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STUDENT'S NAME: Despoina Sofokleous
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LLM in International Commercial and Business Law

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Supervisor: Dr Marios Koutsias

DISSERTATION

Transnational groups and tax avoidance: Is the relevant law in the U.K., USA and in the EU in need of reform? The cases of Google and Apple

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Abstract

The complex structure of transnational corporations and the inadequacy of the anti-tax avoidance measures introduced by governments, constitute the issue of tax avoidance high in the economic and political agenda globally. Tax avoidance schemes conducted by major multinational corporations caused several concerns to the public, domestic businesses, governments and tax administrations as well as to the respective transnational groups themselves. The compulsory repayment of unpaid tax liability by groups such as Google and Apple had no impact whatsoever on the legislative field. What is even more interesting, is the fact that such tax avoidance schemes are granted unintentionally by legislative instruments and enable the use of specific methods for engagement in tax avoidance schemes. The success of such schemes is not always guaranteed as every year, the number of anti-tax avoidance measures is increased. To explore the issue of tax avoidance, the methods of tax avoidance will be identified and the relevant anti-tax avoidance measures will be demonstrated. The thesis argues that significant reforms are needed when the economy of jurisdictions is at stake.

Introduction:

The objective goal and aspiration of every corporation, regardless of the size, composition and nature, has always been to achieve profitability. During the past decades and up to now, the accomplishment of this goal can be attained through the expansion of corporate activities internationally. Nevertheless, the effective operation of a corporation in multiple jurisdictions, necessitates among other things, knowledge of the respective tax systems to avoid legal and financial incidents. The internationalization exposes corporations to constant tax risks as they are forced to operate under various and often unstable tax regimes. Taxes by definition are compulsory means of transferring the resources of citizens and corporations to the respective state. This compulsory nature, coupled with the fact that they directly reduce the citizens' income and the corporation profits, affect their compliance with the tax system and they stand opposed to the tax regimes; thereby, the phenomenon of tax avoidance and other forms of non-compliance is gradually increasing. Tax avoidance, is carried out in the context of an often complex tax plan, which aims the minimization of tax liability within the law. Tax avoidance schemes are usually characterized by the exploitation of ambiguities or 'loopholes' of tax legislation as opposed to the intentions of the legislator. In addition, in the past few years, mass marketed tax avoidance schemes have cause considerable concern to the public. The public has expressed its opposition to tax avoidance schemes through countless of protests, campaigns and boycotts. Major transnational groups (operating in multiple jurisdictions) are constantly taking advantage of the tax system while they are enabled by law and governments around the globe are constantly introducing measures to tackle such schemes.

The particular thesis aims to examine whether the anti-tax avoidance measures taken by the United Kingdom, United States and Europe, are adequate enough in regards to the elimination of tax avoidance in transnational groups and whether they are in need of reform. In the first chapter, a general background will be given on the concepts of 'tax' and tax avoidance. The thesis will provide the definition of tax and its interpretation with a brief reference on its purpose. Then, the concept of tax avoidance will be analysed in depth. More particularly, its definition and interpretation, the legal or illegal dilemma will be provided while it is going to be differentiated from other forms of non-compliance. In the second chapter, the main methods and strategies of engaging in tax avoidance will be identified such as the misuse of the doctrines of limited liability and separate legal personality, the use of intellectual property and transfer pricing, and they are going to unfold the reasons behind it. In order to identify the extent of the issue of tax avoidance, the thesis will refer to two prominent and controversial case studies, namely the case of Google and Apple which will demonstrate in practise the application of the methods. The examples will also manifest the well-needed urgency for reforms in the tax system. In Chapter 3, the measures taken for counteracting tax avoidance by the UK, the USA and Europe will be identified. Finally, Chapter 4 will evaluate the measures taken by the relevant bodies and establish whether they are adequate enough in preventing tax avoidance schemes from distorting the legal framework and the society in general.

For the purposes of this thesis, there will be a use of both primary and secondary sources. The study will adopt the legal method of analysing case law, statute law, books, articles, journals and other written material. Since references are made on foreign jurisdictions (outside the UK), there are few foreign legal materials including statute law. The study also necessitates the use of online materials as a number of measures and legal rules are currently in the process of being enforced or they will be enforced in the near future.

Chapter 1: The Concept of Tax and Tax Avoidance

The Concept of tax

In most countries in the world, small, medium and large businesses and corporations, individuals and other legal entities are already acquainted with the term 'tax'. It is a universal term which is crucial to the functioning of the economy in a domestic and an international level. But what is tax, what is its purpose and what is the cause of its vital importance? First of all, tax is a generic term; it is subjected to different interpretations in the legal, economic and political environment and it varies among jurisdictions. A common interpretation might be a governmental charge imposed to the citizens' income and corporations' profits. Otherwise is supplemented to transactions, goods and services[1]. The first is regarded as a direct taxation while the latter an indirect method of taxation. In the same view, the interpretative guide of the Organisation for Economic Co-operation and Development (hereinafter

[1] Dine, Janet & Koutsias, Marios, 'The Three Shades of Tax Avoidance of Corporate Groups: Company Law, Ethics and the Multiplicity of Jurisdictions Involved', *European Business Law Review* 30, no. 1 (2019), 151

OECD) interprets the term 'tax' as to be confined to "compulsory, unrequited payment to general government"[2]. The public opinion perceives taxation, as a mandatory and inevitable process; a compulsory contribution to the government that is required to abide with. However, both interpretations have been widely criticized for a number of reasons. First of all, tax is often misled as to being only imposed in incomes and profits. This is of course not true since tax is imposed in almost everything; invested savings, pensions, rents, inheritance and wealth, gains and occupation of property and in exchange of services[3]. There is a great variety of taxes which are equally necessary even though the most profitable to the government is the tax subjected to the income.

Murphy views on taxation are based upon the fact that taxes are anything but compulsory. He claims that even though tax is a concept originally created a few centuries back by the government, government and democracy are concepts that we agreed upon. Since functioning democracy means we have the right to elect and be elected, vote and be voted, we also have the right to influence the democratic process and hence, we are not excluded from the tax-making process[4]. Tax is optional rather compulsory since our consent is evident to the operation of the government; if not, government is not the one to blame. A fact to support this view is the estimated tax gap calculated by Her Majesty's Revenue and Customs (HMRC) which is responsible for the collection of taxes. Tax gap is the difference between the actual amount of tax that should, in theory, be paid and what is actually paid to the HMRC. Between 2017 and 2018, the tax revenues were estimated to 690 billion pounds[5]. Respectively, the tax gap was approximately 34.8 billion pounds and among them, only 3.9 billion pounds were outstanding due to non-payment reasons[6]. Therefore, one might argue that since the amount is significantly small comparing to the tax revenues, most taxpayers willingly conform to their tax liabilities. Tax gap measures the degree of non-compliance which is affected by the willingness of

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[2] OECD, <https://www.oecd-ilibrary.org/taxation/tax/indicator-group/english_76e12892-en> accessed on 15 July 2019

[3] Richard Murphy, *The Joy of Tax*, 30 (Bantam Press, 2015)

[4] Ibid. 31

[5] Helen Miller, Barra Roantree, 'Tax revenues: where does the money come from and what are the next government's challenges?' (Institute for Fiscal Studies, 1 May 2017) <https://www.ifs.org.uk/publications/9178> accessed on 15 July 2019

[6] HMRC, 'Measuring tax gaps 2019 edition: Tax gap estimates for 2017-18' (20 June 2019), 4 at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820979/Measuring_tax_gaps_2019_edition.pdf> accessed on 15 July 2019

taxpayers to comply with their tax liabilities. The compliance is referring to the behaviour of the taxpayer and whether they comply voluntarily or involuntarily.

Purpose of tax

The purpose of the tax also varies. It is considered as a contribution to the revenue of the state in order to enable and complement the operations of the government or the country[7]. One might argue that by having tax liability, we indirectly contribute to the development of public transportation, education, rise of job opportunities, goods and services. The purpose and the spending of the tax along with other non-taxes are reflected each year by the Budget. The Budget (Financial Statement) is a statement which outlines the finance and the economy of the state and proposals for reforming taxation by the Chancellor of the Exchequer to the House of Commons[8]. It also includes predictions for the economy by the Office for Budget Responsibility (ORB). In accordance with the latest Budget of 2018, the main use of the Budget was for social protection purposes. Following, are the health purposes, education, defence, debt interest, public order and safety, transport, personal social services and housing purposes[9]. There is a suggestion that taxation mainly exists for governmental purposes. To meet planned expenditure, raise the revenue of the state, reduce any deficits and consequently, balance their books to prevent deflation. A question may arise regarding the essentiality and the role of taxation in the function of the government. Some may argue that printing, coining or borrowing money could be sufficient to raise the necessary amount for the government's spending, especially in countries with monetary sovereignty over their currencies. If there are other ways to raise the amount needed, why government keeps emphasizing on collecting taxes?

The concept of Tax Avoidance as a form of non-compliance

Since 2012, a lot of public attention has been given on tax related issues. After a number of tax avoidance incidents occurred in major corporate groups, questions were raised regarding the

[7] Dine, Koutsias (n1)
[8] HM Treasury, *Budget 2018*, HC 1629, (October 2018) 4,5
[9] Ibid.

consequences of those incidents, about the flexibility of the law and those who enforce it. Major corporate groups such as Google Inc., Apple Inc., Starbucks Inc. and Amazon.com Inc., through different methods were able not only to commit tax avoidance schemes but they were also successful. Worth mentioning, is the fact that tax avoidance has caused more concerns than any other method of non-compliance.

Definition and Interpretation

In order to understand what tax avoidance is, we also need to take into consideration what it is not; tax planning and tax evasion. There are no statutory definitions or "universally applied legal definitions" and usually, their meaning will be determined by the context they will be used[10]. They are means of minimizing the tax liability, they are forms of non-compliance and usually are being used interchangeably, although they differ. In an effort to define and distinguish their differences, it is necessary to point out that the general idea is that tax planning is completely legal (compliant with the letter and the spirit of the law) and tax evasion is completely illegal. That being said, it is argued that tax avoidance stands somewhere in between them; compliant with the letter of the law, but not with the spirit of the law[11]. However, this is not always the case since ''there will be occasions when the line is a little blurred''.

Tax planning is the legal arrangement of affairs or a planned strategy by which tax efficiency and minimization of tax liability is achieved[12]. It offers an insight of the total taxes of a person or a business will owe after a period of time so more benefits can be presented. It was described as the use of tax reliefs ''for the purpose for which they were intended''. More specifically, the intended purpose is determined by whether the tax reliefs are within the scope and the intentions of the Parliament, within the spirit of the law. For instance, actions such as claiming for tax relief on capital investments, making contributions to a pension scheme or saving in an individual savings account (ISA) where the tax is exempt, are all considered as tax planning. In the UK and USA, it is even encouraged by the HMRC and the IRS (tax authorities) since they provide deductions, benefits and even exemptions

[10] HC Deb 24 May 2006 ccWA111-2
[11] HC Deb 12 July 2010 c706
[12] 'Glossary of Tax Terms' (OECD, Centre for Tax Policy and Administration) <https://www.oecd.org/ctp/glossaryoftaxterms.htm> accessed on 18 July 2019

in many forms of taxation to encourage business investments, secured healthcare and so on. In contrast with tax planning, tax evasion is the illegal act of "deliberately not declaring or accounting what is owed" and the taxable activity is hidden from the tax authorities[13]. To be more specific, tax evasion is the intentional misrepresentation of the tax affairs, either by understating the profits or overstating the losses at the detriment of the government. For instance, a taxpayer receives a certain amount of income but the amount declared to the relevant authority is deliberately different.

To continue with, tax avoidance is the use of tax regimes within the law, in order to eliminate the amount of taxes owed to the government. It can be also considered the action of "bending the rules of the tax system to gain a tax advantage" in a way that the Parliament did not intend[14]. It can be argued that the main difference between tax evasion and tax avoidance, is with the former being illegal and the latter being legal. However, tax avoidance in an aggressive form can be considered illegal. The aggressive form can be determined by whether it is beyond of the intentions of the Parliament. In such cases, actions can be taken so the tax system can be fair and everyone will pay according to their tax threshold[15]. So when does tax avoidance ceases to be legal?

In an attempt to define tax avoidance, Parliament tried to determine the confines of tax avoidance and to set the path for a more coherent understanding of the term. In previous debates, a distinction was drawn between the exploitation of the tax system and simple compliance with the law[16]. It was also established that parliamentary intention is one of the elements that differentiates the forms of non-compliance. Although we can argue that parliamentary intention is what the lawmakers had in mind when enacting a particular statute, its meaning was subjected to criticism[17]. It is a concept which is much debated in legal literature and it should be distinguished from colloquial usage and ordinary language[18]. Lord Nicholls explained further by clarifying that tax avoidance is an objective concept ''which the court reasonably imputes to Parliament in respect of the language used''[19]. Tax avoidance

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[13] HM Treasury, *Tackling tax evasion & avoidance*, Cm 9047 (March 2015) 5 (Box 1.A: Clarifying tax terminology)
[14] HM Treasury, *Tackling tax avoidance, evasion, and other forms of* non-compliance, (March 2019) 7
[15] HM Treasury, *Budget 2018*, HC 1629, (October 2018) 51 (3.76)
[16] Antony Seely, *Tax avoidance and tax evasion* (House of Commons Library Briefing Paper CBP-7948, 2019) < https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7948> accessed on 20 July 2019
[17] Ibid. 6
[18] Ibid. 7
[19] *R v Secretary of State for Environment, Transport and the Regions* [2001] 2 AC 349

is unfamiliar with the subjective opinions of the members involved in the process of the enactment of the legislation[20]. Consequently, it is the parliamentary process producing the text of legislation, whilst the intention is found by the courts in view of the wording of that legislation[21]. Nevertheless, a different dimension to the issue is given by Lord Hoffman who expressed his concerns regarding the role of the HMRC on tax avoidance[22]. His beliefs are based upon the fact that HMRC advise the legislators to produce legislation "by reference to substance rather than form" and therefore, resulting to the incapability of the courts to recognize the economic effect of the transactions[23]. He also claims where this is true, where legal concepts conflict with economic substance, problems occur. The difficulty on countering tax schemes is the precision that they have with the letter of law and this is why he suggests that legislature should demonstrate its intention more clearly[24].

<u>Chapter 2: The Methods of tax avoidance and the Case studies of Google and Apple</u>

Moving on, since we have established a general background on the forms of non-compliance, it is of significant importance to focus on tax avoidance and more specifically, the means as well as the main reasons for participating in such schemes. To provide a coherent description in what exactly businesses and transnational groups engage in, we have to take a step back and consider the foundations of company law. By examining these foundations, we will establish the main component that allows transnational groups to engage in such schemes.

Methods

Limited Liability and Separate Legal Personality

Companies are founded upon two doctrines which are closely linked and they can be regarded as the cornerstones of company law; the principle of separate legal personality and the principle of

[20] Ibid.
[21] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 591 (Lord Reid) at 613
[22] Judith Freeman, 'Interpreting tax statutes: tax avoidance and the intention of the Parliament', Law Quarterly Review 2007 at 72
[23] The Rt Hon. Lord Hoffmann, "Tax Avoidance" [2005] B.T.R. 197 at 206
[24] Freeman (n22) 73

limited liability[25]. Through these doctrines, an incorporated company is to be recognised as a single entity with a separate legal existence distinct from the individuals that compose it. Therefore, it has a capacity similar to a natural person with rights and obligations, and is rendered able to enter into hence, the company will incur any liability.[26] Except from the exclusion of the individuals from any liability in regards of the company's actions, it also functions as a protection shield on their personal assets. Thus, the privileges granted by the doctrines, did not only enable a maximisation of the investments and minimisation of the risks, but also benefited claimants who desire to proceed in legal actions against the company. This is because the approach of taking legal action against the company is easier that trying to identify the members that compose it. In regards to the limited liability doctrine, individuals are only liable for the extent of their investment and contribution to the company. In addition, in a single company, the application and the effect of the doctrines is straightforward. Nevertheless, in corporate groups and especially in transnational groups, things get much more complex.

Firstly, corporate groups and transnational groups are groups of parent and subsidiary companies with the latter operating beyond national level. The concept of transnational groups refers to the integration of businesses into a broader entity that has a financial and administrative unity whilst the parent company exercises central authority over its members. Due to their multi-tier corporate structure, the doctrines grant a further layer of protection to the parent company from its subsidiaries' liability of obligations and the subsidiaries are also protected from liability of the other fragments of the corporate group[27]. However, in transnational groups the protection is even more increased. The reason is that a claimant who seeks to take legal action against the group, will face more difficulties than claiming against a single company due to the multiplicity of jurisdictions involved in the group[28]. Again, that adds to an additional protection on the group which they can take advantage of. The fundamental doctrines which gradually formed the privileges of the corporation world as we know it today, have also been functioning beyond their original objectives[29]. Instead of focussing on the protection of shareholders and investors, they enable corporate groups and transnational groups to 'misuse' the

[25] Phillip I. Blumberg, 'Limited Liability and Corporate Groups', Journal of Corporation Law 11 J. Corp. L. (1985-1986) 574
[26] Amanda Pinto QC & Martin Evans, *Corporate Criminal Liability* (Sweet & Maxwell, 3rd edn) 9
[27] Blumberg (n25) 575
[28] Dine, Koutsias (n1) 156
[29] Blumberg (n25) 575

doctrines in an unethical way. For instance, in the United States, the acquisition of shares of other companies was prohibited and was not acceptable till the end of nineteenth century. As soon as the permission was granted, three large corporations took the opportunity to transform into major multi-tier corporate groups due to this development[30]. Nevertheless, it was well established that the limited liability doctrine expanded in a dramatic way (beyond its original objective of protecting the interests and assets of the company's members) but without any recognition or willingness to address the issue. Today, it is argued that many transnational groups, built their structure in such a way in order to "escape the difficulty, if not the impossibility, of qualifying the parent company as a foreign corporation in a particular state…the avoidance of taxation…the desire for limited liability"[31]. Therefore, in some instances, despite the liability that the parent company will escape, the motive might be the avoidance of taxation. In addition, no one can deny the multiple benefits that the doctrines have to offer; not only to the corporate sector but to the path to an efficient economic system in general. Nevertheless, a re-examination of the doctrines and their application, is an issue of foremost importance and if changed, it could prevent many tax avoidance schemes.

Intellectual Property and Transfer pricing

Intellectual property is regarded as "the leading tax-avoidance vehicle" for transnational groups[32]. They extensively use intellectual property transactions in an attempt to decrease or overall elude from their tax liabilities. Patents, copyrights and trademarks can be easily transferred cross-border through an intellectual property assignment agreement which is the "transfer of an owner's rights, title and interest in certain intellectual property rights"[33]. Unlike tangible property (hardware or assets), intellectual property facilitates tax avoidance schemes due to its nature. Firstly, it can be transferred to a tax haven very easily[34]. A tax haven is the term which refers to a country that imposes very low

[30] Ibid.
[31] William Douglas, Carrol Shanks, 'Insulation from Liability Through Subsidiary Corporations' 39 Yale Law Journal 193 (1929)
[32] Andrew Blair-Stanek, 'Intellectual Property Law Solutions to Tax Avoidance' (2015) 62 UCLA L Rev 2, 4
[33] 'What is the purpose of an intellectual property assignment agreement?' (European IP Helpdesk) <https://www.iprhelpdesk.eu/node/2569> accessed on 21 July 2019
[34] Yariv Brauner, 'Value in the Eye of the Beholder: The Valuation of Intangibles or Transfer Pricing Purposes' (2008) 28 Virginia Tax Review 79, 88

effective tax rates or even no tax rates. Transnational groups often exploit the low taxation in tax havens to avoid tax "which otherwise would be payable in a high-tax country"[35]. Secondly, the distinctiveness of each piece of intellectual property and its nature, constitutes really difficult to establish its precise market value. Thus, transnational groups use and justify their artificial low market values and as a consequence, they acquire really low tax assessments[36]. The mechanisms which are being used and by which the profits are being allocated between the fragments of the group, are the transfer pricing and licensing.

Transfer pricing is a mechanism which facilitates transnational groups with the ability to fluctuate the prices of their goods and services accordingly to their own interests. Concerning single unrelated entities, the terms and conditions, as well as the prices of their goods and services when they trade with each other are set by the market[37]. Nevertheless, in multi-tier groups the prices of the transactions are not necessarily set by the market, but by other factors which aim to the minimization of tax liability and costs. Those prices do not reflect an independent market price[38]. Therefore, through transfer pricing, a group has the ability to allocate its earnings among the subsidiaries accordingly, shift their taxable income and thereby affect its overall tax liability. Moving on, groups also eliminate their tax liability by using licensing fees. More specifically, the tax haven in which the profits of the group are being transferred, usually "licenses all patent rights". Every subsidiary that wishes to trade any of the goods or services under the specific brand, name or trademark, should pay to the 'tax haven' an amount for licensing fees in order to acquire the right to trade. Those licensing fees are subjected to a low tax rate since they are being given by a low tax country. Furthermore, all the patents' profits earned by the subsidiaries, will be accumulated to the tax haven, along with some other costs which we will be deducted once again from their tax liability[39]. Therefore, transfer pricing is one of the most common methods for tax avoidance schemes and this is why is a major concern for tax authorities. Nevertheless, it should not be always associated with tax related schemes; but in some instances, it is used for such purposes. Its use may result in the deduction of taxable profits in every jurisdiction involved[40] and since

[35] OECD Glossary (n12)
[36] Blair-Stanek (n32) 5
[37] Dine, Koutsias (n1) 167
[38] European Commission, 'Transfer pricing in the EU context', Taxation and Customs Union <https://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context_en> accessed on 21 July 2019
[39] Dine, Koutsias (n1) 167
[40] European Commission (n38)

it concerns mainly transnational groups, it is rational to assume that the amount of the unpaid tax liability is usually considerable.

Arm's Length Principle

The extended use of transfer pricing has caused several concerns, to the point that a principle was introduced in an international basis; the so called "arm's length" principle. The principle "represents the international consensus on the valuation, for income tax purposes, of cross-border transactions between associated enterprises"[41]. It is the transfer pricing standard that the member countries of the Organisation for Economic Co-operation and Development (hereinafter OECD) have agreed upon to use, in order to substantiate the prices in intra-group transactions. The main objectives of the principle are the correction of any distortions arising when prices do not reflect the market values, the prevention of any tax advantages or disadvantages, the maintenance of fairness between all corporate entities[42] as well as the promotion of the growth of international trade and investment.[43] The principle is being defined by Article 9 of the OECD Model Tax Convention. "Conditions (prices but not only) are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly"[44]. In other words, a transaction between related parties (companies within the same group) is consistent with the principle, if the subsequent profits are equivalent to the profits that would be obtained by independent parties, if they carried out similar transactions under the same circumstances. The arm's length principle is implemented in the form of royalties; a payment from the parent company to the subsidiary established

[41] 'OECD releases latest updates to the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' (OECD, 10 July 2017) < https://www.oecd.org/tax/oecd-releases-latest-updates-to-the-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations.htm> accessed on 22 July 2019

[42] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, Chapter 1: The Arm's Length Principle (2017), 34 at: <https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_tpg-2017-en#page39> accessed on 22 July 2019

[43] Ibid. 36

[44] OECD Model Tax Convention, Articles of the Model Convention with respect to taxes on income and on capital, Art. 9

in the low tax country for the use of its intellectual property[45]. Nevertheless, tax authorities should “not automatically assume that associated enterprises have sought to manipulate their profits”[46]. There might be other elements affecting the ability of the enterprises in the group to establish a price that it is determined by the market. At this point, it is important to mention that OECD drafted some guidelines which includes the application of transfer pricing as well as the arm’s length principle. Throughout the guidelines, there are many provisions which do not compel the immediate intervention when non-compliant practices occur; hence the groups, can take advantage of the guidelines as a mean of justifying their prices once again. In addition, the OECD guidelines is a piece of soft law without any strict or definite provisions. Member countries are not obliged to comply with the guidelines but they are advised to do so in order to avoid any disputes. Other attempts of tackling tax avoidance will be identified at a later stage.

Case Studies

The following case studies, will provide an illustration of the aforementioned methods that transnational groups use in order to engage in tax avoidance schemes. They will also demonstrate certain patterns of behavior that it are similar among many transnational groups and thus, they will indicate the extent and the severity of the tax avoidance issue. Nevertheless, before analyzing the case studies, it is essential to note and highlight the role of Ireland in the tax avoidance context and to provide a background on its taxation policies.

Ireland as a ‘tax haven’

As it will be seen, Ireland played a key role in two of the most controversial and immense tax avoidance schemes of the past few years. Ireland is considered one of the tax havens due to the its taxation rates and economic policies. According to a Working Paper by the National Bureau of Economic Research – an American nonprofit economic research organization – there are many other

[45] Dine, Koutsias (n1) 167
[46] OECD Guidelines (n42) 33

countries which have been considered as 'tax havens' throughout the years and among others, Luxembourg, Netherlands, Switzerland, Singapore, Bermuda and Caribbean havens[47]. The corporate tax rate in Ireland is currently 12.5%[48] which is amongst the lowest in Europe[49], whilst in the UK is currently 19%[50] and in the USA is currently 21% (after the enforcement of the Tax Cuts and Jobs Act)[51]. It may also be argued that Ireland is not a tax haven. Despite the views of some academics who characterize Ireland as a tax haven, Ireland is fully compliant with the criteria established by the OECD on what constitutes a tax haven. Since there is no legal and definite interpretation of the term 'tax haven', these criteria function as an alternative definition depending on the degree of compliance. In any case, the characterization of Ireland as tax haven or not, does not change the fact that transnational groups can take advantage of the benefits provided by the country and it is still regarded as an attractive destination for either investments or establishing a company[52].

The Case of Google

One of the main controversial tax avoidance schemes is the case of Google LLC since it ended up "with stateless income, nowhere taxed"[53]. Google LLC is one of the biggest and well-known online services, computer software and web search engine corporations in the world with hundreds of subsidiaries around the globe. In 2017, Google announced plans of reforming and rearranging its structure and status from a corporation to a limited liability company since Alphabet Inc. acquired the web search giant. Google LLC's strategy in their controversial tax avoidance scheme was the so called "Double Irish Dutch Sandwich". It is the tax strategy in which the company has legal residence in one

[47] Thomas Wright, Gabriel Zucman, 'The Exorbitant Tax Privilege' (2018) National Bureau of Economic Research, NBER Working Paper Series, Working Paper 24983

[48] Irish Tax and Customs, <https://revenue.ie/en/companies-and-charities/corporation-tax-for-companies/corporation-tax/basis-of-charge.aspx> accessed on 22 July 2019

[49] European Commission, <https://ec.europa.eu/ireland/news/key-eu-policy-areas/taxation_en> accessed on 22 July 2019

[50] 'Rates and allowances: Corporation Tax' (HM Revenue and Customs, 10 June 2019) <https://www.gov.uk/government/publications/rates-and-allowances-corporation-tax/rates-and-allowances-corporation-tax> accessed on 22 July 2019

[51] Tax Cut and Jobs Act (TCJA) 2017, H. R. 1—43, s. 13001 (b)

[52] Gary Tobin, Keith Walsh, 'What Makes a Country a Tax Haven? An Assessment of International Standards Shows Why Ireland Is Not a Tax Haven' (2013) 44 (3) The Economic and Social Review, 401-424, 413

[53] Gabriel Zucman, 'Taxing across Borders: Tracking Personal Wealth and Corporate Profits' (2014) 28 (4) Journal of Economic Perspectives 121–148, 126

country but location for tax purposes is another country[54]. This technique involves the arrangement of transactions (intellectual property) between subsidiary companies established both in Ireland and in the Netherlands[55]. Then, transnational groups can shift their profits from one subsidiary to the other in order to exploit the low tax rate or the no tax rate of the jurisdictions.

In 2003, before its initial public offering, the then, Google Inc. entered into an agreement with an Irish subsidiary (Google Ireland Holdings) in order to transfer a part of its intellectual property and rights for its search and advertising technologies regarding the regions of Europe, Africa and Middle East. Despite the fact that the subsidiary was incorporated in Ireland, it was managed in Bermuda[56]. Therefore, the residency of the subsidiary for tax purposes is in Bermuda where the corporate tax is at 0% tax rate. Another Irish subsidiary came into the scene, the Ireland Limited which possessed the license for the technologies of Google Inc.[57] To be more specific, any subsidiary or affiliate of Google Inc. in Europe, Africa and Middle East was granted a permission to use the company's intellectual property and technologies only by acquiring the appropriate license from the Ireland Limited. The process for obtaining license for their own use, was by paying royalties to the new subsidiary and thus, all the profits from the aforementioned regions were being taxed on the Ireland's low corporate tax rate[58]. The next step of the strategy, is to transfer the profits from Ireland to Bermuda where the corporate tax rate is at 0%. It was made possible by directing Ireland Limited to pay royalties to the subsidiary in Bermuda (Google Ireland Holdings) so they could lessen their tax liability even more. At this point, it is important to note that since 2003, a Directive is in force regulating matters on taxation of cross-border interest and royalty payments in the EU[59]. The Directive abolished "any withholding taxes on royalty payments arising in a Member State, provided that the beneficial owner of the payment is a company or permanent establishment in another Member State"[60]. In other words, Members States shall not impose any taxation on royalty payments between them. For this reason, Ireland Limited

[54] Jim Stewart, 'MNE tax strategies and Ireland' (2018) 14 (4) Critical Perspectives on International Business 338-361, 347
[55] Edward Kleinbard, 'Stateless Income' (2011) 11 (9) Florida Tax Review 699-774, 708
[56] Ibid.
[57] Zucman (n53) 125
[58] Kleinbard (n55)
[59] COUNCIL DIRECTIVE 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, Art. 1 (1)
[60] European Commission, <https://ec.europa.eu/taxation_customs/business/company-tax/taxation-crossborder-interest-royalty-payments-eu-union_en> accessed on 3 August 2019

exploited this fact and instead of paying royalties plus taxation for transferring their profits to Bermuda, made a royalty payment to a shell company in Netherlands (Google BV)[61]. Therefore, the payment was not subjected to any tax. A shell company is basically non-existent; it exists only for financial purposes with usually no employees, offices or any business activity. To continue with, Google BV transferred everything back to Google Ireland Holdings because again, the incorporation was in Ireland even though it was managed in Bermuda and hence, the royalty payment was tax-free[62].

Another important element of the strategy is the exploitation of the US law. Among other countries, USA have enforced through legislation 'controlled foreign corporations' (CFC) rules[63]. The objective of the rules is to confine "the tax deferral advantages of United States corporations operating businesses overseas through foreign corporations"[64]. It can be argued that it is a set of anti-tax avoidance rules but with a few 'loopholes' which can be used in contrary with their objective. For example, a company by establishing an 'entity classification election' can change the way it is being treated for US tax purposes and 'disappear', while maintaining its status for other financial matters[65]. Therefore, Ireland Limited and Google BV, were not regarded as companies by US law but as divisions of Google Ireland Holdings and thus, their corporate existence was only perceived by Europe. For tax purposes, Ireland perceived Google Ireland Holdings as a tax resident of Bermuda, and USA as a tax resident of Ireland[66]. Therefore, by taking advantage the contradictory and conflicting tax residencies rules and tax treaties by both jurisdictions, Google Inc. managed to claim 'stateless' status and thereby, its income was not subjected to any tax[67].

By conducting this tax strategy, in the period of 2006 to 2011, Google Inc. has managed to pay \$16 million in corporation taxes in UK while generating the outstanding amount of \$18 billion in sales which is equivalent to 0.1% tax rate and the 13% of their overall global sales[68]. In accordance with the Committee of Public Accounts, Google Inc., defended its position by stating that it was compliant with

[61] Zucman (n53)
[62] Ibid.
[63] Ibid.
[64] Melissa Redmiles and Jason Wenrich, 'A History of Controlled Foreign Corporations and the Foreign Tax Credit' (2007) 27 (1) Statistics of Income Bulletin, U.S. Government Printing Office 129-135, 132
[65] 'About Form 8832, Entity Classification Election' (Internal Revenue Service) <https://www.irs.gov/forms-pubs/about-form-8832> accessed on 3 August 2019
[66] Zucman (n53)
[67] Kleinbard (n55) 711
[68] Stewart (n54) 347

all the relevant laws and “paid the tax required by every company in every country in which it operates”[69]. The main argument of the company was “deeply unconvincing” to the Committee since they argued that Google’s sales in UK clients was taking place in Ireland. The Committee was aware that the sales are billed in Ireland; however, most of the profits were attributed to UK staff[70]. After the demonstration of evidence by both parties, the Committee concluded that the action of processing the sales through the Irish subsidiary “has no purpose other than to avoid UK corporation tax” and they also asserted that the role of the Irish subsidiary is very narrow. In addition, they affirmed that based on evidence, most of the sales were actually conducted in UK, regardless of the allegation that they were conducted in Ireland; especially when the sales were in pound sterling and the payments in British banks[71]. Again, in 2012, Google managed to pay only a tax liability of £11.6 million to the UK Treasury, despite earning the amount of £3.4 billion of conducting business in the UK.

More recently, in 2014, the Irish government decided to ban the ‘Double Irish Dutch Sandwich’ strategy after European pressures emerged. It was announced by the former Irish Finance Minister Michael Noonan that Ireland planned on changing their tax residency rules so as to avoid tax planning and tax avoidance schemes; it was enforced in the Budget 2015. More specifically, as of January 2015, companies were no longer allowed to engage in the strategy; companies already engaging in the strategy were given a 5-year period to stop those practices[72]. However, despite the fact that Ireland provided clearly and announced publicly its intention on to the abolishment of the ‘Double Irish’, Google Inc. persisted on practicing this strategy in the following years. It is reported that in 2016, Google transferred the amount of $19.2 billion to its subsidiary in Bermuda and thereby, escaped approximately the extraordinary amount of $3.7 billion in taxes[73]. The same year, the group was fined the amount of £130 million as a compensation for underpaying its UK taxes for at least a decade and got into a deal

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[69] Committee of Public Accounts, *Tax avoidance – Google, Ninth Report* (HC 2013-14, 112) 7, at: <https://publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/112/112.pdf> accessed on 5 August 2019
[70] Ibid. 5
[71] Ibid. 10
[72] ‘Full text: Michael Noonan’s Budget 2015 speech’ (The Irish Times, 14 October 2014) <https://www.irishtimes.com/business/economy/full-text-michael-noonan-s-budget-2015-speech-1.1962981> accessed on 5 August 2019
[73] ‘‘Double Irish’ and ‘Dutch Sandwich’ saved Google $3.7bn in tax in 2016 ‘ (Irish Times, 2 January 2018) <https://www.irishtimes.com/business/economy/double-irish-and-dutch-sandwich-saved-google-3-7bn-in-tax-in-2016-1.3343205> accessed on 5 August 2019

by which it will face a greater tax burden in the future. Many have disagreed with the amount that Google paid to the UK since it can be considered too ''tiny'' and ''way short'' in proportion to the profits that it had generated during the particular period of time. Furthermore, the group is still under a lot of scrutiny for using its complex structure and escaping its tax liabilities[74]. In 2017, after a six-year battle in the courts between Google and French tax authorities, it was held by the Paris Administrative Court, that Google's parent company should not pay the $1.2 billion that was claimed. The tax authorities' argument was based on the fact that the parent company (Alphabet Inc.) and its Irish subsidiary (Google Ireland Limited), had been "selling a service for inserting online ads to clients in France for years through its Google search engine" from 2005 to 2010[75]. Nevertheless, the court argued that there were no permanent establishments of Google Ireland Limited in France via Google France (also subsidiary of Google) -under Article 4 (1) of the France-Ireland taxation treaty[76]- and thus, it is not to be imposed French taxes. In addition, it was indicated that Google France did not acquire "the human resources or the technical means" to act respectively on its own[77]. The French government appealed the decision of the Paris Administrative Court and in April 2019, the previous decision was approved by the Paris Administrative Court of Appeal in the same manner.

The case of Apple

As we have already established, one of the most attractive destinations for the implementation of tax strategies is Ireland. Another transnational group which found itself in the center of attention for many years is Apple Inc.; one of the largest technological companies in the world along with Google LLC. Strangely enough, the group was engaging for many years in the well-known 'Double Irish and Dutch Sandwich' scheme. It managed to avoid billions and billions of dollars during the years of operating in that manner. To begin with, Apple Inc. established in Ireland two subsidiaries; the Apple

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[74] Kevin Rawlinson, 'Google agrees to pay British authorities £130m in back taxes' *The Guardian* (London, 22 January 2016) <https://www.theguardian.com/technology/2016/jan/22/google-agrees-to-pay-hmrc-130m-in-back-taxes> accessed on 5 August 2019

[75] Dominic Rushe, 'Google ducks $1.27bn bill for back taxes in France' *The Guardian* (London, 13 July 2017) <https://www.theguardian.com/technology/2017/jul/12/google-taxes-france-ruling> accessed on 5 August 2019

[76] Double Taxation Treaty between Ireland and France for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, Art. 4(1)

[77] Rushe (n75)

Operations Europe (AOE) and the Apples Sales International (ASI)[78]. The former, functions as a provider of services in the 'EMEA' (Europe, Middle East and Africa) while the latter functions as a provider and distributor of Apple goods. ASI is fully owned 100% by AOE. The US Senate Permanent Subcommittee on Investigations had offered a description of the main activities of ASI. It was provided that ASI enters into a contract with a company in China regarding the production of Apple's goods. Then, the finished goods are shipped from China and while they are still in transit, ASI makes a payment for the goods and in this way, acquires the initial title of the goods. At this point, ASI resales the goods to the "appropriate distribution entity, in most cases without taking physical possession of the goods in Ireland"[79]. Thus, Apple has managed to set up its structure in such a way, that consumers in the EMEA, were entering into contract with ASI instead of the particular shop in the respective country. In this way, all the profits were allocated to ASI even though the goods had no physical presence in Ireland[80].

Both subsidiaries have the right to sell intellectual property of Apple Inc. in other subsidiaries outside the USA under an agreement with the parent company while Apple Inc. remains with the legal ownership. This constitutes to yearly payments from both the subsidiaries to Apple Inc. to "fund research and development efforts conducted on behalf of the Irish companies in the US"[81]. In 2011, there is an estimated amount of $2 billion dollars on these payments and it was gradually increased[82]. However, these payments enabled the funding of more than half of all research by the group in the USA in order to enhance its intellectual property even more. Of course, these payments are deductible from the subsidiaries' revenues since expenses for research purposes are not to be subjected to any tax. Therefore, the taxable profits of the subsidiaries in Ireland is much lower.

To continue with, the taxable income of the two subsidiaries were determined by two tax rulings issued by the Irish tax authorities; the one being in 1997 and the second one in 2007 (until 2015 when Ireland enforced a different corporate structure). The particular tax rulings were agreements between

[78] Dine, Koutsias (n1) 173
[79] Steward (n54) 345-346
[80] Argyro Myzithra, 'Apple – Ireland and European Union State Aid Rules' Kerschner, Somare (Eds), *Taxation in a Global Digital Economy,* vol. 107 (Series on International Tax Law, Linde 2017) 450
[81] Dine, Koutsias (n1) 173
[82] European Commission Press Release IP/16/2923, 'State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion' (2016) at: <https://europa.eu/rapid/press-release_IP-16-2923_en.htm> accessed on 13 August 2019

Ireland and the two subsidiaries as methods of calculating the internal allocation of their profits[83]. The importance of these arrangements lays upon the fact that all the subsequent profits from the EMEA region flowed through Ireland and ASI. According to the provisions of both rulings, most ASI's profits would be attributed to the country of residence of the 'home office' to be taxed and only a sum of the remaining profits would be taxable in Ireland[84]. This is because under Irish law, a company is resident for tax purposes if it is centrally managed and controlled in Ireland, irrespective of the country of incorporation. In the USA, a company must be incorporated in the country regardless of its management or control. Hence, the Irish subsidiaries are not tax residents in Ireland nor in the USA and they are being treated for tax purposes as 'stateless' companies[85]. The issue here, is the fact that the 'home office' of ASI was non-existent in a physical manner, there were no offices, no employees or location. Therefore, the minority of the profits attributable to Ireland were taxed while the majority of the profits were not subject to tax. Due to those arrangements, Apple ended up paying an effective corporate tax rate of 1% in 2003 and 0.005% in 2014 on the profits of ASI instead of the 12.5% tax rate. It was also established that the same scheme of tax avoidance was almost identical with the AOE.[86] Again, there is an exploitation of both Irish and US laws.

In 2014, the European Commission had announced its plans of conducting a formal investigation on transnational groups and their practices for tax purposes. The European Commission conducted the investigation following the investigation of the US Senate Subcommittee in 2013[87]. The Subcommittee called Tim Cook (CEO of Apple Inc.) to testify regarding Apple's tax practices in their Irish subsidiaries. A few weeks after the testimony, the European Commission called Ireland to provide information regarding its tax ruling practice; in respect of the ASI and AOE Apple's Inc. subsidiaries, as well as of any other resident company conducting similar activities. Ireland submitted information for non-resident companies and the Commission requested detailed information of those tax rulings as well as all the tax rulings for the years 2010, 2011 and 2012. Then again, Ireland delivered all the necessary information but the Commission requested the Apple's rulings of 1991 and 2007. After the examination

[83] Theodore F. Disalvo, 'The Apple-Ireland Tax Case: Three Stories on Sovereign Power' (2018) 28 Duke Journal of Comparative & International Law 372-383, 374
[84] Ibid.
[85] Myzithra (n80) 449
[86] European Commission Press Release IP/16/2923 (n82)
[87] Disalvo (n83) 372

of the evidence, the Commission informed that it would conduct a formal investigation of the tax rulings issued by the Irish tax authorities in 1991 and 2007 in favor of ASI and AOE, and identify whether these rulings constituted a new state aid[88]. More specifically, state aid is within the purpose of Article 107 of the Treaty of the Functioning of the European Union. Article 107 (1) TFEU prohibits "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring…in so far as it affects trade between Member States, be incompatible with the internal market"[89]. The Article also identifies a list of compatible aids and potential compatible aids within the internal market.

In its findings, European Commission made a preliminary conclusion that the two rulings, enabled lower tax liabilities and thus, can be considered as advantage over other companies based on Article 107 (1) TFEU. More specifically, the advantage was found to be 'selective' since it involved only the Apple's Inc. subsidiaries and ''it puts those undertakings in a more favourable position than other undertakings that are in a comparable factual and legal position''[90]. In addition, the Commission also established that this position was enabled by the Irish tax authorities and it went beyond the simple management of tax revenue. Moreover, the Commission determined that the internal allocation of profits within ASI and AOE was artificial, with no factual or economic justification[91]. Consequently, Ireland was in breach of Article 107 (1) and incompatible with Article 107 (2) and (3) which constitutes to a State aid[92]. Another important element of the decision, is that the Apple's strategies of allocating its profits to ASI and AOE did not appear to comply with the arm's length principle. More specifically, since transfer prices in the group, do not reflect those which would have been in under similar circumstances in unrelated companies, the application of the arm's length principle is absent and a selective advantage on that company is conferred. In addition, the arm's length principle functions as a determinant factor of whether a company obtains a selective advantage due to its ability to reveal the

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[88] 2017, O.J. (L 187) Commission Decision (EU) 2017/1283 of 30 August 2016 on State aid SA. 38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple, 1 at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL%3A2017%3A187%3ATOC#document1> accessed on 13 August 2019
[89] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2008] OJ C 115/91, Article 107 (1)
[90] OJ (L 187) (n88) Recital 150
[91] European Commission (n82)
[92] OJ (L 187) (n85) Recital 151

taxable base[93]. It was also concluded that Ireland negotiated a “special tax treatment” with Apple in its 1991 tax ruling (between 0.05% and 2% instead of 12.5%) rather than substantiated by reference to comparable transactions[94]. The tax rulings assisted Apple in paying significantly less tax than other companies, which is illegal under EU state aid rules. But most importantly, Ireland was found non-compliant with Article 108 (3). The provision of the Article provides that any Member State who wish to grant or alter aid, shall inform the Commission so it can review whether the aid is compatible with the internal market. Then, the aid cannot be put into effect until the Commission provides a final decision[95]. Ireland failed to comply since the Commission was not aware of the aid and certainly was unable to review the aid before coming into effect[96].

Once those evidence on the tax techniques of Apple Inc. emerged and the subsequent breach of Article 108 (3), the Commission pursued a ‘recovery’ by virtue of Article 16 of Regulation (EU) 2015/1589 concerning the granting of illegal state aid by tax rulings, from Ireland towards ASI and AOE[97]. The Article provides that “fines and periodic penalty payments are not applicable to Member States, since they are under a duty to cooperate sincerely…and to provide the Commission with all information required to allow it to carry out its duties under this Regulation”[98]. At the point that the Article was enforced in 2016, the Commission decided that Ireland had to recover the amount of €13 billion plus interest for granting illegal tax benefits to the Apple’s Inc. Irish subsidiaries for the period of 2003 till 2014. By the end of 2017, Ireland failed to pay the required amount for the illegal state aid and the European Commission referred the case to the European Court of Justice. Both Apple and Ireland had appealed the decision of the European Commission but unfortunately for the two parties, the appeal was not successful. Therefore, in 2018, the European Commission withdrew the case against Ireland after the payment of €14.3 billion (with interest being €1.3 billion) had been made[99].

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[93] Ibid. Recital 249

[94] Rita Barrera and Jessica Bustamante, ‘The Rotten Apple: Tax Avoidance in Ireland’ (2018) 32 (1) The International Trade Journal, 150-161, 152

[95] TFEU (n89) Article 108 (3)

[96] OJ (L187) (n88) Recital 424

[97] Ibid. Recital 452

[98] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L 248/9, Article 16

[99] European Commission, ‘State aid: Commission decides to withdraw Court action against Ireland for failure to recover illegal aid to Apple’ <https://ec.europa.eu/ireland/news/state-aid-commission-decides-withdraw-court-action-against-ireland-failure-recover-illegal-aid_en> accessed on 14 August 2019

Chapter 3: The Reforms and the Anti-Tax Avoidance Measures in the UK, USA AND EU

Throughout the chapter, an analysis was given on the forms of non-compliance and more specifically, on tax strategies of transnational groups with the aim of avoiding tax liability. Google LLC and Apple Inc. as prominent and illustrative examples, provided an insight of the issue of tax avoidance. To continue with, a more detailed approach on tax avoidance also necessitates the effect that those schemes have, in order to identify the extent of the issue.

Effect of tax avoidance

One of the foremost effects of tax avoidance is the significant loss of governmental revenues. Tax revenue is a vital component for the operations of the government. It is essential for meeting its expenditures, reduce any deficits and for providing the essential services to the public as in every developed economy. When transnational groups avoid tax liability through different corporate tax strategies, the amount of the tax liability remains unpaid. Thus, it is rational to assume that if the tax gap (including the unpaid tax liabilities) is too high, government have the ability to implement budget cuts, increased taxes and other measures it thinks fit in order to maintain its stability. Therefore, the tax liability is indirectly shifted to the citizens who are affected in a great extent. Not only they will be affected by such measures, but they will also be discouraged from complying with their own tax liability. Moreover, during the past decade, citizens have expressed their opposition with tax avoidance schemes through countless of protests, campaigns and boycotts. The excessive use of tax avoidance has also a considerable impact on small businesses. While transnational groups operate in a debatable moral manner and practice tax avoidance schemes which are indirectly enabled by the government, small businesses end up paying more than their fair share of tax liability. They also can get discouraged and engage if not in similar, in alternative or more suitable for them schemes. It is obvious that there is an urgency to alter the existent laws and introduce measures specifically targeted on tax avoidance schemes and the people behind it. The nature of tax avoidance, it is indeed questionable. Although legal, the manipulation of the institutional structures does not only raises concerns about its morality, but also about its economic and social impact which is clearly detrimental. The worst part is the fact that company law, does not only enable such schemes to operate, but also provides the legal tools which can be used or exploited by transnational groups and thereby, they are sowing the seeds of inequality while undermining the legal system. It is therefore undeniable, that there is a need for radical reforms.

As we have established, there is an immense urgency for reforms. Nevertheless, throughout the years, governments and organizations have addressed the issue of tax avoidance and other forms of non-compliance and there were constant attempts to establish measures, rules and legislation for tackling schemes which derived from the misuse of the legal system. In the following chapter, those attempts will be explained and analyzed with the main focus being in the United Kingdom, the United States of America and Europe.

United Kingdom

Initial attempts and the enforcement of DOTAS

In the United Kingdom, tax law has been targeted rather than purposive; in counteracting the exploitation of loopholes in the law, governments have legislated against individual avoidance schemes as and when these have come to light. Often the response to this legislation has been the creation of new schemes to circumvent the law, which in turn has seen further legislation[100]. In order to challenge this market, measures on countering tax avoidance have been emerging since the 1920's. More specifically, the incapability of the then, tax authorities to prosecute the taxpayers who avoided their tax liability followed by the absence of effective anti-tax avoidance legislation. Thus, loopholes were generated which eventually were decreased by the relevant bodies[101]. Throughout the years, there were many attempts on tackling tax avoidance; however, since the 1990's, the increased amount of cross-border activity contributed significantly in the development of new measures. In the late 1990's the Labour Government consulted on a general anti-avoidance rule but it was rejected. The increasing numbers of tax avoidance schemes triggered the Government into reexamining the idea of drafting new measures and by 2004, the government officially announced the formation of a new 'disclosure regime',

[100] Parliament, 'Government statement on tax avoidance, evasion and compliance' <https://www.parliament.uk/business/news/2019/march/statement-on-tax-avoidance-evasion-and-compliance/> accessed on 29 August 2019

[101] Edward Troup, 'Unacceptable Discretion: Countering Tax Avoidance and Preserving the Rights of the Individual' (1992) 13(4) Fiscal Studies, 128-138, 130

the DOTAS[102]. DOTAS (Disclosure of Tax Avoidance Schemes) is a set of rules aiming to provide early information to HMRC regarding tax avoidance schemes. Any 'promoters' who intend to sell tax avoidance schemes, need to disclose the relevant information to the HMRC before they derived to the taxpayers[103]. The necessity of the regime is to provide the ability to the HMRC to track the schemes which operate, the ability to assess whether a scheme does not operate in the intended way and identify any loopholes that can be exploited by any such schemes.[104]

The General Anti-Abuse Rule (GAAR) and the 'Follower notices & accelerated payments'

Following the DOTAS, the government initiated the General Anti-Abuse Rule (GAAR) in 2013. The main policy objective of the GAAR ''is to deter taxpayers from entering into abusive arrangements, and to deter would-be promoters from promoting such arrangements.'' Abusive arrangement within the scope of the rule, is the arrangement which "…cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions..."[105]. In addition, it focuses on the counteraction of intended tax advantages arising from tax arrangements that are abusive. HMRC has the capacity to challenge these arrangements in their own discretion on the basis of other pieces of legislation, but if they cannot be classified as abusive, then they fall outside of the scope of the GAAR[106]. In the case where an abusive tax avoidance arrangement is in force, GAAR opposes to that arrangement and provides a 'just and reasonable' tax adjustment[107]. Nevertheless, the narrow scope of the rule constitutes difficult its application on something broader than abusive arrangements. Therefore, a consultation has taken place ('Raising the Stakes on Tax Avoidance') in summer of 2013 and another one ('Tackling Marketed Tax Avoidance') in 2014 in an attempt to introduce measures with a broader nature and target specifically tax avoidance schemes. Both consultations intended in challenging such schemes and changing the people and promoters conduct in relation to tax avoidance. This led to the announcement of a new set of measures called 'Follower notices & accelerated payments' which were

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[102] Antony Seely, Tax avoidance and tax evasion, House of Commons Library Briefing Paper no. 7948 (May 2019) 4 at: < https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7948#fullreport> accessed on 20 August 2019

[103] Ibid.

[104] Ibid.

[105] Finance Act 2013, s.207 (2) – (6)

[106] HM Revenue and Customs, ''General anti-abuse rule (GAAR) guidance'' Part B, 6 at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695255/gaar_parts_a_b_c_2018.pdf> accessed on 21 August 2019

[107] Ibid.

eventually enacted in the Finance Act 2014 and the National Insurance Contributions Act 2015. Follower notice for the purpose of the Act, is a notice given by the HMRC to a person "who has used an avoidance scheme that has been shown in another person's litigation to be ineffective"[108]. Certain requirements need to be met and if no action is taken before the time given by the Act, the person is subjected to penalties[109] as laid down in the sections 209-212 of the Act[110]. In addition, accelerated payments for the purpose of the Act, are given to a person who engaged in a tax avoidance scheme and fulfil one or more conditions. These are namely, the person acquires a follower notice as well, the person already used a DOTAS notifiable arrangement or the person is subject to a GAAR counteraction notice. The accelerated payment is actually providing that the respective person must pay the necessary amount for engaging in such schemes[111].

Recent attempts

In addition, all the aforementioned measures were altered and strengthen in the following years by other measures such as the Finance Bill 2016, the implementation of the OECD Action Plans and so on. In its Budget 2018, the government announced a set of measures targeting tax avoidance and other forms of non-compliance. More specifically, it was announced that from April 2020 a new form of tax will be presented, the Digital Services tax (DST). This form of tax, will apply on certain digital corporations which their incomes will be subjected on a tax rate of 2% in order to ensure that the tax paid by the corporations is reflective of the derived value from the UK citizens. It will be imposed on "search engines, social media platforms and online marketplaces" which are closely linked to UK users. A more detailed approach will be discussed in the Finance Bill 2019-20[112].

Furthermore, of significant importance is the legislation drafted in the Finance Bill of 2018-19 and enforced in April 2019 namely, 'offshore receipts in respect of intangible property'. Based on the principles, the government taxes the income derived from intangible property (including intellectual property) which is being earned in low-tax jurisdictions and concern UK sales. Instead of the application

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[108] HMRC, 'Guidance on Follower notices and accelerated payments' <https://www.gov.uk/government/publications/follower-notices-and-accelerated-payments/follower-notices-and-accelerated-payments> accessed on 21 August 2019

[109] Finance Act 2014, s. 208 (2)

[110] Ibid. s. 209 – 212

[111] Ibid. s. 219

[112] HM Treasure, *Budget 2018,* HC 1629 (October 2018) 44

of withholding tax, the tax is being collected directly from the offshore corporations. Moreover, the meaning of income for the purpose of the measure also covers income arising from the "indirect exploitation of intangible property in the UK market through unrelated parties" and embedded royalties. However, it applies only to UK sales with a total value exceeding the £10 million but with some exceptions. A set of anti-avoidance principles is also provided, with the aim to prevent arrangements from exploiting the measure to avoid charges[113].

In an attempt to extend the legal framework addressing tax avoidance schemes, the Government decided to publish an updated version of the 'Offshore tax compliance strategy' of 2014. In the publication (earlier this year), the substantial progress of the UK in eliminating and countering non-compliance schemes is noted.

United States

The Subpart F Rules

United States have introduced its first set of anti-tax avoidance measures, Subpart F Rules in 1962 (modified in 1986). The rules were enacted "to prevent (or negate the tax advantage from) deflection of income, either from the United States or from the foreign country in which earned, into another jurisdiction which is a tax haven or which has a preferential tax regime for certain types of income.[114]" In other words, the aim of the rules is to prevent taxpayers and corporations from artificially deferring their income through foreign corporations, established in low or no-tax jurisdictions. Prior the enactment of the rules, many taxpayers and corporations engaged in such deferral schemes with the intention to reduce their tax liability and thus, the Congress attempted to restrict such practices by enacting the particular rules[115].

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[113] Ibid. 45

[114] Office of Tax Policy Department of the Treasury, 'The Deferral of Income Earned Through U.S. Controlled Foreign Corporations: A Policy Study' (2000) xii at <https://www.treasury.gov/resource-center/tax-policy/Documents/Report-SubpartF-2000.pdf> accessed on 28 August 2019

[115] LB&I International Practice Service Concept Unit, 'Subpart F Overview', Internal Revenue Service Department of the Treasury (2013) 3 at <https://www.irs.gov/pub/int_practice_units/DPLCUV_2_01.PDF> accessed on 28 August 2019

The rules are only implemented if three elements are satisfied. Firstly, there must be US shareholders (US citizens, domestic corporations or partnerships, domestic estates or trusts [116]). Secondly, the US shareholders must be in controlled foreign corporations (CFCs) and thirdly, they must have a Subpart F income. A CFC is any 'foreign corporation', if US shareholders own more than 50 percent of the total combined voting power or total value of shares[117] of such corporation. The US shareholders are the ones who own 10 percent or more of the total combined voting or total value of shares of the respective corporation[118]. Under the provisions of the rules, US shareholders must also have Subpart F income. The Subpart F income is mainly divided into three categories; foreign personal holding company income (FPHCI), the foreign base company services income (FBC services income and the foreign base company sales income (FBCSI). Firstly, the FPHCI includes mainly interest, dividends, rents and royalties with some exceptions[119]. The FPCHI rules aim to prevent the unfair tax standpoint between CFCs who operate within the same country. Therefore, in order to counter this abuse, the US shareholders are obliged to include their pro-rata share of this income to their gross income every taxable year[120]. Secondly, the FBC services income includes the income that is diverted to a low-tax country by using transactions of a related CFC and more specifically, by providing services[121]. It is being treated in the same manner as FPHCI income. Thirdly, the FBCSI includes income from the sale or purchase of tangible personal property outside of the CFC's country of incorporation either for personal use or for the use of a related party[122]. The objective of the FBCSI rules, is the preclusion of using CFC in order to shift sales income to foreign countries for the reduction of the US tax liability[123]. To sum up, Subpart F grant to the US shareholders a number of obligations which will enable a fairer tax system. The provisions consist of numerous rules and provisions, limitations and exemptions who aim the tackling of tax avoidance. Nevertheless, there are some loopholes which can be exploited by corporations for tax purposes. As we have established in the Google Inc. case, there are certain tricks like the 'check the box' rules in which corporations or

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[116] US Code, Title 26: Internal Revenue Code (IRC) §7701(a) (30)
[117] Ibid. §957 (a)
[118] Ibid. §951 (b)
[119] Ibid. § 954(c)(1)
[120] Ibid. § 951(a)
[121] Ibid. § 951(a)(1)
[122] Ibid. § 954(d)
[123] LB&I (n115) 8

transnational groups can change the way that the entity is regarded for tax purposes. Apple Inc. has also used the same technique and managed to avoid a significant amount of tax liability by establishing a FPHCI and a FBCSI. The FPHCI ended up 'disappearing' due to the ability of Apple Inc. - enabled by law -, to regard its subsidiaries as disregarded separate legal entities. Therefore, it is not compelled to report any transactions of disregarded entities and as a consequence, there is no taxable income[124].

The Tax Cut and Jobs Act 2017

In addition, Subpart F was subjected to some modifications when in 2017, the USA president Donald Trump and fellow Republicans enacted the Tax Cut and Jobs Act. The Act altered initially the Internal Revenue Code of 1986 and as a consequence, had a great impact on the Subpart F rules. The Act made significant changes that affect international and domestic corporations such as deductions, expensing, depreciation, tax credits and more tax items[125]. Its main objective is the prevention of the 'deferral' of otherwise taxable income through foreign corporations. It also reduces in a great extent the income tax rate of corporations since currently is at 21% (was 35%). Worth mentioning, is the fact that regarding the corporate income tax, US is no longer imposing taxes on the global income but on the territorial income. To be more specific, when a corporation earns income from different jurisdictions (for example by subsidiaries), its income must be taxed in one of the jurisdictions. In order to prevent multiple taxation, the respective country must have either a global tax system or a territorial one. USA until recently, had a global tax system which imposed taxes on the domestic income and the foreign income of the US corporations. In particular, USA allowed the US corporations to claim tax credits to counterbalance their foreign income taxes. It also granted the permission to the US corporations to "defer tax on active profits earned by CFCs until those profits were repatriated to the parent company". In contrast, after the enactment of the Tax Cut and Jobs Act, the imposition of taxes is only attributed to the corporation income that derives within the US. Regarding transnational groups, the impact will mainly fall on the subsidiaries since they will be subjected to taxation only in the jurisdiction in which

[124] Barrera, Bustamante (n94) 154
[125] IRS, Tax Cuts and Jobs Act: A comparison for large businesses and international taxpayers <https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-a-comparison-for-large-businesses-and-international-taxpayers> accessed on 26 August 2019

they are legally established. Consequently, the difference between the rates of taxation within the respective jurisdictions will be balanced[126].

To sum up, the introduction of the Act has clearly the intention of restructuring the whole US tax system. Nevertheless, even if it is enacted to address the transfer of untaxable income and ultimately, tackling tax avoidance, it was subjected to criticism. This is due to the fact that transnational groups (for example Google and Apple) will be even more benefited by the new provisions of the Act. It is estimated that such groups accumulated approximately $3 trillion in foreign jurisdictions and tax havens without being subjected to US taxes. It is undeniable that the provisions of the Act, will gradually force the money back to the USA but the issue is in what tax rate they will be taxed. Taking into consideration the changes, they will not obviously be taxed on the 35% but neither on the anyway low 21%. They will be imposed to a tax rate of 8% to 15.5%[127]. The question of whether the Act will indeed facilitate in the elimination of tax avoidance remains uncertain.

European Union

EU Competence

Before examining the anti-tax avoidance measures of the European Union, it is important to understand the institutional framework by which the EU legislates in the field of taxation and the associated restrictions on its operation. The EU is, in principle, only able to adopt legislative acts for those areas which it has been given equivalent competence by the Treaties. Every legislative act must be centered on the legal basis provided by the Treaty. Nevertheless, it is well known that Member States have fully retained their competence in the field of direct taxation and there is no specific legal basis for developing EU legislative action in this area. For the few direct legislative actions taken by the EU in this field, Article 115 and Article 352 TFEU functioned as the basis of their competence[128]. In particular, according to Article 115 TFEU, the Council may adopt laws (after the consultation of the

[126] Tax Policy Center, Briefing Book, 'Key Elements of the U.S. Tax System' at <https://www.taxpolicycenter.org/briefing-book/what-territorial-tax-and-does-united-states-have-one-now> accessed on 26 August 2019

[127] TCJA (n51) §965

[128] European Commission, 'The Lisbon Treaty and tax legislation in the EU' <https://ec.europa.eu/taxation_customs/general-information-taxation/eu-tax-policy-strategy/lisbon-treaty-tax-legislation-eu_en> accessed on 25 August 2019

relevant bodies in unanimity) for the approximation of laws, regulations and administrative provisions of the Member States which have a direct impact on the establishment or functioning of the internal market[129]. The laws must necessarily be in the form of a Directive. Article 352 TFEU provides that the European Union can still act when necessary, even if it is not within its powers given by the Treaty, after unanimity and consent from the relevant bodies[130].

First attempt: Council Directives

Moving on, in its competence, the EU have made some attempts in eliminating tax avoidance practices. Firstly, a Directive implemented in 1990 which was repealed by the Council Directive 2009/133/EC (Tax Merger Directive). Member States are able to opt-out from provisions which they think fit, if the implementation of provisions of the Directive result in tax avoidance practices[131]. Secondly, another Directive implemented in 1990 and repealed by the Council Directive 2011/96/EU (Parent-Subsidiary Directive)[132] which was imposed changes in 2015 and thirdly, the Council Directive 2003/49/EC (Interest and Royalty Payments Directive)[133]. All three Directives, have designated clauses which allow the exclusion of certain provisions by the Member States if necessary, in an attempt to prevent the abuse of the rights deriving from each Directive.

Second Attempt: The Council Directive 2016/1154

In addition, in 2016, the EU introduced the Council Directive 2016/1164 (ATAD) which differs significantly in scope, objectives and function in comparison with the former Directives on the field. The former Directives, by providing anti-abuse clauses, merely ensured that the provisions would not be abused for the purposes of tax avoidance or tax evasion while ATAD on the other hand, targets specifically tax avoidance practices that directly affect the functioning of the internal market[134]. Its main

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[129] TFEU (n89) Art. 115

[130] Ibid. Art. 352

[131] COUNCIL DIRECTIVE 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States [2009] OJ L 310/34, Art. 15 (1)(a)

[132] COUNCIL DIRECTIVE 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [2011] OJ L 345/8

[133] COUNCIL DIRECTIVE 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States [2003] OJ L 157/49

[134] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L 193/1

objective is to "restore trust in the fairness of tax systems and allow governments to effectively exercise their tax sovereignty"[135]. It is also a part of a broader initiative, the 'Anti-tax avoidance Package' which aims to address a number of matters raised initially by the OECD against Base Erosion and Profit Shifting (BEPS). ATAD functions as a supplement to the Action Plan which OECD had already introduced as a response to the need of a fairer taxation[136] and establish in the form of hard law, the proposed actions of the BEPS. The content of ATAD focusses on five measures; the limits on interest deductions, the exit taxation, the general anti-abuse rule, the controlled foreign company rule and the hybrid mismatches.

The measures can be then differentiated in to two categories. The measures which aim the tackling of the BEPS and they are also included in the OECD Action Plan (limits on interest deductions, the controlled foreign company rule and the hybrid mismatches and then, the additional measures initiated by the ATAD and were not encompassed by the OECD (exit taxation and the general anti-abuse rule). In addition, one of the five measures is the interest limitation rule in Article 4 of the Directive. The purpose of the aforementioned rule is to prevent transnational groups from engaging in tax base erosion practices by shifting profits, and in particular to prevent the groups from using interest payments from corporations based in high corporate tax jurisdictions towards corporations within the same group which are based in low corporate tax jurisdictions or to third parties. Under the Article, it is established that "exceeding borrowing costs shall be deductible in the tax period in which they are incurred only up to 30 percent of the taxpayer's earnings before interest, tax, depreciation and amortization (EBITDA)"[137]. Nevertheless, an exemption is allowed, whereby all borrowing costs up to €3 million will be deducted (de minimis rule), and deduction of full borrowing costs if the taxpayer is a standalone entity[138] ("is not a part of a consolidated group for financial accounting purposes and has no associated enterprise or permanent establishment"[139]). Furthermore, Member States may, optionally firstly, to recognize the right to a full deduction of the excess borrowing costs of a corporation that is a member of a consolidated group if its share capital to all its assets is equal to or higher than the corresponding percentage the group, or otherwise recognize a right to partial deduction of the excess borrowing costs, subject to

[135] Ibid. Recital 1
[136] Ibid. Recital 1,2
[137] ATAD (n134) Article 4 (1)
[138] Ibid. Article 4 (3)(a), (b)
[139] Ibid. Article 4 (3)

conditions. Secondly, Member States may lay down rules for the transfer at a later date or earlier of the excess borrowing costs which are prohibited from deducting during the fiscal year in which they arise[140].

Soft Law: The Organization for Economic Co-operation and Development – BEPS and Guidelines

Moving on, it is essential to analyze the work of OECD in order to enable a more coherent comprehension of the ATAD. The transfer pricing and the arm's length principle were focal points in the Base Erosion and Profit Shifting (BEPS) project initiated by the OECD and endorsed by the G20 (an international forum in the form of summits, where governments and other members discuss the promotion of international financial stability and related issues)[141]. Under the OECD/G20 Inclusive Framework on BEPS, most countries in the world join forces to cease tax avoidance strategies and schemes. At this point, is essential to establish the meaning of BEPS. It is defined as: "strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is a little or no economic activity or to erode tax bases through deductible payments such as interest or royalties"[142]. Even if the definition is straightforward, the legality of such strategies is not always evident. However, this does not change the fact that by practicing BEPS, transnational groups have a competitive advantage over domestic enterprises and such strategies, undermine the equality and the integrity of the tax systems. Furthermore, it also undermines all the taxpayers who are willingly paying their tax liabilities[143]. The BEPS Inclusive Framework, consists of 15 actions; addressed to every government involved and composed of rules and instruments. Some of the actions are: tax challenges arising from digitalization, limitation on interest deductions, harmful tax practices, prevention of tax treaty abuse, transfer pricing and country-by-country reporting[144]. The significance of the participation of the countries in the implementation of the articles, lies in to the fact that corporate tax (and mainly from transnational groups) is an integral part of any country's revenues. Hence, the imposition of the articles, will ensure that the appropriate taxation will be enforced on profits resulting from genuine and

[140] Ibid. Article 4 (5)
[141] 'What is the G20 summit, and what do world leaders talk about?' (BBC News, 28 June 2019) <https://www.bbc.com/news/world-48776664> accessed on 27 August 2019
[142] 'What is BEPS?' (OECD) <http://www.oecd.org/tax/beps/about/> accessed on 27 August 2019
[143] Ibid.
[144] 'BEPS Actions' (OECD, <http://www.oecd.org/tax/beps/beps-actions/> accessed on 27 August 2019

not artificial economic activities. Then, a higher degree of tax transparency could be achieved since exchanging information in a global level, enables an easier detection of illegal tax related schemes[145].

The OECD after the BEPS project, had also initiated a revision of the OECD Transfer Pricing Guidelines as we have already established in the previous chapter. The Guidelines in the 2017 edition, incorporate changes that reflect the Actions of the BEPS project. Their main purpose is to help tax administrations and transnational groups, by promoting mutually satisfactory solutions in cases regarding transfer pricing and therefore, eliminate conflicts that may arise and costly litigation procedures. They also examine whether the transnational groups' methods and the conditions of their commercial and financial relations comply with the arm's length principle and discuss the practical application of those methods[146].

CHAPTER 4: An Evaluation of the current Anti-Tax Avoidance Measures

United Kingdom

By taking into consideration everything up to this point, there are certain assumptions that need to be established. To begin with, since 2010, UK have introduced more than one hundred measures targeting tax avoidance and a few more in its last two Budgets[147]. Moreover, it has a set a record in the percentage of the tax gap which was estimated at 5.6% for 2018 noting a long-term reduction in the overall unpaid liabilities[148]. The introduction of DOTAS, GAAR and the 'Follower notices & Accelerated Payments' were the first attempts into countering forms of non-compliance. DOTAS was widely successful as it increased the information that the HMRC was able to receive and any possible deficiencies were reduced due to the constant consultations and amendments of the regime. In regards to the GAAR, as mentioned before, its narrow scope constitute its application limited to abusive arrangements and not tax avoidance in a broader manner. In addition, other measures are still not

[145] Ibid.
[146] OECD Guidelines (n42) 18
[147] Parliament, 'Government statement on tax avoidance, evasion and compliance' <https://www.parliament.uk/business/news/2019/march/statement-on-tax-avoidance-evasion-and-compliance/> accessed on 29 August 2019
[148] HMRC, 'Measuring tax gaps 2019 edition: Tax gap estimates for 2017-18', 5 at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820979/Measuring_tax_gaps_2019_edition.pdf> accessed on 29 August 2019

enforced or they will be enforced later this year. Nevertheless, it has been observed that the HMRC does not do enough to tackle companies which exploit international tax structures to minimize UK tax liabilities. The Committee of Public Accounts, in its report 'HMRC's progress in improving tax compliance and preventing tax avoidance' established that after some changes in the tax regime, OECD and the European Commission have criticized and characterised their tax practises as 'harmful'. This is due to their assertion that such practices facilitate transnational groups into avoiding paying tax in the jurisdictions where they make a profit. In the report, it is also stated that other international tax experts believe that the "economic benefits for the UK are minimal"[149]. Furthermore, in a study conducted by the Office for Budget Responsibility in 2017, it was established that HMRC costings of anti-avoidance and operation measures (between 2012 till 2016) "have fallen short of the original estimates by amounts that vary between 15 and 65 per cent". The characteristic uncertainty around anti-avoidance and operational measures, combined with the growing reliance that Governments have placed on them to satisfy the relatively certain cost of tax cuts and additional spending, make this a continuing risk to the central forecast[150].

United States

In the United States, the introduction of Subpart F and the Tax Cut and Jobs Act constituted the most recent attempts of counteracting tax avoidance schemes. Although they initiated a large number of new provisions which altered significantly the US tax system, in tax avoidance terms, they remained unsatisfactory. Subchapter F, which was heavily exploited by transnational groups, was altered when the TCJA came into force. Nevertheless, there were not any provisions specifically targeting tax avoidance and the implementation of the rules failed to address the advantage of the corporations given by the IRS, the 'entity classification election'. On the other hand, the Act provided two main changes on corporate taxes which could affect schemes of non-compliance. Firstly, the reduction of the corporate tax from 35% to 21% and secondly, the income which is taxed based on the

[149] Committee of Public Accounts, HMRC's progress in improving tax compliance and preventing tax avoidance, Eighteenth Report (HC 2014-15, 458) 6 at: <https://publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/458/458.pdf> accessed on 29 August 2019

[150] Surjinder Johal, 'Evaluation of HMRC anti-avoidance and operational measures' Office for the Budget Responsibility, Working Paper No.11, 36 (2017) <https://obr.uk/docs/dlm_uploads/WP-No.11-Evaluation-of-HMRC-anti-avoidance-and-operational-measures.pdf> accessed on 29 August 2019

new territorial tax system. The former can benefit corporations as they are going to be subjected a lower corporate tax rate while the latter will prevent multiple taxation. Therefore, most tax breaks were left intact and the outcome was a decline in the corporate tax revenues. In 2018, a year after the enactment of the Act, the revenues reduced by 31% [151].

European Union

The EU established many initiatives for tackling tax avoidance. The first attempt was in the form of Directives; however, they do not target tax avoidance specifically and they only contain clauses in relation to that. The first major initiative of the EU was the 'Anti-tax avoidance Package' which the Directive 2016/1154 coupled with the OECD/G20 BEPS project[152]. Tax avoidance is an issue high in the EU agenda and in political priority since it concerns all Member States and can prevent a fair single market. One of the objectives of the EU in relation to taxation, is the growth and the promotion of tax transparency. Tax transparency is a vital component on fighting tax avoidance and currently it is in a low level. This lack of transparency can facilitate and even encourage tax practices by certain corporations, as it can mean that these practices go unobstructed. Member States may not be aware of other countries' tax regimes effect on their own. It also means that ambiguities and law omissions between national tax regimes go unnoticed and they can be exploited by individuals or corporations who intend to lessen their tax liability[153]. Transparency is also one of the main objectives of the BEPS Project. The BEPS Project progress report which was published earlier this year, identifies the progress that has been made since 2018. It establishes that since the introduction of the Action 13, there has been an 'important milestone towards transparency'[154]. The Action 13 imposes a requirement in all transnational groups, to draft a country-by-country (CbC) report with the collective data on the international allocation of income, profit, taxes and economic concerning the tax countries in which it

[151] '60 Profitable Fortune 500 Companies Avoided All Federal Income Taxes in 2018', Institute on Taxation and Economic Policy at <https://itep.org/notadime/>

[152] European Commission, 'Anti Tax Avoidance Package', Taxation and Customs Union at <https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en> accessed on 30 August 2019

[153] European Commission, 'Tax Transparency Package', Taxation and Customs Union at <https://ec.europa.eu/taxation_customs/business/company-tax/tax-transparency-package_en> accessed on 30 August 2019

[154] 'OECD/G20 Inclusive Framework on BEPS Progress report July 2018 – May 2019', 7 at <http://www.oecd.org/tax/beps/inclusive-framework-on-beps-progress-report-july-2018-may-2019.pdf> accessed on 30 August 2019

functions. This report is then, shared between the respective jurisdictions in order to use it "in high level transfer pricing and BEPS risk assessments"[155]. The first exchanges occurred last year and till now, 80 countries have introduced CbC reporting filing obligation. In general, 2 000 relationships between jurisdictions have been formulated for the exchange of CbC reports. Tax authorities are currently able to access to unprecedented and reliable information on the biggest foreign transnational groups, which are usually the ones that pose the highest probable BEPS risk to their jurisdictions, in regards to their size and the probable income at stake[156]. In addition, it was announced that there are plans of a 'Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy' which will attain a long-term solution by the end of 2020[157]. Corporate tax transparency provides the connection between taxation and real economic activity and it can be considered one of the solutions which can potentially tackle tax avoidance.

Conclusion

In conclusion, transnational groups have a dramatically important role in today's economy. More and more citizens and corporations are engaging in non-compliance schemes in order to eliminate their tax liabilities. Governments need to ensure that the taxable profits of the transnational groups, are not artificially shifted out of their jurisdiction and that the tax base reported by the groups in their country reflects the economic activity undertaken therein. Undoubtedly, one of the main reasons for this phenomenon, is the tax breaks that the law unintentionally grants to both citizens and corporations. Tax avoidance, in a great extent, has the power to affect economic and political foundations, the citizens' compliance, distort the competition among corporations and more importantly, the revenue of the respective jurisdiction. In the thesis, the two of the many real life examples of engagement in tax avoidance schemes that were provided, aimed to demonstrate the severity of the issue and the urgent need for anti-tax avoidance measures. Anti-tax avoidance measures play a key role in the tackling of tax avoidance. Governments, even if they initiated rules, principles or statutes, should take into consideration all the elements that enable the participation in such schemes. In addition, they also

[155] OECD, Action 13 Country-by-Country Reporting at <https://www.oecd.org/tax/beps/beps-actions/action13/> accessed on 30 August 2019
[156] OECD Report (n154)
[157] Ibid. 2

need to identify the reasoning behind it. In order to establish effective measures which will counteract against tax avoidance, there is a need to find the mechanisms which encourage it. It is clear that due to the complex structure of transnational groups and the multiplicity of the jurisdictions involved, the reduction of those schemes is hard work. There is an outstanding number of measures who aimed to raise the compliance with the tax system but as it was established, there is a long way to achieve the desired outcome. Nevertheless, as it was seen in the thesis, there are some relatively new measures which are yet to be enforced. Possible reforms could be the imposition of sanctions and penalties, with a broad nature in order to eliminate the number of citizens engaging in abusive practices. One of the reasons of citizens' non-compliance is their lack of trust to the system. By providing the necessary information to the citizens, the importance and the purpose of the taxation, as well as the necessity to respect and abide with the law, growth and prosperity will be achieved. Furthermore, a thorough examination of the relevant tax law would be ideal, in order to identify the exact omissions or 'loopholes' in the law which are being used. In a European level, Member States can be encouraged to incorporate in their own national legislation the EU rules which are provided. Achieving sound and coherent reforms, will result in a reduction of the non-compliance schemes. But even if this is the case, would we ever be able to find a solution targeting at transnational groups given their complexity?

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