance. *Journal of Finance* 52(2), 737-783.

[984] La Porta R. et al. (2000). Investor Protection and Corporate Governance. *Journal of Financial Economics* 58 (1), 3-27. p. 4.

[985] Friese, A. et al. (2008). Taxation and Corporate Governance – The State of the Art. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 357-425). Berlin / Heidelberg: Springer-Verlag. p. 364.

[986] Adeney, M. (2015, September 6). Sir Adrian Cadbury Obituary. *The Guardian* (online).

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resources" and assuring the "accountability for the stewardship of those resources."[987] Thus, a CG system should provide incentives for the corporate board[988] to "pursue objectives that are in the interest of both the company and is stakeholders."[989] This leaves room for considering CSR under the obligations that derive from CG. In other words, CG "provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined."[990] According to Owens, an effective CG system is necessary for "a degree of confidence" which is a precondition for "the proper functioning of a market economy."[991] Thus, CG can be seen as a "part of the larger economic context" which is also affected by tax rules, but also "business ethics and corporate awareness of the environmental and societal interests of the communities in which a company operates."[992] Such a view on CG is, nevertheless, not commonly agreed upon. In general, there is an underlying assumption in most of the CG literature that corporate managers "operate with self-serving motivation."[993] Nevertheless, it does not imply that it is commonly agreed whose interests CG should take into account or prioritize. Corporations are managed and directed by a board of directors; CG determines corporate accountability, to whom a corporate board is accountable and for what.

To a large extent, it is argued that the corporate board "acts as a surrogate for the shareholders of the corporation and its primary role is to oversee management's performance in terms of increasing profits and meeting social responsibilities."[994] That is why CG rules usually focus on the conflicting relationship between the corporate board and shareholders. For instance, according to the UK Cadbury Commission, CG is "the system by which companies are directed and controlled."[995] The direction of the companies should be controlled to protect investors. The Anglo-Saxon CG system is built on agency theory, according to which "the shareholders not only own the company but also its assets, which are entrusted to the managers based on their so-called fiduciary duty."[996] Based on this theory, corporations should be run serving the shareholders' interests. Even though the modern

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[987] A. Cadbury, foreword in Iskander, M. R. and Chamlou, N. (2000). *Corporate Governance, a Framework for Implementation*. Washington: The World Bank. p. vi.

[988] Various national legal systems recognize different board structures, such as a one-tier system or two-tier system. This research does not advocate any particular board structure and the term 'board' is used to embrace the different national models of board structures. Similar to the OECD/G20 Principles of Corporate Governance, this research combines in the term 'management board' both supervisory board as well as key executives, which in a two-tier system are considered as two separate corporate boards. See OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 10.
One-tier board is common in Anglo-Saxon system of CG whereas a two-tier board has been more used in Rhineland CG system. However, due to global business practices there is convergence towards a one-tier system for it is arguably more efficient. See AMS Advocaten. See also Friese, A. et al. (2008). Taxation and Corporate Governance – The State of the Art. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 357-425). Berlin / Heidelberg: Springer-Verlag. p. 361.

[989] Van Daelen, M. M. A. (2012). *Risk Management and Corporate Governance: Match between the Legal Framework and Practice*. Doctoral dissertation. Brugge: Die Keure. p. 243; see also Ruggie, J. G. (2013). *Just Business: Multinational Corporations and Human Rights*. New York: W. W. Norton & Company. p. 132.

[990] Owens, J. P. (2008). *Good Corporate Governance: The Tax Dimension. In. Schön, W. (Ed.), Tax and Corporate Governance* (pp. 9-12). Berlin / Heidelberg: Springer-Verlag. p. 9.

[991] *Owens, J. P. (2008). Good Corporate Governance: The Tax Dimension. In. Schön, W. (Ed.), Tax and Corporate Governance (pp. 9-12). Berlin / Heidelberg: Springer-Verlag*. p. 9.

[992] *Owens, J. P. (2008). Good Corporate Governance: The Tax Dimension. In. Schön, W. (Ed.), Tax and Corporate Governance (pp. 9-12). Berlin / Heidelberg: Springer-Verlag*. p. 9.

[993] Buchholtz, A. K. et al. (2008). Corporate Governance and Corporate Social Responsibility. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 327-345). New York: Oxford University Press. p. 329.
Nowadays the managers' self-serving motivation is conceptualized as agency theory, according to which one person (agent) has to make decisions on behalf of (or that affects the) another person (principal). Corporate governance rules should offer a safety net in case there occur conflicts between agents and principals. Agents are usually corporate managers and principals are stakeholders, while shareholders are often considered the most important group of stakeholders.

[994] "Corporate governance is essential to corporate accountability and without which no corporation can exist. State laws demand that corporations are to be managed and directed by a board of directors. This board acts as a surrogate for the shareholders of the corporation and its primary role is to oversee management's performance in terms of increasing profits and meeting social responsibilities. As such, corporate governance is fundamental component to corporate accountability as defined above because it provides a strong institutional forum for communication between managers and shareholder's representatives." Sage Publications. (2012). *SAGE Brief Guide to Corporate Social Responsibility*. Los Angeles / London: SAGE. p. 49. See also Bower, J. L. and Paine, L. S. (2017). The Error at the Heart of Corporate Leadership. *Harvard Business Review*, May-June issue.

[995] Cadbury, A. (1992, December 1). Report of the Committee on the Financial Aspects of Corporate Governance. London: The Committee on the Financial Aspects of Corporate Governance and Gee and Co. Ltd. para. 2.5.

[996] Eijsbouts, J. (2011a, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*. Inaugural Lecture, Maastricht University. Pp. 48-49.

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corporate law recognizes that a corporation is "a legal institution in its own right, owning its assets and being responsible for its liabilities"[997] it still puts shareholders in the centre of corporate actions. Nevertheless, not all CG rules or guidelines require focusing on shareholders interests only. According to the Dutch Corporate Governance Code, CG is about good governance and the supervision of listed companies; it regulates relationships between directors, auditors and shareholders.[998] Thus, CG concerns mechanisms to supervise the behaviour of different actors. According to its preamble, the Dutch point of departure is that the corporation is "a long-term alliance between the various parties involved in the company." The Dutch Code refers to different actors: the stakeholders, "the groups and individuals who, directly or indirectly, influence – or are influenced by – the attainment of the company's objects: i.e. employees, shareholders and other lenders, suppliers, customers, the public sector and civil society."[999] The Dutch Code puts the responsibility on the corporate board "for weighing up these interests, generally with a view to ensuring the continuity of the enterprise, while the company endeavours to create long-term shareholder value."[1000] Furthermore, according to the OECD CG reflects "a set of relationships between a company's management, its board, its shareholders and other stakeholders." It additionally, sets a framework for achieving the objectives of the company and for monitoring corporate performance.[1001] The OECD also notes that the aim of CG is to "build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies."[1002] Such a perspective clearly goes further than focusing on shareholder interests only. But what is the main tool of CG to achieve such purposes?

5.2.2. Fiduciary duties of corporate managers

Thus, CG should set certain rules and principles for company management in order to decrease possible negative externalities that might arise from the self-interested behaviour of managers. In the other words, CG should prevent that managers, who do not run the business with their own capital, abuse their power at the expense of the capital owners'– the shareholders' – interests, or at the expense of stakeholders' interests more in general. The most complex tension in the CG debate that has not been solved yet is how to balance "the profit-making objective of corporations and company officers against broader social responsibilities owed to the wider community."[1003] With regard to tax planning, this balancing act is complicated. On the one hand, tax is a cost and the economic shareholder value perspective requires that costs are kept low. Thus, it can be questioned whether it is a reason for corporations to continue with aggressive tax planning in order to keep costs low and shareholders' return high. On the other hand, taxes are an investment in a society and, due to their moral element, corporations should abstain from tax planning practices that aim at paying the absolute minimum without taking into account ethical considerations. Moreover, aggressive tax planning also brings certain costs and risks, which, in the long-term, might harm shareholder value as well.[1004] How should corporate boards deal with such a dilemma?
According to the OECD, corporate boards "should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders."[1005] In certain

[997] Eijsbouts, J. (2011a, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*. Inaugural Lecture, Maastricht University. pp. 48-49.
[998] "Corporate governance gaat over goed bestuur van beursgenoteerde bedrijven en het toezicht daarop. Het regelt verhoudingen tussen bestuurders, commissarissen en aandeelhouders. De overheid heeft wetten opgesteld voor goed en eerlijk bestuur van bedrijven. Ook is er een gedragscode: de Corporate Governance Code." Dutch Corporate Governance Code.
[999] "Corporate governance gaat over goed bestuur van beursgenoteerde bedrijven en het toezicht daarop. Het regelt verhoudingen tussen bestuurders, commissarissen en aandeelhouders. De overheid heeft wetten opgesteld voor goed en eerlijk bestuur van bedrijven. Ook is er een gedragscode: de Corporate Governance Code." Dutch Corporate Governance Code.
[1000] Dutch Corporate Governance Code. Preamble point 7.
[1001] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 9.
[1002] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 7.
[1003] Du Plessis J. J. et al. (2015). *Principles of Contemporary Corporate Governance* (3rd Ed.). Melbourne: Cambridge University Press. p. XXV.
[1004] See also chapter 2, section 5 and section 6.
[1005] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. pp. 45-46.

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jurisdictions, it is a legal requirement for corporate boards to "act in the interest of the company, taking into account the interests of shareholders, employees, and the public good."[1006] Naturally, the central concern of CG is that the corporate board would not become self-interested. Therefore, the members of the corporate boards have fiduciary duty, which, according to the OECD, consists of two key elements: "the duty of care and the duty of loyalty." The first duty "requires board members to act on a fully informed basis, in good faith, with due diligence and care",[1007] while the second "underpins effective implementation" of CG rules.[1008]
According to Stout the fiduciary duty of loyalty precludes corporate boards from "using their corporate positions to line their own pockets." Nevertheless, she believes that managers remain free "to pursue other, nonshareholder-related goals under the comforting mantle of the business judgement rule."[1009] According to the business judgement rule (BJR), the managers are obliged to act in the best interests of the company. Advancing the successful operation of the corporation demands pursuing the interests of the corporation. The board's discretion to make decisions that involve alternative choices can be derived from the BJR. Stout adds that "contrary to the shareholder primacy thesis, shareholders cannot recover against directors or officers for breach of fiduciary duty simply because those directors and officers favour stakeholders' interests over the shareholders' own."[1010] In contrast to various other corporate law scholars, Stout argued convincingly that "corporate law treats directors not as agents of shareholders but as fiduciaries who owe legal duties not only to shareholders, but also to the corporate entity itself."[1011] I agree with this view.
Schön, on the other hand, has argued that the duty of care requires that corporate boards "take all decisions which are expected to bring about a positive net return on investment." Consequently, "any tax-driven measure shall be taken if the expected amount of tax reduction fairly surpasses the ensuing costs," such as "the narrow range of advisory and compliance costs for the tax measure itself and the broad range of costs incurred by the tax-driven operation as such." Thus, corporate managers should choose, based on a cost-benefit analysis, whether to engage in various tax planning structures in order to fulfil their duty of care.[1012] In the same vein, Schön has argued later that in Germany managers have discretion with regard to the choice of tax planning structures, which is protected by the BJR. Only in quite extreme situations will there be a violation of their duty of care.[1013] Schön has also argued (in 2005) that aggressive tax planning might at some point "tend to employ corporate constructions which are not justified from a corporate governance standpoint", as it may result in "a dramatic loss of transparency for the shareholders, who are no longer in the position to estimate the true profitability of their capital." Such managerial behaviour is, thus, according to Schön, harmful from a shareholder value perspective.[1014] This, however, seems to highlight management's decision-making power in tax-planning choices, which will be discussed later in this chapter.

[1006] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. pp. 45-46.
[1007] "In some jurisdictions there is a standard of reference which is the behaviour that a reasonably prudent person would exercise in similar circumstances. In nearly all jurisdictions, the duty of care does not extend to errors of business judgement so long as board members are not grossly negligent and a decision is made with due diligence, etc. The principle calls for board members to act on a fully informed basis. Good practice takes this to mean that they should be satisfied that key corporate information and compliance systems are fundamentally sound and underpin the key monitoring role of the board advocated by the Principles. In many jurisdictions this meaning is already considered an element of the duty of care, while in others it is required by securities regulation, accounting standards, etc." OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. pp. 45-46.
[1008] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. pp. 45-46.
[1009] Stout, L. A. (2012). New Thinking on 'Shareholder Primacy'. In Vasudev, P.M. and Watson, S. (Eds.), *Corporate Governance after the Financial Crisis* (pp. 25-41). Cheltenham: Edward Elgar Publishing. p. 29.
[1010] Stout, L. A. (2012). New Thinking on 'Shareholder Primacy'. In Vasudev, P.M. and Watson, S. (Eds.), *Corporate Governance after the Financial Crisis* (pp. 25-41). Cheltenham: Edward Elgar Publishing. p. 29.
[1011] Stout, L. A. (2016). Corporate Entities: Their Ownership, Control, and Purpose. *Oxford Handbook of Law and Economics, Forthcoming, Cornell Legal Studies Research Paper No. 16-38*.
[1012] Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin/Heidelberg: Springer-Verlag. p. 46-47.
[1013] Schön, W. (2013). Vorstandspflichten und Steuerplanung. In Krieger, G. et al. (Eds.), *Festschrift für Michael Hoffmann-Becking zum 70. Geburtstag*. Munich: Beck. pp. 1091-1092; see also Jallai, A.-G. and Gribnau, J. L. M. (2018). Aggressive Tax Planning and Corporate Social Irresponsibility: Managerial Discretion in the Light of Corporate Governance. In Mulligan, E. and Oats, L. (Eds.), *Contemporary Issues in Tax Research,* Volume 3 (pp. 51-86). Birmingham: Fiscal Publications.
[1014] Schön, W. (2005). Playing Different Games? Regulatory Competition in Tax and Company Law Compared. *Common Market Law Review* 42 (2), 331-365. pp. 348-349.

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It goes without saying that Schön is right in that managers must not act in conflict with their legal duties. However, Stout's broader interpretation of manager's duties illustrates well how legal requirements leave room for various interpretations. While managers' fiduciary duty might be considered a requirement for acting in the best interests of the shareholders, a fiduciary relationship is much broader than understood in corporate law. For instance, Ghahramani points out that a "fiduciary relationship need not be created by contract; it may arise out of an informal relationship where both parties understand that a special trust or confidence has been reposed."[1015] Fiduciary responsibilities are initially not based on "threatening liability but by expressing and reinforcing social norms of careful and loyal behavior."[1016] Fiduciary duties in general are, however, not considered as special duties for "they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other contractual undertakings."[1017] In contrast, the basic functions of taxation suggest that paying taxes is an obligation that has a moral footing.[1018] According to this line of reasoning, the fiduciary duties of corporate managers do not hinder good tax governance for good tax governance does not expect managers to act in their own interests but in the (long-term) interests of the company, which eventually should also be in the interests of the shareholders.

In practice, "the duties that fiduciaries owe the beneficiaries are of 'good faith, trust, confidence, and candor'."[1019] Consequently, fiduciaries "are entrusted with discretion over beneficiary interests."[1020] Monks and Minow argue that the fiduciary duty is "the highest standard of procedural and substantive performance ever developed under our legal system". This duty imposes "responsibilities based not just on contracts but on honor, integrity, trust, and ethics."[1021] Fiduciary duty in corporate law should prevent managers' self-interested behavior for "fiduciary law is inherently altruistic, as it imposes an unquestionable duty to place the interests of another before one's own."[1022]

5.2.3. Board discretion as rooted in corporate law

In order to better understand the role of corporate boards with regard to the decision-making in two theoretical models of corporate governance – shareholder orientation (Anglo-Saxon model) and stakeholder orientation (Rhineland model), it is necessary to know what corporate law says. For this purpose, I will now provide a brief overview of the underlying rules concerning the board's decision-making discretion in UK and US corporate law as the representatives of the Anglo-Saxon model of CG, and Germany and the Netherlands corporate laws as examples of the Rhineland model.

In the US the exclusive discretion (and obligation) of the board to make decisions concerning corporate strategy is established mostly in (Delaware) case law.[1023] The role of the corporate board

[1015] Ghahramani, S. (2018). Business Ethics, Contractarianism, and (Optional?) Fiduciary Duties in Corporate Law. *Business Law Review* 39 (1), 20-24. p. 21.

[1016] Ghahramani, S. (2018). Business Ethics, Contractarianism, and (Optional?) Fiduciary Duties in Corporate Law. *Business Law Review* 39 (1), 20-24. p. 21.

[1017] Easterbrook, F. H. and Fischel, D. R. (1993). Contract and Fiduciary Duty. *The Journal of Law and Economics* 36 (1), 425-446. As cited in Ghahramani, S. (2018). Business Ethics, Contractarianism, and (Optional?) Fiduciary Duties in Corporate Law. *Business Law Review* 39 (1), 20-24. p. 20.

[1018] See chapter 3.

[1019] Ghahramani, S. (2018). Business Ethics, Contractarianism, and (Optional?) Fiduciary Duties in Corporate Law. *Business Law Review* 39 (1), 20-24. p. 23.

[1020] Ghahramani, S. (2018). Business Ethics, Contractarianism, and (Optional?) Fiduciary Duties in Corporate Law. *Business Law Review* 39 (1), 20-24. p. 23.

[1021] Monks, R. A. G. and Minow, N. (2011). *Corporate Governance* (5th Ed.). West Sussex: John Wiley & Sons. p. 102.

[1022] Ghahramani, S. (2018). Business Ethics, Contractarianism, and (Optional?) Fiduciary Duties in Corporate Law. *Business Law Review* 39 (1), 20-24. p. 23.

[1023] See e.g. *Gimbel v. Signal Cos.*, 316 A.2d 599, 608 (Del. Ch. 1974); *Aronson v. Lewis*, 473 A.2d 805 (Del. Mar. 1, 1984). Only in case of takeovers, the board is responsible for seeking highest value for the shareholders; *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). See also Van der Schee, P. A. (2011). *Regulation of Issuers and Investor Protection in the US and EU: A Translatic Comparison of the Basics of Securities and Corporate Law.* Hoofddorp: Eleven International Publishing. pp. 30-34.
See also: Van der Elst, C., de Jong, A. and Raaijmakers, T. (2007). Een overzicht van juridische en economische dimensies van de kwetsbaarheid van Nederlandse beursvennootschappen. *Onderzoeksrapport ten behoeve van de SER Commissie Evenwichtin Ondernemingsbestuur.* pp. 104-120; American Law Institute (ALI). Principles of Corporate Governance.

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as "the ultimate manager of the corporation" is protected and promoted by the business judgemet rule, which was also discussed in the previous sub-section.[1024] The BJR is not "a substantive rule of law" but a presumption that the board acts in the best long-term interests of the company and thereby thus also in the best interests of the shareholders.[1025]
In the UK, the board supremacy principle is vested in the Companies Act 2006 (section 172a).[1026] According to the Companies Act 2006 (172), the corporate board has a duty to promote the success of the company "for the benefit of its members as a whole" and in doing so corporate boards have to, amongst other responsibilities, for instance, consider "the likely consequences of any decision in the long term" and maintain "a reputation for high standards of business conduct". Moore argues that under the UK company law "shareholders have no subjective power over the corporation or its management".[1027]
In Germany, the rights and obligations of the board of the stock-listed corporations are vested in *Aktiengesetz,* the German Stock Corporation Act.[1028] *Aktiengesetz* confirms the board supremacy principle.[1029] According to § 93 of the *Aktiengesetz,* the management board has the duty of care to act in the best interests of the company,[1030] which implies the existence of the business judgement rule in German corporate law.[1031]
In the Netherlands the exclusive right of the board to make decisions regarding business and tax strategy is known as the board supremacy principle.[1032] This principle is vested various Supreme court cases, such as in the Forum-bank case, ABN AMRO, ASM Internationa, and Boskalis / Fugro.[1033] According to this principle, the corporate board has the exclusive discretion for core decision-making in the company. These decisions, however, need to be disclosed and explained to the shareholders on a yearly basis in the annual reports.[1034] From the investor protection standpoint, in all of the aforementioned jurisdictions, corporate boards have to be transparent about their decision-making and disclose relevant information in their annual reports.[1035] For instance, the amendments in the Dutch Corporate Governance Code (2009) strengthen the financial disclosure to the market in order to restore the confidence of the investors in the board decision-making.[1036]
Based on these legal rules, it is evident that corporate managers have in all jurisdictions clear discretion to decide upon corporate strategy, which includes business (CSR) strategy as well as tax

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[1024] Cahn, A. and Donald, D. C. (2010). *Comparative Company Law: Texts and Cases on the Laws Governing Corporations in Germany, the UK and the USA*. Cambridge: Cambridge University Press. p. 392.
[1025] Cahn, A. and Donald, D. C. (2010). *Comparative Company Law: Texts and Cases on the Laws Governing Corporations in Germany, the UK and the USA*. Cambridge: Cambridge University Press. p. 392.
[1026] See also: Moore, M. T. (2017). Understanding the Modern Company through the Lens of Quasi-Public Power. In Choudhury, B. and Petrin, M. (Eds.), *Understanding the Company: Corporate Governance and Theory* (pp. 91-116). Cambridge: Cambridge University Press. pp. 103-106.
[1027] Moore, M. T. (2017). Understanding the Modern Company through the Lens of Quasi-Public Power. In Choudhury, B. and Petrin, M. (Eds.), *Understanding the Company: Corporate Governance and Theory* (pp. 91-116). Cambridge: Cambridge University Press. p. 104.
[1028] Cahn, A. and Donald, D. C. (2010). *Comparative Company Law: Texts and Cases on the Laws Governing Corporations in Germany, the UK and the USA*. Cambridge: Cambridge University Press. pp. 13-17.
[1029] *Aktiengesetz* § 76.1 and § 93.1. See also: Van der Schee, P. A. (2011). *Regulation of Issuers and Investor Protection in the US and EU: A Translatic Comparison of the Basics of Securities and Corporate Law.* Hoofddorp: Eleven International Publishing. pp. 30-34, p. 116; Schön, W. (2013). Vorstandspflichten und Steuerplanung. In Krieger, G. et al. (Eds.), *Festschrift für Michael Hoffmann-Becking zum 70. Geburtstag*. Munich: Beck. pp. 1091-1092.
[1030] *Aktiengesetz* § 93 (1). See: Schulz, M. and Wasmeier, O. (2012). *The Law of Business Organizations: A Concise Overview of German Corporate Law*. Berlin, Heidelberg: Springer – Verlag. p. 188.
[1031] See also: Van der Elst, C., de Jong, A. and Raaijmakers, T. (2007). Een overzicht van juridische en economische dimensies van de kwetsbaarheid van Nederlandse beursvennootschappen. *Onderzoeksrapport ten behoeve van de SER Commissie Evenwichtin Ondernemingsbestuur.* pp. 77-78.
[1032] Van der Schee, P. A. (2011). *Regulation of Issuers and Investor Protection in the US and EU: A Translatic Comparison of the Basics of Securities and Corporate Law.* Hoofddorp: Eleven International Publishing. p. 31.
[1033] Forumbank-arrest (HR 21 januari 1955, NJ 1959, 43); HR 13.07.2007, NJ 2007/434 (ABN AMRO); HR 09.07.2010, NJ 2010/544 (ASM International), and HR 20.04.2018, RN 2018/52 (Boskalis / Fugro). See also Van der Schee, P. A. (2011). *Regulation of Issuers and Investor Proteciton in the US and EU: A Translatic Comparison of the Basics of Securities and Corporate Law.* Hoofddorp: Eleven International Publishing. p. 116.
[1034] Van der Elst, C., de Jong, A. and Raaijmakers, T. (2007). Een overzicht van juridische en economische dimensies van de kwetsbaarheid van Nederlandse beursvennootschappen. *Onderzoeksrapport ten behoeve van de SER Commissie Evenwichtin Ondernemingsbestuur.* pp. 76-77.
[1035] See e.g. Van der Schee, P. A. (2011). *Regulation of Issuers and Investor Protection in the US and EU: A Translatic Comparison of the Basics of Securities and Corporate Law.* Hoofddorp: Eleven International Publishing. pp. 40 ff.
[1036] Van der Schee, P. A. (2011). *Regulation of Issuers and Investor Protection in the US and EU: A Translatic Comparison of the Basics of Securities and Corporate Law.* Hoofddorp: Eleven International Publishing. p. 119.

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strategy.[1037] Next to legal rules, corporate decision-making is also affected by the corporate cultures that are underlying the shareholder-oriented and stakeholder-oriented CG models. The stakeholder (Rhineland) model of CG clearly encourages corporate boards to consider a wider spectrum of stakeholder interests and thus leaves room for good tax governance, as is argued in this research. The shareholder (Anglo-Saxon) model of GG prioritises shareholders' interests but, at the same time, as shown based on the corporate laws in the UK and the US, it does not restrict corporate boards from considering a wider spectrum of stakeholder interests, as long as it is in the best interests of the company. Thus, it also leaves room for good tax governance.
The board supremacy principle leaves, to my mind, in all jurisdictions corporate boards of the CSR corporations sufficient elbow-room for endorsing good tax governance. So far, there is no court case where shareholders have claimed that corporate boards were acting in bad faith, unprofessionally or uninformed when trying to improve the moral acceptability of the corporate tax practices. Based on the case law of various jurisdictions, it seems unlikely that any court would allow such hypothetical claim. On the contrary, corporations that claim to engage in good tax governance but at the same time undertake aggressive tax planning actions, can, in my opinion risk the claims of shareholders based on building wrong expectations.

5.2.4. Concluding remarks

Fiduciary duty is foremost one of the essential tools of CG for preventing managers from the self-interested behaviour (avoid agency costs). On the other hand, the BJR requires managers to act in the best interests of the company and thereby leaves the freedom to managers to "pursue other, nonshareholder-related goals."[1038] Even the shareholder primacy principle does not provide the shareholders with the possibility to "recover against directors or officers for breach of fiduciary duty simply because those directors and officers favour stakeholders' interests over the shareholders' own."[1039] For instance, the US corporate law, which follows the shareholder primacy model, allows corporate boards "leeway to commit corporate resources to projects that benefit the public" as long as such decisions have "some plausible connection to future profitability."[1040]
In principle CG, thus, expects corporate managers to act in the interests of somebody else instead of their own interests. Various theories of CG indicate different starting points – supervision mechanisms protecting first and foremost shareholder interests, on the one hand, or also explicitly taking stakeholder interests into account on the other hand. CG theories are largely based on theories of companies and on the question to whom a corporation should be responsible and accountable, shareholders or stakeholders. Naturally, there is much discussion concerning the purpose of a corporation. Among economists, there has long been an understanding that corporations should generally be run so as to maximize its owners' – shareholder – value.[1041] There is, nevertheless, also a group of people who believe that the purpose of the company is to "provide *ethically and profitably* the goods and services people need and want."[1042] Both positions are hotly debated, as will be shown next. In my opinion, corporate decision making should be in line with legal requirements, but it is not necessarily restricted to such requirements in a sense that corporations have a leeway to go byond strict compliance with the law. I believe that Stout's position reflects the complex business environment and decision making better than a strict

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[1037] Compare, for instance, to the argumentation of Matt Brittin during the UK Public Accounts Committee hearing, Google's Vice President for Sales and Operations, Northern and Central Europe: he claimed that (aggressive) tax planning "is not a matter of personal choice" (UK HMRC 2012, Q. 485, p. Ev 40).
[1038] Stout, L. A. (2012). New Thinking on 'Shareholder Primacy'. In Vasudev, P.M. and Watson, S. (Eds.), *Corporate Governance after the Financial Crisis* (pp. 25-41). Cheltenham: Edward Elgar Publishing. p. 29.
[1039] Stout, L. A. (2012). New Thinking on 'Shareholder Primacy'. In Vasudev, P.M. and Watson, S. (Eds.), *Corporate Governance after the Financial Crisis* (pp. 25-41). Cheltenham: Edward Elgar Publishing. p. 29.
[1040] Stavins, R. N. et al. (2008). Corporate Social Responsibility through an Economic Lens. *HKS Working Paper No RWP08-023; FEEM Working Paper No 842008*. p. 17.
[1041] Berle, A. A. and Means, G. C. (1968). *The Modern Corporation and Private Property*. New York: Harcourt, Brace & World; Friedman, F. (2002). *Capitalism and Freedom, Fortieth Anniversary Edition*. Chicago: The University of Chicago Press. p. 133.
[1042] Charkham, J. (2005). Keeping Better Company: Corporate Governance Ten Years on (2nd Ed.). Oxford: Oxford University Press. p. 2, p. 21.

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corporate hard-law approach. Corporate boards have discretion to combine legal requirements with economic results and a myriad of conflicting interests. From the legal perspective corporate boards are not obliged to prioritize shareholder value maximization in any jurisdiction but the best long-term corporate interests, as developed by the legislator and the courts, instead. Nevertheless, corporate decision-making is next to laws also affected by the corporate culture. Based on these CG regimes and cultures, this research will analyze whether multinationals that have committed themselves to ethical business practices, for instance through CSR, can also opt for more responsible tax planning. This, however, raises a question in whose interests should corporate managers act?

5.3. Corporate governance and conflicting interests

In business practice corporate governance has a wide spectrum of nuances and forms. For the purposes of this research, I will focus on two GC theories that represent quite opposite approaches to illustrate the conflicting interests that corporate managers might face. These CG regimes respond to two prevailing theories among corporate law scholars when addressing the essence of corporation.[1043] These theories, which reflect upon to whom corporations should be responsible and accountable, are shareholder theory and stakeholder theory. The first theory reflects "the importance of the primacy of the shareholder interest and the enhancement of the shareholder value." The stakeholder theory, on the other hand, presumes that "corporations exist to serve a number of different interests and not just shareholders."[1044] Both theories are also the foundation of CSR-related debates, as discussed in the previous chapter of this research.[1045] These two theories also represent two theoretical models of corporate governance: the 'market-oriented' Anglo-Saxon model (based on shareholder theory) and the 'network-oriented' Rhineland model (based on stakeholder theory) of corporate governance.[1046] These models illustrate two diverging regulatory and business culture approaches towards shareholders and stakeholders in company management.[1047]

According to Ferrell et al. stakeholder and shareholder perspectives are two ends of a continuum, of which the shareholder model is a more restrictive precursor to the stakeholder orientation.[1048] It is the responsibility of the boards of directors of the publicly held corporations to ensure "their firms' success or failure, as well as the ethics of their actions."[1049] This suggests that boards need to balance various interests in order to ensure the success of a company. The Anglo-Saxon countries, such as the UK and US, are considered shareholder oriented. However, as showed in the previous section the directors of a company have no specific fiduciary duty to maximize shareholder value only.[1050] The US system is "based much more on hard law and a regulatory state," whereas the UK approach "relies more on soft law and self-regulatory mechanisms, such as Codes."[1051] Jackson has argued that the US hard-law approach (Sarbanes-Oxley Act, SOX) to

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[1043] For a comprehensive overview of the development of theories of the corporation and its responsibilities, see e.g. Avi-Yonah, R. S. (2005). The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility. *Delaware Journal of Corporate Law* 30 (3), 767-818.

[1044] Farrar, J. (2005). *Corporate Governance: Theories, Principles, and Practice* (2nd Ed.). Oxford: Oxford University Press. p. 5.

[1045] See chapter 4, section 4.1.

[1046] See e.g. Wymeersch, E. (2002). Convergence or Divergence in Corporate Governance Patterns in Western Europe? In McCahery J. A. et al. (Eds.), *Corporate Governance Regimes: Convergence and Diversity* (pp. 230-247). Oxford / New York: Oxford University Press. p. 231; Campbell, K., and Vick, D. (2007). Disclosure Law and the Market for Corporate Social Responsibility. In McBarnet, D. et al. (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (pp. 241-278). Cambridge: Cambridge University Press. pp. 250-252; Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 76; McCahery, J. A. et al. (2002). *Corporate Governance Regimes: Convergence and Diversity*. Oxford: Oxford University Press. p. 231.

[1047] Habisch, A. (2005). *Corporate Social Responsibility Across Europe.* Berlin / New York: Springer. pp. 367-370.

[1048] Ferrell, O. C. et al. (2017). *Business Ethics: Ethical Decision Making and Cases* (11th Ed.). Boston: Engage Learning. p. 45.

[1049] Ferrell, O. C. et al. (2017). *Business Ethics: Ethical Decision Making and Cases* (11th Ed.). Boston: Engage Learning. p. 45.

[1050] Only in case of takeovers is the board under the US jurisdiction responsible for seeking highest value for the shareholders; the so-called Revlon principle: *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). See also: Hu, H. T. C. (1996). Behind the Corporate Hedge: Information and the Limits of "Shareholder Wealth Maximization". *Journal of Applied Corporate Finance* 9 (3), 39-52. p. 41.

[1051] Jackson, G. (2010). Understanding Corporate Governance in the United States: An Historical and Theoretical Reassessment. *Hans Böckler Foundation Arbeitspapier* 223. p. 9.

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agency theory has not improved the excessive managerial incentives for risk taking.[1052] Arguably, SOX, which has been a regulatory response to various corporate scandals, such as Enron, has not increased shareholder rights and responsibilities, but it has been "more about diffusing private power into a more public system of checks and balances."[1053] Such checks and balances are necessary to increase the public accountability of a corporation.

In the Rhineland model countries in continental Europe, such as Germany and the Netherlands, managers also have a fiduciary duty but with no judicial obligation to exclusively maximize shareholder value.[1054] In German corporate law, for instance, the concept of the plurality of interests exists: "corporations are expected to abide by commonly accepted legal and ethical norms, and directors are required to take account of the interests of the parties in addition to those of shareholders" – stakeholders, thus.[1055] The most common groups of stakeholders whose interests should be considered in European companies are employees and creditors.[1056] Inherent to the Anglo-Saxon shareholder model is that the focus lies more on "issues of individual liberty and economic freedom," while in Europe the central point of interest is focusing more on "class difference and community solidarity."[1057] The shareholder model, thus, prioritizes less "the interests of the community in the governance of the corporation."[1058]

The OECD, that has to adjust its principles on CG for different jurisdictions and cultures, recognizes that CG concerns "relationships between a company's management, its board, its shareholders and other stakeholders."[1059] It points out that various stakeholders play an important role "in contributing to the long-term success and performance of the company."[1060] The OECD thus seems to propose a pluralist approach to CG. On the one hand, it expects that the board members' remuneration is aligned with "the longer term interests of the company and its shareholders."[1061] At the same time, it also suggests that the corporate board "should apply high ethical standards" and "take into account the interests of stakeholders."[1062] The OECD principles of CG illustrate that, in the global setting, both contradicting systems need to be respected. However, it is unclear which system prevails according to the OECD.

Indeed, as a result of globalizing business practices, there is a degree of convergence of CG standards.[1063] As a consequence of such convergence, the differences between these two conflicting

[1052] Jackson, G. (2010). Understanding Corporate Governance in the United States: An Historical and Theoretical Reassessment. *Hans Böckler Foundation Arbeitspapier* 223. p. 10.

[1053] Jackson, G. (2010). Understanding Corporate Governance in the United States: An Historical and Theoretical Reassessment. *Hans Böckler Foundation Arbeitspapier* 223. p. 40.

[1054] See also Reinhardt, F. L. et al. (2008). Corporate Social Responsibility through an Economic Lens. *Review of Environmental Economics and Policy* 2 (2), 219-239. p. 11; Neri-Castracane, G. (2015). Corporate Governance from a Comparative Perspective: Does the Business Judgment Rule Help Promote Corporate Social Responsibility? *Frontiers of Law in China* 10 (1), 8-23. p. 13.

[1055] Mayer, C. P. (2013). *Firm Commitment: Why the Corporation is failing us and How to Restore Trust in it.* Oxford: Oxford University Press. p. 40.

In the same vein: Muchlinsky, P. T. (2007). *Multinational Enterprises & the Law* (2nd Ed.). New York: Oxford University Press. pp. 341-342: "the classical Anglo-American model of the single board corporation may not give adequate voice to the interests of stakeholders other than shareholders. By contrast, the German dual board model has been supplemented by a mandatory allocation of seats on the supervisory board for workers representatives under the co-determination laws (*Mitbestimmung*)." The participation of stakeholders in the decision-making process is one of the premises (besides transparency and accountability), which are common to both corporate governance and CSR (Lambooy, T. (2010). *Corporate Social Responsibility*. Deventer: Kluwer. pp. 49-104).

[1056] Lambooy, T. (2010). *Corporate Social Responsibility*. Deventer: Kluwer. p. 56.

[1057] Donaldson, T. (2008). The Transatlantic Paradox: How Outdated Concepts Confuse the American/European Debate about Corporate Governance. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 543-551). New York: Oxford University Press. p. 546.

[1058] Donaldson, T. (2008). The Transatlantic Paradox: How Outdated Concepts Confuse the American/European Debate about Corporate Governance. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 543-551). New York: Oxford University Press. pp. 545-546.

For a contrasting example, Sweden has a corporate governance system that lies in between these two 'extremes'; directors have the possibility to "interpret the company's interests as extending beyond those of the shareholders" but they are not obliged to do so: Mayer, C. P. (2013). *Firm Commitment: Why the Corporation is failing us and How to Restore Trust in it.* Oxford: Oxford University Press. p. 41.

[1059] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 9.

[1060] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 10.

[1061] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 48.

[1062] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. pp. 46-47.

[1063] A. Cadbury, foreword in Iskander, M. R. and Chamlou, N. (2000). *Corporate Governance, a Framework for Implementation*. Washington: The World Bank.

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views with regard to shareholders and stakeholders have arguably become smaller.[1064] It is, however, not entirely clear what this convergence exactly entails. In 2002, shortly after the Enron scandal, leading US CG scholars Hansmann and Kraakman argued that there is an international convergence towards the 'standard' model of CG – the shareholder model – since it is the best and strongest, according to the authors.[1065] On the other hand, there are scholars who criticize theories of convergence, because CG is very much attached to national systems and therefore there is no possibility for one general international system.[1066] For instance, Van der Schee claims that "in spite of globalisation of economies and financial markets, corporate governance systems and ownership structures are still very different".[1067]

Whether there is convergence or not, tax matters provide nuances, which make it still a difficult debate. It is namely inevitable that different stakeholders (including shareholders) have likely different perspectives on tax avoidance.[1068] This is because tax, in itself, results in debates where it is not entirely clear what is the goal that companies should aim for. For a further discussion in the context of tax planning, both stakeholder and shareholder-oriented systems still offer various insights to consider; this is especially the case with regard to tax planning in the context of CSR. For instance some corporate directors seem to argue that they do not have a choice with regard to tax planning, implying that a responsible tax planning strategy is not an option.[1069] Therefore, the question of managerial discretion will be addressed further by presenting the two theories in a traditional, rather black-and-white way, although without leaving out nuances evidencing some convergence. The aim of the following sub-sections is to review some of the more recent debates on CG that support either the shareholder or stakeholder perspective and to put these debates in the context of tax planning and good tax governance.

5.3.1. Corporate responsibilities towards shareholders

Taken to extremes, the shareholder value perspective would claim that it is "inappropriate for companies to take on the presumed costs associated with being 'good'".[1070] This seems to reflect Schön's argumentation referred to previously. Tapscott and Ticoll explain that, according to this understanding, firms "contribute to society by creating useful products and services, creating jobs, paying taxes, and generating wealth for shareholders", which would then eliminate "the need for ethical considerations outside the requirements of law."[1071] Such a perspective suggests that economic (costs), legal, and ethical layers of business practices are considered separately. However, Carroll's CSR Pyramid, illustrated in chapter 4, expects CSR corporations to combine these layers for moral decision making.

Moreover, focusing on shareholder value maximization solely would be a complicated task. Under the OECD Principles of CG, shareholders enjoy various basic rights, such as transferring shares, obtaining relevant and material information on the corporation on a timely and regular manner,

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[1064] Stout, L. A. (2012). New Thinking on 'Shareholder Primacy'. In Vasudev, P.M. and Watson, S. (Eds.), *Corporate Governance after the Financial Crisis* (pp. 25-41). Cheltenham: Edward Elgar Publishing. p. 26.

[1065] Hansmann, H. and Kraakman, R. (2002). Toward a Single Model of Corporate Law? In McCahery J. A. et al. (Eds.). *Corporate Governance Regimes: Convergence and Diversity* (pp. 56-82). Oxford / New York: Oxford University Press. pp. 56-58, 76.
The statement of Business Roundtable (April 2019), however, seems to suggest that there is a convergence more towards the stakeholder model. See the Business Roundtable. (2019, April 19). *Statement on the Purpose of a Corporation*. Retrieved from: https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf (accessed 09.11.2019).

[1066] Farrar, J. (2005). Corporate Governance: Theories, Principles, and Practice (2nd Ed.). Oxford: Oxford University Press. pp. 11-13; see also Mallin, C. A. (2016). *Corporate Governance* (5th Ed.). Oxford: Oxford University Press. p. 278.

[1067] See also Van der Schee, P. A. (2011). *Regulation of Issuers and Investor Protection in the US and EU: A Translatic Comparison of the Basics of Securities and Corporate Law.* Hoofddorp: Eleven International Publishing. p. 120.

[1068] Austin, C. R. and Wilson, R. J. (2017). An Examination of Reputational Costs and Tax Avoidance: Evidence from Firms with Valuable Consumer Brands. *Journal of the American Taxation Association* 39 (1), 67-93. p. 68.

[1069] For instance, during the UK Public Accounts Committee hearing, Google's Vice President for Sales and Operations, Northern and Central Europe, Matt Brittin claimed that (aggressive) tax planning "is not a matter of personal choice" (UK HMRC 2012, Q. 485, p. Ev 40).

[1070] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. p. 67.

[1071] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. p. 67.

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voting in general shareholder meetings, electing and removing board members, and more.[1072] Modigliani and Miller write that shareholders expect returns on their investment. Nevertheless, not all shareholders have the same expectations. In other words, shareholders' interests may also conflict. In such cases, Modigliani and Miller argue that, if any shareholder "disagrees with management and the market over the valuation of the project, he is free to sell out and reinvest elsewhere, but will still benefit from the capital appreciation resulting from management's decision."[1073] In the same vein, Hu argues that corporate decision making cannot consider the best interests of individual shareholders, but "individual shareholders can engage in hedging on their own if they so desire."[1074]

Shareholders expect, according to Molz, that "the corporation should generate a steady stream of increasing quarterly profits and higher stock prices."[1075] If such an expectation is met, "the investors are satisfied and unlikely to question the decision making in the firm." Based on such a focus on the short-term returns, corporate boards might loose sight of "broader social issues in the decision making process."[1076] A problem with shareholders is that they are "not accountable as owners for the company's activities, nor do they have the responsibilities that officers and directors do to protect the company's interests."[1077] Consequently, as Bouwer and Paine rightly argue, praising shareholders interests only "results in a narrowness of vision that prevents corporate leaders from seeing, let alone acting on, many risks and opportunities."[1078] Furthermore, the high mobility of shareholders allows them to step out any time they wish; other stakeholders often cannot do that so easily. Therefore, focusing only on the (short-term) shareholder value is not in the interests of the company nor the economy at large.[1079] Consequently, shareholders' short-term interests might be bad for company's long-term interests.[1080] In general, shareholders and managers are like-minded: shareholders look for (fast) returns while managers seek investments. In addition, it cannot be ignored that, due to the high mobility of shareholders, managers might often be under pressure to satisfy shareholders' needs in order not to lose the future investment. Consequently, managers might get carried away by short-term decisions. This can, however, create negative externalities for the rest of the stakeholders or society at large. Nonetheless, to my mind, a fear that shareholders might leave is not equal to a legal obligation to maximize shareholder value at any cost. Excessive executive compensation might push some corporate board members towards more amoral decisions for "the incentives for executives are very biased toward high-powered short-term gains",[1081] but this discussion is out of the scope of this research.

Pursuing shareholders' interests in the Anglo-Saxon CG regimes, especially in the US system, is to a large extent based on hard-law regulations. Having said that, the US case law refrains from making it so explicit.[1082] For instance, the courts of Delaware, the state in which most of the big US

[1072] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 20.

[1073] Modigliani, F. and Miller, M. H. (1958). The Cost of Capital, Corporation Finance and the Theory of Investment. *The American Economic Review* 48 (3), 261-297. p. 264.

[1074] Hu, H. T. C. (1996). Behind the Corporate Hedge: Information and the Limits of "Shareholder Wealth Maximization". *Journal of Applied Corporate Finance* 9(3), 39-52. p. 44. Hedging means investing to reduce the risk of adverse price movements in an asset; Investopedia definition on 'hedge'. Retrieved from: https://www.investopedia.com/terms/h/hedge.asp?ad=dirN&qo=relatedSearchNarrow&qsrc=6&o=40186 (accessed 03.03.2019). See also chapter 2, section 7.

[1075] Molz, R. (1995). The Theory of Pluralism in Corporate Governance: A Conceptual Framework and Empirical Test. *Journal of Business Ethics* 14 (10), 789-804. p. 791.

[1076] Molz, R. (1995). The Theory of Pluralism in Corporate Governance: A Conceptual Framework and Empirical Test. *Journal of Business Ethics* 14 (10), 789-804. p. 791.

[1077] Bower, J. L. and Paine, L. S. (2017). The Error at the Heart of Corporate Leadership. *Harvard Business Review*, May-June issue.

[1078] Bower, J. L. and Paine, L. S. (2017). The Error at the Heart of Corporate Leadership. *Harvard Business Review*, May-June issue.

[1079] See also Chang, H.-J. (2011). *23 Things They Don't Tell You About Capitalism*. London: Penguin books. p. 19.

[1080] See e.g. Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 61; See e.g. Owens, J. P. (2008). Good Corporate Governance: The Tax Dimension. In. Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 9-12). Berlin/Heidelberg: Springer-Verlag. pp. 11-12. See also: Wolf, M. (2018, December 11). We must rethink the purpose of the corporation. *FT* (online).

[1081] Jackson, G. (2010). Understanding Corporate Governance in the United States: An Historical and Theoretical Reassessment. *Hans Böckler Foundation Arbeitspapier* 223. p. 37, p. 32; see also Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. pp. 165-166.

[1082] Hu Hu, H. T. C. (1996). Behind the Corporate Hedge: Information and the Limits of "Shareholder Wealth Maximization". *Journal of Applied Corporate Finance* 9(3), 39-52. p. 41. See also Parkinson, J. (1993). *Corporate Power and Responsibility: Issues in the Theory of Company Law*. Oxford: Claredon Press, as paraphrased in McBarnet 2007. p. 23.

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corporations are incorporated, confirm the centrality of the company's interests instead of shareholders' interests. Delaware case law demands that managers must refrain from pursuing their self-interests and act in "the best interests of the company" as also shown in section 5.2.3.[1083] This is because "managers and directors are fiduciaries rather than agents – and not just for shareholders but also for the corporation." The difference is that agents must "carry out the wishes of a principal, whereas a fiduciary's obligation is to exercise independent judgment on behalf of a beneficiary."[1084] Additionally, dual class shares in the US give management boards much discretion, which means that shareholders have even less of a say than previously thought. In this sense, the role of CG rules is to oblige managers to opt for the long-term best interests of company.[1085] That managers should act in the best interests of the company is affirmed in the Anglo-Saxon model of CG in the form of the BJR principle, explained previously. The BJR in the US or the Companies Act in the UK grant managers a safe harbour for making choices that might not always be in the short-term interests of shareholders but are in the long-term interests of the company. The OECD justifies this by stating that "a balance must be struck between allowing investors to seek remedies for infringement of ownership rights and avoiding excessive litigation."[1086]

In addition to various debatable elements of the shareholder value maximization perspective, tax planning provides some additional nuances with regard to CG. For instance, it is unclear whether serving the shareholders' interests calls for maximizing "reported earnings or earnings per se" or in terms of maximizing earnings per "after-tax cash flow".[1087] Schön argued that shareholder value maximization does not focus on the pre-tax profit but on the value of dividends, "which have been subject to corporate income tax, the interest of the shareholders goes for the after-tax profit rather than for the pre-tax profit." Therefore, he concluded that tax minimization is a corporate managers' duty of care. He argued that corporate boards "are legally bound to engage in tax strategies."[1088] The question however remains what kind of strategies to employ, because, as argued in chapter 3 of this research,[1089] tax planning has various gradations. It is a normal business practice to mitigate tax risks, however, it can not be agreed with Schön if he intends that corporate managers are legally bound to engage tax avoidance or even aggressive tax planning.

Interestingly, Australian empirical research suggests that "shareholders do not send clear messages concerning the level of tax aggressiveness they believe to be acceptable, and do not demonstrate an interest in 'their' company's income tax strategy ex ante".[1090] The corporate finance literature, however, suggests that, if shareholders could choose, they prefer higher cash flows instead of higher reported earnings.[1091] This indicates in my opinion what shareholders would possibly prefer and not what corporate boards are legally obliged to do. Indeed, shareholders can pressure corporate boards in this direction, but it is still not a legal obligation. With regard to tax planning, Schön, however, argued that the corporate board "is not in the position to deviate from the goal to maximize the after-tax profit of the firm without consent from the shareholders in their entirety."[1092] Such a position, nevertheless, still leaves room for good tax governance, as it allows shareholders to opt for socially responsible tax planning which is part of the corporate strategy, as explained previously.

[1083] See also e.g. Neri-Castracane, G. (2015). Corporate Governance from a Comparative Perspective: Does the Business Judgment Rule Help Promote Corporate Social Responsibility? *Frontiers of Law in China* 10 (1), 8-23. p. 10, referring to *Aroson vs Lewis*, 473 A.2d 805, 812 (Del. 1984); *Kaplan vs Centex Corp.*, 284 A.2d 119, 124 (Del. 1971); *Robinson vs Pittsburgh Oil Refinery Corp.*, 126 A. 46 (Del. 1924).

[1084] Bower, J. L. and Paine, L. S. (2017). The Error at the Heart of Corporate Leadership. *Harvard Business Review*, May-June issue.

[1085] See Jackson, R. J. (2018, February 15). Perpetual Dual-Class Stock: The Case against Corporate Royalty. Speech.

[1086] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 20.

[1087] Hu, H. T. C. (1996). Behind the Corporate Hedge: Information and the Limits of "Shareholder Wealth Maximization". *Journal of Applied Corporate Finance* 9 (3), 39-52. p. 41.

[1088] Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin / Heidelberg: Springer-Verlag. p. 46.

[1089] Chapter 3, section 3.

[1090] Lavermicocca, C. and Buchan, J. (2015). Role of Reputational Risk in Tax Decision Making by Large Companies. *eJournal of Tax Research* 13 (1), 5-50. p. 32.

[1091] Hu, H. T. C. (1996). Behind the Corporate Hedge: Information and the Limits of "Shareholder Wealth Maximization". *Journal of Applied Corporate Finance* 9 (3), 39-52. p. 41.

[1092] Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin/Heidelberg: Springer-Verlag. p. 47.

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Furthermore, nowadays, assuming that socially responsible behaviour is "incompatible with owner rights to generate as much profit as possible" is considered wrong, since shareholders' wealth would likely decrease "when firms act in socially irresponsible, let alone illicit, manners."[1093] As a result, "it is quite readily accepted that shareholder value maximization is not incompatible with satisfying certain interests of people with a stake in the firm (stakeholders)."[1094] Therefore, the neo-classical theory has been developed to a so-called "enlightened value maximization" theory. This theory, developed by Jensen, does not accept the stakeholder approach (that corporate decision making should consider the interests of all the stakeholders in a firm). Instead, it focuses on creating long-run profit maximization for shareholders, while creating social value as a by-product.[1095] Even though corporate boards do legally stay accountable to shareholders,[1096] CSR takes a step further from enlightened value maximization theory and requires that the interests of the wider group of stakeholders are also considered.[1097] In order to act in the best long-term interests of the company, managers (especially of multinational corporations) cannot ignore other stakeholder interests in addition to those of shareholders.

5.3.2. Corporate governance and responsibilities towards other stakeholders

Many authors have argued that corporations should be responsible to a larger group of stakeholders than just shareholders.[1098] For instance, CSR, per definition, requires managers to take into account the interests of members of society and/or company's stakeholders in a slightly more limited sense. Thus, the interests to be served by managers include those of the shareholders (who are internal stakeholders) as well as the (other) stakeholders. This stakeholder theory takes stakeholders rather than shareholders as its point of departure.[1099] The stakeholder theory is not meant to be an antipode to shareholder theory but "instead a larger view about corporations that encompasses shareholder theory."[1100] Freeman et al. argue that the introduction of stakeholder theory entails an "invitation to a conversation that forces managers and the public to examine together two questions 'what is the purpose of a corporation?' and 'to whom are managers responsible?'" These two questions arguably "have both ethics and business thoroughly embedded in them."[1101] This is clearly a non-positivist view, as it does not focus on the letter of the law only.[1102]

Two ethical principles covering the corporation and its stakeholders' relationship concern corporate rights and corporate effects.[1103] The principle of corporate rights establishes that "the corporation and its managers may not violate the legitimate rights of others to determine their future." The principle of corporate effects states that "the corporation and its managers are responsible for the

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[1093] Keinert, C. (2008). *Corporate Social Responsibility as an International Strategy*. Heidelberg: Physica-Verlag. p. 65.
[1094] Garriga, E. and Melé, D. (2004). Corporate Social Responsibility Theories: Mapping the Territory. *Journal of Business Ethics* 53 (1-2), 51-71. p. 54.
[1095] See more on enlightened shareholder value maximization in Jensen, M. C. (2000). Value Maximization, Stakeholder Theory, and the Corporate Objective Function. In Beer, M. and Nohria N. (Eds.), *Breaking the Code of Change* (pp. 35-78). Boston: Harvard Business School Press. pp. 35-78 See also Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 57. See also Keinert, C. (2008). *Corporate Social Responsibility as an International Strategy*. Heidelberg: Physica-Verlag. p. 65.
[1096] Also, as Schön argued in 2008: Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin / Heidelberg: Springer-Verlag.
[1097] Friese, A. et al. (2008). Taxation and Corporate Governance – The State of the Art. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 357-425). Berlin / Heidelberg: Springer-Verlag. p. 363; referring to: Smerdon, A. (2004). *Practical Guide to Corporate Governance* (2nd Ed.). London: Sweet & Maxwell. p. 250.
[1098] See e.g. Freeman, R. E. (1984). *Strategic Management: A Stakeholder Approach.* Boston: Pitman; Friedman, A. L. and Miles, S. (2006). *Stakeholders: Theory and Practice.* Oxford: Oxford University Press; Donaldson, T. and Preston, L. E. (1995). The Stakeholder Theory of a Corporation: Concepts Evidence, and Implications. *Academy Management Review* 20 (1), 65-91; Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 64.
[1099] See chapter 4.
[1100] Freeman, R. E. et al. (2010). *Stakeholder Theory: The State of the Art*. Cambridge: Cambridge University Press. p. 206.
[1101] Freeman, R. E. et al. (2010). *Stakeholder Theory: The State of the Art*. Cambridge: Cambridge University Press. p. 206; see also Cerioni, L. (2014). International Tax Planning and Corporate Social Responsibility (CSR): Crucial Issues and a Proposed "Assessment" in the European Union Context. *European Business Law Review* 25 (6), 845-875. p. 848.
[1102] See chapter 3, section 2.
[1103] Evan, W. M. and Freeman, R. E. (1988). A Stakeholder Theory of the Modern Corporation: Kantian Capitalism. In Beauchamp, T. and Bowie, N. (Eds.), *Ethical Theory and Business* (pp. 75-93). Harlow: Prentice Hall. pp. 75-93.

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effects of their actions on others" and focuses, thereby, on the responsibility for consequences of corporate actions.[1104] Also, the OECD Principles of CG, for instance, include both these ethical principles by recognizing that the corporate boards should act in the best interests of the company and its shareholders. Nevertheless, it is also expected that corporate boards "take due regard of, and deal fairly with, other stakeholder interests including those of employees, creditors, customers, suppliers and local communities." Additionally, the boards should consider relevant "environmental and social standards". [1105] In other words, corporations should also consider stakeholder interests and the corporate effects on society.

Initially the stakeholder theory was introduced as "a managerial theory" for better strategic management. According to Hansmann and Kraakman, "at the core of this view was the belief that professional corporate managers could serve as disinterested technocratic fiduciaries who would guide business corporations to perform in ways that would serve the general public interest."[1106] Nevertheless, corporations focusing on the larger group of stakeholders' interests do not provide a cost-efficient business case, while shareholder orientation does, it is said.[1107] This point of view reveals one of the most important criticisms that shareholder theory supporters have with regard to stakeholder theory – it is considered to be economically inefficient. However, since there is also evidence that shows that stakeholder orientation has a business case,[1108] it is difficult to completely reject the stakeholder-orientation based on the business case argumentation. For instance, Clacher and Hagendorff concluded that, even though there is no strong evidence, CSR calls for a positive market reaction which suggests that CSR adds to the corporate value.[1109] Furthermore, stakeholder theory has also been considered "a normative theory which requires management to have a moral duty to protect corporation as a whole and, connected with this aim, the legitimate interests of all stakeholders."[1110] Whether protecting the corporate interests as a whole is always economically inefficient is open to debate. In addition, the stakeholder approach offers considerable business case indications, because a corporation's competitive advantage is increasingly "stemmed more and more from the intangible values embodied in human and social capital."[1111]

Some CSR scholars claim that CSR is directly financially beneficial for companies and, thus, also in the best economic interests of the company.[1112] Carroll and Shabana have argued that, usually, "the business case for CSR is being made by documenting and illustrating that CSR has a positive economic impact on a firm's financial performance."[1113] However, CSR can only have a positive impact on corporate financial performance in case there is "a convergence between the firm's economic objectives and the social objectives of society."[1114] A successful firm requires more than "self-interest and concern for profits": "trust, a sense of loyalty, and good relationships with all stakeholders and, as a consequence, an enduring cooperation among those who are involved in or

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[1104] Evan, W. M. and Freeman, R. E. (1988). A Stakeholder Theory of the Modern Corporation: Kantian Capitalism. In Beauchamp, T. and Bowie, N. (Eds.), *Ethical Theory and Business* (pp. 75-93). Harlow: Prentice Hall. pp. 75-93. See also Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al.(Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 64.

[1105] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 45.

[1106] Hansmann, H. and Kraakman, R. (2002). Toward a Single Model of Corporate Law? In McCahery J. A. et al. (Eds.). *Corporate Governance Regimes: Convergence and Diversity* (pp. 56-82). Oxford / New York: Oxford University Press. p. 60.

[1107] Hansmann, H. and Kraakman, R. (2002). Toward a Single Model of Corporate Law? In McCahery J. A. et al. (Eds.). *Corporate Governance Regimes: Convergence and Diversity* (pp. 56-82). Oxford / New York: Oxford University Press. p. 60.

[1108] Ferrell, O. C. et al. (2017). *Business Ethics: Ethical Decision Making and Cases* (11th Ed.). Boston: Engage Learning. p. 41.

[1109] Clacher, I. and Hagendorff, J. (2012). Do Announcements about Corporate Social Responsibility Create or Destroy Shareholder Wealth? Evidence from the UK. *Journal of Business Ethics* 106 (3), 253-266.

[1110] Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 63.

[1111] Plender, J. (1997). *A Stake in the Future: The Stakeholding Solution.* London: Nicholas Brealey. p. 2. As cited in Clarke, T. (2004). The Stakeholder Corporation: A Business Philosophy for the Information Age. In Clarke, T. (Ed.), *Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance* (pp. 189 -201). New York: Routledge. p. 200.

[1112] Carroll, A. B. and Shabana, K. M. (2010). The Business Case for Corporate Social Responsibility: A Review of Concepts. *International Journal of Management Reviews* 12 (1), 85-105. p. 102.

[1113] Carroll, A. B. and Shabana, K. M. (2010). The Business Case for Corporate Social Responsibility: A Review of Concepts. *International Journal of Management Reviews* 12 (1), 85-105. p. 102.

[1114] Carroll, A. B. and Shabana, K. M. (2010). The Business Case for Corporate Social Responsibility: A Review of Concepts. *International Journal of Management Reviews* 12 (1), 85-105. p. 102.

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are independent with the firm."[1115] Social responsibility "doesn't just deliver benefits. Increasingly it is a requirement for success."[1116] Mitchell has aptly argued that "management that understands that running a successful and sustainable business requires it to behave in a manner that does not risk undermining its own legitimacy, is management that will run a corporation that, as a matter of course, will address most of the problems with which CSR is concerned."[1117]

The stakeholder theory can be criticized on the grounds that stakeholders' interests are many[1118] and sometimes they may conflict.[1119] Different companies have different stakeholders. Moreover, one company can have different stakeholders in different situations.[1120] Also, shareholders are stakeholders. Because of different groups of stakeholders and the different nature of the relations the corporation has with these groups and different interests, the corporation is "situated at the centre of series of independent two-way relationships."[1121] Moreover, as stakeholders often have stakeholders themselves, there exists a network of stakeholders.[1122] Accordingly, stakeholder management is not necessarily directed against shareholders; it just considers a wider group of stakeholders than shareholders only. This leaves corporate managers with difficult dilemmas.

Jensen, for instance, claims that any theory should provide the actors (managers in this case) with guidance on how to deal with multiple "competing and inconsistent constituent interests."[1123] Jensen argues that stakeholder theory presented by other scholars does not explain how to deal with trade-offs that managers have to deal with. Therefore, he proposes a more advanced – enlightened – stakeholder theory. Enlightened stakeholder theory requires managers to operate in a way that maximizes the total long-term market value of the firm.[1124] Thus, the trade-offs the managers face need to consider the long-term market value of the firm as an ultimate goal. This gives managers latitude to assess which competing interests need to be prioritized in order to serve the long-term goals and value of the firm.

5.3.3. Concluding remarks

This section focused on two different CG theories in order to understand the conflicting interests the corporate managers have to balance in different CG cultures. In general, the Rhineland model of CG encourages corporate boards to consider a wider spectrum of stakeholder interests, while the Anglo-Saxon model of GG prioritizes shareholders interests. It was shown in these sub-sections that the Anglo-Saxon model of CG does not restrict corporate boards from considering a wider spectrum of stakeholder interests, as long as it is in the best interests of the company. As also shown in section 5.2.3 both stakeholder as well as shareholder jurisdictions ultimately focus on the best interests of the company. Balancing conflicting interests can, however, have a different focus. Therefore, in both corporate governance systems that explicitly attach weight to one of the two

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1115 Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 61. See also Hosmer, L. T. (1995). Trust: The Connecting Link between Organizational Theory and Philosophical Ethics. *Academy Management Review* 20 (2), 373-403; Kay, J. (1993). *The Foundations of Corporate Success.* Oxford: Oxford University Press; Kotter, J. P. and Heskett, J. (1992). *Corporate Culture and Performance*. New York: Free Press.

1116 Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. p. 72.

1117 Mitchell, L. E. (2007). The Board as a Path toward Corporate Social Responsibility. In McBarnet, D. et al. (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (pp. 279-307). Cambridge: Cambridge University Press. p. 281.

1118 See Weyzig, F. (2009). Political and Economic Arguments for Corporate Social Responsibility: Analysis and a Proposition Regarding the CSR Agenda. *Journal of Business Ethics,* 86(4), 417-428. pp. 418-419.

1119 See chapter 4, section 4.1.

1120 Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 59.

1121 Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 61.

1122 Rowley, T. J. (1997). Moving Beyond Dyadic Ties: a Network Theory of Stakeholder Influences. *Academy of Management Review* 22(4), 62-71.

1123 Jensen, M. C. (2000). Value Maximization, Stakeholder Theory, and the Corporate Objective Function. In Beer, M. and Nohria N. (Eds.), *Breaking the Code of Change* (pp. 35-78). Boston: Harvard Business School Press. pp. 44-45.

1124 Jensen, M. C. (2000). Value Maximization, Stakeholder Theory, and the Corporate Objective Function. In Beer, M. and Nohria N. (Eds.), *Breaking the Code of Change* (pp. 35-78). Boston: Harvard Business School Press. p. 51; Jensen, M. C. (2010). Value Maximization, Stakeholder Theory, and the Corporate Objective Function. *Journal of Applied Corporate Finance* 22(1), 32-42.

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theories, managers do have sufficient latitude for decision making.[1125] In CG systems that lean on stakeholder theory, managerial discretion to implement CSR theories might be broader. This, however, does not suggest that shareholder systems prohibit engaging in CSR entirely. Ferrell et al. argue that "a shareholder orientation should drive a firm's decision toward serving the best interests of investors."[1126] Nevertheless, they go on to say that, next to "a responsibility for economic success and viability to satisfy stockholders", corporations should also consider other stakeholders and balance various interests.[1127]

Starbucks, a multinational that operates within various CG systems, provides a good example of challenges that conflicting interests can pose with regard to corporate tax planning. Starbucks claims on its webpage that it pursues stakeholder inclusiveness, while its tax strategies as well as annual reports show a focus on its shareholder orientation. For instance, the 2012 HMRC hearings in the UK[1128] illustrate how aggressive tax planning practices have affected the corporation's stock price and relationship with shareholders and other stakeholders. Starbucks was accused of immoral tax behaviour.[1129]At the same time, "a Reuter's article compared the amount of Starbucks' U.K. sales to the amount of U.K. income taxes paid by the company" finding that "while Starbucks reported no profit for tax purposes in the U.K., the company was concurrently telling analysts and investors that U.K. operations were profitable and should serve as an example for the U.S."[1130] In addition, from the HMRC minutes (and evidence), it seems that multinationals can either keep business success and no profit in light of taxes apart or they can be considered successful if they do not make profit in jurisdictions where tax rates are high.[1131] Moreover, shortly after the HMRC hearing, the multinational made a statement in the UK saying that it changed its tax strategies in order to win back the trust of stakeholders such as customers. Such corporate (conflicting) behaviour proves that some multinationals present a different picture to shareholders and stakeholders (especially customers). At the same time, it also proves the challenges multinationals face when balancing conflicting expectations. Therefore, good corporate governance needs to include balanced tax governance.

5.4. Corporate governance and good tax governance

CSR is a part of corporate strategy and is therefore a part of the discretion of the corporate board.[1132] The corporate board is also responsible for the financial performance and tax risk profile of the company.[1133]

Naturally, the distinction between shareholder and stakeholder approaches in practice is not as clear-cut as presented previously. Nevertheless, for the purposes of this research, it suffices to conclude that the main difference between the two approaches lies in prioritizing conflicting interests: shareholder theory starts with the economic interests of the company, while stakeholder theory sets society above or on the equal level with pure economic interests. It is not the aim of this research to argue in favour of one or criticize the other model. On the contrary, the aim is to find a

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[1125] Compare to Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin / Heidelberg: Springer-Verlag. p. 36

[1126] Ferrell, O. C. et al. (2017). *Business Ethics: Ethical Decision Making and Cases* (11th Ed.). Boston: Engage Learning. p. 44.

[1127] Ferrell, O. C. et al. (2017). *Business Ethics: Ethical Decision Making and Cases* (11th Ed.). Boston: Engage Learning. p. 45.

[1128] UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited.

[1129] See the statement of Margaret Hodge in UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited.

[1130] Austin, C. R. and Wilson, R. J. (2017). An Examination of Reputational Costs and Tax Avoidance: Evidence from Firms with Valuable Consumer Brands. *Journal of the American Taxation Association* 39 (1), 67-93. p. 67.

[1131] UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited. p. Ev. 21.

[1132] See e.g. Martínez-Ferrero, J., Villarón-Peramato, O. and García-Sánchez, I. M. (2017). Can Investors Identify Managerial Discretion in Corporate Social Responsibility Practices? The Moderate Role of Investor Protection. Australian Accounting Review 27 (1), 4-16. pp. 5-6.

[1133] Lavermicocca, C. and Buchan, J. (2015). Role of Reputational Risk in Tax Decision Making by Large Companies. eJournal of Tax Research 13 (1), 5-50. p. 8.

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connecting factor which appears to be in the long-term best interests of the company, as also legal rules seem to suggest. Without a doubt, financial performance is crucial for the best long-term interests of the company. In addition, "financial success is important because the more a company earns the more taxes it is able to pay."[1134] Taxes are important for corporate decision making for "[T]hey have strong implications for the year end results as well as the profitability and the ability to pay dividends."[1135] Consequently, taxes can affect the share price.[1136] Therefore, corporate boards should balance between "being profitable and not taking tax risks that could have negative impacts on the business performance and the financial statements."[1137] In other words, corporate boards are "responsible for tax risk management" and they can be held accountable for doing so by the shareholders as well as stakeholders of the company.[1138] Tax planning does not concern only direct financial returns but also has an effect on corporate reputation, which in turn may influence the interests of a company in the long run, as discussed earlier in this research.[1139]

Especially multinationals that aspire to being socially responsible should seriously address their tax planning practices. Next to acting in the best interests of the company (and thus shareholders), they also need to be aware of the societal effects of tax planning. The attention corporate tax planning has received in recent years (for instance in public hearings where corporate managers need to explain their tax-planning strategies) have shown that corporate boards have to understand the content of their company's tax strategies better. This has also resulted in a changing relationship between corporate management and tax directors. Tax is an important topic in the boardrooms nowadays.[1140]

To develop good tax governance, it is important to know how far managers can go in their tax planning decisions and in taking into account the non-shareholders' interests, as CSR encourages.[1141] Therefore, good tax governance will be further put into the context of CG in order to understand how good tax governance in principle would promote the best long-term interests of the company. The best interests of the company can diverge from the best interests of the shareholders as explained previously.[1142] Taxation is not only a cost for a corporation but also an investment and moral obligation.[1143] Therefore, good tax governance would also consider the wider interests of stakeholders. In the following sub-sections, it will be analyzed whether corporate boards have sufficient latitude to consider good tax governance, how it can be understood in practice, and what is the relationship between tax planning and the best interests of the company.

5.4.1. Corporate boards' latitude to engage in CSR

As shown in the previous sections, shareholders enjoy a specific position and resulting rights in a corporation according to corporate governance rules. Various legal rules prevent managers from acting against the interest of shareholders. Moreover, as equity financing is important for corporations, managers have serious financial and competition-related motivations to try to satisfy shareholders. Nevertheless, CSR corporations build a certain profile, which creates expectations of such corporations. Not living up to this profile, corporate reputations among different stakeholders, such as consumers, shareholders, media, or government, might be damaged. Moreover, also

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[1134] Erle, B. (2008). Tax Risk Management and Board Responsibility. In Schön, W. (Ed.). *Tax and Corporate Governance* (pp. 205-220). Berlin / Heidelberg: Springer-Verlag. pp. 205-206.
[1135] Erle, B. (2008). Tax Risk Management and Board Responsibility. In Schön, W. (Ed.). *Tax and Corporate Governance* (pp. 205-220). Berlin / Heidelberg: Springer-Verlag. pp. 205-206.
[1136] "In February 2006 Google announced reduced earnings due to a higher than expected tax charge. Market value fell by 20 billion dollars." Erle, B. (2008). Tax Risk Management and Board Responsibility. In Schön, W. (Ed.). *Tax and Corporate Governance* (pp. 205-220). Berlin / Heidelberg: Springer-Verlag. pp. 205-206.
[1137] Erle, B. (2008). Tax Risk Management and Board Responsibility. In Schön, W. (Ed.). *Tax and Corporate Governance* (pp. 205-220). Berlin / Heidelberg: Springer-Verlag. pp. 205-206.
[1138] Erle, B. (2008). Tax Risk Management and Board Responsibility. In Schön, W. (Ed.). *Tax and Corporate Governance* (pp. 205-220). Berlin / Heidelberg: Springer-Verlag. p. 220.
[1139] See chapter 2.
[1140] See e.g. KPMG. (2004). Tax in the Boardroom: A Discussion Paper.
[1141] See more on good tax governance in chapter 6.
[1142] See also: Bower, J. L. and Paine, L. S. (2017). The Error at the Heart of Corporate Leadership. *Harvard Business Review*, May-June issue.
[1143] See chapter 2, section 6; chapter 4, section 5; chapter 5, section 2.

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‘shareholder interest’ is not one commonly agreed-upon concept; shareholders interests are many.[1144] For instance, there is a growing group of investors that are focused on CSR, as will be discussed below. Consequently, in order to live up to many expectations on corporations, which are crucial for ensuring the best long-term success of a corporation, corporate managers have sufficient leeway with regard the corporate decision making.

It is true that, for some, acting in the best interests of the company equals creating shareholder value through maximizing profits “by excluding extraneous factors like social responsibility.”[1145] Nevertheless, the research on socially responsible investment (SRI) suggests that socially responsible and transparent firms are lower-risk investments.[1146] The question is thus whether and to what extent are shareholders willing to take the risk of aggressive tax planning. Based on legal-positivist thinking, Schön argued that it is naïve to think that “‘honest shareholders do not want their company to engage in more or less strategic tax planning.” He argued that “[A]s long as shareholders have not declared formally their will in one way or the other that the company shall abstain from certain tax measures, thus ‘putting tax paying first’, management has no justification to do so.”[1147] In addition to the doubtfulness of such an argument, nowadays socially responsible investments are on the rise.[1148] The European Parliament, for instance, stresses that SRI “is part of the implementation process of CSR in investment decisions; notes that although there is currently no universal definition of SRI, it usually combines investors’ financial objectives with their concerns regarding social, environmental and ethical (SEE) and corporate governance issues”[1149]

Some investor groups can be hesitant about this “difficult trade-off between return on investment and social responsibility.”[1150] It is, however, inevitable that both short-term and responsible shareholders need to make compromises in their ideal solutions in order to make the general picture work. Therefore, tax adds another spectrum to corporations’ attractiveness for investors. Also, the EU has been considering sustainable investment as a fiduciary duty of investors.[1151] Good evidence of the importance of SRI is also BlackRock’s (“one of the most influential investors in the world”[1152]) letter, entitled “A sense of purpose”, to many publicly held companies in which they invest, stating that “[T]o prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society.”[1153] Fink, a CEO of BlackRock, did not ask corporations to stop aggressive tax planning nor did he deny the corporate responsibility to be accountable to shareholders. He stated that responsible companies will ultimately “provide subpar returns to the investors who depend on it”. This suggests that the investor is careful when talking about long-term shareholder value.[1154] Nevertheless, BlackRock’s statement showed that institutional investors who are often thought to be short-term self-interested capitalists also put sustainability and corporate responsibility high on the agenda.[1155] Also the UN Principles for Responsible Investment (PRI) that convenes a large group of corporate members appraises responsible tax planning practices.[1156] In CSR theory, it is clear that, in addition to “self-interest and concern for profits”, a successful firm requires more “trust, a sense of loyalty, and good

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[1144] See also: Bower, J. L. and Paine, L. S. (2017). The Error at the Heart of Corporate Leadership. *Harvard Business Review*, May-June issue.

[1145] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. p. 235.

[1146] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. pp. 236-241.

[1147] Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin / Heidelberg: Springer-Verlag. p. 48.

[1148] See e.g. VBDO, Nordea, PRI, BlackRock.

[1149] European Parliament (2016, January 22). Resolution of 6 February 2013 on Corporate Social Responsibility: Accountable, Transparent and Responsible Business Behaviour and Sustainable Growth (2012/2098(INI)). Pt. 20.

[1150] Verstappen, R. et al. (2017). VBDO Investor Guide: Integration of Tax in Responsible Investment: Practical Steps to Design and Implement a Responsible Tax Strategy for Investors. *VBDO & PwC*. p. 6.

[1151] Rust, S. (2017, November 13). EU Considering Sustainable Investing as Fiduciary Duty for Investors. *European Pensions and Institutional Investment News* (online).

[1152] Sorkin, A. S. (2018, January 15). BlackRock’s Message: Contribute to Society, or Risk Losing Our Support. *The New York Times* (online).

[1153] Fink, L. (2018). Annual Letter to CEOs: ‘A Sense of Purpose’.

[1154] Alexander, R. (2018, February 26). Benefit Corporation: Accountability Matters. *Corporate Governance*.

[1155] See also Turak, N. (2018, January 25). 'We don't talk about inclusion' and that's a problem, says BlackRock's Larry Fink. *CNBC news* (online).

[1156] See e.g. UN. (2017, February 6). *New Recommendations Help Investors Engage on Tax*.

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relationships with all stakeholders and, as a consequence, an enduring cooperation among those who are involved in or are independent with the firm."[1157] Therefore, investors bear a shared responsibility with regard to good tax governance.

The growing importance of SRI has, however, not only provided "an economic incentive for companies to adopt socially responsible practices" but also a "means to measure comparative investment returns between those companies that meet criteria for social investment funds and those that do not."[1158] For instance, RobecoSAM, which is also a part of the Dow Jones Sustainability Index,[1159] claims that, as a result of the recent financial crisis that "exposed significant risks associated with short-termism," there is a growing demand among investors for "long-term oriented strategies that integrate economic, environmental and social criteria within their portfolios."[1160] Therefore, sustainability considerations have become an important part of investors' decision-making.[1161] RobecoSAM that conducts a Corporate Sustainability Assessment for investors puts much attention on "media and stakeholder commentaries and other publicly available information from consumer organizations, NGOs, governments or international organizations to identify companies' involvement and response to environmental, economic and social crisis situations that may have a damaging effect on their reputation and core business."[1162] Having said this, the causality between CSR and profit maximization is not yet proven.[1163] A sustainable mind-set seems to have a positive effect on corporate financial performance,[1164] but it is not clear whether it is due to the fact that a corporation is indeed sustainable or due to the fact that running a sustainable business requires planning strategic long-term vision.[1165] Further (empirical) research is necessary to understand the causality between sustainability, corporate social (CSR), and financial performances.

Good CG in general "requires business ethics at several levels: individual decision making, corporate culture and an overall understanding of a collective business purpose that balances different interests and values."[1166] Balancing various conflicting interests presents an opportunity for corporate managers to apply good corporate governance. Conflicts "need to be managed through a combination of negotiations and bargaining, disclosures and approvals, and reliance on basic underlying rules of trustworthiness and fair dealing."[1167] As argued previously, different CG models entail specific principles that the corporate board has to follow. These different principles still leave a possibility of choices within these rules. Usually, if corporate management would face conflicting interests, the decision should be based on evaluating which alternative is in the best interests of the company and maximizes "the long-term market value of the firm."[1168] This is the prevalent corporate law rule in every jurisdiction discussed in section 5.2.3.

[1157] Melé, D. (2008). Corporate Social Responsibility Theories. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 47-82). Oxford: Oxford University Press. p. 61. See also Hosmer, L. T. (1995). Trust: The Connecting Link between Organizational Theory and Philosophical Ethics. *Academy Management Review* 20(2), 373-403; Kay, J. (1993). *The Foundations of Corporate Success.* Oxford: Oxford University Press; Kotter, J. P. and Heskett, J. (1992). *Corporate Culture and Performance*. New York: Free Press.

[1158] Roselle, J. (2011). The Triple Bottom Line: Building Shareholder Value. In Mullerat, R. (Ed.). *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2nd Ed.) (pp. 129-156). Alphen aan de Rijn: Kluwer Law International. p. 136.

[1159] Sustainability Indices webpage.

[1160] RobecoSAM. (2015). Measuring Intangibles ROBECOSAM's Corporate Sustainability Assessment Methodology. p. 16.

[1161] Dixon, C. and Sharma, A. (2018, January 24). Weil Discusses 2018 10-K and Proxy Season: Spotlight on Corporate Sustainability. *Columbia Law School's Blue Sky Blog on Corporations and the Capital Markets*; see also: Schroder, A. (2017, March 9). Responsible Investing Growing in Importance; see also "Socially responsible investments (SRIs) constitute one of the most rapidly growing segments of the investing community, representing over $2.34 trillion or over 10% of all investments" Tschopp, D. J. (2005). Corporate Social Responsibility: A Comparison between the United States and the European Union. *Corporate Social Responsibility and Environmental Management* 12 (1), 55-59. p. 57.

[1162] RobecoSAM. (2015). Measuring Intangibles ROBECOSAM's Corporate Sustainability Assessment Methodology. p. 10.

[1163] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 49.

[1164] Eccles, R. G. et al. (2007). Reputation and Its Risks. *Harvard Business Review* February issue 85 (2), 104-114.

[1165] Van Son, H. (2014). How duurzaam is de duurzame ondernemer in het mkb? Een explorative studie. PhD dissertation, Tilburg University. p. 44.

[1166] Orts, E. (2002, August 23). Law is Never Enough to Guarantee Fair Practice. *Financial Times* (online).

[1167] Orts, E. (2002, August 23). Law is Never Enough to Guarantee Fair Practice. *Financial Times* (online).

[1168] "And 'firm value,' by the way, means not just the value of the equity, but the sum of the values of *all* financial claims on the firm—debt, warrants, and preferred stock, as well as equity" Jensen, M. C. (2000). Value Maximization, Stakeholder Theory, and the Corporate

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Some authors argue that a duty to act in the interests of the enterprise can be seen as "a duty to protect the business for the benefit of those groups, in addition to shareholders, whose interests are likely to be affected by its success."[1169] Corporate laws in general "do not compel spending on social causes, they do not prohibit either."[1170] For instance, even in the US, where "fiduciary duties to shareholders are formally perhaps the strongest, in practice directors enjoy wide latitude to further the interests of non-shareholder constituencies so long as the decision is framed in terms of promoting long-term shareholder value."[1171] Moreover, even under the shareholder (long-term) value maximization obligation, the directors can (under the BJR) make socially responsible decisions "insofar as these decisions have a supposed business purpose."[1172] From the perspective of the shareholder value approach, extrinsic motivation to engage in good tax governance should, thus, be sufficient.[1173] However, as the business-case of good tax governance still needs to be proven empirically, it is necessary to know weather corporations could also engage in good tax governance based on intrinsic motivation.

The OECD Principles of CG, for instance, refer to ethical concerns as one of the relevant factors that (should) affect corporations' decision-making processes.[1174] The OECD acknowledges that, in principle, CG should ensure "the flow of external capital to companies both in the form of equity and credit." Nevertheless, it also points out that CG should also include other stakeholders for "[T]he competitiveness and ultimate success of a corporation is the result of teamwork that embodies contributions from a range of different resource providers including investors, employees, creditors, customers and suppliers, and other stakeholders."[1175] Considering the interests of stakeholders is thus, according to the OECD, in the long-term interest of corporations. Furthermore, in its MNE Guidelines,[1176] the OECD points out that good CG reassures "shareholders and other stakeholders that their rights are protected and make it possible for corporations to decrease the cost of capital and to facilitate their access to the capital market."[1177] Moreover, corporate boards should, according to the OECD, "adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated."[1178] Considering that aggressive tax planning "may involve substantial indirect costs, including reputation losses, political trouble, more expensive debt, and a higher risk of stock price crash,"[1179] it does not seem that corporate boards engaging in such practices act in the best interests of the company. Even Schön, who argued for corporate managers' legal responsibility to create shareholders' value, agrees that "the management acts contrary to its duty of care when they set up structures where the tax advantages are regularly outweighed by the compliance costs and any negative impact on the real operations of the company."[1180]

Objective Function. In Beer, M. and Nohria N. (Eds.), *Breaking the Code of Change* (pp. 35-78). Boston: Harvard Business School Press. p. 32.

[1169] Parkinson, J. (2006). Corporate Governance and the Regulation of Business Behaviour. In MacLeod, S. (Ed.), *Global Governance and the Quest for Justice - Volume II Corporate Governance* (pp. 27-46). Oxford/Portland: Hart Publishing. p. 54. [as referred to in: Horrigan, B. (2010). *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business*. Cheltenham: Edward Elgar. p. 22.]

[1170] Enriques, L. et al. (2017). The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies. In Kraakman, R. H. et al. (Eds.), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd Ed.) (pp. 79-108). Oxford: Oxford University Press. p. 98.

[1171] Enriques, L. et al. (2017). The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies. In Kraakman, R. H. et al. (Eds.), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd Ed.) (pp. 79-108). Oxford: Oxford University Press. pp. 98-99.

[1172] Neri-Castracane, G. (2015). Corporate Governance from a Comparative Perspective: Does the Business Judgment Rule Help Promote Corporate Social Responsibility? *Frontiers of Law in China* 10 (1), 8-23. p. 15, *idem* Sheehy, B. and Feaver, D. (2014). Anglo-American Directors' Legal Duties and CSR: Prohibited, Permitted or Prescribed? *Dalhousie Law Journal* 37 (1), 345-396. pp. 387-388.

[1173] See more on extrinsic and intrinsic motivation in Chapter 4.

[1174] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. pp. 9-10.

[1175] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 34. Compare this to the behavioral theory of the firm and the nexus of contracts theory. See e.g. Cyert, R. M. and March, J. G. (1963). *A Behavioral Theory of the Firm.* Malden, Massachusetts: Blackwell Publishers.

[1176] See more on OECD MNE Guidelines in CSR chapter, section 6.3

[1177] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 10.

[1178] OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing. pp. 60-61. See also Gribnau, J. L. M. et al. (2018). Codes of Conduct as a Means to Manage Ethical Tax Governance. Intertax 46 (5), 390-407.

[1179] Bayar, O. et al. (2018). Corporate Governance, Tax Avoidance, and Finance Constraints. *The CLS Blue Sky Blog*.

[1180] Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62).

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Corporate boards can, thus, use their discretion based on corporate law, as shown in 5.2.3., to engage in CSR and give their own interpretation to what they consider as going beyond pure compliance with legal rules. This indicates that boards are quite flexible when acting in the best interests of the company in relation to CSR. For instance, a group of chief executive officers (CEOs) of America's leading companies – Business Roundtable – published recently a statement to commit to all the stakeholders and societies in which they operate, in addition to generating long-term shareholder value.[1181] This illustrates that corporate managers are aware of the importance of various stakeholders and that they consider it as added value to the best interests of the company. Moreover, multinationals that already have a CSR strategy in place have an incentive to manoeuvre. For corporate practice, however, it is not very clear what is meant by acting beyond pure compliance with legal rules, because it does not provide clear-cut criteria and effective guidance.[1182] In other words, the aspirational idea of accepting ethical obligations beyond compliance with the law is quite ambiguous. Lacking clarity, defending and prescribing behaviour beyond compliance to justify corporate action will probably not be very convincing and effective for business practice. Therefore, the concept of so-called corporate social irresponsibility (CSI), as introduced in the previous chapter of this research, might be a helpful tool for corporations.[1183]

5.4.2. Tax planning and the best interests of a company

From the responses that the representatives of some large multinationals provided to the UK Public Accounts hearing committee, it seems that multinationals keep business success and profit generation separate in relation to taxes; tax seems rather to be a possibility to increase profit for these businesses.[1184] This indicates the shareholder value maximization mind-set, which is keeping tax low in order to keep shareholder return high. In my opinion, this cannot be considered in the best long-term interests of the company, as explained previously. For example, Vodafone is allegedly taking a new direction with regard to its tax planning practices. It is namely claiming to commit itself to tax principles that are in line with the multinationals' wider spectrum of social responsibilities and, at the same time, in line with the shareholder value protection.[1185] Even though it is unclear whether Vodafone is (willing to be) transparent about its tax planning structures, such a statement already suggests that such balancing is also accepted in corporate practices and not seen as 'mission impossible'. Here has to be noted, however, that transparency is not the same as changing firm's material behavior.[1186] The core question here is: what really is in the best interests of the company when it comes to tax planning?
It is not easy to decide what is in the best long-term interests of the company. Multinational operations affect and are affected by a myriad of factors in various areas. In addition to a typical cost-benefit analysis, which can already almost be seen as a synonym of business administration in the capitalist era, corporations cannot ignore changing societal expectations in relation to their behaviour.[1187] Recent years have witnessed increased attention on corporate tax practices; a growing number of corporate stakeholders (such as governments, NGOs, media, but also certain groups of investors, as shown above) have a certain negative perception of multinationals' tax practices. The European Parliament also considers CG to be "a key element" of CSR.[1188] In addition, the European Parliament further states that "a business's tax policy should be considered part and parcel of CSR and that socially responsible behaviour consequently leaves no room for

Berlin / Heidelberg: Springer-Verlag. p. 56.
[1181] Business Roundtable. (2019, April 19). *Statement on the Purpose of a Corporation.*
[1182] See more on 'going beyond the law' in chapter 4, section 3.2.
[1183] See on CSI in chapter 4, section 3.3.
[1184] UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited. p. Ev. 21.
[1185] Vodafone. (2017). Taxation and our Total Economic Contribution to Public Finances 2016-17. p. 12.
[1186] See the difference between substantive and procedural good tax governance in chapter 6.
[1187] See more on societal expectaitons in chapter 4.
[1188] European Parliament (2016, January 22). Resolution of 6 February 2013 on Corporate Social Responsibility: Accountable, Transparent and Responsible Business Behaviour and Sustainable Growth (2012/2098(INI)). Pt. 6.

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strategies aimed at evading tax or exploiting tax havens".[1189] It is a corporate law duty of corporate managers to consider whether aggressive tax planning practices are in the best long-term interests of the company.

Considering the complexities of tax legislation and societal changes with regard to multinationals' tax practices,[1190] corporations face various tax-related risks. For instance, Gribnau et al. argue that such changes, complexities and debates "entail risk[s] with regard to reputation (the general public demanding transparency with regard to the taxes companies pay), legislative risk (complex legislation and different interpretations of a country's tax legislation) and tax supervision risk related to the tax administration's compliance strategy."[1191] Such risks constitute an external motivation for corporations to have a "robust risk management" that is related to "the valuation of tax positions – often related to uncertainty about interpretation of tax legislation – and the ensuing risks."[1192] Tax is important for investors, because the amount of tax a corporation has to pay "is material to its profitability."[1193] Aggressive tax planning practices might be a signal for investors of "underlying legal, operational, reputational, financial and/or governance risks." Moreover, aggressive tax planning practices inform investors about the risk tolerance or aversion of the management, which is important for the investors from a CG perspective. High risk tolerance can potentially lead to "a variety of damaging outcomes for the business."[1194] Good tax governance and transparency are thus tools to ensure investors' confidence. Investors, namely, are also aware of the fact that taxation is a precondition for "a solid foundation for competition, growth and other factors that enable long-term business sustainability at investee companies."[1195] Corporate management that acts in the best interests of the corporation addresses such risks.

For instance, in the corporate risk paragraph of its annual report, Starbucks (2017) admits that its international nature of business operations inevitably includes additional risks, such as "interpretation and application of laws and regulations, including tax" regulations among others.[1196] The report further adds: "Failure to comply with applicable laws and changing legal and regulatory requirements could harm our business and financial results."[1197] After the public attention Starbucks received in the UK after its tax planning was addressed by the UK PAC, there is no doubt that tax presents a risk for this multinational.[1198] Considering the negative attention the multinational received with regard to its tax practices all over the world, it is questionable whether corporate management addressed such risks properly.

It goes without saying that "taxes are the result of firm's strategy and decisions", which falls under the board discretion.[1199] Nevertheless, as argued in chapter 3, various (corporate) laws and tax rules can drive corporate decision making, as corporations can choose between different alternatives that can have different tax consequences (such as hybrid financial instruments).[1200] Tax should follow business. However, in the case of aggressive tax planning, for instance, a firm's strategy and decisions are the result of various tax regulations. As explained in chapter 3, various legal tax schemes enable corporate (and wealthy) taxpayers to avoid taxes.[1201] Of course, taxpayers may structure their affairs to achieve a favourable tax treatment within the limits set by law. Some

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1189 European Parliament (2016, January 22). Resolution of 6 February 2013 on Corporate Social Responsibility: Accountable, Transparent and Responsible Business Behaviour and Sustainable Growth (2012/2098(INI)). Pt. 7.

1190 See chapter 3.

1191 Gribnau, J. L. M. et al. (2018). Codes of Conduct as a Means to Manage Ethical Tax Governance. *Intertax* 46 (5), 390-407. p. 400.

1192 Gribnau, J. L. M. et al. (2018). Codes of Conduct as a Means to Manage Ethical Tax Governance. *Intertax* 46 (5), 390-407. p. 400.

1193 Ravishankar, V. (2018). Evaluating and Engaging on Corporate Tax Transparency: An Investor Guide. *UN Principles of Responsible Investment.* p. 5.

1194 Ravishankar, V. (2018). Evaluating and Engaging on Corporate Tax Transparency: An Investor Guide. *UN Principles of Responsible Investment.* p. 5.

1195 Ravishankar, V. (2018). Evaluating and Engaging on Corporate Tax Transparency: An Investor Guide. *UN Principles of Responsible Investment.* p. 5. See also chapter 3, section 2.1.

1196 Starbucks. (2018). Fiscal 2017 Annual Report. p. 15.

1197 Starbucks. (2018). Fiscal 2017 Annual Report. p. 17.

1198 See Campbell, K. and Helleloid, D. (2016). Educational Case Starbucks: Social Responsibility and Tax Avoidance. *Journal of Accounting Education* 37, 38–60.

1199 Huseynov, F. and Klamm, B. K. (2012). Tax Avoidance, Tax Management and Corporate Social Responsibility. *Journal of Corporate Finance* 18 (4), 804-827. p. 809.

1200 See chapter 3, section 3.

1201 Chapter 3, section 3.

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(corporate) taxpayers, however, command the kind of resources that enable them to do this in a very sophisticated and successful manner, thus by paying hardly any (income) taxes at all they shift the tax burden to less expert taxpayers. Clark and Grantham see aggressive tax planning as a familiar example of irresponsible corporate behaviour because it exploits negative externalities. In their view, firm costs are thus transferred "to unwilling or unwitting recipients, benefiting the firm at the expense of the total system." According to Clark and Grantham, aggressive tax planning conflicts with the use of tax breaks "in the spirit of their intentions, directing investment to areas of policy priorities, that activity aligns with society's larger interests."[1202] Companies that do not pay their fair share by engaging in creative tax compliance and exploiting loopholes generate a negative externality, "a decrease in the amount of funds available to government programs that hurts society."[1203] Additionally, Clark and Grantham see this behaviour as anticompetitive "for those businesses that pay their taxes appropriately, competition with less scrupulous firms is made more difficult since they are essentially shirking their financial responsibilities and gaining an unfair advantage, leaving an increased tax burden to others."[1204] The tax burden is not only shifted to other businesses but also to other taxpayers. Clearly these negative externalities allow for the conclusion that such corporate taxpayers are acting irresponsibly, rather than simply not acting in a socially responsible way, namely not living up to the ideal of paying a fair share.

The fact is that, despite the objection from the multinationals' side, changing societal expectations with regard to corporate tax planning seem to have an effect. For instance, Starbucks received much public criticism in the UK because of its tax planning practices,[1205] which also had an effect on the multinationals' reputation in the UK.[1206] This forced the multinational to react and change its behaviour[1207] (even though this cannot be traced back in the annual reports of Starbucks[1208]). Another example of a changing corporate position with regard to taxation is Greene King plc, a British leading pub retailer and brewer. In its 2013 annual report, the company stated the following: "The group's tax policy, which has been approved by the board, is aligned with business strategy. It seeks to protect shareholder value by structuring operations in a tax efficient manner, while complying with all relevant tax laws and legislation and fulfilling our obligations as a responsible UK tax payer."[1209] In comparison, the annual report of 2017 stated that the Greene King tax policy "which has been approved by the board, aligns with this strategy and ensures that the group fulfils its obligations as a responsible UK taxpayer."[1210] These are clear examples of corporations that, to a certain extent, have responded to societal changes with regard to corporate tax planning practices. Also, VBDO's yearly Tax Transparency Benchmark illustrates well the progress that corporate taxation goes through.[1211]

Corporations that wish to change can do that. For instance, in 2013, the Tax Justice Network (TJN) asked a prestigious law firm Farrer & Co for its opinion with regard to corporate fiduciary duties and tax planning. The TJN concluded that managers have the obligation "to promote the success of the company, but this should not be misunderstood as requiring blinkered attention solely to maximising distributable profits."[1212] Farrer & Co noted that, according to UK corporate law, "[I]t is not possible to construe a director's statutory duty to promote the success of the company as

[1202] Clark T. S. and Grantham K. N. (2012). What CSR is Not: Corporate Social Irresponsibility. In Tench, R. et al. (Eds.), *Corporate Social Irresponsibility: A Challenging Concept* (pp. 23-41). Bingley: Emerald. p. 31.
[1203] Clark T. S. and Grantham K. N. (2012). What CSR is Not: Corporate Social Irresponsibility. In Tench, R. et al. (Eds.), *Corporate Social Irresponsibility: A Challenging Concept* (pp. 23-41). Bingley: Emerald. p. 31; See also chapter 4, section 3.3.
[1204] Tench, R et al. (2012). The Challenging Concept of Corporate Social Irresponsibility: An Introduction. In Tench, R. et al. (Eds.), *Critical Studies on Corporate Responsibility, Governance and Sustainability*, vol. 4 (pp. 3-20). Bingley: Emerald. p. 31. See also chapter 4, section 3.3.
[1205] UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs (PAC HMRC). (2012). Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012- 13 Report, Together with Formal Minutes, Oral and Written Evidence. London: The Stationery Office Limited; Bergin, T. (2012, 17 October). UK Committees to Examine Starbucks Tax Strategies. *Reuters* (online).
[1206] YouGov Brandindex. (2012, November 21). Google is spared the Public's Anger Over UK Tax Spat. *YouGov Brandindex*.
[1207] Engskov, K. (2012, October 16). Starbucks Coffee Company in the UK; Engskov, K. (2012, December 6). An Open Letter from Kris Engskov.
[1208] See e.g. Starbucks. (2018). Fiscal 2017 Annual Report.
[1209] Greene King plc. Annual Report 2013. p. 25.
[1210] Greene King plc. Annual Report 2017. p. 31.
[1211] See e.g. Urbach, X. et al. (2018). Tax Transparency Benchmark 2018: A comparative study of 76 Dutch listed companies. *VBDO.*
[1212] Tax Justice Network (2013, September 9). *Formal Legal Opinion: Company Directors Have no Fiduciary Duty to Avoid Tax*.

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constituting a positive duty to avoid tax."[1213] As a matter of fact, the law firm argued that "the legislation expressly protects directors from criticism in circumstances where they take decisions based on the kind of factors which would militate against tax avoidance (e.g. change-of-law risk, reputation, brand impact, relationship with HMRC and community impact)."[1214] A director's fiduciary duty under UK corporate law suggests, according to Farrar & Co, that corporate decisions are "taken in good faith in pursuit of the success of the company upon proper deliberation and with regard to the relevant factors".[1215] As long as such a general duty is in principle met, courts would not question that.

Having said that, corporate managers can also have various reasons for believing that tax avoidance is in the long-term interest of the company, such as "the adverse risk profile of tax-structured transactions in the long term" or "the desirability of investment" in other important spheres for company stakeholders.[1216] Thus, if the managers have a solid reason "in good faith and upon proper deliberation" to believe that corporate tax structuring is in the best long-term interest of the company, the managers "would be immune from judicial criticism" (from the corporate law perspective) as well.[1217] As a result, corporate fiduciary duty, especially as developed under the Anglo-Saxon CG model, does not strictly require nor prohibit corporate tax avoidance. Farrar & Co's opinion explains that "codified corporate governance practice and performance-related executive reward structures" are the reasons why some corporate managers "may tend towards the result that the board is motivated to act to the measurable financial benefit of shareholders."[1218] This is, according to the law firm, an "erroneous assumption" rather that misunderstanding the fiduciary duty.

In terms of tax planning, it is in the best interests of the company to stay away from irresponsible behaviour. Businesses are driven by taking risks and aggressive tax planning might bring considerable short-term gains. Aggressive tax planning or tax avoidance may "result in both higher cash flows and higher after-tax earnings"[1219] but, at the same time, it brings certain risks with it, such as reputation damage.[1220] It is argued that stock price is determined by "whatever society values"[1221] and, as shown through this research, society seems not to value aggressive tax planning. Thus, tax planning creates a situation in which risks are confronted with rewards and corporations have to make choices. As explained in chapter 3, one of possibilities for tax planning, but also for aggressive tax planning, is the use of hybrid financial instruments. Bärsch writes that "there is an enormous diversity of types of financial instruments available" and therefore "the corporation has to make a decision about the precise type of financial instruments needed."[1222] This confirms the corporate managers discretion to decide upon the level of tax planning as well. For instance, with regard to hybrid mismatch arrangements, corporate managers might have sufficient reasons to opt for the most tax-efficient alternative.[1223] It is up to corporate managers to decide whether they engage in moral considerations in their decision making or not. Thus, corporate tax avoidance is by no legal means an obligation but rather a choice for corporate managers. Consequently, corporate managers have latitude in their decision making. However, corporations that operate under the flagship of CSR already impose such an expectation on their managers.

From a moral perspective, aggressive tax planning conflicts with CSR and (even though not being illegal) meets the conditions of CSI, which is not in the best interests of the company, as it might, for instance, harm corporate reputation and trustworthiness. It is evident that businesses face many

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[1213] Farrer & Co (2013, June 7). *Fiduciary Duties and Tax Avoidance. Opinion*. p. 1.
[1214] Farrer & Co (2013, June 7). *Fiduciary Duties and Tax Avoidance. Opinion*. p. 1.
[1215] Farrer & Co (2013, June 7). *Fiduciary Duties and Tax Avoidance. Opinion*. p. 3. See also the Companies Act 2006, section 172.
[1216] Farrer & Co (2013, June 7). *Fiduciary Duties and Tax Avoidance. Opinion*. p. 3.
[1217] Farrer & Co (2013, June 7). *Fiduciary Duties and Tax Avoidance. Opinion*. p. 3.
[1218] Farrer & Co (2013, June 7). *Fiduciary Duties and Tax Avoidance. Opinion*. p. 4.
[1219] Austin, C. R. and Wilson, R. J. (2017). An Examination of Reputational Costs and Tax Avoidance: Evidence from Firms with Valuable Consumer Brands. *Journal of the American Taxation Association* 39 (1), 67-93. p. 67.
[1220] See chapter 2, section 6.
[1221] Dobson, J. (1999). Is Shareholder Wealth Maximization Immoral? *Financial Analysts Journal* 55 (5), 69-75. p. 71.
[1222] Bärsch, S.-E. (2012). *Taxation of Hybrid Financial Instruments and the Remuneration Derived Therefrom in an International and Cross-border Context Issues and Options for Reform*. Doctoral Dissertation Universität Mannheim. Berlin, Heidelberg: Springer-Verlag. p. 9.
[1223] See more on hybrid mismatch instruments in chapter 3, section 3.

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changing regulations, such as the new rules as a result of the BEPS project,[1224] as well as changing societal expectations.[1225] The expectations of stakeholders are becoming increasingly important for "companies are more and more relying on their reputation of behaving in a socially responsible way as a factor contributing to their success."[1226] Also the OECD suggests that aggressive tax planning does not "contribute to the long term interests of the company and its shareholders, and can cause legal and reputational risks."[1227] This hypothesis, however, needs to be further tested by empirical research. Furthermore, as shown above, SRI proves that the preferences of investors might also change over time and they are already changing as shown above. Therefore, good tax governance can be attractive to investors, for instance because of reduced compliance costs and a lower risk of future liabilities (such as those related to reputation damage). Taking moral perspective into account may thus have economic impact. Therefore, corporations should balance tax risk management with good tax governance. High ethical standards are evidently "in the long term interests of the company as a means to make it credible and trustworthy, not only in day-to-day operations but also with respect to longer term commitments."[1228]

In 2008 Erle argued that an effective tax governance system minimizes the effective tax rate and adds sustainable value to the company. This is, according to Erle, in the best long-term interests of a company because "only a company that remains competitive and successful in the market can pay taxes and contribute to society."[1229] From a purely profit-maximization standpoint, Erle has a point. However, it is also clear that corporations have to innovate and adapt to changes in order to remain competitive in a changing world. Corporations also need to adapt their CG "practices so that they can meet new demands and grasp new opportunities."[1230] Corporate boards should take the wider societal interest seriously for it is "their fiduciary obligation to close such reputation-reality gaps ... as great as their obligation to improve real performance." Both things arguably "drive value creation for shareholders"[1231] and are in the best interests of the company. Having said that, it is not always self-evident what kind of decision making is in the best interest of the company. This is often up to corporate boards to identify. Nevertheless, aggressive tax planning does not seem to fit with the idea of the best long-term corporate interests.

Bärsch explains that, both in theory and practice, "corporate finance deals mainly with maximizing the corporation's value by minimizing its cost of capital and maximizing its access to external capital."[1232] Bärsch explains that, in theory, "interest payments for debt financing reduce the corporation's tax burden providing hereby a valuable asset, namely the tax shield"[1233] and therefore corporations that wish to plan their taxes as aggressively as possible, could use this instrument. However, in practice, corporations often seem to use more balanced financing.[1234] This proves that corporate managers have the advantage of asymmetric information and have a certain decision-making discretion. The next chapter of this research analyzes what corporate managers should consider to apply good tax governance in practice.

[1224] See chapter 3, section 5.

[1225] See OECD. (2013). *Addressing Base Erosion and Profit Shifting (BEPS).* Paris: OECD Publishing. See also OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. pp. 46-47.

[1226] Erle, B. (2008). Tax Risk Management and Board Responsibility. In Schön, W. (Ed.). *Tax and Corporate Governance* (pp. 205-220). Berlin/Heidelberg: Springer-Verlag. p. 220.

[1227] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. pp. 46-47.

[1228] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. pp. 46-47.

[1229] Erle, B. (2008). Tax Risk Management and Board Responsibility. In Schön, W. (Ed.). *Tax and Corporate Governance* (pp. 205-220). Berlin / Heidelberg: Springer-Verlag. p. 220.

[1230] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 11.

[1231] Eccles, R. G. et al. (2007). Reputation and Its Risks. *Harvard Business Review* February issue 85 (2), 104-114.

[1232] Bärsch, S.-E. (2012). *Taxation of Hybrid Financial Instruments and the Remuneration Derived Therefrom in an International and Cross-border Context Issues and Options for Reform*. Doctoral Dissertation Universität Mannheim. Berlin, Heidelberg: Springer-Verlag. p. 17.

[1233] Thin capitalization rules already set certain limits to debt financing. Bärsch, S.-E. (2012). *Taxation of Hybrid Financial Instruments and the Remuneration Derived Therefrom in an International and Cross-border Context Issues and Options for Reform*. Doctoral Dissertation Universität Mannheim. Berlin, Heidelberg: Springer-Verlag. p. 17.

[1234] Bärsch, S.-E. (2012). *Taxation of Hybrid Financial Instruments and the Remuneration Derived Therefrom in an International and Cross-border Context Issues and Options for Reform*. Doctoral Dissertation Universität Mannheim. Berlin, Heidelberg: Springer-Verlag.

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5.4.3. Concluding remarks

In this section, I argued that good tax governance can have some negative short-term economic consequences on multinationals, since abandoning aggressive tax planning structures would result in a higher tax burden. Nevertheless, multinationals that profile themselves as socially responsible admit that they do not operate according to economic or purely legal layers only.[1235] Existing CG systems do leave room for corporate managers to opt for good tax governance, as long as it is in the best interests of the company.

The BJR, in principle, allows managers to consider stakeholder interests even in shareholder value maximization-minded CG systems. Moreover, managers' latitude is underpinned by the fact that the managers are obliged to consider the best interests of the company. Therefore, to a certain extent, managers are free to decide how aggressive or responsible the company should be in relation to the societies in which they operate. Naturally, management could have less (informal) room to manoeuvre if the majority shareholders are short-term value seeking. Nevertheless, there are certain things that managers still can consider. There is no doubt that corporate managers have an important responsibility in their decision-making process. Managers have to balance the effect of corporate actions and the various expectations multinationals should meet in order to act in the best interests of the company. It goes without saying that it is not an easy task to have a concrete guidance for corporate managers with regard to behaving in the best interests of the company. Similar to CSR, it is easier to agree upon what is not responsible and not in the best long-term interests of the company. Aggressive tax planning clearly constitutes socially irresponsible corporate behaviour and thus is also not in the best interests of a company. Therefore, corporate boards should make use of their discretion to engage in good tax governance. CG rules set certain limits for managers when exercising such a balancing act. However, most importantly, managers have discretion to act in the best long-term interests of the company, also with regard to corporate tax governance.

5.5. Conclusion

This chapter focused on the third pillar of this study: corporate governance. It aimed at understanding whether multinationals face certain constraints in corporate law that restrict them from considering tax as a part of CSR. Thus, good tax governance was analyzed from the perspective of CG principles. Various corporate law elements behind corporate decision making were placed in the context of tax planning. In order to understand the regulatory effect on the international level, it was studied whether and to what extent the Rhineland and Anglo-Saxon CG approaches differ, but also what are their connecting factors. Moreover, whether and how such differences and similarities affect good tax governance.

Choosing the right tax strategy is a legal task of corporate management and also opting for good tax governance is, thus, a question of the discretion of corporate management. Based on two illustrated views on CG theories, corporate boards may face certain pressure to opt for (aggressive) tax planning to increase shareholder value. Tax considerations inevitably form an important part of corporate decision making.[1236] Corporate decision making needs to consider factors such as trust and reputation, which can be severely harmed when engaging in aggressive tax planning, but also tax as a cost element, which should be kept low. From various regulatory developments as well as from the intense public attention, it can be concluded that just paying its due taxes according to the letter of the law (thus, engaging in tax avoidance or aggressive tax planning) does not seem to be sufficient. Nevertheless, satisfying shareholders with higher returns as a result of aggressive tax planning might force corporations to slip away from the idea of good tax governance.

Some business and tax experts have claimed that the various corporate responsibilities to operate in the best interests of the shareholders sometimes even seems to override the interests of other

[1235] See chapter 4, section 3.1.

[1236] See also Desai, M. A. and Dharmapala, D. (2006). Corporate Tax Avoidance and High-Powered Incentives. *Journal of Financial Economics* 79 (1), 145-179.

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stakeholders. In the other words, this suggests that corporate boards are forced to engage in aggressive tax planning. In order to prove this position wrong, this chapter analyzed various theoretical and regulatory frameworks considering the corporate responsibilities towards shareholders and larger groups of stakeholders. Corporations that are convinced of their motivation and wish to embed good tax governance in their business strategies often face various practical questions such as whether and how would they fit with other legal obligations.

CG should set certain rules and principles for company management in order to decrease possible negative externalities that might arise from the self-interested behaviour of managers. From the corporate law perspective, it is often suggested that corporate boards that act as agents for shareholders, the owners of the company, should increase the value for shareholders. Thus, any kind of corporate actions are expected increase shareholder value. On the other hand, nowadays shareholders cannot be directly identified as the owners of the company anymore but as the owners of the shares of the company, as they are very mobile. This suggests that, for the long-term sustainability of a corporation, the boards should act in the best interests of the company instead of the shareholders.

It goes without saying that the distinction between the shareholder and stakeholder approaches is not an exact science in practice. Nevertheless, for the purposes of this research, it suffices to conclude that the main conflict between the two theoretical approaches lies in prioritizing conflicting interests: shareholder theory prioritizes the economic interests of the company, while stakeholder theory sets society above or on the equal level with pure economic interests. The connecting factor between both approaches is that corporate boards should foremost be acting in the long-term best interests of the company. Without a doubt, optimal financial performance is crucial for the best long-term interests of the company. Furthermore, a financially healthy corporation can add more value to society than a corporation that performs poorly with regard to its economic responsibilities.[1237] Therefore, corporate boards should balance between being profitable and being socially responsible. Having said that, the aspirational idea of aiming for ethical obligations beyond compliance with the law is quite ambiguous. Therefore, in this chapter, it was proposed that the concept of corporate social irresponsibility (CSI) might be a helpful tool for corporations. It namely provides some guidance for corporations with regard to what is not in the best interests of the company.

The most complex tension in the CG debate concerns the question of how to balance the profit-making objective of corporations with the corporate responsibilities to the wider group of stakeholders and society at large. Especially with regard to tax planning, this balancing act is complicated, as was illustrated in this chapter. From the profit-making objective of corporations, tax is a cost and should be managed accordingly. On the other hand, taxes are an investment in a society and therefore indirect investments in the well-being of the company.[1238] Moreover, it is argued that, also from a moral perspective, corporations should abstain from tax planning practices that aim at the absolute minimum without ethical considerations. By definition, CSR requires managers to take into account the interests of a company's stakeholders in a broader sense. Thus, in order to act in the best interests of the CSR company (for instance, by not risking reputation damage), the interests to be served by managers include those of the shareholders (who are internal stakeholders) as well as the (other) stakeholders. This is advocated by the stakeholder theory, taking stakeholders rather than shareholders as its point of departure. Aggressive tax planning or tax avoidance, namely, do not fit with the concept of CSR and corporations that present themselves as CSR corporations should take this into account. Corporations that integrate CSR into their business activities should not violate the legitimate rights of others and they are responsible for the effects of their actions on others. Aggressive tax planning or tax avoidance violate both of these elements. As a result, the line of reasoning of Schön, which was introduced in the beginning of this chapter, is questionable, since, as shown above, managers do have exclusive legal discretion. If such

[1237] See Carroll's CSR Pyramid in chapter 4, section 3.1.
[1238] See also chapter 2, section 6.

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discretion is combined with pressure from various stakeholders (including certain shareholders, such as SRI) it is in the best interests of the company to avoid (continuing) to engage in aggressive tax planning strategies. Corporate boards that act in the best interests of the company, thus, take into account the interests of various stakeholders and balance those interests with the interests of the company and shareholders. This is the latitude that corporate managers have in their decision making. Therefore, to a certain extent, corporate boards are free to decide how aggressive or responsible the company should be in relation to the societies in which they operate. Corporate social irresponsibility (CSI) should help managers to better understand the freedom that corporate boards have in excercising their discretion and what to do with that freedom. CSI refers to decisions that responsible companies should not make. Aggressive tax planning has been suggested as an example of irresponsible corporate behaviour, because it exploits negative externalities. It seems to be quite clear that corporate boards that operate within the framework of CSI are not acting in the best interests of the company. Businesses are used to taking risks and aggressive tax planning might bring considerable short-term gains. However, at the same time, aggressive tax planning (or, indeed, tax avoidance) brings certain risks, such as reputation damage. Such reputation damage might also occur in a certain group of shareholders (SRI).

There are many issues related to CG that this research does not solve. Nevertheless, for the purposes of this research, it was proven that various CG approaches in principle do not strictly restrict corporations from opting for good tax governance. Naturally, corporate decision making cannot satisfy all of the conflicting interests of various stakeholders and shareholders. Corporate boards should balance various interests and create value fairly. Needless to say, this does not suggest that corporate managerial power should be increased. CSR that expects corporations to consider larger groups of stakeholders affects corporate decision making from an external perspective, while CG rules affect decision making from an internal perspective. A successful company should balance both. Corporate boards simply need to act in the best interests of the company and not only in their own interests or those of the shareholders or nonshareholder stakeholders. For instance, the Business Roundtable's recent statement to commit to all the stakeholders and societies in which they operate, in addition to generating long-term shareholder value, proves that also managers in the Anglo-Saxon system are aware of broader corporate responsibilities.[1239] The next chapter will propose some ideas for corporate boards to engage in good tax governance.

[1239] Business Roundtable. (2019, April 19). *Statement on the Purpose of a Corporation.*

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6. GOOD TAX GOVERNANCE

6.1. Introduction

CSR is increasingly gaining attention with regard to corporate tax planning. Taxation is a crucial building block for society and therefore corporations are called to account for contributing their part to society.[1240] In the words of the European Commission, "[B]y paying taxes businesses can have an important positive impact on the rest of society."[1241] Moreover, by not paying taxes, businesses can have a negative impact on society.[1242] Consequently, paying taxes, next to a legal oblilgation, is also a moral obligation of corporations, as argued earlier in this research.[1243] Therefore, multinationals presenting themselves as corporations that operate according to socially responsible values should also apply these values in their tax planning practices. In other words, socially responsible corporations should engage in good tax governance. Appropriate tax governance helps multinationals to "comply with tax laws, as well as have processes in place to adhere to the principles and commitments in their own tax strategy."[1244] Good tax governance can be seen as a tool that helps corporations to be consistent with regard to their tax planning strategies internally and also communicate them properly externally.

As explained earlier,[1245] governance is a broad concept that applies to the purpose, management and functions of nations, governments, communities, and organizations, such as corporations. Corporate governance establishes rules and principles for the way power is distributed within a corporation and for the decision-making process with regard to the use of this power. Derived from this, tax governance can be seen as rules and principles for managing corporate tax practices and good tax governance refers to the ethical dimension of tax governance.[1246] From the business practice perspective, however, the words such as *good, ethical,* or *moral* are often vague and do not provide sufficient guidelines nor a normative framework for sound business practices. Therefore, for the purposes of this research, such terms need to be fleshed out in order to provide a more concrete picture of good tax governance.

The previous chapters showed that a certain kind of tax planning does not fit with the profile that many multinationals try to present of themselves: a socially responsible company that contributes to society and sustainable development. In light of recent developments, all corporations should reflect upon their tax planning practices and choose their position in this matter; if necessary, they might need to reconsider some of their practices. This might have certain short-term economic consequences, but it is not in conflict with the best long-term interests of the company.[1247] Despite the understanding that corporations should be run to maximize profit and exclusively increase shareholders' value that still might prevail in the business world, multinationals have sufficient freedom to consider tax planning under the umbrella of CSR. Even Friedman, whose statements are often interpreted as supporting the absolute opposite to businesses having social responsibilities, leaves room for corporations to engage in practices that take the interests of stakeholders into account, and not solely those of shareholders, in order to advance the long-term interests of the

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[1240] See chapter 3, section 2.

[1241] European Commission. (2012, December 6). Communication from the Commission to the European Parliament and the Council: An Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion. Brussels, 6.12.2012 COM(2012) 722 final. p. 6.

[1242] See chapter 4, section 5.

[1243] See chapter 3.

[1244] Ravishankar, V. (2018). Evaluating and Engaging on Corporate Tax Transparency: An Investor Guide. *UN Principles of Responsible Investment.* p. 13.

[1245] Chapter 5, section 2.1

[1246] See also chapter 4, section 5.

[1247] See chapter 5. See also Lanis, R. and Richardson, G. (2012). Corporate Social Responsibility and Tax Aggressiveness: A Test of Legitimacy Theory. *Accounting, Auditing and Accountability Journal* 26 (1), 75-100; Jallai, A.-G. and Gribnau, J. L. M. (2018). Aggressive Tax Planning and Corporate Social Irresponsibility: Managerial Discretion in the Light of Corporate Governance. In Mulligan, E. and Oats, L. (Eds.), *Contemporary Issues in Tax Research,* vol. 3 (pp. 51-86). Birmingham: Fiscal Publications.

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firm.[1248] Therefore, corporations have no valid (legal) excuse for supporting aggressive tax planning.[1249]
Companies that have already taken on the responsibility to engage in CSR should not claim that they behave responsibly while minimizing their tax obligations to the bare minimum.[1250] Lavermicocca and Buchan argue in the same vein that corporations that commit to acting responsibly not only in economic or financial terms, but also in social terms, are expected to "place a higher level of importance on tax compliance and tax contributions to government."[1251] According to Pfeifer and JinYoon taxpayers can comply with tax rules with the help of professional tax advisers (who help corporations to interpret and comply with the rules), but also by "making full disclosure of all facts material and relevant to the tax plan, and making sure that the tax avoidance plan as actually implemented is in conformity with the transaction as planned."[1252] In my opinion, CSR companies should extend such transparency and also disclose their tax values in a moral sense because by doing so they show their stakeholders willingness to improve and engage in dialogue. Therefore, when it comes to tax planning, the notion of "going beyond the compliance"[1253] consists of two layers, one substantive and the other procedural. The substantive element of good tax governance requires ethical decision making and developing tax values. The procedural element means being open about the tax values and strategies of the corporation.[1254] Good – socially responsible – and sustainable tax[1255] governance entails both.
With regard to the substantive layer, based on Carroll's CSR Pyramid, socially responsible companies need to take into account ethical considerations in addition to legal and economic ones when defining and implementing a business strategy and making tax-related decisions. The procedural layer involves the principle of transparency and thereby goes beyond compliance with legal reporting obligations. Accountability concerns the process and outcome.[1256] Corporate accountability in tax matters concerns, thus, the substantive and procedural elements. For living up to the standards socially responsible, sustainable companies set themselves, they should pay their fair share of tax (or at least not unfair), and they should be open and willing to discuss their tax planning strategy and practice. Good tax governance goes beyond a mere cost-benefit analysis aimed at achieving high returns for shareholders; it takes a broader perspective on the effects a corporation's tax planning practices can have.
ActionAid suggests that companies endorsing good tax governance should "create a company tax policy setting out the principles they apply and the practices they rule out; disseminate this policy to internal and external stakeholders; ensure board level oversight of internal tax policymaking; disclose a range of qualitative and quantitative information on their tax practices and their impacts; work with peers and stakeholders to formulate a mutually agreed code of conduct."[1257] In other words, good tax governance requires multinationals to develop a corporate tax strategy that is in accordance with the overall corporate values, such as codes of conduct. This strategy should be communicated to internal and external stakeholders (transparency). Furthermore, such a strategy should be monitored, evaluated and, where necessary, adjusted over time.

[1248] See chapter 5.
[1249] Compare to Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin / Heidelberg: Springer-Verlag.
[1250] It should not be misunderstood that only CSR corporations bear moral responsibilities. All companies have moral responsibilities, but CSR companies especially should take a step further.
[1251] Lavermicocca, C. and Buchan, J. (2015). Role of Reputational Risk in Tax Decision Making by Large Companies. *eJournal of Tax Research* 13 (1), 5-50. p. 12.
[1252] Pfeifer, M. G. and Jin Yoon, S. (2016). The Ethical Limits of Tax Planning. *Trusts & Trustees* 22 (1), 159-165. p. 165.
[1253] See more on going beyond compliance in chapter 4, section 3.2.
[1254] See also Nouy, D. (2018, March 22). *Good Governance for Good Decisions.* Speech by Danièle Nouy, 2nd Banking Supervision Conference: "Governance Expectations for Banks in a Changing Financial Environment", Frankfurt.
[1255] See also Gribnau, J. L. M. and Jallai, A.-G. (2018). Sustainable Tax Governance and Transparency. In Arvidsson, S. (Ed.). *Challenges in Managing Sustainable Business: Reporting, Taxation, Ethics and Governance* (pp. 337-369). Lund: Springer Nature / Palgrave Macmillian. See also footnote 643.
[1256] Buchholtz, A. K. et al. (2008). Corporate Governance and Corporate Social Responsibility. In Crane, A. et al. (Eds.), *The Oxford Handbook of Corporate Social Responsibility* (pp. 327-345). New York: Oxford University Press. p. 335.
[1257] Action Aid (2011). Tax Responsibility: The Business Case for Making Tax a Corporate Responsibility Issue. *ActionAid UK.*

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The aim of this chapter is to provide a better understanding and practical guidance on good tax governance for multinationals. The main focus lies on the substantive (ethical decision-making) and procedural (transparency) elements of good tax governance. This chapter is structured as follows. First, in section 2, the substantive element of good tax governance is analyzed. It will be explained that fairness with regard to taxation depends to a great extent on ethical decision making; a suitable tool guiding corporate decision making is a code of conduct. Section 3 dives into the procedural element of good tax governance: transparency. Expectations of multinationals with regard to various forms of transparency in relation to tax planning will be discussed. A long-term good tax governance serves sustainable development. Therefore, sustainable tax governance, which is not only in the hands of multinationals, will also be studied (section 4). The last section concludes this chapter.

6.2. A substantive element of good tax governance

Next to economic and regulatory considerations, corporations have to deal with moral choices when planning taxes. Society has "certain expectations for appropriate business behavior and outcomes."[1258] Such expectations can be categorized under social norms, which, according to Ruggie, "exist over and above compliance with laws and regulations."[1259] In other words, corporations that wish to increase their income, market share or alike should be aware of the effect of their behaviour on society. Corporations minimizing their tax liability irresponsibly risk loosing their social legitimacy to operate, at least as long as they use their corporate power for tax avoidance when creating their various tax structures.[1260] Such corporations do not meet the societal expectations for appropriate business behaviour and outcomes. This is especially risky for corporations that claim to endorse CSR. Corporate commitment to CSR should be consistently applied to all of the company's dealings and activities. All corporations face ethical choices in every-day business practices but companies that present themselves as socially responsible corporations have made a commitment also to take into account ethical considerations, in addition to legal and economic ones, when defining and implementing a business strategy and making decisions. Consequently, such corporations (but not limited to them) should apply good tax governance.

CSR theories help to understand the core of good tax governance as proposed in this research. As explained, according to the CSR Pyramid developed by Carroll,[1261] corporations are part of the 'social contract' and are therefore expected to pursue their economic missions within the framework of the law and moral norms.[1262] Ethical responsibilities of a company go beyond pure compliance with the law and profit making and embody those standards, norms, or expectations that reflect a concern for what its stakeholders regard as fair, just, or moral. CSR corporations are expected to act in line with ethical responsibilities by doing what is right, just, and fair.[1263] In terms of the key element of Carroll's CSR theory, both layers of good tax governance – substantive and procedural – expect corporations to go beyond strict compliance with the (letter of the) law.[1264]

Even though the exact meaning of 'fair share' is open to debate,[1265] in my view, the link between corporate tax planning and moral behaviour can be made. In chapter 3 I conceptualized fair share as corporate income tax that multinationals have to pay according to (the combination of) the letter and the spirit of the law. But since the spirit of the law is not a clearly defined concept, this research

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[1258] Wood, D. J. (1991). Corporate Social Performance Revisited. *Academy of Management Review* 16 (4), 691-718. p. 695.

[1259] Ruggie, J. G. (2013). *Just Business: Multinational Corporations and Human Rights*. New York: W. W. Norton & Company. p. 91.

[1260] Jallai, A.-G. (2016). Restoring Stakeholders' Trust in Multinationals' Tax Planning Practices with Corporate Social Responsibility (CSR). In Peeters, B. et al. (Eds.), *Trust and Taxation* (pp. 173-201). Antwerp: Intersentia; see also chapter 2, section 3; chapter 3.

[1261] Carroll, A. B. (1991). The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders. *Business Horizons* 34 (4), 39-48. pp. 40-43. See also chapter 4, section 3.1.

[1262] Rayman-Bacchus, L. and Crowther, D. (Eds.). (2004). *Perspectives on Corporate Social Responsibility*. Abington: Taylor and Francis. pp. 3-5.

[1263] Carroll, A. B. (1991). The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders. *Business Horizons* 34 (4), 39-48. pp. 40-43. See also chapter 4, section 3.1.

[1264] See chapter 4, section 3.2.

[1265] See chapter 3, section 2.3.

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suggests to start from the other end by asking what is unfair. Moreover, socially responsible corporations are not expected to act as perfect (corporate) citizens but stay away from immoral behaviour instead. As explained in earlier chapters, morality is about how (corporate) persons live together as a society and "as individuals in relation to one another."[1266] Tax constitutes a link between a (functioning) society and individuals but also individuals among each other within a society. This, of course, complicates corporate stakeholder networks.[1267] Ethics provides a tool for corporations to balance conflicting interests. For instance, it helps corporations to balance short-term shareholder value creation and long-term sustainable development. In terms of good tax governance, such conflicting interests do not always have to exclude the other. In this research, the main question involves the long-term best interests of the company and its relation to society. For good tax governance, corporations should reflect upon their actions; it is an active instead of reactive attitude. In terms of substantive and procedural parts of good tax governance,[1268] multinationals should not strive to pay as little tax as possible (of course, also not as much tax as possible is not expected).[1269] In the following sub-sections, the substantive element of good tax governance will be dealt with. How multinationals could understand the idea of fair share and how they could include this in their ethical decision making will be explained. One such possibility would be a code of conduct as proposed in the third sub-part of this section.

6.2.1. Understanding the essence of fair share in the context of good tax governance

Arguably, responsible corporations should pay their fair share of tax. This, however, is not a very successful term in a sense that it does not give concrete context or practical guidance to what is a fair, just, or moral thing to do. 'Fairness' with regard to taxation is often described as subjective, vague, or a blurred concept.[1270] For instance, even the courts (e.g. ECJ) do not seem to address the concept of fairness consistently.[1271] Due to its vagueness and broad scope, the use of the principle of fairness might conflict with the requirement of legal certainty if not given concrete content.[1272] Therefore, fairness from a taxpayer's perspective deserves a brief explanation.

Fairness in taxation seems to be based on the "relations between the taxpayers and expectations they have on each other"; it concerns not only the tax system itself, "but the use some taxpayers make of the tax system resulting in other tax payers having to pay more."[1273] Ensuring that everybody contributes their share for the financing of the public goods and services and distributive justice – the fairness of the system – is a responsibility of the state. However, as described earlier in this research,[1274] states are not always able to create a perfect system to facilitate international tax fairness; this is so especially when corporations are in a position to take advantage of various legal systems. Therefore, fairness with regard to taxation is also the responsibility of the corporations. In the words of Hemels, "fairness primarily places an obligation on tax payers towards each other and subsequently on governments to safeguard this reciprocity between citizens."[1275] Thus, fairness expects multinationals to exercise some kind of self-restraint.[1276] Multinationals that

[1266] Paine, L. S. (1996). Moral Thinking in Management: An Essential Capability. *Business Ethics Quarterly* 6 (4), 477-492. p. 478.
[1267] See more on corporate stakeholders in chapter 4.
[1268] Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88.
[1269] See also chapter 3.
[1270] See e.g. Lamberts, P. B. W. L. (2017). Fair Taxation: Truth is in the Eye of the Beholder. *Intertax* 45 (1), 49-53. pp. 49-53; Burgers, I. J. J. and Mosquera Valderrama, I. J. (2017). Fairness: A Dire International Tax Standard with No Meaning? *Intertax* 45 (12), 767-783.
[1271] Hemels, S. J. C. (2014). Fairness: A Legal Principle in EU Tax Law? In Brokelind, D. (Ed.). *Principles of Law: Function, Status and Impact in EU Tax Law* (pp. 413-437). Amsterdam: IBFD. pp. 428-436.
[1272] See also Hemels, S. J. C. (2014). Fairness: A Legal Principle in EU Tax Law? In Brokelind, D. (Ed.). *Principles of Law: Function, Status and Impact in EU Tax Law* (pp. 413-437). Amsterdam: IBFD. p. 436.
[1273] Hemels, S. J. C. (2014). Fairness: A Legal Principle in EU Tax Law? In Brokelind, D. (Ed.). *Principles of Law: Function, Status and Impact in EU Tax Law* (pp. 413-437). Amsterdam: IBFD. p. 414.
[1274] See chapter 3, section 3.
[1275] Hemels, S. J. C. (2014). Fairness: A Legal Principle in EU Tax Law? In Brokelind, D. (Ed.). *Principles of Law: Function, Status and Impact in EU Tax Law* (pp. 413-437). Amsterdam: IBFD. p. 424.
[1276] See also Hilling, A. and Ostas, D. T. (2017). *Corporate Taxation and Social Responsibility*. Stockholm: Wolters Kluwer.

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wish to adhere to good tax governance should act fairly towards other taxpayers and pay their fair share of taxes.
As explained earlier, paying a fair share arguably means paying "taxes in a jurisdiction corresponding to the economic benefits that are enjoyed in that jurisdiction."[1277] This is not a commonly accepted definition and therefore it is unclear what exactly the concept of a fair share means. As explained earlier in this research, multinationals are in a position to interpret the laws and, thus, to choose between what is possible within the letter of the law and what should be done in terms of moral behaviour as described by Paine.[1278] Good tax governance requires that multinationals refrain from corporate decision making that aims at tax avoidance or aggressive tax planning, which can be conceptualized as an unfair share since it entails free-riding on the societies in which they operate. Aggressive tax planning by powerful multinationals undermines reciprocity and shared responsibility among citizens.[1279] Therefore, it is considered the opposite to paying a fair share; it is socially irresponsible corporate behaviour.[1280] Corporations that "accept CSR as a guideline for their actions should take into account ethical considerations when using and applying legal rules."[1281] This requires honest decision making from corporations. Multinationals can choose between deliberately a minimalist interpretation of the letter of the law in the short-term self-interest of a company and in the interest of society and long-term sustainable development (and also various gradations between those two extreme positions).[1282] To be clear, it is not expected that corporations opt for philanthropy, they should rather go for collective self-interest (since the existence of public goods and services is in the collective self-interest). Free-riding on other taxpayers is not in line with fairness.[1283]
The fact is that, despite its vagueness, public and political attention is focused largely on the concept of fairness with regard to taxation. In tax debates, fairness is given an important position because of the peoples' perception of fairness.[1284] The free-riding behaviour of other taxpayers is not perceived as fair and this can be seen as the starting point for the debates about fair share. In order to adjust or change its tax planning behaviour (whether intrinsically or extrinsically motivated[1285]), multinationals that wish to engage in good tax governance need to accept that taxation has a moral dimension. Acting fairly does not concern the question whether corporations are breaking the rules (acting illegally) but it is about not taking advantage of loopholes, mismatches, or ambiguities in the system.[1286] Hemels argues that the general anti-abuse rules limit corporate self-serving short-term aggressive behaviour and "could therefore be regarded as a reflection of the principle of fairness."[1287] Nevertheless, in my opinion, this is not enough.
As explained throughout this research, no system is perfect and, consequently, multinationals can always find ways to work around the rules if they wish. Multinationals often have a choice between different legal rules, which, as Gribnau argues, "can be manipulated in unethical ways."[1288]

[1277] Russo, R. and Van Trigt, J. (2015). Corporate Governance and Taxes. In Russo, R. (Ed.). *Tax Assurance* (pp. 23-48). Deventer: Wolters Kluwer. p. 31; see chapter 3, section 2.3.
[1278] Paine, L. S. (1996). Moral Thinking in Management: An Essential Capability. *Business Ethics Quarterly* 6 (4), 477-492. See also chapter 3.
[1279] Gribnau, J. L. M. (2017). Voluntary Compliance beyond the Letter of the Law: Reciprocity and Fair Play. In Peeters, B. et al. (Eds.), *Rebuilding Trust in Taxation* (pp. 173-201). Intersentia, Antwerpen; Gribnau, J. L. M. (2017). The Integrity of the Tax System after BEPS: A Shared Responsibility. *Erasmus Law Review* 1, 12-28.
[1280] See chapter 4, section 3.3.
[1281] Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250. p 241.
[1282] See also section 4 of this chapter.
[1283] Hemels, S. J. C. (2014). Fairness: A Legal Principle in EU Tax Law? In Brokelind, D. (Ed.). *Principles of Law: Function, Status and Impact in EU Tax Law* (pp. 413-437). Amsterdam: IBFD. p. 419.
[1284] Douma, S. (2018). *Miscommunication and Distrust in the International Tax Debate*. Deventer: Wolters Kluwer
[1285] See chapter 4.
[1286] Rawls, J. (1958). Justice as Fairness. *The Philosophical Review* 67 (2). 164-194. p. 180; See also Hemels, S. J. C. (2014). Fairness: A Legal Principle in EU Tax Law? In Brokelind, D. (Ed.), *Principles of Law: Function, Status and Impact in EU Tax Law* (pp. 413-437). Amsterdam: IBFD. p. 426.
[1287] Hemels, S. J. C. (2014). Fairness: A Legal Principle in EU Tax Law? In Brokelind, D. (Ed.). *Principles of Law: Function, Status and Impact in EU Tax Law* (pp. 413-437). Amsterdam: IBFD. p. 426.
[1288] Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250. p. 240.

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Moreover, he adds, "interpreting and using the law inevitably imply making value judgements."[1289] Consequently, it can be said that, in tax planning, multinationals have a choice between interpreting the letter of the law according to their own self-serving welfare or according to the intention of the legislator. Therefore, the corporate mind-set on the decision-making level needs to change and this is the starting point of good tax governance.

Good tax governance mainly concerns the corporate tax structures and practices of tax planning or creative compliance with the law, more than the amount of tax paid. The effective corporate tax rate is usually an outcome of these corporate practices, which means that the effective tax rate of responsible companies is probably higher than that of aggressive tax planners. This, however, could be seen as a trade-off for good tax governance. Indeed, lower tax rates are sometimes a result of the legitimate use of tax incentives, as discussed earlier,[1290] and this is not in conflict with good tax governance. As explained in the previous chapter of this research, social responsibility is often in line with long-term financial responsibility.[1291] Good tax governance is a business strategy that does not accept artificial structures, which are set up for base erosion or profit shifting. In the words of the OECD, corporations should "comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate" and, for that purpose, corporations should take "reasonable steps to determine the intention of the legislature and interprets those tax rules consistent with that intention in light of the statutory language and relevant, contemporaneous legislative history."[1292] In other words, corporations that engage in good tax governance are expected to go beyond strict compliance with the letter of the law. This requires ethical decision making and staying away from CSI.[1293]

6.2.2. Ethical decision making

Corporate ethical decision making is crucial in situations where "values are in conflict".[1294] Corporate decision making requires an ethical reflection in case the decision, which provides corporate managers with "alternative courses of action", is "likely to have significant effects on others" or "the decision is perceived as ethically relevant by one or more parties".[1295] One of these 'grey areas' of business that requires moral reflection that is not covered by the law[1296] is also corporate tax planning. Moral decision making in the context of tax planning entails going beyond minimalist compliance, beyond the strict letter of the tax law. This kind of ethical conduct beyond compliance fits well within a CSR framework.[1297] Therefore, companies that seek to prove moral leadership can implement CSR policies and companies that already claim to show moral leadership by having a CSR strategy in place must meet the expectations of good tax governance since taxes are their contribution to society.

In my opinion, in international tax planning practices, the economic layer of Carroll's pyramid is not up for discussion. All forms of tax planning discussed in chapter 3 stay initially within the economic layer of Carroll's Pyramid.[1298] Any form of tax planning (even tax evasion) that initially aims at lowering costs can be interpreted within the economic layer of Carroll's Pyramid. Taxpayers have the right (liberty) to structure their affairs in a tax-efficient way within the limits set by law.

[1289] Gribnau, J. L. M. (2015). Corporate Social Responsibility and Tax Planning: Not by Rules Alone. *Social & Legal Studies* 24 (2), 225–250. p. 240.
[1290] See chapter 3.
[1291] See chapter 5.
[1292] OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing. p. 60.
[1293] See chapter 4.
[1294] Treviño, L. K. and Nelson, K. A. (2014). *Managing Business Ethics: Straight Talk about How to Do it Right* (6th Ed.). Hoboken: John Wiley. p. 39. As cited in Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 6.
[1295] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. pp. 136-137.
[1296] Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 6.
[1297] See chapter 4, section 3.2.
[1298] It is, nevertheless, questionable whether short-termism is in the best long-term economic interest of the company. This discussion, however, is outside the scope of this research.

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The legal layer of Carroll's theory poses, however, some questions with regard to tax planning. Namely, Carroll's idea of going beyond the law, in its original form, does not directly concern tax practice. There are certain rules and – often with the help of tax advisors – multinationals comply with these rules. Thus, any form of tax that stays within the law would in principle comply the legal layer of CSR Pyramid. Having said that, in my view, the legal layer does not distinguish between the letter and the spirit of the law, which in terms of taxation is very important, because what is legal may not always be morally acceptable, as explained earlier.[1299] Consequently, the line between Carroll's legal and ethical layers is also unclear with regard to taxation. From the legal-positivist perspective, the law could be seen apart from ethics, as the Pyramid seems to suggest.[1300] This research, however, argues that ethics is part of the law, but sometimes legal rules fall short in codifying ethics.[1301] Such shortcomings of the law could, in this sense, be categorized within the ethical layer of the CSR Pyramid. Thus, the ethical layer, which stands for going beyond mere compliance, could practically mark the notions of the spirit of the law and fair share, which was discussed previously.

Good tax governance and aggressive tax planning can thus be translated respectively into corporate social responsibility (CSR) and corporate social irresponsibility (CSI).[1302] CSI indicates what companies should not do instead of what they should do. Therefore, it fits within the idea that tax planning is a matter of degree that, at a certain level, becomes unacceptable by society, which means that corporations should keep away from it.[1303] The concept of CSI can be a helpful tool for multinationals to develop good tax governance. Clearly, within the framework of the CSI and CSR continuum developed by Tench et al., CSR companies should aim to operate on the part of the continuum which as as far as possible from CSI.[1304] This continuum illustrates aptly how legal corporate behaviour (compliance with the letter of the law) can be developed towards a socially responsible corporate behaviour (such as good tax governance) with the help of ethical corporate codes.

Gribnau et al. argue that corporate codes of conduct "are important instruments to enhance moral corporate behaviour."[1305] Moreover, tax codes of conduct could present an opportunity for corporations to "meet stakeholder needs with regard to tax in the current highly politicized and mediatized environment."[1306] Consequently, as good tax governance is not a commonly agreed-upon concept, developing a code of ethical tax conduct provides an opportunity for CSR corporations to prove their intrinsic motivation. It is important, however, that such an ethical "commitment to principled thinking should be consistent and not opportunistic."[1307] Thus, it should be a result of morally responsible business practices, which, according to Carroll "aspires to succeed, but only within the confines of sound ethical precepts – that is, standards predicated upon such ideals as fairness, justice, and due process."[1308] Based on these kinds of standards, according to Carroll, management pursues "its objectives while simultaneously requiring and desiring profitability, legality, and morality."[1309] Moral management can thus be seen as "a matter of balancing competing interests, principles, values and ideals."[1310] Corporations can no longer separate tax and other corporate values.[1311]

[1299] Chapter 3, section 3.
[1300] See also chapter 4, section 3; chapter 3, section 2.
[1301] See chapter 3, section 2.3.
[1302] See more on CSI in chapter 4, section 3.3.
[1303] See chapter 3, section 4; chapter 5, section 4.
[1304] Tench, R et al. (2012). The Challenging Concept of Corporate Social Irresponsibility: An Introduction. In Tench, R. et al. (Eds.), *Critical Studies on Corporate Responsibility, Governance and Sustainability*, vol. 4 (pp. 3-20). Bingley: Emerald. p. 9. See also chapter 4, section 3.3.
[1305] Gribnau, J. L. M. et al. (2018). Codes of Conduct as a Means to Manage Ethical Tax Governance. *Intertax* 46 (5), 390-407. p. 407.
[1306] Gribnau, J. L. M. et al. (2018). Codes of Conduct as a Means to Manage Ethical Tax Governance. *Intertax* 46 (5), 390-407. p. 391.
[1307] Gribnau, J. L. M. et al. (2018). Codes of Conduct as a Means to Manage Ethical Tax Governance. *Intertax* 46 (5), 390-407. p. 398.
[1308] Carroll, A. B. (1987). In Search of the Moral Manager. *Business Horizons* 30 (2), 7-15.
[1309] Carroll, A. B. (1987). In Search of the Moral Manager. *Business Horizons* 30 (2), 7-15. p. 10.
[1310] Gribnau, J. L. M. et al. (2018). Codes of Conduct as a Means to Manage Ethical Tax Governance. *Intertax* 46 (5), 390-407. p. 398.
[1311] See also e.g. Bowers, S. (2018). Apple Claims to be a Good Corporate Citizen, but is it Really? *International Consortium of Investigative Journalists.*

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Corporate values are in general guided by personal values.[1312] Personal value is the "enduring belief that a specific mode of conduct or end-state of existence is personally or socially preferable to an opposite or converse mode of conduct or end-state."[1313] Personal values influence behaviour and persist over time, and are "concerned with individual and/or collective well-being."[1314] Crane and Matten state that "most of us are not as ethical as we think we are".[1315] Moreover, most people make different ethical decisions in different situations.[1316] Therefore, good tax governance is not only based on intrinsic motivation but a mixture of both intrinsic and extrinsic motivations. Ethical decisions are often also guided by the actions of superiors and peers.[1317] This suggests a shared responsibility of various actors for developing the principles behind good tax governance. Moreover, a dialogue (with both internal as well as external stakeholders) is necessary to understand the true meaning of good tax governance.

Corporate boards that are interested in some concrete criteria for improving their tax governance could, for instance, consult the Responsible Tax Principles (the Principles) developed by the B Team, a global nonprofit initiative of a group of global leaders from business, civil society and government.[1318] These principles are divided into three groups: approach to tax management, relationships with others and reporting to stakeholders.[1319] Approach to tax management reflects according to these Principles corporate decision-making with regard to tax strategy. It states that the board should a) consider tax as a part of CSR, b) comply with the tax legislation of the countries in which they operate and pay the right amount of tax at the right time, in the countries where the value is created, and c) use only "business structures that are driven by commercial considerations" and thus "do not seek abusive tax results". These criteria state, in my opinion, that good tax governancerequires that both the real activities and legal structures of a corporation are aligned and are not set up for aggressive tax planning purposes. Further, relationships with others, as proposed in the Principles, reflect what in this research is conceptualized as the (responsible) use of corporate power. Under relationships with others, the Principles state that responsible corporations a) "develop cooperative relationships with tax authorities, based on mutual respect, transparency and trust", b) they make use of tax incentives in a way that is "transparent and consistent with statutory or regulatory frameworks" (tax mitigation, as argued in chapter 3), and c) "engage constructively in national and international dialogue with governments, business groups and civil society to support the development of effective tax systems, legislation and administration."[1320] Under reporting to stakeholders, the Principles mean transparency, providing "regular information to our stakeholders, including investors, policy makers, employees, civil society and the general public, about our approach to tax and taxes paid."[1321] This is the procedural part of good tax governance in the context of this research, as will be discussed in section 6.3. The management of a CSR company could, for instance, use codes of conducts for developing good tax governance and for initiating a dialogue with its stakeholders.[1322]

1312 See chapter 4, section 3.

1313 Rokeach, M. (1973). *The Nature of Human Values*. New York: Free Press. p. 5. As cited in Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 149.

1314 Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 149.

1315 Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 150. Referring to Banaji, M. R. et al. (2003). How (un)ethical Are You? *Harvard Business Review* 81 (12), 56-65.

1316 Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 156. Referring to Treviño, L. K. and Nelson, K. A. (2014). *Managing Business Ethics: Straight Talk About How to Do it Right* (6th Ed.). Hoboken: John Wiley. p. 252.

1317 Treviño, L. K. and Nelson, K. A. (2014). *Managing Business Ethics: Straight Talk about How to Do it Right* (6th Ed.). Hoboken: John Wiley. p. 82. As cited in Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 146.

1318 See: https://bteam.org (accessed 10.03.2020); The B Team. (2018). A New Bar for Responsible Tax: The B Team Responsible Tax Principles.

1319 The B Team. (2018). A New Bar for Responsible Tax: The B Team Responsible Tax Principles.

1320 The B Team. (2018). A New Bar for Responsible Tax: The B Team Responsible Tax Principles.

1321 The B Team. (2018). A New Bar for Responsible Tax: The B Team Responsible Tax Principles.

1322 Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. pp. 149-150.

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6.2.3. Code of conduct: a corporate tool for ethical tax risk management

A code of conduct can be conceptualized as a set of corporate self-regulatory[1323] "rules that guides and orients behaviour within an organisation or sector in order to promote social, environmental, and/or ethical behaviour."[1324] It is a tool for internal and external communication of CSR commitments,[1325] to clarify a corporation's understanding of moral behaviour. In other words, such codes set ethical behavioural standards for corporate decisions and operations. Such codes, thus, are a tool for combining intrinsic and extrinsic motivations of good tax governance; on the one hand, they give a practical form to corporate moral values and, on the other hand, they send the external stakeholders a message that a corporation accounts for its moral behaviour. Codes of conduct help "to achieve moral consistency throughout the company" if they are "implemented strongly and embedded in the organizational culture."[1326] Moreover, a code of conduct can be "a truly helpful resource that employees use for ethical decision-making."[1327] Since stakeholders' expectations, as well as the regulatory environment, business strategy, or ethical norms may change over time, corporations should adjust the code if necessary. Bouwer and Paine aptly argue that corporate long-term interests can only prosper "if they're able to learn, adapt, and regularly transform themselves."[1328] Therefore, Harris's suggestion to "periodically review the code – every three years is common – and update it to remain aligned with changes in the business or in the regulatory environment" is useful.[1329] Additionally, corporate employees on different levels should be trained on a continuous basis "about their responsibilities functioning as ethical role models, recognizing and preventing retaliation, and responding to" arising concerns.[1330]

Managing corporate strategy and values, as well as reputation and trust among stakeholders, suggests that tax governance is a responsibility of the corporate board. It is part of corporate risk management.[1331] According to Mitchell, "running a successful and sustainable business" requires that corporate managers do "not risk undermining its own legitimacy" by ignoring CSR concerns.[1332] Thus, it is the role of the board "to set general guidelines for the company's global tax philosophy and the framework for the governance of tax issues and processes."[1333] To develop a code of conduct for good tax governance, management should have certain tax values that are respected in their decision-making process. Good tax governance, as a self-regulatory approach, should be attractive for multinationals, because it is fairly flexible, and corporations can give their own content to it. Moreover, companies have a choice in deciding how far reaching their social responsibility strategy is. In other words, multinationals aspiring to engage in good tax governance should have certain ethical tax values in place. For example, PwC suggests that sustainable tax is a concept that is based on four key elements: a) conscious choices, that are made based on b) corporate values (which are developed in dialogue with various stakeholders), and that are c)

[1323] Self-regulation stands for regulation that is "exclusively set by business" for business. Such a set of rules and norms are considered to work "as a direct counterpart to governmental regulation". Examples of such self-regulatory standards are "collective agreements or commitments by industry", which are "intended to avoid, forestall or soften potential laws", or corporate codes of conduct. Crane, A. and Matten, D. (2016). *Business Ethics: Managing Corporate Citizenship and Sustainability in the Age of Globalization* (4th Ed.). Oxford: Oxford University Press. p. 520.

[1324] Leipziger, D. (2010). Codes of Conduct. In Visser, W. et al. (Ed.), *The A to Z of Corporate Social Responsibility* (pp. 71-74). Chichester: Wiley; Gribnau, J. L. M. et al. (2018). Codes of Conduct as a Means to Manage Ethical Tax Governance. *Intertax* 46 (5), 390-407. p. 398. Referring to: Buchholtz, A. K. and Carroll, A. B. (2008). Business & Society: Ethics & Stakeholder Management (7th Ed.). Mason: South-Western Cengage Learning. p. 401.

[1325] Bondy, K. et al. (2008). Codes of Conducts as a Tool for Sustainable Governance in MNCs, in Corporate Social Responsibility. In Crane, A. et al. (Eds.) *Readings and Cases in a Global Context* (pp. 432– 448). London: Routledge. As referred to in Gribnau, J. L. M. et al. (2018). Codes of Conduct as a Means to Manage Ethical Tax Governance. *Intertax* 46 (5), 390-407. p. 398.

[1326] Gribnau, J. L. M. et al. (2018). Codes of Conduct as a Means to Manage Ethical Tax Governance. *Intertax* 46 (5), 390-407. p. 398. Referring to: Buchholtz, A. K. and Carroll, A. B. (2008). Business & Society: Ethics & Stakeholder Management (7th Ed.). Mason: South-Western Cengage Learning. p. 331.

[1327] Harris, A. R. (2017). Creating a Code of Ethics and Conduct. *National Defense Magazine.*

[1328] Bower, J. L. and Paine, L. S. (2017). The Error at the Heart of Corporate Leadership. *Harvard Business Review*, May-June issue.

[1329] Harris, A. R. (2017). Creating a Code of Ethics and Conduct. *National Defense Magazine.*

[1330] Harris, A. R. (2017). Creating a Code of Ethics and Conduct. *National Defense Magazine.*

[1331] See also chapter 2.

[1332] Mitchell, L. E. (2007). The Board as a Path Toward Corporate Social Responsibility. In McBarnet, D. et al. (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (pp. 279-307). Cambridge: Cambridge University Press. p. 281.

[1333] Bronzewska, K. and Van der Enden, E. (2014). Tax Control Framework – A Conceptual Approach: The Six Nuances of Good Tax Governance. *Bulletin for International Taxation* 68 (11), 635-640. p. 636.

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implemented though the corporation (e.g. in a form of Tax Control Framework), and that is d) digitalized (in order "to gather, analyse and prepare data and to steer tax operation").[1334] In my opinion, developing certain tax values is at the core of good tax governance, as it leads corporate boards as well as the employees in their decision-making processes.

Therefore, corporate management should "set general guidelines for the company's global tax philosophy and the framework for the governance of tax issues and processes."[1335] Such a tax philosophy should be integrated in "the overall business mission and vision". Multinationals that aspire to be regarded as responsible corporations are expected to have (often required) "an internal validation system" (Tax Control Framework) next to moral values. A Tax Control Framework (TCF) is a guiding corporate tax strategy that is aimed at explaining corporate tax strategy: "what the tax risks are and how these are managed."[1336] The OECD defines TCF as "the part of the system of internal control that assures the accuracy and completeness of the tax returns and disclosures made by an enterprise." The OECD appraises the importance of TCF from the perspective of co-operative compliance.[1337] In its MNE Guidelines, the OECD states that corporations' "commitments to co-operation, transparency and tax compliance should be reflected in risk management systems, structures and policies." According to the OECD, corporate boards should "proactively develop appropriate tax policy principles, as well as establish internal tax control systems so that the actions of management are consistent with the views of the board with regard to tax risk." Developing a TCF allows "the enterprise to not only act as a good corporate citizen but also to effectively manage tax risk, which can serve to avoid major financial, regulatory and reputation risk for an enterprise."[1338] In my opinion, a corporate tax code and TCF can be seen as complementary to each other, as TCF is a corporate tool to show that it is in control of its good tax governance.

Corporations that wish to develop tax values and the risk management framework for that (such as, TCF) can use various sources to begin with. In recent years, many organizations, such as VBDO,[1339] PRI,[1340] Fair Tax Mark,[1341] or B Corp,[1342] have published various principles for responsible tax planning.[1343] For instance, VBDO guiding principles are an appropriate illustration for companies that wish to develop a code of conduct for good tax governance. These principles are: (1) define and communicate a clear strategy regarding tax governance; (2) align taxation with the business and tax is not to be regarded as a profit centre in itself; 3) respect the spirit of the law, i.e. tax compliant behaviour is the norm; (4) have insight into the management of tax risks; (5) monitor and test tax controls and adhere to tax policies and strategy; and (6) be able to provide tax assurance.[1344] In a nutshell, all such principles concern sustainable decision making, transparency, compliance with the laws, and cooperation with the tax authorities.

[1334] PwC. (2017). *Sustainable Tax for Institutional Investors & Asset Managers*.

[1335] Bronzewska, K. and Van der Enden, E. (2014). Tax Control Framework – A Conceptual Approach: The Six Nuances of Good Tax Governance. *Bulletin for International Taxation* 68 (11), 635-640. p. 636.

[1336] Bronzewska, K. and Van der Enden, E. (2014). Tax Control Framework – A Conceptual Approach: The Six Nuances of Good Tax Governance. *Bulletin for International Taxation* 68 (11), 635-640. pp. 635-636.

[1337] OECD. (2016). *Co-operative Tax Compliance: Building Better Tax Control Frameworks*. Paris: OECD Publishing. p. 7.

[1338] OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing. p. 61.

[1339] See Verstappen, R. et al. (2017). VBDO Investor Guide: Integration of Tax in Responsible Investment: Practical Steps to Design and Implement a Responsible Tax Strategy for Investors. *VBDO & PwC*. p. 13; Urbach, X. et al. (2018). Tax Transparency Benchmark 2018: A comparative study of 76 Dutch listed companies. *VBDO*.

[1340] UN PRI. Information Page on Principles of Responsible investment (PRI).

[1341] Fair Tax Mark.

[1342] The B Team. (2018). A New Bar for Responsible Tax: The B Team Responsible Tax Principles. See also: Alexander, R. (2018, February 26). Benefit Corporation: Accountability Matters. *Corporate Governance*.

[1343] In practice, corporations use key performance indicators (KPIs) to measure whether and how business objectives are achieved. Also, with regard to taxation, KPIs are important for business practice as they make it possibe to measure a corporation's tax performance against its overall business objectives and goals. It is, nevertheless, outside the scope of this research to propose possible examples for good tax governance KPIs. See more on KPMG. (2016). *Key Performance Indicators Driving Indirect Tax Value: Getting Down to Business with Indirect Tax*.

[1344] Schuil, G. et al. (2014). *Good Tax Governance in Transition: Transcending the Tax Debate to CSR*. Report coordinated by the Dutch Association of Investors for Sustainable Development (VBDO) with contributions from Oikos and PwC.

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There are several multinationals that already have developed good tax governance, such as Unilever or DSM, or some members of the B Team.[1345] Developing such responsible practices does not immideately mean that those are perfect, however, they are definitely a good start. I am convinced that such corporate practices will be rather common business practice in the future, rather than exceptional examples. It is suggested that usually the first to implement good tax governance are financial institutions "including institutional investors" for "they are and have been subject to increased scrutiny by regulators and the general public."[1346] Consequently, it is only a matter of time that multinationals should also implement more responsible tax practices, as they are likely to face pressure from such investors. Thus, they could gain a competitive advantage if they develop good tax governance ahead of time. PwC suggests that "from a fiduciary perspective, developing a robust tax governance model is valuable to demonstrate that you are in control of your tax position and that potential tax risks around investments are being monitored."[1347] This also sends a positive message to economic value-seeking shareholders.[1348]

There is also evidence that multinationals that have been at the centre of various aggressive tax planning scandals are changing their tax strategies.[1349] For instance, some sources claim that the social media giant Facebook is changing its legal structure in order to ensure that "ad revenues would be booked in the local markets rather than at its international headquarters in Ireland."[1350] Also Google has allegedly become more transparent in New Zealand after public pressure.[1351] Furthermore, Starbucks allegedly changed its corporate structure in Europe in order to pay more tax in the UK after 2012.[1352] In addition, ten large UK multinationals that are accredited to the Fair Tax Mark in December 2015 made a statement supporting that "progressive business practice is recognised and other companies are challenged to be as transparent as possible." The statement praised tax transparency and paying a fair share and, thus, good tax governance in the context of this research. Moreover, it claimed that tax is a CSR issue to which corporations need to respond.[1353] These are clear examples of the positive reactions of business to changing societal expectations with regard to corporate tax planning.

6.2.4. Concluding remarks

A substantive element of good tax governance relies on paying a fair share of tax. Despite its vagueness, fairness has inevitably become an important concept with regard to taxation. The free-riding behaviour of some taxpayers is perceived as unfair. In order to adjust or change their tax planning behaviour, multinationals that wish to engage in good tax governance need to accept that taxation has a moral dimension. Acting fairly suggests that corporations are not taking advantage of loopholes or ambiguities in the system. This requires ethical decision making, which is crucial when corporations face situations where certain values conflict. In such a situation, various conflicting interests need to be balanced.

Naturally, as was also discussed in the previous chapters,[1354] various stakeholders can have conflicting expectations of corporate decision making. In order to prevent reputation damage among certain groups of stakeholders, corporations should manage expectations.[1355] In order to

[1345] See e.g. Urbach, X. et al. (2018). Tax Transparency Benchmark 2018: A comparative study of 76 Dutch listed companies. *VBDO*; The B Team. (2018). A New Bar for Responsible Tax: The B Team Responsible Tax Principles.

[1346] PwC. (2017). *Sustainable Tax for Institutional Investors & Asset Managers*.

[1347] PwC. (2017). *Sustainable Tax for Institutional Investors & Asset Managers*.

[1348] Food for thought: "Even Lehman Brothers had a page on sustainability in its 2007 annual report, hailing its role as an environmentally conscious 'global corporate citizen'." Edgecliffe-Johnson, A. (2019, January 4). Beyond the Bottom Line: Should Business Put Purpose Before Profit? *Financial Times* (online).

[1349] See some examples also in chapter 5, section 4.

[1350] Kuchler, H. (2017, 12 December). Facebook to Stop Booking Ad Sales through Irish HQ. *Financial Times* (online).

[1351] Smyth, J. (2018, February 22). Google Shift Strikes Blow for New Zealand in Global Tax Clampdown. *Financial Times* (online).

[1352] Note, however, that they do not admit any wrongdoing with regard to practices that were at the centre of criticism.

[1353] The Guardian. (2015, December 15). MEPs Should Support a Fair Tax Payer Label. Open letter to *The Guardian* (online).

[1354] Chapter 5; chapter 4, section 4.

[1355] For instance, multinationals should deal with the shareholder expectations, which "may well differ among industries and companies, as well as among the types of risks involved." In case of conflicting expectations, the corporate board can "change what they were planning to do so as to better adhere to existing shareholder expectations" or "they could try to change shareholder expectations; or they could

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manage expectations, corporations can engage in a dialogue with various stakeholders in order to learn what such expectations are with regard to good tax governance. From a corporate perspective, "CSR is clearly about a particular set of business practices and strategies that deal with social issues."[1356] However, "for many people it is also something more than that – namely a philosophy or set of values that underpin these practices."[1357] This dimension of values and morality, however, also causes much controversy and many debates within the discipline of CSR.[1358] For many corporations this can be burdensome for "there are significant pressures on firms to meet public expectations and standards of legitimacy as far as its CSR engagement is concerned."[1359] Morality is inevitably a rather vague concept that raises many questions. Dialogues may help to develop a common understanding on fairness with regard to taxation.[1360] Such dialogues, as they enter the more general public platform, inevitably involve a moral element. Having said that, not everybody will agree with this. For instance, Essers, argues that judging taxpayers on ethical grounds "is not appropriate."[1361] Nevertheless, Essers agrees that companies should, for instance, consider tax as a part of CSR. However, it is difficult to agree with the position that judging the aggressive tax planning practices of multinationals on ethical grounds is inappropriate *per se*. Of course, states should respond with effective policies (though a perfect regulatory system is not possible) but, as argued, corporations face many choices in every-day business practices and deciding between such choices is often a value-based judgement. Therefore, in my opinion, involving an ethical dimension in dialogues about aggressive tax planning is not inappropriate. However, in order to understand the problem, a debate is necessary, and morality is part of this debate.[1362] The B Team's Responsible Tax Principles that provide a good example of clear criteria for good tax governance reflect the discussions through this research. CSR corporations that wish to improve their tax practices are invited to use these Principles as an example of good practices. Nevertheless, corporations need to adjust these criteria for their own company-specific environment. In order to better understand what the stakeholders exactly expect from corporations, initiating a dialogue is necessary. For a well-informed debate, corporations should be transparent. Transparency is a procedural element of good tax governance.

6.3. Transparency: a procedural element of good tax governance

There is increasing public interest in corporate tax practices. Therefore, developing only certain tax values for internal use is not sufficient from the public perspective. In order to understand and accept the corporate behaviour, stakeholders need to know and understand this. Increased public interest in corporate tax practices has also increased the demand for corporate accountability.[1363] Accountability can be considered as "social corporate control", because "corporations are accountable for the creation of organizational wealth for its multiple constituents."[1364] Such social corporate control expects corporations to account for their "activities, accept responsibility for

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even perhaps attempt to change their shareholder 'clientele'." Hu, H. T. C. (1996). Behind the Corporate Hedge: Information and the Limits of "Shareholder Wealth Maximization". *Journal of Applied Corporate Finance* 9 (3), 39-52. p. 50.

[1356] Eijsbouts, J. (2011, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*. Inaugural Lecture, Maastricht University. pp. 30-31, quoting Crane, A. et al. (Eds). (2008). *Corporate Social Responsibility, Readings and Cases in a Global Context*. Abingdon: Routledge. p. 8.

[1357] Eijsbouts, J. (2011, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*. Inaugural Lecture, Maastricht University. pp. 30-31, quoting Crane, A. et al. (Eds). (2008). *Corporate Social Responsibility, Readings and Cases in a Global Context*. Abingdon: Routledge. p. 8.

[1358] Eijsbouts, J. (2011, October 20). *Corporate Responsibility, Beyond Voluntarism: Regulatory Options to Reinforce the Licence to Operate*. Inaugural Lecture, Maastricht University, pp. 30-31, quoting Crane, A. et al. (Eds). (2008). *Corporate Social Responsibility, Readings and Cases in a Global Context*. Abingdon: Routledge. p. 8.

[1359] Wickert, C. and Cornelissen, J. (2017). CSR and Reputation: Too Much of a Good Thing? In Rasche, A. et al. (Eds.). *Corporate Social Responsibility: Strategy, Communication, Governance* (pp. 187-219). Cambridge: Cambridge University Press. p. 336.

[1360] Peters, C. (2014). *On the Legitimacy of International Tax Law.* Amsterdam: IBFD Doctoral Series. p. 307.

[1361] Essers, P. (2017). International Tax Justice between Machiavelli and Habermas. In Peeters, B. et al. (Eds.). *Rebuilding Trust in Taxation* (pp. 235-265). Antwerpen: Intersentia. p. 248.

[1362] See more on the relationship between the law and morality in chapter 3, section 2.

[1363] See more on accountability in chapter 2, section 4.

[1364] Valor, C. (2005). Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability. *Business and Society Review* 110 (2), 191-212. pp. 196-197.

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them, and to disclose the results in a transparent manner."[1365] Accountability can, thus, be achieved through transparency, "through the *provision of information* to stakeholders and society."[1366] With respect to transparency, "the one who is accountable, explains or justifies actions to the one to whom the account is owed."[1367] In other words, transparency is a primary requirement to keep multinationals accountable towards the societies in which they operate.[1368] Without information, it is hardly possible to acquire the knowledge required to hold those who wield power over others accountable. Accountability enables people to check the exercise of power.[1369] This explains why the demand for transparency in tax affairs has become urgent.[1370]

The Internet era facilitates unprecedented access to information, which allows stakeholders to demand accountability. Stakeholders want information in order to assess corporations' conduct and values, whether they are in line with a stakeholders' own values. This is also important for corporate reputation.[1371] In this sense, only publishing financial information is not enough. For instance, in addition to commercial objectives, the OECD encourages companies to "disclose policies and performance relating to business ethics, the environment and, where material to the company, social issues, human rights and other public policy commitments."[1372] Also, good tax governance could be considered a matter related to business ethics that is material to all of the OECD's listed commitments. In this context, codes of conduct can serve the extrinsic motivation behind good tax governance.

Transparency, as a procedural element of good tax governance, can also be driven by both intrinsic and extrinsic motivations.[1373] An extrinsic motivation for transparency originates from mandatory and semi-voluntary requirements, such as (private or public) regulation or investors' requirements. An intrinsic motivation of transparency serves the willingness to be in dialogue with stakeholders and illustrate an entity's values. Also, here, good tax governance is based on both motivations. The division between extrinsic and intrinsic motivations is not black and white but the starting point can indeed be distinguished. In general, mandatory transparency requirements expect multinationals to publish information that can be considered material, which is the information about the company that "is likely to change the perceived value of a security when it is disclosed to the public."[1374] The materiality of information depends on the decision context for "information may have little or no bearing on one type of decision, but be extremely important for another." Lo explains that, in case "materiality is determined by reference to the potential to affect decisions, then it is the potential change in expectations that determines whether an item is relevant."[1375] Moreover, information that is material in one context might become immaterial in another context.[1376] Despite the challenge to distinguish between material and immaterial information, "this does not mean that an 'immaterial' item has zero effect on users—the effect is simply expected to be smaller than the threshold for materiality, so there are still costs and benefits to disclosing such immaterial information." Therefore, as "materiality in concept is continuous and a matter of

[1365] Business Dictionary (online). Search term: "accountability". Retrieved from: http://www.businessdictionary.com/definition/accountability.html (accessed 03.03.2019).
[1366] Swift, T. (2001). Trust, Reputation and Corporate Accountability to Stakeholders. *Business Ethics: A European Review* 10 (1), 16-26. p. 16.
[1367] Swift, T. (2001). Trust, Reputation and Corporate Accountability to Stakeholders. *Business Ethics: A European Review* 10 (1), 16-26. p. 17.
[1368] See also chapter 2, section 4.
[1369] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. pp. 13, 225; Bianchi, A. (2013). On Power and Illusion: The Concept of Transparency in International Law. In Bianchi, A. and Peters, A. (Eds.). *Transparency in International Law*. Cambridge: Cambridge University Press. p. 2.
[1370] See more on corporate power in relation to tax planning in chapter 2, section 3.
[1371] See chapter 2, section 5.
[1372] OECD. (2015). *G20/OECD Principles of Corporate Governance*. Paris: OECD Publishing. p. 34.
[1373] See also chapter 4, section 3.1.
[1374] Business Dictionary (online). Search term: "material information". Retrieved from: http://www.businessdictionary.com/definition/material-information.html (accessed 03.03.2019).
The U.S. Supreme Court interprets material information as the information which would likely be "viewed by the reasonable investor as having significantly altered the total mix of information made available." Grewal, J., Hauptmann, C. and Serafeim, G. (2017). Material Sustainability Information and Stock Price Informativeness. *Harvard Business School Working Paper*. p. 10. See also: OECD. (2011). *Guidelines for Multinational Enterprises*. Paris: OECD Publishing. p. 27.
[1375] Lo, K. (2010). Materiality and Voluntary Disclosures. *Journal of Accounting and Economics* 49 (1), 133–135. pp. 133-134.
[1376] Corporate Reporting Dialogue. (2016, March). *Statement of Common Principles of Materiality of the Corporate Reporting Dialogue*. p. 3.

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degree,"[1377] it is a responsibility of the corporate decision-making organ to determine which information is material "from the perspective of stakeholders."[1378] Corporate decision making "should reflect management's best interpretation of stakeholder expectations as of the reporting date."[1379] Deciding upon the materiality of the information to be disclosed is, however, a challenging task for "there is no international consensus on standards of business conduct."[1380] Moreover, different stakeholders value different kinds of information and they need to be able to "separate signal from noise."[1381] For the purposes of good tax governance, multinationals should thus communicate their tax values and strategies even though it is not required by the law. This illustrates, in my opinion, how mandatory (extrinsic) transparency requirements can in practice evolve into voluntary (intrinsic) transparency. Naturally, in terms of voluntary transparency, corporations have discretion to decide upon the content and extent of the information published. A reasonable and responsible business practice does not publish all of the available corporate information, however, as this would harm a corporations' competitive position.[1382] Voluntary transparency in terms of good tax governance communicates corporate tax values and actions this corporation takes to live up to the values it has set for itself.
In the following sub-sections, mandatory and voluntary dimensions of transparency are discussed. It will be first discussed what kind of externally motivated transparency requirements corporations need to fulfil (mandatory transparency requirements), and then it will be analyzed how corporations can go beyond compliance and external motivation (voluntary transparency).

6.3.1. Extrinsic drivers of tax transparency

Transparency with regard to corporate tax planning is a legal requirement in the first place. Various international transparency requirements and tax disclosure rules represent an extrinsic driver of procedural good tax governance. As argued in this research, multinationals are in a position to use their corporate power with regard to tax planning at a considerable cost to society's welfare.[1383] Usually legal but (socially) illegitimate tax planning structures benefit from information asymmetry and a lack of transparency.[1384] Corporations that wish to prove that their tax planning practices are (socially) legitimate should be transparent about it. For instance, Henriques argues that corporations should be transparent about their role with regard to shaping the law through lobbying and consultations, which were identified as one dimension of corporate power.[1385] In the fight against certain types of tax planning, transparency is often considered a key element.[1386] It is not the aim of this research to analyze whether and in which form the regulatory tax transparency initiatives would eliminate tax avoidance efficiently. The following examples merely illustrate various mandatory tax transparency initiatives at the international level. These examples prove that transparency is a crucial topic with regard to corporate tax planning.
The urgency of transparency was clearly visible already in the 2013 OECD report to the G20: "Leaders, civil society and everyday taxpayers are renewing demands for greater transparency and (…) changes to the international tax rules to restore fairness and integrity of their tax systems and

[1377] Lo, K. (2010). Materiality and Voluntary Disclosures. *Journal of Accounting and Economics* 49 (1), 133–135. pp. 133-134.
[1378] Corporate Reporting Dialogue. (2016, March). *Statement of Common Principles of Materiality of the Corporate Reporting Dialogue*. p. 4.
[1379] Corporate Reporting Dialogue. (2016, March). *Statement of Common Principles of Materiality of the Corporate Reporting Dialogue*. p. 4.
[1380] Donaldson, T. (1996). Values in Tension: Ethics away from Home. *Harvard Business Review* 74 (5), 48-64. p. 52.
[1381] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. p. 22.
[1382] For a discussion regarding the threats of transparency in tax matters, see Douma, S. (2018). *Miscommunication and Distrust in the International Tax Debate*. Deventer: Wolters Kluwer; Stevens, S. (2018, September 14). *Meer transparantie in de vennootschapsbelasting?* Tilburg University. See also Oats, L. and Tuck, P. (2019). Corporate Tax Avoidance: Is Tax Transparency the Solution?. *Accounting and Business Research* 49 (5), 565–583, who point at the risk of dysfunctional consequences, for instance additional costs in providing and processing additional information and the prospect of increased disputes as new information generates new misinterpretations.
[1383] See chapter 2, section 3.
[1384] See chapter 3, section 3.
[1385] See chapter 2.
[1386] Peters, C. (2017). Improving Democratic International Tax Governance: On the Power of Citizens, Transparency and Independent Watchdogs. In Peeters, B. et al. (Eds.), *Rebuilding Trust in Taxation* (pp. 203-234). Antwerpen: Intersentia. pp. 218-231.

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the global financial systems more generally."[1387] The European Commission considers transparency "a crucial element in securing fairer taxation."[1388] According to the Commission, transparency is one of the "three principles of good tax governance."[1389] One of the main reasons why various international regulatory approaches aim to create more transparency in tax planning discussions is to minimize the information gap between corporations and tax authorities. In economics, such an information gap is referred to as information asymmetry, which describes situations in which one party to a transaction or agreement has less information than the other.[1390] Multinationals possess corporate power that gives them a favourable position in relation to information asymmetry.[1391] Various disclosure rules help to evaluate the information corporations provide. This is important, since "without comparability and consistency standards the current reports are more 'greenwash' or environmental spin than a factual representation of the company's actual position."[1392]

Both the OECD BEPS Action Plan[1393] and the EU Action Plan[1394] aim at increasing transparency with their country-by-country reporting initiatives that aim at the exchange of data between tax authorities with regard to income and the wealth of taxpayers.[1395] This exchange can be done upon request but much data is exchanged automatically between the tax authorities in an increasing number of countries.[1396] By way of transnational tax information exchange networks, tax administrators can cooperate actively with administrators from other countries and achieve the capacity to enforce national tax laws in respect of multinational and mobile capital and labour.[1397] The exchange of tax relevant information is an important means for tax authorities to combat tax evasion and tax avoidance.[1398] According to Hey, this reflects a "recent international push for transparency" and the tax legislators' interest in "understanding complex economic structures and upcoming business models", which in turn can lead to "new policy considerations and new legislative actions."[1399] Some argue that increased disclosure requirements are considered to reduce corporate tax aggressiveness.[1400] However, in my opinion, as long as the concept of tax

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[1387] OECD. (2013). OECD Secretary-General Report to the G20 Finance Ministers. Paris: OECD Publishing. p. 2.

[1388] European Commission. (2015, June 17). *Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*. Communication from the Commission to the European Parliament and the Council. Brussels: COM(2015) 302 final.

[1389] European Commission. (2015, June 17). *Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*. Communication from the Commission to the European Parliament and the Council. Brussels: COM(2015) 302 final.

[1390] Stiglitz, J. E. (2002). Information and the Change in the Paradigm in Economics. *The American Economic Review* 92 (3), 460-501. pp. 469-470; Hood, C. (2006). Transparency in a Historical Perspective. In Hood, C. and Heald, D. (Eds.), *Transparency: Key to Better Governance?* (pp. 3-23). Oxford: Oxford University Press. p. 18.

[1391] See chapter 2, section 3.

[1392] Tschopp, D. J. (2005). Corporate Social Responsibility: A Comparison between the United States and the European Union. *Corporate Social Responsibility and Environmental Management* 12 (1), 55-59. p. 56-57. See also See Holland, K. et al. (2016). Tax Avoidance: A Threat to Corporate Legitimacy? An Examination of Companies' Financial and CSR Reports. *British Tax Review* 3, 310-338.

[1393] OECD. (2013). *Addressing Base Erosion and Profit Shifting (BEPS).* Paris: OECD Publishing; OECD. (2014, January 30). *Discussion Draft on Transfer Pricing Documentation and CbC Reporting*. Paris: OECD Publishing. See more on the OECD BEPS and the EU ATAP in chapter 3, section 5.

[1394] European Commission. (2015, June). Action Plan on Corporate Taxation; European Council. (2018, May 25). Directive (EU) 2018/822 amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation in Relation to Reportable Cross-Border Arrangements. Official Journal of the European Union L 139/1, 05.06.2018. pp. 1-13. See also Hilling, A. and Ostas, D. T. (2017). *Corporate Taxation and Social Responsibility*. Stockholm: Wolters Kluwer. pp. 46-54. European Commission. *Overview: Public Country-by-Country Reporting*; European Commission. (2015, March 15). *Combatting Corporate Tax Avoidance: Commission Presents Tax Transparency Package*. Press release. Brussels.

[1395] The EU ATAP is an implementation of the OECD BEPS.

[1396] Enhancing transparency and cooperation is laid down in the obligation of country-by-country reporting (CbC reporting). See e.g. OECD. (2013). *Addressing Base Erosion and Profit Shifting (BEPS).* Paris: OECD Publishing. Action 13. See also Panayi, C. H. J. I. (2017). The Europeanization of Good Tax Governance. In Albors-Llorens, A. et al. (Eds.), *Yearbook of European Law* (pp. 1-54). Oxford: Oxford University Press. p. 16. For criticism on CbC reporting see e.g. Cockfield, A. J. and MacArthur, C. D. (2015). Country-by-Country Reporting and Commercial Confidentiality. *Canadian Tax Journal/Revue Fiscale Canadienne* 63 (3), 627-660. p. 642; Financial Transparency Coalition (2015, September 17). *OECD Country-by-Country Reporting: Only for the Strong*?

[1397] Stewart explores the important question of the legitimacy of these transnational networks, which will be crucial for their sustainability and effectiveness in the long term. Stewart, M. (2013). Global Tax Information Exchange Networks: Legitimacy in a Global Administrative State. In Brauner, Y. and Stewart, M. (Eds.). *Tax, Law and Development* (pp. 316-344). Cheltenham: Edward Elgar.

[1398] Grinberg, I. (2016). Building Institutions for a Globalized World. Automatic Information Exchange. In Pogge, T. and Mehta, K. (Eds.), *Global Tax Fairness* (pp. 14-30). Oxford: Oxford University Press.

[1399] Hey, J. (2018). Tax Transparency (preparatory materials). EATLP Annual Conference 2018, Zurich.

[1400] Lavermicocca, C. and Buchan, J. (2015). Role of Reputational Risk in Tax Decision Making by Large Companies. *eJournal of Tax Research* 13 (1), 5-50. p. 18.

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aggressiveness in itself remains unclear,[1401] the concrete aim of such requirements remains questionable.
Moreover, mandatory disclosure rules do not always provide necessary information to all interested parties. As a result, in addition to mandatory rules, various corporate stakeholders request publicly available information about corporate tax strategies and values in a form that is understandable to a non-tax expert. This is where corporate voluntary transparency plays a role. Such public calls for transparency, while not unimportant, form another layer of extrinsic motivation for tax transparency. For instance, many NGOs pressure corporations into disclosing their tax strategies in the hope of establishing more corporate accountability.[1402] Also, shareholders increasingly request more information on corporate tax strategies. Blowfield and Murray claim that "the degree of transparency depends on legal and stock market requirements."[1403] Such legal and market requirements force corporations to be more transparent and can, therefore, be categorized as extrinsically motivated transparency. Such external calls for transparency are important, as they put more pressure on the corporate moral obligation to pay a fair share. Consequently, corporations can no longer ignore their tax practices and any dubious strategy can have an effect on the corporate reputation, for example, which puts more pressure on companies to behave responsibly. Such external pressure-driven transparency appears, for instance, in the form of private reporting initiatives, such as Environmental, Social and Governance (ESG) reporting.
ESG reporting is one of the most widely used corporate responsibility reporting standards. ESG metrics help investors to calculate long-term returns, as they indicate healthy corporate performance. ESG reporting is especially important in the context of socially responsible investments (SRI).[1404] A myriad of institutions provide guidance for corporations and information for investors with regard to ESG reporting and performance. Many investors pay increasing attention to corporate sustainability in combination with transparency.[1405] For example, FTSE Russell ESG Ratings also include tax transparency as part of the (ES)Governance.[1406] Sustainability considerations have become an important part of investors' decision-making processes.[1407] This also proves that both standardization organizations as well as investors are important actors with regard to the corporate tax planning debate, as they can (financially) motivate corporations towards more sustainable tax governance. For instance, the VBDO Investor Guide to responsible investment states that "[I]nvestors play a crucial role in responsible business conduct."[1408] A responsible investment criterion provides companies with a strong catalyst for change.
The Principles of Responsible Investment (PRI), for example, encourage companies to "disclose information related to policy, governance and performance" through "multiple channels", such as a separate corporate tax policy statement or "the annual report or sustainability report and/or the company website."[1409] Such a comprehensive disclosure should illustrate how corporate boards see taxation and "how this approach is aligned with its business and sustainability strategy." Additionally, it should convince investors that a corporation is in control of its tax-related risks.[1410] In other words, the PRI expects corporations to have and disclose their TCF that was discussed previously.[1411] Such an approach suggests that, for (a certain group of) investors, transparency in

[1401] See also chpater 3.
[1402] See e.g. Tax Justice Network; Oxfam Novib.
[1403] Blowfield, M. and Murray, A. (2008). *Corporate Responsibility: A Critical Introduction*. Oxford: Oxford University Press. pp. 35-36.
[1404] Skroupa, C. P. (2017, April 24). ESG Reporting Reshapes Global Markets. *Forbes* (online); see also chapter 4, section 5.2.
[1405] See e.g. RobecoSAM in chapter 5. See also: Bird, R. and Davis-Nozemack, K. (2016). Tax Avoidance as a Sustainability Problem. *Journal of Business Ethics (online edition)*, 1-17.
[1406] FTSE Russell. ESG Ratings.
[1407] Dixon, C. and Sharma, A. (2018, January 24). Weil Discusses 2018 10-K and Proxy Season: Spotlight on Corporate Sustainability. *Columbia Law School's Blue Sky Blog on Corporations and the Capital Markets*.
[1408] Verstappen, R. et al. (2017). VBDO Investor Guide: Integration of Tax in Responsible Investment: Practical Steps to Design and Implement a Responsible Tax Strategy for Investors. *VBDO & PwC*. p. 6.
[1409] UN PRI. *Investors' Recommendations on Corporate Income Tax Disclosure*.
[1410] UN PRI. *Investors' Recommendations on Corporate Income Tax Disclosure*. See also chapter 5.
[1411] Chapter 6, section 2.3.

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tax matters is also very important, which puts pressure on corporations to meet such expectations.[1412]

In addition to the UN, several other institutions focus on tax transparency. For instance, in the Netherlands, the VBDO, a responsible investors' organization,[1413] has developed the Tax Transparency Benchmark[1414] that provides extra recognition for corporations that have adopted good tax governance and consequently transparency measures. Such a transparency initiative provides an additional dimension of external motivation for good tax governance. Namely, such positive recognition not only adds to a good corporate reputation, but it also creates a competitive environment among corporations to prove their positive impact, creating a race to the top. Another example of a companies' own transparency initiative and peer-pressure on other corporations is the initiative of ten large UK multinationals that are accredited to the Fair Tax Mark. These multinationals made a statement in 2015 supporting that "progressive business practice is recognised and other companies are challenged to be as transparent as possible."[1415] The statement claimed that "enhanced transparency is vital, whether from country-by-country reporting or from public statements on tax policies and governance." Furthermore, it encouraged the businesses to "demonstrate that they are open and transparent about their tax affairs, and pay the right amount of corporation tax at the right time and in the right place." It further recognized tax as the corporate responsibility issue to which corporations must respond. All such statements and publications put extra pressure on multinationals to be more transparent about their tax planning and values.[1416]

Also, in recent years, the media and NGOs have been crucial drivers of a wide debate on corporate taxation.[1417] Various information leaks have proven that "corporate tax issues remain out of the public eye until the media discovers them"; only after media attention, such tax issues have "become part of social concern."[1418] Such attention adds to the extrinsic motivation of transparency, as it can affect corporate reputation. Empirical research "suggests that public pressure can increase both corporate compliance with and government enforcement of existing laws."[1419] Public opinion is mostly formed by the media and NGOs.[1420] It can be agreed with Lee that "news media exerts an effect by translating complex and obscure tax issues into simple and provocative messages which then easily penetrate into the public's mind through repetitive broadcasting."[1421] While such media and NGO attention on corporate tax practices has been a crucial catalyst for good tax governance, it also has had an adverse effect.[1422] For instance, the UK PAC claims that SMEs' tax evasion is increasing because of too much 'media noise' (inconsistent and not nuanced media news); SMEs think that if multinaitonals successfully avoid paying their fair share of tax then they should also not pay.[1423] Lee argues that "external influence of the overheated media coverage of a firm's tax affairs may not be able to shift the level of tax disclosure in an upward direction."[1424] In other

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[1412] Additionally, many shareholders are concerned about "[C]orporate lobbying to influence laws and regulations affect all aspects of the economy". McRitchie, J. (2018, March 14). Lobbying Disclosure Sought @ 50 Companies. CorpGov.net blog. This is also important from the corporate tax planning perspective (see chapter 3). As a matter of fact, corporate lobbying disclosure would be an important dimension of transparency for keeping both corporations as well as politicians accountable for the sustainable system. This discussion is, nevertheless, outside the scope of this research.

[1413] Webpage: http://www.vbdo.nl

[1414] See e.g. Urbach, X. et al. (2018). Tax Transparency Benchmark 2018: A Comparative Study of 76 Dutch Listed Companies. *VBDO*; Vellenga, I. and Reijngoud, A. (2015). *Tax Transparency Benchmark 2015: A Comparative Study of 64 Dutch Listed Companies. VBDO*; Verstappen, R. et al. (2016). *Tax Transparency Benchmark 2016: A Comparative Study of 68 Dutch Listed Companies. VBDO.*

[1415] The Guardian. (2015, December 15). MEPs Should Support a Fair Tax Payer Label. Open letter to *The Guardian*.

[1416] See also e.g. Integrated Reporting (IR): International Integrated Reporting (IR) Council information webpage; Global Reporting Initiative (2016). Forging a Path to Integrated Reporting: Insights from the GRI Corporate Leadership Group on Integrated Reporting. Amsterdam: GRI. p. 3.

[1417] See e.g. Douma, S. (2018). *Miscommunication and Distrust in the International Tax Debate*. Deventer: Wolters Kluwer.

[1418] Lee, S. (2015). News Media Coverage of Corporate Tax Avoidance and Corporate Tax Reporting. *WU International Taxation Research Paper Series* 2015-16. p. 2.

[1419] Dyreng, S. D. et al. (2016). Public Pressure and Corporate Tax Behavior. *Journal of Accounting Research* 54 (1), 147-186. p. 153.

[1420] Douma, S. (2018). *Miscommunication and Distrust in the International Tax Debate*. Deventer: Wolters Kluwer.

[1421] Lee, S. (2015). News Media Coverage of Corporate Tax Avoidance and Corporate Tax Reporting. *WU International Taxation Research Paper Series* 2015-16. p. 23.

[1422] Douma, S. (2018). *Miscommunication and Distrust in the International Tax Debate*. Deventer: Wolters Kluwer.

[1423] UK HMRC (2017, September). Understanding evasion by Small and Mid-Sized Businesses. *HM Revenue and Customs Research Report 433.*

[1424] Lee, S. (2015). News Media Coverage of Corporate Tax Avoidance and Corporate Tax Reporting. *WU International Taxation Research Paper Series* 2015-16. p. 23.

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words, transparency has its limitations and the media should pursue their role responsibly. It is clear that both the media's as well as NGOs' viability depends on publicity; their financial returns depend on the number of readers, followers or attention in any other form they get. Consequently, media and NGOs serve mixed interests: to educate the public while staying popular. Therefore, the media and NGOs also bear responsibility for a balanced and objective discussion in order to achieve sustainable tax governance.

All these examples of extrinsic motivation behind tax transparency prove their relevance for various stakeholders. Goo and Klinger explain that "there is no perfectly efficient market as there are often information asymmetries between the parties to the transaction."[1425] Extrinsically motivated procedural good tax governance, thus, complies with mandatory reporting requirements and also provides the required information to stakeholders. Such transparency, by definition, "will not benefit the party who possesses the information but will increase the overall efficiency of the transaction."[1426] Also, good tax governance has the potential to increase the overall efficiency of transactions in the market economy, as it increases the level playing field and, in my opinion, potentially also consumer purchase power. Additionally, when done properly and with the right intentions, good tax governance also has the potential to benefit the party who possesses the information, multinationals in this case. Information related to corporate tax planning strategies have gained a certain importance when assessing corporate risks, in light of various scandals and public interest.[1427] Such transparency is important, as it "would empower investors to decide whether they want to put their money into a company which has opted for a certain tax risk profile."[1428] In order to eliminate the information asymmetry and related risks to various stakeholders, transparency is, thus, important. Corporations that wish to take transparency to a higher level in the context of good tax governance should engage in dialogue with their stakeholders, as will be discussed next.

6.3.2. Intrinsic tax transparency

"Transparency" is a broad and complicated concept.[1429] In this research, transparency is considered a principle of being open about one's tax planning practices. It concerns "the accessibility of information to stakeholders of institutions, regarding matters that affect their interests."[1430] When a corporation is convinced that its tax planning practices are legal, legitimate (responsible), and in accordance with its CSR engagements, it should be able to report this openly to the public. If a corporation is hesitant to be in dialogue with its stakeholders about its tax values, it could be seen as a first red flag. Companies are economic entities and will not actively search for the possibilities to pay more tax. Full transparency, about its business operations, payments, and tax choices, is usually even rejected by companies that have nothing to hide and this is totally understandable. There can be many downsides to this, such as a threat to taxpayers' privacy, weakening its competitive position or risking a misinterpretation of information by misinformed receivers.[1431] Nevertheless, a truly transparent "company cannot be silent about its relationship to the law."[1432] Transparency and accountability are not only important with regard to shaping the law but also with regard to complying with the law. Therefore, multinationals that wish to engage in good tax

[1425] Goo, S. H. and Klinger, D. (2014). The Limits of Directors' Duties in Fostering Corporate Social Responsibility and the Idea of a Multi-Stakeholder Board. In Paolini, A. (Ed.), *Research Handbook on Directors' Duties* (pp. 185-210). Cheltenham / Northhampton (MA): Edwar Elgar. pp. 192- 193.

[1426] Goo, S. H. and Klinger, D. (2014). The Limits of Directors' Duties in Fostering Corporate Social Responsibility and the Idea of a Multi-Stakeholder Board. In. Paolini, A. (Ed.), *Research Handbook on Directors' Duties* (pp. 185-210). Cheltenham / Northhampton (MA): Edwar Elgar. pp. 192- 193.

[1427] See also chapter 2.

[1428] Schön, W. (2008). Tax and Corporate Governance: A Legal Approach. In Schön, W. (Ed.), *Tax and Corporate Governance* (pp. 31-62). Berlin / Heidelberg: Springer-Verlag. p. 49.

[1429] Schnackenberg, A. K. and Tomlinson, E. C. (2016). Organizational Transparency: A New Perspective on Managing Trust in Organization-Stakeholder Relationships. *Journal of Management* 42 (7), 1784-1810. See also chapter 2.

[1430] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. p. 22.

[1431] Douma, S. (2018). *Miscommunication and Distrust in the International Tax Debate*. Deventer: Wolters Kluwer.

[1432] Henriques, A. (2007). *Corporate Truth: The Limits of Transparency.* Sterling: Earthscan. p. 23.

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governance should be transparent about (the effects of) their tax planning practices. Moreover, failing to do so increases the risk of a bad reputation (extrinsic motivation).[1433] Therefore, such corporations need to communicate their tax strategy in a balanced and integer way.

It is unclear which tax practices exactly are considered socially illegitimate or unacceptable and it is a government's responsibility to provide more guidance in this matter.[1434] However, transparency from the corporations' side opens the door for an informed discussion in order to establish what legitimate or acceptable tax planning practices are. Transparency and openness are preconditions for a focused discussion, as it is necessary to get the facts right and take different perspectives on board. This, in turn, helps corporations to understand the expectations and needs of its stakeholders and to protect (or, where necessary, to re-establish) or advance their reputation and stakeholders' trust.[1435] Furthermore, transparency and the inclusion of tax in CSR reporting would help to minimize the information asymmetry gap that, in current debates, seems to confuse the understanding of the problem. Reporting and openness are significant procedural elements of CSR.[1436] Transparency should nevertheless not be seen as an end in itself here; it is always a means to some other value, for example accountability. Transparency and openness are first steps towards moral tax behaviour. Moreover, transparency is a precondition for accountability and open debate is crucial in creating a better tax compliance environment. Debate promotes a better understanding of factors business take into account in their tax decisions and the moral acceptability of tax planning practices. An informed debate is indispensable for developing standards of substantive good tax governance. Such an informed debate does not request full transparency from corporations but true information (that is not misleading or aiming at showing a corporation in a better light) about corporate tax values and practices in an understandable language for broader discussion.

Nowadays, corporations and their actions are visible to the public and "validation of trust is a click away, as is the power to transfer or destroy trust."[1437] Various technological developments already enhance the availability of information and transparency. Nevertheless, as also described in a previous sub-section, the downside of such transparency is that such information can be misleading or misinterpreted. This can be called uncontrolled transparency, which can do more harm than good (for instance, reputation damage caused by misinterpreted information).[1438] This should be one of the many incentives for corporations to be voluntarily and clearly transparent about their tax values. Transparency is considered an inherent part of tax responsible companies that "will help rebuilding trust and addressing the growing expectations from the public and from the policy makers in terms of transparency and aggressive tax planning by some companies."[1439] Trust, as explained earlier in this research,[1440] "is the expectation that others will be honest, accountable, considerate, and open."[1441] Corporations increasingly depend on stakeholders' trust since people have "unprecedented access to information", which means that corporate actions are more visible. Consequently, various stakeholders require "evidence that firms are trustworthy and behaving according to their values."[1442] Responsible and open corporations should "understand that transparency is a corporate value that must be connected to principles of honesty, accountability,

[1433] Gribnau, J. L. M. and Jallai, A.-G. (2017). Good Tax Governance: A Matter of Moral Responsibility and Transparency. *Nordic Tax Journal* 1, 70-88. pp. 77-79.

[1434] See also chapter 3.

[1435] Hu, H. T. C. (1996). Behind the Corporate Hedge: Information and the Limits of "Shareholder Wealth Maximization". *Journal of Applied Corporate Finance* 9 (3), 39-52. p. 50. See also chapter 2.

[1436] See e.g. McBarnet, D. (2007). Corporate Social Responsibility beyond Law, Through Law, for Law: the New Corporate Accountability. In McBarnet, D. et al. (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (pp. 9-56). Cambridge: Cambridge University Press. pp. 32-37; GRI Sustainability Reporting.

[1437] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. p. 82.

[1438] See e.g. UK HMRC (2017, September). Understanding Evasion by Small and Mid-Sized Businesses. *HM Revenue and Customs Research Report 433.*

[1439] CSR Europe: Tax Project: From Tax Transparency to Responsible Tax Behaviour. *The European Business Network for Corporate Social Responsibility*.

[1440] See chapter 2, section 5.

[1441] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. p. 19.

[1442] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. p. 19.

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and consideration to sustain trust." Moreover, such transparent corporations are expected to embrace and value their networks, "reciprocal engagements with customers, employees, partners, shareholders, and the public", and balance the competing interests of stakeholders.[1443] Therefore, intrinsically motivated and honest transparency is a part of good tax governance that helps to (re-)build trust among stakeholders.

Stakeholders' trust "is a central notion in both corporate governance and CSR."[1444] It is natural that corporations are hesitant about being transparent due to tension between transparency and sensitive corporate (competitive) information. This also true in the case of intrinsic motivation. When acting in the best interests of a corporation, managers are in a position to make choices with regard to what kind of information they publish and how they publish it. Transparency, while being a good value in general, has its limits, and therefore poorly executed transparency increases instead of decreases corporate risk. O'Neill, for instance, argues that, while transparency might "destroy secrecy", it "may not limit the deception and deliberate misinformation that undermine[s] relations of trust." In order to restore trust, O'Neill aptly argues that "*deception and lies* rather than *secrecy*" should be reduced.[1445] In my opinion, multinationals could reduce deception and lies with moral decision-making, honest and knowledgeable disclosure, and dialogue with stakeholders. This is also the reason that transparency, in this research, is considered a principle of being open about one's tax planning practices and not a tool to, for example, achieve a better reputation.

According to Cadbury, disclosure is "[T]he foundation of any structure of corporate governance"; it is "the basis of public confidence in the corporate system, and funds will flow to the centers of economic activity that inspire trust."[1446] Scarce empirical evidence, however, suggests that CSR can also bring some risks with regard to corporate reputation.[1447] For instance, promoting CSR attracts extra attention to corporate activities, which can improve the corporate reputation if done well, but it may also damage it if it is executed poorly. Corporations that present themselves as socially responsible companies are often viewed critically. Therefore, corporations have to be careful with their expectations of management and clear with their communication and CSR integration.[1448] In order to avoid the negative side-effects of transparency, multinationals should (be willing to) explain their tax planning in the context of their CSR policy by fleshing out whether and how their tax strategies fit with their role and responsibilities in the societies in which they operate. This is a clear example of how intrinsic and extrinsic motivations are combined. At the same time, such possible negative side-effects of transparency suggest that also the public debate has its limitations. To my mind this indicates that good tax governance is a matter of shared responsibility of various actors – also other participants of the debate need to accept their responsibility for improving corporate tax practices instead of promoting their own ideas or position (such as media or NGOs could do).[1449]

O'Neill, who is critical about the question of (mis-)trust in a society, argues that "[G]ood governance is possible only if institutions are allowed some margin for self-governance of a form appropriate to their particular tasks, within a framework of financial and other reporting."[1450] This also fits aptly with the essence of intrinsically motivated transparency with regard to good tax governance: multinationals are truly accountable if they provide "substantive and knowledgeable independent judgement" of their tax values beyond the "standardised or relentlessly detailed"

[1443] Tapscott, D. and Ticoll, D. (2004). *The Naked Corporation. How the Age of Transparency Will Revolutionize Business*. New York: Penguin. p. 73.

[1444] Eijsbouts, J. (2011). Corporate Responsibility, Beyond Voluntarism Regulatory Options to Reinforce the Licence to Operate. Inaugural Speech, Maastricht University. p. 44.

[1445] O'Neill, O. (2002). *A Question of Trust. The BBC Reith Lectures*. Cambridge: Cambridge University Press. p. 70.

[1446] A. Cadbury, foreword in Iskander, M. R. and Chamlou, N. (2000). *Corporate Governance, a Framework for Implementation*. Washington: The World Bank. p. vi.

[1447] See e.g. Graafland, J. (2018). Does Corporate Social Responsibility Put Reputation at Risk by Inviting Activist Targeting? An Empirical Test among European SMEs. *Corporate Social Responsibility and Environmental Management* 25 (1), 1–13.

[1448] Graafland, J. (2018). Does Corporate Social Responsibility Put Reputation at Risk by Inviting Activist Targeting? An Empirical Test among European SMEs. *Corporate Social Responsibility and Environmental Management* 25 (1), 1–13.

[1449] See also chapter 7.

[1450] O'Neill, O. (2002). *A Question of Trust. The BBC Reith Lectures*. Cambridge: Cambridge University Press. p. 58.

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reporting requirements.[1451] A corporation is, to a large extent, free to define its "own ethical aspirations" and "communicate the criteria by which it wants to be held and judged." Corporate codes are tools, in this context, that "provide both outsiders and insiders specific and clear statements to use in evaluating the credibility of corporate management."[1452]
From the practical perspective, in order to reach various stakeholders, such communication should be available in a simple language that does not require a specific tax background. This is inevitably a challenging task for corporations, because tax laws are very complex. Nevertheless, in my opininon, corporations and stakeholders that know their values should be in position to explain their practices. Moreover, it should be available in the different languages of relevant stakeholders, and easily accessible on the corporate webpage. In principle, CSR reporting should "provide investors with the information they desire to make decisions."[1453] However, it should also provide other stakeholders with relevant information to allow them to give an informed opinion about the corporation and its values and act accordingly. For instance, Novo Nordisk, a global healthcare company, has published a tax statement in which the company briefly explains its tax values and commits to behaving responsibly with regard to tax planning.[1454] It is a short document in simple language. Nevertheless, it is a corporate commitment that allows stakeholders to evaluate the company's position with regard to the international tax planning debate. Moreover, this written and public statement requires the company to live up to its words in order to avoid becoming a hypocrite and suffering reputation damage.[1455]

6.3.3. Concluding remarks

To (re-)establish trust, multinationals, in addition to the substantial elements of good tax governance, should also be transparent about it. Transparency stands for the procedural element of good tax governance. In terms of good tax governance, transparency has various functions. Transparency can have countless dimensions and conceptualizations, which makes it a complex topic with no clear-cut division. For the purposes of understanding good tax governance, transparency can be approached from the perspective of intrinsic and extrinsic motivations,[1456] as there are different drivers of transparency, as was described in previous sub-sections.
Most importantly, transparency can be seen as a dialogue with stakeholders, which helps a corporation to explain its (tax) strategy and practices and understand what stakeholders require from corporations as well as to manage stakeholders' expectations. This is an intrinsic driver of transparency that enforces corporate accountability and ensures that corporations live up to the substantive element of its good tax governance. Corporations that embrace good tax governance should be honestly transparent about it. This means that a corporation does not intentionally publish confusing technical data but only data that is necessary to understand its practices. Moreover, where necessary, corporations should explain their position with regard to tax planning. In terms of going beyond the law, this means that sometimes multinationals might need to take a step further than the existing legal disclosure requirements and reporting obligations. Transparency is a door to corporate accountability as well as to a dialogue between a corporation and its stakeholders and helps corporations to understand what is the 'fair share' according to their stakeholders. Both accountability and dialogue with stakeholders are signs of socially responsible corporations. Moreover, both help to find a compromise and a common understanding of what kinds of tax practices are acceptable (legitimate) and what not.

[1451] Sage Publications. (2012). *SAGE Brief Guide to Corporate Social Responsibility*. Los Angeles / London: SAGE. p. 50.
[1452] Sage Publications. (2012). *SAGE Brief Guide to Corporate Social Responsibility*. Los Angeles / London: SAGE. p. 50.
[1453] Tschopp, D. J. (2005). Corporate Social Responsibility: A Comparison between the United States and the European Union. *Corporate Social Responsibility and Environmental Management* 12 (1), 55-59. p. 56.
[1454] Novo Nordisk. (2016). *Novo Nordisk Tax Approach*.
[1455] See for example also Vodafone's tax statement: Vodafone. (2017). Taxation and our Total Economic Contribution to Public Finances 2016-17.
[1456] Intrinsic and extrinsic motivations were also discussed in chapter 4.

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The extrinsic motivation for transparency originates from various mandatory and semi-voluntary requirements, such as regulations or investors' requirements. Mandatory transparency should provide a common ground for corporate disclosure. In order to achieve consistency and comparability, regulated reporting standards or guidelines, such as the OECD and EU initiatives or investors' benchmarks, are important, since, without them, voluntary transparency could represent merely "biased marketing campaigns."[1457] These tax transparency initiatives are complementary to intrinsically motivated transparency. Both drivers of transparency are important parts of procedural good tax governance. This combination entails ethical decision making, balancing conflicting interests and not prioritizing one over another because of some kind of reward. This form of transparency allows stakeholders to understand corporate tax values and practices, which is necessary for trust.

Transparency can be given various (mutually non-exclusive) forms, such as publishing a code of conduct; explaining good tax governance in the corporate annual reports; communicating corporate tax values openly via various channels, or by (public) country-by-country reporting.[1458] Even though good tax governance requires honest disclosure from corporations, also externally motivated and mandatory transparency requests are very important for setting certain benchmarks and expectations of corporate behaviour. The positive aspect of voluntary intrinsic transparency is that corporations can create and clearly communicate their own perspective of their (good) tax governance. In this way, they would have an advantage in public debates concerning their tax practices.

There are also limits to transparency. First, full transparency harms the market if corporations should publicly disclose all of their operational information. At the same time, if only parts of the information are disclosed, it might present a false picture of corporate behaviour, which is also negative. Transparency refers, first of all, to public access to information, which is relevant for informed decision making for stakeholders.[1459] But, access to public data, as such, does not guarantee the same or agreed understanding of the content of such information. It should not be taken for granted that people will use the information they obtained to make rational judgments and decisions. Thus, disclosed information can be interpreted selectively.[1460] Therefore, as was explained in this section, both extrinsic and intrinsic elements of transparency are important. Extrinsically driven transparency sets minimum standards for disclosure rules. Corporations that wish to go beyond the law and rules, add an intrinsic layer and step into well-informed dialogue with their stakeholders in order to explore the societal acceptability lines of corporate tax behaviour.

6.4. Conclusion

Multinationals, whose responsibility with regard to good tax governance has been discussed throughout this research, should develop and live up to certain tax values that are also sufficient from the public perspective in terms of morality and fairness. This is a substantive part of good tax governance. To this end, multinationals could adopt a code of conduct concerning their tax values.[1461] In order to understand and accept corporate behaviour, stakeholders need to know about corporate tax planning strategies and values. Therefore, a company that meets the substantive elements of good tax governance should also be transparent about it. Transparency should provide the parties in the debate with a more balanced view and pave the way for regulatory and political changes but also for the changes in the corporate mind-set. Moreover, transparency increases corporate accountability. Transparency on all fronts is one of the most important elements of a more

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[1457] Tschopp, D. J. (2005). Corporate Social Responsibility: A Comparison between the United States and the European Union. *Corporate Social Responsibility and Environmental Management* 12 (1), 55-59. pp. 56-57.

[1458] See for instance, Royal Dutch Shell Plc, *Tax Contribution Report 2018*. p. 4. Retrieved from: https://reports.shell.com/tax-contribution-report/2018/servicepages/downloads/files/shell_tax_contribution_report_2018.pdf (accessed 17.03.2020).
Data on the contribution that large businesses make to the societies in which they operate are a precondition for an informed stakeholderdialogue. See, for instance EBTF/PwC. (2019). *Total Tax Contribution: A Study of the Largest Companies in the EU and EFTA*.

[1459] Fung, A. et al. (2008). *Full Disclosure: The Perils and Promise of Transparency*. Cambridge: Cambridge University Press. pp. 24-25.

[1460] PwC. (2013). *Tax Strategy and Corporate Reputation—a Business Issue*. p. 8.

[1461] See also chapter 6, section 2.3.

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effective fight against international tax avoidance.[1462] Transparency serves as a means to achieve good tax governance under the flagship of CSR.

In this chapter, the substantive and procedural elements of good tax governance were explained. A substantive approach focuses on the amount of tax that a company pays and asks whether this is more than is demanded by mere compliance with the letter of the law.[1463] In this sense, good tax governance adheres to the principle that tax follows business. In the other words, multinationals would pay taxes based on where the economic activities take place. In this way, a multinational exercising good tax governance competes fairly with other enterprises. For instance, the Responsible Tax Principles developed by the B Team are a good example of practical criteria for good tax governance. These principles provide some practical guidelines with regard to approach to tax management, relationships with others and reporting to stakeholders. However, corporations that wish to lean on these Principles should, in my opinion, adjust these principles to fit with their own business operations.

In order to implement good tax governance, multinationals could develop a tax code of conduct. Good tax governance stands for corporate tax planning practices that are in line with the corporation's CSR agenda; corporations that wish to pursue good tax governance pay a fair share and are transparent about it. The substantive part of good tax governance can be seen as ethical behaviour which is pursued as a goal in itself and the use of transparency as means to that end. Without information, no evaluation of the way power is exercised is possible.

The procedural element of good tax governance calls for transparency. It means that a multinational has developed internal tax values and a strategy that confirms the substantive element and communicates these values and strategy clearly both internally and externally. As a result, a multinational proves to its stakeholders that its tax governance is in order and under control. A procedural approach provides information on a company's tax strategy (a substantive part of good tax governance), for instance on how much corporate income tax it pays in all the countries it operates in. Transparency includes extrinsic and intrinsic drivers. An extrinsic motivation of transparency is to respond to various disclosure rules, such as mandatory transparency rules. Nevertheless, for true good tax governance, this alone is not enough. Intrinsic motivation aims at engaging in dialogue with the stakeholders by going beyond compliance with (legal) disclosure requirements and reporting obligations.[1464] Although transparency is not a panacea, it still is a precondition for accountability to the stakeholders. Decision-making procedures, strategies, principles, and their results should be transparent.

[1462] Nouwen, M. F. (2017). The European Code of Conduct Group Becomes Increasingly Important in the Fight against Tax Avoidance: More Openness and Transparency is Necessary. *Intertax* 45 (2), 138-149.

[1463] See chapter 3.

[1464] Gutmann, D. (2010). L'évasion fiscale des sociétés. *Revue Internationale de Droit Comparé* 62 (2), 533-551. pp. 546-547.

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7. CONCLUSION

7.1. Introduction

International corporate tax planning and corporate social responsibility are topics that might not seem to have common ground at first sight. The aim of this research was to prove the contrary. This research addressed international corporate tax planning from various perspectives, such as regulation, ethics, business, and society.

International corporate tax planning is in the eye of a storm: the societal and political expectations in relation to corporate tax planning are changing. Not all forms of legal tax planning are considered (socially) legitimate anymore. Corporate tax planning is a complex issue: on the one hand, it is common corporate practice to keep costs low. On the other hand, corporations have to contribute to society and common goods by paying (corporate income) taxes as any other member of society. It goes without saying that it is the state's responsibility to ensure a fair tax system, however, the issue with the corporate tax practices now is that powerful multinationals are in position to potentially (ab)use the system by profiting from society without contributing to it. Having said that, it should be clear not all kinds of corporate tax practices are (socially) illegitimate *per se*.

Tax planning can be carried out in various forms, which are described with different terms. The legal literature differenciates mainly between tax avoidance and tax evasion. Tax avoidance is in general not breaking (the letter of) the law while tax evasion clearly is. This research focused on tax planning activities that remain within the boundaries of the law, because illegal activities would need a different theoretical approach. Tax planning activities that remain within the law can be divided into a number of sub-categories based on a degree of social legitimacy, as this research pointed out. Focusing on the corporate decision-making process, categorizing tax planning activities was based on a corporate intention to minimize tax costs. The intention, as such, is often difficult to prove, especially in a legal context. This research pointed out some general indicators behind corporate tax planning activities that, for instance, are aimed at avoiding double taxation or that are used for profit maximization purposes. As a result, my categorization of legal tax planning activities differentiates between tax mitigation, tax avoidance and aggressive tax planning. These concepts are also the most used in the international literature and rule making but there is no true consensus when defining these terms.

Even though all of the different kinds of behaviour described by these concepts are legal, not all of these practices are socially legitimate, because, in the case of tax avoidance and aggressive tax planning, multinationals fail to contribute their fair share to society. According to the categorization in chapter 3, I defined the underlying terms for the purposes of this research as follows. Multinationals that are aware of the tax effects on their operations and avoid double taxation actively plan their taxes. A legitimate and socially responsible way to plan taxes is tax mitigation, where a corporation legitimately makes use of tax laws for tax planning purposes, for instance by making use of tax incentives in a transparent and consistent way. A step further from tax mitigation is tax avoidance, in which the taxpayer arranges his/her affairs within existing corporate structures with an intention to reduce his/her tax liability and, even though the arrangement could be strictly legal, it is usually considered to conflict with the intent of the law it purports to follow. Tax avoidance intentionally seeks gaps, mismatches, and other weaknesses in the (international) legal system for tax planning purposes, for instance by structuring transactions within the corporate group with a main intention to minimize corporate income tax. Multinationals that not only rearrange their existing business activities to achieve more beneficial tax treatment but take a step further by, for instance, setting up additional artificial entities that lack any economic or commercial justification can be considered aggressive tax planners. In the case of aggressive tax planning, a corporation intentionally makes use of the mismatches between the national laws at the international level, for instance by setting up ostensible business entities (usually in tax havens).

As a result of legal tax planning that is not always socially acceptable, discussions of morality have entered the picture. Taxes provide funds for governments to offer essential public goods and to

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redistribute wealth among citizens. Taxation plays an important role in society; it supports societal cooperation and provides resources to finance essential public goods and services. Distributive justice and public goods are indispensable for a sustainable society. In other words, taxes enable the government to provide a (legal) framework for the functioning of society and the economy. Enforcing contracts for instance supports trust in markets without which corporations could not operate. Taxes also contribute to the well-being of corporations in other ways, as the state fosters innovation, encourages investment for sustainable growth, boosts worker productivity, and stimulates the efficient use of scarce resources. This is done with subsidies paid for by taxes but also by tax (dis)incentives, such as regulations regarding investments in R&D. Based on that, it can be said that taxation is an essential precondition for the sustainable development of society and markets.

Thus, taxes build a basis for a society. The obligation to pay taxes originates from the law, but in a society morality also guides individuals' behaviour. The legal system should codify public morality; however, it will never be able to do so exhaustively. Therefore, legal rules in a complex society inevitably leave room for different interpretations and choices with regard to the use of the system of tax rules. This suggests that, in case legal rules fall short, morality should fill the gap. Moreover, what is acceptable changes over time and is bound to cultural beliefs. This research linked morality to CSR, which can be seen as a tool for multinationals to balance conflicting interests in a moral way.

Some might believe that various other legal obligations, such as corporate governance rules, restrict corporations from opting for a moral business practices if it decreases shareholder value (in the short term). However, based on the analysis of corporate governance in this research, I am convinced that, as long as managers act in the best interests of the corporation, they do not breach their fiduciary duty when engaging in good tax governance. Furthermore, companies that have already taken on the responsibility to engage in CSR should not claim that they behave responsibly while minimizing their tax obligations. This research argued that socially responsible corporations should engage in good tax governance, which consists of substantive (paying fair share; developing tax codes of conduct) and procedural (transparency) elements.

This concluding chapter provides a brief summary of this research (section 2). Following that, in section 3, the most important findings and answers to the research questions will be summarized. Section 4 sheds some light on the practical implications of good tax governance and the last section makes suggestions for further research.

7.2. Summary

This research was divided into three main pillars. These pillars represent tax planning, corporate social responsibility, and corporate governance and decision making. The aim of these three main pillars was to understand the complex nature of all of these separate areas and to find common grounds for developing a concept of good tax governance.

This research was structured as follows. First, in chapter 2 the concept of a multinational coporation was discussed. Since this research focused on the current debate on (aggressive) tax planning (and avoidance) from the perspective of a multinational, it was necessary to clarify what is understood under the concept of multinational. Next, in chapter 3 another crucial element of this research – tax planning – was analyzed. The concept of tax planning and its various possible degrees based on morality and social acceptability were discussed. Following, chapter 4 focused the third important concept underlying this research: corporate social responsibility. Chapter 5 aimed at bringing together the legal and social responsibilities of corporate boards from corporate law and culture perspectives. Therefore, the underlying principles of corporate governance were analyzed. All of these steps were necessary in order to understand what socially responsible corporations should and could do with regard to socially responsible, good tax governance (chapter 6). The following sub-sections will provide a brief summary of these chapters.

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7.2.1. Multinational corporations and moral responsibility

International tax planning has become an increasingly important topic in the last few decades in the corporate world. To a large extent it is because the way of doing business has changed. Most importantly, the amount and size of cross-border commercial activities has increased. Multinationals have countless possibilities to reduce business costs but, at the same time, they also operate in highly competitive markets. Such possibilities combined with the necessity to constantly improve and grow also means that some corporations have started seeing tax, or more specifically flaws in the tax systems, as an opportunity to reduce costs and increase wealth. As a response to that, various global developments have accelerated the demand for a fair tax balance and the need for transparency. Consequently, corporate actions are visible to the wider public. A large amount of publicly available information allows the wider public to debate upon issues related to corporate actions but also to demand accountability. Increasing negative attention on multinationals has resulted in a decrease of public trust in corporations, which in turn has a negative impact on corporate reputation.

Tax planning at some point has a negative effect on the society and economy, because it leads to unfairness and distortions of fair play. The current public debate with regard to corporate tax planning focuses mostly on the profit-driven behaviour of multinationals, often forgetting that flaws in the tax system are also created by diverging tax systems, a lack of coordination and regulatory competition between the states. Only accusing multinationals of misbehaviour in this context is unbalanced, in my opinion. Therefore, in this research, the topic of corporate tax planning was approached from the perspective of a corporation, more specifically a multinational corporation, rather than for instance the state or (international) regulation.

Chapter 2 of this research explained the core characteristics of a multinational corporation, as used in this research. In this chapter, I defined a corporation as a separate entity controlled by its managers and not, for example, as the sum of its owners nor as an extension of the state. Therefore, a corporation, as discussed within this research, is a distinct legal person with rights independent from the rights of the individual stakeholders. Moreover, as a part of society and as an institution that can make (moral) choices, a corporation was considered to have moral agency. A multinational is in this research, a large stock-listed company that consists of different establishments operating under different national and international laws and regulations. Such a multinational consists of a parent company located in the home country and at least one or more foreign subsidiaries, typically with a high degree of strategic interaction among the units.

Morality addresses not only the question of how one ought to live as an individual, but also how individuals interact with other individuals. Being part of a society entails moral rights and obligations. A society consists of individuals and organizations, which also includes businesses. Like individuals, businesses interact with other members of society and thus affect others and benefit from their actions. Companies benefit from society at large, from many kinds of public goods funded by taxes. Therefore, corporations are expected to contribute to society, because they are moral agents that can make (im)moral choices with regard to tax planning. The question of morality and fairness is, namely, about how multinationals behave, what kind decisions corporate board take, in relation to the societies in which they operate. Multinationals that voluntarily accept either social or moral responsibilities towards the societies in which they operate were conceptualized in this research as CSR corporations.

Also, the specific position of multinationals with regard to tax planning was discussed in this chapter. A multinational corporation, namely, differs from a national corporation and also from small-and medium-sized enterprises (SMEs), because it operates in several jurisdictions. Multinationals are corporations that consist of various subsidiaries and that, as compared to SMEs, in general, have less specific national identification, despite the fact that – in a legal sense – they do have a home country. It was further explained that, for the purposes of this research, a multinational, as such, is considered as one entity, even though it consists of a group of corporate entities. A multinational has the possibility to set up these separate entities in different jurisdictions

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for tax planning purposes, which has been one of the crucial characteristics in the context of this research.
The special characteristics and possibilities multinationals possess also allow them to enjoy a specific kind of corporate power that is distinct from most individuals and SMEs. The special character of multinationals allows them to operate on a global level where, with regard to certain (tax and corporate) rules, there often exists a situation that is close to a regulatory vacuum. For instance, some multinationals have started using mismatching national tax laws to extremes by using their corporate power. Therefore, in the case of tax planning, multinationals can enjoy power that even overrules state power. With regard to tax planning multinationals possess multidimensional corporate power, which consists of corporate lobbying power, extensive knowledge and a strong negotiation position, and global mobility. Consequently, the corporate power of multinationals puts them in positions in which they have the possibility to make (im)moral choices.
To keep multinationals accountable towards the societies in which they operate, the need for transparency arises. Transparency is necessary to enable stakeholders and society to keep corporations accountable for their actions and to reflect on their own decisions and direct them towards moral choices. If multinationals abuse their corporate power or do not meet their responsibilities towards society in other ways, they may face several corporate risks. One of the most relevant in the context of this research was the risk to their reputation. Reputation reflects stakeholder trust in corporation and its actions. Trust is the foundation of every relationship – both business and personal. In order to understand what kind of corporate tax behaviour is socially illegitimate, chapter 3 further focused on the concept of tax planning.

7.2.2. The social legitimacy of tax planning under question

In recent years, several multinationals, such as Starbucks, Google, Apple, and Amazon, have been questioned about their tax planning strategies in the different states in which they operate. It led to many heated discussions among tax professionals as well as non-professionals. Chapter 3 of this research focused on the concept of tax planning and showed how complicated the issue is concerning the various degrees of tax planning, such as tax mitigation, international corporate tax avoidance and aggressive tax planning. This chapter discussed the role of taxation in society. Thereby, the functions as well as the moral element of taxes and the concept of the much debated 'fair share' were explained. Various concepts of tax planning used within this research were explained for the purpose of this research and a tax planning legitimacy continuum was developed in order to illustrate the scale on which the societal acceptability of tax planning could be evaluated. It was argued that, at some point, the morality of corporate legal tax planning can be questioned; nevertheless, not all kinds of tax planning is immoral *per se*. The aim of this chapter was to clarify the different aspects of the tax planning debate in order to understand the tension between socially responsible and irresponsible international corporate tax planning practices. Corporate tax planning is, namely, not only a matter of strict compliance with the law, but it also has political, economic, and moral dimensions. Therefore, discussions around tax planning are complex and contain ethical nuances that should not be ignored.
Most importantly, taxes provide funds for governments to offer essential public goods and to redistribute wealth among citizens. The obligation to pay taxes is a natural obligation which the legislature lays down in the law, in order to enhance certainty and legal equality and make it enforceable. Taxpayers' rights and obligations are laid down in a system of legal rules that support and organize life in a society. Next to the legal system, morality also guides individuals' behaviour. The legal system should codify public morality; however, it will never be able to do so exhaustively. Therefore, legal rules in a complex society inevitably leave room for different choices with regard to the use of the system of tax rules. This suggests that if written legal rules evidently fall short in codifying ethics, morality should fill the gap. Morality requires the members of society to make certain value judgements and behave justly or fairly when making choices. Tax

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planning that evidently does not meet the moral and societal norms results in public outrage, which suggests that such tax planning eliminates paying a fair share towards society or societies. Having said that, it is not entirely clear what exactly this fair share of tax is that corporations should contribute.
In general, it is a task of the lawmaker to strive for the best legal system that does not leave much room for wishful interpretation. However, a perfect system is impossible. In the case of international corporate tax planning, multinationals have choices concerning how they interpret the law (whether it deviates from the spirit of the law or not) and, as a result, to what extent they contribute in the societies in which they operate. In addition, the international context of corporate tax planning complicates the national legislators' opportunities to reduce the gap between the letter and the spirit of the law because of different interests or possibilities of states. In other words, tax competition between the states creates tax planning opportunities, and at the same time corporate tax planning leads to the tax competition between the states. This suggests that multinationals also have a moral responsibility to pay their fair share, to (morally) account for their choices. For the context of this research, the concept of fair share can be summarized as reflecting whether multinationals contribute a part to public goods and services without free-riding.
Every taxpayer plans taxes, to a certain extent, whether this is intentional or not. Taxpayers have the right to structure their affairs to achieve a favorable tax treatment within the limits set by law. Tax planning is a legal way to take into account the tax effects of various laws and rules and adapt ones' actions accordingly. Tax planning is a concept which is used to describe the interpretation and application of legal rules in order to mitigate one's tax burden or avoid double taxation. Contrary to tax evasion, tax planning is legal in its various forms; it stays within the framework of the law. Tax planning is, nevertheless, a complex topic with many nuances, varying from legitimate tax planning responding to tax incentives to illegitimate tax planning abusing tax laws and paying an unfair share. Chapter 3 of this research focused on such issues and built a research framework by analyzing the state of the art of different concepts used to express various degrees of tax planning. Tax planning can be seen as a matter of degree, which, at a certain level, becomes socially unacceptable.
The first degree of tax planning is tax mitigation: a form of tax planning that makes a legitimate use of tax incentives created by the states and differences in the tax systems. Tax mitigation, for instance, complies with the tax legislation of the countries in which corporations operate and pay the right amount of tax at the right time by making use of tax incentives without allowing such incentives to become the main driver for structuring transactions. Tax mitigation can, however, easily change from legal and legitimate tax planning to legal tax planning, the social legitimacy of which is questionable and results in tax avoidance. In case of tax avoidance corporations intentionally structure their transactions within the existing business operations with a main aim to minimize corporate income tax.
Some multinationals even take a step further and create artificial possibilities, such as new artificial entities in tax havens, to reduce the possible tax effects of various rules by engaging in aggressive tax planning. Both tax avoidance and aggressive tax planning include a moral judgement, which has given grounds for public outrage. Aggressive tax planning is not a legal term, but it suggests that there is a corporate behaviour in tax planning matters that raises public concern. It is another strictly legal yet socially illegitimate form of tax planning in which corporations intentionally eliminate their moral responsibilities towards society.
Tax planning should, at a minimum, comply with the law. This implies that the state bears the primary responsibility for good regulation, but that is not an exclusive responsibility. Nowadays, more is expected from multinationals, especially from the multinationals that present themselves as good corporate citizens. Also, the current works of the OECD and the EU with regard to fighting aggressive tax planning were discussed briefly in this chapter to illustrate the regulatory context of the fast-changing international tax law. Despite the fact that concepts such as a fair share or the spirit of the law, that are often used in tax planning debates or complex international regulations, do not offer much guidance or content for business practice, corporations are expected to react to

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the societal disapproval of their behaviour. International corporate tax practice is in desperate need of moral reflection, because the existing international tax system does not seem to be able prevent aggressive tax planning (yet). Next to legality, nowadays legitimacy is also expected with regard to tax planning. Thus, it is up to companies how they interpret the laws. In theory, corporations have the freedom to interpret tax laws even in a way that their tax planning strategies could be categorized as aggressive tax planning.

Requiring multinationals to take responsibility does not suggest that corporations have to act as ideal or even altruistic corporate citizens. In other words, this research did not propose that multinationals are expected to fully abstain from their right to plan taxes; it is acceptable – often even required for the interests of the company – to plan and mitigate taxes as long as the corporation can explain and defend it. At the same time, the multinationals that have voluntarily claimed that they take corporate social responsibilities (CSR) seriously, have accepted moral responsibility towards society. The society has a right to call for moral accountability and CSR companies have accepted to provide it; in my opinion, this should also apply to corporate tax practices. Some multinationals engaging in aggressive tax planning practices do not seem to respect this and that is what makes tax avoidance and aggressive tax planning problematic. Consequently, corporations should balance between profit making and moral responsibilities. With regard to tax planning, there is no black and white answer as to what kind of behaviour is acceptable and what not.

Chapter 3 concluded that, despite the very important accomplishments on the international regulatory level (such as OECD BEPS and EU ATAD), there is still a governance vacuum at the global level. The international system is imperfect, which leaves multinationals possibilities for 'going beyond the law'. Moreover, the fact that tax avoidance has explicitly received growing attention (especially after the financial crisis) suggests a strong link between taxation, tax avoidance, and society. Therefore, this shows the necessity to consider corporate tax practices in relation to CSR, which was the focus-point of chapter 4 of this research.

7.2.3. Corporate social responsibility and its application to tax

The fourth chapter of this research zoomed in on companies that explicitly endorse moral responsibilities towards society. Thus, the focus moved further to corporate behaviour beyond compliance with the letter of the law, towards the concept of corporate social responsibility (CSR). CSR nowadays belongs to every-day business practices. Many companies claim to have integrated social responsibility strategies. Yet, the concrete meaning of such corporate responsibilities is often unclear, especially in the context of taxation. Furthermore, it is open to debate whether companies are actually engaging in CSR or just use it to build a better reputation. Some multinationals, such as Starbucks, claim to endorse CSR but, at the same time, they also use complex aggressive tax planning schemes to minimize their tax burden. Such corporate behaviour puts the moral responsibilities of corporations into question. This research examined these questions in the context of tax planning. Taxes are important contributions towards society, which was argued to be sufficient ground to consider paying taxes as a part of CSR. CSR highlights moral concerns of the society in situations where other solutions fall short.

In order to better understand the extent of corporate moral responsibilities beyond profit maximization, this chapter focused on the societal expectations on corporations beyond the strict legal obligations. Based on the analysis of the expectations (moral and legal) on multinationals with regard to CSR, the aim of this chapter was to understand whether corporate tax practices should be considered under CSR. This chapter first explored the underlying reasons for the development of CSR from practice. It was explained that CSR entails going beyond mere compliance with the law. However, as it is usually difficult to agree upon what an ideal good (corporate) citizen should do, this chapter shed also light on the other end, the counterpart of CSR, corporate social irresponsibility (CSI). CSR and CSI were, similar to tax planning, illustrated in a continuum developed by Tench et al.. This continuum presents CSI as having a finite endpoint, whereas CSR is infinitely scalable. That is because CSI can have a concrete definition (e.g. illegal acts), while

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CSR is an aspirational ideal that leaves room for various corporate activities. The starting point of this continuum is illegal activities that are clearly socially irresponsible. Further, this continuum presents that not all kinds of legal behaviours are necessarily socially responsible, since, next to legal norms, there are also moral norms in a society. Corporations are part of a social contract and are, in my opinion, therefore also subject to the underlying moral norms of society. CSR is an ideal to strive for and keeping away from CSI can be seen as a practical starting point for responsible corporations.

In order to give more content to the aspirational ideal of CSR, this chapter analyzed Carroll's CSR theory. This theory implies that, next to economic and legal responsibilities, corporations also have ethical responsibilities which go beyond the legal and economic responsibilities. CSR corporations have accepted the bottom line of CSR, which expects corporations to go beyond pure compliance with the law. The basic element of Carroll's CSR theory, that socially responsible corporations accept their responsibilities beyond the pure compliance with the letter of the law, provided a theoretical framework for understanding CSR in this research. It is important to note that the understanding that CSR corporations go beyond pure compliance with the letter of the law does not imply that ethical responsibilities should replace legal ones but rather they exist in addition to legal responsibilities. It means that not all kinds of legal behaviour is automatically morally responsible. Corporations have a social role. Not only from a societal but also a regulatory perspective, there are clear expectations on corporations; yet, some corporate actions cannot be restricted by the law but are still not acceptable by society. They are legal but illegitimate. As a consequence, socially responsible behaviour is not purely voluntary, because there is a lot of social pressure for corporate moral accountability. Having said that, corporations are left with wide discretion to decide upon the content and extent of such responsibilities. This can be seen as a space between corporate CSR and CSI. Clarifying what a corporation should not do probably adds to the effectiveness of CSR; clarity about what not to do may be more effective as guidance to convince businesses to take action than a prescriptive approach. Corporations are expected to take responsibility and accept accountability for their actions, to stay away from CSI and engage in CSR. In other words, CSR is a tool for stakeholders to keep corporations accountable for their corporate power, but also a tool for corporations to endorse and prove corporate moral responsibility where legal systems fall short.

Conceptualizing CSR as an ideal also means that it faces various challenges and limitations that were discussed in chapter 4. Corporations, namely, have to manage the conflicting interests of various stakeholders with regard to CSR. As a result of many conflicting interests, corporations can have various drivers to engage in CSR, which were also introduced in this chapter. Engaging in CSR can be driven by intrinsic and extrinsic motivations. Intrinsic motives are a characteristic of an integrity-based approach, where corporations are driven by morality next to the economic performance (profits) and compliance with the law. Extrinsic motivation, on the other hand, indicates that a corporation behaves in a certain way because of some (external) reward, coercion or a desire to avoid penalties or a bad reputation. In terms of extrinsic motivation, CSR serves the corporate business strategy. This would be the instrumental use of CSR. CSR actions can be attributed to both intrinsic and extrinsic motives at the same time.

Furthermore, there are different opinions possible with regard to the moral responsibilities of business: the stakeholder view and shareholder view. According to the shareholder value maximization view, the only responsibility of a company comes down to operating within the framework of the law with minimal ethical constraints. The stakeholder perspective, on the other hand, stresses that corporations should behave ethically above law, taking account of certain moral responsibilities towards the society in which they operate. Both views imply different expectations on corporations with regard to CSR. Corporate boards do not only need to balance the different interests of shareholders and stakeholders in general, but also the conflicting interests within these groups. This leaves corporations with difficult choices. In addition, corporations face a challenge defining the nature of CSR. Societal expectations of CSR corporations change together with the developments in business practices. Such a dynamic nature of CSR also clarifies why taxation is increasingly discussed in the context of CSR.

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I concluded in chapter 4 that taxation can be considered an independent category of CSR, since, in the case of aggressive tax planning or tax avoidance, corporations can use their corporate power to ignore the laws and harm the societies in which they operate. In this research combining CSR and tax promotes the idea that certain members of society should not be earning unfair profits at the expense of society. CSR is a tool for corporations to show how they deal with the insufficiencies of public governance systems with regard to problems related to corporate moral responsibility towards society. This does not mean that corporations should forget their economic responsibilities, as moral behaviour does not require denying one's own personal needs and aspirations. A corporate management board should act in the best interests of the company. The best interest of the company is long-term financial stability, which is dependent on corporate reputation among its shareholders as well as stakeholders. The question is whether these best interests are in conflict with shareholder value maximization. In order to analyze such corporate obligations and their relationship to taxation and CSR, chapter 5 focused on corporate governance theories and practices.

7.2.4. Good tax governance and corporate governance: conflicting interests?

Multinationals are complex entities with multidimensional layers of decision-making processes that need to balance conflicting interests. Taxation poses various challenges for corporate decision making. On the one hand, taxes are considered a cost that should be kept low in order to keep some stakeholders, such as shareholders, satisfied. On the other hand, taxes are a crucial contribution to society and, by avoiding their tax liabilities, corporations fail to account for the other stakeholders, such as society at large. For corporations that have chosen to endorse CSR, the second perspective should prevail. However, in order to prove that, chapter 5 analyzed some underlying principles of corporate law in order to understand whether some corporate governance rules could possibly restrict corporate managers considering tax as a part of CSR.

The central subject of this chapter was corporate governance, the third main pillar of this research. This chapter first explained the background of the importance of CG with regard to the corporate tax planning debate that is central for this research. The concept of CG and one of the key concepts of CG – fiduciary duty – were explained. Corporate governance refers to the way power is distributed within a corporation and to the decision-making process with regard to the use of this power. It is sets of rules and principles for how a (large) company should be regulated and managed. Among corporate law scholars, there are two prevailing theories when addressing the essence of a corporation. These theories, which reflect upon to whom corporations should be responsible and accountable, are shareholder theory and stakeholder theory. Based on these CG theories, chapter 5 focused on the question: can multinationals that have committed themselves to ethical business making, for instance in the form of CSR, also opt for good tax governance?

In order to answer this question, chapter 5 briefly compared different CG regimes to understand whether and what kind of limits they could possibly pose for good tax governance. The focus was on the conflicting interests of various corporate stakeholders and their relevance from the CG perspective. Therefore, the comparison was based on the 'market-oriented' Anglo-Saxon model (shareholder model) and the 'network-oriented' Rhineland model (stakeholder model) of corporate governance. These models illustrate two diverging regulatory approaches towards stakeholders and shareholders in company management. Based on four corporate law jurisdictions (the UK, US, Germany and the Netherlands) it was shown that corporate boards in all jurisdictions have exclusive discretion to decide upon the corporate strategy, under which also CSR falls, and upon the corporate tax strategy. Therefore, from the corporate law perspective, corporate boards have sufficient discretion to opt for good tax governance.

It is the responsibility of corporate managers to ensure that corporate legal obligations are met. The responsibility to operate in the best interests of the shareholders sometimes even seems to override the interests of other stakeholders, which is at the centre of CSR. In chapter 5, I concluded that corporate managers should foremost act in the best long-term interests of the company. Choosing the right tax strategy is also a task of corporate management. Corporate management has to follow

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the applicable laws but, at the same time, they also have the freedom to opt for good tax governance. Furthermore, balancing between shareholder and stakeholder approaches, in practice, is not an exact science. Nevertheless, for the purposes of this research, I concluded in chapter 5 that the main conflict between the two approaches lies in prioritizing conflicting interests: shareholder theory prioritizes the economic interests of the company, while stakeholder theory sets society above or on a equal level with pure economic interests. The connecting factor between both approaches is that corporate boards should foremost be acting in the long-term best interests of the company. Without a doubt, financial performance is crucial for the best long-term interests of the company. Furthermoroe, a financially healthy corporation can add more value to a society than a corporation that performs poorly with regard to its economic responsibilities. Therefore, corporate boards should balance between being profitable and being socially responsible. Having said that, the aspirational idea of accepting ethical obligations beyond compliance with the law is quite ambiguous.

Corporate boards that act in the best interests of the company take into account the interests of various stakeholders and balance those with the interests of the company and shareholders. This is the discretion that corporate managers have in their decision making. Therefore, to a certain extent, corporate boards are free to decide how aggressive or responsible the company should be in relation to the societies in which they operate. In order to understand the freedom that corporate boards have better, in this chapter, I proposed that the concept of corporate social irresponsibility (CSI) might be a helpful tool for corporations. CSI is namely a concept that represents decisions that responsible companies should not make. Aggressive tax planning has been suggested as a familiar example of irresponsible corporate behaviour, because it exploits negative externalities. It is quite clear that corporate boards that operate in the framework of CSI are not acting in the best interests of the company. Taking risks is a usual business practice and aggressive tax planning might bring considerable short-term gains. However, at the same time, aggressive tax planning (or, indeed, tax avoidance) brings certain risks, such as reputation damage. In order not to risk failing to act in the best long-term interests of the company, CSR corporations should engage in good tax governance.

7.2.5. Good tax governance

The final aim of this research was to conceptualize good tax governance and provide some guiding principles that could serve as the foundation for developing a framework for a code of conduct for good tax governance. Three main frameworks studied in the preceeding chapters formed a basis for conceptualizing good tax governance. First, studying tax planning provided the understanding on the central topic of the international tax debates and alleged problems. Second, analyzing corporate social responsibility provided a basis for exploring possibilities for combining tax and CSR. Third, studying CG was necessary to understand whether good tax governance could be applied in practice; whether and to what extent could CG regimes pose restrictions in binding corporate tax and CSR as a form of good tax governance. All pillars were fundamental building blocks for good tax governance. In chapter 6 of this research, I provided my perspective on good tax governance.

In light of recent developments, all corporations should reflect upon their tax planning practices and choose their position in this matter; if necessary, they might need to reconsider some of their practices. This might have certain short-term economic consequences, but it is not in conflict with the best long-term interests of the company. Despite the understanding that corporations should be run to maximize profit and exclusively increase shareholders' value that still might prevail in the business world, corporate boards have sufficient freedom to consider tax planning under the umbrella of CSR (based on the board supremacy or business judgement rule principles). Even Friedman, whose statements are often interpreted as supporting the absolute opposite to businesses having social responsibilities, leaves room for corporations to engage in practices that take the interests of stakeholders into account and not solely those of shareholders in order to advance the long-term interests of the firm. As a result of the analysis, in chapter 5, I showed that, in my opinion, corporations' (legal) excuse for supporting aggressive tax planning is weak. Furthermore,

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companies that have already voluntarily taken on the responsibility to engage in CSR should not claim that they behave responsibly while minimizing their tax obligations to the bare minimum.
Multinationals presenting themselves as corporations that operate according to socially responsible values should also apply these values in their tax planning practices. In other words, socially responsible corporations should engage in good tax governance. Good tax governance can be seen as a tool that helps corporations to be consistent with regard to their tax planning strategies internally and also to communicate them properly externally. In this research, good tax governance refers to the ethical dimension of tax governance. From the business practice perspective, however, the words such as *good, ethical,* or *moral* are often vague and do not provide sufficient guidelines nor a normative framework for a sound business practice. Therefore, in chapter 6, such terms were fleshed out in order to provide a more concrete content for good tax governance. I argued that, with regard to tax planning, the notion of going beyond compliance consists of two layers, one substantive and the other procedural. The substantive element of good tax governance requires ethical decision making and developing tax values. The procedural element means being open about the tax values and strategies of a corporation. Good – socially responsible – tax governance entails both.
With regard to the substantive layer, based on Carroll's CSR Pyramid, socially responsible companies need to take into account ethical considerations in addition to legal and economic considerations when defining and implementing a business strategy and making tax-related decisions. Socially responsible multinationals should develop and live up to certain tax values that are also sufficient from the public perspective in terms of morality and fairness. Such tax values could for instance be: openly considering tax as a part of CSR, paying corporate income taxes in the countries where the value is created, using only business structures that are driven by commercial considerations, use of tax incentives without allowing such incentives to become the main driver for structuring transactions, and being transparent about the corprorate approach to tax and corporate income taxes paid.
The procedural layer of good tax governance involves the principle of transparency and thereby going beyond compliance with legal reporting obligations. In terms of good tax governance, accountability concerns both the process and outcome; thus, the substantive and procedural elements. Corporations that claim to be socially responsible should pay their fair share of tax (or at least not unfair), and they should be open and willing to discuss their tax planning strategy and practice. Good tax governance goes beyond a mere cost-benefit analysis aimed at achieving high returns on shareholders; it takes a broader perspective on the effects that a corporation's tax planning practices can have. Good tax governance stays (at least) away from socially irresponsible behavior.
In other words, good tax governance requires that multinationals develop a corporate tax strategy that is in accordance with the overall corporate values, such as those set out in codes of conduct. This strategy should be communicated to internal and external stakeholders (transparency). Furthermore, such a strategy should be monitored, evaluated and, where necessary, adjusted over time. Good tax governance stands for corporate tax planning practices that are in line with the corporation's CSR agenda; corporations that wish to pursue good tax governance pay a fair share and are transparent about it. Substantive part of good tax governance is ethical behaviour, as a goal in itself, and transparency as means to that end. Without information, no evaluation of the way power is exercised is possible.
Transparency includes extrinsic and intrinsic drivers, as was explained. The extrinsic motivation of transparency is to respond to various disclosure rules. Nevertheless, for true good tax governance, this alone is not enough. Intrinsic motivation aims at engaging in dialogue with the stakeholders by going beyond compliance with (legal) disclosure requirements and reporting obligations. Although transparency is not a panacea, it is still a precondition for accountability to the people. Decision-making procedures and their results should be transparent.

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7.3. Findings

Based on the analysis of tax planning, CSR and CG, I concluded that taxation is a part of corporate ethical responsibilities towards society and that corporate law leaves sufficient discretion for corporate boards to opt for good tax governance. In line with this, the research questions, posed in the first chapter of this research, can be answered. The main research question of this dissertation read as follows:
How can multinationals opt for socially responsible tax governance while meeting company law requirements?

Based on the discussions in this research and on the sub-questions (divided according to the pillars of this research), the answer to this question can be summarized as follows: good tax governance means that multinationals set their tax values and do not act as irresponsible (substantive element), and are transparent about them (procedural element). Engaging in dialogue with their stakeholders about their tax values allows corporations to better understand what the society expects from corporations (but also, for example, to improve their reputation among various stakeholders), which in turn is in the best long-term interests of the company. Moreover, by contributing fair share of taxes, corporations invest in a stable and well-functioning system of public goods and services, which is important for corporations to mitigate unnecessary risks.

More specifically, the sub-questions can be answered as follows:
1. Tax planning: What kind of tax planning is (not) socially responsible?

As laws are imperfect, the letter of the law can be interpreted in a way that it violates the spirit of the law.[1465] Especially multinationals that enjoy corporate power are in a position to circumvent the rules.[1466] In general, it is a task of the lawmaker to strive for the best legal system that does not leave much room for (wishful) interpretation. However, as argued through this research, a perfect system is impossible. In the case of international corporate tax planning, multinationals have choices concerning how they interpret the law (whether they deviate from the spirit of the law or not) and, as a result, to what extent they contribute to the societies in which they operate. In addition, the international context of corporate tax planning complicates the national legislators' opportunities to reduce the gap between the letter and the spirit of the law, because of different interests or possibilities of states. This difficult situation suggests that, in order to respond to public outcry, multinationals also have a moral responsibility to pay their fair share, to (morally) account for their choices.
Due to various justified standpoints, it is difficult to agree on what is fair and what exactly complies with the spirit of the law; it is easier to start with what is evidently unfair. In this research, the concept of 'fair share' refers to corporate tax practices that aim at going beyond strict compliance with the letter of the law. Moral corporate behaviour with regard to tax planning is an active attitude towards aiming at paying a fair share while staying away from evidently unfair behaviour. In other words, the concept of a fair share reflects whether multinationals contribute a part to public goods and services without free-riding. Having said that, I do not agree that all kinds of tax planning is immoral, *per se*, as the tax planning continuum in chapter 3 also illustrated. Based on (business) ethics, it can, however, be argued that a certain kind of tax planning, such as tax avoidance and aggressive tax planning, is socially irresponsible. The societal issue with regard to international corporate tax planning in general is that multinationals that are part of society are in a position to eliminiate their moral responsibilities towards the societies in which they operate and free ride on societal goods and services funded by other taxpayers.

[1465] Chapter 3.
[1466] Chapter 2.

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2. Tax planning and CSR: How does tax planning fit in the context of CSR?

In chapter 4, I argued that two basic premises of CSR are that corporations are part of society and have moral agency. Based on Carroll's CSR Pyramid, I explained that the core of business practices entails that corporations pursue their economic missions within the framework of the law. CSR, however, also requires ethical responsibilities in addition to these economic and legal responsibilities. The ethical responsibilities of a company go beyond the law and profit making and embody these standards, norms or expectations that reflect a concern for what consumers, employees, shareholders, and the community regard as fair, just, or moral. Ethical responsibilities are seen as the corporate moral obligation to do what is right, just and fair.
From a CSR perspective, organizations are, thus, (morally) accountable for their actions towards the societies in which they operate. In chapter 2, I argued that, to be successful, corporations need a social license to operate from the local communities, which increases corporate social legitimacy. Consequently, this reflects the trust stakeholders have in a corporation. In case businesses do not use their corporate power responsibly, they lose such social legitimacy and also risk reputation damage. In other words, corporations engage in CSR to receive and maintain their social legitimacy to operate.
In chapter 4, I presented various reasons why tax planning should be part of CSR. Foremost, similar to other CSR domains, such as human rights and environment, with regard to tax planning, multinationals have power that allows them to abuse the legal vacuum that exists on the global level. CSR is a tool that allows stakeholders to hold corporations accountable for corporate actions in case the legal vacuum or imperfections leave room to engage in strictly legal but socially illegitimate corporate behaviour. Behaving in a moral way ensures that multinationals do not harm or free ride at the cost of the societies in which they operate. In addition, irresponsible corporate tax practices (indirectly) undermine CSR in other fields.[1467] In other words, CSR limits the possibility of powerful multinationals to eliminate their moral responsibilities towards the societies in which they operate and free ride on societal goods and services funded by other taxpayers.

3. Good tax governance and corporate governance: What are possible CG challenges corporations face (internally and externally) when trying to fit their tax planning strategies into their CSR policy?

In chapter 5 I identified a possible challenge corporations face when trying to fit their tax planning strategies into their CSR policy. This challenge entails that corporate responsibilities in Anglo-Saxon CG cultures (especially the supposed responsibility to maximize shareholder value) might be so strong that corporate managers are not in a position to opt for good tax governance. For instance, some businesses protect their very aggressive tax planning practices by arguing that they cannot opt for less aggressive tax planning due to their legal obligations towards shareholders (profit maximization). My aim in this research was to find out whether that really is a correct and justified argument. Based on a brief analysis of the UK, US, Germany and the Netherlands corporate laws I illustrated that corporate boards in both, Anglo-Saxon and Rhineland model jurisdictions have exclusive discretion to decide upon the corporate strategy. Such corporate strategy includes also CSR. Moreover, corporate boards are obliged to choose the right corporate tax strategy. Therefore, from the corporate law perspective, corporate boards have sufficient discretion to opt for good tax governance.
In this chapter I also presented examples of how the Rhineland model of CG encourages corporate boards to consider a wider spectrum of stakeholder interests than only the interests of shareholders. I further showed that it is true that the Anglo-Saxon model of GG culture prioritizes shareholders interests. Having said that, for instance, the US CG regime (the largest corporate law regime that

[1467] See chapter 4, section 5.1.

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is based on Anglo-Saxon roots) does not restrict corporate boards from considering a wider spectrum of stakeholder interests, as long as it is in the best interests of the company. For example, a recent statement of the Business Roundtable also confirmed that.[1468]

I showed that, even though the Anglo-Saxon CG regime does prioritize shareholder interests above the larger group of stakeholders, it does not exclude good tax governance entirely. Both CG regimes (Anglo-Saxon and Rhineland) require corporate managers to act in the best long-term interests of a corporation in the first place. Thus, in order to understand whether corporate managers have discretuion to opt for good tax governance also under a regime that prioritizes shareholder value maximization as opposed to a larger group of stakeholders, it was necessary to prove that good tax governance is in the best interests of the company. As I argued in chapter 5, it is difficult to generalize what exactly is in the best interests of the company.[1469] Having said that, the changing nature of how corporate tax planning is perceived and publicly debated allows one to conclude that aggressive tax planning brings with it the risk of getting a bad reputation and losing social legitimacy, which definitely is not in the best interests of the company. Furthermore, it was explained that a growing group of shareholders value CSR in various forms of corporate operations. In chapters 2 and 3, I illustrated that the existence of public goods and services, but also other functions of taxes, are the basis for an equal and stable society, which is integral to a successful business. In chapter 2, I explained in more detail how companies benefit from society and state and how, by paying their fair share of taxes, corporations are indirectly managing certain fundamental risks. Based on these arguments, I conclude that good tax governance is in the best long-term interests of the company.

There are many issues related to CG that this research did not discuss or solve. Nevertheless, for the purposes of this research, I showed that various CG approaches, in principle, leave freedom for corporate managers to opt for good tax governance. Naturally, corporate decision making cannot satisfy all of the conflicting interests of various stakeholders and shareholders. Corporate boards should balance various interests and create value fairly. Needless to say, this does not suggest that the corporate managerial power should be increased. CSR that expects corporations to consider larger groups of stakeholders affects corporate decision making from an external perspective, while CG rules affect it from the internal perspective. A successful company should balance both. Corporate boards foremost need to act in the best interests of the company and not only in their own interests or shareholders' or nonshareholder stakeholders' interests. The analysis in chapter 5 confirmed that good tax governance is a possible tool to allow multinationals to prove their moral tax planning behaviour.

4. Good tax governance: What is good tax governance and how can multinationals opt for good tax governance?

In chapter 3 I agreed that corporations have a right to choose the most effective way, as long as it is within the law. However, corporations that value their social licence to operate and aim to morally account for their tax behaviour (chapter 2) should engage in good tax governance (chapter 6). In chapter 4 I conceptualized corporate tax planning that is in line with corporations CSR agenda as good tax governance. In chapter 6, I explained that good tax governance consists of two layers: substantive and procedural. The substantive element of good tax governance requires ethical decision making and developing tax values. The procedural element means being open about the tax values and strategies of a corporation. Good – socially responsible – tax governance entails both. In chapter 6 I suggested that corporations that wish to engage in good tax governance should first think of their corporate tax values and develop a tax code of conduct. Following, corporations should be transparent about their tax values and engage in a dialogue with its internal and external stakeholders in order to reach commonly accepted standards with regard to good tax governance.

[1468] The statement of Business Roundtable (April 2019), however, seems to suggest that there is a convergence more towards the stakeholder model. See The Business Roundtable. (2019, April 19). *Statement on the Purpose of a Corporation.*
[1469] Chapter 5, section 4.2.

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Accordingly, this research concluded that companies that claim to be socially responsible should impose restrictions on themselves with some kind of social norms. Therefore, multinationals that claim to be CSR companies should have more transparent tax planning systems and they should not avoid paying taxes over the limits of moral and societal acceptability (thus, no aggressive tax planning). The recent developments with regard to international regulation and the public attention that corporate tax planning has received shows that it is a dynamic concept since norms are apparently changing. Therefore, good tax governance should also be seen as a dynamic concept that evolves over time and does not have a one-size-fits-all definition.

7.4. Practical implications of good tax governance

This research is mainly based on a theoretical analysis. Nevertheless, it can have various practical implications. This research illustrated that multinationals should and can re-think their tax planning strategies. For instance, do their tax practices respond to the economic activities or do they make use of artificial structures in order to minimize tax close to zero? Do they structure their business operations (artificially) in order to benefit from tax incentives or do they apply for tax incentives that respond to their real business activities?

Corporate practice is much more nuanced than this research was able to grasp. Nevertheless, this research identified several principal starting points that corporations that wish to improve could use. From a more practical perspective, this research provided some basic elements of good tax governance that can both be used, in business practice as well as in the regulatory field when developing either best practices or guidelines. CSR corporations should engage in good tax governance and corporations that have not yet adopted CSR strategies but wish to improve the social legitimacy of their tax planning practices can use good tax governance as explained in this research. Multinationals that have already accepted certain moral responsibilities to go beyond the law (CSR croporations) should also acknowledge that they have to strive for moral behavior with regard to tax planning (good tax governance). As explained in chapter 6, to apply good tax governance in practice, corporations should reflect upon their existing tax practices in order to understand whether these respond to the expectations of various stakeholders. It goes without saying that it is not an easy task to identify whether corporate tax practices respond to the stakeholder's expectations. Therefore, corporations can develop their corporate tax values in the form of a tax code of conduct. These values should not only be applied in corporate practices but also be communicated with internal and external stakeholders in order to create a dialogue and see whether these values respond to the expectations. When necessary, the values should be adjusted and the tax code of conduct updated. In addition to this substantive part of good tax governance, corporations that wish to improve their tax planning practices should also be transparent about their tax planning practices. As explained in chapter 6, full transparency is not expected. Instead, responsible corporations should be able to show and explain to the stakeholders how their tax values match their tax practices.

Furthermore, this research illustrated that multinationals that engage in international tax planning are not immoral *per se*. This image has prevailed in public debates for too long and I think that this should change. As shown in chapter 3, corporations should often engage in tax planning in order to avoid double taxation or make (legitimate) use of tax incentives. Only certain kinds of abusive tax planning practices can be considered to be in conflict with corporate moral responsibilities. Debates should be more nuanced in this sense, also including, for instance, the roles and responsibilities of various other actors and multinationals that wish to improve should be included in a constructive societal dialogue.

7.5. Discussion and suggestions for further research

When starting this research in 2014, I realized that there was no theoretical basis for combining tax, CSR and CG. I believe that I have succeeded in providing a sufficient basis for hypotheses that can

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further be tested with empirical research. Nevertheless, during this journey I also realized that there are still many unanswered questions that make this topic interesting for any researcher in any field. Here I will briefly summarize some of the most important points that, in my opinion, deserve further research.

First, a fairer tax system under the umbrella of CSR is not a responsibility that should rest exclusively on the shoulders of corporations, as it is a much broader issue. International corporate tax planning is a topic that includes various actors with different interests, such as multinationals, states, tax administrations, international organizations, media, and academics. For instance, NGOs fight for tax fairness and justice, whereas multinationals tend to lobby for even more favourable tax laws; also media often presents negative news because this *sells* more.[1470] Moreover, each group of actors is inevitably biased and puts their own specific interests over those of others; states ideally need to consider and balance all of them. For a legitimate change on the international level, a multi-stakeholder approach is necessary.[1471] In addition to taking into account such different interests, cultural differences also need to be thought of in the international setting. This is where, for instance, the media and academics can contribute in their role of knowledge providers. It goes without saying that different actors should all contribute and coorperate to improve the system as such. For instance, whether NGO's campaigns have an effect depends in the end on how the public reacts. Elliot writes that if the public does not agree with certain matters, there are two possible reactions: "put pressure on governments to break up monopolies and inject more competition" and thereby plant incentives to reconsider the business mind-set, or stakeholders could vote with their feet and "stop patronising the companies that exploit loopholes in the tax system, even though that might mean higher prices and less choice."[1472] McBarnet et al. have argued that "changes to the law alone cannot easily tackle creative compliance, because creative compliance is the product not just of limits of the law but of a mind-set which seeks to exploit those limits, and, crucially, which sees this exploitation as perfectly legitimate."[1473] In my opinion, from society's perspective, it is important that the mind-set with regard to how taxes are experienced changes, since tax is an important building block for a sustainable society. By engaging in a dialogue, various actors contribute to developing and improving good tax governance practices. However, all participants in such dialogue bear responsibility for achieving a better system; only striving for one's own interests and pursuing one's own agenda will not help in finding commonly accepted solutions.

Also, states have a crucial role to play with regard to eliminanting socially unacceptable corporate tax practices.[1474] The legislature bears the responsibility to establish a fair and well-functioning system of tax laws. Next to the legislature, the executive and judicial branches of the state also play a role in the tax-planning process. The tax authorities and judges, namely, put the laws into action. Tax authorities should be safeguarding tax laws; they need to ensure the effective enforcement of tax laws and tax income of the state. However, the tax authorities' only toolkit is usually the law and, if multinationals operate in strict accordance with the law, the tax authorities' possibilities to fight tax avoidance are limited. Moreover, multinationals can use their corporate power against the state: if tax authorities reject certain agreements, multinationals can move to other states. In addition, different tax authorities in different countries have different resources and (working) culture that can also weaken their negotiation position against multinationals.[1475]

[1470] See e.g. Douma, S. (2018). *Miscommunication and Distrust in the International Tax Debate*. Deventer: Wolters Kluwer.

[1471] Davarnejad, L. (2010). The Impact of Non-State Actors on the International Law Regime of Corporate Social Responsibility: Blessing or Curse? In Ryngaert, C. and Noortmann, M. (Eds.), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (pp. 41-65). Farnham: Ashgate. pp. 41-65, p. 61; Stevens, S. (2014). The Duty of Countries and Enterprises to Pay Their Fair Share. *Intertax* 42 (11), 702-708; Stevens, S. (2018, September 14). *Meer transparantie in de vennootschapsbelasting?* Tilburg University.

[1472] Elliot, L. (2013, May 19). Tax Avoidance: How to Change Corporate Behaviour. *The Guardian* (online).

[1473] McBarnet, D. (2007). Corporate Social Responsibility beyond Law, through Law, for Law: the New Corporate Accountability. In McBarnet, D. et al. (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (pp. 9-56). Cambridge: Cambridge University Press. p. 48.

[1474] See also e.g. Freedman, J. (2007). The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility. In Holder, J. and O'Cinneide, C. (Eds.), *Current Legal Problems 2006* (pp. 359-390). Oxford: Oxford University Press. pp. 384-385; De Wilde, M. F. (2015). *'Sharing the Pie': Taxing Multinationals in a Global Market*. Doctoral Dissertation, Erasmus University Rotterdam. p. 22.

[1475] Ylönen, M. and Laine, M. (2015). For Logistical Reasons Only? A Case Study of Tax Planning and Corporate Social Responsibility Reporting. *Critical Perspectives on Accounting* 33, 5-23. p. 14.

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If corporations are expected to be transparent in their tax planning strategies, values and tax contribution and consider it as part of their CSR policy, other actors also need to take responsibility and contribute to sustainable global tax governance. While states bear a primary responsibility for creating a fair legal system and legal certanty, fairer tax system is a shared responsibility of all the actors.[1476] Currently there is no common understanding on what is right or wrong. A dialogue is necessary to reach such an understanding. At the end of the day, aggressive tax planning cannot be resolved merely by changing the laws, for all laws can be circumvented; it also requires that the mind-set and attitude of multinationals, but also other actors, such as politicians, public in general or media, change.

The majority of existing literature on responsible corporate tax planning focuses mainly on multinationals, since corporations have a significant role to play in this respect. Nevertheless, tax planning is a complex process that also requires the input of several other actors. The fact that various other actors have an important role to play in initiating but also in eliminating excessive aggressive tax planning, however, seems to be a forgotten part of the tax avoidance debate. Such different actors have different interests and different professional and cultural backgrounds. Consequently, the debate concerning aggressive tax planning is peppered with different perspectives. Gribnau describes taxes as an elephant in a village of blind people – depending on their perspective, different people understand it differently.[1477] Different parts need to be put together in order to understand the complete picture. This research only focused on the perspective of multinationals. Further research is necessary to better understand the role and responsibilities of other relevant actors with regard to good tax governance.

For instance, further research could identify the role of various corporate advisors (external and in-house), international organizations, civil society actors (NGOs), intermediaries such as banks, shareholders, investors, and pension funds. How do these actors influence the tax planning culture and corporate decision making? What are the possibilities to engage these actors more in good tax governance? How do corporate tax decisions concretely affect these specific actors?

Furthermore, this research argued that good tax governance is in the best interests of society as well as corporations. However, further empirical research should, for instance, find out whether practicing good tax governance leads to higher prices or lower shareholder returns. If so, are consumers or shareholders willing to pay the price? If consumers or shareholders are not interested in more responsible business practices, then corporations would also not want to do that, because they would risk losing an important external incentive. In addition, more empirical research is necessary in order to find out what exactly the most important factors are in relation to the trustworthiness of multinationals' tax behaviour and also to better understand the relationship between corporate reputation in tax avoidance.

From a CG perspective, this research argued that corporate managers have sufficient freedom to opt for good tax governance. However, tempting executive compensation might push executives towards more amoral decisions. Furthermore, it cannot be ignored that, due to the high mobility of shareholders, managers might often be under pressure to satisfy shareholders' needs in order not to lose the (future) investment. This can, however, create negative externalities for the rest of the stakeholders or society at large. Therefore, in order to understand what would internally motivate corporate managers to opt for good tax governance, the link between executive compensation and corporate tax planning behaviour could be further researched. Moreover, this research generalized the CG perspective. Focusing on theoretical models, instead of comparing concrete jurisdictions in depth, made it possible to present a fundamental picture of the expectations of corporate management. At the same time, such an approach limits drawing country-specific concrete conclusions, which leaves room for further research.

As also identified in this research, the core of the issue is not whether the managers have a duty to increase shareholder value. To act in the best interests of the company, corporate managers are

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[1476] See also Peters, C. (2020). Global Tax Justice: Who's Involved?. In Van Brederode, R. F. (Ed.), *Ethics and Taxation* (pp. 165-187). Singapore: Springer.

[1477] Gribnau, J. L. M. (2016). Belastingen als Olifant. NTFR*: Nederlands Tijdschrift voor Fiscaal recht* 17 (8), 1-5.

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probably very capable of balancing the interests of different stakeholders. However, some stakeholders, such as some short-term interest shareholders, can have a strong ability to influence the corporate board members' decisions. As Lipton et al. rightly argue, "[U]nless shareholders consistently support the board in managing for the long-term and balancing the interests of all stakeholders, the lowest common denominator will often prevail and long-term investments will be sacrificed for near-term gains."[1478] In this line, further research should clarify how shareholders informally influence the corporate tax planning decisions. For instance, is there a certain change in corporate law necessary in order to make more space for good tax governance? Moreover, further (empirical) research should also identify, in more detail, how multinationals make their tax planning decisions. Such research should provide more practical guidance for corporations with regard to using certain tax planning structures; for instance, what are the relevant concrete criteria for socially responsible tax planning structures and which criteria help the management board to balance the different interests of stakeholders.

This research also presented various examples of corporations that already claim to be responsible taxpayers and have good tax governance practices. Nevertheless, there is insufficient empirical research confirming that corporations that apply good tax governance also live up to their intentions. From the perspective of transparency, further research should identify what kind of information exactly is material to sufficient disclosure.

In addition, from a more global sustainable development perspective, future research should analyze how (separate) SDGs are exactly related to taxation. Namely, SDGs give more concrete content to CSR and thereby are also relevant for good tax governance. Such research would, in my opinion, add much value to understanding and developing the concept of good tax governance further.

[1478] Lipton, M., et al. (2019, June 3). Wachtell Lipton Discusses Corporate Purpose—Stakeholders and Long-Term Growth. The CLS Blue Sky Blog.

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