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## Tax Non-avoidance as a Missing Piece of the Puzzle in the CSR Agenda in Poland

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### Abstract

The commitment not to engage in tax avoidance – to refrain from using aggressive tax planning techniques – has not become part of the corporate social responsibility agenda in Poland. The purpose of this paper is to examine justificatory and explanatory reasons of that significant absence.

The analysis unfolds in the following way. After setting out the necessary terminological background, I present main results of the limited empirical study of selected CSR documents, in order to substantiate the claim that tax avoidance is a theme absent from the CSR programs in Poland. Then I put forward the contention that this commitment should be included in such programs, as prima facie justified, and address a selection of objections that can be raised to defeat this contention. Finally, in the last section of the paper, I briefly comment on possible reasons of this absence and show how they elucidate the nature of CSR.

**Keywords:** corporate social responsibility, empirical study, stakeholders, tax avoidance, tax compliance, tax law

**JEL Classification:** H26, M14, M48

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### 1. Introduction

The commitment not to engage in tax avoidance – to refrain from using aggressive tax planning techniques – has not become part of the corporate social responsibility agenda in Poland. The purpose of this paper is to examine the justificatory and explanatory reasons of that significant absence.

The analysis unfolds in the following way. After setting out, in the second section of this paper, the necessary terminological background, I present the main results of the limited empirical study of selected CSR documents, in order to substantiate the claim that tax avoidance is a theme absent from the CSR programs in Poland (the third section). Then I put forward the contention that this commitment should be included in such programs, as *prima facie* justified (the fourth section), and address a selection of objections that can be raised to defeat this contention (the fifth section). Finally, in the last section of the paper, I briefly comment on the possible reasons of this absence and show how they elucidate the nature of CSR.

## 2. Definitions

The notions fundamental for the present discussion: tax avoidance and corporate social responsibility are perennially ambiguous and conceptually elusive. Therefore, while providing their working definitions is a necessary step in the analysis, it is also – as ever – open to dispute.

Tax avoidance (to be distinguished from tax evasion<sup>1</sup>) is a taxpayer's course of action which satisfies jointly the following conditions:

- (1) it is in line with the letter but contrary to the spirit of the tax law (*ratio legis*);<sup>2</sup>
- (2) it leads to achieving the tax benefit by a taxpayer (in particular, to reducing or eliminating tax liabilities in corporate income tax), while
- (3) this tax benefit is the significant (main or one of the main) reasons/motives for a taxpayer to undertake the course of action under consideration.

It is purported that tax avoidance thus defined leads to the (total or partial) non-payment of tax in the jurisdiction where the company derives economic benefits (where value is created).<sup>3</sup>

If defining tax avoidance is a challenging task, it is even more difficult to capture the notion of the corporate social responsibility. 'Since the 1990s CSR has become a catchword, possibly because it means different things to different publics,

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<sup>1</sup> To avoid any doubt, it is highlighted that the subject of this paper is not tax evasion but tax avoidance. Tax evasion is blatant infringement of the law under any conceivable standard and, as such, it is indisputably at variance with CSR.

<sup>2</sup> 'Contra legem facit, qui id facit, quod lex prohibet, in fraudem vero qui, salvis verbis legis, sententiam ejus circumvenit' (Paulus, Corpus iuris civilis, Dig. 1.3.29). This is what differs tax avoidance from tax evasion – which is contrary to the letter of the law. More on that in., e.g., H. Filipczyk, *Why is Tax Avoidance Immoral? Ethics, Metaethics and Taxes* (October 27, 2014). Available at SSRN: <http://ssrn.com/abstract=2515557>.

<sup>3</sup> It is not a deductive conclusion from the above premises, but an independent, empirical observation.

and since the concept of SCR is inexplicit, indefinite, multidimensional and changing'.<sup>4</sup> CSR is considered a 'wide-ranging umbrella term'<sup>5</sup> and is compared to the 'polyhedral figure'.<sup>6</sup> Pretty metaphors should not obscure the fact that the characteristics it connotes are capricious, case-dependent and often lacking any theoretical rigour, and that the realities it denotes largely diverge.

In view of the lacking consensus as to what theoretical underpinnings should be given to CSR, the definition adopted in this paper is broad, unspecific and (to the extent possible) neutral as regards various theories of CSR.

Taking as a point of departure the definition put forward by the European Commission, it is submitted that CSR is 'the responsibility of enterprises for their impacts on the society'.<sup>7</sup> More precisely, the term is categorically ambiguous: it is at the same time *a responsibility* – i.e., the *state* of a corporation/management *being morally responsible* – and *a business strategy* which (normatively) *presumes* and (factually) *assumes* this responsibility.<sup>8</sup>

Towards whom does the responsibility arise? 'Society' is taken to be composed of (individual or group) stakeholders<sup>9</sup> Stakeholders are all those who have 'legitimate interest in procedural and/or substantive aspects of corporate activity'.<sup>10</sup> The corporation is the 'constellation of cooperative and competitive interests possessing intrinsic value'.<sup>11</sup>

The inventory of stakeholders typically enlisted and accounted for (besides shareholders/owners/investors) includes clients, suppliers, creditors, business partners, public authorities, and local communities. It is a truly nontrivial and largely disputed question, however, on what basis these categories are identified – in other words, what is ultimately the source of duties towards stakeholders.<sup>12</sup> In general, the validity of stakeholders' interest is founded on one of the (non-exclusionary) principles:

<sup>4</sup> M.A. Gonzalez-Perez, *Corporate Social Responsibility and International Business: A Conceptual Overview* [in:] *International Business, Sustainability and Corporate Social Responsibility*, ed. L. Leonard, M.A. Gonzalez-Perez, Emerald Group Publishing Limited 2013, p. 2.

<sup>5</sup> J. Hasseldine, G. Morris, *Corporate social responsibility and tax avoidance: A comment and reflection*, "Accounting Forum" 2012, p. 9, doi: 10.1016/j.accfor.2012.05.001.

<sup>6</sup> R. Mullerat, *International Corporate Social Responsibility*, Wolters Kluwer 2010, p. 3.

<sup>7</sup> *A renewed EU strategy 2011-14 for Corporate Social Responsibility (CSR)*, p. 6.

<sup>8</sup> For a non-comprehensive catalogue of various CSR definitions see, e.g.: R. Mullerat, op. cit., pp. 15–25; A. Lulewicz-Sas, *Corporate social responsibility versus social irresponsibility. Theory approach*, [in:] *Corporate Social Responsibility*, ed. A. Lulewicz-Sas, Agencja Wydawnicza Ekopress Białystok, Białystok 2013, pp. 12–16.

<sup>9</sup> The stakeholder theory was developed in the landmark book by R. Edward Freeman, *Strategic Management: A Stakeholder Approach*, Pitman, Boston 1984 – but has evolved since (see: R. Mullerat, op. cit., pp. 225–234).

<sup>10</sup> T. Donaldson, L.E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, "The Academy of Management Review" 1995, Vol. 20, No. 1, January, p. 67. 'Stakeholders are identified by **their** interests in the corporation, whether the corporation has any corresponding functional interest in **them**'.

<sup>11</sup> *Ibidem*, p. 66.

<sup>12</sup> Cf., e.g., A. Lewicka-Strzałecka, *Odpowiedzialność moralna w życiu gospodarczym*, Wydawnictwo IFiS PAN, Warsaw 2006, p. 24.

- (1) the commutative justice/fiduciary duties principle: duties arise towards those who invested in the corporation (also through making social capital investments);
- (2) the ‘avoid-evil’ principle: duties arise towards those who may be negatively (adversely) affected by corporation’s activities;<sup>13</sup>
- (3) the ‘do-good’/charity/beneficence principle: duties arise towards those who may be positively (favourably) affected by a corporation’s activities.<sup>14</sup>

It seems that, practically, all of them intervene to bring about commonly indicated groups of stakeholders.<sup>15</sup>

Importantly, CSR as a business strategy has an aspect of *willingness* in embracing the duties and *transparency* in their fulfilment.<sup>16</sup> Irrespective of whether (or to what extent) duties towards stakeholders are of legal nature as well, from the ethical point of view CSR is voluntarily (or even willingly) assumed. The attitude of a CSR-conscious manager is one of good will in doing what is the right thing.

### 3. Limited empirical study – summary of the results

#### 3.1. Methodology of the study

The study consisted in checking two categories of data (information and documents) for the presence of the commitment not to avoid taxation. The analysis was performed *in and as of* November 2014.

The first category comprised 11 publicly available general documents of the Polish public bodies and agencies: the Ministry of Economy, the Polish Information and Foreign Investment Agency (PAIiZ), the Polish Agency for Enterprise Development (PARP), the Warsaw Stock Exchange (GPW), and the leading organizations whose mission is CSR promotion: *Forum Odpowiedzialnego Biznesu*, *Akademia Rozwoju Filantropii w Polsce* and *Fundacja Centrum CSR*.<sup>17</sup> The analysed documents span manuals, guidelines, questionnaires for enterprises and general reports.

The second category included company-specific material: documents (codes of conduct and social reports<sup>18</sup>) and other information available on CSR-dedicated corporate websites of 35 Polish companies – CSR leaders.<sup>19</sup> The companies chosen for

<sup>13</sup> Consider the concept of negative externalities.

<sup>14</sup> Cf. M.A. Gonzalez-Perez, *op. cit.*, p. 4, who points to two principles contributing to contemporary views on CSR: the principle of charity and the principle of stewardship. These principles roughly correspond to those mentioned above under (3) and (1).

<sup>15</sup> It is outside the interests of this paper to analyze if these reconstructed principles are justified. I argue only that they (individually or collectively) underlie the recognition of stakeholders and of duties towards them – and that based on the very same principles there arises also the duty not to avoid taxation (cf. section 4).

<sup>16</sup> Hence the standards of financial and non-financial disclosure promoted by the Global Reporting Initiative (GRI).

<sup>17</sup> The documents included in the study are listed in the References section.

<sup>18</sup> Subject to the study was the most recent social report available.

<sup>19</sup> The companies included in the study are listed in the References section.

the study were selected based on the criterion of enlistment on one or more of three ranking lists of socially responsible businesses.<sup>20</sup>

The criteria of selection, and therefore the content of the resulting database, are in a sense arbitrary. However, since the practice of CSR is institutionally multi-centred, organically growing and not hierarchized, any choice made in this respect would be potentially questionable. The aim behind the choice actually made was to analyze: (1) documents setting or reflecting the Polish standard of CSR and (2) information and documents showing the social aspirations of the SCR elite in Poland.

A terminological note: various terms usually used to convey the same concept were considered synonymic with ‘tax avoidance’ (the Polish language equivalents of ‘aggressive tax planning’, ‘tax arbitrage’, ‘strategic tax behaviour’).

### 3.2 Results of the study – summary

#### 3.2.1 Background – general documents

The analysed documents neither declare tax avoidance an important social issue nor consider the commitment not to engage in it to be required from a corporation which subscribes to CSR. In general, paying taxes does not emerge as a central theme in the focus of CSR interest. Incidentally, taxation is referred to in order to: (1) stress that contribution to the general welfare through taxes, important as it is, the social duties of business go beyond it; (2) highlight tax reliefs which are or should be available to socially responsible businesses;<sup>21</sup> (3) applaud the initiatives encouraging taxpayers (natural persons) to allocate in their tax returns 1% of their personal income tax to the ‘public benefit organization’ (*organizacja pożytku publicznego*) of their choice (which the Polish PIT Law allows them to do).

A special note is for the questionnaire prepared by PAIiZ for companies wishing to implement the *OECD Guidelines for Multinational Enterprises*.<sup>22</sup> On the one hand, the required standard on which the successful implementation depends is that a corporation ‘timely pays its tax liabilities’. On the other hand – contrary to the original OECD document – in the questionnaire no mention is made of the duty to respect the spirit of tax law as well as its letter. As a result, the questionnaire misses the area of real risk and in this respect collapses to triviality.

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<sup>20</sup> The study took into account the content of websites of the companies: listed within the first 30 in “VIII Ranking Odpowiedzialnych Firm 2014” (“8<sup>th</sup> Responsible Companies Ranking”) by Forum Odpowiedzialnego Biznesu and “Dziennik Gazeta Prawna” (one of the leading newspapers); awarded with “Złoty Listek CSR Polityki 2013” (“Golden CSR Leaf”) by “Polityka” magazine and PwC or awarded in the competition “Lider Odpowiedzialnego Biznesu 2013” (“Responsible Business Leader 2013”) by Pracodawcy Rzeczypospolitej Polskiej (organization of employers).

<sup>21</sup> See: *Ocena stanu wdrażania standardów społecznej odpowiedzialności biznesu. Raport*, pp. 214–216. Cf. also: G. Bartkowiak, *Spoleczna odpowiedzialność biznesu*, Difin, Warsaw 2011, p. 20, again about the tax barriers to the development of CSR in Poland, and M. Bernatt, *Spoleczna odpowiedzialność biznesu. Wymiar konstytucyjny i międzynarodowy*, Wydawnictwo Naukowe Wydziału Zarządzania Uniwersytetu Warszawskiego, Warsaw 2009, pp. 46–47. The latter author vigorously argues for CSR-oriented tax reliefs – and yet despite the title of his book (referring to the constitutional dimension of CSR) and the clear ground for the duty to pay taxes in the Polish Constitution (art. 84) he does not recognize this duty as relevant for CSR (see: pp. 117–179).

<sup>22</sup> Available at <http://www.oecd.org/corporate/mne/>.

### 3.2.2 Company-specific information and documents

For those the following results were obtained:

- (1) 0 companies (0%) have explicitly made the commitment not to avoid taxes;
- (2) 15 companies (42.86%) refer anyhow to taxes; out of which 9 companies (25.71%) put stress on taxes paid as an important contribution to the welfare of citizens; 3 companies (8.57%) accentuate it strongly;
- (3) 14 companies (40%) indicate the amounts of taxes paid,<sup>23</sup> out of which 6 companies (17.14%) specify their CIT contribution;
- (4) 9 companies (25.71%) are committed to complying also with the spirit of the law;<sup>24</sup>
- (5) 2 companies (5.71%) emphasize the commitment to obey tax laws (but not specifically understood as both the letter and the spirit).

### 3.3. Commentary to the results of the study

By way of a commentary to the study several remarks are in place.

First, the results of the study support the thesis that the *explicit* commitment not to avoid taxation is not part of the Polish CSR agenda. The mere linkage between CSR and tax liabilities is identified by roughly one-fourth of the companies under consideration, and for the majority of them taxes are discussed rather peripherally to the main CSR themes. It hardly comes as a surprise given that taxation is marginally discussed, if at all, in the general CSR documents.

Second, the commitment not to avoid taxes can be claimed to be *implicit* in other commitments made by the CSR leaders, and in particular in the self-assumed duty to obey the spirit of the law. However, given the alleged specificity of tax law (see below) it cannot be taken for granted that the companies would accept applying the general commitment to abide by the spirit also to taxation. On the other hand, admittedly, it seems that at least for some companies expressing the will not to avoid taxes is ‘around the corner’; it would only require ‘connecting the dots’ (associating respecting the spirit of the law and the importance of tax contribution).

Third, the fact that CSR leaders included in the study do not directly and overtly commit themselves to tax non-avoidance does not imply that in their business practice they *actually* engage in tax avoidance. Such a conclusion would be unjustified and unfair.<sup>25</sup>

Four, although comprehensive discussion of this topic is outside the scope of this paper, it is worthy of mention that the absence of tax non-avoidance commitments from the CSR agenda in Poland is not exceptional. It is often noted that

<sup>23</sup> Either directly in the CSR documents or in the financial data to which these documents refer *explicitly*. Presumably the relevant data of (some) other companies are available in other sources.

<sup>24</sup> Out of 27 companies (77.14%) which emphasize their compliance with the legal regulations. It seems obvious, however, that other companies also would be ready to make such a general commitment.

<sup>25</sup> Empirical studies aiming to establish if CSR companies engage in tax avoidance can be performed, e.g. using as proxies efficient tax rates or permanent book-tax differences. To the best of my knowledge, such studies have not yet been performed in Poland.

‘[a]lthough the payment of tax is a fundamental way corporations engage with society, it is seldom classified as a significant CSR activity.’<sup>26</sup> Wherever the CSR project was launched before it gained popularity in Poland, it typically did not at first contain any references to taxes, and even less – to tax avoidance.<sup>27</sup> Things have to an extent changed over time – the first international corporate responsibility instrument amply addressing taxation is the *OECD Guidelines for Multinational Enterprises* which, starting from the 2000 update, include the requirement to act in accordance also with the spirit of the tax law.<sup>28</sup> Yet even now the initiatives promoting fair taxation are often carried out either independently of,<sup>29</sup> or at the outskirts of the CSR movement.<sup>30</sup>

#### 4. Tax avoidance and CSR – *prima facie* relation

The commitment to refrain from avoiding taxation (or, to put it positively, to pay taxes according to the spirit of the law) is *prima facie* a paradigm duty for the CSR program – one that ideally fits the overall profile and the definition of CSR given above.

To begin with, let me recall that CSR is a responsibility (and a corresponding business strategy assuming this responsibility) of a corporation towards the society – stakeholders within it. Yet ‘[p]aying taxes is perhaps the most fundamental way in which private and corporate citizens engage with broader society.’<sup>31</sup> The special status of taxation – as a primary platform of engagement in the common good and an instrument of the fulfilment of social duties – makes it immediately significant for CSR.

<sup>26</sup> Ch-K. Hoi, Q. Wu, H. Zhang, *Is Corporate Social Responsibility (CSR) Associated with Tax Avoidance? Evidence from Irresponsible CSR Activities*, p. 8. Also, e.g., G.H. Dowling, *The Curious Case of Corporate Tax Avoidance: Is It Socially Irresponsible?*, “Journal of Business Ethics” 2014, No. 124, pp. 173–174; J. Christensen, R. Murphy, *The Social Irresponsibility of Corporate Tax Avoidance: Taking SCR to the Bottomline*, “Development” 2004, 47(3), pp. 37–39 et al.

<sup>27</sup> P. Sikka, *Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance*, “EBS Working Papers” 2010, April, p. 2.

<sup>28</sup> Cf. pp. 60–63 where this requirement is explained.

<sup>29</sup> Cf., e.g., *Tax Justice Network agenda or Fair Tax Mark initiative* (<http://www.fairtaxmark.net/>), which in many respects resembles the CSR certification pattern, yet is independent of all major agencies dealing with CSR.

<sup>30</sup> Consider, e.g., the European Commission promoting three principles of good tax governance: ‘transparency, exchange of information and fair tax competition – in relations between states. Enterprises are encouraged, where appropriate, also to work towards the implementation of these principles.’ (*A renewed EU strategy 2011–14 for Corporate Social Responsibility (CSR)*, p. 7) and the PwC ‘Total Impact Measurement and Management’ framework (in which ‘tax impact’ is one of four dimensions of CSR and where tax avoidance is expressly mentioned, if mostly in the context of possible reputational damage). However, tax avoidance is not addressed in AccountAbility standards, Global Compact or ISO 26000.

<sup>31</sup> J. Christensen, R. Murphy, op. cit., p. 37.

A corporation is morally bound to pay taxes; this duty holds towards the stakeholders – the citizens of the given state.<sup>32</sup> This general contention is justified under all three principles employed to identify stakeholders (cf. section 2).

Under the commutative justice principle, a corporation is morally obliged to offer a return for social capital invested in it by the community of citizens.<sup>33</sup> Since a corporation derives benefits from the fact of operating in the given society, it should compensate this society – and this return is realized through tax contribution. ‘The state collects return on social capital in the form of taxes to enable it to finance a particular kind of social order.’<sup>34</sup> The general term ‘social order’ denotes a variety of institutional building blocks, both material and intellectual, of society and state (including, but not limited to, the law itself and market order) which form the framework of any business activity and collectively allow profits to be generated. This social order has been, and still is, put together in the common, if not always concerted, every-day efforts of the citizenry of the given state. Unwillingness to compensate others for their input makes tax avoiders ‘economic free-riders.’<sup>35</sup>

To be more illustrative: teachers teach, doctors cure, legislators make laws, engineers make bridges, judges adjudicate, etc. – all this is done also for the benefit of a corporation. A corporation neither operates in the social void, nor pays individually for all the services received (directly or indirectly) from the citizens. The way to ‘remunerate’ them is through taxes. Hence arranging one’s affairs with the aim of minimizing the tax burden is ethically flawed.

Under the ‘avoid-evil’ principle a company has a duty towards the citizens to pay taxes because their non-payment would make the same citizens worse off. The basic mechanism is twofold: the condition of the inhabitants of the state citizens is worsened either through shifting to them the fiscal burden avoided by a corporation<sup>36</sup> or through reducing the level of public service available to them – lowering their living standards.<sup>37</sup> In practice both consequences ensue, and both are unwelcome. What is striking in particular is the anti-egalitarian side of tax avoidance: realistically, tax avoidance tricks are available only to the few.<sup>38</sup> The not paying of taxes by some entities while it remains a necessity for others flies in the face of the principles of equality and a level-playing-field for all. Additionally, tax avoidance

<sup>32</sup> Or of other self-governing structure, including more territorially limited, e.g. community – *gmina* in Poland.

<sup>33</sup> P. Sikka, op. cit., p. 37.

<sup>34</sup> Ibidem, p. 7.

<sup>35</sup> R.S. Avi-Yonah, *Corporate Social Responsibility and Strategic Tax Behaviour*, University of Michigan Law School, Law & Economics Working Papers Archive, 2006, p. 2. In this fascinating and intellectually compelling article the author demonstrates that tax avoidance is inconsistent with any view of the corporation (out of three considered).

<sup>36</sup> W.B. Barker, *The Ideology of Tax Avoidance*, “Loyola University Chicago Law Journal” 2009, No. 2, p. 239.

<sup>37</sup> ‘[I]f all corporations engage in strategic tax behaviour, the state may not be able to raise sufficient money to fulfill its exclusive social responsibility functions’ (R.S. Avi-Yonah, op. cit., pp. 21–22). This formulation has a Kantian flavor to it; more on employing the Categorical Imperative mechanic to the issue of tax avoidance in: H. Filipczyk, op. cit., *passim*.

<sup>38</sup> Consider the famous quotation from President Roosevelt: ‘[t]ax avoidance (...) means that you hire a \$250,000-fee lawyer, and he changes the word “evasion” to the word “avoidance”’ (I cite after Barker, op. cit., p. 248).



produces further negative ripple-effects,<sup>39</sup> e.g. of undermining the general public's trust in the tax system, prompting the complexity of tax laws, arresting the time and efforts of tax authorities, generating market distortions, etc.

Under the 'do-good' principle the duty towards citizens to pay taxes is rooted in the taxation as a machinery put in place to secure the source of public spending for the general welfare: the well-being of citizens. The financial means for all public services are provided mainly in taxes. It would be inconsistent and paradoxical to allow tax avoidance, leading to massive tax gaps and lack of resources for public needs – with schools, hospitals, etc. among them – and at the same time welcome and jubilate the small-scale support offered by corporations for the very same public needs – e.g. through buying laptops for particular schools, organizing one-off actions for the prevention of diseases, etc.

Let us finally focus on the *modus* of tax avoiders' actions, as it is flawed as well. Tax avoidance capitalizes on the incongruence between the letter and the spirit of tax laws and on the information asymmetry between a taxpayer and a tax authority. First, to defeat the spirit of laws is to have a distorted and manipulative attitude towards it. Tax avoiders game the tax law using tricks and contrived business structures – they do not construe it in good faith. Second, they act without transparency, through selective, disjoint or deliberately obfuscatory disclosure of facts crucial for their tax position and tax assessment.<sup>40</sup> This *way of behaviour* in itself, i.e. irrespective of its consequences (the effect of diminishing state revenues it gives rise to), is at variance with the values of openness and trust and is morally questionable. And again, it would be inconsistent to deny this where CSR leaders take pride in the transparency of their activities and their open and honest approach to stakeholders.

## 5. Objections (a selection)

Based on the preceding considerations it is argued that the commitment not to avoid taxation should be part of the CSR agenda and that it is not in Poland – therefore it can be regarded as the title's 'missing piece of the puzzle'. This contention is likely to give rise to objections. A selection of them is discussed below.<sup>41</sup>

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<sup>39</sup> See, e.g., J.M. Fisher, *Fairer Shores: Tax Havens, Tax Avoidance, and Corporate Social Responsibility*, "Boston University Law Review" 2014, no 1, pp. 337–365; G.H. Dowling, *op. cit.*, p. 176; J. Christensen, R. Murphy, *op. cit.*, p. 41.

<sup>40</sup> Originally, misreporting was considered a defining feature of tax evasion, differentiating it from tax avoidance. This is no longer the case: the close connection between lack of transparency and tax avoidance is now well recognized in the literature and practice. That is why special disclosure duties, i.a. concerning aggressive tax schemes, tend to be imposed on taxpayers and/or tax consultancy (e.g., the 'DOTAS' regime in the UK).

<sup>41</sup> Among the selected objections, I do not discuss those universally applicable to CSR, e.g. to the very idea of the business having social commitments. They are epitomized in the slogan 'the business of business is business' (cf., e.g., M. Friedman, *The Social Responsibility of Business is to Increase its Profits*, "New York Times", September 13, 1970). All CSR duties as such are problematic under the principal-agent model of a corporations in its orthodox version.

First, a possible doubt is that paying taxes is a matter of compliance with the law – and, as it is routinely claimed, CSR demands more than just to be compliant.<sup>42</sup> It is a self-regulatory and voluntary mechanism and ‘a matter of business going the extra mile beyond what the law requires.’<sup>43</sup>

However, it is not the aim of CSR to run counter to the requirements imposed by law or abstract from them but rather to give them full realization. In this sense CSR is accomplished *through* law, i.e. by ensuring that legal duties are complied with in their entirety, not attempting to explore where the boundary between compliance and non-compliance lies, not giving the law the reading biased towards its own advantage. What is expected from the CSR-conscious businessman is not only *compliance* with the law but *cooperation* with it:<sup>44</sup>

*[o]ne complies with the letter of the law; one cooperates with the law’s spirit (...) one cooperates by resisting the temptation to exploit legal loopholes, by interpreting legal ambiguities with reference to the public good rather than with sole reference to one’s private interest, and by living to the spirit of the law even when the law is not effectively enforced.*<sup>45</sup>

The point is lucidly argued by Doreen McBarnett<sup>46</sup> who considers ‘creative compliance’ (including with tax laws) to be the common problem of the corporation’s functioning which is hardly tractable by purely legal means (law enforcement). It is morally wrong to be satisfied with the compliance with the law taken ‘by the letter’ and to adopt the mindset in which:

*law is seen not as an authoritative and legitimate policy to be implemented, but as a body of decontextualised words, and as a raw material to be worked on to one’s own advantage, regardless of the intentions of the legislators in making the law or the objectives they are seeking to meet.*<sup>47</sup>

The CSR duty of *cooperation with the law* is particularly relevant in the domains where law is given restrictive interpretation for fear of infringing citizens’ rights. Tax law is such a domain – definitely so in Poland. The *nullum tributum sine lege* principle, traced back to Article 217 of the Polish Constitution, along with the dominant interpretative taboos and textualist approach well-entrenched in the Polish

<sup>42</sup> ‘Corporate social responsibility concerns actions by companies over and above their legal obligations towards society and the environment’ (A renewed EU strategy 2011–14 for Corporate Social Responsibility (CSR), p. 3).

<sup>43</sup> D. McBarnett, *Corporate social responsibility beyond law, through law, for law* [in:] *The New Corporate Accountability: corporate social responsibility and the law*, eds. D. McBarnett, A. Voiculescu, T. Campbell, Cambridge University Press, Cambridge 2007, p. 11.

<sup>44</sup> Upon the condition that law is legitimate – yet there is no reason to assume that tax law (in Poland) is not.

<sup>45</sup> D.T. Ostas, *Cooperate, Comply or Evade? A Corporate Executive’s Social Responsibilities with Regard to Law*, “American Business Law Journal” 2004, Vol. 41, Issue 4, Summer, pp. 8-9. The reception of the author’s distinction does not mean his position is the same as defended in this paper (it is not).

<sup>46</sup> D. McBarnett, *op. cit.*, esp. pp. 48–54.

<sup>47</sup> *Ibidem*, p. 48.

legal culture outline quite a narrow scope of enforceable legal obligations in the field of tax law. As a result, the reality is that paying corporate income tax (at the efficient tax rate somewhere near the statutory rate) has become a question of good will and discretion of large-scale and/or multinational entrepreneurs. Above and beyond the narrow confines of the compliance with enforceable tax liabilities there is the ‘twilight zone of ambiguity.’<sup>48</sup> It is in this zone, in the ‘aura of law,’ that the quasi-voluntary commitment of corporations not to avoid taxes should be relied on to mould good practices.

However, it can be argued that the *prima facie* argument put forward in section 4 justifies only the duty of *tax compliance* (with the letter) and not *tax cooperation* (with the spirit of laws). Businesses cannot be morally expected to pay taxes beyond their legal obligations and they are free to choose the so-called ‘fiscally least burdened route.’<sup>49</sup>

To this it should first be responded, in the words of D. McBarnet, that ‘[c]reative compliance in areas such as tax avoidance may pass the test of legality but fail on the test of social responsibility.’<sup>50</sup> Two distinct normative standards are at work here, and it is the ethical standard which counts. After all, ‘the SCR agenda is driven by demand for an ethical approach to doing business.’<sup>51</sup> In consequence, non-enforceability of duty in legal terms does not preclude it from being morally valid.

And morally valid it is. It is submitted that once the duty to pay taxes is accepted as a social responsibility (as it was argued for in section 4 above), it is mandatory that this duty is fulfilled readily and to the best of one’s abilities. It would be inconsistent to recognize the moral nature of the duty (here: to pay taxes) and concurrently accept that this duty may be circumvented at no moral cost. Consequently, all purely tax-motivated activities which are designed to reduce tax liabilities are questionable, whether they can be legally tackled or not.

Taxes should be paid without seeking opportunities not to pay them, without pressing the law to its limits, exploiting ambiguities and legislators’ ‘slips of the tongue,’ without artificiality, contrivance and fragmentary disclosure – in short, without making use of tax avoidance techniques.<sup>52</sup> The ultimate reason, to put it bluntly, is that ‘tax is good’.

In this connection it is observed that contrary to what is sometimes claimed, the commitment not to avoid taxes does not obligate corporations to choose the structuring of their business which triggers the *maximum* tax liability possible. On the definition of tax avoidance given above, it is essentially demanded that *minimum* tax liability is not vigorously sought. One is not morally obliged to seek the *increase* of his own tax burden; it is enough that he does not seek the *decrease* of it.

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<sup>48</sup> W.B. Barker, *op. cit.*, p. 250.

<sup>49</sup> *Ibidem*, p. 237. Cf. the emblematic UK case *IRC v. Duke of Westminster*, [1936] AC 1.

<sup>50</sup> *Ibidem*, p. 51.

<sup>51</sup> J. Christensen, R. Murphy, *op. cit.*, p. 39.

<sup>52</sup> By the same token, the allegedly blurred distinction between tax avoidance and tax planning does not offer justificatory grounds for questioning the duty not to avoid taxes. While borderline cases can arise, normally managers know when they venture into a dubious area. Therefore, ‘a corporation can be legitimately expected to police its own behaviour in this regard, without worrying too much about where the line should be drawn’ (R.S. Avi-Yonah, *op. cit.*, pp. 15–16).

The underlying issue behind this objection seems to be that the duty to pay taxes is not recognized at all. Taxation is perceived of as a matter between corporations and states – and not between managers of corporations and citizens of states, and as such it is, at most, morally neutral. ‘This ideology portrays tax as a transfer from shareholders to the state rather than a return to society on the investment of social capital and thus regards avoidance of taxes as a normal and commonsensical business practice.’<sup>53</sup> This is a serious problem of erroneous perception of reality, possibly seen through the lens of liberal social philosophy.<sup>54</sup>

A further objection can be raised, pointing to the corporations’ various and multiform contributions to society. It goes on to argue that corporations can (and in fact do) provide for social needs otherwise than through (corporate income) taxes; arguably, other ways are chosen as more efficacious.

However, it is unclear how observance of one type of moral duty (engaging in charity) can exonerate someone from observing another type (paying taxes). Moreover, in purely financial terms, upon reasonable guesswork<sup>55</sup> the tax gaps created by tax avoidance are unlikely to be compensated through other channels of contribution. Finally, contrary to what the argument suggests, tax avoidance is typically driven by the desire to maximize after-tax profits rather than by the concern to use more efficient ways of providing for social needs.

If material or procedural aspects of taxation are defective, leading to the non-efficiency of the tax system, they should be improved within proper procedures (in particular, by inspiring legislative changes) and not through ‘creative compliance’ – which does not rectify the situation but engenders further evils.

One could argue as well that paying taxes, also according to the spirit of tax laws, is too evident a duty to be mentioned in the context of CSR, or that it is already covered by more general commitments (e.g., the commitment to act in compliance with the law).

Yet including the commitment explicitly is not contingent upon its being evident or not (many commitments usually included in the CSR are indisputable) but rather on whether the issue it addresses is an important social problem. It would be definitely overly optimistic to claim that tax avoidance is no such problem; quite the contrary, it is a serious issue of public finance, law and society. Testimony to its seriousness are

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<sup>53</sup> P. Sikka, *op. cit.*, p. 12.

<sup>54</sup> Cf. W.B. Barker, *op. cit.*, *passim*.

<sup>55</sup> Cf. D. McBarnet, *op. cit.*, p. 22, after “The Economist”: ‘corporate philanthropy by the United Kingdom’s FTSE 100 companies, including donations, gifts in kind, staff time and attributed management costs, in fact amounts to less than 1 percent per annum of pre-tax profits’.

the numerous steps undertaken at the global,<sup>56</sup> European,<sup>57</sup> as well as the local Polish level<sup>58</sup> with the aim of combating tax avoidance.<sup>59</sup>

Finally, it could be argued that CSR contains only commitments which are selective, in terms of being directed towards a well-defined limited range of individuals in close proximity to the company. The most wide-ranging CSR duty is towards local communities – whereas taxes are pooled at the level of the state.

However, taxes in Poland – including income taxes, most susceptible to tax avoidance – serve the needs of local communities.<sup>60</sup> Moreover, some well-recognized CSR commitments are towards the community whose boundaries stretch even beyond one particular territorial state; such is the case of environmental sustainability.

The list of the discussed objections is not exhaustive. Yet, hopefully, the above discussion made it plausible that the defended contention can be successfully tested against counterarguments. Ultimately, the duty not to avoid taxes arises because corporations should (1) embrace the social dimension of taxes (and therefore, pay taxes willingly); (2) cooperate with the law (and not only comply with it); and (3) be open and transparent towards stakeholders (and not economical with the truth).

## 6. Explanatory reasons

Discarding objections concerning the above *prima facie* thesis makes it plausibly true that there are no justificatory reasons for the absence of the commitment to tax non-avoidance in the SCR programs. What remains to be investigated are the explanatory reasons for this omission. In other words, after having found that *normatively* (from the ethical perspective) this omission cannot be justified one can be nonetheless interested in finding why it is *factually* the case. The reasons for this state of affairs are particularly interesting to the extent that they shed light on the nature of CSR as a project in the field of business ethics.

A possible explanation – and one that has in fact been given on more than one occasion – points to the ‘organized hypocrisy’ corporations are guilty of and ‘the gaps between the corporate talk, decisions and action’ resulting from double standards.<sup>61</sup> Corporations (their management) are purportedly declarative in their pro-

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<sup>56</sup> The most notable and prominent example is *Action Plan on Base Erosion and Profits Shifting* created by the OECD at the initiative of G20 countries agreed upon at the summit in September 2013. Information on the current status of actions included in the BEPS Action Plan is available at <http://www.oecd.org/ctp/beps.htm>.

<sup>57</sup> Examples abound; suffice it to mention the Commission’s recommendation of 6.12.2012 on aggressive tax planning, C(2012) 8806 final, available at [http://ec.europa.eu/taxation\\_customs](http://ec.europa.eu/taxation_customs).

<sup>58</sup> The GAAR (general anti-avoidance rule) is included in the draft amendment to the Tax Ordinance (*Ordynacja podatkowa*) is currently in the legislative process. As of 1 January 2015 the CFC rules (controlled foreign companies) will come into force.

<sup>59</sup> The widespread presence of this phenomenon in Poland is corroborated by, e.g., the fact that most of the direct investment of Polish enterprises is made in Luxembourg.

<sup>60</sup> Cf. ustawa z dnia 13 listopada 2003 r. o dochodach jednostek samorządu terytorialnego (consolidated version Journal of Laws of 2014, item 1115).

<sup>61</sup> P. Sikka, op. cit., p. 6.

social approach, and the reality of their business practices is gloomy. Despite flagrant examples of the discrepancy between rosy CSR words and sinister tax avoidance cited in the literature,<sup>62</sup> it would be hasty to conclude that all corporations subscribe to CSR to misdirect public attention – deflect it from their acts of social misconduct – and practice window-dressing.<sup>63</sup> By the same token, assuming that CSR is pure rhetoric, there would be no obstacle to include the commitment to tax non-avoidance in CSR manifestos only to disregard it in practice.<sup>64</sup> Therefore, we should look further for the explanation of the discussed significant absence.

It is contended that the main reason for this absence is the indifference of Polish society towards tax avoidance. This indifference relates to CSR in two ways. First, the management of corporations are as a rule<sup>65</sup> part of the society in which the corporation operates, and are not immune to the dominant social trends and perceptions. If Polish society is largely undisturbed by tax avoidance (be it for the deficit of knowledge or because paying a fair share in taxes is hardly seen as an important ethical issue<sup>66</sup>), so is the management of the corporation. Second, CSR is the project at the crossroads of business ethics and public relations. CSR as an instrument of ‘wealth creation’ as much as it is a ‘morally correct position’.<sup>67</sup> Corporations engaging in CSR, particularly by using formal CSR tools, seek organizational legitimacy in the eyes of society, as ‘in the long run, those who do not use power in a manner which society considers responsible will tend to lose it.’<sup>68</sup> Accordingly, the CSR agenda is formulated largely in response to public concerns and under social pressure.<sup>69</sup> In the absence of such pressure, the agenda is unlikely to be enriched. In particular, if the potential enrichment would have had to be done by making costly commitments, as tax non-avoidance.

Although the commitment not to avoid taxation was called a ‘missing piece of puzzle’ of the CSR agenda, it is not the case that this omission instantly stands out. The problem is that CSR is not based on any well-structured and firm grounds or explicitly pronounced general principles.<sup>70</sup> It is not built methodically, *more geometrico*, but in an improvised manner or even chaotically, as ‘phenomenal’ (focusing on superficial facets of reality) and modular (joining together various areas of social responsibility that are not interrelated). The central and well-known issue

<sup>62</sup> Ibidem, pp. 14–36, including the Enron case.

<sup>63</sup> It is observed that CSR is used also to minimize reputational damage caused by tax avoidance (see: Ch-K. Hoi, Q. Wu, H. Zhang, op. cit., pp. 5–10).

<sup>64</sup> Empirical studies investigate a possible correlation between tax avoidance and neglecting CSR commitments (if there is any). Cf. L. Preuss, *Tax avoidance and corporate social responsibility: you can't do both, or can you?*, “Corporate Governance” 2010, Vol. 10, No. 4, pp. 365–374, showing that investing in tax havens is correlated with professing fewer CSR commitments; Ch-K. Hoi, Q. Wu, H. Zhang, op. cit., providing evidence that entities ‘socially irresponsible’ tend to be more aggressive in their tax policies.

<sup>65</sup> The foreign decision-makers of Polish resident companies may in turn be uninterested in being more rigorous than Polish society.

<sup>66</sup> There is no place here to discuss the reasons for this indifference, which deserves more than a handful of remarks.

<sup>67</sup> M.A., Gonzalez-Perez, op. cit., p. 9. The ‘business case for CSR’ (ibidem, p. 11) is made quite often.

<sup>68</sup> L. Preuss, op. cit., pp. 366–367.

<sup>69</sup> Cf. J.M. Fisher, op. cit., pp. 360–362.

<sup>70</sup> Cf. G.R. Dowling, op. cit., p. 178: ‘(...) the definitional landscape of CSR is morass.’

of how to identify stakeholders testifies to the unsystematic nature of this project. Against this patchwork backdrop it is not easy to realize that important commitments are left out of the picture.

Another aspect of this absence is that taxation is perceived as unattractive, abstract and technically difficult, whereas the CSR documents preferably present what is immediately appealing, concrete and easy to grasp. What is more, taxation is rarely seen as people- and not state-oriented – and CSR documents like to refer commitments to happy human faces. That is why they readily focus on ‘good practices’ and bring them to the attention of the public in a visually attractive, often flashy way.

How does the above relate to the nature of CSR? The observations that have just been made elucidate features of this project. First, it mirrors social attitudes rather than forges them; it is reactive rather than proactive. Consequently, it cannot be expected that new areas of social sensitivity will emanate from CSR. It always comes second, and emerges through the intermediary of social attitudes. Second, it is constructed bottom-up – from particular examples (at the outset, often by contrast to infamous cases) to the more general, yet always improvised, *ad hoc* principles. Third, it is focused on what is concrete, easy-to-grasp and imaginable. As a result, it risks that important social duties, yet not so apt to be ‘sold’ in a formally attractive way, will be left aside and neglected.

And such is the status of the duty not to avoid taxes.

## 7. Concluding remarks

Prem Sikka is right to claim that ‘(...) the payment of democratically agreed taxes represents a litmus test for claims of social responsibility.’<sup>71</sup> The corporate promise not to avoid taxes should become the flagship commitment of the CSR agenda in Poland.

Regrettably, CSR theory and practice remain fragmented and heterogeneous. Its nature can be adequately illustrated by the image of a gaudy patchwork. Once it is built upon ‘good principles,’ carefully considered and well-structured underpinnings, rather than on eye-catching ‘good practices,’ practical commitments will automatically and uncontroversially follow from the theoretical basis. And, as I believe, the commitment not to avoid taxes will be among them.

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<sup>71</sup> P. Sikka, *op. cit.*, p. 39.

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#### **Companies/corporations included in the empirical study:**

PKN Orlen, Grupa Lotos, TAURON Polska Energia, Orange Polska, Tesco (Polska), Volkswagen Poznań, Bank Zachodni WBK, DB Schenker Logistics, GlaxoSmithKline Pharmaceuticals, Kompania Piwowarska, Danone, Nutricia, Polpharma, ING Bank Śląski, Grupa Żywiec, Coca-Cola HBC Polska, Bank BGŻ, Cemex Polska, Bank Handlowy w Warszawie, Scanned Multimedis, Unilever Polska, Bank BPH, EDF Polska, Grupa Raben, Toyota Motor Manufacturing Poland, Tchibo Warszawa, Provident Polska, Procter & Gamble Polska, Bank Gospodarstwa Krajowego, Carlsberg Polska, OTTO Polska, ABB, Mars Polska, Mondelez Polska, Nestle Polska.