Haven Indicator 3: Loss utilisation

What is measured?

This indicator measures whether a jurisdiction provides unrestricted loss carry backward and/or loss carry forward for ordinary and trading losses. Capital losses fall outside the scope of this indicator. Accordingly, we have split this indicator into two components.

1. Loss carry backward: we assess whether a jurisdiction provides loss carry backward provisions in its rules determining the corporate income tax base.
2. Loss carry forward: we assess whether a jurisdiction offers unrestricted loss carry forward (independent of change of ownership rules) in its rules determining the corporate income tax base.

The overall haven score for this indicator is calculated by the simple addition of the haven scores of each of these two components. The scoring matrix is shown in Table 3.1 and full details of the assessment logic are presented in Table 3.3 below.

Table 3.1: Scoring Matrix Haven Indicator 3

Regulation	Haven Score [100 = maximum risk; 0 = minimum risk]
Component 1: Loss carry backward (50)	
Loss carry backward is available Corporates are allowed to transfer losses accrued in the current (or a later) tax year to a previous tax year, and thereby to obtain a tax reduction of corporate income taxes assessed and/or paid in the previous tax year (so as to obtain a reimbursement).	50
Loss carry backward is not available Losses accrued in the current tax year cannot be transferred back to previous tax years.	0
Component 2: Loss carry forward (50)	
Unrestricted loss carry forward Losses accrued in the current tax year can be carried forward to reduce taxable income in future tax years without any restrictions.	50
Loss carry forward is restricted to a maximum of more than five years Losses accrued in the current tax year can be carried forward only for a certain number of years, but this number is higher than five. Or Loss carry forward is restricted by an annual ceiling ("minimum tax") Losses accrued in past tax years can be carried forward for an unlimited number of years, but the extent to which these losses can be used to reduce income taxes is restricted in each current tax year.	37.5
Loss carry forward is restricted to a maximum of more than five years, and by an annual ceiling Losses accrued in the current tax year can be carried forward only for a certain number of years, but this number is higher than five, and there is an annual ceiling. Or Loss carry forward is restricted to a maximum of five years or less Losses accrued in the current tax year can be carried forward only for up to five subsequent years.	12.5
Loss carry forward is restricted to a maximum of five years or less, and by an annual ceiling Losses accrued in the current tax year can be carried forward only for up to five subsequent years and there is an annual ceiling. Or No loss carry forward is available	0

Ordinary companies generate revenue by selling goods or providing services and expenses, such as for paying salaries and buying intermediate goods and services. When company revenues exceed expenses in a given tax year, the company makes a taxable profit. If, however, the expenses exceed revenue, the company makes a loss. Normally, if a company is loss making, no corporate income taxes are due in that tax year. In addition, most jurisdictions allow this loss to be carried forward. Carrying forward losses allows a company to use the losses of the past to offset or reduce taxes due in future years when the company may be making a profit.

Carrying losses backward allows a company to go back in time to whenever it made a loss to reduce, retroactively, the profits booked in an earlier tax year in which it made a profit. Thus, tax due on profits in earlier years is reassessed and adjusted accordingly. Assuming a company will have paid more tax in the past than what it owes after carrying back

losses, the company would expect to receive a corresponding reimbursement.

Most jurisdictions do not allow loss carry backward, or they allow it only for a limited time.[1] According to the OECD, loss carry backward provisions have a more severe impact on reducing government budgets and are more difficult to administer than carry forward provisions.[2]

To avoid abuse of such provisions by multinational companies,[3] jurisdictions generally place limits on the time and value of loss carry forward rules. The strictest time limitation for loss carry forward we have found in the literature is five years (such limitation is found in Argentina, China, Poland, Portugal, Turkey).[4]

This time limit threshold refers to the period within which revenue administrations are permitted to reopen tax assessments.[5] For reopening an assessment, tax administrations must rely on company records. According to the OECD Global Forum Joint Ad Hoc Group on Accounts, the necessary accounting record retention period and the accessibility to accounting records are as follows:

> Accounting records need to be kept for a minimum period that should be equal to the period established in this area by the Financial Action Task Force. This period is currently five years. A five-year period represents a minimum period and longer periods are, of course, also acceptable.[6]

Thus, we have chosen a five-year threshold in assessing the haven risk of loss carry forward provisions.

Several jurisdictions introduced changes to loss utilisation as a measure to deal with the Covid-19 pandemic. Whenever the measure was only for a short time and was lifted in 2020 or 2021 we disregarded it for the purposed of this indicator (e.g. in Belgium and Poland). However, if it lasted during 2021 or beyond, we treated it as a permanent measure and the jurisdiction has been assessed accordingly (e.g. the Czech Republic and the USA).

The data for this indicator was collected primarily from the country analyses and country surveys in the International Bureau of Fiscal Documentation (IBFD) database.[7] In some instances, we have also consulted additional local websites and reports.

All underlying data can be accessed in the Corporate Tax Haven Index database.[8] To see the sources we are using for particular jurisdictions please consult the assessment logic in Table 3.3 and search for the corresponding info IDs (IDs 509 and 510) in the database report of the respective jurisdiction.

Why is this important?

By carrying forward billions in losses to future tax years, global businesses have gamed the system with "loss" to generate colossal deductions and pay no or very little tax. The use of artificial losses to minimise tax has been a core element of Apple's tax strategy in Ireland. In 2015, the artificial inflation of debt and a multibillion-dollar purchase of Apple's own intellectual property generated billions in recognised losses for Apple's subsidiary in Ireland.[9] In other words, Apple Ireland borrowed heavily to purchase Apple's intellectual property from an Apple subsidiary tax-resident in Jersey (which applies nearly zero tax). As a result, Apple Ireland had billions in deductible interest payments, billions in deductible intellectual property purchase expenses, and billions in capital allowances; enough to write off all profits from European sales for years. Similarly, Apple's offshore entity in Jersey earned billions from the sale of intellectual property and interest repayments which went untaxed.[10]

The Apple case illustrates the damage that multinational corporate practice has on public revenues. While Apple's business in Europe is thriving and its sales continue to rise worldwide,[11] Apple declares losses. While piles of cash continue to accumulate in Jersey, Ireland's subsidiary is heavily in debt.

These tax avoidance games would not have been possible if comprehensive limitations were in place. Both this indicator (haven indicator 3) and our indicators on intra-group payments deductibility (haven indicators 15, 16 and 17) present measurements and alternatives towards a financially consistent and fiscally responsible environment for multinational corporations. This is the reason any temporary loss utilisation rules introduced in the wake of the Covid-19 pandemic are considered problematic and assessed as such in this indicator if they last during 2021 or beyond as they further create room for businesses to game the system. The World Bank underlines the heightened risk of "sham" losses: "Whereas an increase of NOL [net operating loss] is expected to be filed by taxpayers engaged in business affected by overall economic conditions, some businesses perceive economic downturn periods as opportunities to claim sham NOLs".[12] In any case, if a country nevertheless chooses to provide such temporary measures for companies, the least it can do is to subject the measures to several conditions in order to prevent taxpayer's money from ending up in corporate tax havens.[13]

Annual tax accounting systems are a basic feature of modern income taxation. Income tax is calculated and charged on the income earned in the preceding fiscal year, which consists of 12 consecutive months. However, this system involves an intrinsic unfairness: "taxpayers whose incomes fluctuate from year to year should receive tax treatment equivalent to those with stable incomes".[14] To eliminate this intrinsic

unfairness, countries provide tax relief on profits to reflect losses. Losses may be carried forward and set off against future profits and/or carried backward and relieved against profits in earlier or subsequent years. The basic rationale behind the loss carry-over rules is income averaging.

However, companies might use losses as an aggressive tax planning tool by increasing or accelerating tax relief on their losses. Unrestricted loss carry forward and loss carry backward are in effect a profit-based tax incentive because they only take effect once a company declares profits. It increases those profits further by showering taxpayer's money onto those private sector profits. Unrestricted loss carry forward and backward thus enables profit shifting, investment round tripping and corporate (re)structuring for tax avoidance purposes.[15]

Countries may deny or restrict the use of losses for tax purposes to eliminate or reduce tax compliance risks. Countries should consider introducing or revising carry-over limitations, especially those countries that have introduced or are planning to introduce a fixed-ratio rule or a group ratio rule, which are other anti-base erosion and profit shifting measures for limiting interest deductibility. These rules establish a limit on the ability of an entity to deduct net interest expenses that in turn result in an entity either incurring an interest disallowance (i.e. where its net interest expense exceeds the maximum permitted), or having unused interest capacity (i.e., where its net interest expense is below the maximum permitted).[16]

Several kinds of limitation on loss relief exist. The OECD has captured some of these based on country practice[17]:

- The number of years for which disallowed interest expense or unused interest capacity may be carried forward, or disallowed interest expense may be carried back, could be limited.
- The value of carry forwards could reduce over time, such as by 10% each year.
- The value of a carry forward or carry back could be capped at a fixed monetary amount.
- The amount of a carry forward or carry back that may be used in a single year could be limited. For example, providing that no more than 50% of current net interest expense may be set against unused interest capacity carried forward from previous years.
- Carry forwards should be reset to zero in certain circumstances, following normal practice applied to loss carry forwards, such as where a company changes ownership and also changes the nature of its economic activity. Countries impose this kind of limitation especially to ensure that the loss relief is granted exclusively to the person that economically incurred the losses.

Nonetheless, a study showed a growing tendency of relaxing the loss offset provisions before the 2008 financial and economic crisis by comparing 41 country practices. According to the study, 31 countries restricted the loss carry forward in 1996 while only 25 countries restricted the loss carry forward in 2007.[18] In light of the magnitude of global corporate losses and growing tax compliance risks associated with loss-making corporations since the 2008 crisis, this indicator evaluates the current state of play.

Results Overview

Figure 3.1: Loss Carry Backward

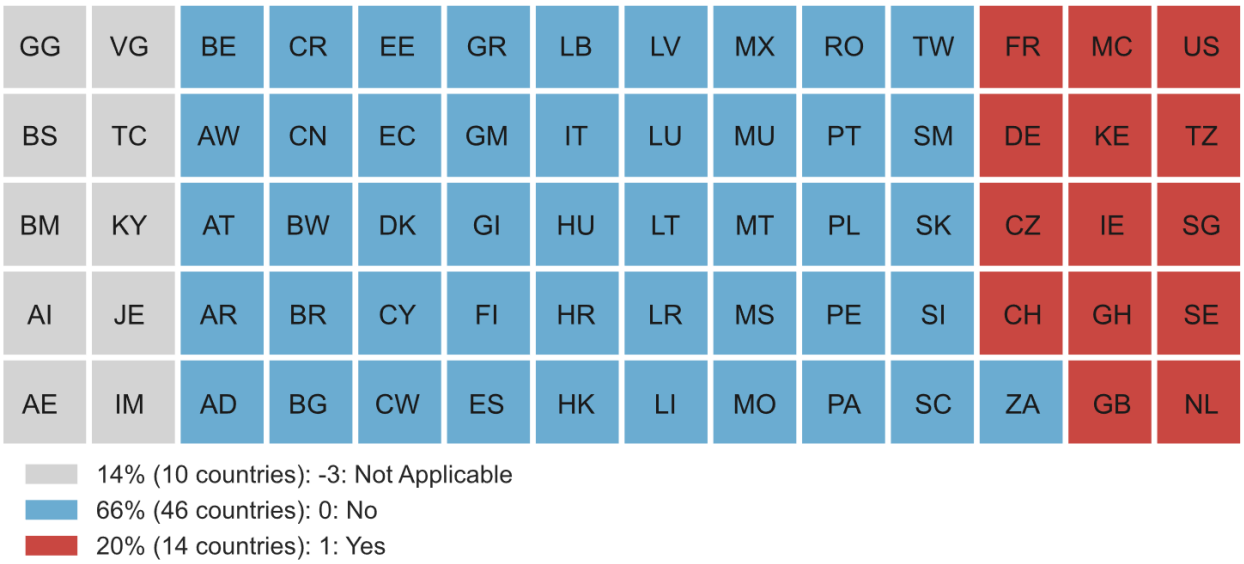


Figure 3.2: Loss Carry Forward

Table 3.2: Loss Utilisation – Haven Indicator Scores

Haven Score	ISO2:	Country Name
50	AW:	Aruba
100	AI:	Anguilla
38	AD:	Andorra
100	AE:	United Arab Emirates
12	AR:	Argentina
50	AT:	Austria
38	BE:	Belgium
12	BG:	Bulgaria
100	BS:	Bahamas
100	BM:	Bermuda
38	BR:	Brazil
50	BW:	Botswana
88	CH:	Switzerland
38	CN:	China
12	CR:	Costa Rica
50	CW:	Curaçao
100	KY:	Cayman Islands
12	CY:	Cyprus
62	CZ:	Czechia
88	DE:	Germany
38	DK:	Denmark
12	EC:	Ecuador
38	ES:	Spain
0	EE:	Estonia
38	FI:	Finland
88	FR:	France
88	GB:	United Kingdom
100	GG:	Guernsey
62	GH:	Ghana
38	GI:	Gibraltar
38	GM:	Gambia
12	GR:	Greece
50	HK:	Hong Kong
12	HR:	Croatia
12	HU:	Hungary

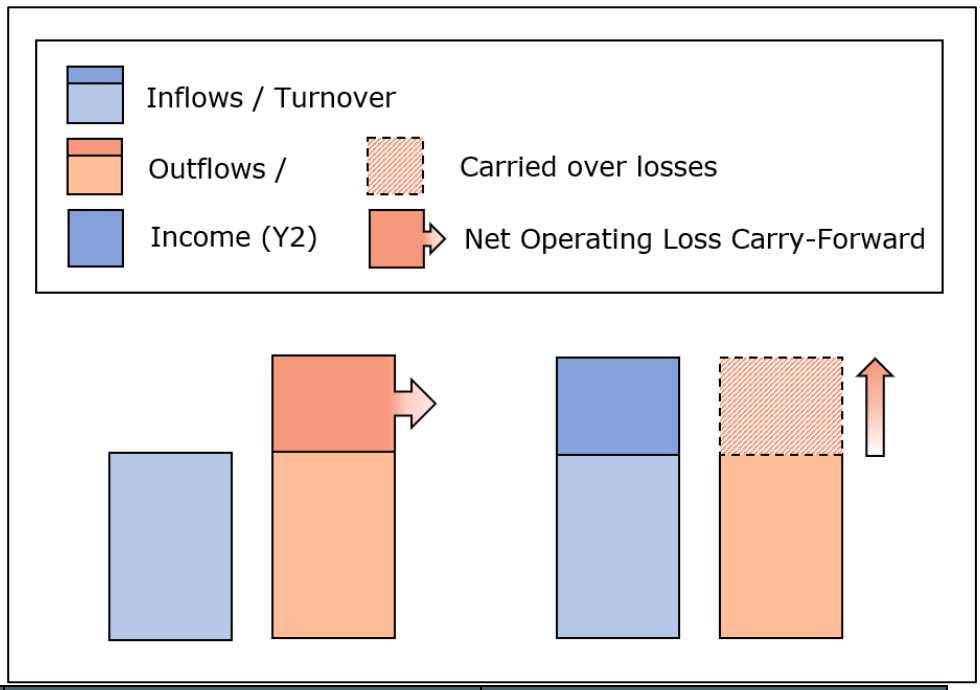
Haven Score	ISO2:	Country Name
100	IM:	Isle of Man
100	IE:	Ireland
38	IT:	Italy
100	JE:	Jersey
100	KE:	Kenya
12	LB:	Lebanon
38	LR:	Liberia
38	LI:	Liechtenstein
38	LT:	Lithuania
38	LU:	Luxembourg
0	LV:	Latvia
12	MO:	Macao
88	MC:	Monaco
38	MX:	Mexico
50	MT:	Malta
12	MS:	Montserrat
50	MU:	Mauritius
88	NL:	Netherlands
0	PA:	Panama
12	PE:	Peru
0	PL:	Poland
12	PT:	Portugal
38	RO:	Romania
100	SG:	Singapore
0	SM:	San Marino
12	SK:	Slovakia
38	SI:	Slovenia
100	SE:	Sweden
12	SC:	Seychelles
100	TC:	Turks and Caicos Islands
38	TW:	Taiwan
100	TZ:	Tanzania
88	US:	United States
100	VG:	British Virgin Islands
50	ZA:	South Africa

Table 3.3: Assessment Logic

Info_ID	Text_Info_ID	Answers (Codes applicable for all questions: -2: Unknown; -3: Not Applicable)	Valuation Haven Score
509	Loss Carry Backward: Does the jurisdiction allow loss carry backward?	0: No; 1: Yes	0: 0 1: 50
510	Loss Carry Forward: Does the jurisdiction restrict loss carry forward independent of change of ownership?	0: No, unrestricted loss carry forward is available. 1: Yes, loss carry forward is available with a time limit of more than 5 years but there is no annual ceiling. 2: Yes, loss carry forward is limited only by annual ceiling (minimum tax). 3: Yes, loss carry forward is available with a time limit of up to 5 years but there is no annual ceiling. 4: Yes, loss carry forward is limited by an annual ceiling and a time limit of more than 5 years. 5: Yes, either there is no loss carry forward available or it is restricted by an annual ceiling and a time limit of 5 years or less.	0: 50 1: 37.5 2: 37.5 3: 12.5 4: 12.5 5: 0

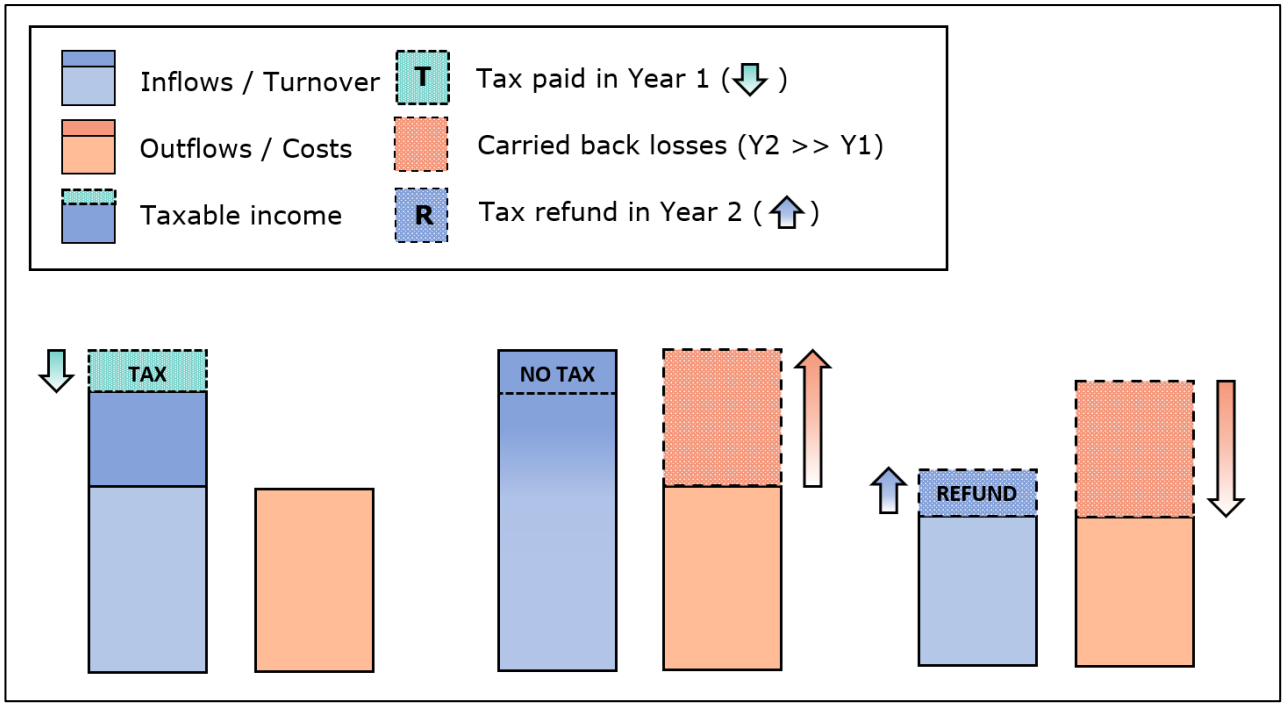
Annex 1. Loss Utilisation Explanatory Diagrams

Figure 3.3: Loss Carry-Forward: Economics and Tax Consequences



	Year 1 : Net Operating Losses	Year 2 : Loss Carry-Forward
Economics	Outflows are larger than inflows, the company makes losses (i.e. net operating losses). Such losses can be met using cash reserves. Otherwise, losses might be expensed (paid to creditor) in following years. Sustained losses may trigger dissolution of the company.	Losses incurred in a previous tax year offset income generated in current tax year. The tax system attenuates cyclical losses of corporations, ensuring reduced taxation for companies having suffered losses in previous years.
Tax consequences	The company does not have income (profits) and thus no corporate income tax is due. The company may be able to carry forward the losses to offset future income.	If losses incurred in a previous year (Y1) are allowed to be deducted against the current year's(Y2) income, the company may be able to reduce or eliminate its tax liability in current year (Y2).

Figure 3.4: Loss Carry-Backward: Economics and Tax Consequences



Reference List

Brehm Christensen, Martin, and Emma Clancy, *Exposed: Apple's Golden Delicious Tax Deals. Is Ireland Helping Apple Pay Less than 1% Tax in the EU?* (Brussels, 21 June 2018) <https://www.guengl.eu/content/uploads/2018/06/Apple_report_final.pdf>

de Cogan, Dominic, *Building Incoherence into the Law: A Review of Relief for Tax Losses in the Early Twentieth Century* (Rochester, NY, 20 August 2013) <https://papers.ssrn.com/abstract=2312950> [accessed 16 May 2019]

DLA Piper, 'Loss Utilization around the World - DLA Piper Guide to Going Global', 2021 <https://www.dlapiperintelligence.com/goingglobal/tax/index.html?t=11-loss-utilization> [accessed 3 March 2021]

Dreßler, Daniel, and Michael Overesch, 'Investment Impact of Tax Loss Treatment—Empirical Insights from a Panel of Multinationals', *International Tax and Public Finance*, 20/3 (2013), 513–43

IBFD, *Tax Research Platform: Country Surveys, Country Analyses, Country Key Features*, Accessed 2018-2019, 2018 <https://research.ibfd.org/> [accessed 9 May 2019]

Macrotrends, 'Apple Revenue 2006-2020 | AAPL', 2021 <https://www.macrotrends.net/stocks/charts/AAPL/apple/revenue> [accessed 3 March 2021]

OECD, *Corporate Loss Utilisation through Aggressive Tax Planning* (2011) <http://www.oecd-ilibrary.org/taxation/corporate-loss-utilisation-through-aggressive-tax-planning_9789264119222-en> [accessed 15 August 2018]

———, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2015 Final Report* (Paris, 2015) <https://www.oecd-ilibrary.org/docserver/9789264241176-en.pdf?expires=1557996390&id=id&accname=guest&checksum=4C61C67D7652BE5C0ABF0421567F6774> [accessed 16 May 2019]

———, *Tax Co-Operation: Towards a Level Playing Field - 2006 Assessment by the Global Forum on Taxation, Annex III*, 2006 <https://www.oecd.org/ctp/harmful/42179473.pdf> [accessed 16 May 2019]

Romano, Roberta, and Mark Campisano, 'Recouping Losses: The Case for Full Loss Offsets', *Northwestern University Law Review*, Faculty Scholarship Series., 76/5 (1981), 709–44

Seamus, 'Economic Incentives: What Apple Did Next', *Economic Incentives*, 2018 <http://economic-incentives.blogspot.com/2018/01/what-apple-did-next.html> [accessed 21 May 2019]

Tax Justice Network, *Bail, or Bailout? Tax Experts Publish 5-Step Test for Covid19 Business Bailouts*, 23 April 2020 <https://www.taxjustice.net/press/bail-or-bailout-tax-experts-publish-5-step-test-for-covid19-business-bailouts/> [accessed 3 March 2021]

World Bank Group, *Covid-19: Revenue Administration Implications: Potential Tax Administration and Customs Measures to Respond to the Crisis*, 2020 <https://openknowledge.worldbank.org/bitstream/handle/10986/34152/COVID-19-Revenue-Administration-Implications-Potential-Tax-Administration-and-Customs-Measures-to-Respond-to-the-Crisis.pdf?sequence=4&isAllowed=y> [accessed 23 February 2021]

---

[1] OECD, *Corporate Loss Utilisation through Aggressive Tax Planning* (2011), 26 <http://www.oecd-ilibrary.org/taxation/corporate-loss-utilisation-through-aggressive-tax-planning_9789264119222-en> [accessed 15 August 2018].

[2] OECD, *Corporate Loss Utilisation through Aggressive Tax Planning*, 26–27.

[3] OECD, *Corporate Loss Utilisation through Aggressive Tax Planning*, 27.

[4] DLA Piper, 'Loss Utilization around the World - DLA Piper Guide to Going Global', 2021 <https://www.dlapiperintelligence.com/goingglobal/tax/index.html?t=11-loss-utilization> [accessed 3 March 2021].

[5] Dominic de Cogan, *Building Incoherence into the Law: A Review of Relief for Tax Losses in the Early Twentieth Century* (Rochester, NY, 20 August 2013), 661, Footnote 34 <https://papers.ssrn.com/abstract=2312950> [accessed 16 May 2019].

[6] OECD, *Tax Co-Operation: Towards a Level Playing Field - 2006 Assessment by the Global Forum on Taxation, Annex III*, 2006, para. 14 <https://www.oecd.org/ctp/harmful/42179473.pdf> [accessed 16 May 2019].

[7] IBFD, *Tax Research Platform: Country Surveys, Country Analyses, Country Key Features*, Accessed 2018-2019, 2018 <https://research.ibfd.org/> [accessed 9 May 2019].

[8] Corporate Tax Haven Index database: https://cthi.taxjustice.net/cthi21/data-downloads

[9] Seamus, 'Economic Incentives: What Apple Did Next', *Economic Incentives*, 2018 <http://economic-incentives.blogspot.com/2018/01/what-apple-did-next.html> [accessed 21 May 2019].

[10] Martin Brehm Christensen and Emma Clancy, *Exposed: Apple's Golden Delicious Tax Deals. Is Ireland Helping Apple Pay Less than 1% Tax in the EU?*

(Brussels, 21 June 2018) <https://www.guengl.eu/content/uploads/2018/06/Apple_report_final.pdf>.

[11] Macrotrends, 'Apple Revenue 2006-2020 | AAPL', 2021 <https://www.macrotrends.net/stocks/charts/AAPL/apple/revenue> [accessed 3 March 2021].

[12] World Bank Group, *Covid-19: Revenue Administration Implications: Potential Tax Administration and Customs Measures to Respond to the Crisis*, 2020, 6 <https://openknowledge.worldbank.org/bitstream/handle/10986/34152/COVID-19-Revenue-Administration-Implications-Potential-Tax-Administration-and-Customs-Measures-to-Respond-to-the-Crisis.pdf?sequence=4&isAllowed=y> [accessed 23 February 2021].

[13] The Tax Justice Network proposed five key bailout test conditions "designed to prevent tax payer's money from ending up in corporate tax havens and to ensure tax transparency from bailout recipients into the future".[13] These conditions include 1) requiring full public country by country reporting for companies with one or more subsidiaries ranked among the top 10 countries in the Corporate Tax Haven Index or Financial Secrecy Index, 2) banning any company involved in tax scandals, such as having received illegal state aid, 3) requiring publication online of most recent accounts for all legal entities in the group, including full country by country reporting in line with the Global Reporting Initiative's standard, 4) requiring the publication of all beneficial and legal owners of all legal vehicles across the entire corporate structure, and 5) requiring the corporate group to be committed to employee protection and to no shareholder extraction until rescue loans have been paid back in full and corporate group has returned to profitability or become insolvent. Tax Justice Network, *Bail, or Bailout? Tax Experts Publish 5-Step Test for Covid19 Business Bailouts*, 23 April 2020 <https://www.taxjustice.net/press/bail-or-bailout-tax-experts-publish-5-step-test-for-covid19-business-bailouts/> [accessed 3 March 2021].

[14] Roberta Romano and Mark Campisano, 'Recouping Losses: The Case for Full Loss Offsets', *Northwestern University Law Review*, Faculty Scholarship Series., 76/5 (1981), 710.

[15] OECD, *Corporate Loss Utilisation through Aggressive Tax Planning*, 30.

[16] OECD, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2015 Final Report* (Paris, 2015), 69, para. 164 <https://www.oecd-ilibrary.org/docserver/9789264241176-en.pdf?expires=1557996390&id=id&accname=guest&checksum=4C61C67D7652BE5C0ABF0421567F6774> [accessed 16 May 2019].

[17] OECD, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2016 Update: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project (2016), 73 <https://www.oecd-ilibrary.org/taxation/limiting-base-erosion-involving-interest-deductions-and-other-financial-payments-action-4-2016-update_9789264268333-en> [accessed 22 August 2018].

[18] Daniel Dreßler and Michael Overesch, 'Investment Impact of Tax Loss Treatment—Empirical Insights from a Panel of Multinationals', *International Tax and Public Finance*, 20/3 (2013), 513–43.