I. SOME THOUGHTS ON THE PROBLEMS OF TAX AVOIDANCES

In the European Union the main and significant goal and tendency in the tax policy is fighting against the tax avoidance. One of the types of the tax avoidance techniques is the harmful tax competition and the other types are the new ways of the digital tax avoidance, like: the double tax avoidances by the multinational companies (Google, Apple), so the double non taxation, and the hidden offshore tax structure (Ireland). These questions are connected with each other, because the offshore structure is also part of the harmful tax competition, it is one type and form of the harmful tax competition, and the offshore and hidden offshore structure also drives to the tax avoidance.

The fair competition is one of the main principle in the EU and the single market, of course, and the fair competition is also important part of the tax liability. The most significant problem is, that very difficult to delimitate the tax competition from the harmful tax competition. When a state supporting the investments and investors with fiscal instruments realizes a harmful tax policy or simply stimulates the economic life of the state with the inflowing foreign capital? When does a state realize tax competition, and where is the line between tax competition and harmful tax competition? What are the new ways of the digital tax avoidances? In this study I will examine these questions, and I should like to deal with tax avoidance and aggressive tax planning by the digital multinational enterprises (Google, Apple), the tax avoidance technique like “Double Irish with a Dutch sandwich”, and aim to give a short answer of the European and international regulation, like BEPS and ATAD.

As noted in the BEPS Action Plan: “…the emergence of competing sets of international standards, and the replacement of the current consensus-based framework by unilateral measures, could lead to global tax chaos marked by massive re-emergence of double taxation.”1 That is why the OECD/G20 BEPS Project creates a single set of consensus-based international tax rules to protect tax bases while offering increased certainty and predictability to taxpayers. Developed in the context of

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the OECD/G20 BEPS Project, the 15 actions set out equip governments with domestic and international instruments to address tax avoidance.

II. THE NEW STRUCTURES OF THE DIGITAL TAX AVOIDANCE

The aggressive tax planning and new tax avoidance techniques of the digital companies are appearing in the European Union and worldwide too, so the new problem is to tackle the tax avoidance of the multinational digital companies. The digital companies make their activity all over the world, but they often apply a new technique to avoid paying taxes. So it is very vital to address the tax challenges of the digital economy.

In the Apple, Google, Microsoft, Amazon is often used to double non-taxation, like the new structure of an aggressive tax planning “Double Irish with a Dutch Sandwich”2.

What does it mean the new way of tax avoidance: “Double Irish with a Dutch Sandwich”?.

The double Irish with a Dutch Sandwich is a tax avoidance technique employed by certain large corporations, involving the use of a combination of Irish and Dutch subsidiary companies to shift profits to low or no tax jurisdictions. This technique is just one of a class of similar international tax avoidance schemes. These techniques are most prominently used by digital companies, like Google, Apple, Microsoft, because these companies can easily shift large portions of their profits to other countries by assigning intellectual property rights to subsidiaries abroad. It is generally considered to be a very aggressive tax planning strategy because it was discovered that this technique made it possible to send several billion dollars annually tax-free to tax havens.3

What is the realization of this technique – “Double Irish with a Dutch Sandwich” - , how it works? The technique involves two Irish companies, a Dutch company and an offshore company located in a tax haven. The first Irish company is used to receive substantive royalties on goods, such as iPhones sold to U.S. consumers. The U.S. profits, and therefore taxes, are dramatically lowered, and the Irish taxes on the royalties are very low. Due to a loophole in Irish laws, the company can then transfer its profits tax-free to the offshore company, where they can remain untaxed for years.

The second Irish company is used for sales to European customers. It is also taxed at a low rate and can send its profits to the first Irish company using a Dutch company as an intermediary. If done right, there is no tax paid anywhere. The first Irish company now has all the money and can again send it onward to the tax haven company.4


4https://www.investopedia.com/term...
So the first step is: sending profits through the first Irish company as a royalty, which has a very low taxation, then the second step is: send the profit further to a Dutch company, and the third step is: send it back finally to a second Irish company, which was registered in Ireland, but it was headquartered in a tax haven, in Bermuda Island. The consequences will be: double non-taxation, and tax avoidance.

The Google shielded 16 Billion Euros from tax with the same double non taxing technique. Google uses two structures, known as a “Double Irish” and a “Dutch Sandwich,” to shield the majority of its international profits from taxation. The setup involves shifting revenue from one Irish subsidiary to a Dutch company with no employees, and then on to a Bermuda mailbox owned by another Ireland-registered company.  

Another form and a new way of the digital tax avoidance: the tax avoidance of the Apple Operations International (AOI), which firm is a subsidiary of the Apple enterprise in Ireland. In this regulation needs a loophole in the Irish law, because in Ireland there is a very low tax rates of the company business tax for the foreign multinational enterprises, only 2 %, instead of the normal rate: 12,5%. There is another lightening in the regulation, there is no tax if the head of the company or the owners are foreigners and no Irish owner or head registered in Ireland. In the Apple Operations International which was registered in Cork as an Apple’s subsidiary, but the owners and heads of this enterprise lived in California in the USA. With this technique, the Apple did not pay 12,5 billion Euro tax.  

This is also a new way of the tax avoidance: the hidden offshore technique.

However it is a great challenge to fight against the tax avoidance, that is why ended of this regulation in Ireland, so finished the new tax avoidance structure: the Double Irish with a Dutch Sandwich. Due largely to international pressure and the publicity surrounding Google’s and Apple’s uses of “Double Irish with a Dutch sandwich”, the Irish finance minister in the 2015 budget passed measures to close the tax loopholes that permitted “Double Irish” and effectively end the use of “Double Irish with a Dutch sandwich” for new tax plans. But companies with established structures will continue to benefit from the old system until 2020, and allowed to continue employing it until the end of 2020. So the Google and Apple also can continue these structure until the end of 2020.

III. A WAY OF THE INVESTMENT INCENTIVES OR A HARMFUL TAX POLICY?

It is an eternal question whether a state prefers the incitement of investments or follows a harmful tax policy? This question has interested the managers since the economic system change in Hungary and has remained a topical issue to date, which is proved by the EU, as the European Union has repeatedly dealt with the issue of tax competition since 1990. The question is simple: whether a state supporting the investments and investors with fiscal instruments realizes a harmful tax policy or (simply) stimulates the economic life of the state with the inflowing foreign capital. When does a state realize tax competition, and where is the line between the fair and legal tax competition and with the harmful tax competition? This is also a big question of the tax harmonization, and at the same time its great battle too, between the European Union and the Member States. The Member States are against the limitation of the fiscal sovereignty; however, it is evitable for the EU to interfere with the Member States’ taxation in order to control the compliance of the European tax law’s rules. The European tax law, which is created by the tax harmonization, is the most important instrument for stopping the harmful tax competition.

Tax competition exists, was and will be in Europe, but the only question is how far we can go without offending the European Union’s regulations. In early 1990, Hungary was at the forefront at tax benefits, which were given to the foreign investors, investments. By now we have to find other incentives instead of giving tax benefits, because of the European tax law’s limitations and regulations. So nowadays the EU considers the tax benefits as the instruments of the harmful tax policy, thus these are not allowed because of the prohibition of discrimination and the principle of national treatment.

IV. LINE OF THE FAIR AND HARMFUL TAX COMPETITION

In the professional literature we can find differing opinions about the distinction between tax competition and its harmful type, so these views are not unified. The literature is neither unified about the issue of how far a state can expand without producing harmful outcomes i.e. realizing a harmful tax policy. Dániel Deák⁸ believes that we can not draw a line between the tax competition and the harmful tax competition, i.e. there is no reason to make a distinction between tax competition and harmful tax competition, because it is needed to be stated, that harmful tax competition limits and distorts free competition. In Galántainé Szabó Zsuzsanna’s opinion⁹, “if we looking extremely the fact of the taxation, it results ‘abnormal conditions’ between the conditions of the market economy. In her opinion the EU’s jurisprudence (EC and EU judicial decisions) considers harmful those legal requirements for direct taxes, which offending permanently and systematically the fiscal neutrality, if it does not correspond to the tax regime’s nature or internal structure.”¹⁰ According to Dániel

Deák, the question to be examined is whether, the concrete regulations of tax law are an integral part of its surrounding tax system. In my view it has to be stated that we can find the issue of the harmful tax competition in corporate taxation, because its instruments e.g. exceptional preferences, tax benefits for investors and investments, given preferences for foreign-owned companies or joint ventures, the tax discrimination and selectivity are not allowed instruments of the EU’s competition and tax law.

My opinion is the same as the cited authors’, but I have to complement it with one thing: the principle of public burden sharing is distorted when the tax payer does not pay taxes where he/she uses the public services, so he/she pays minor tax or levy for registering his/her company in other states, then in his/her country, while he/she uses the public services in his/her country, and he/she takes his/her activity but there he/she does not contribute the tax burdens, so we also speak about harmful tax competition in these kinds of cases. It is typical case the application of the tax haven (offshore) regulation.

Why and when is the tax competition regarded as harmful? The tax competition and the tax benefits are harmful in terms of the economic competition, because they divert and distort the competition in the market with fiscal discrimination, i.e. mainly with giving tax benefits for the foreign investors. The tax competition is needed to be viewed harmful when: (a) diverts the international investments, (b) discourages the tax payers from the voluntary legal compliance, (c) changes the balance between the public expenditures and the taxes, (d) other countries have to raise other taxes’ bases, because of the loss of tax revenues and (e) the measures increase other countries’ costs of tax administration.

If closed incentives systems are accompanied with this, which do not let the national tax payers use the special benefits and the country also does not participate in the exchange of information, its legal and administrative system are not transparent, and where the tax payers can agree with the tax authorities in tax rates it is needed to be stated that a tax regime with the above mentioned features causes harmful consequences.

In 1998, the European Union (the ECOFIN Council) created the Code of Conduct for Business Taxation, which is not a statute, or an Act, but rather the member countries’ unilateral and voluntary political commitment for keeping behavioural norms. The Code of Conduct is a new regulatory instrument in the field of the harmonization of direct taxes, which is occurred instead of the unanimity rulemaking, but actually it does not have a legal biding force. The members can fulfil voluntary requirements of the Code, if they stay away from a legislation, which can realize the harmful tax

12 Hungary was also in this situation, where the foreign companies can avail a reduced a tax rate at 3% for our corporate taxation. When we joined to the EU we had to repeal our off-shore regulations, because of the tax harmonization… see more: ERTŐS Éva – KOVÁCS Kitti: Az adóoptimalizálás egyik eszköze: az offshore jelenség ténnyerése és gyakorlati nehézségei. Gazdaság és Jog, 2010/1, 17-21. p.
competition (*standstill)*\(^\text{15}\). If a statue is in force, which can realize the harmful tax competition, the members undertake to eliminate it as soon as it is possible (*rollback*)\(^\text{16}\).

Signing the Code of Conduct meant the avoidance a very strict rule\(^\text{17}\) of the EU’s decision-making’s system, which was the unanimity in the decision-making. The Code of Conduct is not a source of the EU law, but when Hungary joined to the EU in 2004, the European Union requested from us to show them all of the instruments, which helped to eliminate the tax competition, and also requested to repeal all of the statues, which had realized the harmful tax competition. In 2012 Hungary has embarked on the bumpy road of the tax competition with decreasing the tax bases of corporate taxation and introducing a flat-rated personal income tax, but it is important to mention, that we have fulfilled the requirements of the EU.\(^\text{18}\)

As a summary we have to state that the tax competition and the harmful tax competition can appear in different fields, but the following fields necessarily are included here: (a) tax benefits for the foreign investors and investments, the case of positive tax discrimination favouring the foreign capital. (b) Tax avoidance, the harmful case of tax minimization, licensing the creation of tax havens (off-shore companies).\(^\text{19}\) (c) State aids, which are prohibited by the EU, because they cause harmful tax competition. (d) The limitation of the free movement of capital (international capital flows) and the freedom of establishment, the issue of relocating headquarters into other Member States. (e) Applying tax rates, which are different from the average’s and from the neighbouring countries’ tax rates and they could have a capital suction effect and they can affect the international capital flows.\(^\text{20}\)

So when we can say about unfair, harmful tax competition?

- When a country is giving tax benefits for the foreign investors and investments, it is the case of positive tax discrimination, favoring the foreign capital.
- The practice of tax avoidance, the harmful case of tax minimization, licensing the creation of tax havens (off-shore companies).
- The incompatible State aids, which are prohibited by the EU, because they cause harmful tax competition.
- The limitation of the free movement of capital (international capital flows) and the freedom of establishment, the issue of relocating seats into other member states. (It is a new form of profit shifting).
- When a state is applying tax rates, which are different from the average’s and of the neighbouring countries’ tax rates and they could have a capital suction effect, and they can affect the international capital flows, and distort the economic competition.

\(^\text{15}\) TERRA – WATTEL: supra note 14 at 284. p.


\(^\text{17}\) Articles 93 – 94 of the EC.

\(^\text{18}\) E.g. we eliminated the tax benefits for the foreign investors and for multinational companies, we terminated the given special tax benefits for the foreign tax payers by 31 December 2011. The regulation of tax havens was eliminated in 2003 and the corporate taxation has become unified. For the issue of relocating headquarters the Cartesio C-2010/06. case was decided.


\(^\text{20}\) See more ERDŐS Éva: A beruházásösztönhöz adójoga Miskolci Egyetem, 2012. 121.-199.o.
When the State aids appear in the forms of tax measures, especially in tax preferences, giving tax benefits for the foreign direct investments. So my comment and conclusion is: the tax competition might have benefits (e.g. it has got an economic stimulus effect. The attraction of foreign capital, the production increases, the economic growth may begin and may increase and with this the tax revenues can increase), but it has got more negative impacts than positive. We can delimitate the fair and harmful tax competition: we can say about a fair tax competition, when it would not distort the international economic competition, there is no discrimination, and does not abuse the single European market.

V. CLOSING THOUGHTS - CONCLUSIONS

As we can see above, we can summarize the problems, which are: the double non–taxation, the hidden offshore’s rule, tax avoidance, tax measures of harmful tax competition. The solution is: fighting against the unfair tax competition, and fighting against the tax avoidance with the regulation of EU law, so look at the solutions and the types of the European regulation.

First of all, in 1998. ECOFIN Council came into force the Code of Conduct on Business Taxation: in this document there are two regulations, the rollback and the standstill rules, which has made a solution to the conflicts of harmful tax competition and tax avoidance. If a statue is in force, which can realize the harmful tax competition in a Member State, the Members undertook to eliminate it as soon as it is possible (rollback rule), and the standstill rule: the Member States can fulfill voluntary requirements of the Code, if they stay away from a legislation, which can realize the harmful tax competition.

2015. OECD: BEPS Action Plan: Base Erosion and Profit Shifting (BEPS) refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations. Under the inclusive framework, over 100 countries and jurisdictions are collaborating to implement the BEPS measures and tackle BEPS.

The BEPS Document’s goal is the OECD/G20 BEPS Project, the 15 actions set out governments with domestic and international instruments to address tax avoidance, ensuring that profits are taxed where economic activities generating the profits are performed and where value is created. The BEPS Project has also revisited the existing international tax standards to eliminate double taxation, in order to stop abuses and close BEPS opportunities. The OECD and G20 countries will extend their cooperation on BEPS until 2020 to complete pending work and ensure efficient targeted monitoring of the agreed measures.

The European Commission has entered into force the anti tax avoiding Directive ATAD (2016/1164/EU Directive): laying down rules against tax avoidance practices that directly affect the functioning of the internal market, and international taxation highlight the need for ensuring that tax is paid where profits and value are generated.

Solution: Ireland had to finish the hidden offshore’s regulation and the Apple Operations International received a large fine from the EU Commission – 12,5 billion euro – in the rules of competition law.
Tax competition which is legal and fair, compatible with the regulation of EU, and it is not harmful, and that is why this tax competition complies with ethical and fair tax liability. It would not distort the international economic competition and does not abuse the internal market.

What are the solutions in fighting against the harmful tax competition and tax avoidance? Tackle the harmful tax competition and tax avoidance by EU regulation, like the primary and secondary law sources, like ATAD, with the judgements of the European Court of Justice, and with the soft law instruments of the EU institutes, documents like Code of Conduct on Business Taxation and like OECD BEPS Action Plans. The methods of giving solution to these problems: the „rollback” and „standstill” regulation, monitoring the rules of the member states, giving fines to the companies in the territory of competition law by the EU Commission, and exchanges of the data and information between Member States.

My opinion is that the above mentioned tools are very important in the battle fighting against the tax avoidance, but the most important rule is need to employ the regulation: need for ensuring that tax is paid in the state where profits and value are generated, ensuring that profits are taxed where economic activities generating the profits are performed and where value is created. In this case the principle of public burden sharing will not be abused, and it will not be an unfair, harmful tax competition, and will not employ tax avoidance. All this requires tax harmonization.