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BEPS, AEOI, ATAD etc.: Are We Going Too Far Away?

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Is tax avoidance a bad thing? The international tax community seems recently to adopt an almost unanimous position: Yes, it is supposedly a very bad thing, as it not only reduces public revenue, but also makes taxation “less fair”, since tax-avoiding taxpayers do not pay their “fair share”.

It is surprising how unanimous is this position today, while there are a lot of arguments towards the opposite direction. Tax avoidance is not only a bad, but also a good thing for many different reasons:

First of all, tax avoidance proves that the rule of law principle does work in practice. The ability of taxpayers to take advantage of existing loopholes in domestic and international legal framework of taxation shows that citizens can truly rely on tax laws stating about what will and what will be *not* taxed. Alone the institutional possibility to commit tax avoidance increases, thus, legal certainty and makes jurisdictions more friendly to investment. An investment-friendly environment is key feature for higher public revenue.

It is, further, underestimated that tax avoidance is until today and in many cases a process well-known and tolerated by most governments. One cannot claim that 70 years of international tax avoidance practices in post-war prosperous world was happening just because governments have been either too stupid or even corrupt in tolerating such practices. On the contrary: While political correctness or other political considerations often did not allow governments to do much in order to guarantee better tax conditions for bigger or smaller enterprises, tolerating lawful tax avoidance was granting more flexibility towards business taxpayers and, at the same time, more prosperity to the economy, without having to give political fights with unknown outcome in order to achieve such results.

Moreover: Tax avoidance and specifically international tax avoidance has always been the most effective weapon in the arsenal of taxpayers in their effort to impose to their governments respect towards the ability to pay principle: *“If you tax us too much, then we can always try to avoid this through lawful ways”*.

People got used during these last 70 years to democracy, to constitutional liberties and to the rule of law. It has not always been the case. Closing now all available loopholes for tax avoidance may very well lead governments to bend to the temptation to increase taxation beyond reasonable levels. The author of this contribution comes from a country whose government already increased taxation beyond such levels and would very much like to increase taxation even more. They have increased taxes imposed not on multinationals, but on a vanishing middle-class.

One-sided consideration of the governments' constitutional power to impose taxes, while not considering at the same time taxpayers' rights to resist excessive taxation would be detrimental for social cohesion. Democracy is not and cannot be the only guarantee against excessive taxation. On the contrary: While taxpayers in old times had to face only the arbitrary wills of monarchs that were in need of taxpayers' money, in modern democratic, but heavily bureaucratic societies there are millions of people expecting to survive and become prosperous from public treasury, either because they are in government payroll, or because they are in business with governments – not all of such business being fully legitimate. Political clientelism is disease in many countries. This part of society that expects taxpayers' money for their living and prosperity, would not always care too much if investment environment in their jurisdiction would become worse in the long term – after all in the long term we would all be dead.

Governments have today, with the help of technology, huge material and moral power towards citizens. The only counter-balance for citizens can be some room of financial and material freedom, where governments would have no access. But contemporary public discourse refuses this. Combatting tax avoidance – that is: combatting the citizens' freedom not to pay taxes if a law allows them not to – is the new political correctness.

Last but not least, governments want not only to preclude any leeway for the taxpayers to avoid state intervention in all aspects of their finances, but they want also to learn everything about their personal finances. And this, regardless if tax authorities have any clue about tax evasion or tax avoidance of holders of foreign bank accounts.

On this issue, much attention has to be drawn to the following: It has been too easy for the international community to impose Automatic Exchange of Financial Information rules on most tax havens. This brings to surface an unavoidable question: If it has been so easy to convince tiny states to commit to the abolishment of their bank secrecy rules in 2014 and 2015, then how can it be that it had not been as easy to convince them for a similar abolishment back in 2005 or in 1995 or in 1985? Obviously the developed nations had then refused to exercise the necessary political pressure on those tiny, non-powerful states.

This means that the international community had all possibilities to achieve, for example, an international regime of exchange of information upon request. A regime that was dominant in international administrative tax co-operation rules until the Savings Directive and FATCA came to our lives.

Thus, while the international community had not achieved a minor – but absolutely essential – goal, i.e. exchange of tax related financial information upon request for many decades, suddenly they achieved a major – but not absolutely necessary – goal, i.e. automatic exchange of full financial information for everybody. For tax evaders and for ordinary people. Does it not look like totalitarianism or is it just me thinking in this way?

The worse is that few people dare to talk about this. Although skepticism against, for example, BEPS and its consequences is increasing and becomes louder, no one dares to put under scrutiny the underlying idea of all these new notions, BEPS, FATCA, AEOI, ATAD: That tax avoidance is not necessarily a bad thing. And tax evasion can be combatted by lighter means.

While the international community promises now to bring forward some guarantees for the taxpayer, as a matter of fact this is hardly possible. The main institutional guarantee is to be able to avoid taxation while following the rules. This is not only eliminated, but also demonised: Citizens

will be at the mercy of their governments. But governments are not always merciful. History proves they are not.

It is, thus, urgent to review the current international path against tax avoidance. 70 years of post-war prosperity and peace have been 70 years with respect to the freedom to commit lawful tax avoidance. Today's prosperity is not a self-granted thing. Prosperity requires freedom at first place. The international community may well wish to "close loopholes", but they might very soon miss such loopholes; while new political correctness "kill-tax-avoidance" will not be letting them walk their way back to normality.

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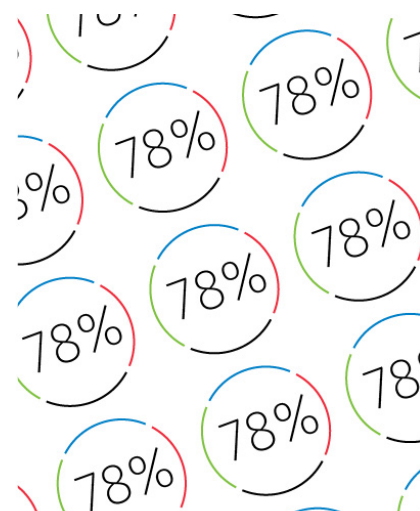
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Avoidance

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