ROLE OF TAX HAVENS IN TAX AVOIDANCE BY MULTINATIONALS WITH SPECIAL REGARD TO IRELAND

Tamás Zoltán WÁGNER[1]

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Abstract
Nowadays, many multinationals use tax avoidance strategies in order to minimise their tax liability. They often cooperate with governments providing them preferential treatment. These low-tax jurisdictions called tax havens pose a threat for world economy because they result in huge budgetary loss for countries. Even the European Union has its own tax havens which contribute to the loss of 250 billion euros annually. It is more than 2% of the Union's GNP. Despite the apparent negative evidences, several member states' tax system still contains favourable provisions for multinationals. Although, almost everybody would mention the Benelux states first, but many multinationals utilize the loopholes of the Irish tax system. In this regard, it is enough to refer to the Apple case where the European Commission ordered the recuperation of 13 billion euros from the company due to illegal state aid. Hence, we conducted a research based on academic literature and case-law. After a short introduction and dealing with the European Commission's response to tax avoidance, we analyse the Irish tax system. The main goal was to demonstrate that Ireland – despite the denial of the respective authorities – was a tax haven. Our study proves that multinationals could use almost freely several tax optimisation strategies (e.g. Double Irish and Dutch Sandwich) up to now. Due to strong criticism and scandals the government had to amend the former tax regime, but it does not mean that preferential treatment is abolished. Ireland still should be considered a tax haven.

Key words: *tax avoidance, tax havens, state aid law, multinationals, sweetheart deals*

Introduction

Multinational companies have been aiming at reducing their tax liabilities by introducing several practices such as profit shifting and hybrid entities. They often cooperate with governments which tries to lure investors from each other by providing favourable taxation. Countries become more and more vulnerable due to globalization and the termination of obstacles before the free movement of capital because investors can easily move production to another country if the economic environment is adverse. In addition, the size and influence of multinationals pose a challenge to states. For instance, there are 37 companies among the 100 biggest economies in the world and only the Walmart is bigger than most countries' GDP, besides world trade takes place between these giants. As a consequence of tax optimisation, billions of euros are missing from state budgets violating the principle of burden sharing and fair taxation. Despite the abovementioned, there are a lot of countries which grant tax breaks to multinationals. These jurisdictions – mainly low-tax countries – are called tax havens in academic literature. Although

[1] dr. Tamás Zoltán Wágner, Law and Political Sciences Doctoral School, Péter Pázmány Catholic University, Szentkirályi street 28-30, Budapest, 1088, Hungary, E-mail: wagnertomi@freemail.hu

the negative effects of tax avoidance especially hit the developing countries, the European Union is also concerned because it endangers the integrity of the internal market.

Regarding the latter, it is worth mentioning Daniela Iuliana Radu who calculated that the European Union lost 250 billion euros annually which was more than 2% of the Union's GNP. In the light of these, it is not surprising that the European Commission launched its investigations – based on state aid law – in 2013-2014 by analysing tax rulings granted to multinationals. Interestingly, it predominantly affected the Benelux countries. However, if we look at the amount of money to be recovered, Ireland should be mentioned first: after the resolution of the Commission, it had to recuperate 13 billion euros from Apple. Do these countries provide exceptional advantages to multinationals? If yes, what are the reasons for that? In the following study, we go after that.

Materials and methods

Our purpose is to demonstrate that despite the alleged benefits of a tax haven, it is detrimental to state budget and irreconcilable to the internal market. Hence, we firstly focus on the positive and negative effects of tax havens and on the difficulties to combat them. Regarding the latter, we – after a short historical introduction – touch upon the notion, fight against double taxation and the absence of international tax system. In advance, we must emphasise that without a universal definition, it is extremely hard to identify tax havens because the governments concerned can always rely on notions favourable to them. Consequently, the most practical way is to analyse the relevant tax system as a whole looking for loopholes abused by multinationals. Nonetheless, in particular cases the tax authorities which provide tax reliefs. After that, we get on the reaction of the European Commission. In this regard, it is worth mentioning that the Body had basically two choices: using internal market rules or state aid law. It chose the latter because it enabled – due to its monopole competence – much quicker reaction than initiating an infringement procedure. Finally, we investigate the Irish tax regulation due to their alleged advantageous systems for multinationals. In this respect, we will see how member states can maintain preferential treatment by offering sweet-heart deals. Our study is predominantly based on academic literature by citing relevant authors in the topic. Furthermore, we also touch upon briefly the case-law.

Results and discussion

General information about tax havens

Nowadays, there are 70 registered tax havens in the world. Its roots can be traced back to antiquity because the rich always tried to find "shelters" for their wealth. For instance, Chinese merchants evaded taxes in these places 3000 years ago. In modern sense, we can speak about tax havens from the 19th century. However, their role in international economy gained significance only in the end of the 19th century and in the beginning of the 20th century, thanks to the United Kingdom. Since the British tax system granted tax exemption to multinationals without prescribing establishment. The golden age of tax havens came after World War II in which the Bretton-Woods agreement played an important part: although it regulated the local and international financial markets in detail, there were still countries which provided favourable tax environment. Besides, the tensions of the Cold War also contributed to the spread and strengthening of tax havens all around the world. Several large companies open US dollar-based accounts to prevent the intervention of hostile governments and to gain more profit. All these created new opportunities for small countries and entities such as Hong Kong, Bermuda, Liechtenstein, Andorra etc. Their recruitment can be underscored by the fact that they managed 10,6 billion dollars in 1968 which increased to 21-32 trillion dollars in 2012 according to Tax Justice Network (think tank). In

addition, Oxfam revealed that 156 billion dollars disappeared annually due to offshore activities which would be enough to eliminate global poverty.

Despite strong criticism from several experts, it is still popular among countries which create flexible regulation for investors in the field of taxation, finances and company management. Thus, it is useful to examine whether positive effects override the negatives ones. In this respect, it must be stressed again that host countries are vulnerable to multinationals which can easily move their headquarters to another place if the current economic environment is unfavourable to them. Moreover, countries also compete with each other forcing them to reduce corporate taxes continuously to win the "race" (the so-called prison dilemma). However, small countries are in an advantageous position because they can introduce low taxes due to relatively elastic supply of capital. Above all, there are further arguments to become a tax haven, namely:

- low taxes lead to higher wages and lower product prices,
- facilitation of economic growth and foreign investments,
- consolidation of a given country's role in international trade,
- inflow of FDI contributes to the creation of new jobs and to the development of human capital.

Although these statements seem to be convincing, we have to consider the negative factors as well. In this regard, it is worth drawing our attention to developing countries where the legislators think that investors ignore political instability, uncertain economic environment and poor infrastructure after receiving huge tax benefits. For instance, there were no special economic zone in sub-Saharan countries in 1980, but in 2005 every second apply one. Simultaneously, the share of countries granting tax reliefs increased from 40% to 80%. In contrast with that, OECD, UN, World Bank and the IMF also warned these countries about the detrimental effects of tax competition by highlighting to the fact that most economic actors would have invested even in the absence of preferential treatment. Besides, reduced taxation of multinationals does not contribute to higher wages and missing revenues must be collected from value added tax levied on consumers. And there are even more arguments such as bank secrecy, opacity and widening gender inequality. The latter based on the empiric evidence that tax avoidance force governments to limit spending on public services which mostly affect women due to their dependency on public services and the likeliness of their worse financial status. In the absence of fair taxation, companies channel more profits to stakeholders and senior executives who are overwhelmingly male.

Albeit, tax havens are primarily detrimental to developing countries, they have negative – direct or indirect – impact on developed countries as well. At first sight, it seems to be weird because there are several – mainly small – states which concluded sweat-heart deals with multinationals such as Luxemburg, Netherlands etc. But if we examine the whole system (the internal market), the distortion of competition becomes apparent causing huge budgetary loss. According to Daniela Iuliana Radu's calculation, the EU budget loses 250 billion euros a year which bigger than the 2% of the Union's GNP. Besides, there are further evidences. The authors of The Missing Profits of Nations revealed that multinationals shifted 600 billion dollars of profit to tax havens. The share of EU tax havens was 30% (especially Ireland, Luxembourg and the Netherlands). Based on these data, Oxfam estimates that France, Spain and Germany lost tax revenues of 35,1 billion dollars in 2015 alone which could be spent on public health.

Despite clear evidences of the dark side of tax havens, there are several factors which make counter measures difficult. In this respect, the absence of universal notion should be mentioned first. The most cited one is the notion elaborated by OECD in 1998. Accordingly, the tax system concerned is a tax haven if the following criteria are met:

- revenues are not or minimally taxed,
- no effective change of information,
- absence of transparency,
- tax system facilitates the settlement of companies which have no presence in the given country.

Although the definition has many criteria, it does not cover every potential issue. For instance, the Dutch tax system only fulfil the last criterion, because there are several post box companies in the country. Thus, it is worth considering other definitions as well. Jules Hendriksen suggests working with John Murphy's – economist, founder of Tax Justice Network – notion which is based on use (utilization). In this sense, tax havens are used to:

- avoid or evade tax liability,
- keep crimes in secret,
- keep the activities of customers in secret,
- gain exemption from procedural costs of their home country.

In the light of these, it is difficult to set up a unified list of tax havens. Hence, it is not surprising that the existing ones often face harsh criticism from think tank, civil organisations. In this regard, the EU black lists – adopted after the Panama Papers – are a typical example because they were deemed to be biased by the International Consortium of Investigative Journalists and Tax Justice Network. In their opinion, the EU missed a serious opportunity to combat tax avoidance and tax fraud by leaving out countries like Ireland, Malta and Luxemburg due to political reasons. In addition, these critiques seem to be well-founded: although Commissioner Pierre Moscovici admitted that the EU made a significant progress, but it is still not enough to counter worldwide tax fraud.

Secondly, double non-taxation agreements also contribute to the development of tax havens. Since after the abolishment of obstacles before the free movement and due to globalisation, multinationals faced tax liability in more countries which endangered their competitiveness and profit. Thus, many countries concluded tax treaties to prevent double taxation. Albeit, it resulted in the reduction of administrative costs, facilitation of inflow of FDI, legal certainty and increased cross-border activity, it also enabled multinationals to utilize the loopholes of the system in their favour. For instance, they can easily reduce their tax base by tax planning. Moreover, several multinationals concluded such agreements with the authorities which practically mean tax exemption for them. A typical example of that is the McDonald's case where the company concerned arose no tax liability due to the US-Luxemburg Treaty.

Finally, the absence of international tax system can also result in tax havens. It is a consequence of the fact that every country has its own tax system with its different rates, and many provides preferential treatment to multinationals. Because – as we mentioned earlier – countries compete for the investors in a cruel race where everybody tries to offer the lowest taxation (prison dilemma). Besides, they rely on the positive macroeconomic effects so that they often surrender to enforce burden sharing against multinationals. The reduction of corporate tax rates features well this course: between 1980 and 2015, it decreased from 40% to 25% and if it continues there will be no tax liability for multinationals.

All these indicate, that there are many ways for multinationals to avoid or evade taxes. Although it is sometimes difficult to distinguish between the two notion, there is one fundamental difference: tax evasion is an illegal activity which is punishable such as ignoring tax filing. On the other hand, tax avoidance does not violate laws, but it aims to reduce tax liability through optimisation. Most of the multinationals follow the second option when they cooperate with the

governments concerned. In the remaining chapter we will see how the European Commission reacted to this phenomenon and a special corporate tax regime will be introduced as well.

European Commission's response to tax avoidance

The institutes of the European Union raised doubts from the beginning whether these practices complied with EU law. One of the loudest critics was the European Commission which had basically two options for countermeasures, namely internal market rules (especially the freedom of establishment) and state aid law. The former – similarly to law harmonisation – means a device to the creation and maintenance of internal market. Besides, it also provides an effective way to combat tax advantages granted by member states because it prescribes strict rules such as:

- hindrance of the four freedoms is enough to classify a state measure as illegal,
- the European Court of Justice interprets exceptions narrowly,
- principle of proportionality constitutes a great challenge for member states (most cases failed on this test).

Although the European Commission does not have monopole competence in this field, it could be a useful strategy to rely on internal market rules against tax discrimination issues. In this regard, it is worth mentioning the Hervis case where the European Court of Justice held that the Hungarian retail tax based on progressive rates violated the freedom of establishment by preferring independent franchisee to related undertakings. All these indicate that tax measures can be successfully challenged before Union courts based on internal market rules. Despite the possible positive outcomes, the European Commission chose state aid law. The reasons for this step were the following facts:

- European Union has been committed to limit unjustified state aids for a long time,
- article 107 TFEU provides few exceptions,
- state aid can be realised in many ways, among others as tax measures,
- the interpretations of notions "tax" and "enterprise" are much broader than the traditional concepts,
- according to article 108 TFEU, the Commission has monopole competence in this field,
- initiating infringement procedures against member states are much slower than launching an investigation based on illegal state aid.

Albeit, the relevant state measures must fulfil cumulative criteria[2], Commission's practice indicates that the Body can easily use its powers to combat legal instruments endangering the internal market. In this respect, we have to emphasise the fact that the European Commission examines only the impact of a given state measure and other factors (aim, reason, form) are rather ignored. Furthermore, it analyses the existence of advantage and selectivity jointly which contributed to the failure of several multinationals on the so-called selectivity or reference test. The latter is criticised by many experts because it – in their view – contradicts both the case-law and article 107 TFEU. Since selectivity of economic advantage is a refutable presumption and the two notions deserve separated investigation.

[2] These are the followings:

- advantage,
- the given measure must be provided through state or state measures,
- selectivity,
- affects trade between member states,
- distorts or threatens to distort competition.

All these did not bother the Commission which launched its campaign against tax benefits granted to multinationals in 2013-2014. The words of former Commissioner for Competition, Joaquin Almunia well featured the standpoint of the Body: *"EU tax authorities are responsible to ensure a level playing field, instead of offering different treatments to companies with comparable legal standings and operations"*. Thus, it was not surprising that several famous multinationals, such as Amazon, Starbucks or Fiat failed the test. Interestingly, these cases predominantly related to the Benelux states. But if we look at the amount of money to be recovered, the Apple case excels from the others: Ireland – after the negative resolution of the Commission – had to recuperate 13 billion euros from the company. In the light of the abovementioned, it is worth analysing such tax systems which deemed to be tax havens by the experts. The Irish tax system is popular among multinationals due to its preferential treatment. Is it really a tax haven? In the final chapter, we will find the answer for that.

Ireland: officially unrecognised tax haven?

Several think tanks (Oxham, Tax Justice Network) state that the EU – despite its generally negative attitude towards tax avoidance – is a shelter for multinationals, especially from the USA. In their view, the main tax havens are the Benelux states and Ireland. Each country developed a unique preferential treatment to lure foreign investors in. One of the most outstanding outcomes of the European Commission's campaign against tax avoidance practices was the Apple case where 13 billion euros had to be recovered by state authorities. This issue drew the attention of the public towards the controversies of the Irish tax system. Thus, we survey the development and the characteristics of the Irish tax system.

First of all, despite the heavy criticism from several analysts, think tanks, the Irish government and many local experts never recognised that the authorities concluded many sweetheart deals with multinationals and let them to abuse the loopholes of the system. In this respect, it is worth mentioning Tom Maguire who stated that Ireland could not be regarded as a tax haven because it did not meet the criteria laid down by the OECD in 1998. Besides, he brought up other reasons as well, such as:

- fewer exemptions from the application of corporate tax compared to other countries e.g. dividends received by a resident company from foreign sources are – contrary to Ireland – not taxable in many countries,
- level of transparency is high, Ireland was among the first countries which implement country-by-country reporting (OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes gave Ireland the highest possible transparency rating in 2017),
- Ireland has 70 tax treaties and more than 20 tax exchange of information agreements.

Against these arguments, the opponents refer to the fact that after setting up the EU black list, several US multinationals move their intangible assets from the Caribbean region to Ireland. The value of this transfer was 300 billion euros between 2014 and 2017. In addition, Ireland provided tax incentives to them which resulted in nearly zero taxation. Although, the preferential system was limited, it still enables companies settling in the future to secure a 2.5% effective tax rate. The contradiction between the data highlights both the absence of universal definition for tax havens and the difficulties of combatting detrimental tax avoidance practices. All these are especially true in a country where tax breaks have a long tradition.

According to the academic literature, it started in 1956 when the export profits tax relief was introduced. Initially it provided a remission of 50% income tax on profits of a manufacturing industry derived from increased exports over a datum year which was increased to 100% and 25-year exemption was granted for the customs free zone at Shannon Airport. After that, the Irish tax regime was amended several times when a new, general rate of 12,5% was introduced in 1998. Besides, other feature of the system that it – based on historic British case-law – enables companies to settle down in Ireland without being a tax resident in the country. The latter contributed to the development of the Double Irish and Dutch Sandwich tax avoidance strategy. Its gist briefly is to transfer profits to low-tax countries (the Netherlands, Ireland and a third country) to minimise or avoid taxation. For instance, Google successfully gained exemption from its tax liability by transferring its profit through Ireland and the Netherlands to Bermuda. Thus, it – as other multinationals – could accumulate untaxed royalty income instead of paying the preferential 2% corporate tax.

The abovementioned practice changed after 2013 in which the Apple decision[3] had a decisive role. In this framework, it was prescribed that an Irish registered company had to be a tax resident in one of the participating countries if Ireland had concluded a double taxation agreement with it. But it was abused: several multinationals established tax residence in offshore zones such as Cayman Islands. Thus, a new regulation was adopted in 2015 where all Irish registered companies had to be Irish tax resident according to the main rule. Nevertheless, it could be easily abused by multinationals because it provided a temporary 6-year period (till the end of 2020) to those which had an Irish registered non-resident company in 1th January 2015. Summarizing the chapter, we can see that Ireland had to amend its former tax regime due to strong criticism and scandals. But it did not mean that it totally abolished its preferential treatment towards multinationals. Even, there is a new method called Single Malt under which an Irish registered company would be Maltese resident under the terms of the double taxation agreement with Ireland. Microsoft already utilized this opportunity….

Conclusion

Despite its negative attitude towards tax avoidance, there are several tax havens in the European Union. Due to the fact that direct taxation is still in the competence of the member states, the European Commission had to find detours. In this respect, it chose state aid law because the Body had monopole competence in this field, and it is much quicker than initiating an infringement procedure before the European Court of Justice. Although this method has its own shortcomings, it enabled the Commission to combat tax avoidance practices conducted by multinationals. The most outstanding issue was the Apple case where the Irish tax system was in the centre of attention and the resolution of the European Commission ordered that the tax authorities had to recuperate 13 billion euros from the company. The effectiveness and legality of these procedures faced many criticisms (e.g. violation of tax sovereignty) from scholars and several cases were brought before the General Court. Nevertheless, it seems to be that this phenomenon can be only eliminated by common international efforts where the EU has decisive role.

[3] Apple had 2 registered affiliated company (Apple Sales International and Apple Operations Europe) in Ireland. Most of their profit were displayed as the profit of the central office, although it existed only in paper. Consequently, it managed to decrease its tax liability almost to zero per cent. The European Commission initiated a state aid investigation against this practice classifying it as against the economic reality. Finally, the Body held the illegal state aid and ordered Ireland to recuperate 13 billion euros from Apple. But both parties appealed to the General Court (still pending).

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