

**KEDGE BUSINESS SCHOOL**

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# **What is the extent of the BEPS phenomenon?**

And how hard is it for MNEs to engage in profit shifting?

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This master's thesis reflects only the opinions of its author and not those of KEDGE Business School and the Master of Finance.

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## Topic's interest

After reading last summer Matthew C. Klein's and Michael Pettis's *Trade Wars are Class Wars* (2020), I realised the topic of fiscal optimisation and profit shifting was of paramount importance, not so much because of its economic extent that is hard to assess and debatable as because of its coverage in the media and the public debate. I already saw how recurring this topic was in the media, how regularly the fiscal schemes of big multinationals made the headlines of major news outlets and how such practices were at the centre of the political debate.

After having experienced the matter of fiscal optimisation during my first internship in a big four accounting firm and seeing related topics during my current internship in a consultancy, I thought digging on that subject would prove very interesting and formative. After consulting with my supervisor as well as various colleagues, I thus decided to write my master thesis on profit shifting.

**Topic: what is the extent of the BEPS phenomenon, and how hard is it for MNEs to engage in profit shifting?**

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## Acknowledgements

I sincerely thank all the respondents to my study who gave me several hours of their time, since I know how busy they were. Given how sensitive the topic is, I also thank them for all the concrete examples they gave me on my thesis's topic: this information was exciting and precious. For the same reason, all their names were anonymised, as were the references to the companies they worked for and the clients they mentioned. Hence, I can only express my gratitude to J.O., A.C., M.E, V.M. and U.J.

I also thank deeply Mr Armand Bajard—to whom I proposed this master thesis's topic—who agreed to supervise my work. He was readily available to help me and gave me precious and relevant advice.

Finally, I am also grateful for the professors and staff I met at KEDGE Business School, whether in class or outside. During those last four years, I learned much academically and personally and feel confident and ready about what lies ahead.

## Abstract

June 5th, 2021: the G7 economies reach a historic agreement, proposing to enforce an international corporate tax and allow countries to tax the revenues of companies that shift their profits. A year before, in June 2020, the European justice cancelled the European Court's decision that demanded Apple give back to Ireland €13bn taxes it avoided, thanks to special agreements between Apple and Ireland's tax administration. This event came as a blow to some countries' efforts against profit shifting, especially France's with Bruno Le Maire's—the French minister of Economy—GAFA tax. These rapidly unfolding events will determine whether international companies will continue to reduce their fiscal base and shift a part of their profits to low-tax jurisdictions. What is the extent of the profit shifting phenomenon, how has it evolved, and how hard is it for international companies to reduce their taxable base and shift their profits?

**Keywords:** international taxation, profit shifting, transfer pricing, royalty payments

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## Résumé

5 juin 2021 : les économies du G7 parviennent à un accord historique, proposant d'appliquer un impôt international sur les sociétés et d'autoriser certains pays à taxer sur la base de leur chiffre d'affaires les entreprises qui délocalisent leurs profits. Un an auparavant, en juin 2020, la justice européenne annulait la décision de la Commission Européenne qui exigeait de la société Apple qu'elle rembourse 13 milliards d'euros de taxes à l'Irlande qu'elle avait évitées. Cela avait été rendu possible par des accords spéciaux entre Apple et l'administration fiscale irlandaise. Cet événement était synonyme de coup dur vis-à-vis des efforts de certains pays contre l'optimisation fiscale et le transfert de bénéfices, en particulier ceux de la France, symbolisés par la taxe GAFA, cheval de bataille de Bruno Le Maire, le ministre français de l'Économie et des Finances. Ces évolutions économiques et politiques détermineront si les entreprises internationales continueront de pouvoir réduire leur base imposable et transférer une partie de leurs bénéfices vers des pays à taxation favorable ou vers des paradis fiscaux. Quelle est l'ampleur du phénomène de transfert de bénéfices, comment a-t-il évolué, et dans quelle mesure est-il difficile pour les entreprises internationales de réduire leur base imposable et de délocaliser leurs profits ?

**Mots-clefs :** fiscalité internationale, transfert de bénéfices, prix de transfert, royalties

## Abbreviations

**APA:** Advanced Pricing Agreement

**BEPS:** Base Erosion and Profit Shifting (commonly referred to as either “base erosion” or “profit shifting”)

**BVIs:** British Virgin Islands

**CapEx:** Capital Expenditure (equals change in PP&E)

**CFF:** Cash Flow from Financing

**CFI:** Cash Flow from Investing

**CFO:** Cash Flow from Operations

**COGS:** Cost Of Goods Sold

**CP:** Cost-Plus

**CSA:** Cost Sharing Arrangement

**CUP:** Comparable Uncontrolled Price

**DEMPE:** Development, Enhancement, Maintenance, Protection and Exploitation

**DTA:** Double Tax Agreement

**EATR:** Effective Average Tax Rate

**EBIDTA:** Earnings Before Interest, Taxes, Depreciation and Amortisation

**EBIT:** Earnings Before Interest and Taxes

**EBT:** Earnings Before Tax or pre-tax profit (interests have already been taken into account and removed from this accounting aggregate)

**EMEA:** Europe, Middle East, and Africa

**EMTR:** Effective Marginal Tax Rate

**ETR:** Effective Tax Rate

**EU:** European Union

**FED:** **FED**ederal reserve (US central bank)

**FOB:** **F**ree-**O**n-**B**oard

**GAFAM:** **G**oogle, **A**pple, **F**acebook, **A**mazn, and **M**icrosoft

**IASC:** **I**nternational **A**ccounting **S**tandard **C**ommittee

**INSEE:** **I**nstitut **N**ational de la **S**tatistique et des **E**tudes **E**conomiques

**IP:** **I**ntellectual **P**roperty

**IRS:** **I**nternal **R**evue **S**ervice (US tax authority)

**LP:** **L**imited **P**artnership

**MNC:** **M**ulti**N**ational **C**orporation

**MNE:** **M**ulti**N**ational **E**nterprise

**OECD:** **O**rganisation for **E**conomic **C**ooperation and **D**evelopment

**OpEx:** **O**perational **E**xpenditure

**PE:** **P**ermanent **E**stablishment

**P&L:** **P**rofit and **L**oss (refers to the income statement).

**PP&E:** **P**roperty, **P**lant and **E**quipment

**SEC:** **S**ecurities and **E**xchange **C**ommission

**SG&A:** **S**elling, **G**eneral and **A**dministrative **E**xpenses

**TIEA:** **T**ax **I**nformation **E**xchange **A**greement

**TPM:** **T**ransfer **P**ricing **M**ethodology

**VAT:** **V**alue-**A**dded **T**ax

## Glossary

**Advanced Pricing Agreement:** Forward agreement made between a tax authority and a taxpayer to fix a TPM over a fixed period of time for a fixed number of transactions.

**Arbitrage:** A practice that consists in taking advantage from price differences for a same asset on two or more different financial markets.

**Arm's length:** An arm's length transaction is a transaction done at the market price determined by supply and demand, meaning that no market participant can exert an influence on it.

**Capital (classical economics):** Goods and services that can be used through multiple production cycles and that are not destroyed in one of those cycles. They can be machines, shipping materials, tools, etc.

**Concealment cost:** Cost of hiding the transfer pricing practices when they are not compliant with a MNE's home country's tax regulation. It represents various costs such as paying the accountants that alter the financial statements or the potential penalties the authorities could impose on the firm if it is found guilty.

**Confounding factor:** A random variable that affect both a dependent (explained) variable (often at the left-end side of an equation) and independent (explanatory) variables (often at the right-end side of an equation).

**Cross-sectional data:** Refers to a collection of data retrieved and analysed for a given date. Cross-sectional data is often used to compare two or more objects of a given group and to assess how external factors affect their state.

**Cost Plus:** Following this methodology, each selling price is equal to the real cost plus i) a margin that includes fees not included in the real cost and ii) the company's profit.

**Cost Sharing Arrangement:** Contractual arrangement that allows two entities to share the costs pertaining to assets production or to services performance. The two entities receive the potential benefits proportionally to their cost allowance.

**Double Tax Agreement:** Agreement between two or more countries to avoid to tax multiple times income or property.

**Elasticity:** The change in percentage of a variable in response to the change in percentage of another variable (e.g.: if X increases by 10%, Y decreases by 40%, which gives an elasticity of 0.25).

**Free-On-Board:** Term used to determine at which point the seller and the buyer of a good are responsible for a good. For instance, the term FOB destination refers to the location at which the responsibility of the good is transferred from the seller to the buyer (it can be, for example, the dock as which a car arrives after shipping).

**Granularity:** Granularity defines the smallest size of a system's element. Once one considers a system's granularity level, one cannot divide information further.

**Hybrid mismatch:** Consists for a MNE in exploiting a tax differential between two countries so as to achieve a double-non taxation (being tax neither in the home country nor in the foreign country). This process results in base erosion.

**Intangible asset:** An asset that has no physical aspect or form and that has a useful life of more than one year. They are often a part of an acquisition, in which the entity that makes the acquisition is allowed to put a part of it to acquired intangible assets. Example: a vaccine patent.

**Intra-firm trade:** Good and services flows between subsidiaries and their parent company or between subsidiaries and other subsidiaries in the same company.

**Intrinsic value:** The intrinsic value measures what an asset is worth, which can be equal to the market value (the value at which investors are willing to acquire the asset), inferior to the market value (in which case the asset is overvalued) or superior to the market value (in which case the asset is undervalued).

**Labour (classical economics):** Human activities resulting in the production of goods and services.

**Linear regression:** A model that seeks to establish a relationship between a dependent (explained) variable and one or multiple independent (explanatory) variables.

**Market value:** The price investors would pay for an asset on the marketplace.

**Meta regression:** An analysis that combines the results of multiples analyses so as to produce a quantifiable, exhaustive and reproducible synthesis.

**Permanent Establishment:** Gives an entity the liability to income tax or VAT in a particular jurisdiction.

**Semi-Elasticity:** The change in percentage of a variable in response to the absolute change in another variable (e.g.: if X increases by 1 unit, Y decreases by 1.4%, which gives an elasticity of 1.4). See [Appendix 1](#) for a more detailed explanation of this key concept.

**Tangible asset:** An asset that often has a physical aspect or form and a finite monetary value. Most of the time, they can be bought or sold on specific markets, though the value based on their liquidity may vary. Example: a machine tool in a plant belonging to a car manufacturer.

**Time-series data:** A succession of numerical values representing the evolution of a specific quantity across time. Time-series data are often used to study the past behaviour and patterns of a specific phenomenon.

**Transfer pricing:** The process of pricing the tangible or intangible assets transferred between related parties such as subsidiaries and parent companies.

**Transparent entity:** A tax transparent entity or “pass through” entity is an entity defined by a special status that allows the income to flow through the owners. The income of the entity is considered as being the income of the entity’s owners. These individuals pay an income tax as if the entity’s income were their own.



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*What is the extent of the BEPS phenomenon?  
And how hard is it for MNEs to engage in profit shifting?*

## INTRODUCTION

## Introduction

"A historic agreement" that will "change the world": this is how the G7 economies termed the deal that was struck a month ago<sup>1</sup> to enforce a set of rules aiming at curbing profit shifting. This agreement paves the way for both implementing a 15% international corporate tax and allowing countries to tax some companies based on their revenues. Though some countries are even pushing for a higher international corporate tax, the proposed one would already be greater than the corporate taxes of some of the most popular low tax jurisdictions, such as Ireland's (12.5%), which is the home of multiple MNEs' affiliates and a significant place of profit shifting in Europe.

This deal comes in the wake of increased scrutiny of profit shifting and, more broadly, fiscal optimisation. Some scandals recently shed light on tax havens, such as the release of the Panama Papers in 2016, whose content was analysed by several journalists and economists, among other professionals. These papers estimated the loss of tax revenue for governments worldwide due to tax havens to be around €200 billion in 2015. Although these papers were not only about profit shifting—which is legal—but fiscal fraud, its impact in the media and around the world severely boosted the public's attention towards big multinationals that seem to make everything in their power to reduce the taxes they should pay.

And these multinationals seem to succeed. For example, Apple, one of the most profitable companies in the world<sup>2</sup>, managed to overturn last year an EU order to give back €13bn of taxes it should have paid to Ireland<sup>3</sup>. This staggering figure representing the amount of taxes that should have potentially been taxed by European countries in which Apple operates seems to be a sign of the lack of fiscal justice that allows big companies to avoid taxes while national companies cannot. And the list of prominent companies operating internationally in every industry involved in fiscal optimisation and profit shifting since the 1990s goes on:

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<sup>1</sup> Financial Times, "G7 strikes historic agreement on taxing multinationals":

<https://www.ft.com/content/a308bbff-5926-47a1-9202-6263e667511e>

<sup>2</sup> Statista, "Leading companies in the world in 2019, by net income":

<https://www.statista.com/statistics/269857/most-profitable-companies-worldwide/#:~:text=In%202019%2C%20Saudi%20Aramco%2C%20the,with%2088.21%20billion%20U.S.%20dollars.>

<sup>3</sup> The Irish Times, "Ireland wins appeal in €13 billion Apple tax case":

<https://www.irishtimes.com/business/economy/ireland-wins-appeal-in-13-billion-apple-tax-case-1.4305044>

GlaxoSmithKline<sup>4</sup>, Motorola<sup>5</sup>, Fiat Chrysler<sup>6</sup>, Astra Zeneca<sup>7</sup>, Zara<sup>8</sup>, Microsoft<sup>9</sup>, Amazon<sup>10</sup>, Apple<sup>11</sup>, Facebook<sup>12</sup>, Google<sup>13</sup>... As such, it looks like many companies seek to avoid taxation as soon as they operate internationally.

But what exactly does “avoiding taxation” mean? Most MNEs do not avoid taxation by simply not paying their taxes or cooking their books and hiding a chunk of their taxable base: the tax administration can easily spot such practices and impose severe fines. Instead, MNEs reduce their taxes by exploiting the tax differential between tax jurisdictions. To do so, MNEs shift their profits made in the higher-tax jurisdictions to the lowest ones in which they operate. Hence, their earnings are globally taxed less. To that end, MNEs may set up affiliates in low tax jurisdictions with the sole purpose of shifting to them the profits made in higher tax jurisdictions. MNEs cited above, and many more, engage in such practices: companies that operate in European countries, where they make most of their profits, will create an affiliate in Ireland or Luxembourg and shift the profits they make in Europe to it. Therefore, some countries, such as France, proposed to tax the companies' revenues that shifted their profits the most. This idea is behind the GAFA tax, proposed by Bruno Le Maire in 2019. It can be summed up as follows: if a company manages to shift its profits and reduce its taxable base to zero, the tax administration makes the company's revenue its new taxable base, since it is the only way to tax the company based on the activity it realises in the country.

National companies and SMEs obviously cannot shift their profits since they do not have the means to set up affiliates in low tax jurisdictions. This situation is a source of public outrage: the biggest and most profitable companies can reduce their corporate tax rate, deprive the tax administration and, as a result, the populations of public money, whereas the national

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<sup>4</sup> Thepharmaletter, “GSK faces US tax evasion charges”: <https://www.thepharmaletter.com/article/gsk-faces-us-tax-evasion-charges>

<sup>5</sup> International Tax Review, “Motorola Faces IRS Bill”: <https://www.internationaltaxreview.com/article/b1fbts75v3rb7i/motorola-faces-irs-bill>

<sup>6</sup> The New York Times, “E.U. Court Orders Fiat Chrysler to Pay Back \$33 Million in Taxes”: <https://www.nytimes.com/2019/09/24/business/eu-fiat-chrysler-starbucks-tax.html>

<sup>7</sup> The Guardian, “Revealed: how AstraZeneca avoids paying UK corporation tax”: <https://www.theguardian.com/business/2015/oct/04/how-astrazeneca-avoids-paying-uk-corporation-tax>

<sup>8</sup> Oxfam, “Zara scandal shows tax dodging still in fashion, says Oxfam”: <https://www.oxfam.org/en/press-releases/zara-scandal-shows-tax-dodging-still-fashion-says-oxfam>

<sup>9</sup> ProPublica, “The IRS Decided to Get Tough Against Microsoft. Microsoft Got Tougher.”: <https://www.propublica.org/article/the-irs-decided-to-get-tough-against-microsoft-microsoft-got-tougher>

<sup>10</sup> The Guardian, “New study deems Amazon worst for 'aggressive' tax avoidance”: <https://www.theguardian.com/business/2019/dec/02/new-study-deems-amazon-worst-for-aggressive-tax-avoidance>

<sup>11</sup> BBC, “Apple has €13bn Irish tax bill overturned”: <https://www.bbc.com/news/business-53416206>

<sup>12</sup> The Verge, “Facebook sued by the IRS for \$9 billion in unpaid taxes”: <https://www.theverge.com/2020/2/19/21144291/facebook-irs-lawsuit-9-billion-taxes>

<sup>13</sup> Reuters, “Google shifted \$23 billion to tax haven Bermuda in 2017”: <https://www.reuters.com/article/us-google-taxes-netherlands-idUSKCN1OX1G9>

companies cannot. In the context of growing inequalities and successive economic crises since the 2000s, this is deemed as profoundly unfair. But is it?

The goal of this master's thesis is simple: assessing the extent of profit shifting so as to have an idea of whether the phenomenon is important and deprives countries of a significant portion of their fiscal revenues, and also the costs shifting profit entails since this practice requires a complex scheme to be undertaken. However, though this master thesis' goal is simple, achieving it will be arduous and complicated, given the breadth of the topic.

This topic will lead us to review the existing literature to understand its scope and its magnitude. To that end, we will, in our first part, define what an MNE and profit are in order to keep these concepts clearly and properly in mind and then explore the ways MNEs shift their profits, to what extent they do it, and what the tax administrations and international institutions do to prevent it (1). In our second part, we will wonder how to dig in the ideas and conclusions best empirically we will have come to in our literature review (2). Finally, in our third and final part, we will interview some professionals that have dealt with profit shifting and have a strong understanding of it to strengthen our grasp on the topic (3). We will thus be able to come up with some relevant insights regarding our question (Conclusion).

Our research and work will not be geographically limited to be as relevant as possible since profit shifting is, by definition, an international phenomenon. We will, however, focus on a specific time period, spanning from the 1980s to today, since the phenomenon of profit shifting became significant once the great globalisation process that started after the Second World War reached its cruising speed.

*What is the extent of the BEPS phenomenon?  
And how hard is it for MNEs to engage in profit shifting?*

## PART 1: LITERATURE REVIEW



# 1. Literature review

## 1.1. How is a firm's performance measured?

### 1.1.1. The firm: a simple and synthetic classical definition

#### 1.1.1.1. The firm in the market economy

Understanding theoretically what a firm is and how it exists within our modern market economy system—which characterises most of the world's countries—is essential to understand how they maximise their income through profit shifting.

The most well-known definition of a firm has been developed in *The Nature of the Firm* by Ronald Coase (1937). He defines the firm as a system of relationships that appears when resource allocation depends on an entrepreneur—that is, when people replace the price mechanism in resource allocation.

The firm implies a wage relationship that entails coordination and authority. The firm is thus a mode of coordination of economic relations between economic agents, which appears as an alternative to the market. Coordination between agents is done unconsciously in the market, whereas it is done consciously under the entrepreneur's authority in the firm.

This coordination between economic agents saves transaction costs: the firm will indeed engage in fewer contracts than an individual for a given quantity of exchanged goods. The firm can, for example, hire an employee whose contract will be valid for all his working hours. In contrast, an individual will have to make several contracts with various professionals to achieve the same result. These transaction savings are the benefits of “internalisation”, which is the process of doing multiple transactions within a firm, as opposed to “externalisation”, which is the process of conducting transactions with third parties.

Though the firm saves transaction costs, it also incurs organisational costs (such as human resources management). A firm's size will thus be limited by the number of transactions it can integrate effectively. As the firm grows, the marginal transaction savings decrease and end up being lower than the marginal externalisation costs<sup>14</sup>.

In this neoclassical economics paradigm, a firm's output depends on its production factors, Labour (L) and Capital (K). A widely used representation of a firm's output is the Cobb-Douglas

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<sup>14</sup> This is consistent with the classical and foundational rule of diminishing returns developed in *An Inquiry into the Nature and Causes of the Wealth of Nations* by Adam Smith (1776).

function, developed in *A Theory of Production* by Cobb & Douglas (1928), which can be simplified as follows <sup>15</sup>:

$$Y = AL^{\alpha}K^{\beta}$$

$A$  being the total factor productivity (a positive constant),  $Y$  being the firm's output of goods,  $L$  being the labour quantity used into production,  $K$  being the capital quantity used into production,  $\alpha$  and  $\beta$  summing up to 1 ( $0 < \alpha < 1$  and  $0 < \beta < 1$ ) and being the output elasticities of respectively labour and capital.

#### 1.1.1.2. The goal of the firm

The main goal of the firm of the firm is to grow and generate profit. In *Business behaviour value and growth*, Archibald & Baumol (1959) consider that the firm's objective is to maximise its overall sales under the constraint of a minimum profit, but not to maximize only its profit. This behaviour corresponds to the objective of the firm's executives since their prestige and income depend more on sales volume than on profit (as long as it is not negative).

Archibald & Baumol consider that a company seeks to maximise its sales growth by reinvesting the profits made. This process can reduce dividends, causing shareholders to follow the firm's development more closely.

However, some argue that a firm must use its power to benefit the community it constitutes and not only to generate profit and maximize the firm's executives' revenue and prestige. In *Dérives du capitalisme financier*, Aglietta & Rebérioux (2004) contend how working towards the whole firm's members' interest is also the firm's primary role and how its global governance and strategy should be structured to this end. Segrestin & Hatchuel (2012), in *Refonder l'entreprise ?*, go further by explaining how a firm's central mission is to benefit all its stakeholders and society as a whole through innovation and social progress. Hence, for them, the firm encompasses more than its mere stakeholders (executives, employees, shareholders, and debtholders) but all parties that interact with it.

#### 1.1.1.3. The implications on profit shifting of the firm's perception

Because we have seen through a brief overview of mainstream firm theories that a firm seeks to maximise its profits, it can be expected that a firm will engage in activities to reduce its tax burden—which is the compensation it has to give to the countries in which it operates for the use of the infrastructures they finance—so as to reduce its costs and increase its profits.

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<sup>15</sup> For instance, if we have  $A = 1$ ,  $\alpha = \beta = 1/2$ ,  $L = 16$  and  $K = 4$ , we obtain the following output  $Y$ :  
 $Y = f(16,4) = 1 * \sqrt{16} * \sqrt{4} = 8$ .

Among the firms, the ones that engage the most in profit shifting are unsurprisingly MNEs. MNEs are firms that operate in multiple countries. Because they operate in multiple countries, MNEs can more easily take advantage of different tax regimes and optimise the taxes they must pay to the countries' tax authorities in which they operate. They are considered—along with states and international organisations—the main actors of globalisation, which is the growing interdependency of national economies throughout the world (Hennart, 2009). MNEs play a significant role in employment (by being major employers in several countries), environmental impact (especially for industrial MNEs), soft power (MNEs spread their home countries' cultures abroad) and politics (their substantial financial means and strategic sectors give them weight to influence countries' regulations).

Now that we have defined what a firm is and why they theoretically seek to generate profits, we can define what is profit itself, which is its net product and its primary measure of wealth creation.

### 1.1.2. What is profit?

#### 1.1.2.1. Profits seen through the financial statements

Understanding profit shifting requires understanding what profit itself is and what type of profit we are considering. Profit is considered as the critical metric of a company's performance and is thus the one that companies seek to maximize in the long term (Tulvinschi, 2013). As such, it is the keystone of a company's financial statements, whose aim is—following the IASC Board<sup>16</sup>—to represent faithfully and in a relevant manner the financial health of the company.

Let us go through the most relevant financial statements presented in an Anglo-Saxon format to assess how a company's profit is represented and highlight the most crucial items MNEs use to shift their profits. The most important financial statements are the income statement, the cash flow statement, and the balance sheet (Penman, 2007; Ross et al., 2018).

##### 1.1.2.1.1. The income statement

The income statement's goal is to represent the profitability of a given company over a period of time through its revenue and expenses. It starts with the revenue and ends with the net income. It includes the following elements, calculated as follows:

- The **gross profit** is the difference between a company's revenue—equal to the product of the number of items sold multiplied by the item price—and the COGS—

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<sup>16</sup> According to the *Framework for the Preparation and Presentation of Financial Statements* approved by the IASC: [http://www.actuaries.org/CTTEES\\_INSACC/Documents/Rio\\_Item\\_7c\\_Rio\\_Discussion.pdf](http://www.actuaries.org/CTTEES_INSACC/Documents/Rio_Item_7c_Rio_Discussion.pdf)

equal to the sum of the variable costs and the fixed costs stemming from items' production.

- The **operating profit** is equal to the difference between gross profit and SG&A expenses (highlighted in orange in Figure 1)—which includes expenses such as payroll and overheads—plus depreciation & amortization of assets which are used through multiple production cycles over more than one year (highlighted in purple in Figure 1). SG&A also includes royalty payments pertaining to patents or intellectual property, which are a powerful tool of profit shifting: MNEs locate subsidiaries in low-tax jurisdictions that hold the property rights of goods sold in high-tax jurisdictions. The subsidiaries located in high tax jurisdictions then pay royalties to subsidiaries located in low-tax jurisdictions. This mechanism decreases the high-tax jurisdictions' net income and increases the low-tax jurisdictions' net income, thus reducing the MNE's global tax liability and maximizing the MNE's overall profit.
- The **income before tax**, or earnings before tax, is equal to the difference between operating profit and the interest expense, which includes interest paid on loans that the company contracted as well as coupon payments to bondholders that hold the bonds the company has issued. Interest expense (highlighted in blue in Figure 1) is also an essential tool of financial profit shifting techniques, which involve for an MNE to contract debt from affiliates and allocate the interest expense to locations where the MNE is highly taxed.
- The **net income** is the difference between the income before tax and the corporate tax (highlighted in green in Figure 1) which is a percentage of the income before tax, and is also called net earnings or profit when positive (highlighted in red in Figure 1).

The corporate tax is determined by the tax jurisdiction in which the company operates and generates revenue. It represents the company's financial contribution to the infrastructures financed by the country in which it operates. These infrastructures include roads, telecommunications networks, railways, airports (utilities), or higher education and hospitals (social infrastructures) that provide a qualified workforce. Taxes payables determined by the corporate tax is the very line that is the purpose of BEPS. Companies that engage in profit shifting intend to reduce the corporate tax to which they are subject to maximize their earnings.

Standard metrics of profitability such as EBT (which is the sum of net income and corporate taxes), EBIT (which is the sum of EBT and interest expense), and EBIDTA (which is the sum of EBIT and depreciation and amortization) are directly influenced by net income and followed

heavily by financial analysts, whose forecasts have a critical weight on the company's financing costs.

#### *1.1.2.1.2. The balance sheet*

Profit affects the balance sheet, which aims to represent the financial position of a given company at a given point in time through its assets, liabilities, and shareholder's equity. It starts with the cash balance and ends with the retained earnings.

The net income is added to retained earnings, which includes all the earnings that were not distributed as dividends to shareholders. It increases the shareholder's equity and thus the total liabilities and shareholder's equity, which finances and is equal to the company's total assets.

#### *1.1.2.1.3. The cash flow statement*

Finally, profit affects the cash flow statement, which aims to represent the cash movements of a given company over a period of time, through its variation of cash. It starts with net income and ends with the cash balance.

Net earnings increase the cash flow from operations, depreciation, and amortization—which are non-cash expenses—as well as the change in working capital, which is equal to the difference of the sum of accounts receivable plus inventory and accounts payable. Cash flow from operations, cash flow from investing (sales of fixed assets minus investments in PP&E) and cash flow from financing (issuance of debt and equity) result in the cash variation of the given period. This cash variation is added to the opening cash balance—which is the closing cash balance of the prior period's balance sheet—and results in the closing cash balance that will be the starting point of the current year's balance sheet.

In the short run, a company might reduce its profits to reduce its tax liabilities through increased D&A, SG&A expense, or interest expense, but with the goal of maximizing its profits in the long run. We can thus see how maximizing the net earnings, in the long run, is of paramount importance for a company.

What is the extent of the BEPS phenomenon?  
And how hard is it for MNEs to engage in profit shifting?

Figure 1 | How profit is calculated and behaves within the three main financial statements

Income Statement (Multiple-Step Format)			Cash Flow Statement (Activity Format)		
	N	N+1		N	N+1
+ Revenue	100,000	120,000	+ Net Earnings	1,750	11,900
- COGS	40,000	50,000	+ D&A	20,000	18,000
= Gross Profit	60,000	70,000	+ Δ Working Capital	12,750	3,250
- SG&A   OpEx	35,000	32,500	= CFO	9,000	26,650
- D&A	20,000	18,000			
= Operating Profit	5,000	19,500	+ Sales of Fixed Assets	8,000	-
- Interest Expense	2,500	2,500	- Investments in PP&E	17,000	23,000
= Income Before Tax   Earnings Before Tax	2,500	17,000	= CFI	(9,000)	(23,000)
- Corporate Income Tax Expense (30%)	750	5,100	+ Issuance of Debt	-	8,000
= Net income   Net earnings   Profit (loss)	1,750	11,900	+ Issuance of Equity	170,000	-
			= CFF	170,000	8,000
+ Net income	1,750	11,900			
+ Corporate Income Tax	750	5,100	+ CFO	9,000	26,650
= EBT	2,500	17,000	+ CFI	(9,000)	(23,000)
+ Interest Expense	2,500	2,500	+ CFF	170,000	8,000
= EBIT	5,000	19,500	= Δ Cash	170,000	11,650
+ D&A	20,000	18,000	+ Opening Cash Balance	-	170,000
= EBITDA	25,000	37,500	= Closing Cash Balance	170,000	181,650

Balance Sheet (Report Format)		
	N	N+1
+ Cash	170,000	181,650
+ Accounts Receivable	10,750	11,000
+ Inventory	10,000	12,000
+ PP&E (Δ in PP&E = CapEx)	59,000	64,000
= Total Assets	249,750	268,650
+ Accounts Payable	8,000	7,000
+ Debt	60,000	68,000
= Total Liabilities	68,000	75,000
+ Equity Capital	180,000	180,000
+ Retained Earnings (= Net income - Dividends)	1,750	13,650
= Shareholder's Equity	181,750	193,650
+ Total Liabilities	68,000	75,000
= Total Liabilities & Shareholder's Equity	249,750	268,650
+ Accounts Receivable	10,750	11,000
+ Inventory	10,000	12,000
- Accounts Payable	8,000	7,000
= Working Capital	12,750	16,000

### 1.1.2.2. How profit can be manipulated

#### 1.1.2.2.1. Profit versus performance

The central measure of performance is often believed to be profits. However, there is a difference between profit and performance. Businesses activity is measured by profit, whereas operations conducted by the management of companies are measured by performance (Tulvinschi, 2013).

Accounting profit can be defined:

*“In terms of the positive difference between the revenue gained after the sale of the goods produced by a business entity and the costs incurred during production, understood as a measure of economic efficiency.”*

- Verboncu & Vrîncuț (2013)

Thus, profit is a monetary advantage resulting from economic activity and represents the gap between revenue and expenditures generated by a firm.

Accounting profit aims to measure an entity's financial performance and is generally calculated regularly at each business cycle to be relevant (monthly, quarterly, semestrial or annually). It also serves various essential economic functions for a company, including:

- Guiding dividends policy;
- Budgeting decisions (investments);
- Assessing management's efficiency regarding how it operates the entity;
- Acting as a measurement value of the entity by third parties.

Profit is also of paramount importance in determining an entity's efforts towards increasing its efficiency since it is the metric considered as being the one that best translates such successful efforts.

Performance can be defined as:

*“An outstanding result reached in the field of management, business and trade, conveying competitiveness, efficiency and effectiveness to the organisation and to its methodological and structural elements.”*

- Verboncu & Vrîncuț (2013)

Performance conveys a broader meaning than profit since it represents the “*competitive spirit of a specific business entity that consolidates its lasting presence on the market*” (Tulvinschi, 2013).

#### 1.1.2.2.2. Influence of some accounting techniques on profit

We can see through two illuminating examples how revenue recognition techniques can significantly impact profit without influencing performance.

The first example concerns revenue recognition. Imagine that a firm’s products are manufactured at year N with production costs of 100 and sold at N+1 at 120, with the cash being collected at N+2. We can see through **Figure 2** that, depending on revenue recognition methods, profit can vary between N and N+2.

Figure 2 | Revenue recognition methods

Method 1: Completion of production			
Year	N	N+1	N+2
Income	120	0	0
Expenses	(100)	0	0
<b>Profit</b>	20	0	0

Method 2: Time of delivery			
Year	N	N+1	N+2
Income	0	120	0
Expenses	0	(100)	0
<b>Profit</b>	0	20	0

Method 3: Cash collection			
Year	N	N+1	N+2
Income	0	0	120
Expenses	0	0	(100)
<b>Profit</b>	0	0	20

The second example concerns the processing of costs regarding R&D, which is a well-known difference between US GAAP and IFRS accounting standards. US GAAP states that R&D costs should be considered as expenses, whereas IFRS states that R&D costs should be amortised over time to account for their long-term impact.<sup>17</sup>

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<sup>17</sup> This distinction is, in fact, more nuanced. Research costs and development costs must be incurred as expensed under US GAAP. However, under IFRS, development costs can be amortised if their technological feasibility has been proved, whereas research costs must be expensed as under US GAAP. This distinction has been simplified to demonstrate how accounting techniques influence profit.



Consider a company that undertakes an R&D project over 4 years for a cost of 4,000 that generates cash-flows of 1,800 each year and has yearly production costs of 200. The accounting profit will significantly vary each year, being way higher in years 1, 2, 3 and 4 if the R&D project is expensed (1,600 per year) following US GAAP than if the R&D project is amortised (600 per year) following IFRS (see [Figure 3](#)).

Figure 3 | Amortisation methods' impact on accounting profit

R&D costs are recognized as assets (IFRS, linear amortization)					
Entry	N	N+1	N+2	N+3	N+4
Sales income	0	1,800	1,800	1,800	1,800
Production costs	0	(200)	(200)	(200)	(200)
R&D amortization costs	0	(1,000)	(1,000)	(1,000)	(1,000)
<b>Accounting profit</b>	0	600	600	600	600
<b>Business entity performance</b>	2,400				

R&D costs are not recognized as assets (US GAAP)					
Entry	N	N+1	N+2	N+3	N+4
Sales income	0	1,800	1,800	1,800	1,800
Production costs	0	(200)	(200)	(200)	(200)
R&D amortization costs	(4,000)	0	0	0	0
<b>Accounting profit</b>	(4,000)	1,600	1,600	1,600	1,600
<b>Business entity performance</b>	2,400				

These two examples highlight how profit must not be confounded with performance. A profitable company has revenues that are greater than its expenses. In contrast, a performing entity is competitive enough to secure its long-term presence on the market, independently of fluctuations resulting from accounting practices.

Performance results from a comparison between stated objectives and actual results over time. Profits can be a measure of performance but can also significantly change following different accounting principles. To a certain extent, it can thus be misleading to consider accounting profit a strict performance measure.

This shows how accounting profit can variate only with different accounting methods and how it is a monetary measure and not a global and abstract measure of performance. As such, profit does not necessarily reflect the intrinsic performance of a company. This observation is particularly interesting given that it is the main issue raised by profit shifting: MNEs' affiliates declare profits in low-tax countries that are higher than their genuine "performance".

\* \* \*

We have defined what a firm is and how it exists and interacts with the market economies that characterise most countries in the world. We also explained what profit is—which is considered as the principal measure of a firm’s performance though not the best one—and how it can be altered. These two definitions allow us to understand profit shifting, that is, how MNEs maximise their profits by attributing economic activity in low tax jurisdictions.

## **1.2. The BEPS phenomenon: the ways firms maximise their income through profit shifting**

### **1.2.1. Artificially altered intrafirm prices: transfer pricing**

#### **1.2.1.1. Definition and example**

Transfer prices are the prices that companies in the same group charge each other for goods sold or services provide (Hines & Clausing, 2001). They are the same as intrafirm prices. Transfer prices can be distorted to shift a part of the profit generated by an entity to another related entity so as to minimise the income tax.

Let us take a simplified example to go through the transfer pricing mechanism, in which we omit countries’ tax authorities’ ability to tax foreign income.<sup>18</sup>

Suppose Automotive Corporation is an MNE that operates in the car manufacturing industry, with a parent company based in Country B, which enforces a tax rate of 40%. Automotive Corporation plant is based in Country A, which enforces a tax rate of 20%. Automotive Corporation wishes to sell its car in Country A.

The car that the affiliate based in Country A produces would be sold in its current state for \$30K to an unrelated party, representing the producing and shipping cost plus what would be considered a “fair margin” by tax authorities: this is the arm’s length price.

1st scenario: the intercompany price equals the arm’s length price (see [Figure 4](#)).

The affiliate ships the car to the parent company for the arm’s length price. Then, the parent company undertakes various operations on the car, which further increase its value. It then

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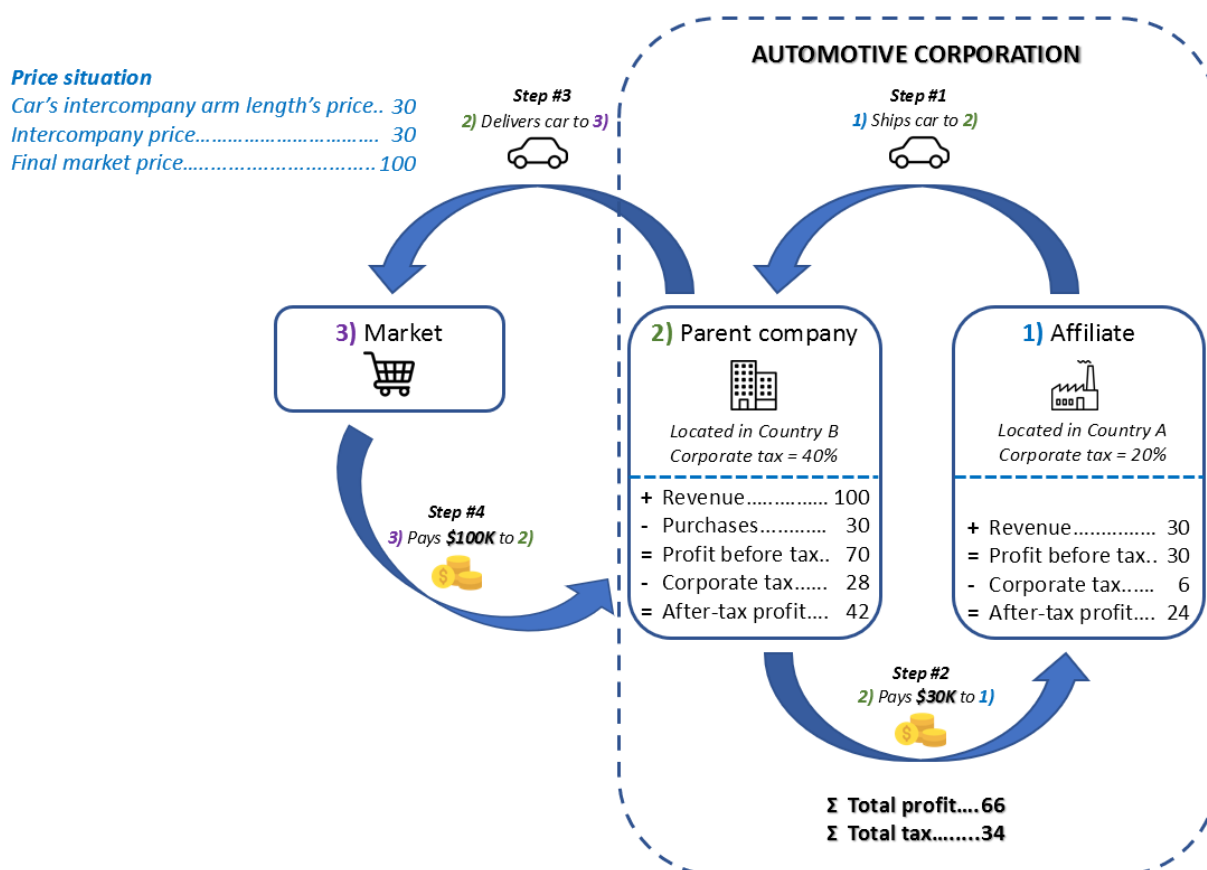
<sup>18</sup> This example is not realistic as car manufacturing is far from being an industry suitable for profit shifting. However, illustrating profit shifting through such a tangible good as a car makes the whole concept more understandable. Also, tax authorities of a given country tend to tax foreign income, which reduces the benefit of transfer pricing.

sells the car for \$100K on the market. Thus, the parent company makes a profit before tax of \$70K, representing the \$100 from the market minus the \$30K it paid to its affiliate. Corporate tax is then equal to  $0.4 \times 70 = \$28K$ , thus resulting in an after-tax profit of \$42K in Country B.

The affiliate made a revenue of \$30K by selling the car to the parent company. Its before-tax profit is thus \$30K (we do not consider the affiliate's own cost for the sake of simplicity). Corporate tax is then equal to  $0.2 \times 30 = 6$ , thus resulting in an after-tax profit of 24.

Automotive Corporation's total profit is then equal to \$66K, and its total tax liability is equal to \$34K.

Figure 4 | The intercompany price is equal to the arm's length price (amounts in \$K)



2nd scenario: the intercompany price is higher than the arm's length price (see [Figure 5](#)).

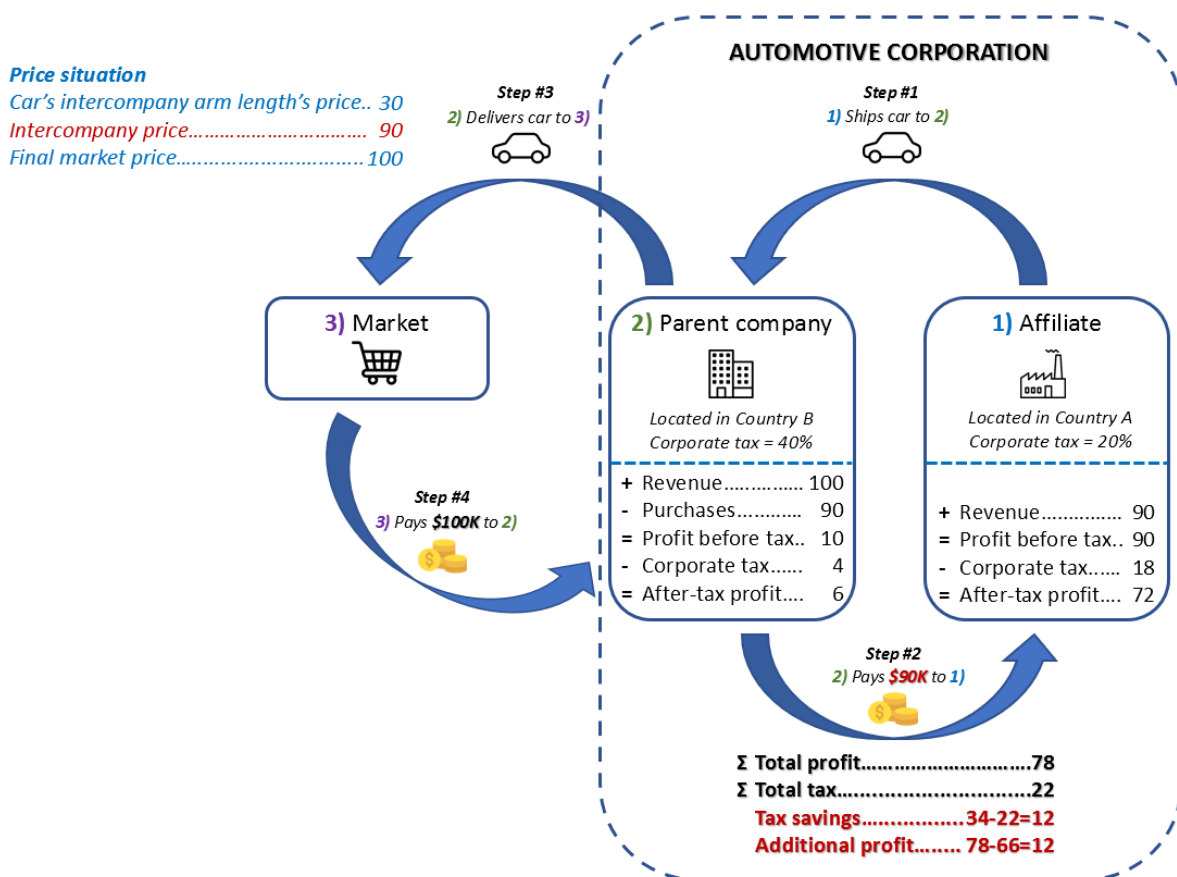
The affiliate increases the price to which it sells the car to the parent company to \$90K after having convinced Country A's and B's tax authorities that it was somehow a proper valuation of its value. Then, the parent company undertakes various operations on the car, which further increase its value. It then sells the car for \$100K on the market. Thus, the parent

company makes a profit before tax of \$10K, representing the \$100 from the market minus the \$90K it paid to its affiliate. Corporate tax is then equal to  $0.4 \times 10 = \$4K$ , thus resulting in an after-tax profit of \$6K.

The affiliate made a revenue of \$90K by selling the car to the parent company. Its before-tax profit is thus \$90K (we do not consider the affiliate's own cost for the sake of simplicity). Corporate tax is then equal to  $0.2 \times 90 = \$18K$ , thus resulting in an after-tax profit of \$72K.

Automotive Corporation's total profit is then equal to \$78K, and its total tax liability is equal to \$22K.

Figure 5 | The intercompany price is higher than the arm's length price (amounts in \$K)



We can see how Automotive Corporation took advantage of the tax differential between the country where it located its manufacturing operations (Country A) and the country where it undertook further operations to increase the car's value and sell it (Country B) by artificially inflating the car's intercompany price above the arm's length price. By doing so, Automotive

Corporation increased its profit by \$12K and reduced its tax liability by an equal amount of \$12K.<sup>19</sup>

#### 1.2.1.2. Circumstances in which MNEs engage in transfer pricing

##### 1.2.1.2.1. The theoretical framework in which MNEs engage in transfer pricing

Intra-firm trade has indeed significantly increased since the 1980s and even more recently. The intra-firm trade within OECD countries has been multiplied by six in the 2000s. This evolution is due to various factors, ranging from increasing capital mobility to new technologies and the complexification of value chains (Gupta, 2018). In this environment, governments must make arbitrage between i) economic stimulation through public spending and ii) budget balancing, while considering how the public perceives the practices of companies that try to reduce their income tax.

Many empirical studies show that profits reported by MNEs are sensitive to local corporate tax rates. A critical explanation of this phenomenon is transfer pricing (Hines & Clausing, 2001). Transfer pricing has been deemed by EY as the first tax issue for business today.<sup>20</sup>

Following the arm's length principle, the tax administrations consider that the price set for transactions between two entities should be equal to the price determined by the market. There are various methods—the cost-plus method or the comparable prices method being the most used ones—for MNEs to determine their intrafirm price that complies with most countries' tax authorities regulations (Behrens et al., 2014). The main problem for tax authorities is that information about prices of products traded between related entities is hardly available to tax authorities, and a reference arm's length price of a product that could be compared to that same product's price sold between related entities is even less available (Lohse & Riedel, 2013).

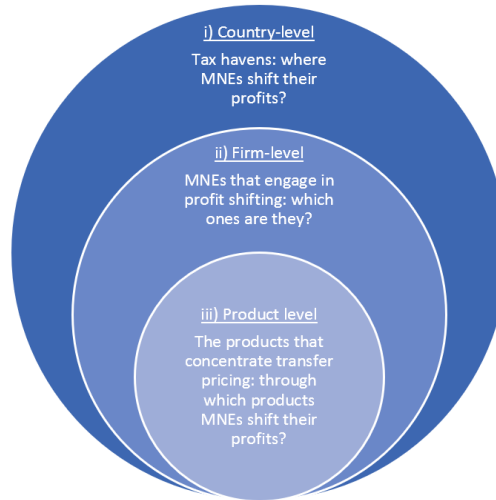
To understand in which circumstances and to what extent MNEs alter their intrafirm prices and engage in this technique called "transfer pricing", Davies et al., (2018), in *Knocking on Tax Haven's Door: Multinational Firms and Transfer Pricing*, observed the arm's length and intrafirm prices on a company-, country- and product-level, and developed a model to compare an MNE's intrafirm price for a product to an arm's length's price for the same product, synthesised in **Figure 6**.

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<sup>19</sup> An affiliate of an MNE that would want to export goods or services to a country in which corporate tax is lower would ship its goods to the affiliate located in the low-tax jurisdiction to a price inferior to the arm's length price, which is the opposite of the scenario displayed.

<sup>20</sup> See Ernst and Young's *Transfer Pricing and International Tax Survey 2019*:  
[https://www.ey.com/en\\_gl/transfer-pricing-international-tax-survey](https://www.ey.com/en_gl/transfer-pricing-international-tax-survey)

Figure 6 | Davies et al. (2018) study's levels



Davies et al. built a model to show how taxes and other factors such as GDP per capita or trade costs determine MNEs' pricing strategies.

The main model's inputs are as follow:

$H$  = country in which the MNE produces its good

$F$  = country in which MNE's affiliate is located

$T^H$  = country  $H$  tax rate

$T^F$  = country  $F$  tax rate

$P_{MNE}^H$  = FOB price at which the MNE sells its goods to its affiliate  
= transfer price

$P_{MNE}^F$  = consumer price in country  $F$

$P^{H*}$  = arm's length or market price

$\gamma$  = concealment cost

With these inputs and through various econometric-related calculations, Davies et al. study how the price gap between the market price and the transfer price, measured as  $\frac{P^{H*}}{P_{MNE}^F}$ , responds to the other parameters mentioned above.

The main idea is that when the home corporate tax is higher than the foreign corporate tax ( $T^H > T^F$ ), then the MNE can make additional profits by shifting a fraction of its domestic profits to the foreign country, but only if the concealment cost  $\gamma$  is lower than the tax differential at a transfer price inferior to the arm's length price ( $P_{MNE}^H < P^{H*}$ ).

Otherwise, when the home corporate tax is lower or equal to the foreign corporate tax ( $T^H \leq T^F$ ), then the MNE has no incentive to shift its domestic profits. Consequently, the export price and the arm's length price are the same ( $P_{MNE}^H = P^{H*}$ ).

An equilibrium is reached when the cost of transfer pricing is equal to the marginal savings stemming from tariffs and tax payments reductions obtained through transfer pricing.

Hence, when the host country's tax increases, the difference of the intrafirm price minus the arm's length price increases as well. More precisely, export price decreases as the host country's corporate tax increases, but only for transactions between related entities within an MNE.

However, above a certain difference threshold between the home country's and the host country's corporate taxes, the difference between the intrafirm and arm length prices should not increase. This is because countries are not attractive for MNEs that engage in profit shifting only because they have a low corporate tax rate. They are also because they offer a favourable tax environment suitable to profit shifting, such as good infrastructures for communication purposes and bank secrecy that, according to the OECD, "*artificially segregates taxable income from the activities that generate it*"<sup>21</sup>.

#### 1.2.1.2.2. Empirical findings regarding transfer pricing

Davies et al., with the previous model, used yearly FOB values and quantities of goods and services exported by French MNEs that control at least 50% of another firm in terms of voting rights outside France, provided by French customs. They also used firms' export modes, provided by INSEE surveys on French firms. Both of these data sources are from the year 1999. They represent roughly 700K observations, 65K MNEs, 5K products and 45 countries. Finally, they considered the EMTR and the EATR of the 45 countries identified on the firm level to assess how these countries' corporate tax rates affect profit shifting.

The main results are that most of the tax avoidance done through transfer pricing is done by a reduced number of important French MNEs and that their intrafirm prices are 11% lower than arm's length prices. Indeed, only 450 MNEs are responsible for 90% of the profits shifted from France to tax havens, and these shifts represent roughly 1% of France's corporate tax revenues. This observation shows that legislation focused on fewer companies could yield significant results to reduce profit shifting practices.

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<sup>21</sup> See *Action plan on base erosion and profit shifting* by the OECD: <https://www.oecd.org/tax/action-plan-on-base-erosion-and-profit-shifting-9789264202719-en.htm>

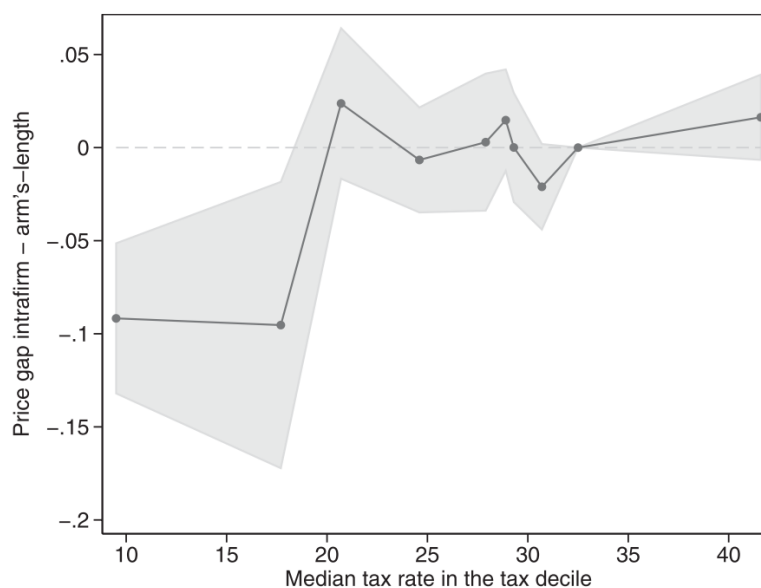
Concerning the effects of the other factors studied by Davies et al., on the intrafirm prices of MNEs:

- A reduction of 10% of the EMTR decreases intrafirm prices by 1.2%;
- An increase of 10% in GDP per capita increases export price by 0.6%;
- An increase of 10% in distance increases exports price by 1.8%;
- The price of a product exported to a tax haven is 11% lower than the market price of the same product;
- There is a negative correlation between median tax rate and the differential between intrafirm price and arm's length price (see [Figure 7](#)).

We can draw a generalised conclusion that the lower the corporate tax of the foreign country, the higher the difference between transfer price and arm's length price. We can also conclude that intrafirm trade is positively correlated with the difference between the transfer price and the arm's length price in each destination.

Cristea & Nguyen (2016), in *Transfer pricing by multinational firms: new evidence from foreign firm ownerships*, also showed that when an MNE exports goods to a country that enforces a lower corporate tax than its home country's, the MNE will always use a price inferior to the arm's length price. More broadly, these authors contend that diverging from the arm's length price is a profit source when a certain tax differential threshold is reached between the home countries and the host countries. This finding is consistent with the work of Davies et al., (2018).

Figure 7 | Corporate tax rate (x-axis) effect on the difference between intrafirm price and arm's length price (y-axis), with an interval confidence of 5%, from *Knocking on Tax Haven's Door: Multinational Firms and Transfer Pricing* (Davies et al., 2018)





## 1.2.2. Intangibles and royalty payments

### 1.2.2.1. The growing use of intangibles as a means of shifting profit

MNEs use complex group structures to alter their tax liabilities and maximise their profits. They often locate intangibles so as to use royalty payments within their structure as a means to shift profit to their entities based in low tax jurisdictions. (Gupta, 2018).

A company pays typically the international corporate tax where its economic activity or its capital is located. Nevertheless, through the management of intellectual property, MNEs manage to shift profit to favourable tax jurisdictions. MNEs then defer their taxes until they repatriate profits from their subsidiaries, hence generating savings.

During recent years, GAFAM companies and various companies such as Starbuck, Nike, or Fiat, drew much attention due to the structures of their businesses that intend to shift profits to low tax jurisdictions. A growing number of MNEs are indeed creating complex holding structures in various countries to shift their profit using intangibles. *In Corporate taxes and the location of intangible assets within multinational firms*, Dischinger & Riedel (2011) indeed show that European MNEs have a higher probability of holding IP intangibles in low-tax countries than in high-tax countries.

Global projects such as the OECD's BEPS<sup>22</sup> project show that most countries and institutions are aware of that problem and the complexity of companies' schemes (a corporation may own several subsidiaries which hold themselves several subsidiaries). Lawmakers are trying to fight these complex schemes by reinforcing regulation, which in turn increases the complexity of the companies schemes that try to avoid the new tighter regulations (Huizinga & Laeven, 2008).

The ability of endeavours such as the BEPS Project to prevent taxation-based arbitrage is, however, widely discussed, especially with the practice of relating intangible property between subsidiaries of an MNE without requiring the transfer of any tangible asset or people. The main focus of OECD's BEPS project has thus been on these intangible assets' transfers, but with limited success so far.

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<sup>22</sup> See OECD's BEPS project: <https://www.oecd.org/tax/beps/>

#### 1.2.2.2. What are intangibles and in which cases are they used?

According to the *Transfer Pricing Guidance on Financial Transactions* of OECD<sup>23</sup>, an intangible is defined as something:

*“Which is not a physical or financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances.”*

The OECD introduces specific examples of what elements can be considered as intangibles:

- Patents and trademarks (also known as IP);
- Trade secrets and specific know-hows;
- Brands;
- Rights under contract;
- Government licenses.

And two main types of transactions that involve intangibles:

- Selling intangibles or intangibles rights;
- Selling tangible products or services sales linked to intangibles.

#### 1.2.2.3. A case-study approach to understand the way MNEs use intangibles to shift their profits.

In *Analysis of intellectual property tax planning strategies of multinationals and the impact of the BEPS project*, Gupta (2018) conducted research about relevant examples on companies that:

- Were MNEs,
- Engaged in profit shifting,
- Had complex group structures,
- Were under the European Commission’s investigation,
- Used royalty payments as a means of profit shifting on the 2013-2016 period.

And chose Starbucks, Amazon, and McDonald. This study—the first of its kind—offers a concrete perspective about how MNEs use intangibles to shift their profit.

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<sup>23</sup> See OECD’s *Transfer Pricing Guidance on Financial Transactions*: <http://www.oecd.org/tax/beps/transfer-pricing-guidance-on-financial-transactions-inclusive-framework-on-beps-actions-4-8-10.htm>

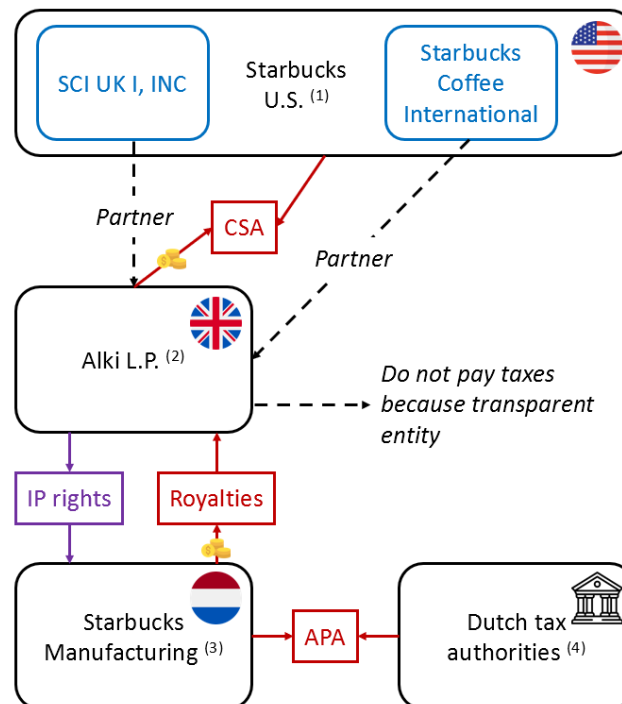
### 1.2.2.3.1. The case of Starbucks

Starbucks is a manufacturer and seller of coffee that operates in 70 countries. Starbucks' operations are grouped in business lines as follows<sup>24</sup>:

- U.S.A, Canada and South America;
- Asia & Pacific;
- EMEA;
- Other operations (include all operations outside operations related to retail coffee worldwide, such as ready-to-drink beverages, or grocery stores).

The profit shifting scheme of Starbucks is as follows:

Figure 8 | Starbucks's profit shifting scheme, adapted from *Analysis of intellectual property tax planning strategies of multinationals and the impact of the BEPS project* (Gupta, 2018)



Starbucks Manufacturing (3), based in the Netherlands:

- Produces the bulk of Starbucks' products for Europe;
- Pays royalty payment to Alki LP (2) since Alki LP (2) detains the IP pertaining to the products Starbucks Manufacturing (3) produces. Royalties are a function of Starbucks Manufacturing (3) profits and the funds it needs to function as follows:

$$\text{Royalties} = \text{Profits} - \text{Remunerations for function performed}$$

<sup>24</sup> See Starbucks's 10-K SEC filing:

<https://www.sec.gov/Archives/edgar/data/829224/000082922418000052/sbux-9302018x10xk.htm>

Alki LP <sup>(2)</sup>, based in the United Kingdom:

- Is a transparent entity not liable to corporate tax following Dutch and UK tax systems;
- Alki LP <sup>(2)</sup>'s partners are residents in the US and pay their taxes according to the US tax law;
- Holds IP rights and bears all the entity risks;
- Receives Starbuck Manufacturing <sup>(3)</sup> royalty payments for the use of the IP rights Alki LP <sup>(2)</sup> detains. These are not subject to Dutch withholding tax;
- Has no employees;
- Has concluded a CSA with Starbucks U.S. <sup>(1)</sup>.

Starbucks U.S. <sup>(1)</sup> and partners (SCI UK I, INC & Starbucks Coffee International):

- Receives Alki LP <sup>(2)</sup>'s royalty payments under the Cost Sharing Arrangement.

Dutch tax authorities <sup>(4)</sup>:

- Made a favourable APA with Starbuck Manufacturing <sup>(3)</sup> regarding the royalty payments made to Alki LP <sup>(2)</sup> that are not taxed in the Netherlands.

Overall:

- Starbuck Manufacturing <sup>(3)</sup> takes advantage of the Dutch tax system so as not to pay taxes on the royalties it pays to Alki LP <sup>(2)</sup>;
- Alki LP <sup>(2)</sup> avoids tax liability in the UK because of its form as an LP;
- Starbucks U.S. <sup>(1)</sup>'s partners defer their tax until the company brings back all its earnings to the US from its related entities (Alki LP <sup>(2)</sup> and Starbuck Manufacturing <sup>(3)</sup>).

#### *1.2.2.3.2. The case of Amazon*

Amazon is a technology company that offers several services, the most important one being its global marketplace and its data storage solution (Amazon Web Services). Amazon decided to split its business as follows<sup>25</sup>:

- North America, encompassing all online retailing services in North America;
- International, encompassing all online retailing services outside North America;
- Amazon Web Services, encompassing all cloud computing-based services worldwide.

In Europe, Amazon created a subsidiary named Amazon EU Sarl based in Luxembourg, which records the bulk of Amazon's profits in the area.

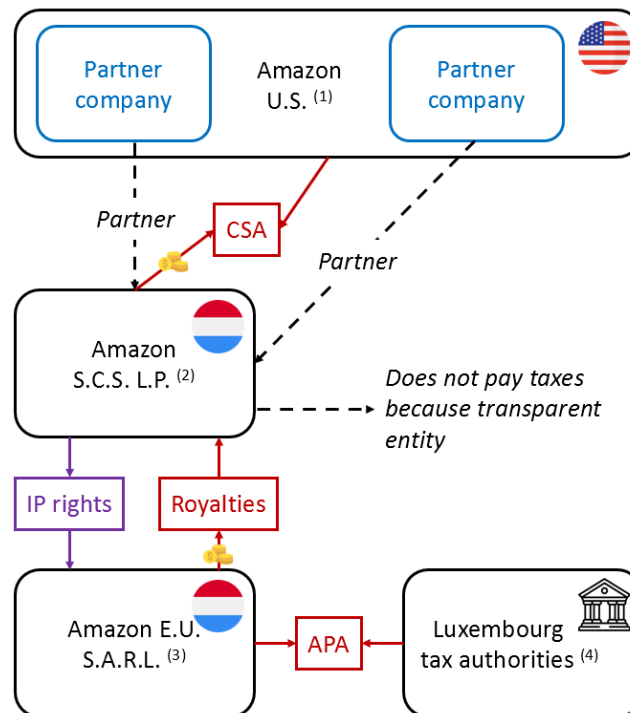
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<sup>25</sup> See Amazon's 10-K SEC filing:

<https://www.sec.gov/Archives/edgar/data/1018724/000101872419000004/amzn-20181231x10k.htm>

The profit shifting scheme of Amazon is as follows:

Figure 9 | Amazon's profit shifting scheme, adapted from *Analysis of intellectual property tax planning strategies of multinationals and the impact of the BEPS project* (Gupta, 2018)



Amazon EU Sarl <sup>(3)</sup>, based in Luxembourg:

- Performs Amazon services for Europe.
- Pays royalty payments to Amazon SCP LP <sup>(2)</sup> for the use of IP rights. These payments are calculated as follows:

$$\text{Royalties} = \text{Profits} - \text{Remunerations for function performed}$$

Amazon SCP LP <sup>(2)</sup>, based in Luxembourg:

- Licences IP rights to Amazon EU Sarl <sup>(3)</sup> and receives a tax-deductible royalty from Amazon EU Sarl <sup>(3)</sup> in return (Luxembourg tax rules do not tax local or foreign recipients of royalty payments).
- Made a CSA with US affiliate companies.

Amazon U.S. <sup>(1)</sup>, based in the US:

- Receives Amazon SCP LP <sup>(2)</sup> royalty payments under the Cost Sharing Arrangement.

Luxembourg tax authorities <sup>(4)</sup>:

- Agreed to the transfer pricing policy and the calculation of royalties between Amazon's entities based in Luxembourg.

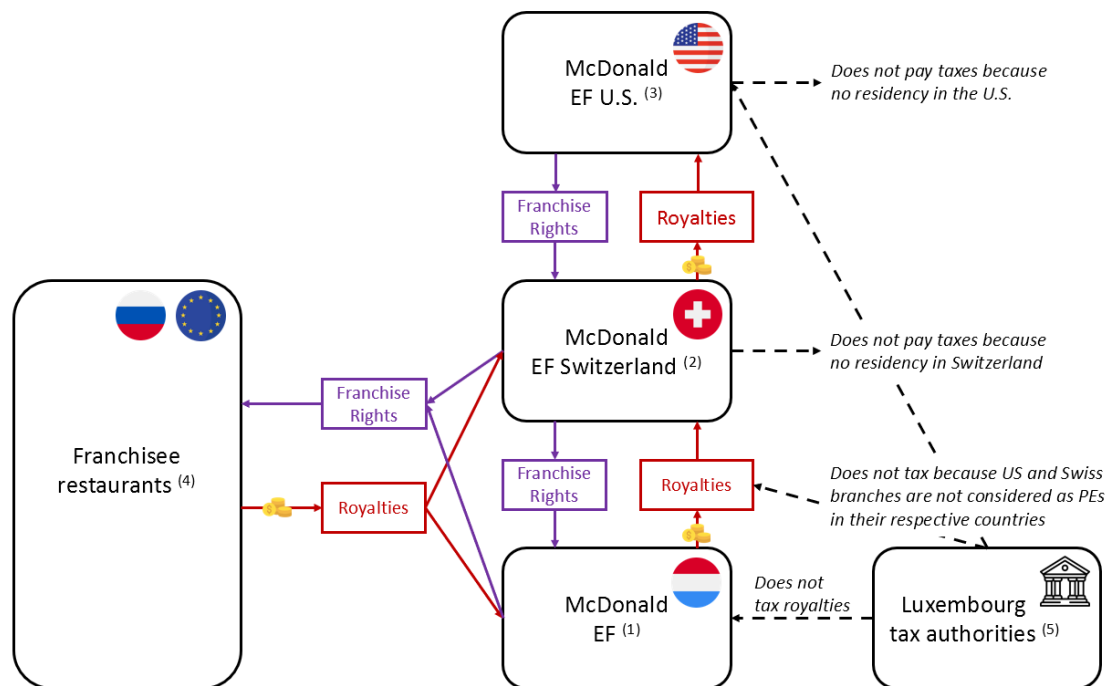
The European Commission casted doubt on the fact that Luxembourg might have provided Amazon with an economic advantage by allowing Amazon to reduce its tax liabilities.

#### 1.2.2.3.3. The case of Mac Donald's

McDonald's is a major food industry operator and structured its activities between five business lines<sup>26</sup>:

- U.S. market,
- Foreign market,
- Growth market,
- Fundamental market,
- Business market.

Figure 10 | MacDonald's profit shifting scheme, adapted from *Analysis of intellectual property tax planning strategies of multinationals and the impact of the BEPS project* (Gupta, 2018)



McDonald's Europe Franchising <sup>(1)</sup>, based in Luxembourg:

<sup>26</sup> See McDonald's 10-K SEC filing:

<https://www.sec.gov/Archives/edgar/data/63908/000006390816000103/mcd-12312015x10k.htm>

- Owns various franchise rights (intangible).
- Allocates franchise rights to its US branch, McDonald's Europe Franchising U.S. <sup>(3)</sup>, and its McDonald's Europe Franchising Switzerland <sup>(2)</sup>.

McDonald's Europe Franchising U.S. <sup>(3)</sup>, based in the U.S.:

- Receives royalties paid by McDonald's franchisee restaurants <sup>(4)</sup>.
- Receives royalties transferred by McDonald's Europe Franchising Switzerland.

McDonald's Europe Franchising Switzerland <sup>(2)</sup>, based in Switzerland:

- Received royalties from McDonald's franchisee restaurants <sup>(4)</sup>.

McDonald's franchisee restaurants <sup>(4)</sup>, based in Europe and Russia:

- Sells MacDonald's products in Europe and Russia.
- Pay royalties to either McDonald's Europe Franchising Switzerland <sup>(2)</sup> or McDonald's Europe Franchising U.S. <sup>(3)</sup> based on complex tax benefits depending on the precise location of the restaurants.

Luxembourg tax authorities <sup>(4)</sup>:

- Considers McDonald's Europe Franchising <sup>(1)</sup> as a tax resident of Luxembourg (PE), but considers its branches McDonald's Europe Franchising Switzerland <sup>(2)</sup> and McDonald's Europe Franchising U.S. <sup>(3)</sup> as PEs of their respective countries.

As such, and under the DTA between Luxembourg and Switzerland as well as Luxembourg and the US, Luxembourg tax authorities expect these branches to be taxed in their respective countries. However, under Swiss and US tax laws, these branches do not constitute PEs and are thus exempt from taxes.

The European Commission highlights that Luxembourg tax authorities misinterpreted the DTAs between Luxembourg and MacDonald's branches' countries, following the successful work of building a complex juridical structure by MacDonald. MacDonald hence avoids a substantial amount of taxes.

#### 1.2.2.4. Synthesis

Gupta, 2018 found that in the cases of Starbucks, Amazon and MacDonald, the tax authorities of the respective tax jurisdictions where these companies are established agreed with these companies' tax advisers concerning their royalty payments and pricing transfer methods. However, the European Commission highlighted tax authorities had made these decisions based on misleading or at least partial information.

So, one can wonder if providing misleading or insufficient information is a deliberate strategy undertaken by MNEs to reduce their taxes or if some tax authorities are incentivised to let MNEs engage in profit shifting?

MNEs do have a clear incentive to engage in profit shifting since this practice generates savings and provides a competitive advantage against domestic business in the countries in which these MNEs operate.

Nevertheless, tax authorities may not be willing to let companies shift their profits in most cases. Tax systems are indeed very complex worldwide, and it is thus hard to create an efficient international tax system. Moreover, arrangements between countries such as DTAs are numerous and can be a source of great confusion. This complexity creates a significant information disparity between the MNEs that create these structures and engage in profit shifting, taking advantage of various tax systems and the tax authorities of each country.

These factors provide MNEs with an economic upper hand over domestic businesses and informational advantage over tax authorities.

### **1.2.3. Intra-group financing**

#### **1.2.3.1. Overview of the mechanism of profit shifting through debt financing**

Another essential technique for MNEs to engage in profit shifting is debt financing. We know that a company has two ways of financing its operations: through either equity or debt. The main benefit of debt financing is that it is tax-deductible, whereas equity financing is not. However, debt financing, though cheaper than equity financing, has some significant drawbacks:

- An increased debt financing comes with increased risk of financial distress: bondholders (banks) are indeed contractually entitled to receive their coupons (interests) and principal (Miller, 1977) ;
- Relying heavily on debt might lead to inefficient investment (Buettner & Wamser, 2013).

As such, firms are not expected to finance themselves exclusively through debt.

Profit shifting through debt financing consists—for an MNE—of using its affiliates to set up internal loans so as to shift profit from high-tax jurisdictions to low-tax jurisdictions. In such a situation, an affiliate would borrow money from a third-party lender in a low-tax jurisdiction and lend to another related party (such as the parent company, for example) from which the MNE seeks to shift profits. The parent company would incur interest expense which would



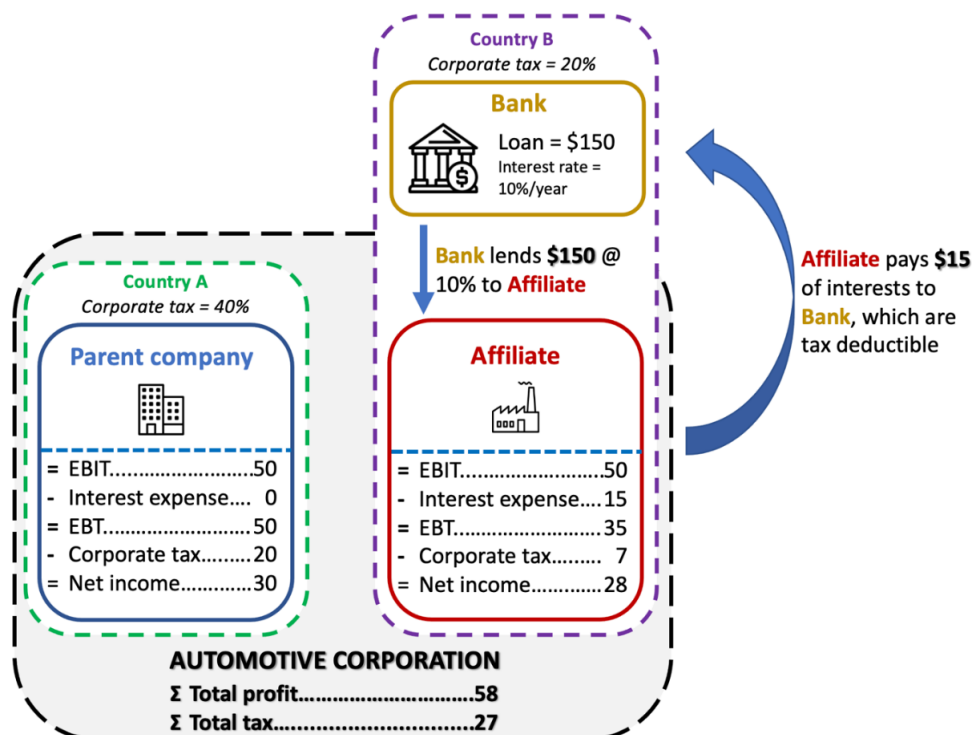
reduce its taxable income and pay those interests to the affiliate from which it borrowed money. The affiliate would then collect the interests from the loan it lent to the parent company. These earnings due to the collection of interests are taxable but at the lower low-tax jurisdiction's corporate tax rate.

To illustrate this mechanism, let us take our fictitious **Automotive Corporation** seen in 1.2.1. in another simplified example. **Automotive Corporation** has an **Affiliate** located in Country B that enforces a corporate tax rate of 20% and has its **Parent Company** located in Country A that enforces a corporate tax of 40%. **Automotive Corporation** would like to shift the profits it makes in Country A to Country B, so as to reduce its overall corporate tax and maximise its overall profits.

In both scenarios that illustrate this mechanism, the **Parent Company**, and the **Affiliate** each have an EBIT of \$50. The **Affiliate** borrows \$150 from a third-party lender (a **Bank**) at a 10% yearly interest rate compounded annually.

In the first scenario depicted in **Figure 11**, **Automotive Corporation** does not engage in debt financing. As a result, it pays \$27 ( $35 \cdot 20\% + 50 \cdot 40\%$ ) due to the corporate tax and generates \$58 ( $30 + 28$ ) in profits.

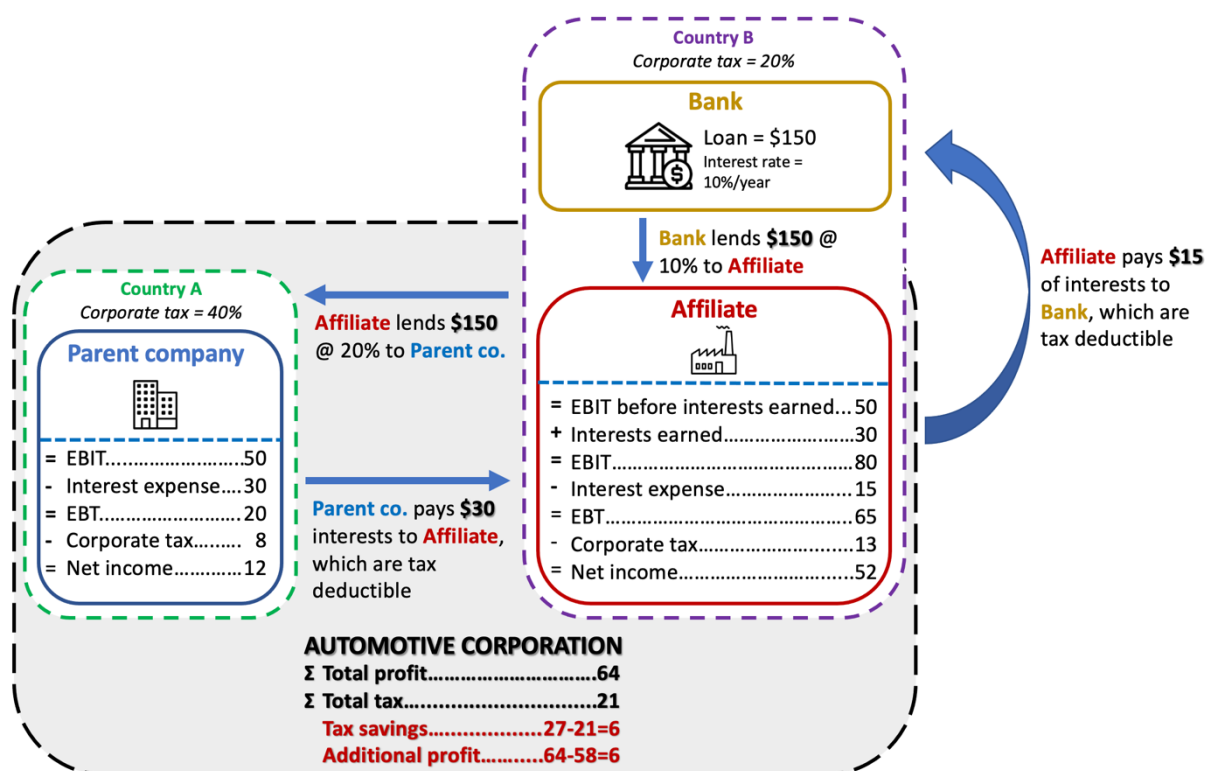
Figure 11 | Automotive corporation does not use intra-group financing to shift its profits



In the second scenario depicted in **Figure 12**, **Automotive Corporation** intends to shift the profits it makes in Country A to Country B to reduce the corporate tax it pays overall so as to maximise its profits. To that end, the **Affiliate** lends the \$150 is borrowed from the **Bank** to the **Parent Company** at a 20% yearly interest rate compounded annually. The **Parent Company** thus incurs \$30 ( $150 \times 20\%$ ) in interest expense which reduces its taxable income and pays those interests to the **Affiliate**. As a result, the **Affiliate** sees its EBIT increased by \$30. In addition, the **Affiliate** own interest expense of \$15 ( $150 \times 10\%$ ) due to the **Bank** is also tax-deductible and thus reduces the taxable income of the **Affiliate** to \$65.

Overall, **Automotive corporation** pays \$21 ( $50 \times 40\% + 35 \times 20\%$ ) in corporate tax and generates \$68 ( $12 + 52$ ) in profits. **Automotive corporation** generated an additional \$6 ( $64 - 8$ ) in profits by engaging in profit shifting.

Figure 12 | Automotive corporation uses intra-group financing to shift its profits



### 1.2.3.2. The extent of debt financing as a means of shifting profits

However, MNEs that control affiliates in low-tax jurisdictions will not finance themselves entirely through debt financing so as to completely shift to low-tax jurisdictions the profit generated in high-tax jurisdictions. Miller (1977) contends that:

- An increase in debt financing increases the power of managers compared to those of stakeholders (according to the agency theory<sup>27</sup>), which will create tensions that will undermine the MNE's efficiency;
- Since there are regulations designed to prevent profit shifting through debt financing in multiple countries, engaging in debt financing to shift profit entails gradually increasing concealment costs.

Hence, an MNE is expected to use internal debt to shift profit to the point where the marginal cost of profit shifting through debt financing is equal to the marginal cost of profit shifting through debt financing. Since the marginal cost of debt financing is increasing, an MNE will not shift all the profits it makes in high-tax jurisdictions to low-tax jurisdictions through internal lending.

A robust empirical analysis of the use of debt financing has been conducted. Buettner & Wamser (2013) conducted an analysis of the phenomenon of almost all German MNEs. They found that as the gap between the corporate taxes of the jurisdictions in which an MNE's affiliates were located widened, the use of intra debt financing for profit shifting purposes increased. However, they highlighted that debt financing is not the primary means of profit shifting, which is consistent with Heckemeyer & Overesch (2013) findings that debt is less used as a profit shifting technique than pricing and licensing, as we will see in greater detail in [1.3.1](#).

\* \* \*

Now that we have examined the main techniques through which MNEs shift their profits, which are transfer pricing, royalty payments and intrafirm debt financing, we can assess the global extent of profit shifting. How important is this phenomenon?

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<sup>27</sup> According to agency theory, managers are shareholders' agents within the company and are intended to manage the company in the latter's interests. However, managers and shareholders have different utility functions and act to maximize their respective utility. According to Jensen & Meckling (1976), managers tend to gain control over part of the firm's resources in the form of privileges for their own consumption and are willing to strengthen their position at the head of the company. They can thus prefer to increase revenue and not profit (on a local scale). Their aim is thus to serve the corporate interest of the company before satisfying the interests of shareholders (distribution of dividends or revaluation of securities).

## **1.3. Magnitude of the global phenomenon**

### **1.3.1. MNEs are sensitive to the corporate tax differentials between the countries in which their affiliates are established ...**

#### **1.3.1.1. Empirical observations show that countries' tax rates influence profitability**

The very low ETR of large MNEs has stirred public debate about how these companies avoid taxes. For instance, Apple, one of the most profitable companies globally, had an ETR of 4.7% in 2011. The G20 and major countries such as the US try to hinder this phenomenon.

The understanding of international tax arbitrage has increased over the last 20 years. Though it is hard to quantify profit shifting properly and how it is correlated to differences in profit tax rates worldwide, this phenomenon's occurrence is straightforward. As we have seen, the main drivers are MNEs financial structures that are proved to be designed to take advantage of tax rate differences. This arbitrage is also done through licensing and transfer pricing, despite that the relative importance of each of these practices regarding profit shifting behaviour is also hard to determine (Vicard, 2015).

In *Multinationals' profit response to tax differentials: Effect size and shifting channels*, Heckemeyer & Overesch (2013) highlighted that the incentive to engage in profit shifting techniques is important, because empirical observations show that a company's profitability is negatively correlated with its host country's tax rate.

Empirical data also shows that MNEs report a lower net income in low-tax countries than in high-tax countries. For instance, in *Altered States: Taxes and the Location of Foreign Direct Investment in America*, Hines (1996) have shown that US MNEs in 1982 report lower profits in high-tax jurisdictions than in low-tax jurisdictions. Concerning European MNEs, Huizinga & Laeven (2008) have shown that increasing the corporate tax by 10% decreases reported earnings by 13%.

There is also a significant correlation between intercompany trade balance and tax differential between an MNE's home country's tax rate and the foreign countries' tax rates in which its affiliates are located. Clausing (2003) has shown that a 10% increase in tax differential between affiliates' countries' tax rates and the home country's tax rate induces a 4.5% increase in trade surplus between the affiliates and parent companies.

An MNE can indeed benefit from shifting its profit from a high-tax country to a low-tax country if the reallocation cost is lower than the tax savings. For instance, see in **Figure 13** the two following scenarios for an MNE that generates \$1,000 of profits:

Figure 13 | Impact of profit shifting on total income and tax savings

Scenario 1: the MNE reports all of its \$1,000 income in Country A		
Entry	Country A	Country B
Reported income	1,000	0
* Tax rate	40%	20%
= Corporate tax	400	0
= Total Corporate tax (A + B)	400	
- Income reallocation costs from A to B	50	
= Global tax savings (A + B)	0*	

\* No income is shifted, so there is not tax savings and no income reallocation costs as well

Scenario 2: the MNE reports 50% of its \$1,000 income in A and shifts 50% of its income in B		
Entry	Country A	Country B
Reported income	500	500
* Tax rate	40%	20%
= Corporate tax	200	100
= Total Corporate tax (A + B)	300	
- Income reallocation costs from A to B	50	
= Global tax savings (A + B)	50*	

\* Scenario 1 corporate tax of 400 – Scenario 2 corporate tax of 300 – Reallocation costs of 50

Heckemeyer & Overesch compiled various studies from a reliable database (EcoLit database) containing data regarding the profits as defined by EBIT made by MNEs and what portion of these profits were shifted in or out of their specific countries, extracting more than 200 meaningful observations. They used data of these studies as inputs for a mathematical model they devised, whose main assumption is that reported pre-tax profits of an entity in a country are equal to the unnoticeable pre-tax profits (those that cannot be 'recorded' by tax legislation) of an entity in this country plus the profits shifted in and out of another country. This relationship can be summarised as follows<sup>28</sup>:

$$P_i^r = P_i + P_i \gamma \tau_{i,j} = P_i (1 + \gamma \Delta \tau_{i,j})$$

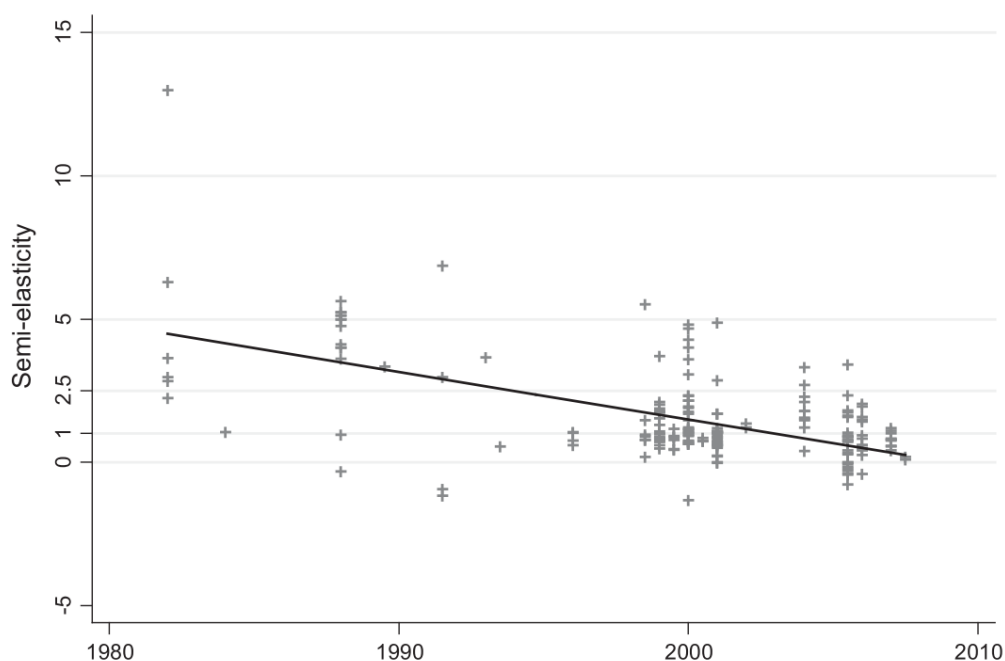
<sup>28</sup> Reported profits in country i ( $P_i^r$ )

= Unnoticeable profits in country i ( $P_i$ ) + unnoticeable profits (P) in country i ( $P_i$ ) \* the semi-elasticity ( $\gamma$ ) \* the tax differential between countries i and j ( $\tau_{i,j}$ )

= Unnoticeable profits in country i ( $P_i$ ) \* [1 + the semi-elasticity ( $\gamma$ ) \* the change ( $\Delta$ ) in tax differential between countries i and j ( $\tau_{i,j}$ )]

Heckemeyer & Overesch highlighted that empirical observations do show an apparent elasticity between profit shifting and tax differentials, averaging 0.8 (see [Figure 14](#)). The elasticity tends to decrease over time, but it can be due to either more accurate data being retrieved as the time goes by that could tend to reduce the semi-elasticity or to stricter legislation against profit-shifting that could gradually deter companies from engaging in profit-shifting techniques. This relationship means that if the tax rate differential between a parent company and its affiliate increases by 10% (for instance, the affiliate's location's tax rate decreases from 40% to 30%), then the affiliate's reported pre-tax income will increase by 8% (for instance, it would increase from €200,000 to €216,000).

Figure 14 | Heckemeyer & Overesch' 203 observations' semi-elasticities (y-axis) plotted against the average year during which they were sampled (x-axis), and their regression line, from *Multinationals' profit response to tax differentials: Effect size and shifting channels*



The studies from which Heckemeyer & Overesch have pulled their data to calculate the semi-elasticity of profits and tax differentials show different characteristics. The following key factors have been considered by the authors to “smooth” their findings and make their whole work coherent:

- Some studies use measures such as EBIT that do not consider the financial structure of companies, while others use after-tax profit measures such as net income. EBIT is a measure independent from the firms' financial structure. In contrast, after-tax measures of profits consider firms' debt financing and subsidiaries intercompany debt

in high-tax countries that are used to shift profits since interest expenses can be deducted from taxable profits. The latter tend thus to overstate profit shifting techniques more than the former.

- Some studies use data on a subsidiary level, whereas others do on a country level. Differences arose between these two characteristics concerning the studied semi-elasticity.
- Some studies do not consider tax aggressiveness that tends to differ among firms and can be determined in part by the firms' culture and management and by conflicts opposing global management and management at a subsidiary level, for which profit shifting contradict their interests (for instance, their bonuses that depend on profitability).
- Some studies only consider profit shifting as bilateral transactions between firms from a high-tax country to a low-tax country. However, some schemes are more complicated and involve a cascade of tax jurisdictions to shift profits effectively.

Through various data reprocessing, the authors corrected their initial findings by considering the four afore-mentioned factors for each study they used, which contributions are detailed as show in **Figure 15** <sup>29</sup>:

Figure 15 | Heckemeyer & Overesch' calculation of semi elasticity of reported profits to tax differentials from *Multinationals' profit response to tax differentials: Effect size and shifting channels*

Parameter	Value
Raw semi-elasticity	2.75
After-financing measures (i)	0.24
No control for debt (i)	0.26
EBIT (i)	(0.98)
Data-level (ii)	(1.68)
Time fixed effects (iii)	0.29
Subsidiary effects (ii)	(0.44)
Country fixed effects (iv)	0.35
<b>Adjusted semi-elasticity</b>	<b>0.79</b>

<sup>29</sup> The effects of each of these factors that bias upward or downward the most accurate semi-elasticity differ also among the databases used by the authors. These intra-databases different have also been considered.

### 1.3.1.2. Profit shifting routes used by MNEs have different weights

To determine which are the most crucial profit shifting methods when calculating the semi-elasticity of profits to tax differentials, we must separate profit shifting done through:

- Financial means, i.e., increasing inter-debt financing from entities located in high-tax jurisdictions to entities in low-tax jurisdictions to deduce the debt interests from income tax, or artificially increasing inter-firm lending interest rate to increase tax expenses in high tax jurisdictions (see 1.2.1. and 1.2.2.);
- Non-financial means, i.e., licensing and transfer pricing (see 1.2.3.).

To this end, Heckemeyer & Overesch (2013) made a comparison between the studies they used since, as mentioned above, some used EBIT as a measure of profits to calculate profit shifting. In contrast, others used pre-tax profits (which is EBIT – interests, interests representing the company's financing structure's impact).

Heckemeyer & Overesch found that the semi-elasticity of pre-tax profit was approximately 0.64. Thus, the semi-elasticity of profit-shifting to tax differentials due to intrafirm debt financing is  $0.78 - 0.64 = 0.14$ . Hence, non-financial profit-shifting techniques account for approximately 82% ( $0.64 / 0.78$ ) of total profit-shifting, financial profit-shifting techniques accounting for 18% ( $1 - 82\%$ ) of the total.

Heckemeyer & Overesch's work is the first main study assessing the global extent of profit shifting using previous studies and has been used as a reference by several scholars. However, in contrary to the conclusion of Heckemeyer & Overesch that profit shifting is a significant phenomenon, other scholars found that the seriousness of profit shifting—in terms of its impact on public finances and tax fairness treatment among firms—is debatable, after having analysed more empirical observations (Hines, 2014).

### 1.3.2. ... but does it have a significant impact on countries' public finances and tax fairness treatment among firms?

#### 1.3.2.1. Other studies suggest that profit shifting is not as important as it was thought to be

Nowadays, BEPS is seen as an important factor that reduces governments' tax collection. This topic is often covered by media and presented as a major problem that deprives nations of the wealth they should rightfully have. The US Congress even asked the US Joint Committee to find among the biggest US corporations those that engaged significantly in profit shifting<sup>30</sup>.

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<sup>30</sup> See *Present Law and Background Related to Possible Income Shifting and Transfer Pricing* (JCX-37-10) by the US Joint Committee on Taxation: <http://www.financialtransparency.org/wp->



However, the BEPS issue might be overstated since many studies found different semi-elasticities of reported profit to tax differential between countries, even when using large data panels used by studies already used to study profit shifting. In *Do Transfer Pricing Laws Limit International Income Shifting? Evidence from European Multinationals*, Lohse & Riedel (2013) found a semi-elasticity of income to a tax rate differential around 0.4, meaning that if Country A has a corporate tax of 30% and Country B has a corporate tax of 20%, a company located in Country A will tend to shift approximately 4% of its income to Country B. Further empirical studies from Dharmapala & Riedel (2013) shows that an MNE located in high-tax jurisdiction shifts, on average, only 2% of its profits to low-tax jurisdictions.

Moreover, in the early 2010s, the average country member of the OECD raises a little less than 9% of its total tax revenues from the corporate tax, and only a fraction of tax revenues raised through the corporate tax comes from MNEs (Hines, 2014). As such, an amount between 2 and 4 per cent of this fraction can be considered as negligible. Hence, even if countries and international institutions could develop a perfect solution to prevent BEPS from occurring, the positive impact on their finances would probably not be substantial.

Therefore, one can wonder why BEPS causes so much concern. Is it because it is simply overstated in the media, or is it because most of the empirical work done thus far was performed with a flawed methodology?

#### 1.3.2.2. The more recent the data, the less important profit shifting seems to be

Studies conducted in the 1990s found a reported income sensitivity to tax rate differential between the locations of an MNE's affiliates that is three times that the sensitivity found by more recent studies.

The fact that BEPS's "magnitude" seems to be lower than expected should not, however, induce us to consider BEPS being a small or a large factor. This just means that there is a contradiction between the growing concern of policymakers and public opinions over public shifting and its importance following the findings of empirical studies.

These studies have been conducted using the Hines-Rice approach developed by Hines & Rice (1994) in *Fiscal paradise: Foreign tax havens and American business*, which has been widely used and then further developed to undertake empirical estimations of the BEPS phenomenon. The main idea is that a subsidiary's pre-tax income is equal to the sum of the

income that can be attributed to the subsidiary (called “true income”) and the income that is shifted (called “shifted income”, which can be greater or less than zero).

A simplified version of this model is constructed as follows<sup>31</sup>:

$$\pi_i = \alpha\tau_i + \beta K_i + \gamma L_i$$

The true income comes from the affiliate’s utilisation of its production factors, capital ( $K_i$ ) and labour ( $L_i$ ), whereas the incentive to move profits out or in ( $\tau_i$ ) the affiliate determines the shifted income. Overall, an affiliate located in a low-tax jurisdiction that reports income which cannot be linked to the affiliate’s utilisation of its production factor can be attributed to profit shifting. For instance, an affiliate that has a low capital ( $K_i$ ) and labour ( $L_i$ ) factors of production but shows high profits ( $\pi_i$ ) and have a high tax differential with the parent company’s jurisdiction ( $\tau_i$ ) can be thought to have an important propension to engage in profit shifting.

This model was used by Hines & Rines to analyse data coming from the Bureau of Economic Analysis (BEA) of the US Department of Commerce for the year 1982.

The most relevant empirical studies on this subject have been conducted through data analysis using the afore-mentioned model, further developed and complexified to integrate a wide variety of factors. They have been conducted on databases that provide commercial and financial information for MNEs and their affiliates and subsidiaries. The main databases used in these studies are:

- Orbis, a database containing information about more than one hundred million companies;
- Amadeus, a database containing information pertaining only to firms and affiliates located in Europe.

The findings of studies conducted to assess the extent of the profit shifting phenomenon using the Hines & Rines approach are shown in **Figure 16**:

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<sup>31</sup> The profits of the MNE affiliate  $i$  ( $\pi_i$ )

= the propension of the MNE to shift its profit ( $\alpha$ ) \* the tax incentive of shifting income in or out the affiliate  $i$   
+ the propension of the affiliate  $i$  to use its capital ( $\beta$ ) \* the affiliate’s  $i$  capital value ( $K_i$ )  
+ the propension of the affiliate  $i$  to use its labour ( $\gamma$ ) \* the affiliate’s  $i$  capital value ( $L_i$ )

The parameter  $\alpha$  can also be considered as a proxy of the semi-elasticity of pre-tax income to the tax incentive of engaging in income shifting  $\tau$ .

Figure 16 | Main semi-elasticities of reported income to tax differentials calculated using the Hines & Rice approach, ranked from the most recent to the oldest

Author	Year in which the study was performed	Source of data	Period studied	Semi-elasticity	Semi-elasticity effect on reported income*
Heckemeyer & Overesch <sup>(1)</sup>	2013	Multiple sources	Multiple periods	0.8	1,080,000
Lohse & Riedel <sup>(2)</sup>	2013	Amadeus	1999-2009 (panel data)	0.4	1,040,000
Dischinger <sup>(3)</sup>	2010	Amadeus	1995-2005 (panel data)	0.7	1,070,000
Huizinga & Laeven <sup>(4)</sup>	2008	Amadeus	1999 (cross-sectional data)	1.31	1,130,100
Hines & Rice <sup>(5)</sup>	1994	Bureau of Economic Analysis	1982 (cross-sectional data)	2.35	1,225,000

- Heckemeyer & Overesch (2013) <sup>(1)</sup>, as seen in 1.3.1.1., performed a meta-regression of nearly 240 semi-elasticities computed in 25 studies, taking into account the characteristics of data sets and empirical approaches of each study. They concluded that the semi-elasticity of profit to tax differentials is approximately equal to 0.8, which can be considered as a consensus measure since it is computed from a variety of other studies.
- Lohse & Riedel (2013) <sup>(2)</sup>, using panel data on Amadeus for a more recent ten-year period spanning from 1999 to 2009, found a semi-elasticity value of 0.4.
- Dischinger & Riedel (2010) <sup>(3)</sup>, using panel data on Amadeus for a ten-year period spanning from 1995 to 2005 focuses on MNEs' affiliates located in Europe, found a semi-elasticity value of 0.7.
- Huizinga & Laeven (2008) <sup>(4)</sup> focused on the year 1999 for European MNEs, using cross-sectional data on the Amadeus database. They computed a semi-elasticity of profit to tax differentials among European countries, as well as country-specific income shifting estimates for all the countries studied. Their global result is a semi-elasticity value of 1.31.
- Hines & Rice (1994) <sup>(5)</sup>, as mentioned previously, focused on the year 1982 using cross-sectional data concerning US companies. They found a semi-elasticity of reported income to tax differentials of 2.35.

We can see a clear decreasing trend of measured BEPS over time. Moreover, even if firms do locate affiliates in low-tax jurisdictions and happen to shift a part of their profits, their presence in these low-tax jurisdictions can be due to other factors than profit shifting opportunities.

### 1.3.2.3. MNE's presence in low tax jurisdictions can be attributed to other factors

In *International taxation and multinational firm location decisions*, Barrios et al. (2012) showed that it is true that MNEs locate more PP&E and employment in low-tax countries and less in high-tax countries, though these low tax countries' economic structures could allow such amounts of PP&E and employment. However, though being a type of base erosion, this observation especially shows that MNEs find it hard to repatriate pre-tax income from low-tax jurisdictions to high-tax jurisdictions. Indeed: if it were easy to do so, MNEs would locate all their operations in the country where they could maximise their pre-tax profits, and they shift them to low-tax jurisdictions. In that case, MNEs would consider locating 'real' employment and production in low-tax countries pointless.

Desai et al. (2006) also highlighted that a low number of MNEs engage in profit shifting schemes. On average, they found that:

- During the 1980s and the 1990s, only 40% of US MNEs had affiliates located in tax havens;
- During the 2000s, only 20% of German MNEs had affiliates located in tax havens.

These observations show that most MNEs in the US and Germany did not even have the means to reallocate profits through affiliates located in low- or zero-tax jurisdictions.

These observations show that a significant part of the activity of MNEs in low tax jurisdictions is attributable to the fact that these jurisdictions provide a higher reward (a higher after-tax profit) than high tax jurisdictions.

Another important topic is that corporations located in low-tax countries are expected to finance themselves less through debt than in high-tax countries but do so seldomly. Firms are indeed financed through equity or debt. We could indeed expect MNEs to use intrafirm debt financing to generate foreign tax credits to reduce domestic taxable income. Nevertheless, evidence gathered by Graham (2000) shows that MNEs do not really make a wise and strategic use of debt financing from a BEPS-wise standpoint, since high-tax jurisdictions concentrate a low amount of interest deductions of MNEs coming from their foreign affiliates: MNEs could use much more debt to reduce their corporate tax but continue to finance themselves through equity significantly.

We could thus wonder why MNEs do not engage more in profit shifting despite the various opportunities that exist. The most likely reasons mentioned by Hines (2014) are:

- Actions that need to be undertaken to engage in tax avoidance techniques are expensive and complex and make profit shifting not worth the investment it requires;

- Governments of high-tax jurisdictions places MNE's intercompany transactions under an intense and gradually increasing scrutiny.

\* \* \*

We have seen that profit shifting is indeed an actual phenomenon, but that its extent and importance is hard to assess and discussed by scholars. However, the academic consensus is that it is an important topic for public opinion publicly tackled by governments of high tax jurisdictions. In the light of what we have seen, are these governments' efforts efficient and do their benefits outweigh their costs?

## **1.4. How countries' tax authorities attempt to curb profit shifting**

### **1.4.1. International institutions push for a tightening in regulation in high tax jurisdictions**

#### **1.4.1.1. The root causes that allow profit shifting**

What appears as a leading cause of current tax systems' inability worldwide to deal effectively with base erosion and profit shifting is its international framework, which was mainly devised in the 1920s and has not known any major update since (Ault et al., 2014). This framework was developed between countries whose tax systems were complete and was based on income recognition of an MNE in a "source country" and in a "residence country": the country where the MNE is located cannot tax the income generated by affiliates already taxed in a residence country. This distinction has been made to avoid what is called "double taxation". For instance, an MNE that generates income in Country B cannot be taxed by the Country A, where it is headquartered.

As time went by, and especially since the 1980s and the complexification of business activities, a growing number of intermediaries have been used by MNEs to increase their financial efficiencies (meaning paying fewer taxes). The rise of private equity financing and the continuous growth of stock markets increased the weight of investors in private and public companies and thus the pressure to maximise profits. Therefore, from this standpoint, tax liabilities have been seen as just another cost to minimise. MNEs have allocated an increasing number of resources to that end.

Meanwhile, increased pressure exerted on governments by their populations to attract business in an ever more competitive world has also generated a gradually more competitive tax environment. Some countries are indeed vying for their share of MNEs presence in their jurisdiction and the employment and tax revenues that come with it.

#### **1.4.1.2. The OECD's response**

The OECD has brought the most structured international response to the concerns around BEPS. The OECD's BEPS action plan is aiming at addressing the following methods of engaging in profit shifting:

- Transfer pricing between related parties of an MNE;
- The growing number of disputes between countries regarding their respective tax rates;

- The various measurement and classifications methods between countries that facilitate profit shifting;
- The low effectiveness of anti-abuse rules pertaining to profit shifting.

The main goal of the BEPS project is to provide a framework to undertake changes in international tax laws and treaties. The action plan comprises 15 actions so that international tax rules report profits “*where the economic activities are carried out and where value is created*”<sup>32</sup>.

To that end, the OECD provides new instruments to tax authorities to assist companies in appropriately pricing agreements pertaining to intangibles and their valuation. Indeed, intangibles’ complexity is deemed by the OECD as the most crucial factor that allows MNEs to engage in profit shifting.

Enforcing this plan became urgent for many European countries because profit shifting has been widely covered by media and has increased public opinion awareness. Famous MNEs’ tax avoidance operating in the new technologies sector, such as Apple and Google, and older companies operating in more traditional sectors such as General Electric, Cadbury, or Starbucks, were discussed in the media and generated a demand for action by the public.

The OECD highlights the main adverse effects of profit shifting. Profit shifting:

- Decreases the tax revenue and increase the compliance enforcement costs of many governments. This is especially problematic in developing countries, which struggle because of this tax revenue deprivation to finance public infrastructure that could foster economic growth.
- Causes the integrity of tax systems to be questioned by public opinions, which deem it unfair that big corporations are able to pay fewer taxes than small domestic businesses. This situation erodes the confidence of citizens in their governments’ ability to enforce the law fairly.
- Compromises the reputation of MNEs worldwide and the corporate world in the eyes of public opinion.
- Promotes unfair competition amid countries since international companies that have the means to reduce their tax burden have a competitive edge over companies that operate only domestically and that do pay their taxes fully.

According to the OECD, there are two main paths to reduce profit shifting, but both entail some difficulties:

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<sup>32</sup> (already seen in <sup>12</sup>) See Ernst and Young’s *Transfer Pricing and International Tax Survey 2019*:  
[https://www.ey.com/en\\_gl/transfer-pricing-international-tax-survey](https://www.ey.com/en_gl/transfer-pricing-international-tax-survey)

- An anti-abuse method consists for a country in enforcing more restrictive legislation on particular companies or sectors that engage in profit shifting. This practice may reduce profit shifting and compliance costs, but a country's tax authorities are likely to always lag behind new technologies and new ways of engaging in profit shifting. As such, this might not be an efficient way in the long term to prevent profit shifting.
- For a country or multiple countries, a comprehensive method consists of engaging in structural reforms pertaining to their tax systems to make profit shifting impossible or inefficient.

The problem is that these are particularly complex to enforce. Comprehensive tax reforms require significant legislative work that involves policymakers, academics, various advisors, and representatives of the taxed parties (the MNEs) themselves to be efficient, which can take much time.

A recommended approach by the OECD is for countries to engage in structural changes by aiming at an ambitious overhaul of the current tax system to prevent profit shifting at the European Union level, for example, but by performing incremental changes. This kind of iterative method would allow for the exploration of various solutions and the assessment of their effectiveness in the present and the future with the development of new technologies. It is indeed of paramount importance to design rules that states can practically enforce. For instance, a reform that entails a specific way of taxing profit might be theoretically efficient and hard to enforce today but may be applicable in the future due to the development of new technologies.



Figure 17 | Summary of the goals and actions around which OECD' BEPS action plan is structured

Goals	Actions	Key issues addressed	Key targets of actions
I. Establishing international coherence of corporate income taxation Globalisation	1. Address the tax challenges of the digital economy	Digital presence in a country sometimes does not entail income tax liability and makes it hard to collect VAT	Establish a set of coherent tax regulations across countries
	2. Neutralise the effects of hybrid mismatch arrangements	Hybrid mismatches allow for double non-taxation and double deduction	Set domestic law provisions to deny deduction of payments deductible in other jurisdictions
	3. Strengthen CFC rules	CFCs provide MNEs with deductible interest expense to reduce tax liabilities	Tax rules should not allow to use foreign interest expense to reduce earnings of another related entity
	4. Limit base erosion via interest deductions and other financial payments	Current tax rules do not prevent base erosion	Set common rules between countries regarding interest deductions
	5. Counter harmful tax practices more effectively, taking into account transparency and substance	Harmful tax practices in some countries encourage BEPS	Enforce a mandatory substantial activity requirement for a MNE to be entitled to a preferential tax regime
II. Restoring the full effects and benefits of international standards	6. Prevent treaty abuse	Treaties (such as DTAs) are used for double non-taxation purposes	Prevent treaty benefits from being granted in inappropriate circumstances
	7. Prevent the artificial avoidance of PE status	PE status allows for artificial tax avoidance	Change the definition of PE to prevent taxes from being passed through
	Assure that transfer pricing outcomes are in line with value creation in regards with:		
	8. Intangibles	Intangibles are moved through related parties to shift income through royalty payments	Rigorously define types of intangibles and ensure that profits are located in accordance with value creation
	9. Risks and capital	MNEs' affiliates capital and risks are not linked to their revenues	Prevent entities from benefiting from higher than normal returns because they bear contractual but unsubstantiated risks
III. Ensuring transparency while promoting increased certainty and predictability	10. Other high-risk transactions	Transactions between related parties that would not between third parties occur	Clarify pricing transfer methods and situations in which transactions can occur
	11. Establish methodologies to collect and analyse data on BEPS and the actions to address it	Actions' effectiveness against BEPS are hard to measure	Identify new sources of data and new methodologies to assess BEPS' magnitude
	12. Require taxpayers to disclose their aggressive tax planning arrangement	Taxpayers find ways of not disclosing aggressive tax planning	Require mandatory and comprehensive data pertaining to taxpayers' tax planning strategies
	13. Re-examine transfer pricing documentation	Pricing documentation is insufficient to assess transfer pricing	Require comprehensive data regarding intrafirm prices so as to assess the arm's length prices of intrafirm transactions
IV. Swift implementation of the measures	14. Make dispute resolution mechanisms more effective	Treaty-related disputes between countries remain unsolved	Include arbitration provisions in treaties to facilitate disputes settlements
	15. Develop a multilateral instrument	There is a lack of coordination between countries' tax authorities	Ensure that revamped tax rules that comply with OECD's recommendation are made jointly by countries

Among all the OECD's BEPS actions detailed in [Figure 17](#), the most interesting ones are actions 8-10. They provide guidance to determine transfer pricing within MNEs' entities and recommendations for tax authorities to allow them to check the correct allocation of profits generated by the use of intangibles. These chiefly focus on the concept of ownership and the fact that this ownership does not systematically confer the right to exploit returns stemming from these intangibles' exploitation (Gupta, 2018).

Actions 8-10 state that returns coming from IP should be assigned to entities that perform and oversees the five value-creating functions of DEMPE (development, enhancement of value, maintenance, protection/compliance with the law, and exploitation).

OECD thus recommends that relevant intangibles be detected through a functional analysis that involves:

- The identification of the relevant intangibles;
- The way these intangibles contribute to the creation of value;
- How functions are performed, and risks assumed following DEMPE;
- How these intangibles interact with other intangibles to create value.

The DEMPE approach helps to identify the appropriate financial and commercial relationships between parties regarding the DEMPE functions. It focuses on allocating accurate returns to intangibles based on which parties of the MNEs provide their inputs and thus makes the legal ownership secondary. This approach is composed of 6 steps:

- Identify the intangibles that are used or transferred.
- Identify and assess the contractual arrangements and determine the legal ownership of the intangibles.
- Perform an in-depth analysis of the DEMPE functions to assess each party's contribution.
- Evaluate the consistency of the arrangements' terms with the DEMPE functions and risks.
- Identify transactions that are controlled and those that are not controlled.
- Determine a range of prices for similar contributions done at arm's length to assess whether the royalty payments are righteous and correspond to economic reality or if they are disconnected from it. However, it is tough to do so, as finding comparables for specific intangibles is almost impossible, and making an *ex-ante* approximation is even more challenging.

Considering this framework, the European Commission concluded that “capital-rich companies” that holds the IP and receives royalties for it may receive—following the DEMPE approach—an investment return only on these IP equal to the risk-free return on the market but are not necessarily entitled to that contribution. This risk-free return is specified in a framework in the OECD BEPS project.

However, there are two main limitations of the OECD's report:

- The DEMPE approach, as stated in the OECD's report, has a broad scope, and provides no clear definition of the DEMPE functions, leaving significant room for interpretation.

- The additional ways the report provides to challenge profit shifting are complex to enforce and thus likely to increase compliance costs.

#### 1.4.2. And high tax jurisdictions have gradually tightened their own regulations.

Tax authorities of several countries have implemented regulations into their tax legislation regarding transfer pricing to curb profit shifting. Two main ways of reducing transfer pricing are i) ensuring that intra firm price is equal to arm's length prices and ii) requiring firms to provide extensive documentation to prove the proper pricing of products and services bought and sold between related parties. Failure to abide by these regulations in these countries result in significant penalties.

The central issue tax authorities face with transfer pricing regulation is the costs they entail, which are high for both the tax authorities themselves and the MNEs subject to these regulations that must provide extensive documentation.

These regulations are enforced effectively in numerous Western countries. Anglo-Saxon countries such as the United Kingdom, the United States or Canada have sanctioned the transfer pricing policies of major MNEs such as Motorola (a US mobile phone manufacturer), Daimler Chrysler<sup>33</sup> (a car manufacturer), Astra Zeneca<sup>34</sup> (a UK-Swedish pharmaceutical), or GlaxoSmithKline<sup>35</sup> (UK pharmaceutical). The latter incurred a \$3bn fine by the IRS for irregular transfer pricing.

*In Do Transfer Pricing Laws Limit International Income Shifting? Evidence from European Multinationals*, Lohse & Riedel (2013) collected a vast amount of information pertaining to transfer pricing regulations and corporate tax laws in 26 European countries as well as financial information (P&L accounts) from MNEs between 1999 and 2019. The data collected consisted of more than 150,000 observations of more than 30,000 affiliates of MNEs. They analysed this data through a mathematical model and a three-step analysis. The authors were thus able to assess the effectiveness of anti-profit shifting regulations within European countries and their evolution over time.

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<sup>33</sup> Daimler (a German car manufacturer) and Chrysler (a US car manufacturer) had merged in 1998 and demerged in 2007. Fiat (an Italian car manufacturer) merged with Chrysler in 2014. Fiat and Chrysler then merged in 2018 with PSA (a French car manufacturer) to form a new car manufacturing company called Stellantis.

<sup>34</sup> The Financial Times (2011), *AstraZeneca pays \$1bn in US tax settlement*:  
<https://www.ft.com/content/b956d948-590b-11e0-b9f6-00144feab49a>

<sup>35</sup> The New York Times (2006), *GlaxoSmithKline to Settle Tax Dispute With U.S.*:  
<https://www.nytimes.com/2006/09/12/business/worldbusiness/12glaxo.html>

They categorised the countries of their studies as follows:

- Group 1: countries that do not enforce regulation regarding transfer pricing or have a vague legislation that cannot capture and be used against transfer price-related practices.
- Group 2: countries that slightly regulate transfer pricing, often requiring documentation about intrafirm prices but not acting upon them.
- Group 3: countries that strictly regulate transfer pricing and impose penalties on countries that do not abide by tax authorities' regulations. Providing to tax authorities extensive documentation when requested or with the annual tax reports to justify their intrafirm prices is mandatory for the MNEs that operate in these jurisdictions.

A significant finding is that transfer pricing regulations—when effectively enforced—reduce MNEs' profit shifting by 76% overall, compared to a situation in which no tax regulations that aim to curb profit shifting are enforced. More specifically, when a country moves from the first group to the second group, the sensitivity of profits to a corporate tax differential is reduced by 40%, and when a country moves from the first group to the third group, by 65%. This observation is consistent with Marques & Pinho (2016)'s findings that the sensitivity of reported tax rate to different tax rates increases with the severeness of the transfer pricing framework.

Also, as shown on [Figure 18](#), it is noted that over the period covered by the study (1999-2009), European countries have significantly tightened their regulations, as numerous countries shifted from the first group (loose restrictions regarding profit shifting) at the beginning of the period to the third group (tight restrictions regarding profit shifting) at the end of the period.

Another finding from Lohse & Riedel concerns APA. APA is a way for tax authorities and taxpayers—in this case, MNEs—to agree on intrafirm prices, that is, prices at which an MNE's affiliates will trade goods and services. An APA can be bilateral, between an MNE and a country in which an MNE operate, or multilateral, between an MNE and multiple countries in which it operates. An APA can offer the MNE protection against revisions and changes of the intra-firm prices allowed by tax authorities, thus providing some protection to the MNEs. This advantage comes at the cost of increased transparency from the MNE, which must disclose comprehensive information about its pricing methodology to reach an agreement with tax authorities. An MNE can thus choose to not enter into an APA and practice intrafirm prices that do not comply with the regulations while hiding it if the concealment costs are inferior to the benefit of not complying with the tax authorities' regulations.

One could think that, given the increasing tightening of regulations regarding transfer pricing observed in the period 1999-2009, a growing number of MNEs would have entered in APA.

However, Lohse & Riedel found that the number of APAs did not increase substantially between 1990 and 2019. As such, it seems that APAs are not an incentive for MNEs to disclose their transfer prices extensively, which could curb profit shifting.

Figure 18 | European countries grouped by the severeness of their anti-profit shifting regulation (gr.1: less severe; gr.3: most severe) between 1999 and 2009, adapted from *Do Transfer Pricing Laws Limit International Income Shifting? Evidence from European Multinationals* (Lohse & Riedel, 2013)

Country	1999	2009	Synthesis	1999	2009
Austria	Group 2	Group 2	Σ Group 1	7	2
Belgium	Group 2	Group 2	Σ Group 2	16	9
Bulgaria	Group 1	Group 2	Σ Group 3	3	15
Croatia	Group 1	Group 3			
Czech Republic	Group 2	Group 2			
Denmark	Group 3	Group 3			
Estonia	Group 2	Group 3			
Finland	Group 2	Group 3			
France	Group 2	Group 2			
Germany	Group 2	Group 3			
Hungary	Group 2	Group 3			
Ireland	Group 1	Group 1			
Italy	Group 2	Group 2			
Latvia	Group 2	Group 2			
Luxembourg	Group 2	Group 2			
Netherlands	Group 1	Group 3			
Norway	Group 2	Group 3			
Poland	Group 3	Group 3			
Portugal	Group 1	Group 3			
Romania	Group 2	Group 3			
Slovak Republic	Group 1	Group 3			
Spain	Group 2	Group 3			
Sweden	Group 2	Group 3			
Switzerland	Group 2	Group 2			
Ukraine	Group 1	Group 1			
United Kingdom	Group 3	Group 3			

Concerning profit shifting done through financial techniques (intrafirm financing), high-tax countries have also imposed limits on the number of deductible interest expenses. They implemented regulations to limit domestic income tax deductibility coming from foreign

interest expenses. For instance, in the US, the US Tax Reform Act of 1986<sup>36</sup> compelled MNEs to allocate a fraction of domestic interest expense to a fraction of foreign profits. This action successfully removed the mechanism that allowed to have domestic interest reductions with foreign debt and the foreign tax credits that came with them (Froot & Hines, 1995).

As such, this tightening in anti-profit shifting regulations may be one of the causes of the declining significance of profit shifting observed in recent studies (see 1.3.2.2.). Current regulation may offer enough tools to high-tax countries to successfully enforce BEPS strategies and prevent profit shifting.

### **1.4.3. ... while low-tax jurisdictions engage in lobbying efforts to prevent them from preventing profit shifting**

There have been numerous efforts to fight tax havens and reduce the scale of profit shifting, dating back to the 1990s. Among the most well-known international endeavours against tax havens, we can cite:

- The Harmful Tax Competitions<sup>37</sup>;
- Action Plan on Base Erosion and Profit Shifting<sup>38</sup>;
- The EU list of non-cooperative tax jurisdictions<sup>39</sup>;

About the last of these actions (the EU list of non-cooperative tax jurisdictions), an intriguing fact is that many countries that were expected by many professionals and politicians to be considered as tax heavens did not appear on it (Hauck, 2019). This situation is due to significant efforts undertaken by governments to protect some tax havens that provide benefits to their companies. For instance, the BVI and Bermuda were not put on this list thanks to efforts done by British Overseas Territories—among others—that hired PR companies that actively prevented Bermuda from being put on this list. These PR companies did so by approaching MPs and MEPs in London and Brussels to defend their cases or directly the British government.

To shed light on how low-tax jurisdictions try to stimulate MNEs' profit shifting practices, Hauck (2019), in *Lobbying and the international fight against tax havens*, explains, through a

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<sup>36</sup> See the 1986 of US Tax Reform Act, the biggest overhaul of the US Internal Revenue Code:

<https://www.congress.gov/bill/99th-congress/house-bill/3838>

<sup>37</sup> See *The Harmful Tax Competition: An Emerging Global Issue* on OECD's website: [https://www.oecd-ilibrary.org/taxation/harmful-tax-competition\\_9789264162945-en](https://www.oecd-ilibrary.org/taxation/harmful-tax-competition_9789264162945-en)

<sup>38</sup> (already seen in <sup>14</sup>) See OECD's BEPS Project: <https://www.oecd.org/tax/beps/>

<sup>39</sup> See European Commission press release about the EU list of non-cooperative tax jurisdictions: <https://www.consilium.europa.eu/en/press/press-releases/2017/12/05/taxation-council-publishes-an-eu-list-of-non-cooperative-jurisdictions/>

two-country model, the effects of offshore lobbying on the development and resilience of tax havens and profit shifting techniques.

The author's model considers two countries,  $H$  and  $F$ , and a continuum of firms located in  $H$ . All of these firms have a different propensity to shift their profits, which depends on a parameter  $X_i$  for firm  $i$ , uniformly distributed over the interval  $[0,1]$ . These firms face transaction costs when they engage in profit shifting that depend on the tax haven's (offshore country's) administrative costs like paper filings  $f > 0$  and the onshore tax rate  $t \in [0,1]$ .

The model includes a pressure factor<sup>40</sup>  $\alpha$  the onshore country puts on firms engaging in profit shifting activities that can take the form of "naming and shaming" (that is, publishing a list of companies that engage in these activities) or an increase in costs related to profit shifting that can be due to a TIEA between the  $H$  (onshore) and the  $F$  (offshore) countries. This pressure factor  $\alpha$  increases the cost of profit shifting.

Finally, the model also includes a lobbying factor<sup>41</sup>  $\gamma$  the offshore country  $F$  puts on onshore country  $H$  as well as international institutions. This pressure factor  $\gamma$  decreases the cost of profit shifting. The marginal effectiveness of  $\gamma$  decreases in as  $\alpha$  does.

With these assumptions, the author then builds three stages to evaluate how firms engage in profit shifting. Stages i) and ii) are simultaneous, and stage iii) is subsequent to stages i) and ii), as shown in [Figure 19](#).

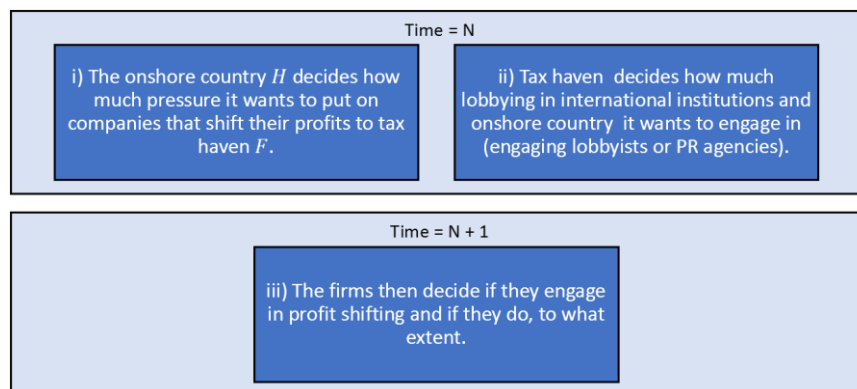
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<sup>40</sup> The marginal effectiveness of  $\alpha$ , that includes "naming and shaming" companies by governments that engage in profit shifting to prevent them to do so, is decreasing, meaning that it costs a gradually increasing amount of resources in naming and shaming these companies to achieve the same results in terms of preventing these companies from shifting their profits.

<sup>41</sup> It also costs a gradually increasing amount of resources to lobby to achieve the same cost reduction of profit shifting.



Figure 19 | Tobias Hauck's model steps to assess the effects of offshore lobbying on the development and resilience of tax havens and profit shifting techniques



The model shows that when an onshore country (from which companies shift their profits) cannot eliminate profit shifting, there is an incentive to lobbying for tax havens. Tax havens can indeed benefit from profits shifted to their jurisdictions by companies seeking to minimise their income tax. Also, as the cost of profit shifting decreases, there are two effects at play that respectively i) increase and ii) decrease the incentive for profit shifting:

- i. The direct cost reduction for firms that engage in profit shifting which encourages more firms to shift their profits;
- ii. The tax rate differential between the onshore and offshore countries reduces because the reduction in the cost of profit shifting encourages the onshore country to reduce its tax rate.

International lobbying by offshore countries decreases the benefit of onshore countries to apply pressure as to prevent their national companies from engaging in profit shifting activities. Consequently, offshore countries engage significantly in lobbying activities.

This relationship explains why companies continue to shift a part of their profits in offshore countries despite the various measures and actions undertaken by governments worldwide and international institutions. These practices are still occurring because the pressure that onshore countries apply on their companies to prevent them from shifting their profits is below the level they intend to apply to these companies.

Hauck also highlights, through his model, how economic integration at its early stages can reduce profit shifting opportunities but how, beyond a certain “threshold” or “level” of integration, this phenomenon reverses and begins to increase profit shifting opportunities. As such, when considering the European Union case, if that level of integration has already been reached, further integration and capital mobility improvement would boost profit shifting in low-tax jurisdictions (such as Ireland or Luxembourg).



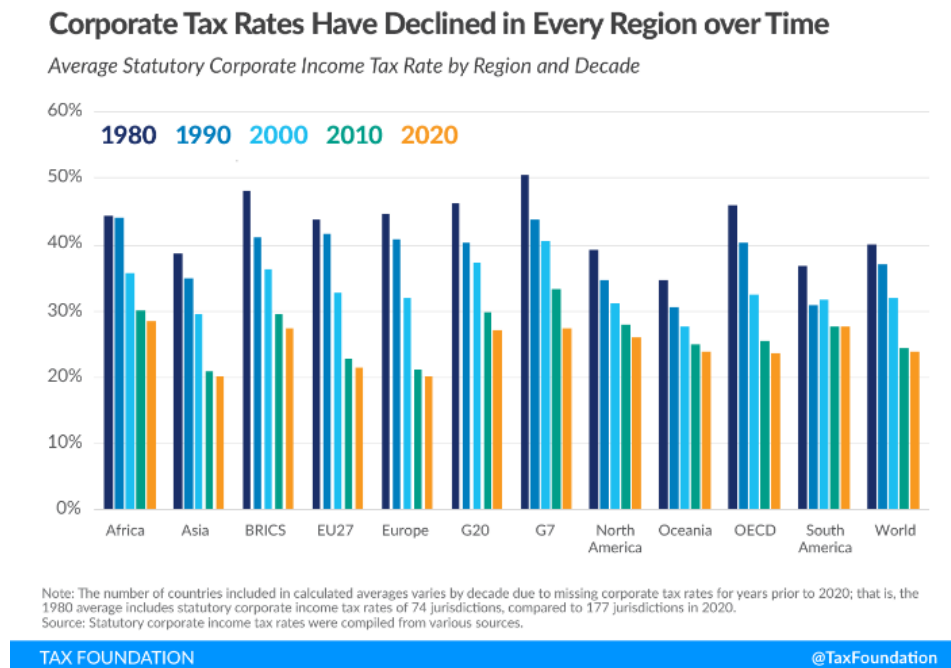
Furthermore, Hauck shows with the integration to its model of multiple tax havens that, as the number of possible tax havens increases, the pressure the onshore country has to put on its companies increases as well. The onshore country also has to devote more resources to keep its pressure efforts. However, the marginal effectiveness of onshore countries' pressure to decrease the incentive to engage in profit shifting activities for companies increases as the number of tax havens increases.

#### **1.4.4. But is it worth it for governments to engage in anti-profit shifting measures?**

In *Income Misattribution under Formula Apportionment*, James R. Jr. (2010) examines one radical suggestion made by some scholars that would be to totally overhaul the current tax system worldwide by a new system in which profits would be assigned to jurisdictions following a calculation methodology based on tangible factors such as capital, sales, or employment. Proponents of this method argue that these factors are more troublesome to manipulate than intercompany prices that can be inflated to levels superior to arm's length prices. However, opponents of this formula underscore that these factors are also tough to estimate and could be subject to biases that would make them inaccurate and manipulated as transfer prices are.

Moreover, another issue is that, in the unlikely case that countries worldwide could coordinate to find a solution that would totally prevent BEPS, corporate taxes would probably globally decrease. James R. Jr. indeed contends that some high-tax jurisdictions can earn more by heavily imposing domestic firms whose tax base is less elastic than MNE's tax bases because domestic firms cannot engage in profit shifting. However, if BEPS is made impossible, MNEs might have an incentive to relocate their business elsewhere entirely. High tax countries—fearing a significant reduction of their international business economy—could thus be incentivised to reduce their tax rates to keep MNEs in their countries and not be totally deprived of their tax base. We can see in **Figure 20** that most countries have steadily lowered their corporate tax since the 1980s.

Figure 20 | Average statutory corporate income tax rate by region and decade, from *Corporate Tax Rates around the World, 2020*, by Elke Asen<sup>42</sup>



Totally preventing BEPS would thus increase tax competition between countries. Consequently, total tax revenues might well be below those earned currently by governments when BEPS is possible. The expensive costs of measures aimed at impeding BEPS would further decrease the potential gain of preventing BEPS. As such, the benefits of engaging in anti-BEPS actions by governments may not outweigh the costs. Hence, undertaking such actions must be done only after careful consideration of worldwide governments.

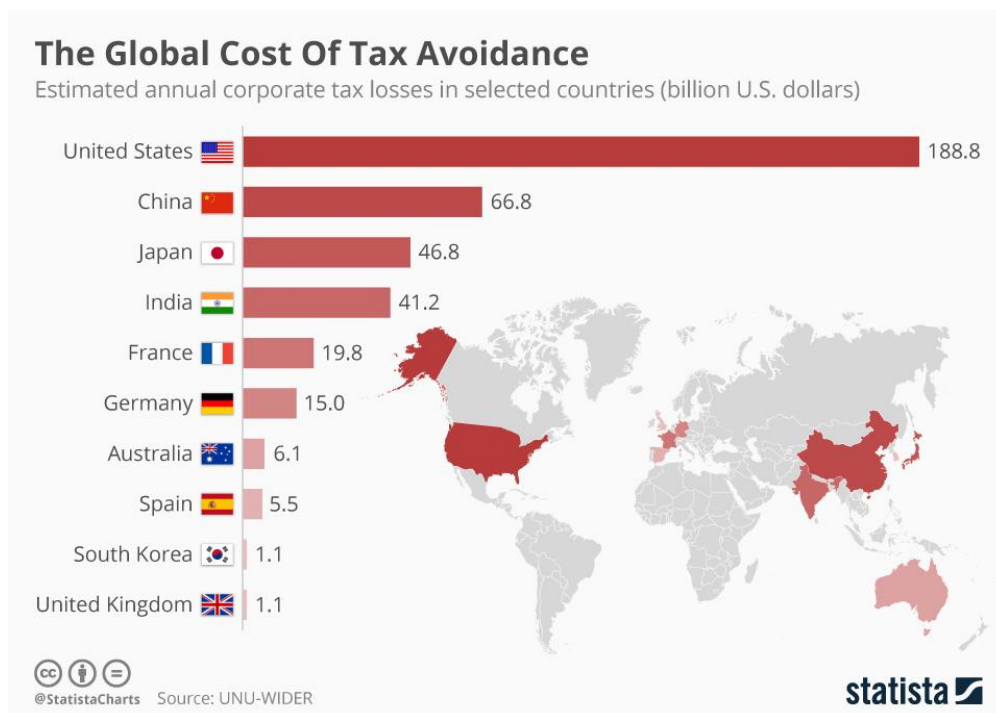
However, targeted measures on a small number of MNEs might yield significant results, even if small in comparison with a high jurisdiction's total tax revenues. In *Knocking on Tax Haven's Door: Multinational Firms and Transfer Pricing*, Davies et al., (2018) studied the losses incurred by the French tax authorities due to profit shifting in 1999. The 1999 corporate tax in France was 32% on average and generated roughly 36 billion euros. The sum of the differences between arm's length prices and intrafirm prices of the products sold in intrafirm transactions is approximately equal to 1 billion euros. This represents a loss of approximately  $\text{€}1,000,000,000 \times 32\% = \text{€}320,000,000$  or  $\text{€}0.32\text{bn}$ . As such, revenues from corporate tax for the French tax authorities should have been 1% higher than they were. Is this phenomenon economically material enough to justify strong anti-profit shifting measure? This figure seems

<sup>42</sup> See Tax Foundation's article: <https://taxfoundation.org/publications/corporate-tax-rates-around-the-world/#:~:text=The%20worldwide%20average%20statutory%20corporate,177%20jurisdictions%2C%20is%2023.85%20percent.&text=The%20average%20statutory%20corporate%20tax,in%20every%20region%20since%201980.>

quite low, but it is worth noting that only 450 French MNEs and 10 countries accounted for 90% of intrafirm exports, and 25 MNEs and 10 countries accounted for 10% of intrafirm exports, which means that transfer pricing is very concentrated and that a few numbers of firms are avoiding a significant share of their corporate tax. As such, targeted actions on those MNEs could be enough to reduce the bulk of French MNE's profit shifting and reduce the French tax authorities' losses.

Davies et al. pointed to further studies that underscored how, in most high-tax jurisdictions, profit shifting was conducted by a small fraction of MNEs. Enforcing measures targeting these companies could hence help governments of high-tax jurisdictions reduce the loss of revenues attributable to profit shifting. We can see in [Figure 21](#) that tax avoidance costs, for instance, more than \$190bn to the US or \$20bn for France in 2017. However, we can see in [Figure 22](#) that these numbers represent a small share of these countries' GDP (respectively 0.91% and 0.78% for the US and France) that may not justify wide and expensive anti-profit shifting measures. Nevertheless, targeted measures at the biggest MNEs that engage in profit shifting might prove worth their costs, as suggested by Davies et al.

Figure 21 | The cost of tax avoidance in 2017 for some of the world's biggest economies, from Statista<sup>43</sup>



<sup>43</sup> See *The Global Cost Of Tax Avoidance* by Niall McCarthy (2017): <https://www.statista.com/chart/8668/the-global-cost-of-tax-avoidance/>

Figure 22 | Cost of tax avoidance in 2017 for some of the world's biggest economies compared to their GDP in 2020<sup>44</sup>, combined information sources from Statista<sup>45</sup>

Country	Cost of tax avoidance (\$bn)	GDP 2020 (\$bn)	% of cost avoidance in GDP
United States	188.80	20,807.27	0.91%
China	66.80	14,860.78	0.45%
Japan	46.80	4,910.58	0.95%
India	41.20	2,592.58	1.59%
France	19.80	2,551.45	0.78%
Germany	15.00	3,780.55	0.40%
Australia	6.10	1,334.69	0.46%
Spain	5.50	1,247.46	0.44%
Korea	1.10	1,586.79	0.07%
United Kingdom	1.10	2,638.30	0.04%

<sup>44</sup> Finding a reliable source for 2017 GDP estimates per country was surprisingly difficult, but 2020 GDP are still relevant to give a relevant order of magnitude for the losses due to tax avoidance.

<sup>45</sup> See *The 20 countries with the largest gross domestic product (GDP) 2020*:  
<https://www.statista.com/statistics/268173/countries-with-the-largest-gross-domestic-product-gdp/>

## PART 2: RESEARCH METHODOLOGY

## 2. Research methodology

### 2.1. Hypotheses stemming from the literature review

#### 2.1.1. Literature review synthesis

The literature review leads us to conclude that BEPS—as expected given its broad coverage in the media and the efforts in which governments publicly engage to prevent it—is a technique in which MNEs engage to shift significant amounts of money. They do so through three main canals: transfer pricing, royalty payments pertaining to intangible assets, and intra-group financing. The shared academic consensus is that these three means of shifting profits are not equivalent in their magnitude. Indeed, MNEs engage more in profit shifting through transfer pricing and royalty payments than intra-group financing.

The academic studies in this literature review also allow us to apprehend how difficult it is to empirically assess the extent of profit shifting. The volume of time-series, cross-sectional, or longitudinal data that must be retrieved is massive and must be processed to be exploitable. As such, we can see that there are some disparities in the final results obtained by various studies concerning the extent of profit shifting, in the form of very different semi-elasticities of profit shifting to the tax differentials between the jurisdictions in which MNEs' affiliates are located.

However, it is maybe more surprising to see that some scholars point out—with robust evidence—the relative unimportance of profit shifting compared to the losses they cause to the high-tax jurisdictions' governments. These scholars also highlight the numerous difficulties MNEs face when they intend to engage in profit shifting, since doing so implies going through complex processes and important costs. As such, there seems to be a paradox between the public attention that profit shifting receives and the real impact it has on public finances and the difficulty most MNEs encounter to engage in profit shifting.

These observations lead us to ask ourselves how difficult it is for a company that operates in multiple countries to engage in profit shifting, and what specific hurdles an MNE that seeks to engage in profit shifting must overcome. They also lead us to wonder if the attention that profit shifting receives in the public opinion is righteous and if the efforts in which governments engage are worth their costs.

### 2.1.2. Hypotheses

Following the synthesis of our literature review, we can elaborate the following hypotheses to focus the empirical study on the most relevant aspects of profit shifting as to answer the question: what is the extent of the BEPS phenomenon, and how hard is it for MNEs to engage in profit shifting?

**Hypothesis 1: Profit shifting is a positive function of the tax differential between countries.**

The fact that profit shifting is a positive function of the tax differential between countries is the main observation of nearly all scholars' studies in our literature review. Nearly all of these scholars noted that the broadest the corporate tax differential between two jurisdictions in which an MNE is established, the more the MNE will tend to shift its profits to the jurisdiction that enforces the lowest corporate tax.

**Hypothesis 2: Profit shifting has been decreasing over time, indicating a growing efficiency of anti-profit shifting measures.**

As we have seen in our literature review, most scholars have noted that profit shifting has been decreasing over time. While a part of this decrease can be attributed to increased accuracy in measuring profit shifting, most of this decrease is probably due to increased effectiveness in anti-profit-shifting measures enforced by governments.

**Hypothesis 3: Engaging in profit shifting entails high costs for an MNE, which may be superior to their benefits.**

Some scholars highlighted that MNEs faced significant hurdles with engaging in profit shifting: they deem the process of shifting process as costly and complex. These hurdles could explain why it seems that most MNEs that engage in profit shifting are considerable in size (more than 1,000 employees and \$200m of revenue).

**Hypothesis 4: The coverage of profit shifting in the media is not proportionate to its impact on public finances in high-tax jurisdictions and is explained by non-financial factors, such as perceived inequalities.**

Scholars disagree on whether profit shifting coverage in the media is righteous. Some scholars argue that profit shifting represents, in fact, a small cost to high-tax jurisdictions that is negligible and not worth governments' and international institutions' efforts to curb it.

## **2.2. Empirical research methodology**

### **2.2.1. Qualitative study through semi-conductive interviews**

Following our analysis of several academic papers, we tried to obtain more information pertaining to profit shifting and which actions MNEs must undertake to shift their profits so as to minimise their income tax. The most appropriate way to do so was to interview relevant professionals who could give us relevant information and insights. A quantitative analysis using statistics as inputs would indeed have been too challenging and complex given the scope of this thesis, since we saw in our literature review how difficult it was to obtain and analyse data from thousands of MNEs in tens of countries. Hence, our goal was to empirically come up with findings that could confirm or infirm our hypotheses, since we could not statically draw clear-cut conclusions. Nevertheless, our hypotheses were still useful in that they helped us to strengthen our research methodology.

We thus conducted a qualitative empirical study through semi-conductive interviews that lasted from 60 to 90 minutes. The respondents received some information prior to the interview to familiarise themselves with the topic and the interview guide, which is structured on the following axes:

- i. The extent of profit shifting (pertains to hypothesis 1)
- ii. The trend of profit shifting (pertains to hypothesis 2)
- iii. How MNEs engage in profit shifting (pertains to hypothesis 3)
- iv. The costs and benefits of curbing profit shifting for governments and the media's coverage of this phenomenon (pertains to hypothesis 4)

We aimed to interview different professionals who could give us relevant information, such as CFOs and CEOs of MNEs, Financial auditors and Tax specialists. The interview guide consists of open-ended questions covering comprehensive aspects of profit shifting and is constructed to be versatile and relevant to all the aforementioned professionals. Using all the questions was not mandatory as they serve as guidelines so as to give the respondents ample room to develop their thoughts in their areas of expertise and interest.

### **2.2.2. Panel of respondents**

To obtain a result as relevant as possible, the panel of respondents comprises a CFO, chartered accountants, statutory auditors, a tax specialist, a consultant, and a CEO of an MNE coming from different countries with significant work experience. This panel is summarised in the following table:



Role	Company	Professional experience	Country	Transcript reference
CEO	Refinancing Company	32 years	Saudi Arabia	<a href="#">Appendix 3</a>
Chartered Accountant & Partner	French accounting firm	35 years	France	<a href="#">Appendix 4</a>
Tax specialist	French accounting firm	20 years	France	<a href="#">Appendix 4</a>
Statutory Auditor & Partner	Big 4	38 years	France	<a href="#">Appendix 5</a>
Chartered Accountant & Consultant	Consultancy	8 years	France	<a href="#">Appendix 6</a>

The interviews were conducted either physically when possible or remotely and were transcribed in French.

### **2.2.3. Potential limits**

There are potential limits to this qualitative study. They were taken into account in the analysis of its results as well as in the conclusion.

These limits are due to several factors. To begin with, this thesis topic aims to assess the extent of a phenomenon and the factors that drive it: it thus cannot give a binary yes/no answer. There is indeed a consensus among scholars regarding the difficulty of assessing profit shifting and the methods that companies use to shift their profits, given the wide variety of data among countries and organisation types.

Furthermore, the sample size is quite limited relative to the topic's breadth, complexity, and controversy. The respondents need to both have a significant work experience so as to be able to give us relevant insights and be willing to talk about this controversial topic. These respondents were, as such, hard to find: it is thus impossible to be exhaustive on the matter. However, the panel of respondents aims to include various profiles having different and relevant backgrounds regarding the topic of profit shifting to have the broadest possible view on the thesis's subject.

Finally, some biases may affect the respondents' answers:

- Survey administration methods: Due to geographical or sanitary constraints, the interviews are conducted physically, through phone or via e-mails. Hence, the non-verbal information that can be obtained through these interviews may vary following the means through which they are conducted.

- Moral bias: Profit shifting is a phenomenon on which many people have a negative or neutral view based on their philosophy and beliefs. Some people may deem this practice as morally harmful and detrimental to society that deprives governments and their population of tax revenues, whereas others may consider this technique as righteous as any other since it is legal. These moral considerations may impact the respondents' answers.
- Position of the respondents: Some respondents may be more uneasy given their position to talk about profit shifting. For instance, a CFO that is involved in the shifting of profits of its company may be less inclined to detail the process or more inclined to present it as a technique that does not correspond to profit shifting. In contrast, a tax specialist may speak more freely about this phenomenon.

## PART 3: RESULTS AND LINE OF THOUGHT

## 3. Results and lines of thought

### 3.1. Profit shifting is a complex and costly process for companies to engage in

#### **3.1.1. Profit shifting is a costly process that requires a lot of conditions to be met to be profitable**

As argue several authors whose arguments we have examined in the literature review in 1.2., some respondents underlined that shifting profits for an MNE was a relatively complex and costly task. J.O. explains that the difficulty of shifting profit fundamentally depends on the MNE's activity and that it materially increases for physical companies.

For instance, a carmaker with production facilities in a particular country will need to undertake many complex actions to shift its profits. It could create a royalty fee on the vehicle's brand and locate it in a low-tax jurisdiction or create a management fee collected by a shell company set up in a low-tax jurisdiction. These actions are hard to perform since their righteousness is hard to prove to the tax administration of most countries, especially high-tax jurisdictions.

However, J.O. concedes that it may be easier for MNE whose industry is mainly based on services—such as the GAFAM—since they do not have a physical production process that is simple to monitor for the tax administration. U.J. gives us an example of a service-based industry that can shift profits more effortlessly than industrial ones: the insurance industry. In most insurance groups, the classic insurance business is conducted along with a reinsurance business: the latter can be located anywhere. For example, suppose a group has an insurance activity in France taxed at 28% and a reinsurance activity in Ireland taxed at 12%. In that case, it is possible to have the French insurance activities reinsured by the Irish reinsurance activities. As such, the turnover is made in France, but the profits are taxed in the jurisdiction in which the reinsurance activities are located.

Nonetheless, J.O. claims that companies still need a legitimate business case to shift a part of their profits to low-tax jurisdictions that meet legal requirements, tax requirements and tax agreements between the countries in which they operate and the countries to which they shift profits. They also must ensure that these agreements and the tax systems of these countries are stable. These conditions are obviously numerous and need a highly qualified team of lawyers and analysts to be met.

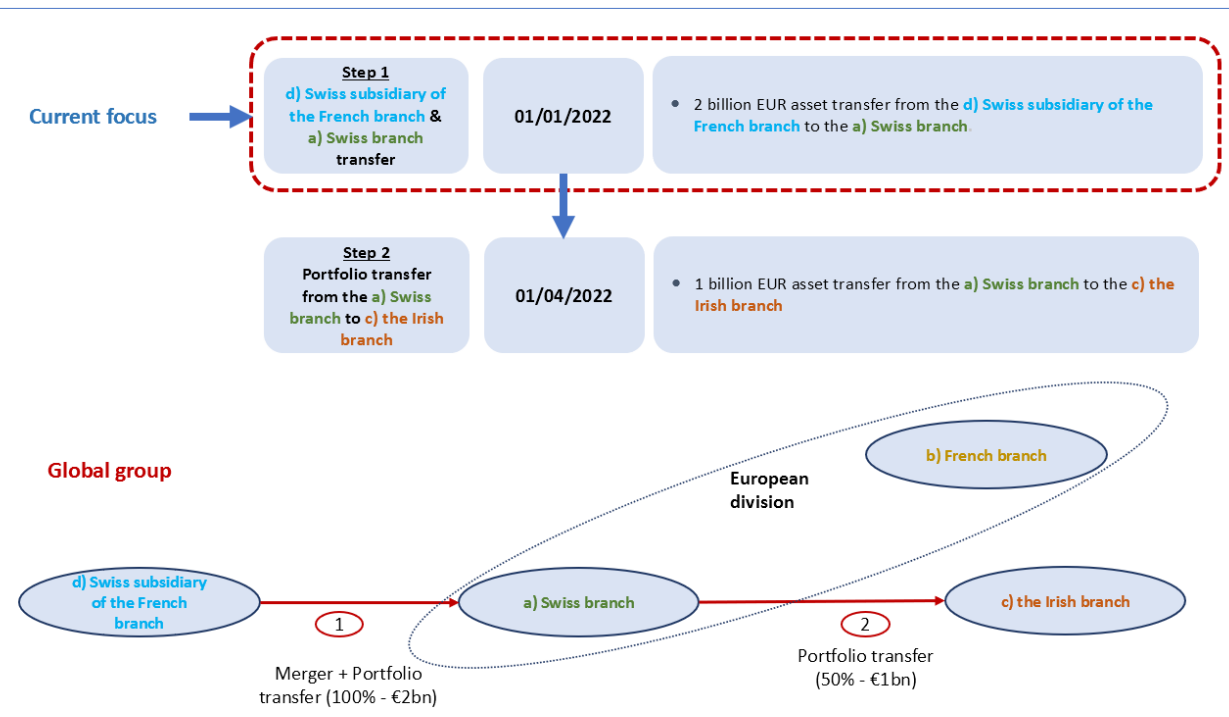
“In either case, shifting profits is definitely a complex process that cannot be done overnight”, sums up **J.O.**

**J.O.** contends that a company will obviously accept all the costs related to profit shifting if the benefits stemming from this process are higher (a classical cost-benefit analysis) and if the place where the profits are shifted has a stable tax system. Moreover, **J.O.** underlines that a company needs to have made stable profits for several consecutive years and have a clear outlook of what its profits are going to be before engaging in profit shifting. If the company has unstable profits and incurred losses, it will first use all its loss carryover to avoid the corporate tax when it makes profits before finding other ways to minimise its corporate tax. Furthermore, if the company does not have a clear outlook of stable profits, it certainly will not engage in all the costs previously mentioned.

**U.J.** gives us an example of the complexity of shifting profits and the costs stemming from this practice. **U.J.** is involved in an operation for a major reinsurance company, which consists of shifting assets worth 3 billion euros that are split between its Swiss branch, its French branch, the Swiss subsidiary its French branch and its Irish branch. This shift is performed by relocating reinsurance activities, resulting in the relocation of reinsurance contracts and the risks and assets tied to them.

Figure 23 | Reinsurance company's tax plan brief excerpt (adapted from the actual brief, references to client removed): the profit shifting scheme of the reinsurance company involving the merger of the Swiss branch and the Swiss subsidiary of the French branch, followed by the merger of the Swiss and Irish branches

Current forecasted scenario – STEP 1: **d) Swiss subsidiary of the French branch** <> **a) Swiss branch**.



As shown in **Figure 23**, this shift of activities and assets is done through a merger between key entities in two steps. The scheme involves 4 of the group's entities: **a) the Swiss branch**, **b) the French branch**, **c) the Irish branch**, and **d) the Swiss subsidiary of the French branch**. The latter today has an important loss carryover.

The first step of the operation consists of transferring all the assets from **d) the Swiss subsidiary of the French branch** to **a) the Swiss branch**. This transfer will yield a taxable gain resulting from a change in accounting methods in Switzerland that will consume the loss carryover of **d) the Swiss subsidiary of the French branch**.

The second step consists of transferring all the assets of **a) the new Swiss branch** that now contains all the assets of **d) the former Swiss subsidiary of the French branch** to **c) the Irish branch**.

There are two objectives to this operation. The first one is to reduce the group's overall capital requirements through a complex mechanism based on broadening the scope of the **c) the Irish branch**, which today has life insurance activities and after the mergers will have life and non-life insurance activities. The company will thus be able to do an additional activity with the same capital and increase the return-on-investment for its shareholders. For example, the company today with 10 of capital can have an activity worth 100 but will be able after this operation to do an activity of 120: it will benefit from a 20% greater leverage effect.

The second objective is to reduce the corporate tax the overall group pays. Since Ireland's tax rate is lower than France's or Swiss's (approximately 12% in the former versus 25% for France and Switzerland), the expected benefits of this step of the operation are worth the profits the group makes times the tax differential between, on one side, Ireland, and on the other side, France, and Switzerland.

Furthermore, **U.J.** explains that many consultants are working on the project. The project lasts about a year and involves around thirty consultants from different consulting firms and software publishers, tax specialists, and strategists who think about the project's architecture. Around 7 million euros are committed on the operational side of the project, knowing that the "strategists" that **U.J.** mentioned are undoubtedly paid much more and come from the most recognised strategy consulting firms: they are likely to be billed 2000 euros per day, while the operational consultants **U.J.** works with are billed around 1000 euros per day.

**U.J.** thinks that the group realised this operation had to be done before next year at the latest to benefit from the fiscal retroactivity allowing to consume the fiscal deficit of **d) the Swiss subsidiary of the French branch**. If they had done it later, this operation would have been of much less interest. Indeed: when a company merges, it does so at a date after the authorities'

approval. Nevertheless, this merger is retroactive: this means that the Swiss, Dutch, and Irish authorities, in our case, are positioning themselves in the second quarter of next year to accept the merger and that, therefore, the merger must take place in the first quarter of next year. “If they do not do it this year, then it is too late: if the merger takes place today, the approval must not take place more than six months later. The entity I am talking about is already short on getting approval in the second quarter of next year.” explains U.J.

What does this tell us? The operation to shift profits to Ireland is complex and involved a pre-merger between a) the Swiss branch and d) the Swiss subsidiary of the French branch that generates gains resulting from changes in accounting methods. If the latter did not have carryover losses, then the whole scheme would not have been profitable. It was necessary to have a loss-making company to make the series of mergers that end in Ireland profitable.

On top of that, there is also a time constraint that forces the group to complete this whole operation before next year. That is why so many consultants are working on the project.

We can thus argue, through this example, that J.O. is quite right: shifting profits is complex. Many parameters must be considered only to perform the operation, not to mention the need for a stable profits outlook and tax policies in the country where the profits are shifted.

### 3.1.2. This phenomenon can be deemed as marginal when one compares the tax losses stemming from it to countries' fiscal revenues

...

The tax revenue lost by countries due to MNEs shifting their profits is hard to measure, as we have seen in the literature review. For some respondents, these are probably marginal. J.O. explains that if one considers companies that should pay taxes in France, in the United Kingdom or Germany and measures how much they do not pay due to the schemes they devise to relocate their profits, the tax savings probably represent a marginal fraction of these countries' budget or overall tax revenues.

Moreover, J.O. underscores that if these taxes are measured in a consolidated way, the taxes that an MNE does not pay in a particular country can be paid in their home country. “The truth, for example in France, the U.K. or Germany, is not necessarily the same as the one measured in the United States when you consider American brands”, says J.O.. By claiming that, he means that the taxes lost by a specific country can be offset by the taxes gained by another on a global scale. Hence, J.O. concludes his argument by claiming that these companies do not have a massive fiscal impact on the economies of rich and high-tax countries: it is not as if they were escaping taxation from developing countries with tight budgets.

**V.M.** is also in line with **J.O.** **V.M.** says he is not sure that profit shifting is a significant phenomenon, especially when one considers the reactions it generates in France. Admittedly, the government is rightly reacting to tax companies that outsource their profits. For example, the French government imposed the GAFA Tax on the American digital giants and announced it could get back a sum that seems hefty, such as 800 million euros. *“Overall, the phenomenon is not major, and the tax administration of rich countries does not even measure up to it: 800 million euros is a probably ridiculous amount compared to all the profits that are outsourced, which are themselves really small compared to the overall taxes that the tax administration collects. The result of such measures is quite ridiculous: everyone laughs at us, especially the United States.”*, says **V.M.**

However, both **J.O.** and **V.M.** concede that, on a company scale, the gains an MNE generates from shifting its profits to low-tax jurisdictions can be significant. *“From a business point of view, the delocalisation of profits can have a significant impact: if the business that relocates its profits were to comply with local common law in all the countries it operates, it could indeed have lower overall profits”*, says **J.O.** **V.M.** also explains that, for some MNEs, the tax savings may be significant, citing some customers for which he worked that indeed paid substantially lower taxes thanks to profit shifting techniques.

Furthermore, **J.O.** and **V.M.** also consider that our attention and sensitivity are drawn by the effects of headlines on a few massive examples, like the GAFA because they make billions in turnover and have a minimal tax contribution in the countries where they generate significant revenue. *“When this topic comes up in the press, you immediately get the impression that it is huge. In France, as soon as we talk about more than a million euros in the newspapers, it is major news. However, honestly, when one has a state budget of 2 trillion, a billion is nothing, and a million euros even less”*, **V.M.** says.

Overall, both **V.M.** and **J.O.** consider that profit shifting can be significant for some companies that can indeed make substantial tax savings, but that the overall taxes lost by rich countries are negligible compared to their budget or GDP. However, they also say their points of view are subjective and that it is hard to measure the losses due to this phenomenon.

### **3.1.3. ... but profit shifting must generate at least fiscal losses of importance for high-tax jurisdictions, for they would not engage in ambitious anti-profit shifting measures if it were not**

In contrast to **V.M.**'s and **J.O.**'s points of view, **A.C.** and **M.E.** argue that profit shifting must be a source of significant tax losses, for rich countries would not engage in such measures if it were not the case.



**A.C.** and **M.E.** claim that profit shifting deprives rich countries of a substantial amount of tax revenue. However, as **J.O.**, **V.M.** and several authors in the literature review, **A.C.** and **M.E.** consider that the amount of losses due to profit shifting is arduous to estimate. *"I think no one ever reached a somewhat satisfying and reliable estimation of what countries lose"*, says **A.C.**

Even though there is no precise estimation of what this phenomenon costs, the argument that **A.C.** and **M.E.** make is that rich countries would not allocate so many resources to fight it if it were unimportant. *"For instance, if the Americans care so much about profit shifting, it has to be important, and one cannot say that Americans are bureaucrats; they are rather liberals."* For **A.C.**, if Biden claims that American MNEs operating abroad need to be more taxed, he may want to finance large deficits and its stimulus plans, but he also considers that there is a real revenue shortfall for the IRS.

Furthermore, **A.C.** adds that D. Trump also wanted to tackle the problem, but differently. When he came to power, D. Trump proposed to American companies that had all their cash in the Cayman Islands, in Ireland or in other low tax jurisdictions to repatriate their money to the U.S. in exchange for a low tax rate of around 10%. As a result, many companies repatriated their cash from these jurisdictions, which was actually made of the profits that these companies had shifted and accumulated in those countries.

**A.C.** sums his point of view this way: *"It is definitely a big topic. That is why everyone gets excited about it; there is no smoke without fire."*

**M.E.** also explains that this problem is hard to solve regarding the European Union since it cannot have a common budget and, therefore, a common fiscal policy. Countries like Ireland, Malta, Cyprus, or Luxembourg complain about every regulation attempting to harmonise tax rates because their low rates allow them to attract many companies and make much money. They would not do so if their gains were not substantial.

Regarding the relative inefficiency of tax administration that struggle to tax profits shifted to low tax jurisdictions, **M.E.** underlines that although the tax administration has improved and is more aggressive, it does not necessarily want to go into conflict systematically. Indeed, large companies that relocate their profits have many legal means and can negotiate for a long time to drag out administrative procedures for years.

When large MNEs undergo tax audits, they request the services of the most prominent lawyers in the market. Though the tax administration may have capable people, it knows it will be hard to compete against these excellent lawyers. The lawyers working for MNEs are specialised in tax issues and have been working on similar cases for decades. They also happen

to work for companies that analyse the regulation, and the tax administration uses the analyses they produce as a reference. *“These lawyers write the Francis Lefebvre [law editions] that the tax administration often uses to justify its procedures”,* says M.E. As such, *“the tax administration prefers to say to these companies that it knows they shifted profits but is willing to make a deal”,* explains M.E. Therefore, legal proceedings often end with a transaction involving lower adjustments than expected.

M.E. also points out that the tax administration makes money when settling these cases: avoid fighting with MNEs’ very capable lawyers saves time and human resources. Hence, the tax administration collects lower amounts but quicker and has enough time to audit other companies. It is inefficient for the tax administration to fight with big MNEs for years: all in all, it comes down to a classical arbitrage to maximise revenues.

\* \* \*

Overall, though most scholars our respondents agree that measuring the extent of profit shifting is hard, and though an important part of them claim that the losses stemming from profit shifting can be deemed as marginal when compared to rich countries’ overall tax revenue, we must consider the argument that rich countries allocate many resources to fight this phenomenon. As such, one can reasonably infer that profit shifting must at least deprive rich countries’ tax administration of a non-negligible amount of money. However, we have seen in 3.1.1. that some professionals consider profit shifting to be very costly for MNEs. Hence, we cannot conclude concerning our **third hypothesis**: engaging in profit shifting does entail high costs for an MNE that may be superior to its benefits. However—despite the manoeuvre’s costs—it seems that enough MNEs are shifting their profits to the point that high tax jurisdictions lose a certain amount of tax revenues that compel them to engage their turn in costly counter-measures.

Nevertheless, we have found some elements that tend to hold true for our **first hypothesis**: profit shifting seems to be a positive function of the tax differential between countries. This theory was already widely held in our literature review. For example, the reinsurance group U.J. talked about in 3.1.1. is a good illustration. This group decided to shift its activities to Ireland to reduce the corporate tax it paid and budgeted its gains directly by multiplying its profits by the tax differential between France and Ireland or Swiss and Ireland.

## **3.2. Governments of high tax jurisdictions are increasingly more efficient at preventing profit shifting**

### **3.2.1. The tax administration is becoming more efficient to prevent profit shifting thanks to more financial resources and capable agents**

Some respondents agree that the tax administration became gradually more efficient at fighting profit shifting over time, as we have seen in **1.4.2.**

**A.C.** walks us through the difficulties that the tax administration encounters to fight profit shifting and its ways to detect it. First, it depends on the nature of the product manufactured and sold by the MNE. If the product is a mass retail product, the tax administration can then pretty effortlessly see if the MNE shifts its profits through, for example, transfer pricing. For instance, if the company sells such a product €100 and buys it for €98 from the parent company, while another company sells a similar product €100 but buys it €60 from its national suppliers, then it is easy for the administration to see that there is a problem.

However, it is much more complicated for the tax administration to make comparisons regarding services. Breaking down a physical product's costs into labour, distribution, and other expenses is easy but doing so is much harder for services. This difficulty explains precisely why companies like Google and Amazon manage to relocate a significant portion of their profits.

**M.E.** explains us the rationale that the tax administration uses to make these comparisons. The tax administration uses databases containing margin rates, the same kind of databases practitioners such as him can access. The most used one is Xerfi, which is complete and contains a large amount of information by actor in each sector, giving many companies' margins, EBITDAs, and other numerous indicators and how they compare to their sectoral averages.

The administration did not have this kind of practice 25 years ago, explain **M.E.** and **A.C.** Nowadays, the administration knows well how to use all this information. As **A.C.** puts it, the tax administration can therefore carry out comparable studies and report to a given company that would have a 5% margin on a certain type of product that the average margin in France is 10% for this product, so as to conclude that the company hides 5% of its profits that should be taxed. On this basis, the tax administration can then impose an adjustment.

**V.M.** also observes that the tax administration is getting more efficient at curbing profit shifting. *"The tax administrations of most rich countries have made enormous progress over*

*the past fifteen years on the subject. This topic is regularly at the centre of the public debate and one of the main focuses of the tax administrations", he says.*

In France, for example, the tax administration has made significant progress in several areas: the quality of the processes is higher, more capable agents are recruited, and more efficient tools are used. More broadly, the tax administration has more means at its disposal. For example, **V.M.** explains that the tax administration has access to numerous qualitative databases to make benchmarks used to determine whether the transfer prices of certain companies are abusive, which was not or less the case in the early 2000s. **V.M.**'s point of view is totally in line with **A.C.**'s and **M.E.**'s.

**V.M.** adds that thanks to the widespread digitalisation in most industries that affects accounting practices, most companies have their books "practically open" with the tax administration. It is thus more difficult today for MNEs to not disclose their accounts to the tax administration than a few decades before.

All in all, according to these professionals, the tax administrations of most rich countries have become way more efficient at curbing profit shifting. We can infer two things from their testimonies: i) the reduction in profit shifting noted by some scholars since the 2000s in our literature review can indeed be attributed to a growing efficiency of tax administrations, and ii) profit shifting cannot be deemed as an unimportant phenomenon since it must have been one of the priorities of tax administrations for them to improve that much on its understanding.

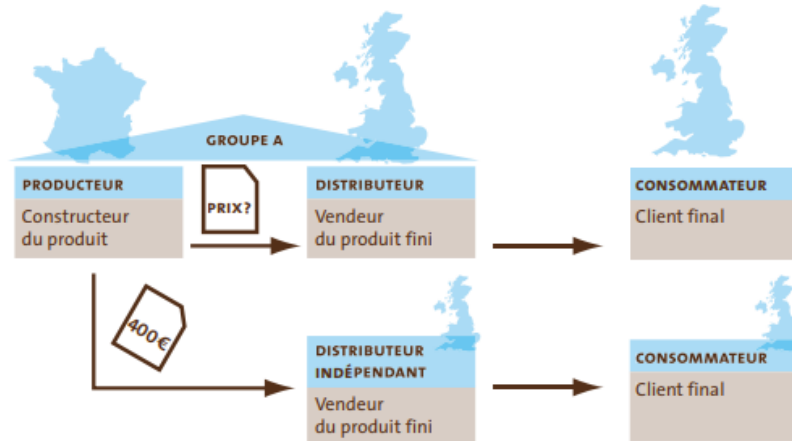
### **3.2.2. International efforts and harmonisation are gathering steam, but do not have necessarily the objective of increasing taxation**

International coordination is becoming increasingly more potent against profit shifting. The wealthiest countries and, more broadly, countries belonging to the OECD are undertaking global efforts to curb this phenomenon. We have indeed been through the OECD BEPS Action Plan in our literature review **1.4.1.2.**

**A.C.** explains that the OECD serves as a reference for most Western countries' tax administrations, especially for the French one. A guide published in 2006 by the French tax administration illustrates this trend. It serves as a reference in terms of how transfer pricing should be conducted to avoid profit shifting. Its publication date also marks the moment at which—according to **A.C.**—the administration started to tackle down the topic of profit shifting.

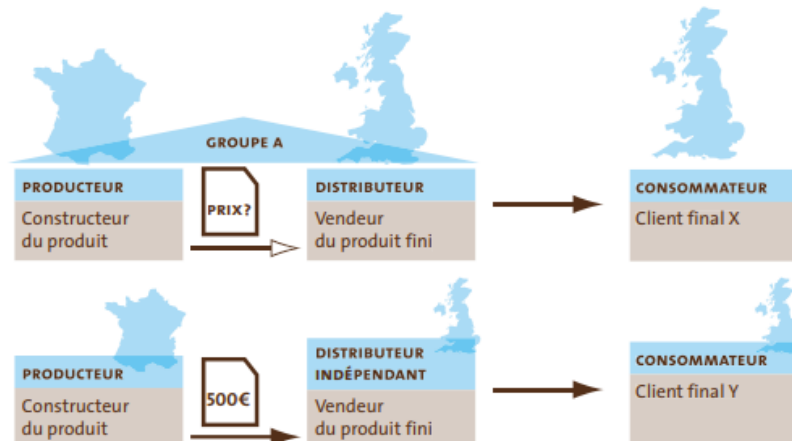
Figure 24 | Excerpt from “Les prix de transfert”<sup>46</sup> published by the French tax administration: details of the rules to properly determine a transfer price, which should be equal to the market price

*Exemple de comparable interne.*



*Dans l'hypothèse où les conditions d'exploitation sont identiques<sup>5</sup>, le prix de transfert du lave-linge qui doit être appliqué entre le producteur français et le distributeur britannique, appartenant au même groupe A, est de 400 €.*

*Exemple de comparable externe.*



*Dès lors que les conditions d'exploitation sont similaires<sup>6</sup> à celles qui existent entre les entreprises indépendantes, le prix de transfert du téléviseur, qui doit être appliqué entre le producteur et le distributeur du même groupe A, est de 500 euros.*

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For instance, concerning transfer pricing, the French tax administration directly uses OECD's methodology. As shown in **Figure 24**, the French tax administration considers a transfer price fair if it is equal to the market price (also called arm's length price). The OECD often serves as a basis to determine the reference market prices in most developed countries, **A.C.** says.

<sup>46</sup> « Les prix de transfert, Guide à l'usage des PME » (Transfer pricing: a guide for SMEs) : [https://www.impots.gouv.fr/portail/files/media/3\\_Documentation/guides\\_notices/prix\\_transfert\\_entreprise.pdf](https://www.impots.gouv.fr/portail/files/media/3_Documentation/guides_notices/prix_transfert_entreprise.pdf)

However, this harmonisation does not necessarily mean that countries are trying to impose a higher tax rate. For instance, in the E.U., **M.E.** explains that most countries are doing a kind of tax dumping, through which corporate tax rates differences are narrowing but globally going down. He cites the example of Jean-Claude Juncker, who—during the time he was the head of the European Commission—signed several tax rulings that made Luxembourg granting substantial tax advantages to MNEs, even though the same man was stating he was trying to harmonise taxation in the E.U. **M.E.** claims that this kind of behaviour is common among other European countries such as Ireland, Belgium, Malta or Cyprus.

This levelling down of taxation also seems to occur in France. **A.C.** says that France was, before 2017, enforcing a 33% corporate tax rate, which the current government aims to reduce to 25% before 2025. This reduction is made with the idea, according to **A.C.**, to bring the French corporate tax rate closer to the German one.

On this topic, **A.C.** has an interesting experience. **A.C.** worked for a company that—as many French and European listed companies—had set up its sub-holdings that held its equity securities in the Netherlands as BVs (which stands for *Besloten Vennootschap* in Dutch, Limited Liability Company in English). The manoeuvre's interest was that capital gains stemming from the sale of equity securities were not taxed, whereas they were taxed at 19% in France. The outcome was that European MNEs were shifting a part of their profits through this method and avoiding taxes.

However, in the early 2000s, the French tax administration—partly because of pressures from lobbyists of the companies located in the Netherlands that wanted to repatriate these activities—decided to align itself with the Netherlands, Luxembourg, and Belgium. The French administration decided to tax capital gains at a very low rate by taxing only the gains made on the “costs and expenses” portion of the sale of equity securities. This portion represents, on average, 12% of the whole capital gain made from equity securities sales. Thus, the tax became only the corporate tax times 12% of the capital gains resulting from the sale of equity securities. Considering France's actual corporate tax, it amounts to  $28\% \times 12\% = 3\%$ . As a result, this tax became less than six times lower than the previous taxation on this type of capital gains (3% vs 19%).

**A.C.** concludes by saying that many French companies consequently repatriated their equity securities management activities to France.

**M.E.** adds that this kind of tax dumping can also be observed in Europe and elsewhere, such as in the U.S. The U.S. can be considered, according to **M.E.**, as a high-tax jurisdiction because if the state tax is added to the federal tax, the overall corporate tax companies pay is roughly close to 40%. However, multiple presidents have lowered the federal tax rate, such as D.

Reagan, G.W. Bush and, more recently, D. Trump. This reduction may not have been done with the intent of attracting MNEs, but it undoubtedly opens up opportunities for tax dumping.

According to these professionals, we can thus see globally that rich countries and high-tax jurisdictions are becoming gradually more cooperative on the profit shifting issue. However, this cooperation does not necessarily translate into more taxes: it seems to be even the contrary, as seen in our literature review, especially in the figures displayed in 1.4.4. Though an agreement on a transnational 15% corporate tax has been reached at the beginning of June 2021, as explained in the [Introduction](#), the trend of cooperation that goes hand in hand with diminishing corporate taxes can still be observed.

### **3.2.3. The tax administration uses a strong methodology that improves over time, as it gets to know better the ways companies shift their profits**

The tax administration gets better at curbing profit shifting, as seen in 3.2.1. and 3.2.2., thanks to a robust methodology. To understand precisely how the tax administration proceeds to detect profit shifting practices and impose fines on the companies that engage in them, we will go through a case of a company that underwent a tax audit and had to adjust its accounts at the request of the tax administration.

Such a case was handled by [M.E.](#) a few years ago; it illustrates the tax administration's approach nicely.

In this case, concerning Company X (the company name will not be disclosed for obvious confidentially purposes), the administration scrutinised all of the subsidiary's accounts for the past eight years. The tax administration's report details the subsidiary's sales made to the group's third-party customers.

The tax administration, explains [M.E.](#), decided to audit this French subsidiary of an international group because it declared consecutive losses for many years. After a while, the tax administration "*woke up and found it strange*", says [M.E.](#) The subsidiary had a series of years of deficits and had more than 15 million euros in losses carried forward. [M.E.](#)'s firm warned the subsidiary that running abnormal deficits while the group to which it belonged was making profits would eventually raise a red flag, but he did so to no avail.



Figure 25 | Company's X tax audit report excerpt #1: Company's X operating profit in relation to its turnover

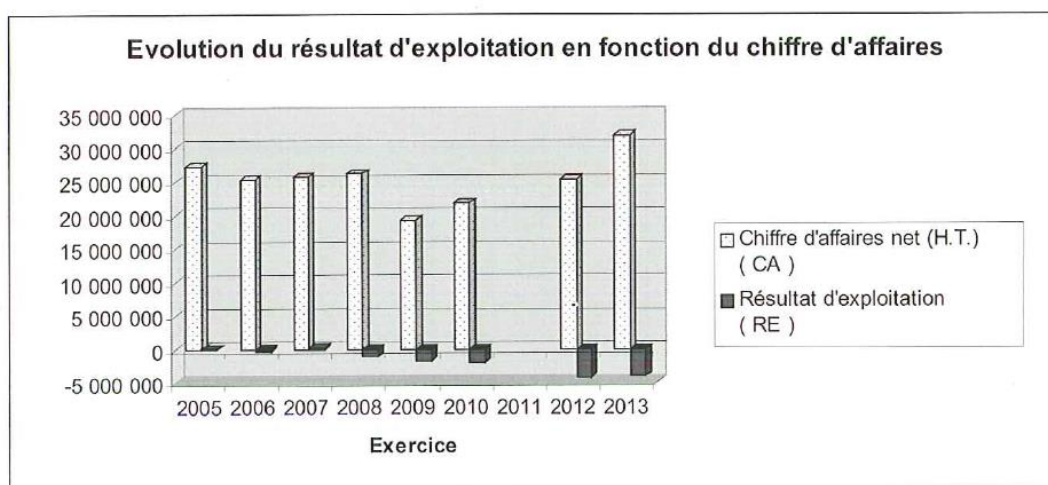
**2- Constatations réalisées par le service au cours des interventions sur place :**

Lors des interventions sur place, plusieurs éléments ont été relevés par le service :

**a- Des pertes d'exploitation structurelles récurrentes au sein d'un groupe bénéficiaire :**

Depuis l'exercice 2008, la société française [REDACTED] est extrêmement déficitaire.

Le graphique suivant présente l'évolution du résultat d'exploitation en fonction du chiffre d'affaires réalisé par la société sur la période 2006-2013 (données issues du tableau 2052 des liasses fiscales déposées par la société) :



As shown in **Figure 25**, the tax administration saw a significant discrepancy between the subsidiary's gradually increasing turnover and its lowering operating profit. Because the subsidiary belonged to a profitable group, this financial evolution was deemed a typical profit shifting scheme by the tax administration. Indeed, the turnover went from less than 20 million euros in 2009 for an operating profit of -1.5 million euros to a turnover of 31 million euros in 2013 for an operating profit of almost -4 million euros.

Moreover, the subsidiary sold products in a business line for which the margins are usually significant but went so far as to buy from the parent company to the point they had a negative margin rate, as shown in **Figure 26**. That further caught the tax administration's attention. For instance, the net margin made on the product category (see the document's first line) went from -23% in 2008 to -52% in 2012. That indicates the subsidiary is engaging in unjustified transfer pricing to shift its profits to the entity it buys its products from.



Figure 26 | Company's X tax audit report excerpt #4: Company X's margins analysed by product type by the tax administration

f- Des taux de marge nette négatifs sur l'intégralité des produits achetés et revendus neufs :

L'étude réalisée par la société sur les taux de marge nette dans le cadre du contrôle informatisé figure en Annexe-2-2.

Le tableau suivant synthétise les résultats obtenus :

code famille article	CODE NATURE	Libellé famille	libellé nature	TAUX MARGE NETTE 2008	TAUX MARGE NETTE 2009	TAUX MARGE NETTE 2010	TAUX MARGE NETTE 2011	TAUX MARGE NETTE 2012
■	N	■	NEUF	-23%	-37%	-37%	-52%	-52%
■	O	■	OCCASION	19%	23%	10%	16%	51%
Total ■				-18%	-30%	-29%	-41%	-35%
■	N	■	NEUF	3%	-5%	12%	-11%	-7%
■	O	■	OCCASION		57%	68%	133%	
Total ■				3%	7%	14%	-7%	-7%
■	N	■	NEUF	-6%	9%	3%	14%	9%
■	O	■	OCCASION		100%			
Total ■				-6%	9%	-1%	14%	5%
Total général				-11%	-14%	-16%	-21%	-19%

Les taux de marge nette réalisés sur les produits vendus neufs et achetés auprès du groupe se révèlent tous négatifs : l'ensemble de ces produits ne lui sont donc pas profitables.

The tax administration uncovered quite easily the unjustified subsidiary's transfer pricing practices. It applied the same methodology from *Les prix de transfert* detailed in [Figure 24](#) and compared the margins made on each of the subsidiary's product with the sectoral margins of those products. As shown on [Figure 27](#), the average gross margin of the subsidiary is equal to slightly less than 21%, which is significantly below the lowest quartile of the sector's gross margin average, equal to 25%.

Figure 27 | Company's X tax audit report excerpt #3: Company X's margins analysed and compared by the tax administration to the sectors' margins in which Company X operates

**b- Taux de marge brute insuffisants sur le secteur d'activité « NEUF » :**

Les taux de marge brute sur les ventes de marchandises achetées au groupe et revendues neuves sont très inférieurs à ceux réalisés par des sociétés comparables dépendantes et indépendantes et ne sont justifiés par aucune contrepartie équivalente.

→ Les résultats obtenus sont détaillés dans l'Annexe-3-1.

L'étude de comparabilité met en évidence les taux de marge brute suivants :

- Comparables externes dépendants et indépendants :

- 3<sup>e</sup> quartile : 51.72%
- Médiane : 38.41% ;
- 1<sup>er</sup> quartile : 29.49% .

- Comparables externes indépendants :

- 3<sup>e</sup> quartile : 35.73% ;
- Médiane : 30.93% ;
- 1<sup>er</sup> quartile : 25.58% .

Sur la même période, les taux généraux de marge brute calculés sur l'ensemble de l'activité à partir des tableaux n° 2052 déposés par la société sont en moyenne de 20.72%, soit bien en-dessous du 1<sup>er</sup> quartile minimum de **25.58%**.

Sur le seul secteur d'activité « NEUF », les taux de marge brute sont en moyenne de **13%** pour les [REDACTED] et **16%** pour les [REDACTED]

**Les taux de marge brute sont donc en-dessous de l'intervalle de pleine concurrence.**

En prenant le 1<sup>er</sup> quartile de **25.58%** résultant de l'étude de comparabilité fondée sur les sociétés indépendantes, appliqué sur le chiffre d'affaires correspondant au secteur d'activité « NEUF », le service a pu quantifier le montant de majoration sur les prix d'achats ayant bénéficiés à la société fournisseur [REDACTED]

The subsidiary, which was, as we just saw, running significant losses for years, had to find means to still operate. As we can see in **Figure 28**, the subsidiary decided to compensate its losses by a series of recapitalisations conducted by the group to which the subsidiary belonged. These capital influxes were exempt from taxation, which preserved the group's gains made from shifting profits from the French subsidiary to the lowest tax jurisdictions.

Figure 28 | Company's X tax audit report excerpt #2: Company X's recapitalisation operations analysed by the tax administration

**b- Des recapitalisations importantes :**

La société [REDACTED] a fait l'objet de recapitalisations par abandon de créance de sommes en compte courant en contrepartie d'une augmentation de capital réalisée par l'associé unique (« coups d'accordéon »).

« Les déficits successifs ayant entraîné une dégradation financière de l'Entreprise, le Groupe est intervenu en capital à plusieurs reprises, en injectant des moyens financiers destinés à apurer les résultats déficitaires des exercices précédents et ainsi pouvant laisser croire à l'absence de pertes réalisées. »

(source : Raisons économiques, financières et techniques du projet de réorganisation de la Société [REDACTED] et le projet de licenciement collectif pour motif économique qui en découle – Livre II).

Le tableau suivant retrace l'évolution des capitaux propres depuis l'exercice 2007 (en milliers d'euros) :

Exercice clos	2007	2008	2009	2010	2012 (15 mois)	2013
Capital social	1 250	1 250	5 700	1 250	1 250	1 250
Prime d'émission	0	0	0	2 635	436	0
Réserve légale	30	34	34	34	34	34
Report à nouveau	273	344	-9	0	0	-5 899
Résultat	75	-903	-1 806	-2 199	-6 336	-2 431
Capitaux propres	1 628	725	3 919	1 720	-4 616	-7 046

Or, l'abandon par les associés de sommes en compte courant en contrepartie d'une augmentation de capital constitue un supplément d'apport non imposable.

**M.E.** explains that Company X's case was his first concerning transfer pricing. He handled it when the tax administration started to sanction profit shifting. Company X had accumulated several millions of losses carry forward in six years, but the tax administration wanted to adjust Company X's result to roughly 2 million euros of profits each year. That meant the tax administration considered Company X as being profitable and not loss-riddled. It consequently intended to tax those profits that were supposed to be made by Company X if they had not been shifted.

The group defended itself with lawyers to limit the adjustment. Consequently, the tax administration agreed to cancel the recovery on the company's deficit, which only amounted to a corporate tax based on a theoretical yearly 500 000 euros profit, as shown in **Figure 29** and **Figure 30**. **M.E.** highlights that, since this adjustment, Company X has been profitable each year.

**M.E.** underlines a strategic mistake made by the subsidiary: the recovery the tax administration can make in France is bounded to 3 years maximum, but it can take on over more than three years if it concerns losses. As such, in Company X's case, the recovery went back to the source of the losses. Had company X declared profits every three years, it would have limited the adjustment up to 3 years.

Figure 29 | Company's X tax audit report excerpt #5: detail of the adjustments imposed by the tax administration to Company X due to its profit shifting practices

**4- Chiffrage des rehaussements selon la méthode de la MTMN :**

Le taux de marge nette minimum de pleine concurrence de 2.08% est appliqué au chiffre d'affaires global réalisé sur l'ensemble de l'activité de la société (« NEUF », « OCCASION » et Prestations de services afférentes).

Les résultats des calculs sont détaillés dans le tableau suivant :

Comptes sociaux	31/12/2008	31/12/2009	31/12/2010	31/03/2012	31/03/2013
Chiffre d'affaires net (HT) déclaré ( A )	26 182 262	19 229 756	21 788 925	25 402 429	31 990 807
Résultat d'exploitation déclaré ( B )	-1 148 853	-1 765 983	-1 992 625	-4 152 770	-4 013 731
Taux de marge RE/CA déclaré	-4,39%	-9,18%	-9,15%	-16,35%	-12,55%
Taux de marge nette théorique (MTMN) ( C )	2,08%	2,08%	2,08%	2,08%	2,08%
Résultat d'exploitation théorique ( A x C = D )	544 591	399 979	453 210	528 371	665 409
Montant des rehaussements ( = D - B )	1 693 444	2 165 962	2 445 835	4 681 141	4 679 140

Il en résulte les rehaussements en matière d'impôt sur les sociétés suivants :

- Au titre de l'exercice clos en 2012 :
  - Rejet de report déficitaire :
    - 2008 : 1 693 444€ ;
    - 2009 : 2 165 962€ ;
    - 2010 : 2 445 835€ ;
    - montants limités au montant du déficit reportable à l'ouverture de l'exercice clos en 2012, soit 4 124 416€ ;
  - Au titre de l'exercice même clos en 2012 :
    - 2012 : 4 681 141€ ;
    - soit un total sur l'exercice 2012 de : 4 124 416 + 4 681 141 = 8 805 557€ ;
- Au titre de l'exercice clos en 2013 : 4 679 140€ .

Figure 30 | Company's X tax audit report excerpt #6: summary of the adjustments imposed by the tax administration to Company X due to its profit shifting practices

**LISTE DES REHAUSSEMENTS**

Nature du rehaussement	(*)	Ventilation par taux			Ventilation par exercice	
		Taux normal	Taux réduit	Autres	31/03/2012 (E)	31/03/2013 (E)
<b>Proposition du : 10/07/2015</b>						
-Rejet de report déficitaire (Déficits exercices 2008-2009-2010)	(02)	4 124 416			4 124 416	
-IS - Transf. De Bénéf. à l'étranger (remise en cause pol. prix) (Achats à prix majoré)	(02)	3 333 066			3 333 066	
-IS - Transf. De Bénéf. à l'étranger (remise en cause pol. prix) (Achats à prix majoré)	(02)	3 277 579				3 277 579
-IS - Transf. De Bénéf. à l'étranger (remise en cause pol. prix) (Rémunération insuffisante)	(02)	1 348 075			1 348 075	
-IS - Transf. De Bénéf. à l'étranger (remise en cause pol. prix) (Rémunération insuffisante)	(02)	1 401 561				1 401 561

Nb: les montants sont exprimés dans la monnaie de la tenue de comptabilité de la période (F:Franc;€:Euro)

(\*) Codes pénalités :

02-Bonne foi (0%) ;

\* \* \*

Overall, we can see that the tax administration is becoming gradually more efficient at curbing profit shifting. According to many professionals, as we have discussed in [3.2.1.](#), the tax administrations of several countries is becoming more capable, hiring new talents, and having access to more resources of better quality. Furthermore, they cooperate to a greater extent with one another than before, like the professionals we interviewed explained in [3.2.2.](#) Company X's case that we analysed, directly handled by [M.E.](#), clearly shows that the tax administration has a well-rounded and robust rationale to justify adjustments to companies that would want to shift their profits and pay fewer taxes. We can thus conclude that these observations would tend to confirm our **second hypothesis**: profit shifting has been decreasing over time, indicating a growing efficiency of anti-profit shifting measures.

### 3.3. The righteousness of the coverage of this phenomenon in the media and by government officials can be deemed questionable

#### **3.3.1. Profit shifting can be seen as being used to portrait big companies as scapegoat of growing inequalities, especially the GAFA that thrived during the pandemic**

As we have seen in the literature review, especially in **1.3.2.1.**, some scholars argue that the coverage of profit shifting in the media and by governments is not proportionate to its importance in terms of what it costs to high-tax jurisdictions. Some of the respondents share this point of view.

**J.O.** thinks the growing internationalisation movement fosters a negative public opinion about MNEs. Until the 1960s, **J.O.** explains, when General Electric, Coca-Cola and other worldwide dominant companies made 90% of their production on U.S. soil, they still paid their taxes in the United States or their home countries despite operating internationally. Consequently, no one was wondering whether they were paying their fair share to the government. However, after this period, the world witnessed the emergence of companies that managed more easily to outsource a part of their activity, such as marketing management, ownership of brands or rights licensing, without having to relocate industrial sites. Moreover, since the 2000s, “dematerialised” companies such as the GAFA emerged and took over the globe.

Hence, nowadays, **J.O.** says, *“Amazon is the biggest seller but does not make anything, AirBnB is the biggest hotel in the world but does not own any room, and Uber is the biggest taxi company in the world but does not own a single car!”*. In parallel with this economic development, the tax burden increases as countries need more money, especially since the subprime crisis in 2008. Therefore, everyone is looking for resources: that is why, according to **J.O.**, high-tax jurisdictions are also keen on taxing MNEs that try to optimise the corporate tax they must pay.

For instance, France’s debt represents 120% of its GDP, partly because it has been financing generous social programs for decades and offering one of the most generous compensation plans following the Covid crisis. Consequently, says **J.O.**, someone must pay. Raising taxes can be done internally, for instance, by further taxing the wealthiest citizens, the minority which is well-off and whose anger will not matter a lot electorally, but also by further taxing MNEs that manage to reduce their corporate tax. Thus, claims **J.O.**, the GAFA are the perfect expiatory victims in a period during which most people experience rising inequalities

exacerbated since the 2008 crisis, and witness, on top of that, GAFA companies making even more profits thanks to the COVID-19 while most businesses struggle. Moreover, since the GAFA and akin companies minimise their corporate tax by shifting their profits, this practice becomes highlighted by the governments' tax administrations, even though it does not represent a significant chunk of their revenues.

Electoral, develops **J.O.**, the hunt for untaxed profits gives the governments enough arguments to claim that they are reducing inequalities while bringing in new resources.

**J.O.** concedes that it might seem unfair that huge companies such as the GAFA get to make a significant turnover in countries where they pay little taxes, and rightly so. **J.O.** contends that, nevertheless:

*“Even though it may seem visually shocking, one has to dig in and figure out what the right measure is and not fall for the most popular one. Imposing strong taxation is a good way for countries to escape their own fiscal responsibility.”*

According to **V.M.**, all the attention that profit shifting receives is not righteous as well. Rich countries are driven by political motivation to put such a focus on profit shifting, which the media are following. **V.M.** claims that this kind of behaviour resembles the rich governments' stance on tax fraud, which would supposedly cost a country like France more than 100 billion euros per year. The French government claims that if France totally succeeded at preventing it, it could build hospitals, schools, and other valuable infrastructures. However, this estimate of €100bn for **V.M.** has never been proven and could be far above the reality. Today, **V.M.** explains, the tax administration has become very efficient: it collected almost 8 billion euros last year. It is thus hard to imagine that it would be possible to harvest ten times more tax revenue because of supposedly massive fraud. The same applies, he concludes, to profit shifting: governments claim there are supposedly significant gains to be made, but the reality is probably less rosy.

Overall, these two professionals—**J.O.** and **V.M.**—view the fight against profit shifting as a helpful mean for governments to increase their fiscal resources while claiming to fight against inequalities. For them, anti-profit shifting measures are at least partially politically motivated and are not proportionate to the severeness of the phenomenon in terms of lost revenues for tax administrations.

### 3.3.2. Defining what a just corporate tax rate or overall tax rate would be is hard, since it depends on each country's own objectives and political choices

The arguments against profit shifting rely on a critical assumption that is often neglected by most articles on the subject and not dealt with by many scholars. This assumption is that a “just” or “fair” corporate tax rate, or overall tax rate, exists and that countries that set this rate too low are unfairly depriving countries that set a “just” tax rate by attracting MNEs that intend to shift their profits. But what is a “just” corporate tax rate, and to what extent benefiting from tax rates differentials between countries is not just the result of a constrained optimisation that any company is expected to do in a free market?

**J.O.** explains that any company seeks to optimise its results under constraints. There are, as such, two interpretations of profit shifting. The first would be for a company to relocate a part of its activities in a country that meets its needs and corresponds to its best constrained optimisation. For example, the company could relocate its activities to Country A, where the workforce is skilled and inexpensive. But an observer could argue that, compared to Country B with less qualified and more expensive labour and also a higher tax rate, Country A that attracted some activities of the MNE did so thanks to fiscal dumping. This observer could add that MNEs that located their activities to Country B are shifting their profits.

For **J.O.**, this is obviously not the case. In our economic system and the free markets promoted by most governments around the globe, a company cannot be blamed for seeking to minimise its provisions, operating costs, and taxes. **J.O.** even goes as far as saying that it is almost desirable for a business.

**V.M.** argues in the same fashion that one will never manage to prevent companies from optimising their taxes, which is not akin to fraud. *“Optimising means making the best use of existing laws: if there are loopholes, it is the countries’ responsibility to fix them”*, he says. However, **V.M.** is still a proponent of fiscal justice: MNEs must comply with the countries’ tax rules in which they operate. However, companies cannot be blamed for using regulations that are different. **V.M.** illustrates his point with an example: 20 years ago, some items were neither taxed in France nor Belgium. That situation allowed MNEs to avoid taxation on these entirely without breaking the law. *“For me, it is up to the states to ensure that everything is properly taxed”*, says **V.M.**

Moreover, **J.O.** explains that most people often cite countries such as Luxembourg or Ireland epitomise tax-havens. Nevertheless, if one considers every tax practice, each European country can be considered as a tax haven compared to its neighbours, based on the tax advantages they offer that others do not.



For example, France granted tax credits for research. This advantage meant that a company that located its research in France could benefit from a tax reduction that could not be obtained in other countries. These other countries could then say that France was practising a form of fiscal dumping. *“But because of France’s status, there were no real complaints about this advantage”*, says J.O.

Similarly, Germany offered an advantageous tax scheme for business successions, especially for SMEs, whereas France and other European countries did not. Some companies thus benefited from this advantage that could have been deemed unfair by other countries.

J.O. thus claims that high tax jurisdictions such as France and Germany that offer some fiscal advantages cannot righteously blame countries such as Ireland and Luxembourg because they enforce a low tax rate. He says that the issues of offshoring and taxation are generally raised by countries with the highest marginal tax rates, which want to prevent companies from relocating part of their activities to countries with more favourable taxation. However, taxation depends on each country’s capacity and budget management: it is linked to each country’s budgetary choices and ability to manage its budget correctly.

Hence, claims J.O., high tax jurisdictions can be willing to unwisely spend their money and prevent companies that would want to avoid taxation to locate in lower tax jurisdictions, arguing that they engage in fiscal dumping. But the truth can be, explains J.O., that these low-tax jurisdictions have a low tax rate because they manage well their budget. In the end, says J.O.:

*“The lower tax rate low tax jurisdictions enforce can be the result of more rigorous budget management, which allows them to ask for less taxpayers’ money. Why should they raise their corporate tax rate that attracts businesses to the level of other countries that do not manage their budget well and need more resources?”.*

J.O. concludes his argument by an example. For him, a country such as Luxembourg has assets on which it relies to balance its budget and can thus offer a low tax rate rightfully:

*“Some could still argue that Luxemburg is not a relevant example because it is a small country that does not have to engage in significant expenses. But another country such as the Netherlands cannot be considered a minor country and enforces a low tax rate because it manages its budget well”.*

Overall, J.O. claims that taxation is an element of national sovereignty. If a country wants to offer high social coverage with hefty taxes, it cannot blame a country that enforces a low tax rate because it does intend to have such expenses.

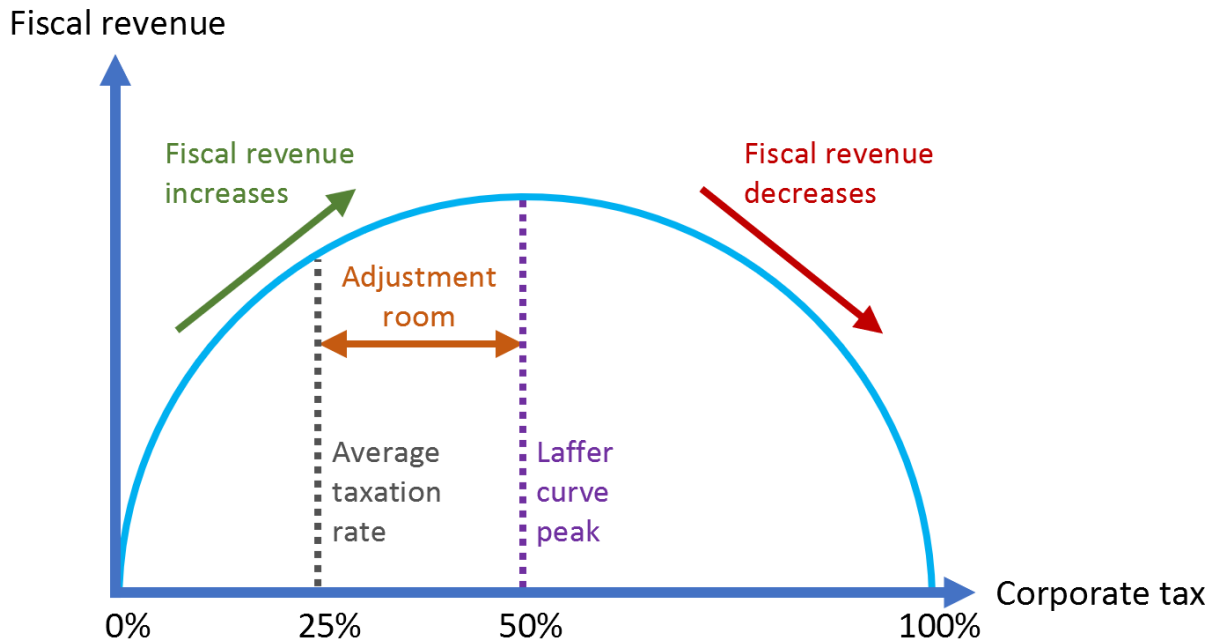
All in all, the argument that no definition of a “fair” tax rate exists is quite compelling. As we have seen in the literature review, there may be countries that enforce corporate tax rates that could be considered as objectively too low. Nevertheless, it is true that high tax jurisdictions—such as France, Germany, or the U.S.—have significant expenditures and, as such, need to impose high taxes. One could thus consider that countries that have low expenses have the right to need fewer resources and enforce a lower corporate tax. If, because of a lower tax rate, these countries attract MNEs, they have every right to benefit from their activities and profits.

**3.3.3. There is a clear incentive for governments to increase their fiscal revenue to raise taxes and, as such, to tax MNEs that engage in profit shifting, but it can be detrimental for high tax jurisdictions’ public finances if they do not manage to force low tax jurisdictions to do the same**

As our respondents explained in 3.3.2., high-tax jurisdictions that sometimes engage in significant or even lavish public expenses have a strong incentive to collect more resources and thus to increase taxes. However, if they do not manage to force low-tax jurisdictions to do the same—the righteousness of such behaviour being not considered—doing so is detrimental to their finances. That is mainly the case because, as corporate taxation increases, companies have gradually more incentives to find means to escape taxation, such as shifting their profits. The cost of avoiding taxation becomes indeed lower than the cost of taxation itself as taxation goes up.

**J.O.** thus explains that the more the tax burden increases, the more businesses and individuals are encouraged to find ways to escape this tax burden. This relationship is very well theoretically explained by the Laffer Curve, as displayed in **Figure 31**: there is a point beyond which a marginal increase in the tax rate will result in a marginal decline in the tax revenue.

Figure 31 | The Laffer Curve: as the corporate tax rate goes up, companies have a greater incentive to avoid taxes and tax revenue consequently diminishes



**J.O.** mentions that an essential attribute of low-tax jurisdictions that attracts MNEs is taxation stability. *“No business is going to bother to shift its profits because it wants to reduce its corporate tax for a couple of years”*, explains **J.O.** *“When a high-tax jurisdiction has an erratic behaviour and decides to retroactively increase taxes, change tax principles, or remove loopholes or tax favours, it obviously scares business.”* The lack of fiscal stability in countries with high taxes is therefore also a factor that encourages companies to relocate their profits. As such, high-tax jurisdictions can also decide to put global pressure to increase the overall tax rates. Hence, they can have more room to change their tax principles and still keep business on their territory.

**V.M.** goes further by stating that the tax administrations of high-tax jurisdiction themselves can get too aggressive because of this political will to increase fiscal resources. For instance, concerning transfer pricing, MNEs can operate in countries whose tax administrations do not agree on the margin rates to be respected and may, as a result, be taxed twice.

To illustrate his point, **V.M.** walks us through a simplified version of a case he handled. A French company might sell a product worth €150 to a Dutch subsidiary for €100 to sell it on the Dutch market afterwards. The French tax administration can consider that the average margin rate for this product on the market is 25% and that it should therefore not be sold at less than €120 to the subsidiary ( $150/120 = 25\%$  margin). The French state, therefore, imposes a €20 tax ( $120 - 20 = 100$ ). The Dutch tax administration estimates on its side that the margin rate for an equivalent product is 10% and that it should therefore not be sold for less than

€136 ( $150/136 = 10\%$  margin). As a result, the Dutch state imposes a €26 tax on the company ( $136 - 36 = 100$ ). The MNE finds itself taxed twice on a €20 basis for its product (by France and the Netherlands) because these tax administrations did not come to an agreement and were both looking to increase their fiscal revenue.

According to **V.M.**, the tax administrations' aggressiveness is simply due to a compelling need for money on their part. "This is nothing; it has been like this since the Middle Ages, even the Roman Empire: the states need money and are willing to find means to find it".

**V.M.** concludes by saying that these transfer pricing issues are complicated to manage for MNEs. Most of **V.M.**'s customers often struggle to justify their prices even when they do it wilfully and seriously since the tax administration's requirements are demanding and complex, as we have seen in **3.2.3**. These customers often have rather difficult discussions with the tax administration—which has its own approach—as they try to follow the rules as well as possible.

\* \* \*

According to the professionals we have interviewed, the issue of profit shifting can be used by the government of high-tax jurisdictions to find means of taxing MNEs and increasing their revenues. They do so over extensively, making the phenomenon central in the public debate compared to its actual cost in terms of fiscal losses. This situation can be deemed problematic since the rationale behind the argument made by high-tax jurisdictions to justify adjustments on MNEs shifting their profits or even create new taxes based on new metrics—such as the GAFA tax supported by France based on turnover—is that a "just" corporate tax rate exists. However, as some professionals explained, a "just" tax rate is hard to define because a country's taxes are not necessarily determined by its willingness to attract MNEs' activities that aim to avoid taxes but rather by their budgeting decisions and financial rigour. It can thus be considered unfair for countries like Ireland or Luxemburg to be treated as countries engaging in fiscal dumping if they are just financially rigorous and can manage to live by with low taxes.

This state of affairs explains why high-tax jurisdictions are pretty aggressive about profit shifting, these professionals say. Because they want to increase their fiscal revenue and prevent MNEs from shifting their profit to more favourable tax jurisdictions, high-tax jurisdictions are willing to be the proponents of international efforts aiming to curb profit-shifting by enforcing international tax rules that impose a minimum tax rate in most countries. However, high tax jurisdictions' goal is not necessarily to increase the overall tax rate, as we have seen **3.2.2.**, but rather to prevent countries from enforcing a tax rate that is too different from theirs.

What these professionals told us would tend to confirm our **fourth hypothesis 4**: the coverage of profit shifting in the media is not proportionate to its impact on public finances in high-tax jurisdictions and is explained by non-financial factors, such as perceived inequalities. However, we have to bear in mind that all our respondents still consider profit shifting a real issue that deprives high-tax jurisdictions of a fraction of their fiscal revenue. Their point is only relative to the proportionality of the phenomenon's extent to its coverage in the public debate.

## CONCLUSION

## Conclusion

According to the OECD<sup>47</sup>, MNEs and their affiliates represent nearly 30% of the world's GDP and almost half of its exports and imports. They also employ 20% of the world's labour force. Furthermore, according to Janský & Palanský (2019), these MNEs shifted more than \$400bn of profit in nearly 80 countries in 2018. These quite staggering figures, along with the coverage of the BEPS phenomenon in the media, lead us to investigate this topic.

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In the first part of our literature review, we first tried to define what an MNE and profit shifting are. It seemed indeed of paramount importance to have a clear idea of these concepts before tackling the topic of profit shifting. The gist of this definition work was that i) a firm is an entity that seeks to maximise its profits, and thus needs to have a revenue greater than its expenses, ii) an MNE is itself a firm that operates in two or more countries and iii) profit is an accounting measure that can be different from the performance of a firm and vary widely following the differences in accounting methods.

In the second part of our literature review, once the definitions of these critical concepts were laid out, we were able to understand the phenomenon of profit shifting itself by examining which methods MNEs use to shift their profits. Our literature review allowed us to uncover three main profit shifting methods.

The first and most used one is transfer pricing: MNEs manipulate the prices at which their affiliates buy and sell products internally to shift profit from a jurisdiction to another, with the affiliates in the higher tax jurisdictions paying the higher transfer prices, usually above the market price or arm length's price.

The second method is the use of intangibles and royalty payments. MNEs can set up affiliates in low-tax jurisdictions that own intangibles for which they ought to receive a payment, such as licences or intellectual property (IP), and then make their affiliates located in high-tax jurisdictions pay rights or fees for the use of these intangibles. A method that is akin to both transfer pricing (the first method) and intangibles use (the second method) is the use of management fees, which can be used by affiliates located in low-tax jurisdictions to bill affiliates located in high-tax jurisdictions to shift their profits.

Finally, the third method of profit shifting is debt financing: an MNE can set up all its debt financing activities used for investments in all affiliates only in the affiliates located in the higher tax jurisdictions. This technique aims to use the deductible debt interest payments to

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<sup>47</sup> <https://www.oecd.org/industry/ind/MNEs-in-the-global-economy-policy-note.pdf>

reduce the taxable income of the affiliates located in the higher tax jurisdictions, thus lowering the MNE's overall tax rate.

These methods are not evenly used to shift profits, and some are more suitable to specific industries than others. More than 75% of the profit is shifted through transfer pricing (the first method we mentioned) and the use of intangibles (the second method we mentioned). Transfer pricing is a convenient method both for industrial MNEs and services-based MNEs, because—to put it simply—it is as easy to inflate the profit of car components for a car manufacturer as it is to inflate the cloud services a technology company needs to offer web services. The use of intangibles is more suitable to services-based companies that tend to have more numerous and more valuable intangible assets—such as patents or brands—than industrial companies. The remaining 25% of profits are shifted through debt financing and is suitable to all MNEs but are limited to their investments' needs.

In the third part of our literature review, after having defined our key terms and the methods through which MNEs shift profits, we were able to browse through the existing literature to assess the extent of the BEPS phenomenon. The studies conducted by most scholars show that—though it is hard to measure—the phenomenon of profit shifting exists. The broad consensus to which most scholars come is i) as the tax differential between two tax jurisdictions in which an MNE's affiliates operate increases, the MNE tends to shift more profits to the lowest tax jurisdiction and ii) there is an inverse relationship between the corporate tax rate and an MNE's level of profits.

However, the phenomenon's magnitude was also quite nuanced. Some scholars also highlighted that profit shifting's fiscal impact might be not as crucial as presented in the media. It may even be negligible to a certain extent in terms of losses of the tax administrations of high-tax jurisdictions. That means that these high-tax jurisdictions would well cope with the losses stemming from this practice.

Most scholars also noticed a trend regarding the phenomenon's occurrence: as time went by, the phenomenon decreased since the 1990s. This trend was measured by the semi-elasticity of profits to tax differential, which indeed became increasingly lower as the studies got close to present days. The most likely explanation, according to these scholars, was twofold: i) anti-profit shifting measures undertaken by governments and international institutions became increasingly effective, and ii) the overall corporate tax rates' reduction around the world made engaging in profit shifting—which is a complex and costly process—less interesting for MNEs.

In the fourth and last part of our literature review, after having reviewed the assessments of the extent of profit shifting, its trend and its impact on high-tax jurisdictions, we examined



the measures that were undertaken on both a national and international level. We saw that the international coordination on the topic gathered steam and was led mainly by the OECD, which devised precise guidelines to define a methodology aiming at helping high-tax jurisdictions to curb profit shifting. These guidelines are widely used by the tax administrations of high-tax jurisdictions themselves, which indeed tightened their anti-profit shifting measures as well. This observation is corroborated by a study that measured the evolution of anti-profit shifting measures' severeness in several European countries and examples of increasingly severe sanctions against MNEs that engage in profit shifting.

We also saw that, in response to this growing anti-profit shifting stance adopted by most prosperous countries, low-tax jurisdictions were engaging in lobbying efforts to prevent the international regulation from becoming too harsh on the matter.

Nevertheless, as underlined by some scholars when we assessed the phenomenon's extent, some studies questioned the cost-benefit balance of anti-profit shifting measures. The question of whether these measures were worth their costs was indeed raised by some scholars. Since the losses stemming from profit shifting is deemed marginal by some scholars, these same scholars wonder if the costs of anti-profit shifting measures may be greater than the fiscal losses due to that phenomenon. However, this phenomenon being hard to measure, as we previously explained, it is hard to come to a clear-cut conclusion.

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In the second part of our thesis, once our review of the existing literature was completed, we wanted to dig deeper into specific areas concerning the phenomenon and empirically strengthen or weaken some conclusions to which the literature review lead us. To that end, we determined the best way to do so. We came to the conclusion that conducting a quantitative empirical analysis was too challenging given the scope of our research, given that—as highlighted by scholars whose readings we examined—the amount of data to analyse would be massive and significantly disparate.

As such, we chose to conduct a qualitative empirical analysis by interviewing professionals with relevant work experience to give us insights and compare their field experience to the theoretical findings we examined in our literature review. The main difficulty of this approach was that—the topic being complex and controversial—only highly qualified professional willing to talk about it could be interviewed, hence limiting the sample size. Furthermore—the topic being also significantly broad—we had to devise a solid and rigorous interview methodology.

We thus used some research hypotheses because though they could not be confirmed or invalidated quantitatively, they proved helpful to define our topic's perimeter and create a relevant interview guide. Our hypothesis stemming from our literature review aimed at investigating i) if profit shifting was a function of tax differential between countries, ii) whether profit shifting decreased, iii) how costly engaging in profit shifting for MNEs was, and iv) if the phenomenon's coverage in the media was proportionate to its importance. The interview guide's questions were constructed around these four hypotheses.

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In the third and last part of our thesis, we analysed the results of the interviews we conducted among some professionals.

In the first part of our empirical analysis, regarding the process of profit shifting, the professionals we interviewed underlined its costs and complexity, echoing the consideration of some scholars we examined in our literature review. The professionals explained that—being whether industrial or services-based—MNEs had to incur several costs to shift their profits, such as localising affiliates in low-tax jurisdictions, hiring qualified staff to devise the profit shifting strategy, and finding a good business case so that the tax administrations of the countries in which these MNEs operate agree with their policies. A professional provided us with an example of an MNE's profit shifting scheme, which is indeed complex and requires many conditions to be met. Moreover, these professionals also highlighted that both the MNEs' profits and the tax policies of the tax jurisdictions in which the MNE intended to shift their profits had to be stable over time. These two factors add further constraints to the process.

These professionals also shared the same considerations of some scholars concerning the phenomenon's extent. They questioned whether the amounts at stake were significant compared to the high-tax jurisdictions' fiscal revenues. However, they could not come to a conclusion, lacking sufficient and reliable data, but agreed that the phenomenon was indeed real. Furthermore, some of them acknowledged that, even if the losses for high-tax jurisdictions stemming from jurisdiction were not massive, they were at least substantial, for high-tax jurisdiction would not engage in ambitious anti-profit-shifting measures if that were not the case. They illustrated their point with some recent anti-profit shifting measures, such as the international tax agreement reached last June at the London G7 summit.

In the second part of our empirical analysis, the professionals we interviewed stated that high tax jurisdictions were becoming increasingly more efficient at curbing profit shifting. The main reasons cited were that the phenomenon became increasingly known by the tax administrations. They are becoming more capable and have a growing pool of tools at their

disposal to counter it, such as access to databases to assess whether transfer pricing or management fees policies are righteous. Some professionals walked us through the rationale France's tax administration—quite representative of high-tax jurisdictions' tax administrations—used to detect and sanction profit shifting. They showed us that the tax administration could analyse an MNE's affiliate's margins and compare them to sectorial averages to justify tax adjustments. However, they also explained that, though the tax administrations became increasingly better at detecting profit shifting, they still wanted to compromise with MNEs to reduce their adjustments. This is because tax administrations are still less qualified, able, and resourceful than the MNEs, which hire the market's best lawyers and tax specialists to defend themselves.

In the third and last part of our empirical analysis, some professionals we interviewed claimed that the coverage of the profit shifting phenomenon was not proportionate to its importance. They explain this current situation by i) the ever-longing of governments for tax revenues and ii) the growing inequalities accelerated by the subprime and the coronavirus crises between rich MNEs that can shift their profits and national SMEs. These two factors constitute an opportunity for high-tax jurisdictions to shame MNEs that shift their profits.

Some professionals we interviewed also questioned the basis of shaming low-tax jurisdictions. They explained that a low corporate tax rate could result from a country's wise budget management and not a willingness to attract MNEs willing to shift their profits from high-tax jurisdictions in which they operate.

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Now that we analysed some scholars' works on profit shifting, compared these findings to some professionals' opinions on the same matter and synthesised our work, we can come up with more elements to assess the extent of the BEPS phenomenon and the difficulty for MNEs to engage in profit shifting.

Nevertheless, we have to mention that our findings about our research question and the subsequent moral considerations that stem from it encounter some limits. The professionals we interviewed were subject to the biases we mentioned in our methodology. Moreover, as profit shifting is a controversial topic that requires a high level of expertise to be dealt with, finding professionals capable and willing to discuss it was not an easy task. As such, our conclusions are probably biased as well and may be contradicted by further work conducted with more significant means that could manage to interview way more professionals than we did.

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It appears that the BEPS phenomenon is indeed widespread: major MNEs do shift the profits they make in high-tax jurisdictions to low-tax jurisdictions in order to reduce their corporate tax, especially since the 1980s. The techniques used are well-known and were extensively dealt with in our literature review. It is also true that shifting profits incurs high costs, which can be borne only by companies with important financial means and a stable profit outlook in low-tax jurisdictions with stable tax policies.

It seems that we managed to answer our research question. But did we?

This straightforward and seemingly easy answer cannot mistake us: things are way more qualified as we have seen. We can safely conclude that profit shifting entails high costs, but we can hardly come to a definitive answer concerning the extent of profit shifting.

Though it is agreed by all the scholars whose work we examined and the professionals we interviewed that BEPS is a real and widespread phenomenon, its costs for high-tax jurisdictions are hard to assess and may not be significant, despite the phenomenon's coverage in the media. Notwithstanding this consideration, anti-profit shifting measures have gained increasingly in effectiveness thanks to the efforts of high-tax jurisdictions and international institutions such as the OECD.

Hence, the answer to our question “What is the extent of the BEPS phenomenon” is hard to find when we try to assess the phenomenon's impact on the world economy. Is the tax revenue lost because of profits shifting important or not? Despite our efforts, finding a clear answer was not possible.

The interesting question this topic raises is whether profit shifting is morally righteous. Some scholars and professionals highlight how unfair it might seem that MNEs can shift their profits and reduce their overall corporate tax rate whereas national SMEs cannot and how this practice deprives some countries of revenue and hence public infrastructures and services.

But on what grounds can one blame a country whose corporate tax is low? It is indeed also true that a country sets its corporate tax following its financial needs; if these are low, a country does not need high fiscal revenues and an important corporate tax. High-tax jurisdictions could be willing to prevent lower corporate taxes than theirs around the world and may use the theme of profit shifting as a means to achieve that end by being the proponent of an international tax—such as the 15% international tax discussed in June 2021 at the London G7 summit—and sanctions against MNEs that shift their profits. Is such a motive more righteous than a country setting a low tax rate because it does not need important resources?

As we see, judging profit shifting from a moral ground proves to be a challenging exercise, as assessing its extent.

Nevertheless, we should not be disappointed by not having found a clear-cut answer. Our findings still allowed us to confirm that the BEPS phenomenon is real and is a costly process for MNEs. But, more importantly, we managed to explore exciting developments. Is profit shifting costly for governments? Is profit shifting morally wrong? On what moral ground could any country shame another for the corporate tax it enforces? We believe that having come to these considerations is a satisfying conclusion to our work since, as the physicist Richard Feynman said:

*“I would rather have questions that cannot be answered than answers that cannot be questioned.”*

- Richard Feynman, American Physicist

## BIBLIOGRAPHY, FIGURES TABLE & APPENDICES

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## **Appendix 1: A synthetic definition of elasticity, the main measure of the magnitude of profit shifting**

### **A1.1. Definitions of elasticity and semi-elasticity**

As most scholars use the concept of elasticity to assess the extent of profit shifting, it is of paramount importance to define it synthetically but thoroughly, as to be able to properly understand these scholars' analyses. To this end, a simplified definition of elasticity developed in *The Concept of Elasticity in Economics* by Nievergelt (1983) can help us to visualise the extent of profit shifting through elasticity in an illuminating way later on.

- **Elasticity**

The elasticity is the change in percentage of a variable in response to the change in percentage of another variable. The x-elasticity of y can be presented as follows:

$$\varepsilon = \frac{\Delta y/y}{\Delta x/x}$$

For example, if  $X = 200$  and  $Y = 400$ , and a 10%-increase in X decreases Y by 40%, then we obtain the following elasticity:

$$\varepsilon = \frac{\Delta y/y}{\Delta x/x} = \frac{-160/400}{20/200} = \frac{-0.4}{0.1} = -4$$

As such, when X increases by 1%, Y decreases by 4%.

- **Semi-elasticity**

The semi-elasticity is the change in percentage of a variable in response to the absolute change in another variable.

$$\varepsilon = \frac{\Delta y/y}{\Delta x}$$

For example, if  $X = 200$  and  $Y = 400$ , and a 10-point increase in X decreases Y by 20%, then we obtain the following x-semi-elasticity of y:

$$\varepsilon = \frac{-80/400}{10} = \frac{-20\%}{10} = -2\%$$

As such, when X increases by 1 unit, Y decreases by 2%.

## A1.2. Price elasticity of demand and price semi-elasticity of demand

- **Price-elasticity of demand**

We can see how elasticity and semi-elasticity can be computed on a simple individual's demand function for a random product, such as apple juice, given by the following equation:

$$Q_a^d = 5 - 1.25P_a + 0.008I - 0.25P_o$$

Where  $Q_a^d$  is the quantity of liters of apple juice demanded,  $P_a$  is the price per liter of apple juice in dollars,  $I$  is the individual's income, and  $P_o$  is the price per liter of orange juice.

If the price per liter of apple juice  $P_a$  is 2, the income  $I$  is 1,500, and the price per liter of orange juice  $P_o$  is 4, then, the demand of apple juice in liters is:

$$Q_a^d = 5 - 1.25 * 2 + 0.008 * 1,500 - 0.25 * 4$$

$$Q_a^d = 5 - 2.5 + 12 - 1$$

$$Q_a^d = 13.5$$

Now, if the price per liter of apple juice  $P_a$  increases by 1%, then the new price per liter of apple juice  $P_a$  will be  $2 * 1.01 = 2.02$ . Then, the new demand of apple juice in liters  $Q_a^d$  will be:

$$Q_a^d = 5 - 1.25 * 2.02 + 0.008 * 1500 - 0.25 * 4$$

$$Q_a^d = 5 - 2.5250 + 12 - 1$$

$$Q_a^d = 13.475$$

$$\varepsilon = \frac{13.475 - 13.5}{13.5} = -0.1852$$

As such, when the price per liter of apple juice  $P_a$  increases by 1%, the demand of apple juice decreases by 0.1852%. We say that the price elasticity of demand is -0.1852.

We can generalize the formula as follows:

$$\frac{\Delta Q_a^d}{\Delta P_a} * \frac{P_a}{Q_a^d} = \frac{-0.025}{0.02} * \frac{2}{13.5} = -1.25 * 0.1481 = -0.1852$$

- **Price semi-elasticity of demand**

The price semi-elasticity of demand is simply the sensitivity of the demand of apple juice  $Q_a^d$  to an increase in one unit of  $P_a$  (which are dollars). If the price per liter of apple juice  $P_a$  increases by 1, the new demand  $Q_a^d = 5 - 1.25 * 3 + 0.008 * 1500 - 0.25 * 4 = 5 - 3.75 + 12 - 1 = 12.25$ . Thus, the demand of apple juice decreases by  $12.25 - 13.5 = 1.25$  liters. Hence, we can say that the price semi-elasticity of demand is -1.25.

### A1.3. Cross-price elasticity and cross-price semi-elasticity

- **Cross-price elasticity**

Similarly, we can calculate the sensitivity of the demand of apple juice  $Q_a^d$  in response to a change in the price per liter of orange juice  $P_o$  as follows:

$$\varepsilon = \frac{\Delta Q_a^d}{\Delta P_o} * \frac{P_o}{Q_a^d} = \frac{-0.01}{0.04} * \frac{4}{13.5} = -0.25 * 0.2963 = -0.0741$$

If the price per liter of orange juice  $P_o$  increase by 1%, then the new price per liter of orange juice  $P_a$  will be  $4 * 1.01 = 4.04$ .

$$Q_a^d = 5 - 1.25 * 2 + 0.008 * 1500 - 0.25 * 4.04$$

$$Q_a^d = 5 - 2.5 + 12 - 1.01$$

$$Q_a^d = 13.49$$

$$\varepsilon = \frac{13.49 - 13.5}{13.5} = -0.0741$$

As such, when the price per liter of orange juice  $P_o$  increases by 1%, the demand of apple juice decreases by 0.0741. We say that the cross-price elasticity of demand to the price per liter of orange juice is -0.0741.

- **Cross-price semi-elasticity**

Performing the same calculation as the price semi-elasticity, we find that the cross-price semi-elasticity of demand to the price per liter of orange juice is  $13.49 - 13.5 = 0.25$ .

#### A1.4. Income elasticity of demand and semi-elasticity of demand

Finally, we can compute the sensitivity of the demand of apple juice  $Q_a^d$  in response to a change in income  $I$  as we did for the price elasticity of demand and the cross-price elasticity of demand to the price per liter of orange juice:

$$\varepsilon = \frac{\Delta Q_a^d}{\Delta I} * \frac{I}{Q_a^d} = \frac{13.62 - 13.5}{1,515 - 1500} * \frac{1500}{13.5} = \frac{0.12}{15} * \frac{1500}{13.5} = 0.008 * 111.111 = 0.8889$$

And obtain an income elasticity of demand of -0.8889 and an income semi-elasticity of demand of -0.8.

We can interpret elasticity, as show in **Figure 32**.

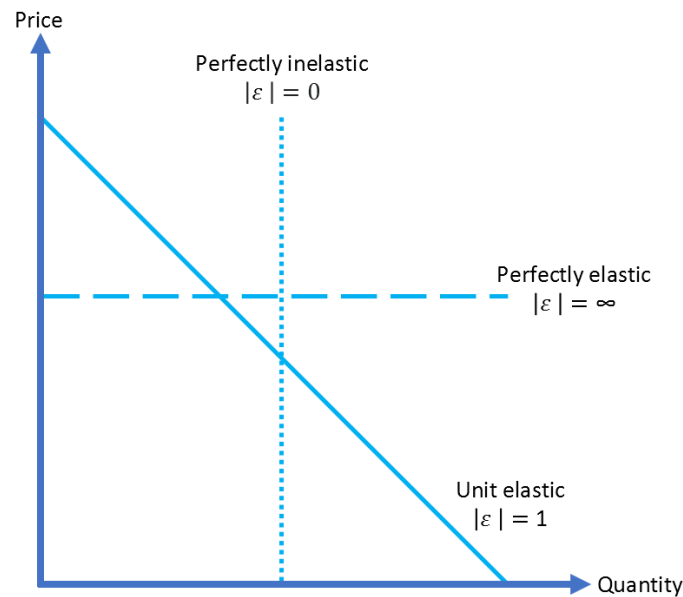
Figure 32 | Elasticity interpretation table

Value	Meaning	Interpretation
$ \varepsilon  > 1$	Elastic	$Q_a^d$ changes more than $P_a$
$ \varepsilon  = 1$	Unit elastic	$Q_a^d$ changes as much as $P_a$
$ \varepsilon  < 1$	Inelastic	$Q_a^d$ changes less than $P_a$
$ \varepsilon  = 0$	Perfectly inelastic	$Q_a^d$ does not change when $P_a$ changes

As such, the price elasticity of demand, the cross-price elasticity of demand to the price per liter of orange juice and the income elasticity of demand, whose absolute values are respectively 0.1852, 0.0741 and 0.8889, show that the demand of apple juice is inelastic to the price of apple juice, the price of orange juice and income. We can however conclude that the demand of apple juice is more elastic to income (0.8889) than to the price of apple juice (0.1852) and is even less elastic to the price of orange juice (0.0741).

The interpretation of elasticity can be more illuminating on a graph. On **Figure 33** are examples demand curves displaying price elasticities of demand that illustrate what has been explained above:

Figure 33 | Three demand curves displaying perfect elasticity, perfect inelasticity, and unitary elasticity (x-axis = quantity, y-axis = price)



### A1.5. Synthesis and application to profit shifting

The semi-elasticity is the main measure used by scholars to assess the extent of profit shifting. The most used approach by these scholars, first developed by Heckemeyer & Overesch (2013), is to measure profit shifting as the semi-elasticity of reported profit in response to tax differential between two countries (this is dealt with in greater detail in 1.2.5.). To sum up the mathematical model used by the authors, the semi-elasticity<sup>48</sup> is defined as follows<sup>49</sup>:

$$\text{Semi-elasticity} = \frac{\Delta \text{Reported profit}}{\text{Reported profit}} * \frac{1}{\Delta \text{Tax Differential}}$$

Understanding the concept of elasticity and how it is applied to the measurement of the profit shifting phenomenon allows us to study the main means through which MNEs shift their profit, along with the global extent of the profit shifting phenomenon.

<sup>48</sup> The semi elasticity is here defined as the change ( $\Delta$ ) in an entity's reported profit in response to a change in tax differential between two countries / total reported profit \* the inverse of the change ( $\Delta$ ) in the tax differential between two countries.

<sup>49</sup> For instance, with the following inputs:

Reported profit in 2017 = 100

Reported profit in 2018 = 105

Tax differential in 2017 = 2%

Tax differential in 2018 = 3%

We obtain the following semi-elasticity:

$(105-100) / 100 * (1 / (3\% - 2\%)) = 5$



## Appendix 2: interview guide used for the semi-directive interviews

### A2.1. Interview guide's introduction message (English and French)

Dear Mr [Name],

My name is Hadrien, and I am currently a final year Master in Management student at KEDGE Business School. I am doing my master's thesis on profit shifting, which is a phenomenon that has been gaining gradually increasing public attention since the 1990s. I am now interviewing a series of professionals to further my research on my thesis' topic, and your opinion would be extremely useful to that end. If you agree to participate, your interview will be based on a guide structured around 4 main themes. The interview guide's questions' goal is to serve as guidelines: as such, it is not mandatory to answer them all. Based on your area of expertise and your centres of interest, we may focus on specific questions or areas and not exhaustively cover the whole interview guide.

Your answers will be anonymous and in accordance with the French Data Protection Act of January 6<sup>th</sup>, 1978, you will be able to exercise your access, modification, or suppression rights by reaching out to me. I will send you a copy of this study once completed if you wish.

\* \* \*

Thank you for answering these questions about BEPS. This interview is confidential and will be used in the empirical phase of my master's thesis about the following topic: What is the extent of the BEPS phenomenon, and how hard is it for MNEs to engage in profit shifting? The interview will unfold as follows: an introduction will give you the opportunity to present yourself and give an understanding of what you think is profit shifting. Then, we will go through various questions pertaining to the i) extent of profit shifting, ii) the trend of profit shifting, iii) the ways MNEs engage in profit shifting and, finally, iv) the costs and benefits of curbing profit shifting for governments and the media's coverage of this phenomenon.

Cher M. [Nom],

Je m'appelle Hadrien et suis actuellement en dernière année du Programme Grande Ecole de KEDGE Business School. J'effectue mon mémoire de master sur la délocalisation des profits, phénomène suscitant une attention grandissante du grand public depuis les années 1990. Je mène une série d'entretiens auprès de professionnels pour poursuivre mes recherches sur ce sujet, et votre opinion me serait extrêmement utile à cet égard. Si vous acceptez de participer, l'entretien auquel vous prendrez sera basé sur un guide d'entretien construit autour de 4 principaux axes. Le but de ce guide est de servir de fil conducteur : ainsi, il n'est pas nécessaire d'y répondre intégralement. Basé sur votre zone d'expertise et vos centres d'intérêts, l'entretien pourra s'articuler autour de certaines questions et sujets et ne pas couvrir l'ensemble du guide d'entretien.

Vos réponses seront anonymes. Conformément à la Loi « Informatique et libertés » du 6 janvier 1978, vous pourrez exercer vos droits d'accès, de modification ou de suppression en me contactant. Je vous enverrai une copie de cette étude si vous le souhaitez.

\* \* \*

Je vous remercie de bien vouloir répondre à ces questions à propos de la délocalisation des profits. Cet entretien est confidentiel et sera utilisé dans le cadre de la phase empirique de mon mémoire de master à propos du sujet suivant : Quelle est l'étendue du phénomène de délocalisation des profits, et quelles difficultés les FTN rencontrent-elles pour délocaliser leurs profits ? L'entretien sera structuré comme suit : dans un premier temps, une introduction vous laissera l'opportunité de vous présenter et de donner votre conception de ce en quoi consiste la délocalisation des profits. Ensuite, nous naviguerons à travers différentes questions ayant trait à i) l'étendue du phénomène de délocalisation des profits, ii) la tendance de ce phénomène, iii) les techniques utilisées par les FTN pour délocaliser leurs profits, et enfin, iv) les coûts et bénéfices de la lutte contre la délocalisation des profits pour les gouvernements et la couverture de ce phénomène dans les médias.

## A2.2. Interview guide (English and French)

THEMES	QUESTIONS AND SUB QUESTIONS
Introduction	<p>1. Could you briefly present your professional and academical backgrounds?</p> <p>2. How would you define profit shifting and its usefulness for MNEs?</p>
i) The extent of profit shifting	<p><i>Transition/Scholars' point of view:</i> Profit shifting has been empirically observed in academic works and papers since the 1980s. There is a consensus that this phenomenon is indeed happening, despite the intricacies and complexities through which one must go through to assess its extent.</p> <p>3. According to your personal experience, how important is profit shifting nowadays?</p> <p>→ <sup>50</sup>Its importance relative to governments' GDP/public spending?</p> <p>→ Its importance relative to MNEs' net income that engage in profit shifting?</p> <p>4. What are the main countries from which and to where profit is shifted?</p> <p>→ From North American countries (USA, Canada) to Caribbean countries/low-tax states (Delaware)?</p> <p>→ From European countries (Germany, France) to low-tax jurisdictions within the EU (Ireland, Luxembourg)?</p>
ii) The trend of profit shifting	<p><i>Transition/Scholars' point of view:</i> Scholars have observed that profit shifting is on a decreasing trend since the 1980s, despite the gradually increasing coverage of the phenomenon in the media or from high tax governments' officials.</p> <p>5. When do you think MNEs started to engage in profit shifting, and how do you think the magnitude of profit shifting evolved ever since?</p> <p>6. How has increasing globalisation and international trade impacted profit shifting?</p> <p>7. To what extent the dramatically economic integration of some regions such as the European Union has been an incentive for both MNEs to engage in profit shifting in those regions and countries to facilitate profit shifting (Luxembourg, Ireland, Andorra, Liechtenstein, etc.)?</p>
iii) The ways MNEs engage in profit shifting	<p><i>Transition/Scholars' point of view:</i> Scholars identify three means of profit shifting for MNEs: intra-company financing (a financial means), royalty payments, and transfer pricing (non-financial means). Some scholars highlight that profit shifting is costly and that, as such, a lot of MNEs cannot shift their profits.</p> <p>8. According to your experience, what concrete actions will a MNE undertake if it intends to engage in profit shifting?</p> <p>→ What is the most frequent scheme/set-ups of MNEs that engage in profit shifting?</p> <p>→ What are the factors and incentives that will push a MNE to engage in profit shifting?</p> <p>9. How costly is it for a MNE to engage in profit shifting?</p> <p>→ What would be the approximative threshold for a MNE in terms of size (revenue, headcount) at which the net benefits of profit shifting will be positive?</p> <p>→ Are some industries more favourable than others to engage in profit shifting?</p>
iv) The costs and benefits of curbing profit shifting for governments and the media's coverage of this phenomenon	<p><i>Transition/Scholars' point of view:</i> Some scholars question the benefits of governments to enforce anti-profit shifting measures, arguing that the phenomenon is negligible and that these measures could have more negative than positive economic impacts.</p> <p>10. What do you think is the cost of profit shifting for governments?</p> <p>11. Do you think the cost of profit shifting is negligible for governments?</p> <p>12. What is the impact of profit shifting in terms of competition?</p> <p>→ Do MNEs that engage in profit shifting can gain an unfair competitive edge over domestic companies because of reduced costs?</p> <p>→ To what extent can anti-profit shifting measures be a source of greater costs than profit shifting and deter business activity?</p> <p>13. What are the factors that explain the discrepancy between the coverage of profit shifting in the media and the real extent of the phenomenon?</p> <p>→ Social rejection of perceived inequalities: "big MNEs such as GAFA can avoid taxes whereas SMEs and common citizens must pay their taxes"?</p> <p>→ Way for the government to blame big companies and shift public anger towards the corporate sector?</p>
Conclusion	<p>14. Is there anything you would like to add? Does any relevant question that you have not been asked comes to your mind?</p>

<sup>50</sup> Questions flagged with an arrow (→) are sub questions that will not be shown to the respondent.

AXES	QUESTIONS ET SOUS QUESTIONS
Introduction	<p>1. Pouvez-vous présenter brièvement votre parcours professionnel et académique ?</p> <p>2. Comment définiriez-vous la délocalisation des profits et son utilité pour les FTN ?</p>
i) L'étendue du phénomène de délocalisation des profits	<p><i>Transition/Point de vue académique : Des observations empiriques analysées dans des revues académiques attestent de l'existence des pratiques de délocalisation des profits depuis les années 1980. Il existe donc un consensus sur l'existence de ce phénomène, malgré les difficultés rencontrées pour mesurer l'étendue d'une pratique si large et protéiforme.</i></p> <p>3. D'après vous, à quel point le phénomène de délocalisation des profits est-il important aujourd'hui ?</p> <p>→ En comparaison du PIB/des dépenses publiques des pays qui le subissent ?</p> <p>→ En comparaison du résultat net des FTN qui délocalisent leurs profits dans des juridictions à taxation favorable ?</p> <p>4. Quels sont les principaux pays depuis lesquels et vers lesquels les profits sont délocalisés ?</p> <p>→ Depuis les pays d'Amérique du Nord (Etats-Unis, Canada) vers les pays d'Amérique latine et des Caraïbes/états ayant un faible taux d'imposition (Delaware) ?</p> <p>→ Depuis des pays européens (Allemagne, France) vers des pays ayant un faible taux d'imposition au sein de l'Union Européenne (Irlande, Luxembourg) ?</p>
ii) La tendance du phénomène de délocalisation des profits	<p><i>Transition/Point de vue académique : Les travaux académiques montrent que la délocalisation des profits perd en intensité depuis les années 1980, malgré une couverture croissante du phénomène dans les médias ou de la part de hauts fonctionnaires d'Etats ayant de forts taux d'imposition.</i></p> <p>5. Depuis quand pensez-vous que les FTN délocalisent leurs profits, et comment pensez-vous que l'étendue de ce phénomène a évolué depuis ?</p> <p>6. Comment la globalisation et l'intensification du commerce international ont-elles impacté la délocalisation des profits des FTN ?</p> <p>7. Dans quelle mesure l'accélération de l'intégration économique de certaines régions du monde comme l'Union Européenne a-t-elle encouragé à la fois les FTN à délocaliser les profits au sein de ces régions et les pays à faciliter la délocalisation des profits des FTN (comme le Luxembourg, l'Irlande, Andorre, ou encore le Liechtenstein) ?</p>
iii) Les techniques de délocalisation des profits des FTN	<p><i>Transition/Point de vue académique : Les travaux académiques identifient trois principaux moyens par lesquels les FTN délocalisent leurs profits : le financement interne par la dette (un moyen financier), le paiement de royalties et les prix de transferts (des moyens non financiers). Certains universitaires soulignent que la délocalisation des profits est un processus coûteux difficile à mettre en œuvre pour de nombreuses FTN.</i></p> <p>8. D'après votre expérience, quelles actions concrètes une FTN mène-t-elle pour délocaliser ses profits ?</p> <p>→ Quels sont les modes d'organisation/de structures les plus fréquents des FTN qui délocalisent leurs profits ?</p> <p>→ Quels sont les facteurs qui poussent des FTN à délocaliser leurs profits ?</p> <p>9. Quel est le coût de la délocalisation des profits pour les FTN ?</p> <p>→ Quel serait le seuil approximatif (en termes de chiffre d'affaires, d'effectifs) à partir duquel il serait rentable pour une FTN de délocaliser ses profits ?</p> <p>→ Certains secteurs d'activité sont-ils plus propices que d'autres à la délocalisation des profits ?</p>
iv) Les coûts et bénéfices de la lutte contre la délocalisation des profits pour les gouvernements et la couverture de ce phénomène dans les médias	<p><i>Transition/Point de vue académique : Certains universitaires mettent en doute les bénéfices des mesures visant à empêcher la délocalisation des profits pour les gouvernements à haut taux d'imposition, expliquant que ce phénomène est négligeable et que ces mesures pourraient avoir un impact économique net négatif.</i></p> <p>10. Que représente selon vous le coût de la délocalisation des profits pour les gouvernements à forts taux d'imposition ?</p> <p>11. Pensez-vous que le coût de la délocalisation des profits est négligeable pour ceux-ci ?</p> <p>12. Quel est l'impact de la délocalisation des profits sur la concurrence ?</p> <p>→ Les FTN qui délocalisent leurs profits obtiennent-elles un avantage injuste vis-à-vis des entreprises nationales grâce à des coûts réduits ?</p> <p>→ De quelle manière des mesures visant à empêcher la délocalisation des profits peuvent-elles coûter davantage que ce qu'elles rapportent en décourageant l'activité économique des FTN ?</p> <p>13. Quels sont les facteurs expliquant la différence entre la couverture du phénomène de délocalisation des profits dans les médias et l'étendue réelle de ce phénomène ?</p> <p>→ Le rejet social des inégalités perçues liées à cette pratique : « Les grandes FTN comme les GAFA peuvent réduire leur impôt sur les sociétés alors que les PME et citoyens ordinaires doivent payer leurs impôts » ?</p> <p>→ Manière pour les gouvernements de blâmer les FTN et orienter l'ire du public vers le secteur privé ?</p>
Conclusion	<p>14. Souhaitez-vous ajouter quelque chose ? Une question à laquelle vous n'avez pas répondu et qui vous semble pertinente vous vient-elle à l'esprit ?</p>

## Appendix 3: Interview with J.O. – CEO of a refinancing company located in Saudi Arabia

*Communication method: Teams interview*

*Length: 1 hour and 15 minutes*

Bonjour **J.O.**, je vous remercie de bien vouloir répondre à ces questions à propos de la délocalisation des profits. Cet entretien est confidentiel et sera utilisé dans le cadre de la phase empirique de mon mémoire de master à propos du sujet suivant : Quelle est l'étendue du phénomène de délocalisation des profits, et quelles difficultés les FTN rencontrent-elles pour délocaliser leurs profits ? L'entretien sera structuré comme suit : dans un premier temps, une introduction vous laissera l'opportunité de vous présenter et de donner votre conception de ce en quoi consiste la délocalisation des profits. Ensuite, nous naviguerons à travers différentes questions ayant trait à i) l'étendue du phénomène de délocalisation des profits, ii) la tendance de ce phénomène, iii) les techniques utilisées par les FTN pour délocaliser leurs profits, et enfin, iv) les coûts et bénéfices de la lutte contre la délocalisation des profits pour les gouvernements et la couverture de ce phénomène dans les médias.

**Q1** Pouvez-vous présenter brièvement votre parcours académique et professionnel ?

**J.O. :** Je suis aujourd'hui le CEO d'une entreprise saoudienne basée à Riyad qui est une filiale du Fonds souverain PIF [Public Investment Fund]. C'est une société quasi gouvernementale qui a pour mission de procéder à des refinancements de crédits hypothécaires, et s'inscrit dans un grand plan de transformation du pays qui passe notamment par l'accès au logement pour le plus grand nombre possible de citoyens.

La société ressemble à ce que peuvent faire des fonds comme Fannie Mae [*Federal National Mortgage Association*], Ginnie Mae [*Government National Mortgage Association*] et Freddie Mac [*Federal Home Loan Mortgage Corporation*].

Avant ça, j'ai travaillé pendant une vingtaine d'années à Londres où je m'occupais des activités de titrisation pour BNP Paribas, banque dans laquelle j'ai commencé à travailler en 1997. J'ai, avant ça, travaillé dans d'autres banques comme la Société Générale à l'Inspection Générale.

En termes de *background* académique, j'ai fait un DEUG de droit à Nanterre, puis j'ai poursuivi avec Sciences Po, un master de finance à Dauphine et un MBA à la London Business School.

**Q2    Comment définiriez-vous la délocalisation des profits, et son utilisation pour les multinationales ?**

**J.O. :** Mon problème sur la délocalisation des profits, c'est que le terme sous-entend qu'il y a une intentionnalité, qui n'est pas nécessairement alignée avec un rationnel industriel ou commercial.

Toute entreprise cherche à optimiser ses résultats sous contrainte. A partir de là, il y a deux visions de la délocalisation des profits. L'une consiste à dire "je vais implanter une partie de mes activités, qu'elles soient industrielles ou commerciales, des activités de détention de droits ou encore de brevets, dans un pays qui correspond à mes besoins et qui correspond à mon optimisation sous contraintes." Par exemple, cela peut consister à délocaliser une usine dans un pays où la main d'œuvre est qualifiée et bon marché. Dès lors, par rapport à un pays qui a une main d'œuvre moins qualifiée et plus chère, et qui pratique des taux d'imposition plus élevés, peut-on considérer qu'il s'agit de délocalisation au sens d'une manœuvre fiscale, ou d'une manœuvre qui suit un rationnel industriel ?

Il y a donc deux cas : soit je localise mes activités et mes détentions de droits en fonction de mes objectifs d'optimisation sous contraintes, soit je suis motivé par une volonté de manœuvre fiscale que sous-entend un peu le vocabulaire de délocalisations de profits où l'entreprise sait qu'elle est borderline en termes de manipulation comptable ou fiscale.

Dans ce-dernier cas, elle cherche effectivement à trouver quelle manœuvre elle pourrait bien effectuer pour réduire de façon artificielle ses profits en localisant ses activités dans des juridictions spécifiques. La société va modifier certains éléments de mon process pour aboutir à la détermination de mon P&L [*Profit & Loss Statement*, compte de résultat] en utilisant des expédients qui n'ont pas nécessairement comme objectif premier une rationalité industrielle, mais plutôt comme finalité de réduire mon imposition.

Donc, pour revenir à votre question, je définirais la délocalisation des profits comme une action normale d'une entreprise qui s'inscrit dans une logique d'optimisation de ses processus sous contraintes.

Après, se pose la question de savoir si l'on peut reprocher à une entreprise de chercher à minimiser ses provisions, ses impôts et ses coûts de fonctionnement. Je dirais que c'est presque souhaitable pour une entreprise.

Bien sûr, quand on parle de délocalisation des profits, tout le monde a à l'esprit les actions que mènent les entreprises en l'absence de toute rationalité industrielle et commerciale qui visent, par le biais d'un jeu de passe-passe international, à réduire leur taux d'imposition.

Donc, dans le premier cas, celui motivé par un des impératifs industriels, je n'y vois pas de problème. En revanche, pour le second, là oui, c'est plus problématique, mais sous un angle de moralité, qui est très difficile à définir.

**Q3**    **Oui effectivement, il est difficile de définir ce qu'est une localisation justifiée des profits. L'OCDE cherche à définir des ratios de proportionnalité entre l'activité qu'une entreprise a dans un pays et les profits qu'elle peut raisonnablement y générer pour déterminer si une localisation de profits est justifiée ou non, mais ça reste très subjectif.**

**J.O. :** C'est très difficile, à la fois sur le plan opérationnel, et à la fois par ce qu'on a du mal à se départir d'un certain nombre d'idées préconçues sur ce que représente la délocalisation des profits en termes de masse et sur la frontière entre ce qui relève d'une gestion sous optimisation et ce qui relève de manœuvres fiscales.

**Q4**    **Quel est pour vous l'importance de ce phénomène aujourd'hui, au sens du deuxième cas de figure que vous décrivez, à savoir la localisation « injustifiée » de profits qui est ce qu'on entend communément par le terme « délocalisation des profits » ?**

**J.O. :** Il faut pour moi d'abord définir le périmètre sur lequel on mesure ce phénomène. Un bon moyen de le faire, c'est de procéder d'une façon consolidée, et de regarder par exemple le résultat moyen d'une entreprise puis de regarder le taux de *leakage*, d'évaporation de son résultat net.

On pourrait le mesurer par pays, mais c'est un peu compliqué et je pense que si on regarde l'impact que ça peut avoir par rapport au PIB ou à la masse fiscale de certains pays, c'est rarement très significatif.

Si on regarde par exemple les entreprises devraient payer des impôts en France, au Royaume-Uni ou en Allemagne, et combien elles n'en paient pas grâce à ces manœuvres ou grâce à ces solutions qui sont mises en œuvre de délocalisation des profits : qu'est-ce que ça représente par rapport au budget ou à la masse fiscale des pays concernés, c'est probablement relativement marginal.

Alors après, si vous mesurez de façon consolidée, peut-être qu'elle ne paye pas des impôts dans un certain pays mais qu'elles en paient dans leur pays domestique ou de rattachement de leur siège social et fiscal, la vérité, par exemple en France ou en Angleterre ou en Allemagne, n'est pas nécessairement la même que celle mesurée aux États Unis quand vous regardez des groupes américains.

Mais, du point de vue de l'entreprise, la délocalisation des profits peut avoir un impact significatif, c'est à dire que les impôts non payés, s'ils étaient soumis au droit commun local dans un certain nombre de pays, pourraient représenter une importance relative par rapport à l'ensemble des résultats générés par l'entreprise. Cependant, je pense que globalement, notre attention et notre sensibilité sont attirées par des effets de headlines, de titres sur quelques exemples massifs, comme les GAFA : ils réalisent des milliards de chiffre d'affaires et ont une contribution fiscale très limitée dans les pays où ils génèrent un chiffre d'affaires significatif.

Mais ce n'est pas forcément représentatif au regard de la masse des entreprises internationales et de la masse des impôts qui sont prélevés. Pour moi, ces entreprises n'ont pas un impact budgétaire massif sur les économies des pays riches à fort taux d'imposition. Ce n'est pas comme si elles échappaient à l'imposition dans des pays en voie de développement qui ont des budgets restreints.

Il faut aussi prendre en compte le fait que les pays dont des entreprises délocalisent leurs profits se considèrent comme des victimes, mais que dans bien des situations, chaque pays peut être un paradis fiscal pour un autre pays.

On cite souvent des pays qui sont des exemples de paradis fiscaux en Europe comme le Luxembourg et l'Irlande dans le cas de l'Europe, mais la réalité est que sur certaines pratiques fiscales, chaque pays européen peut lui-même être un paradis fiscal par rapport à ses voisins par ce qu'il offre des facilités que d'autres pays n'offrent pas à ses entreprises nationales.

Donc c'est très compliqué d'avoir une vraie mesure. On peut regarder le chiffre d'affaires qui est par exemple la base de la taxe GAFA, mais ce n'est pas une mesure de la rentabilité d'une entreprise.

**Q5 Vous dites qu'au sein de l'Europe, chaque pays peut être un paradis fiscal vis-à-vis d'un autre car il offre certaines fiscales. Auriez-vous des exemples de pays qui ont de telles pratiques, en dehors des paradis fiscaux souvent cités dans la liste de l'OCDE ?**



**J.O. :** Par exemple, la France a eu pendant longtemps un régime très favorable sur les crédits d'impôt recherche. Cela veut dire qu'une entreprise qui localisait sa recherche en France pouvait bénéficier d'aides fiscales qui ne pouvaient être obtenues dans d'autres pays.

Imaginons, même si c'est peut-être inexact, que l'Allemagne ait un régime différent, elle pourrait dire « vous encouragez des entreprises à venir localiser leurs équipes et leurs travaux de développement recherche dans votre pays parce que vous leur donnez un avantage fiscal ». C'est pour moi de la défiscalisation parce que pour le même travail, elle n'obtiendrait pas les mêmes avantages fiscaux. Mais évidemment, parce que c'est la France, avec un taux marginal d'imposition qui est considéré comme standard, personne ne s'offusque.

De la même façon, les Allemands ont des régimes de traitements fiscaux avantageux pour la succession des entreprises, notamment dans le secteur des PME, donc la France pourrait dire « les entreprises localisées en Allemagne bénéficient d'un régime plus favorable que si elles étaient en France ».

Donc, il y a certes des pays qui proposent une fiscalité douce à cause d'un IS faible et qui se trouvent à un niveau qui est marginalement plus faible que celui de leurs concurrents européens, ce qui paraît comme un élément immédiat de de récrimination. Cependant, chaque pays européen peut lui-même avoir – au-delà du taux d'imposition sur les résultats qui est le l'éléphant dans la pièce d'autres petits avantages qui sont donnés à droite ou gauche et qui, n'étant pas donné dans tous les pays de la même façon, peuvent correspondre à des sujets de défiscalisation.

**Q6 Je comprends que tous les pays puissent offrir des avantages fiscaux spécifiques. Mais pour vous, est-ce que les avantages sur certains types d'activité que peuvent offrir des pays comme la France ou l'Allemagne valent, au global, les avantages que peuvent offrir des pays comme l'Irlande ou le Luxembourg ? Des pays comme l'Irlande ou de Luxembourg ne sont-ils pas davantage des paradis fiscaux que la France ou l'Allemagne ?**

**J.O. :** Le problème que je vois est que les sujets de délocalisation et de fiscalité sont des sujets évidemment soulevés en général par les pays qui ont les taux marginaux les plus élevés. Ces pays disent « je ne comprends pas pourquoi est-ce que on autorise les entreprises à délocaliser une partie de leurs activités situées dans des pays à la fiscalité plus favorable ».



Mais la fiscalité est elle-même un élément révélateur de la gestion de la capacité et de la gestion budgétaire d'un pays. C'est à la fois révélateur de ses choix budgétaires et de sa capacité à gérer proprement son budget.

Donc, c'est facile de dire « moi, j'ai envie d'avoir un taux d'imposition élevé par ce que je veux dépenser à qui mieux mieux, mais je n'accepte pas que vous, vous ayez une gestion plus frugale de votre budget et que, du coup, vous puissiez vous permettre un taux d'imposition plus faible. »

Alors, beaucoup disent « c'est une concurrence scandaleuse », mais il faut remettre les choses en perspective. Est-ce que c'est vraiment une concurrence scandaleuse, ou est-ce que ce taux d'imposition plus faible vous pouvez vous permettre de vous offrir et le fruit d'une gestion plus rigoureuse de vos équilibres budgétaires ? Au nom de quoi devrait on imposer d'avoir un taux d'imposition supérieur parce que des pays ont de mauvais équilibres budgétaires, motivés par d'autres priorités ?

C'est ce qui me gêne dans ces débats : on prend la partie émergée de l'iceberg, tout le monde dit « Ah, la Hollande, le Luxembourg, ce sont de petits pays, ils ont des taux d'imposition qui sont ridicules, c'est scandaleux ».

Mais un pays comme le Luxembourg a d'autres atouts sur lesquels il s'appuie pour équilibrer son budget. D'autres peuvent encore objecter « C'est non significatif parce que c'est un petit pays ». Alors regardons l'Irlande ou la Hollande, les mêmes objectent « Ah bah non, ces pays bénéficient de ce je sais quels avantages compétitifs qui distordent la concurrence par rapport à d'autres pays ».

Je pense que la fiscalité est un élément de souveraineté nationale qui est l'expression de tes choix et de tes contraintes budgétaires. Si vous voulez avoir une couverture sociale avec des transferts très élevés et que vous voulez imposer à tout le monde à 50 ou à 90%, c'est votre choix. Mais si moi j'ai un équilibre budgétaire différent et d'autres contraintes et que je décide d'imposer les gens à 40%, pourquoi faudrait-il que je m'aligne sur vous au nom de ce que vous considérez comme une concurrence déloyale ? Hé bien non ! Soignez votre budget, vos déficits budgétaires, votre taux d'imposition, et vous pourrez offrir le même niveau de taxation que moi.

Le problème est qu'il n'existe pas de définition de ce qu'est un taux d'imposition juste. Un taux est fonction de vos objectifs et de vos contraintes.

Quand vous regardez les entreprises, plus la pression fiscale augmente, plus vous encouragez les entreprises comme les individus à trouver des moyens d'échapper cette pression fiscale. C'est vraiment la courbe de Laffer.

Le deuxième élément important, c'est la stabilité. Je ne connais pas d'entreprises qui vont s'emmerder à faire de la délocalisation de profits parce que, une année ou deux années, ils veulent réduire leur taux d'impôt. Quand vous êtes dans un régime fiscal erratique où, du jour au lendemain, tous les 2 ans, on va décider d'augmenter ou de changer rétroactivement des principes d'imposition, ça fait évidemment fuir les entreprises. Une entreprise ne rechignera pas à payer un peu plus d'impôts à condition d'avoir la une garantie de visibilité et de stabilité.

Quand les gouvernements impécunieux décident tous les 4 matins de changer le taux d'imposition, de remettre en cause les niches fiscales ou les faveurs qui ont été données, vous remettez en cause un système, tandis entreprise cherche à stabiliser les conditions dans elle peut continuer son développement.

Le manque de stabilité fiscale de pays avec de forts d'imposition est donc aussi un facteur qui incite les entreprises à délocaliser leurs profits.

**Q7 Pour rebondir ce que vous disiez, il est vrai que délocaliser ses profits peut être complexe pour une entreprise. Quelles sont, selon vous, les principales difficultés que rencontrent une FTN qui souhaite délocaliser ses profits ?\***

**J.O. :** Cela dépend fondamentalement de l'activité de l'entreprise. La délocalisation des profits va aller souvent de pair avec une optimisation du process industriel. Par exemple, vous êtes une entreprise qui avez des chaînes de fabrication automobiles dans un certain pays et de se dire « tiens, pour faire de l'optimisation fiscale, je vais créer une redevance sur la marque et l'utilisation du badge de la voiture et localiser cette activité de détention des droits dans un pays à fiscalité avantageuse, et surcharger les activités industrielles en leur faisant payer des *fees* ou des *royalties* qui sont complètement absurdes ». Bon, c'est très compliqué parce qu'évidemment il y a des limites à ce que vous pouvez faire de façon justifiée fiscalement et organisée.

Ça l'est un peu moins pour des activités purement commerciales, on le voit bien avec les GAFA. Il n'a pas vraiment de process de fabrication mais davantage de process logistiques, c'est donc un peu plus simple. Cela étant, il faut tout de même tenir compte de l'endroit où sont basés tes activités commerciales, et avoir un business case assez légitime qui permet de facturer de délocaliser une partie des profits en facturant des coûts dans un pays avec un taux intéressant, des *requirements* juridiques, légaux

et fiscaux compatibles, une vision et une stabilité suffisante, des accords de taxes entre ce pays et les pays où sont localisées tes activités industrielles, etc.

C'est pour cela qu'à la fin des fins la complexité qui est liée soit à la relocalisation d'activités industrielles, soit à la localisation d'une partie du process comme les GAFA, fait que délocaliser ses profits ne se fait pas sur le coin d'une enveloppe du jour au lendemain !

Tous ces coûts additionnés, une entreprise ne va les accepter que si, évidemment, le bénéfice est suffisant et si l'endroit où les profits sont relocalisés applique une fiscalité stable.

C'est un calcul de coûts/avantages. D'un côté, on met l'ensemble des contraintes qu'il faut satisfaire pour délocaliser des profits : des contraintes légales, fiscales, juridiques, le fait de devoir créer une équipe, créer une structure, la capitaliser, assurer que les contrats de non double imposition sont applicables, analyser la faisabilité de la délocalisation ; etc. De l'autre, on met en face les éventuels gains générés.

Et ces gains ne sont pas évidents. Il faut des résultats depuis plusieurs années, une visibilité sur les résultats qui viennent et une visibilité sur la stabilité du régime dans lequel vous allez essayer de relocaliser vos profits. Et avant même de rentrer dans une logique de délocalisation des profits, l'entreprise va utiliser le *carryover* de ses pertes.

**Q8** **Comment pensez-vous que le phénomène de délocalisation des profits évolué depuis la fin de la Seconde Guerre Mondiale ? A-t-il pris de l'ampleur ou diminuée, et les actions des Etats en réaction à ce phénomène ont-elles gagné ou perdu en efficacité ?**

**J.O. :** J'aurais tendance à penser que ce phénomène s'est démultiplié, d'abord avec l'internationalisation croissante des grands groupes. Auparavant, les grands groupes pouvaient des grands groupes nationaux qui exportaient mais qui ne délocalisent pas forcément une grande partie de leur activité, et la fiscalité était en moyenne plus douce.

Avec l'internationalisation, d'une part, et la délocalisation croissante des activités industrielles pour satisfaire des contraintes de vente local, d'optimisation de gestion sous contrainte d'autre part, je pense que les opportunités se sont accrues.

Je pense aussi que l'augmentation de pression fiscales a accru ces opportunités. Quand on regarde depuis les années 70 dans la plupart des pays développés, malgré

quelques exceptions et des variations, la pression fiscale sur les entreprises s'est en moyenne accrue. Par forcément que l'IS, mais tout le reste aussi : la TVA, l'impôt sur les immobilisations, les taxes de contributions à ceci, à cela, etc.

Je pense donc que le phénomène s'est accru depuis les années 70, et je ne sais pas quel est l'impact des contre réactions organisées par les pays au travers du G20, de l'OCDE, pour essayer de limiter l'arbitrage que faisaient les entreprises. Je ne sais pas si les tentatives de coordination internationale ont réduit ce phénomène, ou ont ralenti sa croissance ce qu'il fait qu'il a moins d'ampleur que ce qu'il aurait pu avoir, ou alors s'il est beaucoup moins important maintenant qu'il l'était il y a 30 ans.

**Q9** **Votre argument est intéressant : vous dites que la pression fiscale sur les entreprises s'est accrue dans les pays développés ces dernières décennies. Alors que souvent, l'argument avancé est que le taux d'IS diminue dans tous les pays depuis 40 ans, même si vous me citez plein d'autres taxes.**

**J.O. :** Ouais, mais il y a deux phénomènes. Les taxes qui se sont ajoutées comme vous le rappelez, mais surtout ce qu'on mesure : le taux effectif ou le taux d'imposition ?

Quand on regarde, le taux effectif est la résultante est la résultante de ce que les entreprises payent effectivement, donc ce taux effectif aujourd'hui peut être plus faible parce que les entreprises optimisent la charge fiscale.

Je vais prendre un exemple : si vous prenez l'impôt effectif d'Amazon en France, vous allez dire « regardez, ce n'est pas vrai, il paye 0,5% taux d'impôt et par rapport à leur chiffre d'affaires, c'est ridiculement faible ». Oui, mais c'est justement parce qu'ils ont délocalisé que ce taux d'impôt est très faible, mais en réalité le taux d'imposition sur le papier comme le taux d'imposition marginal pour les revenus des ménages a augmenté sur ces 40 dernières années.

Ce que vous dites est très intéressant et va contre l'argument souvent mis en avant dans la presse qui consiste à dire « regardez, le taux d'IS baisse partout, cela crée une compétition malsaine où tous les pays baissent leur taux d'imposition et donc par conséquent les recettes des pays diminuent ».

Alors, les pays ne perdent pas forcément de recettes fiscales en baissant leurs impôts, car comme disait Laffer, « trop d'impôt tue l'impôt ». Je suis très Lafferiste : un taux d'imposition plus faible mais à assiette large est beaucoup plus productif pour la fiscalité et le budget qu'un taux d'imposition qui désespérément augmente parce

qu'on cherche à squeezer jusqu'à la dernière goutte de bénéfices des entreprises ce qui les pousse à optimiser ou foutre camp !

Je me dis que si je prends le taux d'imposition des entreprises en France dans les années 70, je doute qu'il ait été aussi élevé qu'il l'a été aujourd'hui.

Et je pense que c'est la même chose : a augmenté avec Nixon, ça a rebaisé avec Reagan, ça augmenté avec Clinton, ça a rebaisé avec, et ça va réaugmenter avec Biden : au global, même si le taux officiel reste stable voire diminue un peu, le taux effectif, lui, augmente probablement.

**Q10 Pour revenir sur ce que vous disiez certains pays baissent leurs impôts pour avoir une assiette fiscale plus large et donc, augmenter leurs recettes. Mais c'est justement le fait d'avoir un impôt fait pour attirer des profits d'entreprises qu'ils ne devraient pas attirer avec leurs atouts autres que fiscaux qui est reproché à ces pays, comme le Luxembourg par exemple.**

**J.O. :** Ouais, mais encore une fois, il ne faut pas oublier qu'on ne sait pas ce qu'est un taux d'imposition juste. Chaque pays trouve que son taux d'imposition est juste : quant au Royaume-Uni, il y avait un taux d'imposition marginal sur le revenu des ménages à 90%, le gouvernement travailliste devait trouver ça très juste : quand vous gagnez 10 millions de livres par an, le fait qu'il vous reste 500 000 £ pour vivre, c'est largement suffisant par rapport à un ouvrier qui gagne 20 000 £. Mais via un autre prisme, on pourrait trouver délirant que l'Etat prenne 90% des revenus d'un individu sous prétexte qu'il est riche.

Un autre sujet important est la substance économique du taux d'imposition. Le taux d'imposition étant le reflet de votre stratégie, de vos objectifs et de votre discipline budgétaire, parce qu'à la fin des fins, les impôts servent à payer les écoles, les routes, l'armée, etc.

Alors en fonction de votre discipline, vous pouvez très bien décider de mettre l'impôt à 20%, pas nécessairement parce que vous voulez attirer les entreprises : par exemple, le taux d'imposition en Allemagne est plus faible que le nôtre globalement, et pourtant ils sont à l'équilibre budgétaire. Alors, quel est le bon taux d'imposition : c'est celui des Allemands, qu'on devrait prendre référence, ou le nôtre ? Quand vous regardez la masse des prélèvements par rapport au PIB, on est devant l'Allemagne, et malgré tout on a un déficit budgétaire qui est monstrueux par rapport à l'Allemagne. Donc les Allemands sont-ils cons qui font de la défiscalisation et devraient-ils avoir un taux d'imposition comme le nôtre ? Ben non, parce que si je regarde leur équilibre

budgétaire, ostensiblement, le taux d'imposition correspond bien avec leurs contraintes budgétaires, donc pourquoi devraient ils s'aligner sur notre taux ?

Donc le taux, pour quoi faire ? Si c'est juste pour faire plaisir à des gens qui veulent imposer à 50% parce qu'ils considèrent que, quand vous imposez à 20%, vous induisez une compétition *unfair*, par rapport à quoi cette compétition est-elle *unfair* ?

Certes, la question de la substance économique compte. Si pour qu'une entreprise bénéficie d'un IS à 20% dans un certain pays, il suffit qu'elle y domicilie une boîte aux lettres, je reconnais que la question peut se poser.

Mais si l'entreprise doit y mettre ses *headquarters*, avoir un minimum de présence commerciale, industrielle, et à partir de là, elle paie taux d'imposition plus faible, au nom de qui et au nom de quel droit allez-vous dire que c'est injuste ? « Mais moi je trouve que c'est de la compétition injuste ! » : mais, mon cher ami, faites la même chose dans votre pays, baissez votre taux d'imposition, vous allez attirer des entreprises en nombre et vous compenserez par le volume la baisse de votre taux marginal.

**Q11** **Maintenant, au niveau d'un pays, pensez-vous que le fait que des FTN puisse réduire leur taux d'imposition en délocalisant leurs profits, peut-être à bon droit, n'induisse tout de même pas une compétition injuste avec « la PME du coin » qui elle doit payer plein pot ?**

**J.O. :** Je pense que c'est un argument qui se tient dans la mesure où une entreprise nationale, évidemment, n'aura pas le bénéfice d'une entreprise transnationale. Maintenant, évidemment, ça sous-entend que vous mesurez les avantages et les inconvénients sur une base comparable. Si je suis une entreprise qui vend des chaussures localement et que vous me comparez avec une GAFA, ça a peu de sens.

Je pense qu'il est nécessaire d'avoir une relation entre le taux d'imposition et les éléments qui sont le calcul de l'assiette de l'impôt. Même si une entreprise décide de délocaliser certaines activités pour délocaliser ses profits, elle paie un impôt juste sur la base de son assiette taxable.

En admettant qu'il y ait des injustices à assiettes comparables, des entreprises nationales vont bien avoir un désavantage localement. C'est tout le problème de la logique fiscale. Si on est dans un État dans lequel l'entreprise locale doit se battre contre des entreprises multinationales, que fait de son côté l'État pour avoir une pesanteur fiscale aussi supportable que possible ?

La charge de la preuve n'est pas nécessairement uniquement et toujours sur le dos des entreprises qui certes gère en fonction des contraintes et des soucis d'optimisation. Ce qu'on oublie, c'est qu'une entreprise internationale ne le devient pas du jour au lendemain.

Amazon, pendant plus de 10 ans, n'a pas versé un centime de dividende à ses actionnaires. Amazon a investi dans le développement de ses entrepôts logistiques sans l'aide de personne, à un moment où mon entreprise locale se développait localement. Leur capacité internationale est le fruit d'un développement qui a pris du temps, qui a mis des capitaux à risques, qui est le fruit d'une logique de diversification : donc s'ils arrivent à obtenir des avantages, à partir du moment où il y a un minimum de relation entre les avantages qu'ils obtiennent dans certains pays leur activité dans ces pays, ça ne me paraît pas injuste.

Le problème de pays comme la France, c'est qu'ils faussent le système avec certaines taxes, comme la taxe GAFA. Ils disent « regardons le chiffre d'affaires d'Amazon en français, il devrait payer un impôt sur le chiffre d'affaires » : mais le chiffre d'affaires n'est pas l'ultima ratio regum de la base fiscale. Alors après, est-ce qu'en jouant sur les royalties, l'utilisation des marques, etc., ils exagèrent sur la délocalisation de leurs profits ? Oui, la question qui se pose, mais est-ce que ça veut dire qu'il faudrait qu'il paye le même taux d'imposition qu'en France en Irlande ? Non, pas forcément.

**Q12 Pour ma dernière question, je vais rebondir de la taxe GAFA que vous avez évoquée, qui a été le cheval de bataille fiscal de Bruno Le maire. On a beaucoup parlé de cette taxe dans la presse et de la situation des GAFA, et donc beaucoup mis en lumière l'optimisation fiscale des GAFA et en général des FTN par le biais de la délocalisation de leurs profits. Cependant, vous estimez que ce que perdaient les Etats des pays riches en recettes fiscales était finalement assez marginal, ce qui est la conclusion à laquelle sont arrivées plusieurs articles académiques sur le sujet. Qu'est-ce qui explique selon-vous la décorrélation entre l'importance de ce phénomène et sa couverture dans la presse ?**

**J.O. :** Je pense en effet que, par rapport à la masse fiscale que gère les différents États, c'est assez faible, mais que les gains peuvent être importants pour l'entreprise elle-même, comme je le disais plus haut.

Je pense que le mouvement d'internationalisation croissante est ce qui suscite la vision négatives de ces entreprises. A l'époque, quand General Electric et Coca-Cola étaient des entreprises dominantes, 90% de leur production était américaine et ils payaient donc leurs impôts aux Etats-Unis, donc personne ne se posait de question.

Ensuite, on voit apparaître des entreprises qui arrivent à plus aisément délocaliser une partie d'activité, comme la gestion marketing, la détention des marques, les droits d'utilisation, etc., sans avoir à délocaliser des chaînes ou des process industriels, et avec en particulier ces dernières années une explosion des entreprises dématérialisés.

Amazon est le plus gros vendeur en ne fabriquant rien, AirBnB est le plus gros hôtelier du monde sans détenir la moindre chambre d'hôtel, Uber la plus grande compagnie de taxis du monde sans posséder la moindre bagnole, etc.

En parallèle, il y a tout le phénomène de croissance de la pression fiscale en termes de charge qui a été exacerbée pendant la crise. Par conséquent, tout le monde cherche des ressources, donc tout le monde se dit « bah tiens, qui allons-nous imposer ? Bah commençons par imposer les riches et les entreprises qui paient peu d'impôts ! ».

Je suis la France, j'ai une dette qui représente 120% de mon PIB par ce que j'ai signé des chèques à tire-larigot qu'il va bien falloir que je rembourse au bout d'un moment, donc il faudra bien que quelqu'un paye des impôts. Je peux le faire en interne, taxer les français riches, la minorité qui est well-off, et comme c'est une minorité, électoralement je m'en fou, mais j'ai quand même une masse beaucoup plus importante d'entreprises qui génèrent des résultats sur lesquels elles ne sont pas imposées. Ainsi, les GAFA sont des victimes expiatoires dans une pour une période où on constate que les inégalités se sont exacerbées depuis la crise de 2008, d'autant que les GAFA ont tiré leur épingle du jeu du COVID alors que les restaurants sont tous en train de boire un bouillon.

La chasse aux profits non taxés rapporte donc des ressources et permet de surfer sur la vague du « Regardez, on va réduire les inégalités de traitement entre les entreprises », donc ça explique pourquoi une telle attention.

Cela étant, ça peut être à bon droit : comment expliquer qu'une entreprise qui génère un énorme chiffre d'affaires paie très peu d'impôts ? Il y a parfois un problème de substance et quelque chose de choquant visuellement, mais il faut creuser et trouver quelle est la bonne mesure et ne pas tout de suite tomber dans la facilité. Imposer une fiscalité forte est un bon moyen pour les États de s'exonérer de leur propre responsabilité budgétaire.

**Je vous remercie vivement pour votre disponibilité et notre échange.**



## **Appendix 4: Interview with A.C., a chartered accountant and statutory and M.E., a tax specialist, both working in a French accounting firm**

*Communication method: physical interview in the Accounting firm X's office*

*Length: 1 hour and 30 minutes*

Bonjour **A.C.** et **M.E.**, je vous remercie de bien vouloir répondre à ces questions à propos de la délocalisation des profits. Cet entretien est confidentiel et sera utilisé dans le cadre de la phase empirique de mon mémoire de master à propos du sujet suivant : Quelle est l'étendue du phénomène de délocalisation des profits, et quelles difficultés les FTN rencontrent-elles pour délocaliser leurs profits ? L'entretien sera structuré comme suit : dans un premier temps, une introduction vous laissera l'opportunité de vous présenter et de donner votre conception de ce en quoi consiste la délocalisation des profits. Ensuite, nous naviguerons à travers différentes questions ayant trait à i) l'étendue du phénomène de délocalisation des profits, ii) la tendance de ce phénomène, iii) les techniques utilisées par les FTN pour délocaliser leurs profits, et enfin, iv) les coûts et bénéfices de la lutte contre la délocalisation des profits pour les gouvernements et la couverture de ce phénomène dans les médias.

**Q1** Pouvez-vous présenter brièvement votre parcours professionnel et académique ?

**A.C.** : Je suis expert-comptable et commissaires aux comptes depuis les années 1980, et j'ai rejoint GVA il y a maintenant trente ans.

**M.E.** : J'ai passé mon DEC [Diplôme d'Expert-Comptable] il y a une quinzaine d'année, et me suis spécialisé sur les questions fiscales.

**Q2** Comment définiriez-vous la délocalisation des profits et son utilité pour les FTN ?

**A.C.** : On va commencer par faire un panorama du sujet de la délocalisation des profits, puis ensuite je vous raconterai une expérience que j'ai connue sur une manœuvre de délocalisation de profits qui passait par des cessions de titres de participation.

Ce qu'il faut savoir, c'est que le sujet de délocalisation des profits est très ancien, et qu'on est loin des clichés des îles Fiji ou des îles je-ne-sais-pas quoi : il n'y a pas besoin d'aller plus loin que le cœur même de l'Europe. Certains pays européens pratiquent des formes de délocalisation fiscale à l'aide de politiques fiscales très agressives, au

détriment bien évidemment des autres pays de l'Union européenne. Ainsi, si on prend un exemple tout bête, c'est l'Irlande.

**M.E.** : L'Irlande qui a un taux d'IS à 12,5% contre 28% pour la France.

**A.C.** : Que font toutes les entreprises et les grosses multinationales, les Google, les AirBnB, les Apple, les Amazon qui ont des activités en Europe, en France, en Allemagne, en Italie ? Ils mettent le siège européen de leurs activités en Irlande justement à cause de ce taux d'IS à 12,5%.

Et après, par la technique du transfert du bénéfice (on vous expliquera le fonctionnement des techniques existantes et la manière dont l'administration fiscale essaye de cerner ces opérations), ces entités-là ne paye absolument aucun impôt en France, ou alors un impôt ridicule, alors qu'elles sont implantées en France, en Allemagne, en Italie et qu'elles y réalisent une partie majeure de leur activité.

Il y a d'ailleurs une actualité très récente sur ce sujet : J. Biden a annoncé l'application d'un taux d'imposition de 21% à toutes les multinationales. Je vous assure que ça, ça va être terrible parce que les entreprises installées dans des pays comme l'Irlande qui font du dumping fiscal vont se retrouver en train de payer de l'impôt à 21%. Ainsi demain, quand le taux d'imposition sera 25% en France (**M.E.** : par ce que c'est l'objectif du gouvernement français à terme) l'avantage compétitif de l'Irlande sera bien moindre pour attirer les FTN.

D'ailleurs j'ai lu un article de journal du Monde ce matin « Vers une taxe mondiale des entreprises ? » qui explique bien comment ces sujets-là vont être traités de manière uniforme. Parce que le gros problème est que les États ne sont pas en phase sur ce sujet et essaient de faire du dumping entre eux pour mettre le taux d'IS le plus bas possible afin d'attirer les FTN.

En exemple récent et européen, on peut citer par exemple les *tax rulings* signés par JC. Juncker qui, lorsqu'il était président de la Commission Européenne, a signé des accords fiscaux avec des FTN par lesquels le Luxembourg a accepté de leur accorder des avantages énormes. C'est amusant de savoir qu'en parallèle de ça, ce même Monsieur disait « Il faut harmoniser la fiscalité européenne ».

Cela illustre bien le fait qu'en Europe, le discours commun est de dire « Il faut harmoniser » alors qu'en réalité derrière, chaque Etat fait bien sûr à sa sauce. Vous avez en effet des pays en pleine Europe comme l'Irlande, la Belgique, le Luxembourg,

Malte, Chypre qui pratiquent un dumping fiscal massif : pas besoin d'aller dans les paradis fiscaux !

**M.E.** : Exactement, et ça pose un problème au niveau de l'Europe notamment puisque l'idée est quand même d'essayer qu'un jour on ait un minimum d'harmonisation. Par exemple en France, on est passé de 33% à bientôt 25% en 5/6 ans, et derrière cette baisse se trouve l'idée d'aller dans le sens d'une harmonisation de la fiscalité européenne et de rejoindre notamment le taux allemand qui étaient déjà autour de 25 ou 26%. Mais cela n'est qu'un début d'harmonisation, puisqu'on a toujours les brebis galeuses qu'a citées **A.C.** pas. Par conséquent, l'harmonisation européenne ne se fait pas vraiment.

**A.C.** : Il y a aussi le cas des Pays-Bas, et j'ai comme exemple le cas dont je vous parlais au début. Il y a environ une vingtaine d'années, de nombreuses sociétés cotées françaises et européennes – dont une pour laquelle j'ai travaillé mais dont je ne vous citerai pas le nom – avaient installé leurs sous-holdings qui détiennent leurs titres de participation aux Pays-Bas avec comme forme juridique BV (*Besloten Vennootschap* pour Société A Responsabilité Limitée).

L'intérêt de la manœuvre résidait dans le fait que, quand une société cédait ses titres de participation, les plus-values de cession étaient exonérées d'impôt. En fait, c'est et parce que dans ces pays-là, quand vous cédez les titres de participation, alors qu'en France elles étaient taxées à 19%. Par conséquent, les entreprises se disaient « Au Pays-Bas, on ne paie pas d'impôts sur ces opérations, donc on ne va pas en payer en France ».

L'administration fiscale française a fini par comprendre à force de subir la pression de la part des lobbyistes de toutes ces sociétés, et s'est mise il y a une quinzaine d'année au diapason de ce que faisaient les Pays-Bas, le Luxembourg et la Belgique en ne taxant en France les plus-values de cession sur titres qu'à un taux très minime.

**M.E.** : Pour rentrer dans le détail, une quote-part dite « de frais et charges » représentant 12% de la plus-value de cession de titres de participation est soumise à l'IS. Ainsi aujourd'hui, 28% de 12%, soit environ 3%, des plus-values de cession de titres de participation est payé en IS, contre 19% avant !

**A.C.** : Par conséquent, de nombreuses sociétés françaises ont rapatrié leurs activités en France.

Pour reprendre un peu de recul, ce qui je pense est quand même assez délirant quand on regarde tout ça, ce sont les centaines de milliards, d'euros ou de dollars d'impôts qui échappe aux États ou l'activité se passe : c'est ça qui est terrible.

Et à mon avis, la taxe GAFA va être remplacée par une taxe de ce style. Par ce que l'idée est tout simplement de dire « On va vous faire payer l'impôt là où vous produisez, là où vous avez votre activité » : c'est logique !

**M.E. :** D'ailleurs, quand on regarde les États Unis et qu'on prend en compte l'impôt fédéral et l'impôt par Etat, on était avant autour de 40%, et Trump a baissé drastiquement l'impôt à presque 24%. Ce n'était peut-être pas fait dans un but premier d'attirer des FTN mais plutôt pour rendre service à sa propre économie. Cela dit, ça peut potentiellement ouvrir des opportunités de dumping fiscal.

**Q3** Vous m'avez donné l'exemple de sociétés françaises qui, par le passé, délocalisaient une partie de leurs profits via ce mécanisme que vous avez décrit de faible taxation des plus-values de cession de titres de participation. Avez-vous des exemples aujourd'hui d'entreprises qui délocalisent leurs profits ?

**A.C. :** Oui, on a un certain nombre de sociétés dont les maisons mères se trouvent à l'étranger, comme aux États Unis au Japon, qui ont des activités importantes en France et qui ont recourt aux méthodes de transfert de bénéfices. Le raisonnement est principalement le suivant : les filiales d'une FTN pratiquent entre elles un prix d'achat qui n'est pas celui du marché, ou un prix de vente qui n'est pas celui du marché.

Par exemple, si je suis au Japon et que j'ai de l'activité en France, ça ne m'intéresse pas de payer d'impôt en France : je veux le payer au Japon. L'idée est de laisser très peu d'assiette fiscale en France et de tout rapatrier au Japon. Comment je fais ? Je facture des redevances de marques, des *managements fees*, ou encore des redevances de propriété intellectuelle. Par conséquent, on réduit la base imposable en France.

**M.E. :** C'est le *transfer pricing* économique, qui passe donc soit par l'achat-vente classique dans un fonctionnement de groupe, soit par des *management fees*, soit des redevances. Ce sont les 3 grands axes qui permettent ce qu'on appelle « l'évasion fiscale » *corporate*. La philosophie est de laisser le moins de bénéfices possibles dans les pays où la taxation est importante.

**A.C. :** Nos gouvernements essaient aussi de lutter contre ces faibles taux de taxation en essayant de d'avoir un taux d'impôt eux-aussi plus bas, enfin pas non plus le plus bas

possible car il faut quand même, dans des pays comme la France, faire rentrer un peu d'argent dans les caisses. Dans le cas de la France justement, cette politique de baisse du taux d'imposition a commencé à baisser sous Hollande, lorsque l'impôt était à 33,3%, avec l'objectif de le ramener à l'époque à 30%. Puis Macron a poursuivi cette politique de baisse de l'IS dans le but de le ramener à 25%.

**M.E. :** Mais cette baisse d'IS bénéficie davantage aux grandes entreprises. Quand on compare l'impôt payé par un ensemble de PME par rapport à son chiffre d'affaires, le taux d'impôt est largement supérieur au taux d'impôt que payent les multinationales. Selon les dernières estimations, les FTN payent en moyenne entre 8 et 10% d'IS, contre 25 à 30% pour les PME, qui est le taux normal.

Cela est en partie dû au fait que les grandes entreprises bénéficient du bénéfice consolidé. Très peu d'entreprises en bénéficient : c'est un régime fiscal mis en place pour les très grosses structures, notamment celles qui sont cotées. Par exemple, un groupe comme Total qui opère partout dans le monde avec de nombreuses filiales paye seulement 8% d'IS, car il bénéficie de ce régime consolidé.

**A.C. :** C'est surtout le ratio impôts/bénéfices nets d'une société qu'il faut regarder. Des sociétés du CAC vont avoir un taux à 8 ou 10% mais elles ont beaucoup de résultat financier pour lequel elles ne paient pas d'impôt : les plus-values et les dividendes sont exonérées d'impôts. Quand vous prenez l'impôt divisé par le résultat net de ces sociétés et qu'on le compare aux taux d'impôt des PME, c'est assez effarant : ces sociétés du CAC paient en réalité quelque chose comme 3% d'IS. Ça paraît facilement indécent par rapport aux milliards de bénéfices qui sont réalisés.

**Q4** **Depuis quand le phénomène a pris de l'ampleur, et depuis quand l'administration fiscale essaie de s'organiser pour parer à ce genre de pratiques ?**

**A.C. :** L'administration fiscale essaie de s'organiser depuis assez peu de temps. Il y a encore une quinzaine d'année, elle était très peu organisée : la délocalisation des profits n'était même pas vraiment un sujet.

Le phénomène de délocalisation des profits lui-même, c'est-à-dire la localisation de sociétés dans des pays, a débuté lorsque l'économie a commencé à se financiariser, donc je dirais à partir des années 1970/1980. Ce phénomène s'est surtout localisé, comme je vous le disais, dans des pays loin d'être exotiques, comme les Pays-Bas, la Belgique ou encore le Luxembourg.

En particulier, le phénomène de *transfer pricing* a commencé à vraiment jouer lorsqu'il y a le phénomène de la mondialisation, car avant il y avait un très faible nombre d'entreprises qui opéraient dans plusieurs pays.

**M.E. :** Là je vous affiche à l'écran le guide qu'avait établi l'administration fiscale il y a une dizaine d'années. L'administration fiscale s'est organisée pour traquer les transferts de bénéfices entre des sociétés qui se trouvent en France vers les pays vers des sociétés qui se trouvent à l'étranger.

Pour cela, elle a mis en place deux techniques. La première sont les politiques de prix de transfert, qui détaillent les éléments que les entreprises doivent fournir pour justifier leurs prix de transfert. Ces éléments sont bien sûr vérifiés par l'administration lors de contrôles fiscaux.

La deuxième sont les règles qui encadrent tout ce qui est *management fees* et autres redevances. Le problème, c'est que ce sont des choses beaucoup plus dures à contrôler. Les administrations fiscales de plusieurs pays essaient aussi de coopérer entre elles pour déterminer quels sont des ordres de grandeur de montant de *management fees* ou de redevances acceptables, mais ça reste globalement difficile de contrer ce type de transfert de bénéfice.

Alors donc, ils essaient de dormir ? Bah il y a une espèce de convergence ou de de oui enfin de de de d'accord entre les différents États pour que c'est tout tourne autour de GPA X pour 100. Mais c'est vrai que c'est très difficile de contrer ce type de de transfert de de bénéfice.

**A.C. :** Si les activités de transfert de prix sont plus simples à contrôler, c'est par ce qu'elles portent sur de vraies activités de production pour lesquelles un marché existe.

**M.E. :** En effet. Pour rebondir sur le guide que je vous projette, on constate d'abord qu'il date de 2006. C'est le premier guide complet sur le sujet publié par l'administration fiscale, donc on peut décemment dire que ça fait une vingtaine d'années que ce sujet est vraiment sur la table. Ce document donne la démarche de l'administration fiscale.

D'ailleurs, c'est l'administration fiscale qui est bien sûr la plus intéressée par le contrôle de ces pratiques, mais les actionnaires minoritaires le sont aussi car ils peuvent voir leur échapper une partie des dividendes, si le résultat est délocalisé dans des filiales.

On voit tout de suite dans la partie introductive de ce document que l'OCDE est le référentiel de base. L'OCDE apparaît d'ailleurs toujours dans toute la documentation qui existe sur les prix de transfert, car c'est la base utilisée pour avoir des références de prix de marché dans tous les pays développés.

Dans ce document, donc, l'administration fiscale expose les meilleures méthodes pour lutter contre le *transfert pricing*. Parmi ces méthodes, celle qui est la plus la plus pratiquée est celle du prix de marché et des marges comparable.

Par exemple, je suis une filiale d'un groupe japonais médical en France, qui distribue des produits sur le territoire français. En tant que filiale, j'achète des scanners ou des IRM fabriqués au Japon par le groupe, les importe en France et les vends à des clients français, à des hôpitaux et à des cliniques.

J'ai donc un prix d'achat qui vient du Japon déterminé par la société mère. Moi, je revends mes scanners et mes IRM à un prix en France qui est forcément de marché (car sinon je n'arrive pas à les vendre). Le prix de vente est donc de marché, mais le prix d'achat auprès de la société mère lui, souvent, ne l'est pas.

L'administration fiscale examine donc la marge que réalise la société mère la vente de ses scanners et de ses IRM à sa filiale française. Si la marge n'est pas la même que celle de sociétés concurrentes en France qui n'appartiendraient pas à un groupe - et elle s'avère souvent être inférieure - cela sous-entend qu'il y a un sujet sur les prix de transfert. En effet : cela signifie que le prix auquel la filiale achète ses produits à la société mère n'est pas un prix de marché.

**Q5 N'est-il pas compliqué pour l'administration fiscale de trouver des sociétés comparables et indépendantes pour s'assurer du fait que les prix de transfert soient proches des prix de marchés ?**

**A.C. :** Ça dépend de la nature du produit. S'il s'agit d'un produit de grande distribution, c'est facile de comparer. Par exemple, si vous vendez un tel produit 100€ et vous l'achetez à 98€ à la maison mère, alors qu'une autre société vend un produit similaire à 100€ mais l'achète à 60€ auprès de son fournisseur, c'est simple de voir qu'il y a un problème.

En revanche, quand il s'agit de services, c'est bien plus compliqué de faire des comparaisons. Un produit physique, c'est facile de le décomposer entre la main d'œuvre, la distribution et d'autres postes de dépenses. C'est beaucoup plus dur à faire pour une prestation de service. C'est justement pour ça que les entreprises

comme Google ou encore Amazon parviennent à délocaliser une partie importante de leurs profits ; ils n'ont pas de marchandises, mais de la matière grise.

**M.E. :** Pour effectuer ces comparaisons de taux de marge, l'administration dispose de base de données, les mêmes auxquelles nous pouvons avoir accès en tant que praticiens. Par exemple, on se sert souvent de Xerfi qui est très complète, et qui contient un grand nombre d'informations par acteur de chaque secteur qui vous donne par entité les niveaux de marge, d'EBE et d'autres nombreux indicateurs, ainsi que des moyennes sectorielles pour chacun de ces indicateurs.

L'administration a donc bien sûr accès à toutes ces informations, et sait bien s'en servir : ce n'est plus l'administration d'il y a 25, aujourd'hui, elle est dotée et bien formée ! Elle peut donc réaliser des études de comparables, et dire à une entreprise "je vois que vous avez une marge de 5%, mais en France la marge moyenne est de 10% pour ce type de produit, il y a donc 5% qui échappent à l'impôt" pour ensuite lui imposer un redressement.

Mais pour qu'elle puisse justifier ce type de redressement, l'administration fiscale doit clairement expliquer la manière dont les entreprises d'une certaine taille doivent documenter de façon détaillée leur politique du prix de transfert au niveau du groupe. La taille à partir de laquelle les entreprises doivent justifier de leur politique de prix de transfert a, d'ailleurs, été fortement réduite : il y a quelques années, on était à 400 millions d'euros, et on est récemment descendus à 50 millions d'euros.

C'est une politique qui doit donc être déterminée au niveau du groupe dans son ensemble et disponible dans chaque siège social de chaque filiale du groupe dans le monde.

Au cas d'espèce en France, quand vous êtes filiale d'un groupe étranger que vous devez avoir, au siège social de la filiale, la politique de prix de transfert du groupe, généralement écrite en anglais. L'administration fiscale impose de la traduire en français, mais ils le font de moins en moins car maintenant, ils savent parler anglais aux impôts !

Cette politique de prix de transfert doit également être détaillée par zone géographique, parce que le prix de marché, par exemple, d'un stylo à bille, n'est évidemment pas le même en Inde qu'en France.

Les entreprises sont ensuite bien sûr censées appliquer cette politique de prix de transfert, et doit évidemment être traduite comptablement.



**Q6**    **Lorsqu'une FTN définit une politique de prix de transfert pour ses filiales, peut-elle parvenir à justifier des taux de marge différents de ceux du marché ?**

**A.C. :** Cette politique doit évidemment avoir un sens et être proche de la réalité. Une politique de prix de transfert qui parviendrait à justifier un taux de marge de 2% alors que des produits comparables font une marge de 10% ne serait pas acceptable. Cependant, l'administration fiscale n'est pas complètement bornée non plus. Elle peut concevoir que, pour telle ou telle raison justifiée, pour un produit dont le taux de marge est normalement de 10%, une entreprise en particulier ait un taux de marge de 8%. Ça n'est donc jamais complètement binaire, mais il faut que ce soit expliqué et détaillé.

**M.E. :** Je peux maintenant vous montrer un document, avec l'accord de **A.C.**, sous le sceau de la totale confidentialité, qui détaille le résultat d'un contrôle fiscal de l'entreprise XXX sur ce sujet. Il fait 56 pages parce que tout est détaillé, mais je vais revenir sur les parties les plus intéressantes de ce document. Nous sommes experts-comptables de la division française de cette société, par conséquent ce que je vais vous dire est strictement confidentiel et ne sort pas de chez vous.

Ce contrôle n'est pas très vieux, il date de XXX. Il illustre bien toute l'approche de l'administration fiscale.

Dans ce cas, l'administration a épluché tous les comptes de la filiale sur les 5 dernières années. Tout d'abord, ce document détaille les principales informations : les ventes de la filiale sont toujours réalisées auprès de clients tiers du groupe.

Ce contrôle a eu lieu à la suite du fait que la filiale en question réalisait des déficits abyssaux en France depuis de nombreuses années. Au bout d'un moment, l'administration fiscale s'est réveillée et a trouvé ça étrange. La filiale enchaînait les années de déficits, et avait plus de 15 millions d'euros de déficits reportables. Notez qu'on est expert-comptable, donc on les avait bien sûr prévenus depuis longtemps : la filiale savait le risque qu'elle encourait, et notre cabinet n'a été exposé à aucun moment.

**A.C. :** Honnêtement, ils ont été cons. Dans son secteur d'activité, la filiale vendait des produits pour lesquels les marges sont énormes, ce qui a attiré l'attention de l'administration. En plus, ils n'ont même pas été stratégiques : ils auraient pu réduire leurs déficits pour que ça se voit moins.

**M.E.** : Comme vous voyez sur cette page, ils sont allés jusqu'à acheter à la maison mère de sorte qu'ils avaient un taux de marge négatif. Là, pour l'administration fiscale, c'est bingo.

L'administration fiscale a mis en œuvre toute la théorie et détaille tout : elle compare chaque marge avec les marges sectorielles, et examine également les actions de la filiale qui souhaitait par exemple justifier son déficit par une volonté de se recapitaliser.

**A.C.** : Vous avez donc un cas concret d'une position de l'administration fiscale sur une délocalisation de profits. Cela montre qu'il y a beaucoup de délocalisation de profits, mais qu'à un moment, la patrouille finit par rattraper. En général, dans ce genre de situation, le rattrapage se fait sur 3 ans. Cela veut dire que si vous avez fait ça pendant 10 ans, vous avez gagné 7 ans.

**M.E.** : Alors oui **A.C.**, vous avez raison, mais dans mon cas d'espèce, la reprise se fait sur plus de 3 ans, parce que la spécificité de la France est que la prescription fiscale au-delà de 3 ans ne s'applique pas lorsque vous êtes fiscalement en position déficitaire. Dans ce cas, le redressement remonte jusqu'à l'origine des déficits. La société était structurellement déficitaire depuis 8 ans, donc ils sont remontés jusqu'à 8 ans.

**Q7**     **Comment se fait-il que cette société n'ait pas fait preuve davantage de prudence ? Il aurait été simple de faire en sorte de ne pas être structurellement déficitaire sur une telle période pour éviter un redressement sur plus de 3 ans ?**

**A.C.** : Oui en effet, c'est une connerie de leur part. Ils auraient dû tous les trois ans déclarer un bénéfice pour tout redémarrer. Après, c'est vrai que lors de leur contrôle, il n'y avait pas eu beaucoup de précédents, ils n'étaient donc pas particulièrement vigilants.

**M.E.** : Oui, moi c'était mon premier contrôle de ce type. C'est vers cette période que l'administration fiscale a commencé à taper. L'entreprise avait accumulé 15 millions de déficits reportables, mais l'administration voulait redresser sur 30 millions ce qui voulait dire qu'elle considérait l'entreprise comme bénéficiaire et non déficitaire. Le groupe s'est défendu avec des avocats pour limiter le redressement, et l'administration fiscale a accepté en conséquence d'annuler le redressement sur le déficit de cette société, qui n'a donc plus porté que sur 10 millions d'euros. Et, depuis ce redressement, la filiale en question est bénéficiaire chaque année.

Alors, ça n'était pas une très grosse division en France, elle réalise quelque chose comme 30 millions de chiffre d'affaires, et elle déclare maintenant chaque année

quelque chose comme 200 000 ou 300 000 euros de bénéfices, bénéfices sur lesquels elle paie bien sûr l'IS.

**A.C. :** Donc ça, c'est vraiment un cas pratique qui illustre parfaitement ce qu'on racontait avant. Cela étant, il faut vraiment que ça reste anonyme, parce qu'on est un peu limites de notre côté. Mais on tenait à vous donner un exemple pour que vous puissiez voir comment, en pratique, ce que l'administration fiscale met en place pour lutter contre la délocalisation des profits.

**M.E. :** Alors, je vais vous montrer un autre document qui est, lui aussi, hyper confidentiel, qui détaille la politique de prix de transfert d'une FTN au niveau du groupe, rédigée en anglais. Comme ça, vous avez un volet concret en deux phases : une phase amont avec la stratégie du prix de transfert, et une phase aval avec ce que ça donne au niveau d'un contrôle. Ce document illustre bien la manière dont est construite une politique de prix de transfert, avec toutes les comparaisons de marges en fonction des moyennes sectorielles des marges par pays, en faisant toujours référence à l'OCDE.

**Q8** **Il existe d'autres techniques de délocalisation des profits sur lesquelles j'ai pu me renseigner en lisant des articles académiques, comme celle utilisant les *management fees*. Pouvez-vous m'en parler ?**

**M.E. :** Alors oui, mais sur le sujet des *management fees*, j'ai moins de documentation, mais j'ai une expérience dont je peux vous faire profiter. Il s'agissait d'un groupe asiatique, qui avait une holding en France avec des sous-filiales. C'était donc un sous-groupe européen qui facturait des *managements fees* à tous les pays européens : l'Allemagne, la République Tchèque, la Hongrie, etc. L'administration fiscale, dans le cadre d'un contrôle, est venue contester cette pratique, car elle contestait la méthode de calcul des *management fees*.

La société en question n'utilisait en effet pas de clef de répartition classique, c'est-à-dire qu'elle ne refacturait pas aux filiales des *management fees* au prorata du chiffre d'affaires qu'elles réalisaient. Elle se servait d'une clef de répartition subjectif, en prenant un pourcentage du chiffre d'affaires des filiales sans lien avec leur taille. Cela créait une incohérence au niveau de la facturation, car les *management fees* étaient en réalité inférieures aux coûts supportés par la holding.

**A.C. :** En fait, une politique de *management fees* va souvent passer par un taux appliqué au chiffre d'affaires de chacune des filiales par rapport au global du groupe. La base est de partir des coûts de la holding, comme par exemple la direction financière, la direction commerciale, la direction informatique, la direction juridiques, et d'autres

fonctions supports : si on estime que, par exemple, tout cela coûte 20 millions, on répartit ces coûts à toutes les filiales par ce qu'elles en bénéficient.

Mais en plus de ce coût, la holding prend un petit plus, qu'on appelle un *cost-plus*, pour par exemple dire « ça coûte 100 euros, mais je vous en facture 105 euros ». Et tout cela ne pose pas de problème au niveau de l'administration fiscale. En revanche, quand la holding applique un taux forfaitaire qui tombe du ciel à 3% alors que je devrais être à 5%, ça pose un problème. Si je fais remonter tous mes résultats fiscaux vers le haut et que je ne suis pas en intégration fiscale, l'administration peut contester cette pratique.

Dans le cas dont parle M.E., la holding française s'appauvrissait volontairement : elle facturait moins que ce qu'elle devait facturer pour rapatrier moins de profits en France et réduire son assiette taxable. L'exemple qu'a connu M.E. est un peu l'inverse de la délocalisation des profits, vu qu'en général on va surtout évoquer le cas de holdings dans des juridictions fiscalement douces qui facturent, elles, trop de *management fees*.

**M.E. :** Concernant les *management fees* toujours, une nouvelle pratique que l'on voit de plus en plus souvent est la facturation de *management fees* par les *holdings* sur la base non pas du chiffre d'affaires des filiales mais de ce qu'on appelle des *time sheets*. Ce sont souvent les avocats qui incitent à mettre ça en place, et j'ai ce cas avec une *holding* française.

C'est-à-dire que toutes les personnes qu'on considère comme faisant partie du management ont des *time sheets* définies par avance : c'est conventionné dans le cadre de conventions intragroupe. Et on va dire, par exemple, que tel directeur financier passe 30% de son temps sur telle filiale, et tel directeur commerciale passe 25% de son temps sur telle autre filiale. Par ce mécanisme, une la holding française dont je parle peut se retrouver fiscalement déficitaire en exploitation, ce qui n'est pas naturel pour une holding : une holding en exploitation doit être à 0 plus, elle est censée au moins refacturer ses coûts.

**Q9** Comme autre technique importante sur laquelle j'ai eu l'occasion de me renseigner, il y a la délocalisation de profit via le paiement de *royalties*. Avez-vous eu des clients ayant recours à ce genre de procédé ?

**A.C. :** Après, le dernier thème, c'est tout ce qui va être redevances de marque ou *royalties*. C'est relativement simple : une maison mère va dire à ses filiales « vous utilisez nos produits, il a fallu qu'on les développe, qu'on entretienne sa notoriété, qu'on fasse de

la R&D sur un tas de produits, donc on va vous facturer une redevance de marque qui va être équivalente en général à entre 4 et 7% de votre CA. »

On voit bien que si on met le curseur à 1 ou 2%, ce n'est pas énorme, mais que si on le met à 8%, là évidemment ça devient significatif : plus vous le mettez haut, plus vous faites remonter le bénéfice à l'étranger et vous réduisez votre base fiscale en France.

Alors, pour ce cas-là, je me rappelle d'une mission où des avocats de EY avaient cités des bases de référence de brevets. Sur cette base, vous avez les taux de redevance qui s'appliquent dans tel ou tel secteur d'activité. L'administration peut s'en servir et dire par exemple « Chanel facture 5% pour sa marque, vous vous vendez des trucs moins sexy que Chanel, vous ne pouvez pas prendre 10% alors que Chanel n'en prend que 5. »

**Q10** Mais dans ce cas, il faut estimer la valeur de la marque pour pouvoir se servir de ce référentiel. N'est-ce pas trop complexe ?

**A.C. :** Oui, ce n'est pas évident. Quand on regarde le résultat final d'une entreprise, on va vous dire que le REX ou l'EBITDA rémunère plusieurs actifs de la société : la marque, l'IT ou encore l'outil industriel. Mais après, comment peut-on réussir à bien partager tout ça ? Ce n'est pas simple, ça se fait de manière un peu approximative : chacun fait sa tambouille.

**M.E. :** La base de données avec un référentiel de taux de redevance de brevets dont tu parlais, c'est Royalty Source.

**A.C. :** Alors après, vous avez aussi dans les entreprises qui se servent des redevances de propriété intellectuelle. C'est une manière pour elles d'économiser beaucoup d'argent, car si on prend de manière générale tout ce qui est propriété intellectuelle, comme un brevet, c'est protégé pendant 20 ans en France, et il me semble que c'est pareil à l'étranger.

Par exemple, vous êtes une société mère qui a développé une propriété intellectuelle en la finançant avec vos profits, vous allez donc facturer cette licence à toutes vos filiales à un taux qui n'est pas simple à déterminer. La règle est de faire un calcul un peu à l'envers, où on estime le chiffre d'affaires que le brevet va me rapporter, sous forme d'une courbe concave classique. Cette courbe est donc étalée sur une période de 20 ans, et à chaque niveau de chiffres d'affaires, vous pouvez déduire le revenu, et donc le profit résultant de votre découverte de brevet : grâce à cela, vous pouvez déterminer le taux auquel facturer vos filiales.

Ça me rappelle une autre mission que j'ai faite y'a quelques années : une grosse société transférait d'énormes montant de profit par le biais des redevances. Ils sont parvenus à transférer presque 600 millions d'euros via les redevances de propriété intellectuelle.

**Q11** Dans quelle mesure, pour revenir à un niveau plus macro, pensez-vous que ce phénomène de délocalisation des profits est important ? Les Etats perdent-ils un montant significatif de recettes fiscales ?

**A.C.** : Oui, clairement. C'est très dur à chiffrer, je crois que personne n'est parvenu à sérieusement le chiffrer.

**M.E.** : Moi je pense aussi ce c'est important, je suis d'accord avec **A.C.**

**A.C.** : Vous savez, pour que les Américains y accordent autant d'importance, c'est forcément important. Et les Américains, on peut difficilement les taxer de bureaucrates, ce sont plutôt des libéraux. Pour que J. Biden dise : « il faut qu'on taxe ces sociétés à l'étranger, elles ne paient pas assez d'impôts », c'est certes pour financer d'importants déficits et ses plans de relances, mais c'est aussi par ce qu'il y a un réel manque à gagner à cause de ce phénomène de délocalisation des profits.

D. Trump a aussi voulu traiter le problème mais d'une autre manière : quand il est arrivé au pouvoir, il a proposé aux sociétés américaines qui avaient toute leur trésorerie dans les Îles Caïmans, en Irlande ou je-ne-sais-où de rapatrier trésorerie, je vous fais payer un taux d'impôt très faible, de l'ordre de 10% si je me souviens bien. Par conséquent, beaucoup d'entreprises ont rapatrié leur trésorerie, qui était en fait composée des bénéfices que ces sociétés avaient accumulés dans ces pays-là, et que ces sociétés ne voulaient pas rapatrier pour ne pas être imposées dessus.

Donc, pour moi, c'est définitivement un gros sujet. C'est bien pour ça que tout le monde s'excite dessus, et l'administration fiscale en premier chef : il n'y a pas de fumée sans feu.

Et c'est assez insoluble si on revient sur l'Union Européenne, puisqu'on ne peut pas faire de budget commun et donc de politique fiscale commune. Des pays comme l'Irlande, Malte, Chypre ou le Luxembourg se plaindraient car leurs taux bas leur permettent d'attirer plein de sociétés et de se faire beaucoup d'argent.

**M.E.** : Il faut en plus souligner que, même si l'administration fiscale s'est améliorée et est plus agressive, elle n'a pas forcément le souhait d'aller systématiquement au conflit.

En effet, les grosses sociétés qui délocalisent leurs profits ont beaucoup de moyens juridiques, peuvent négocier longtemps et faire traîner les démarches administratives pendant des années.

**A.C. :** En effet : lorsque ces grosses sociétés subissent des contrôles fiscaux, elles ont recours aux plus grands avocats de la place. Et l'administration fiscale en face, ils ont peut-être de bons éléments, mais ils ne sont pas totalement sereins, donc ils préfèrent dire « vous avez mis le doigt dans le pot de confiture, on vous a pris en flagrant délit, donc on fait un deal ». C'est pour ça que ça se termine souvent en transaction avec des redressements moins importants que prévu, comme dans l'exemple dont je vous parlais tout à l'heure [le cas du *transfer pricing*]. Surtout que ces grands avocats, ce sont des mecs qui ne sont spécialisés que là-dedans : ce sont même les références de l'administration fiscale, ce sont les mêmes qui sont chez nos amis Francis Lefebvre [les éditions] dont se sert l'administration fiscale. Donc, très souvent, l'administration préfère transiger, dire aux fautifs de se mettre au carré pour le futur et de les redresser plus modestement.

**M.E. :** Quelque part, l'administration fiscale gagne aussi de l'argent à faire ça : elle perd moins de temps, économise des moyens humains, encaisse des montants plus faibles mais plus rapidement, et peut aller plus vite contrôler d'autres sociétés. C'est inefficace pour elle que les contrôles durent des années, c'est une question d'arbitrage.

**Je vous remercie vivement pour votre disponibilité et notre échange.**

## **Appendix 5: Interview with V.M., a chartered accountant and statutory auditor partner in a big four audit firm**

*Communication method: Teams interview*

*Length: 1 hour and 15 minutes*

Bonjour **V.M.**, je vous remercie de bien vouloir répondre à ces questions à propos de la délocalisation des profits. Cet entretien est confidentiel et sera utilisé dans le cadre de la phase empirique de mon mémoire de master à propos du sujet suivant : Quelle est l'étendue du phénomène de délocalisation des profits, et quelles difficultés les FTN rencontrent-elles pour délocaliser leurs profits ? L'entretien sera structuré comme suit : dans un premier temps, une introduction vous laissera l'opportunité de vous présenter et de donner votre conception de ce en quoi consiste la délocalisation des profits. Ensuite, nous naviguerons à travers différentes questions ayant trait à i) l'étendue du phénomène de délocalisation des profits, ii) la tendance de ce phénomène, iii) les techniques utilisées par les FTN pour délocaliser leurs profits, et enfin, iv) les coûts et bénéfices de la lutte contre la délocalisation des profits pour les gouvernements et la couverture de ce phénomène dans les médias.

**Q1** Pouvez-vous présenter brièvement votre parcours professionnel et académique ?

**V.M.** : J'ai fait l'ESSEC et en suis sorti au milieu des années 1980. J'ai ensuite commencé ma carrière chez Arthur Andersen, avant de rejoindre EY en 2002 en tant qu'associé.

Je suis expert-comptable et commissaire aux comptes depuis 1995, essentiellement de sociétés françaises cotées ou non cotées. J'interviens aussi sur beaucoup de transactions.

**Q2** Comment définiriez-vous la délocalisation des profits et son utilité pour les FTN ?

**V.M.** : En réalité, si on prend le concept de profit de façon neutre, la délocalisation des profits n'existe pas. Les profits sont simplement localisés là où ils sont réalisés.

Cela étant, ce phénomène existe et ce pour des raisons business évidentes et fait partie des techniques classiques d'optimisation fiscale. Cependant, ces techniques sont de moins en moins répandues, car les réglementations dans ce domaine se sont renforcées ces dernières années, mais nous y reviendrons après.



Le concept de délocalisation des profits pose un problème de définition, car il concerne les FTN. Mais qu'est-ce qu'une FTN ? Il faut arriver à les classer entre. Est-ce que ce sont des firmes qui exportent leurs biens ou leurs services et qui ne font que les exporter, ou est-ce que ce sont des firmes qui ont localisé leur zone de production dans des pays où se trouvent leurs clients ? Ce sont deux choses différentes.

Par exemple, j'ai bien connu le groupe XXX qui fait des équipements électriques et qui a une très grosse activité en Chine. Au début de son activité en Chine il y a 40 ans, ce groupe exportait ses produits qui étaient fabriqués en Europe avant de les envoyer en Chine. Puis le marché chinois est devenu un de ses premiers grands marchés : il n'était plus question d'envoyer des bateaux de d'équipements électriques, il fallait installer des usines sur place. Ainsi, dans cette situation, il n'est bien sûr pas question de délocalisation de profits.

Cela étant, il peut bien sûr y avoir des problématiques de prix de transfert.

Dans le cas le plus simple, lorsqu'on est simple exportateur, il n'y a pas de délocalisations de profits puisque on envoie la marchandise à l'étranger : celle-ci est directement taxée par exemple en France.

Les prix de transfert peuvent s'établir lorsque, par exemple, vous commencez à établir une filiale à l'étranger qui va être taxée localement à laquelle vous vendez des produits. La filiale locale n'a qu'un simple rôle de commercialisation, et ne doit que constituer un réseau de vente pour aller chercher des clients et être source de commandes pour, par exemple, la France. La délocalisation des profits s'opère donc sur la valeur ajoutée des filiales sur leur partie commerciale.

On peut envisager un second moyen de délocalisation des profits, via le transfert de technologie ou du transfert d'une partie des produits qui sont dans certains assemblages. Ces produits peuvent être par exemple être faits en France parce que la technologie est française, mais leur finition peut se faire dans des usines locales. Se pose alors la question du prix auquel le produit est transféré, et du taux de marge utilisé pour transférer le produit.

**Q3**    **Donc certaines FTN peuvent volontairement localiser des profits dans certaines filiales via les prix de transfert, profits que ces filiales ne devraient "en principe" pas dégager ?**

**V.M. :** Oui effectivement, elles le font car c'est utile en termes d'optimisation fiscale. Après, il faut bien se rendre compte qu'elle a tendance à régresser avec le temps, notamment parce que les taux d'impôts qui, il y a 30 ans en France, était à 50%, sont en train

d'arriver vers les 25% : on arrive donc à des taux qui sont assez comparables à ceux de beaucoup d'autres pays. Les FTN ont donc moins d'intérêt sur le plan fiscal à jouer sur la délocalisation des profits.

Il faut aussi noter qu'il est utile de localiser les profits pour des raisons autres que fiscales. Par exemple, des entités locales qui ont des usines peuvent avoir besoin de moyens pour investir ou pour maintenir leur appareil de production. Cela est particulièrement vrai dans des marchés tels que le marché chinois : il faut en permanence se développer et adapter ses outils de production.

**Q4 Mais la localisation de profits est-elle plus souvent effectuée dans le but d'obtenir un avantage fiscal que dans le but de donner les moyens à des filiales d'investir ou de maintenir leur appareil de production ?**

**V.M. :** Je ne dirais pas ça. La motivation fiscale de la localisation des profits est régulièrement rappelée dans la presse mais il s'agit surtout, pour moi, d'un épiphénomène. La presse évoque ces sujets comme si c'était un problème majeur. Il est vrai que cela peut sembler important en termes de montant, notamment lorsque sont évoquées certaines firmes, surtout américaines, qui vont aller se localiser en Irlande ou au Luxembourg et qui ensuite, ensuite vont ensuite organiser une localisation de certains profits dans des environnements fiscaux peu imposables ou en tout cas avec des taux d'imposition faibles.

Par exemple, si vous localisez toutes vos activités en Irlande, notamment pour tout le "monde de l'Internet" qui par définition est virtuel, vous pouvez dire que toute l'activité est basée en Irlande et que, par conséquent, tous les résultats y seront taxés à hauteur de 10%.

**Q5 Vous parlez "d'épiphénomène" et mentionnez en exemple les entreprises américaines qui délocalisent leurs profits dans des pays comme l'Irlande. Pour vous, la délocalisation des profits n'est-elle pratiquée que par une minorité de FTN, ou est-ce une pratique répandue parmi les FTN comme les unes de la presse le laisse entendre ?**

**V.M. :** Je ne suis pas sûr que ça soit un phénomène important, surtout quand on voit les réactions par rapport à ça, en France. Certes, le gouvernement réagit à bon droit pour taxer les entreprises qui délocalisent leurs profits, comme en imposant la Taxe GAFA aux géants du numérique américain, et annonce "cocorico, on va récupérer quelque chose comme 800 millions d'euros". Mais le phénomène n'est pas majeur, et ce n'est même pas à la hauteur de ce phénomène : 800 millions d'euros est un montant

probablement ridicule par rapport à tous les profits qui sont délocalisés. Le résultat de telles mesures est assez dérisoire et on fait rigoler tout le monde, en particulier les Etats-Unis.

**Q6** Si je comprends bien, vous sous-entendez que le phénomène n'est pas très important, mais que les gouvernements, par exemple la France, mettent en place des mesures qui ne permet de récupérer qu'une part très faible des recettes fiscales perdues. Ces recettes fiscales que les gouvernements n'ont pas pu récupérer, pensez-vous qu'elles soient significatives, par exemple dans le cas de la France par rapport au budget des administrations publiques ?

**V.M.** : A l'échelle d'une entreprise, ces pertes peuvent être importantes. A l'échelle d'un pays comme la France, ce n'est pas évident, j'aurais du mal à dire si ces pertes sont significatives. Le problème, c'est que quand ce sujet est évoqué dans la presse, on a tout de suite l'impression que c'est énorme. En France, dès qu'on parle de plus d'un million d'euros dans les journaux, c'est majeur. Quand on parle d'un milliard au niveau de l'État parle d'un milliard, c'est un fait majeur. Or, quand on a un budget de l'État qui fait 2000 milliards, un milliard ce n'est rien, et un million d'euros encore moins.

Après, il est vrai que le phénomène existe, et je pense que malgré l'incertitude sur l'importance du sujet, il est posé à bon droit.

**Q7** Nous avons parlé de l'Irlande. Quelles sont d'après vous les autres juridictions les plus favorables en termes de taxation vers lesquels les entreprises vont délocaliser leurs profits ?

**V.M.** : En Europe, il s'agit principalement de l'Irlande et du Luxembourg. Mais il y a également d'autres pays vers lesquels des FTN peuvent délocaliser leurs profits qui ont une fiscalité favorable, comme par exemple Gibraltar ou Malte. Cependant, j'ai personnellement peu de clients qui délocalisent leurs profits, je n'ai donc pas beaucoup d'exemples.

J'ai eu par le passé des clients qui installaient des activités en Irlande. Le problème avec l'Irlande, c'est que c'est un pays plutôt éloigné de l'Europe, et c'est aussi un petit pays qui n'est pas un centre de consommation. Par conséquent, il n'a jamais été très judicieux d'installer des industries en Irlande, ce qui limite les secteurs dans lesquels des entreprises peuvent délocaliser leurs profits.

**Q8** Ces juridictions mènent-elles des actions pour attirer volontairement des entreprises sur leur territoire ?

**V.M.** : Oui, des pays comme l'Irlande dont nous parlons mènent ce genre d'actions pour attirer des entreprises et donc de l'emploi. Il est évident qu'un taux d'imposition réduit attire l'activité.

Après, c'est quelque chose qui se justifie. L'Irlande le fait pour attirer de l'activité dans une zone géographique qui n'est pas très favorable, excentrée de l'Europe et qui n'est pas un bassin de consommation. Avoir un taux d'imposition plus faible que les autres pays européens se comprend sur ce point, ce n'est pas forcément injuste.

Cela existe aussi dans certaines zones géographiques, comme par exemple en France où on retrouve des zones franches dans lesquelles on essaie d'attirer des entreprises avec des taux d'imposition locaux à 0 ou proches de 0, et cela se justifie parce que ces zones sont difficiles d'accès et ont peu d'atouts géographiques.

Donc, quelque part, l'aménagement du territoire, y compris à l'échelle européenne, peut passer par l'impôt qui sert à flécher l'activité économique dans les zones plus défavorisées.

Après bien sûr, toute la question est l'exagération : à partir de quel seuil va-t-on considérer qu'un impôt réduit ne se justifie plus par la compensation de certains désavantages structurels ou géographiques et devient abusif.

Par rapport à cette considération d'exagération, le problème des GAFA ne se pose pas seulement vis-à-vis de l'Europe mais ce sont vis-à-vis aussi des États Unis. Ces entreprises retirent également de la base taxable à leur pays d'origine.

En effet, contrairement à ce qu'on pense en Europe, les pays d'Amérique du Nord ne sont pas des pays à fiscalité particulièrement douce. On a encore plus cette image faussée depuis que Trump a réduit le taux d'impôt à presque 20%. On a cette image faussée car on oublie souvent qu'il y a, en plus de l'impôt fédéral [celui qui a été baissé par l'administration Trump] un impôt par Etat. Quand on additionne les 2, on est souvent au-dessus du taux d'impôt français, qui était de 33% avant le gouvernement Macron et qui va être progressivement ramené à 28%.

Aujourd'hui, aux États-Unis, on est à un impôt fédéral de 20%, auquel il faut ajouter un taux local qui varie de 5 à 10% par Etat. Donc on peut se retrouver imposé à 30% aux USA, ce qui est supérieur aux taux français.

**Q9**      **Quand pensez-vous que le phénomène de délocalisation des profits a émergé ?**

**V.M.** : Je dirais que ce phénomène a existé depuis la fin de la Seconde Guerre mondiale, mais qu'il s'est accentué au fur et à mesure de l'internationalisation de l'économie et de la mondialisation, et en particulier avec l'ouverture des marchés asiatiques à partir du milieu des années 1990.

Cependant, je dirais que ce phénomène a tendance dans certains pays à décroître depuis les années 2000, comme je le mentionnais avant. Cela est dû à une baisse d'impôt opérée par plusieurs pays occidentaux. Par exemple, le taux d'imposition en France dans les années 1990 était à presque 50%, soit quasiment un des plus importants du monde, mais il a commencé à être progressivement réduit dans les années 2000. Ainsi, il était beaucoup plus intéressant à cette période passée pour les FTN de délocaliser leurs profits.

Avec l'évolution de l'économie en général et des budgets des États, la France n'est pas la seule à s'être intéressée aux prix de transfert. Tous les pays ont édicté des règles pour que les sociétés justifient l'adéquation de leur prix de transfert avec les règles fiscales et la réalité économique de leurs transactions.

De manière générale, ce que les administrations fiscales essaient de faire, c'est de demander aux sociétés de justifier leur taux de marge (par exemple 10% de marge) lorsqu'elles produisent un produit dans une usine pour ensuite la vendre dans un pays étranger à travers une filiale. Chaque pays a édicté des règles dans ces domaines là et a demandé aux sociétés de documenter et de justifier leur règle de répartition des marges par pays.

Ce sont des sujets qui très prégnants au sein de nombreuses sociétés maintenant parce que toutes doivent s'y conformer et que toutes ne sont pas arrivées au bout de ce travail de mise en conformité.

Un des principaux problèmes au niveau des requis des administrations fiscales concernant le prix de transfert est la variété des taux de marge des prix de transfert acceptés selon les pays. Des pays peuvent accepter des niveaux de taux de marge plus bas que d'autres. Ainsi, des pays peuvent être en désaccord à propos de prix de transfert pratiqués par des FTN opérant sur leurs territoires respectifs.

**Q10** Pensez-vous que ces politiques des administrations fiscales de nombreux pays portant une attention accrue aux politiques de prix de transfert des FTN ont été efficaces et ont permis de réduire le montant des profits délocalisés ?

**V.M. :** Oui, définitivement. Les administrations fiscales ont énormément progressé depuis une quinzaine d'années sur le sujet. Ce-dernier revient régulièrement et est au centre de leur attention.

Dans le cas de la France par exemple, l'administration fiscale a sensiblement progressé, au niveau de la qualité de leurs processus, de leur recrutement, des outils qu'elle déploie et, plus globalement, des moyens dont elle dispose. Par exemple, au niveau des outils, l'administration fiscale a accès à de nombreuses bases de données qualitatives qui lui permet de faire des benchmarks pour juger si les prix de transfert pratiqués par certaines entreprises sont abusifs, ce qui n'était pas ou moins le cas au début des années 2000.

Aussi, avec la digitalisation, la majorité des entreprises sont pratiquement à livre ouvert avec l'administration fiscale : il est plus difficile pour les FTN d'être opaque au niveau comptable avec l'administration fiscale.

**Q11 En dehors des prix de transfert, quelles sont pour vous les principales pratiques des FTN leur permettant de délocaliser les profits ?**

**V.M. :** Oui, on peut évoquer par exemple les pratiques qui s'articulent autour des actifs incorporels, par exemple les redevances de marque ou encore les *management fees*, c'est-à-dire des frais d'organisation et de gestion qui peuvent être facturés de la maison mère à des filiales étrangères. A noter cependant que, pour cette dernière pratique, ces pratiques ne sont pas forcément acceptées par les managements des filiales auxquelles les *management fees* sont facturées, car cela ampute leurs profits et peut dégrader leur position au du groupe.

Mais là aussi, des pratiques comme la facturation de *management fees* ne sont pas forcément injustifiées. Par exemple, une maison mère peut centraliser certaines activités, comme la comptabilité, ou encore les activités ayant trait à la stratégie du groupe ou encore à la politique marketing. Ces activités peuvent ensuite être logiquement facturées aux filiales du groupe car ces-dernières en bénéficient.

Donc c'est, tout comme les prix de transfert dont je parlais tout à l'heure, une question de degré de justification. Cela peut-être une façon de délocaliser de manière injustifiée du profit lorsque c'est « exagéré ».

**Q12 A quel point est-ce difficile pour une FTN de délocaliser ses profits ? Les pratiques dont vous parlez sont-elles coûteuses et/ou complexes à mettre en place ?**

**V.M.** : Oui, la mise en œuvre de ces pratiques représente un certain coût. Elles sont surtout contingentes à un fort développement à l'international : une FTN ne peut avoir de telles pratiques que lorsqu'elle est bien implantée à l'étranger. Elles ont bien sûr un calcul bénéfices/coûts ou bénéfices/risques à effectuer lorsqu'elles se lancent dans de telles pratiques.

**Q12 Quel ordre de grandeur donneriez-vous en termes de chiffre d'affaires ou de nombre de salariés à partir duquel ce genre d'activité devient envisageable ?**

**V.M.** : Je dirais que lorsqu'on est en-dessous de 150 millions d'euros de chiffres d'affaires pour une FTN, qui serait donc également une ETI, le coût de délocaliser les profits serait supérieurs aux bénéfices que cela pourrait apporter. Globalement, délocaliser des profits, peu importe la technique, demande une très bonne organisation, ainsi qu'une capacité de documentation importante pour camoufler des prix de transfert ne respectant pas les taux de marge imposés pour se conformer aux obligations des différentes administrations fiscales.

De plus, il est nécessaire de localiser les profits au bon endroit : il faut localiser son activité dans les juridictions qui sont intéressantes fiscalement parlant, et n'est pas forcément évident de localiser une activité de manière totalement ad-hoc juste pour délocaliser des profits. Souvent, les filiales par lesquelles les profits de FTN est délocalisé réalisent tout de même une vraie activité économique derrière.

Ainsi, certaines entreprises organisées avec de base beaucoup d'activité à l'étranger peuvent délocaliser leurs profits même en réalisant un chiffre d'affaires inférieur à la barre que j'évoquais. Par exemple, je connais une société française qui fait 50 millions de chiffre d'affaires dans les services maritimes, mais qui a des activités à 80% hors de France à Singapour, en Arabie Saoudite ou encore en Angola, et qui a donc une structure lui permettant de potentiellement délocaliser ses profits.

**Q13 Pour revenir à la popularité de ce phénomène, dans quelle mesure pensez-vous que l'attention portée à ce phénomène par les médias et les gouvernements des pays occidentaux est-elle justifiée ? Si elle ne l'est pas, quels intérêts auraient les États à attirer de manière injustifiée l'attention sur ce phénomène et à mettre en œuvre des politiques fiscales coûteuses pour l'administration ?**

**V.M.** : Pour moi, toute cette attention n'est pas justifiée. Il y a un intérêt bien sûr politique pour les Etats à mettre une telle focale sur le sujet, que suivent les médias. Cela rejoint le marronnier de la fraude : on dit soi-disant que la fraude fiscale coûterait plus de 100 milliards par an à la France, et que si on parvenait à totalement la prévenir, on pourrait

construire des hôpitaux, des écoles et d'autres infrastructures utiles. Mais cette estimation de 100 milliards, même si elle a été reprise par des politiques comme J.L. Mélenchon ou des économistes comme T. Piketty qui dit que « tout le monde fraude », n'a jamais été prouvée. C'est vraiment une approximation qui peut être totalement fausse.

Aujourd'hui, l'administration fiscale qui est devenue très efficace : elle a récolté presque 8 milliards d'euros l'année dernière. Difficile d'imaginer qu'il serait possible de récolter 10 fois plus à cause d'une fraude qui serait soi-disant massive.

L'administration fiscale peut elle-même devenir un peu trop agressive à cause de cette pression politique. Pour revenir sur les prix de transfert, des FTN qui se retrouvent à opérer dans des pays dont les administrations fiscales ne sont pas d'accord sur les taux de marge à respecter peuvent se retrouver taxés 2 fois.

Par exemple, une entreprise française vend un produit à une filiale hollandaise à 100 euros alors qu'il en vaut 150 (pour qu'il soit ensuite vendu sur le marché hollandais). L'État français fait remarquer que, pour lui, le taux de marge moyen pour ce produit sur le marché est de 25% et qu'il ne devrait donc pas être vendu à moins de 120 à la filiale ( $150/120 = 25\%$  de marge). L'État français taxe donc l'entreprise de 20 euros ( $120-20=100$ ). Du côté des Pays-Bas, l'État hollandais estime lui que le taux de marge pour un produit équivalent est de 10%, et ne devrait donc pas être vendu à moins de 136 euros ( $150/136 = 10\%$  de marge). Par conséquent, l'État hollandais taxe l'entreprise de 26 euros ( $136-36 = 100$ ). La FTN se retrouve taxée deux fois sur 20 euros pour son produit (par la France et les Pays-Bas) car les administrations fiscales ne sont pas d'accord entre elles.

Cette agressivité des administrations fiscales est simplement dû au fait que, souvent, les Etats ont simplement besoin d'argent. Ce n'est pas nouveau, c'est comme ça depuis le Moyen-Âge, voire probablement depuis l'empire Romain.

Et ces sujets de prix de transfert sont compliqués à gérer pour les FTN. On le voit souvent chez nos clients : la justification des prix, même pour les entreprises qui se qui sont les plus sérieuses, est toujours complexe. Ces clients ont souvent des discussions assez difficiles avec l'administration fiscale qui a sa propre approche, alors qu'ils essaient de respecter aussi bien que possible les règles.

**Q14** Trouvez-vous les actions de l'administration fiscale, malgré cette « agressivité » que vous mentionnez, tout de même justes ?



**V.M.** : Oui, je suis pour une certaine justice fiscale. Il me paraît normal d'appliquer les règles fiscales telles qu'elles sont édictées, et de combattre les mauvaises pratiques politiquement et par la loi.

Après, vous n'empêcherez jamais les entreprises d'optimiser leur fiscalité, ce qui ne veut évidemment pas dire frauder. Optimiser, ça veut dire justement se servir au mieux des lois existantes, et s'il y a des trous dans la raquette, c'est aux États de les combler.

On ne peut pas reprocher aux entreprises d'avoir utilisé des réglementations qui étaient très différentes. Par exemple, il y a une vingtaine entre la France et la Belgique, certains éléments n'étaient pas taxés ni en France ni en Belgique, ce qui permettait aux FTN opérant dans ces pays de gagner sur les deux tableaux. Mais c'est pour moi davantage la responsabilité des États que des entreprises qui bénéficiaient de ce système de faire en sorte que tout soit justement taxé.

Après, des entreprises mettant en œuvre des schémas de financement dans l'objectif clair de réduire sa base taxable méritent d'être sanctionnées, mais ça se fait de moins en moins. C'est aujourd'hui surtout autour des montages autour du *private equity* et des opérations de LBO où l'optimisation de la fiscalité fait partie des éléments importants de la rentabilité d'opérations largement financées par la dette. Mais là aussi, les États ont progressivement trouvé des parades en rendant plus difficile le fait de déduire certains types d'intérêt de la base taxable issus des endettements des entreprises.

Et il y a bien sûr des entreprises qui doivent payer plus d'impôts. On évoquait les GAFA : bien sûr que ces montages financiers passant par l'Irlande leur permettant d'économiser beaucoup d'impôts en délocalisant leurs profits sont abusifs. Ce qui est d'autant plus compliqué avec les GAFA et les entreprises des secteurs des nouvelles technologies qui optimisent leur fiscalité, c'est qu'il s'agit d'un modèle totalement nouveau, et l'administration fiscale est parfois un peu « comme une poule devant un couteau » en face de ces *business models* et de la manière dont il faudrait les taxer. Et puisque les GAFA font aussi beaucoup parler d'eux pour d'autres sujets, leurs pratiques dont la délocalisation des profits font l'objet d'un coût de projecteur.

Mais heureusement, 95% des FTN respectent avec rigueur les règles de l'administration fiscale, ou pratiquent une optimisation fiscale très mesurée.

**Je vous remercie vivement, V.M., pour votre disponibilité et notre échange.**

## **Appendix 6: Interview with U.J., a chartered accountant in a consultancy**

*Communication method: physical interview in the consultancy's office*

*Length: 30 minutes*

Bonjour U.J, je vous remercie de bien vouloir répondre à ces questions concernant votre mission que vous effectuez pour une société dont le but est de tirer parti d'avantages fiscaux en délocalisant une partie de ses profits. Cet entretien est réalisé dans le cadre de mon mémoire sur la délocalisation des profits, et avoir des détails de votre part sur un cas concret d'optimisation me permettra de mieux comprendre les situations qui poussent les sociétés à recouvrir à ce type de manœuvre.

**Q1      Pouvez-vous présenter brièvement votre parcours professionnel et académique ?**

**U.J. :** J'ai passé un DSCG et ai suivi une formation dans un IAE. J'ai ensuite travaillé plusieurs années dans un big four en audit FSO (Financial Services Organizations) avant de rejoindre le cabinet où je suis actuellement.

**Q2      En quoi la mission consiste, et quel est l'intérêt de la société dans la réorganisation qu'elle effectue ?**

**U.J. :** L'opération consiste en un déplacement d'actifs pour 3 milliards d'euros qui est réalisé entre l'entreprise suisse, l'entreprise française et l'entreprise irlandaise. Ce déplacement concerne en fait des activités de réassurance qui, en conséquence, génèrent un déplacement des contrats de réassurance et donc du risque, ainsi qu'un déplacement des actifs qui sont associés à ces risques.

Notre société intervient sur la partie de transfert d'actifs. Cette opération de transfert d'activité à 2 objectifs principaux .

Le premier objectif est celui de réduire les *capital requirements*, puisque, à travers cette migration d'activité, une entreprise irlandaise qui n'est aujourd'hui consacrée qu'à une activité vie va se retrouver consacrée à l'activité vie et l'activités non-vie. Par un mécanisme que je ne maîtrise pas, les *capital requirements* de la société vont baisser.

Le second objectif est fiscal : l'opération cherche à bénéficier de 2 avantages fiscaux. Le premier avantage fiscal, qui n'est pas propre à l'entreprise mais au pays, est que le taux d'imposition en Irlande est plus bas que le taux d'imposition en Suisse en France.

Le deuxième avantage fiscal est qu'aujourd'hui, dans la filière suisse, il y a un déficit fiscal reportable pour un montant conséquent qui va être consommée grâce au transfert d'actifs, car le transfert d'actifs va réaliser une plus-value taxable qui consommera le crédit d'impôt de la branche suisse.

**Q3 A quoi est due cette plus-value issue du transfert d'actifs ?**

**U.J. :** Cette plus-value historique est due au fait que la branche suisse perd de l'argent.

Il y a deux étapes dans le projet. Il y a 4 entités : une entreprise suisse, une entreprise française, une entreprise irlandaise ainsi que la branche suisse de l'entreprise française.

La fusion qui va s'effectuer, c'est une fusion entre l'entreprise suisse et la branche suisse de l'entreprise française. C'est la branche suisse de l'entreprise française qui aujourd'hui porte un déficit fiscal reportable et le transfert d'actifs aura lieu entre la branche suisse de l'entreprise française et l'entreprise irlandaise. La réalisation de ce transfert entre branche suisse et entreprise irlandaise va générer une plus-value taxable en Suisse et qui va consommer le crédit d'impôt suisse.

**Q4 Concernant l'actualité, un accord sur un impôt minimal de 15% a été trouvé au G7 à Londres. Cela impacte-t-il l'intérêt du projet ?**

**U.J. :** A ma connaissance, cela n'a pas d'impact sur le projet. De toute façon, le taux d'imposition étant supérieur à 15% en Suisse ou en France, ce serait quand même plus intéressant d'être en Irlande.

**Q5 Toutes ces manœuvres ont un coût assez important. Cela signifie-t-il bien que l'entité au global estime certain que les gains seront supérieurs à tous les coûts qui sont engagés ?**

**U.J. :** Les gains potentiels futurs sont supérieur au coût du projet, sinon ils ne l'auraient pas fait. Il y a deux gains, un chiffrable et l'autre non. Le gain fiscal est chiffrable, mais le gain de diminution des capitaux requis pour leur activité n'est pas chiffrable.

Grâce à la diminution des capitaux requis, la société va pouvoir garder la même activité mais réduire le capital minimum nécessaire. Elle va donc pouvoir faire de l'activité supplémentaire avec les mêmes capitaux : d'un point de vue retour sur investissement au niveau de son actionnariat, le rendement est amélioré. Par exemple, la société fait aujourd'hui avec 10 de capitaux une activité de 100, et demain, avec des capitaux de 10, elle pourra faire une activité de 120 : elle bénéficiera d'un effet de levier 20% plus important.

Le gain fiscal lui n'est pas chiffrable car il est issu de la différence de taux d'imposition entre les 2 pays multiplié par le bénéfice.

**Q6 Quels sont les moyens humains et financiers engagés sur ce projet ?**

**U.J.** Le projet dure environ un an et engage bien une trentaine de consultants de différents cabinets de conseil, mais aussi des éditeurs de logiciel, des fiscalistes, ainsi que des stratèges qui pense l'architecture du projet de manière macro.

Je dirais, d'après les données que j'ai, qu'environ 7 millions d'euros sont engagés sur le volet opérationnel du projet, en sachant que les « stratèges » que je mentionnais sont sûrement payés bien plus et proviennent des plus grands cabinets de conseil en stratégie : ils doivent être facturés 2000 euros par jours, tandis que les consultants opérationnels que je mentionnais sont facturés environ 1000 euros par jour.

Intervient aussi un cabinet de conseil en stratégie d'investissement et risque d'investissement, qui détermine où faire les investissements dans le monde.

**Q7 La filiale suisse de l'entreprise français qui est au cœur du montage était-elle structurellement déficitaire ?**

**U.J. :** À ma connaissance oui, parce que pour avoir un déficit reportable significatif, on parle de plusieurs centaines de millions d'euros : c'est donc que cette filiale était structurellement déficitaire, ou alors qu'une opération historique a eu lieu et a créé du déficit.

L'entité s'est-elle rendu-compte que sa filiale était déficitaire depuis longtemps et a ensuite cherché à en tirer parti, ou le montage faisait-il partie d'une stratégie de plus-long terme où la filiale aurait été conçue de sorte à être structurellement déficitaire pour ensuite tirer parti des avantages fiscaux que vous mentionniez ?

Vu la manière dont ça s'est fait, c'est à dire précipitamment, je pense qu'il y a eu un événement déclencheur que je ne connais pas qui a généré le projet. Surtout que le projet doit être réalisé avant la fin de l'année et a été déclenché au premier trimestre de cette année. Il ne reste donc qu'un peu plus de 6 mois, ce qui est très court pour penser les impacts sur le système et sur l'organisation une opération d'une opération qui porte sur plusieurs milliards d'euros qui sont déplacés.

J'ai une théorie sur cette évènement déclencheur : ils se sont rendu compte qu'il fallait faire cette opération au plus tard, avant l'année prochaine, pour pouvoir bénéficier de la rétroactivité fiscale permettant de consommer déficit fiscal. S'ils l'avaient faite plus tard, cette opération aurait eu beaucoup moins d'intérêt.

En effet : quand une entreprise fusionne, elle le fait à une date postérieure à l'approbation des autorités. L'entreprise dit « je veux fusionner », les autorités prennent 6 mois pour réfléchir et disent ensuite « OK, vous pouvez fusionner » : ça, c'est la date légale d'approbation de la fusion.

Mais cette fusion est rétroactive : cela veut dire que les autorités suisses, hollandaises et irlandaises, dans notre cas se positionnent au deuxième trimestre de l'année prochaine pour accepter la fusion, et que par conséquent, la fusion doit avoir lieu au premier trimestre de l'année prochaine.

S'ils ne le font pas cette année, c'est donc trop tard : si la fusion a lieu aujourd'hui, il ne faut pas que l'approbation ait lieu plus de 6 mois après. L'entité dont je parle est en réalité déjà un peu short sur le fait d'avoir une approbation au deuxième trimestre de l'année prochaine.

Si nous n'avons pas d'approbation au premier trimestre de l'année prochaine, on ne peut pas avoir la rétroactivité au premier trimestre de l'année prochaine parce que ça ferait sauter le bénéfice fiscal. Or, pour ce type d'opération, tout acteur veut absolument faire sur une ouverture d'exercice parce qu'il faut bouger tellement de choses dans les comptes que si elle a lieu en cours d'année, c'est un massacre d'un point de vue données financières et communication avec les investisseurs, avec toutes les problématiques d'audit et de contrôle interne qui s'ensuivent. Si c'est en début d'année, c'est toujours compliqué mais c'est moins compliqué.

**Q8 Avez-vous pu constater d'autres manœuvres de ce type dans le secteur de l'assurance ?**

**U.J. :** Je n'ai pas participé à d'autres projets de ce type, mais j'ai pu en observer. Dans la plupart des groupes d'assurance, il y a une activité d'assurance classique mais aussi de réassurance, et cette activité de réassurance peut être localisée n'importe où. Par exemple, si un groupe a une activité d'assurance en France taxée à 28% et une activité de réassurance en Irlande qui est taxée à 12%, il est possible de faire réassurer les activités de la France par l'Irlande ce qui fait que le chiffre d'affaires est certes généré en France, mais que les bénéfices sont taxés dans la juridiction dans laquelle sont localisées les activités de réassurance.

D'un point de vue franco-français, on peut aussi avoir l'ouverture par la Loi Pacte de 2019 qui autorise les assureurs à prendre leur contrat de fonds de retraite professionnelle supplémentaire (RPS) afin de la mettre dans une structure juridique à part qui prend la forme d'un fond (donc FRPS) qui a des *capital requirements* plus légers que ceux du secteur de l'assurance.

Car, dans le monde de l'assurance, les principales règles prudentielles qui déterminent ces *capital requirements* sont Solvency I et Solvency II qui a remplacé certains morceaux de S1 et en a enrichi d'autres. Le FRPS dont je parle est soumis aux *capital requirements* de S1 et non de S2. Ça intéresse beaucoup de gros assureurs de la place qui sont en train de bénéficier de ce FRPS.

**Q9      Quel intérêt a le régulateur à créer une facilité de *capital requirements* plus bas en autorisant cette structure pour les retraites professionnelles supplémentaires ?**

**U.J. :** Ma supposition est que la retraite professionnelle supplémentaire est une épargne de très long-terme, ce qui explique que le régulateur se dise que les assureurs peuvent prendre davantage de risques avec ce type d'épargne. Ce n'est pas le cas de l'assurance-vie ou de l'assurance IARD. Cela ne veut pas forcément dire que le régulateur est plus « gentil », mais seulement qu'il est plus cohérent.

Cela permet aussi d'optimiser l'action retraite des assureurs et donc de théoriquement maximiser la couverture retraite qui est ouverte aux Français à travers le contrat de retraite professionnelle supplémentaire.

**Je vous remercie vivement, U.J., pour votre disponibilité et notre échange.**