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Redesigning sovereignty using European and international tax avoidance regulation

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Redesigning sovereignty using European and international tax avoidance regulation

Mihaela Tofan*

Abstract

The paper reflects the results of the research on the relation between tax avoidance regulation and sovereignty, in particular within European Union, analyzing the effective regulatory methods for limiting/eliminating aggressive tax planning by the multinational companies. The good practice in fiscal regulation and the results generated by the tax jurisprudence have led to common, yet flexible, solutions for the actual fight against companies' abusive fiscal conduct, when taking advantage of the tax competition.

The topic of the research is significant in the actual context, as the integration of national economies and markets has increased substantially, both within EU and globally. This has put a strain on the domestic tax rules, which have to be inter-connected and in line with the demands of the international taxation requirements.

Presently, the EU member states' fiscal sovereignty blocks the option for common regulation in this field and the paper points out how the efficient patterns used in the international taxation significantly impact on the traditional concept of sovereignty, changing its features not in a formal, but in informal sense.

Summary:

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1. Introduction

The everyday life routine has reached a general unprecedented level of globalization, described in patterns that largely rely on continuous and significant public authorities' efforts. Mankind enjoy the personal comfort of individual featured living conditions, and equally have relatively high expectations to benefit from the social amenities and the collective facilities, derived from high quality public services, amenities and infrastructure. Only a small part of these functionalities is private, though their majority relies on the public services and goods, which indirectly, implies a large amount of money collected to the state budget. In other words, the citizens and residencies' current everyday living is influenced in a decisive way by the quality of the public facilities offered by the states, which is dependent on the amount of public spending. Sure enough, the state budget is a limited resource, so the public spending and the revenues must be balanced. Consequently, supplying a certain level of living for the citizens depends critically on the level of incomes to the state budget and that brings our analysis to tax regulatory policy, the most convenient tool to optimize public revenues.

Taxation is considered a field of precise knowledge and technicalities[1], although everybody pays taxes, and the concept is present in regulatory systems since the construction of the first form of public authorities. Using the conventional approach

[1] The Quote Investigator ran an investigation on Albert Einstein's commented on filing tax returns, proving that the great mathematician said that filling the tax revenue form "is too difficult for a mathematician, it takes a philosopher" (https://quoteinvestigator.com/2011/04/15/einsotein-taxes-too-difficult/, retrieved on the 15th of June 2020). My opinion is that the required abilities are best fulfilled by a professional of law, mainly because of the dimension of effects of the tax specific regulation for all legal and natural persons, and secondarily because the legitimacy of the taxation is governed by a complicated mixture of rules of law, soft law and jurisprudential twists, both domestic and international.

towards taxation, the "three Rs" (Revenue, Redistribution and Regulation) are to be addressed,[2] considering that in their chase for large budgets, the governments manifest the tendency to tax everything[3].

The topic is even more challenging in the context of global trade, because in cross-border transaction, at least four scenarios for taxation are possible to concur, i.e.

(i) taxation at source of the money jurisdiction.

(ii) taxation at the residence jurisdiction of the parties.

(iii) taxation at source jurisdiction of the income.

(iv) taxation at the investor's residence jurisdiction, when borrowed capital is used.

In such situations, double taxations may be addressed either by unilateral provisions included in the domestic law of the interested countries, or by the application of the previsions included in double tax treaties. Still, neither unilateral provisions, nor double-tax treaties, are sufficient to eliminate the fiscal treatment that are colliding with the principle of tax neutrality.[4] There are particular situations when the valid connection that exists between the feature of a particular transaction and a precise state regulation (usually called nexus) asks for the application of international law; for the European order, the legitimacy of the nexus should be analyzed directly, through the application of primary and secondary law, or indirectly, through the case law of the Court of Justice of the European Union.[5]

Tax law is one of the legal fields with the most subtle influence on European integration and EU law. The European economic cooperation project emerged with the custom union, essentially a tax law concept, and evolved together with other topics of tax harmonization.

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[2] As Avi-Yonah has noted, the "three Rs" mesh surprisingly neatly with the three major taxes in most countries: the value-added tax (VAT) for revenue, the personal income tax (PIT) for redistribution, and the corporate income tax (CIT) for regulation. For details, see Reuven S. Avi-Yonah, "The Three Goals of Taxation" (2006), vol. 60, no. 1, Tax Law Review 1-28.

[3] Charles Kettering quotation "Thinking is one thing no one has ever been able to tax" is referred by Henry Ejdelbaum, at https://www.aims.co.uk/%C2%93thinking-is-one-thing-no-one-has-ever-been-able-to-tax-%C2%94-charles-kettering/#, retrieved on the 17th of August 2020.

[4] Jason Furman - The Concept of Neutrality in Tax Policy, available at https://www.brookings.edu/wp-content/uploads/2016/06/0415_tax-_neutrality_furman-1.pdf, retrieved on the 14th of April 2020.

[5] Antonio Calisto Pato - *Cross-border direct tax issues of investment funds from the perspective of European law*, EC TAX REVIEW 2008, vol. 5

Still, the existence of the EU tax law is disputed[6] and it is described as the reflection of two characteristics that have negative impact on the proper functioning of the internal market. Firstly, the fact that an economic operation event could be taxed twice in the EU creates an important limitation for the free movement of people and their capital on the internal market. Secondly, the present miss-coordination of the corporate taxation in the Member States generates both obstacles and opportunities for companies operating within EU, as they face 27 different corporate tax bases, creating high operative costs and bureaucratic liabilities that are both limiting the European competitiveness and generating opportunities for aggressive tax-planning schemes based on the exploitation of mismatches.[7]

In the general context of globalization, digitalization and internationalization of the economy, taxation evolved from a national regulatory prerogative to a very demanding and intensely argued subject of cooperation among governments. The topic is acute and the difficulty in finding the reasonable and efficient (if not perfect) regulation is generated by the dimension of divergent interests: paying less taxes and obtaining higher revenues to the state budget. It is generally acknowledged that the governments, which are competent in implementing money spending policy, are oriented to keep their offices for longer terms, so they prefer to prove their generosity in spending. Large public budgets are able to support bountiful public spending programs and to generate higher electoral satisfaction. Maximizing the public budget income is in direct conditionality with the respect for the liability to pay taxes and the efficient regulation of the tax system.

1.1. Argument for the research topic

Taxation is a topic of intensive research, scholars and practitioners looking for the appropriate rules of law to limit and, if possible, to eradicate tax avoidance. Among the

[6] Deak, Daniel - *Legal Considerations of Tax Evasion and Tax Avoidance* (September 12, 2009). Society & Economy, Vol. 26, No. 1, pp. 41–85, 2004, Available at SSRN: https://ssrn.com/abstract=1472508

[7] Paolo Arginelli - *A Proposal for Harmonizing the Rules on the Allocation of Taxing Rights within the European Union and in Relations with Third Countries*, in PistonePasquale, 2018, Part 6 – *A Possible Roadmap: European Tax Integration*

taxpayers, the companies are more likely to adapt their activities, looking for the most innovative ways in saving tax money, especially when operating at international level.

The ubiquity of using state sovereign right to rule taxation and the dysfunctions of the mechanism of international taxation create the opportunity for avoiding the tax mandatory liability. This conduct is usually called tax avoidance and it is not unanimously qualified as illegal[8], but its effects on the public budgets are negative in all the cases.[9]

Weaknesses in the current domestic rules create opportunities for diminishing the amount of money that are subject to taxation (strategy called base erosion) and for moving the profits from one company, which is subject to high taxation, to another company in the same group that is situated in a territory with lower level of taxation (which is called profit shifting). Usually, a precise taxation subject uses strategic tax planning, and it may take advantage by both these mechanisms, which are addressed in literature and by the practitioners altogether as Base Erosion and Profit Shifting (BEPS).

The dimension of the tax avoidance using BEPS requires courageous measures adopted by policy makers, in order to restore confidence in the taxation system and to ensure that profits are submitted to justified fiscal treatment, in respect to the fundamental principle of equity in taxation.

The international regulation in the field is dominated by the Organization for Economic Co-operation and Development (OECD) actions in 2015[10] and 2019[11] and oriented by the US 2017 changes in taxation,[12] and it is accompanied by the EU struggle to identify by the end of 2020 the efficient methods to fight tax avoidance, in general, and to BEPS, in

[8] Simone de Colle, Anne Marie Bennett – *State-induced, Strategic or Toxic? En Ethical Analysis of Tax Avoidance Practices*, in Business & Professional Ethics Journal, vol. 33, no. 1/2014, p. 53-82

[9] Blaufus, Kay; Braune, Matthias; Hundsdoerfer, Jochen; Jacob, Martin (2015): *Does legality matter? The case of tax avoidance and evasion, arqus Discussion Paper*, No. 193, Arbeitskreis Quantitative Steuerlehre (arqus), Berlin

[10] OECD (2015*), Measuring and Monitoring BEPS, Action 11 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241343-en.

[11] OECD and country officials discuss OECD workplan for new rules for taxing multinational businesses and ongoing projects in the annual tax conference in Washington, DC, on 3-4 June 2019. Under the name *The Road to 2020: Tax Challenges of Digitalization*, new proposal for Profit Allocation and Nexus (Pillar 1) were analized (https://taxinsights.ey.com/archive/archive-news/oecd-and-country-officials-discuss-oecd-workplan-for-new-rules.aspx, retrieved on the 17th of August 2020).

[12] Erica York, Alex Muresianu - *The Tax Cuts and Jobs Act Simplified the Tax Filing Process for Millions of Households,* Fiscal Fact no. 604, 2018, Tax Foundation, Washington DC

particular[13]. Considering the status of implementation of OECD BEPS guidelines,[14] the results of the research points out the perspectives of tax cooperation among states, pointing out the transformation in the sovereignty concept globally and in the EU, in particular. EU Council conclusions (2015)[15] stressed out the need to find common and flexible solutions, consistent with OECD BEPS conclusions, and the Council Directive (EU) 2016/1164,[16] looking for proper rules to fight tax avoidance practices that directly affect the functioning of the internal market. The volatility of the regulation is even more present in nowadays, when the global pandemic crises puts further stress on the public budgets. There is also the necessity to rebuild the trust in legitimacy of the public budgets, not only in the spending procedure but also in collecting the income, with regard to the fundamental principle of taxing all the revenues from the economic activity.

1. 2. Research questions and methodology

The main research question is whether solving the dispute among states over taxable income implies reshaping the sovereignty concept. Additionally, the research will establish what is more efficient: the traditional way of taxing using the sovereignty credentials or internationalization of the tax regulatory framework.

Almost 15 years ago, prof. Pasquale Pistone[17] tackled a similar topic by asking himself:

(i) which EU law limits Member States actions, bounding to comply with when applying their tax treaties.

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[13] European Commission - *Aggressive tax planning indicators. Final Report* TAXUD/2016/DE/319 FWC No. TAXUD/2015/CC/131, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_papers_71_atp_.pdf, retrived on the 15ht of March 2020.

[14] OECD - *International collaboration to end tax avoidance*, available at https://www.oecd.org/tax/beps/, retrieved on the 20th of April 2020.

[15] European Council conclusions adopted in the European Council meeting (19 and 20 March 2015), https://www.consilium.europa.eu/media/21888/european-council-conclusions-19-20-march-2015-en.pdf, retrived on the 1st of July 2020.

[16] COUNCIL DIRECTIVE (EU) 2016/1164 of 12 July 2016, laying down rules against tax avoidance practices that directly affect the functioning of the internal market, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1164&from=EN, retrieved on the 10th of April 2020.

[17] Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer, Alfred Storck - *Corporate Income Taxation in Europe: The Common Consolidated Corporate Tax Base (CCCTB) and Third Countries*, Edward Elgar Publishing Limited, Massachusetts, 2013, E-ISBN 978 1 78254 542 2

(ii) whether tax treaties were (still) the appropriate means to regulate cross-border direct taxation issues within the EU and in relations with third countries.

He answered these questions by proposing a European Communities (EC) Model Tax Treaty, which would have been compliant with article 293 of the Treaty on the European Community, as well as with the principles of subsidiarity and proportionality. Such a model, in fact, would have only steered the conclusion of bilateral tax treaties by Member States without requiring a direct intervention of the EU institutions in a non-harmonized area of law and without going beyond what is necessary in order to achieve the goal of better coordination of the Member States' policies in the field of direct taxation and avoiding the breach of primary EU law. [18] This proposal did not evolved to actual regulation, so the question is still justified and supported by additional queries.

As subsequent questions or secondary objectives of the research, the paper contributes to the development of regulation for limiting/eliminating tax avoidance, enhancing the expertise in the field of international taxation, and the results will be disseminated in renewed publication. The research investigates whether existing regulatory tools to limit/eliminate tax avoidance have already proved their general applicability and if their scope could be extended globally. Considering the argument that tax policy can support equity or efficiency but not both[19], the research has as subsequent objective to identify the effective tax avoidance regulation at national, European and global level.

Today's questions echo those formulated before, although they assume different shapes and justifications, due to the evolved economic and legal environment in which they arise. From a substantive perspective, the paper reiterates the inquiry on whether (and why) there is any need to coordinate or to harmonize the regulation for allocating the taxing rights between Member States, on one side, and between Member States and third countries, one the other side. In the case of an affirmative answer, it is important to establish:

(i) to what extent such rules should be coordinated or harmonized; and

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[18] Paolo Arginelli - *A Proposal for Harmonizing the Rules on the Allocation of Taxing Rights within the European Union and in Relations with Third Countries*, in Pistone Pasquale – A Possible Roadmap: European Tax Integration - Part 6, 2018.

[19] Torben M. Andersen, Jonas Maibom - *The big trade-off between efficiency and equity - is it there?,* 2016, available at https://www.nbs.rs/internet/latinica/90/90_9/TorbenAndersen_wp.pdf, retrieved on the 14th of April 2020.

(ii) what should be regarded as the most effective and efficient solutions.

From a formal perspective, the investigation should concern the identification of the appropriate legal instruments to implement the required coordination (or harmonization) and, in particular, whether bilateral tax treaties should still be regarded as the most suitable means to achieve that result.[20]

The paper is addressing the tax professionals and equally the non-specialists, who prove interest for the evolution and development of the tax systems and tax avoidance regulation. The scope of this paper is linked to the following research topics: fiscal sovereignty, the effects of recent major fiscal policy initiatives on the European Union and the Member States, and informal mechanism to harmonize taxation.

The research will determine the development of regulation in the field of taxation, due to unilateral initiatives of the states, at European level, meanwhile analyzing the OECD proposals. The paper addresses the issue of challenges for the contemporary taxation systems (section 3), establishing the present status of regulation and the conflicts arisen form the interconnectivity of the global economy. The concept of sovereignty in ruling taxation is analyzed and its particular features at EU level (3.1) and in the EU member states (3.2.). The re-design of the sovereignty in taxation is investigated (section 4), as a result of the by European integration, using doctrinal approach for tax cooperation (4.1) and tax competition (4.2) and jurisprudential approach for the internal market (4.3. and 4.4.). The final part of the paper (section 5) synthesizes the conclusions, presents some limits of the research and future direction to follow in the research field.

If sovereignty equals in taxation with the untouchable state right to decide completely autonomously on the public revenue and it is perceived as fundamental value for the tax systems, then we could reasonably hypothesize that the unilateral regulation in tax field is the legitimate method to rule in nowadays. To investigate this assumption, there are various accepted methodologies or ways in legal research[21] and it is not uncommon than more than one methodology is employed in the course of completing a single research project. Taxation field indulge in multidisciplinary approach from the methodological

[20] Paolo Arginelli - *A Proposal for Harmonizing the Rules on the Allocation of Taxing Rights within the European Union and in Relations with Third Countries*, in Pistone Pasquale – A Possible Roadmap: European Tax Integration - Part 6, 2018.

[21] Dawn Watkins, Mandy Burton - *Research Methods in Law*, e-book, second edition, available on Taylor & Francis e Books, 2017.

point of view (e.g., economic, statistic, legal). The tax avoidance is a large phenomenon, and it can be addressed from different perspective: the subject of tax avoidance, the methods of doing it, the prejudicial parties, the dimension of the effect etc. In this wide field of research, our analysis focused on the conduct of the companies that operates internationally and that are simultaneously a subject of taxation for different public budgets. The research uses both doctrinal or black letter research[22] with case law analyses and comparative approach of the active regulation. To the extent that legal research goes beyond doctrinal inputs and takes a broader perspective encompassing some aspect of law in its social context, the socio-legal research will also be utilized.

A complex of methods and means of documenting were used when analyzing, comparing, synthesizing, deepening and concluding specific information in the tax systems and tax avoidance. The study of the relevant scientific literature is carried out by qualitative, comparative, and deduction analysis. The information thus collected is processed through comparative methods in order to synthesize arguments to support or to contradict our hypothesis parameters. Subsequently, the assumptions are subject to validation processes, mainly by the conclusions expressed in published case law, applying critical analyses to the specific situations. The documentation phase includes selection and organizing relevant categories of resources, data collection and information processing. The main methods of investigation are theoretical research on specialized literature, empirical research, exploratory qualitative and primary quantitative data analysis, analyses and comparison of the courts of law solutions in taxation cases, non-contentious case study investigation, synthesis and deduction.

The collection of data includes analysis of literature in the field, doctorate thesis, articles, using IT tools and the printed format. The legislation in force and the newest standards, databases and OECD documents were identified. The available data is selected and inventoried, using the most recent and relevant criteria. The documentation for the research, starting with the literature resources and the information available in the library (courses, academic papers and study materials in companies' taxation field of regulation) was considered. The first stage of documenting was dedicated for research in the library,

[22]Terry Hutchinson, Nigel Duncan - *Defining and Describing What We Do: Doctrinal Legal Research*, Deakin Law Review, vol. 17, no. 1, 2012.

discussion and participating in working group (colloquia and seminars). The deep analyze of the concepts, the differences and similarities of the taxation are spotted in the present research. The lines for drawing the conclusions of the research are to summarize the guidelines of the literature, to monitor and to follow the achievement of the objectives, to identify the limits of the research and to state the future direction for investigation.

The used methodology combines methods of theoretical investigation, such as the theory of integrative legal consciousness,[23] together with specific legal methods, including formal method and comparative law approach. The regulation was addressed on three levels of investigation: from the domestic/unilateral point of view, to the EU level and globally. The good practice in fighting tax avoidance and the results and models used in the multi-state taxation were acknowledged. The research identified the results in combating tax evasion and limiting BEPS, the characteristics that bring autonomy and strength to this area of regulation. This research outlines the differences that may appear when considering the international dimension of the domestic taxation system, the fundamental principle of equity in taxation and the legitimacy of using tax avoidance mechanisms, if the law is not specifically forbidding them.

The analysis is not limited to academic research, comprising jurisprudential introspection. The Court of Justice of the European Union (CJEU) constantly argues its tax case-law solutions based on the equity in taxation principle. Without a doubt, there is more to comment on the European concept of inequity in taxation, than the equality among the subjects of the tax. The US doctrine uses mainly the concept of inequality of the taxation system, while considering the situations of lack of equity. The difference between the two approaches require doctrine and case-law examination, in order to determine if inequality in tax policy is equal to the lack of equity of the taxation system and which one generates better results.

2. Brief literature review

[23] Klare, Karl E. - *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 1937-1941" (1978). Minnesota Law Review, retrieved from https://scholarship.law.umn.edu/mlr/1732 on the 20th of March 2020.

Taxation is known as a dynamic, competitive and multidisciplinary field of research[24] for scholars in law, economics and public policies[25]. The present research on taxation trends at global level, generally, and in the EU, particularly,[26] aims at identifying the actual means to overcome the restrictions derived from the connection sovereignty – taxation methods for limiting/eliminating tax avoidance[27]. Mandatory rules, necessary for limiting base erosion and profit shifting, such as deductibility of interest, exit taxation, a general anti-abuse rule, controlled foreign company rules and rules to tackle hybrid mismatches are analyzed.[28] This topic is relatively new[29] and under ongoing academic disputes both for OECD countries and for the candidates[30]. The US academics have remarkable results in taxation research[31], which outlines the effect of tax evasion[32] and avoidance[33] through use of tax havens[34], a number of proposals were formulated[35], results of the extensive research in the field carried out by scholars and practitioners[36]. It is legitimate to distinguish tax planning versus tax fraud[37], considering the first within the scope of the legal right to organize ones' activity in order to maximize the income and the latter when

[24] Heller, M. (2003) Globalization, the New Economy, and the Commodification of Language and Identity. Journal of Sociolinguistics, 7, 473-492.
[25] Posner, Richard A. - *Economic analysis of law*, 8th ed. New York, Aspen Publishers, c2011.
[26] Keightley, Mark P.; Stupak, Jeffrey M., Corporate Tax Base Erosion and Profit Shifting (BEPS): An Examination of the Data, Congressional research data, 2015.
[27] Pun, Gregory - *Base Erosion and Profit Shifting: How Corporations Use Transfer Pricing to Avoid Taxation,* Boston College International and Comparative Law Review, Volume 40, Issue 2, 2017.
[28] Global Tax Alert - *Luxembourg publishes draft law implementing EU Anti-Tax Avoidance Directive*, EY 2018
[29] Bufan, Radu - *Treaty of Tax Law – Vol. I General theory of taxation*, Hamangiu Publishing House, Bucharest, 2016.
[30] Tofan, Mihaela - *Tax Law,* CH Beck Publishign House, Bucharest, 2016
[31] Daniel Shaviro - *Fixing U.S. International Taxation,* Oxford University Press, 2014
[32] Williamson, Vanessa - *Paying Taxes: Understanding Americans' Tax Attitudes,* Doctoral dissertation, Harvard University, Graduate School of Arts & Sciences, 2015.
[33] Brown, Patricia - *OECD Update STEP,* Miami 4th Annual Summit May 31, 2013, University of Miami School of Law.
[34] Rosenbloom, H. David - *International Tax Policy: A View from the US*, in Australian Law Review vol. 41, no. 3, 2012
[35] Reuven, Avi-Yonah - *International Tax Evasion: What Can Be Done?,* in American prospect Lonform, 2016; see also Gravelle, Jane G., Tax Havens: International Tax Avoidance and Evasion, Cornell University ILR School DigitalCommons@ILR, 2015.
[36] Desai, Mihir A.&Dharmapala, Dhammika - *Corporate Tax Avoidance and High Powered Incentives*, Economics Working Papers Department of Economics, University of Connecticut, UCONN Library, 2004; see also Cremona, Marise, Hilpold, Peter, Lavranos, Nikos Schneider, Stefan Staiger, R. Ziegler, Andreas, Reflections on the constitutionalisation of international economic law: liber amicorum for Ernst-Ulrich Petersmann, Leiden : Martinus Nijhoff Publishers, 2014.
[37] Ulrich Schreiber, Gregor Fuhrich - *European group taxation-the role of exit taxes,* Eur J Law Econ (2009) 27:257–274, DOI 10.1007/s10657-008-9090-6, Published online: 24 December 2008, Springer Science+Business Media, LLC 2008

the planning of the activity involves breaking the rule of law or abusive conduct[38]. Some authors contributed to the wholly artificial arrangements doctrine,[39] associating the loss of the Member State tax authority in fighting tax avoidance with the next logical step in the courts' free movement jurisprudence.

Regarding the legitimacy of the tax avoidance conduct, the European doctrine is split in two groups:

- first group includes the authors/researchers considering that the tax avoidance is as illegal as tax evasion, being itself a conduct that is not in accordance with the spirit of law[40], and
- the second group, including the ones considering that the tax avoidance is the result of the lack of clarity of the law, so if the law is not forbidden a conduct, so it is allowed. [41]

The topic of the research is mainly derived from the regulation addressing the taxation of the Multinational Companies (MNEs) and/or Controlled Foreign Companies (CFCs), which were generally described in terms of their main function: tax avoidance.[42] The fiscal conduct of the MNEs usually includes

(i) extended tax deferrals in the countries where companies are located, in the context of a global taxation system (e.g., US); or

(ii) large tax avoidance, including mechanism to target reduced effective tax rates from the perspective of the country where the business is located, when the taxation system has a territorial component (e.g., France) and worldwide

[38] Morgan, JA (2017) *Taxing the powerful, the rise of populism and the crisis in Europe: the case for the EU Common Consolidated Corporate Tax Base*, International Politics, pp. 1-19. ISSN 1384-5748 DOI: https://doi.org/10.1057/s41311-017-0052-x

[39] Lilian V. Faulhaber - *Sovereignty, Integration and Tax Avoidance in the European Union: Striking the Proper Balance,* 48 Colum. J. Transnat'l L. 177 (2009-2010), available at https://scholarship.law.georgetown.edu/facpub/1838

[40] Violeta Ruiz Almendral - *Tax Avoidance and the European Court of Justice: What is at Stake for European General Anti-Avoidance Rules?,* INTERTAX. Volume 33. Issue 12, Kluwer Law International 2005, pp. 560-582

[41] Robert W. McGee - *The Ethics of Tax Evasion - Perspectives in Theory and Practice*, Springer Science and Business Media, LLC 2012, Publisher Name, New York, NY, https://doi.org/10.1007/978-1-4614-1287-8

[42] Błażej Kuzniacki - *Tax Avoidance through Controlled Foreign Companies under European Union Law with Specific Reference to Poland*, Accounting, Economics, and Law: A Convivium. 2017; 20150018, DE GRUYTER

exemptions for foreign-sourced income as a result of concluding tax treaties and/or the Parent-Subsidiary Directive (e.g., East European countries).

From the doctrinal point of view, the legal evolutionary paradigm at the interface of international law and EU law describes, in metaphor, the changing evolutionary relationship between the European and international law regimes as a "tale of romance and divorce." [43] The two systems of laws departed during the 1950s and the separation grew with each treaty concluded among the Member States and the two finally separated as effect of the revision of the European primary law by the Lisbon Treaty. In taxation field, the administrative and judicial procedure enlarged this separation. Given the collateral effects of European integration on the symbiosis between taxation and democracy, teleological grounds for supranational income taxation are presented.[44]

In the relevant literature, the principal purpose test (PPT) clause is discussed,[45] evaluating its ability to prevent access to treaty benefits in abusive situations[46]. Instead, income tax and its cross-border complications have been considered, in a traditional manner, as an inalienable feature of national sovereignty. Still, there are opinions in favor of building the European tax union,[47] or in favor of creating the European unique tax.[48] The income tax regulation constitutes the core of the justification for the European politics in favor of unique taxation system. The key question is whether the European Member States have the political agreement for the re-design of the primary sources of law, which have been drafted to protect the sovereignty in taxation. The doctrine investigates the inputs of the rulings of the Court of Justice of the European Union (CJEU)

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[43] Shafi U. Khan Niazi, Richard Krever – *Romance and divorce between international law and EU law: implications for European competence of direct taxes*, Stanford Journal of International Law, no. 53:2 2017, ISSN: 0731-5082, Author/Editor: Stanford University, Publisher: Stanford University – School of Law.

[44] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?,* German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55

[45] McGowan, Michael; Thomson, Andrew & Hardwick, Emma - *Preventing treaty abuse*, Tax Journal Insight and analisys, www.taxjournal.com, 2015.

[46] Weber, Denis - *The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) versus the EU Principle of Legal Certainty and the EU Abuse of Law Case Law*, Erasmus Law Review, Issue 1, 2017.

[47] Paolo Arginelli - *A Proposal for Harmonizing the Rules on the Allocation of Taxing Rights within the European Union and in Relations with Third Countries*, in Pistone Pasquale – *A Possible Roadmap: European Tax Integration* - Part 6, 2018.

[48] Mihaela Tofan - *Argument for Ruling a Unique European Tax, Journal of Modern Accounting and Auditing,* Vol. 7, no. 10, David Publishing Company, Inc., USA

in the area of taxation, mainly when connected or collided with the four fundamental freedoms of circulation. Given the huge budgetary impact of the Court's solution in the field of taxation, three different indicators (i.e., interpretation and use of general principles of EU law, limitation of the temporal effects of the judgment and the number of references for preliminary rulings), were used to conclude that the Court has not been affected by the external factors in its solutions.[49]

Tax systems, cornerstone of our societies, are dependent on enforcements as much as on policy. The selective application of taxes that gives priority to maximizing revenue and short-term efficiency fatally affects the neutrality and fairness of overall tax systems; there is a decrease in the long-term efficiency of these systems, which crucially undermines the rule of law by slowly corroding one of the core values on which our societies are based.[50]

There are voices qualifying this moment in tax systems evolution as the proper one for advancing a constitutional model of regulating international taxation, debating on the possibility to reconcile the public authorities initiatives with the pressure of the civil society and the opinion of the companies involved in cross-border activities (either multinational corporations MNC or controlled foreign corporations CFC).[51]

The model of taxation that is used in such large market as the internal market of the European Union may use one of the following patterns:

- the regulation designs the prototype of European taxes, whose essential legal structure is defined directly by EU sources and becomes binding on Member States; or
- the European law determines the general principles and rules of tax regulation, which are intended to outline the legal framework governing national tax.[52]

In both cases, tax neutrality should characterize the tax systems, requirement which translate into the obligation that it does not determine any limitation to the economic

[49] Katerina Pantazatou – *Economic and political considerations of the court's case law post crisis: an exemple from tax law and the internal market*, CYELP 9 [2013] 77-118

[50] Rita de la Feria – *Tax Fraud and Selective Law Enforcement,* in Journal of Law and Society, Vol. 00, no. 0, XXX 2020, ISSN: 0263-323X, pp. 1–31

[51] Steven Dean - *A Constitutional Moment in Cross-Border Taxation*, paper presented in Tax Policy Colloquium, NYU Law School, 25 august 2020.

[52] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

operators' decision in its current activity, for example where to establish or where to invest.[53]

The first category of tax model mentioned above is considered to be in connection to more complex and advanced forms of tax harmonization, which covers the entire system of tax and which, in any case, aims to define the key elements of the tax structure (taxpayers, tax base, tax rate, etc.). The second type of fiscal model is in direct connection to some particular forms of sectoral harmonization, which covers segments of the system of tax and do not aim at defining the fundamental structure of the tax or the basic aspects of the structure of taxation.[54] The first model is mainly found in the field of indirect taxation (as mentioned in previous paragraphs). Consequently, the tax literature qualified the value added tax, customs duties and (sometimes) excise duties as European taxes, in the sense that the legal framework of these taxes are effectively included in the legislation attributed to the EU institutions. The second taxation model can be seen especially in the field of direct taxation, where European harmonization covers limited aspects of fiscal system.

3. Challenges for the contemporary taxation systems

A tax system is a set of rules, regulations, and procedures that

(i) defines what events or states of the world trigger tax liability (tax bases and rates),

(ii) specifies who or what entity must remit that tax and when (remittance rules), and

(iii) details procedures for ensuring compliance, including information-reporting requirements, and the consequences (including penalties) of not remitting the legal liability in a timely fashion (enforcement rules).[55]

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[53] Cesar Garcia Novoa - '*Tax Neutrality in the Exercise of The Right of Establishment within the EU and the Funding of Companies*', (2010) 38 Intertax, pp. 568.

[54] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[55] Slemrod, J. and C. Gillitzer (2014) - "*Insights from a Tax-systems Perspective*", CESinfo Economic Studies, Vol. 60/November 2013, pp. 1-31, http://dx.doi.org/10.1093/cesifo/ift015.

Even if we skip in-depth analyze of this definition, it is obvious that there are infinite ways and features that individualize tax systems, even in the rare situation when two or many of them are considered akin. In such a diverse landscape, it is frequently possible that a particular transaction gets under the scope of different tax system, each of them claiming a piece of the revenue. The international taxation is not only present but important for every fiscal administration.

In order to observe the international dimension of the taxation system, it is necessary to consider that the majority of the European countries describe their taxation system in the fiscal code, establishing the competence for local authorities to evaluate and to collect taxes for all the income obtained within the area of jurisdiction of that particular state. The activities within the scope of other state regulation or under the conflict of two/many different regulation, either involving a taxable person with another nationality/citizenship or the income generated from transactions with legal entities or natural persons over goods from different country, are to be addressed under the terms of the mutual tax treaty/convention between two countries. The diagnosis of a particular case is more challenging when the fiscal regulation is frequently changing, as it is the situation in the many countries, especially the Eastern European. It is reasonable to consider that the volatility of the tax regimes[56] generates no long-term predictability for the taxpayer fiscal optimal conduct and, if there is no predictability about tax liability, there is no interest for innovative tax planning. Actually, this is not the case, because both the substantial fiscal regulation and the tax procedure are sometimes on a random and, I might say, even chaotic path. This favors tax avoidance and it is deconstructive for the collection of the public revenue from taxes.

Tax planning is considered in some research to be mainly tax avoidance,[57] and it is described as the operation of using the active regulation in order to diminish tax payments, although it may be considered permitted in certain circumstances. As long as the actual taxpayer presents a valid economic reason for choosing a particular location for

[56] Van den Noord, P. (2003) - *"Tax Incentives and House Price Volatility in the Euro Area: Theory and Evidence"*, OECD Economics Department Working Papers, No. 356, OECD Publishing, Paris, https://doi.org/10.1787/410243688730.

[57] Ulrich Schreiber - *International Company Taxation. An Introduction to the Legal and Economic Principles*, ISBN 978-3-642-36305-4, DOI 10.1007/978-3-642-36306-1, Springer-Verlag Berlin Heidelberg 2013

developing the activity and a justification for the legal form used for certain investment, the activity is considered legitimate tax planning. Not only the scholars, but also the courts are in favor of the taxpayers, admitting the legality of their tax planning operations, if their decisions are not issued for the sole intention of avoiding taxes, but are economically justified. Therefore, taxpayers are allowed to manage their businesses in order to keep low tax liabilities, as long as their actions comply with the regulation in force.[58] Within these limits, the tax planning is permitted and acknowledged, but when the taxpayer pushes the planning outside the legal framework, the conduct is sanctioned by fiscal regulation and, eventually, it could be prosecuted under criminal law. It is though important to draw the line between permitted tax planning and illegal tax avoidance, both in domestic and international regulation.

For instance, it is only natural that the taxpayer reacts to the state tendency of collecting more, using tax planning opportunities, especially when they are explicitly indicated by the regulation itself[59]. In many cases, regulation in force offers alternative options, e.g., choosing between a permanent establishment or a subsidiary in another country, thus choosing the favorable tax system and choosing between financing with equity or debt, in accordance with one of the methods that offers the best tax advantages. In both these situations, if the tax law permits tax planning, then it is a matter of regulating the mechanisms of the fiscal policy, which translates into reality the fiscal program of the ruling authorities.

3.1 Sovereignty in ruling taxation

Sovereignty is not just a legal concept, but also a characteristic of the state power that is undergoing through important transformations worldwide, in general, and within the EU, in particular. Along with the citizenship, sovereignty has changed its basic meaning

[58] Ulrich Schreiber - *International Company Taxation. An Introduction to the Legal and Economic Principles,* ISBN 978-3-642-36305-4, DOI 10.1007/978-3-642-36306-1, Springer-Verlag Berlin Heidelberg 2013

[59] There are multiple choices in accountancy and fiscal regulation inviting the taxpayer to opt for the most favoring one in order to pay less, like computation of the entire loss and accelerated depreciation instead of straight-line depreciation.

together with the development of the EU construction.[60] The exercise of national tax sovereignty in an international legal framework characterized by the lack of coordination and harmonization of the rules on the allocation of taxing rights among EU Member States and between such states and third countries generates international disputes and political tensions. [61]

Sovereignty, the main characteristic of the state authority, is nowadays in direct connection with democracy and legitimacy of regulation process. In Western capitalist societies, the three decades after World War II saw a strong interconnection between income tax and democracy. On the one hand, the democratically representative political process was a precondition for the legitimacy of taxation. On the other hand, redistributive income taxation has improved the conditions for equal democratic participation by allocating resources and equalizing political power among citizens. [62]

The concept of sovereignty, once relatively uncontested, has recently become a major bone of contention within international law and international relations theory.[63] Instead of assuming that the concept of sovereignty has a timeless or universal meaning, more studies have focused on the changing meanings of this concept in a variety of historical and political contexts.[64]

From the fiscal point of view, the sovereign state is able to rule tax system,[65] to establish tax liabilities, to collect taxes, to apply sanction when fiscal discipline is not respected and even to pardon certain fiscal liabilities, using amnesty acts. In the doctrine,[66] it is assumed that the defense of fiscal sovereignty on significant portions of national taxation is due to

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[60] J.H.H. WEILER - *To be a European Citizen – Eros and Civilization*, Working Paper Series in European Studies Special Edition, Spring 1998, available at http://aei.pitt.edu/8990/1/weiler.pdf, retrieved on the 18th of August 2020.

[61] Paolo Arginelli - *A Proposal for Harmonizing the Rules on the Allocation of Taxing Rights within the European Union and in Relations with Third Countries*, in Pistone Pasquale – A Possible Roadmap: European Tax Integration - Part 6, 2018.

[62] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?,* German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55

[63] Jens Bartelson - *The Concept of Sovereignty Revisited,* The European Journal of International Law Vol. 17 no.2, EJIL 2006, pp. 463–474 doi: 10.1093/ejil/chl006

[64] Bartelson, J. (1995). *A Genealogy of Sovereignty* (Cambridge Studies in International Relations). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511586385

[65] Orbach, Barak, *Regulation: why and how the state regulates*, New York, NY : Foundation Press, 2013.

[66] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

an axiological choice: by proper taxation, states choose to keep the constellation of values enshrined in the Constitutional Charters by anti-sovereignty attacks, thus avoiding equality and freedom, the protection of the social community and the promotion of civil transformation, fighting with the strong impetus of the market towards defining values and interests in accordance with the expectations and decisions of economic forces.
The fiscal sovereignty is considered an important asset for the governments and they are not willing to transfer it in favor of the EU, slowing down the reinforcement of the integration process.

3.2. The right to rule taxation for the EU member states

The EU is e wonderful economic integrated area for the 27 members states, and it is a construction that functions, despite the challenges it was confronted with and the controversies it is constantly facing. One of these controversies is the success of the European currency/euro and the function of the monetary union for the 19th of the EU Member States, although the fiscal union does not go along with it, as it is supposed to be, in the traditional economic model of financial integration[67]. The Member States of the EU have come a long and fruitful way in coordinating their financial policies, but after the global financial crisis constrains in 2008 a step back in the integration may be determined. The EU representatives struggled to reinforce the European financial integration but the differences among the member states taxation systems and the extraordinary context of BREXIT is negatively affecting the whole process.
In the EU, the existence of a deeply integrated internal market order for the Member States and the concomitant lack of profound income tax integration is surprising. Differential or secvential integration between market order and tax order has constituted fiscal interdependence between Member States: formal sovereignty to regulate income

[67] Enrique G. Mendoza, Vincenzo Quadrini, Jose-Vıctor Rıos-Rull - *Financial Integration, Financial Deepness and Global Imbalances,* Journal of Political Economy, 2009, vol. 117, no. 3, University of Chicago, available at https://www.journals.uchicago.edu/doi/pdfplus/10.1086/599706?casa_token=v7rgCxMSa9MAAAAA%3AR2Zka5IV5jQjhONhL_VT49ZpiBfJoLB4x5L5-YMLGipLwBzwTUNyN7KuToSte-UmRHYX3ySuwfs&, retrived on the 20th of May 2020.

tax systems allows differences between national tax systems, while increased economic operations creates the context for the most flexible economic actors the opportunity to re-locate to the most favorable tax jurisdiction. The interconnection between income tax regulation and the rule of democracy in the Member States has not been affected by fiscal interdependence that is present on the internal market. The consequences of fiscal interdependence for Member States' tax system resides in connection both to the conditions prior to drafting tax regulation and to the taxing regulation itself and its abilities to strengthen democracy. Therefore, there have been opinion in the literature that the procedural—as well as substantive—essential of a national symbiosis between taxation and democracy is affected.[68]

Member States are subject to the effects of transnational policy, which may act in two basic ways. In the situation of tax externalities, it is possible that the tax bases migrate from the jurisdiction with more severe tax system to another, where the tax liability is lower. In the situation of regulatory externalities, the Member State are confronted with the necessity to avoid the transfer of existing tax bases and, if possible, to attract revenues form activities abroad. As a consequence, the states adjust their tax systems according to the tendences of the mobile capital and the option of the corporations. In other words, Member States respond to the requirements of actors whose flexibility on the marker has been influenced by the fiscal advantages of a certain location, in the context of the transnational economic order and who have consequently been given the option of judicial exits and entrances. In this conduct, states conduct a competitive regulatory process, which is alleged to have turned Keynesian welfare regimes into competition states.[69]

The asymmetric European integration[70] that has advanced trans-nationalization of cross-border market order but preserved income taxation under national political authority has

[68] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?,* German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55

[69] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?,* German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55.

[70] Hagen, J.v. and Hammond, G.W. (1998), *Regional Insurance Against Asymmetric Shocks: An Empirical Study for the European Community. The Manchester School*, 66: 331-353. doi:10.1111/1467-9957.00104

established fiscal interdependence between Member States of the EU and exposed them to transnational regulatory effects.[71]

In accordance with the European primary law, the EU institutions conduct operations and activities in taxation area in respect to the subsidiarity principle, acting only if the Member State is unable to resolve the problems effectively. Usually, the problems arise from the inadequate level of coordination for the tax systems of the EU Member States. According to Article 5 of the Treaty on European Union, the principle of the assurance of competence determines the limits of the competence of the Union and the principles of subsidiarity and proportionality limit the exercise of this competence. The Union shall act only within the limits of the powers conferred upon it by the Member States in the Treaties to attain the objectives set out therein and the competences not conferred upon the Union in the Treaties remain with the Member States.[72] It is the precise case of the competence to rule fiscal system, which is yet one of the Member States exclusive prerogative.

The Treaty on the Functioning of the European Union (TFEU) defines the internal market as an area without internal frontiers in which the free movements of goods, persons, services and capital is ensured (Art. 26.2 TFEU). According to this forecast and for a true internal market, fiscal harmonization seems inevitable. This is especially true for income taxes, as international double taxation and international tax arbitrage have a strong impact on business and investment patterns. However, European legislation requires only a certain (but not complete) degree of harmonization of indirect taxes, in particular value added tax (Article 113 TFEU). With regard to income taxes, Art. 115 TFEU provides the European Council with a mandate to issue directives concerning the approximation of laws affecting the functioning of the internal market, stating that the council shall act

[71] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?,* German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55.

[71] Mihaela Tofan – *The Accession of Romanian to the European Monetary Union*, All Beck Publishing House, 2008, ISBN ISBN 978-973-115-453-4, pp. 315.

[72] Kyle Richard – *Are all tax rulings state aid? Examining the European Commission recent state aid decisions,* Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018, Author/Editor: University of Houston - Law Center, Publisher: University of Houston Law Center Language: English, Country of publication: United States of America.

unanimously. Given the requirement of unanimity, income tax remains essentially an autonomous prerogative for Member State.[73]

It is also important to observe that principle of unanimity, applicable when the Council has to decide on tax issues, shows the Member States prior option to maintain their possibility to act immediate and without limitation in situation that involve tax policy, expressing, at the same time, the option for limiting the role of the EU in this area.[74]

Regarding the nature of interdependence between internal market construction and fiscal integration in the EU, certain characteristics which define this process have been outlined. The guarantee of application of economic freedoms using judicial control proves the deconstruction of the internally established public authority, namely in the situation when the power of states to impose taxes is discussed. When the exercise of state authority to rule taxation creates disadvantages for cross-border operations, excessive tax burdens will be waived as a result of the judicial control, for the reasoning of unjustified taxing power.[75]

Cross-border investment by investment funds is still surrounded by an aura of uncertainty, stemming from the lack of harmonization of direct taxation in the European Union and the consequences of discrepancies in the treatment of these investments by different EU Member States. Uncertainty about the tax treatment of this type of vehicle, coupled with its complexity and constant evolution (derived from continued competition in financial markets and the consistent creation of new investment "products"), especially in cross-border situations, tends to trigger tax issues that have not yet been analyzed, such as possible discrimination and restrictions on fundamental freedoms that may arise when such investments are cross-border, both on a fully EU scenario and in scenarios involving third countries. [76]

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[73] Ulrich Schreiber, Gregor Fuhrich - *European group taxation-the role of exit taxes*, Eur J Law Econ (2009) 27:257–274, DOI 10.1007/s10657-008-9090-6, Published online: 24 December 2008, Springer Science and Business Media, LLC 2008

[74] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[75] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?,* German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55

[76] Antonio Calisto Pato - *Cross-border direct tax issues of investment funds from the perspective of European law,* EC TAX REVIEW 2008, vol. 5

It is not easy to respect the rules of unique European market and still respect the sovereignty in taxation, especially if we think about the freedom of the market and the need of the legal person to expand their business in the most profitable area. This generates the need to align the regulation for all the company's activity, including the fiscal aspects. While the approximation of the corporate tax may be easily justified in order to facilitate the proper functioning of the internal market, the legislation has yet to be adopted unanimously. The unanimity in the Council is a difficult rule to comply to, in the EU 27. It is, on the one hand, constitutionally reasonable to protect the general legal basis of Article 115 TFEU with strict legislation to avoid any competence by the EU. On the other hand, it is also clear that this special legislative procedure contrasts sharply with the ordinary legislative procedure, which requires only a qualified majority vote (QMV), albeit with the consent of the European Parliament[77]. It is reasonable to estimate that the Member States are most unlikely to agree on anything, because their taxation systems differ considerably, and they have the tendency to protect their prerogatives.

The general rule provided by art. 115 TFEU (formerly Article 94 of the Maastricht Treaty and Article 100 of the Treaty of Rome), gives the Council the power to decide unanimously, after consulting the Parliament and the Economic and Social Committee, on certain directives for the approximation of national laws, as the common market integration process develops.[78] Although this prevision has led some to call for further tax integration beyond the national state, others have remained skeptical about the democratic legitimacy of Europeanized taxation.[79] In order to respect the principle of unanimity, any tax specifically targeting a cross-border transaction could be seen as an unlawful restriction; this broad understanding of the sphere of potential obstructive regulation on the internal market would indirectly sugest that the full harmonization of

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[77] Anna Sting - *Company Tax Integration in the European Union during Economic Crisis - Why and How?,* Erasmus law review, ISSN: 2210-2671, no. 1/2014, Author/Editor: Erasmus Universiteit Rotterdam. Faculteit der Rechtsgeleerdheid, Publisher: Erasmus School of Law, URL: http://www.erasmuslawreview.nl/ Language: English, Country of publication: Netherlands, retrieved from https://heinonline.org

[78] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[79] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?,* German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55

European tax rules and regulations is able to solve any miss-understanding between concurrent legislation of the states. As a result, Member States' performance in supporting the symbiosis between democracy and taxation has been eroded. But things did not move so far until now, although there is unlimited support for unrestricted regulation of free movement on the European market, both in terms of entry and exit transactions.

When assessing the restrictive nature of a regulation, it is necessary to compare similar operations: cross-border economic activity is compared to a fully domestic transaction in terms of its tax treatment and when a tax treatment is considered less favorable, the taxpayer suffers an objective disadvantage, with respect to a cross-border activity.[80] The value of harmonization does not necessarily apply in the same way as the other values set out in the primary law, but it requires the formation of a political consensus in the relevant EU institutions for the adoption of tax rules. When observing this value into practice, the principle of unanimity is needed to ensure the recognition of the fiscal sovereignty of each Member State.[81]

Still, there are situations when exercising its sovereign right in ruling taxation, the state may impose a legitimate restriction. For instance, when group taxation is addressed, most group tax regimes are applicable to group companies that are in the same country as the parent company, excluding foreign group companies from the tax group. Group taxation imperative rules are addressed to centrally controlled groups, when sharing a common business objective. Usually, the group taxation is applicable if two conditions are fulfilled, addressing requirements in connection to the tax residence of the group members and their participation in shares, i.e.:

(i) the affiliate companies are domestic corporations owned by a domestic parent,

(ii) the subsidiaries are controlled by the parent; the control is assumed if the shareholding exceeds 50% or 75%.[82]

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[80] Ulrich Schreiber, Gregor Fuhrich - *European group taxation-the role of exit taxes*, Eur J Law Econ (2009) 27:257–274, DOI 10.1007/s10657-008-9090-6, Published online: 24 December 2008, Springer Science and Business Media, LLC 2008

[81] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[82] Ulrich Schreiber - *International Company Taxation. An Introduction to the Legal and Economic Principles,* ISBN 978-3-642-36305-4, DOI 10.1007/978-3-642-36306-1, Springer-Verlag Berlin Heidelberg 2013

Needless to say, in such a case i.e., transfer of assets from a head office to its permanent establishment abroad, taxes should only be levied insofar as the exemption method applies between the state where the company resides and that of the permanent establishment. When credit method is applied, insofar as assets are moved to the state of the permanent establishment, then consistency could only be achieved by obliging the state of the head office to keep record of the hidden reserves (difference between the fair market value of the assets at the time of the transfer and its historical cost) and by postponing the collection at the time such assets are sold. In both cases, either when assets are moved from the permanent establishment state or from the head office state, the state of departure will tax only capital gains accrued before the intra-company transfer was deemed to take place.[83]

Group taxation is ruled using different options. The analyses of the used possibilities to set out the tax system for group taxation shows that few states use the full consolidation of intra-group profits and losses in line with the terms of active financial accounting, so the group are not treated as a single taxpayer. Most states have regulated tax regimes for groups, which take into account the additional revenues of the group members, weighting it in different manner. These methods are called group tax schemes and they are considering the transfer of taxable income from one member of the group to another. In practice, the following group taxation systems have been identified:

- Partially tax consolidated system, including aggregation systems, group relief system and group contribution system, all of them do not fully consolidate the group's profits and losses.
- Full tax consolidation systems (e.g., the Netherlands), which seek to tax the domestic group as a single economic unit.[84]

The most obvious solution to address the issues of legal basis and subsidiarity is an amendment to the Treaty that would create a more specific legal basis for tax harmonization in the EU. If there will be such a change in the EU taxation that would

[83] Mario Tenore - *The Transfer of Assets from a Permanent Establishment to its General Enterprise in the Light of European Tax Law*, International Tax Review INTERTAX, Volume 34, Issue 8/9 5 Kluwer Law International 2006

[84] Ulrich Schreiber - *International Company Taxation. An Introduction to the Legal and Economic Principles,* ISBN 978-3-642-36305-4, DOI 10.1007/978-3-642-36306-1, Springer-Verlag Berlin Heidelberg 2013

admit the possibility to take action using the ordinary legislative procedure, only a qualified majority in the Council would be needed to adopt tax legislation. In addition, depending on the type of competence that the EU would have assigned, exclusively or shared, the issue of subsidiarity would either be outdated (if it is exclusive) or it would not be such a problem (if it is shared). Even when competence was to be shared with the Member States, a specific legal base would not only make it easier for the Commission to justify its action, but rather a mandate under the Treaties as tax harmonization would become one of the objectives in the Treaty.[85]

Legal double taxation may be generated by multiple scenarios, including the simultaneous applicability of the rule of unlimited and limited tax liability and double residence. If, for example, a corporation has its registered office (place of incorporation) in Germany and its place of management in the United Kingdom, the corporation is subject to an unlimited tax liability in both countries. Limited liability may also lead to double taxation, for example when a Polish branch of a German corporation receives dividends from a US subsidiary and the corporation is both subject to a limited tax liability in the US and subject to Poland tax on dividends received, because those dividends are resulting from the activity carried out by the Polish branch. Overlapping tax bases due to conflicting determination of taxable income can also lead to double taxation. For example, the U.S. rules to determine the profit of a German branch may differ from the respective German rules.[86]

There are pieces of regulation of primary source of European law, such as the art. 52 TFEU, which allow restrictions on the freedom of establishment, if there is a reason of public policy, security or public health. Still, we observe that the justifications explicitly mentioned in the treaty are usually not applicable in the field of taxes. As usual when the law is not directly applicable to certain situations, it is the mission of the CJEU to explain and characterize the possible situation within the scope of the regulation, addressing in

[85] Anna Sting - *Company Tax Integration in the European Union during Economic Crisis - Why and How?,* Erasmus law review, ISSN: 2210-2671, no. 1/2014, Author/Editor: Erasmus Universiteit Rotterdam, Faculteit der Rechtsgeleerdheid, Publisher: Erasmus School of Law, URL: http://www.erasmuslawreview.nl/ Language: English, Country of publication: Netherlands, retrieved from https://heinonline.org.

[86] Ulrich Schreiber - *International Company Taxation. An Introduction to the Legal and Economic Principles,* ISBN 978-3-642-36305-4, DOI 10.1007/978-3-642-36306-1, Springer-Verlag Berlin Heidelberg 2013.

its case-law the legitimate reason for limiting the general rule on restricting freedoms. According to the main rule of European law, the validity of a national tax rule depends on the following three conditions:

- the particular tax rule applies in a non-discriminatory manner,
- the rule is justified by reasons of public interest and
- the rule is proportionate.

In its jurisprudence, the CJEU has accepted a few justifications for restrictions, [87] depending on criteria such as:

(ii) Anti-avoidance rules are permitted on the grounds that ensuring effective fiscal supervision is a reason accepted in the public interest. The fight against tax evasion is, in principle, legitimate.

(iii) Coherence of tax regulation is a necessity. In general, coherence describes a situation in which a number of different tax rules are systematically linked. Those tax rules must be in a systematic context with regard to the same taxpayer and the same tax.

(iv) Allocating the power to impose taxes on Member States requires that each State regulatory authority take into account both profits and losses when exercising its tax rights. Otherwise, a balanced allocation of the power to impose taxes between Member States would be jeopardized. Therefore, taxpayers should not be free to choose where they are taxed.

Still in line with this analysis, the effects of Article 293 should be considered. The text initially included in the Treaty establishing the European Community (article 220), and in the Amsterdam consolidated version and it indicates that Member States will, to the extent that it is considered useful and/or benefiting to their nationals, engage into negotiations between each other, in order to target:

- protection of citizen, their jobs and guaranteeing the same rights as those granted by each state to its citizens.
- the elimination of double taxation within the European internal market.

[87] Ulrich Schreiber, Gregor Fuhrich - *European group taxation-the role of exit taxes*, Eur J Law Econ (2009) 27:257–274, DOI 10.1007/s10657-008-9090-6, Published online: 24 December 2008, Springer Science and Business Media, LLC 2008

- reciprocal recognition of companies or firms within the reasoning of the second paragraph of Article 48, retention of legal personality when transferring the registered office to another country and when merging operation involve companies registered under the laws of different countries.
- minimization of administrative procedure for the mutual recognition and execution of the effects of court or tribunal decisions and arbitral awards.

The text proves the fact that integration project grew its reliance on European legal order, rather than trusting interstate treaties based on public international law, and an inherent growth in the European "federal" mandate to take wide-ranging actions to harmonize direct taxes in single market during the post-repeal period is inevitable.[88] The article 293 categorized the necessity of negotiation with potential to affect the integration process among Member States into four groups of arguments. It is important to state that the conventions eventually concluded are not a part of the EU law, but they enhance the flexibility of the European project using legal instruments applicable only for the signatory parties. In theory, these conventions are under the scope of the international law, instead of EU law. Technically, because such agreements are not a part of the EU legal system, they may not be used or censored by EU institutions, not even by the CJEU. Prioritizing their own sovereignty, no Member State has proposed transferring the right to rule direct taxation in favor of the EU institutions so far. Following this purpose, in the Lisbon Treaty the rule previously enunciated by art. 293 of the Maastricht Treaty (formerly Article 220 of the Treaty of Rome) which required negotiations between Member States to ensure the abolition of double taxation in the European Union was abandoned. In essence, it means that the use of a thick network of bilateral (or multilateral) agreements between different Member States to resolve the issue of taxation of income generated in international transactions in the European Union must be ruled out. The general objective of harmonizing direct taxes and the specific objective of

[88] Shafi U. Khan Niazi, Richard Krever – *Romance and divorce between international law and EU law: implications for European competence of direct taxes*, Stanford Journal of International Law, no. 53:2 2017, ISSN: 0731-5082, Author/Editor: Stanford University, Publisher: Stanford University – School of Law.

avoiding double taxation on the European market is a task within the competence of the EU bodies and institutions.[89]

The withdrawal of a regulation incorporating the solutions to cross-border barriers at Member State level happened simultaneously with the intensification of the discussions on European model of fiscal federalism, which considers that an EU-wide mandate is needed to develop direct tax policies as an integral part of the policies for the proper functioning of the single market. However, the field of fiscal policy remains an important item on the agenda of national governments and therefore European fiscal competence continues to be surrounded by legal and political complexities.[90] The increase number of papers in the European tax literature on this repealed provision is in accordance with its status as the only explicit reference to direct taxes in the EU treaties, the primary sources of EU law. Our analysis supports the observance that the elimination of the only explicit reference to direct taxation in the EU primary law:

- is in line with the actual and natural dependence of the European taxation on European order, rather than its connectivity with the international taxation.
- suggest wider powers to act at EU level against tax obstacles in the single market,
- enforces the concept of differentiated or flexible integration in tax legislation.
- limits the application of international law within EU boarders, in favor of the European specific jurisdiction, which has developed prodigiously in the last half of the century.[91]

[89] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017

[90] Shafi U. Khan Niazi, Richard Krever – *Romance and divorce between international law and EU law: implications for European competence of direct taxes,* Stanford Journal of International Law, no. 53:2 2017, ISSN: 0731-5082, Author/Editor: Stanford University, Publisher: Stanford University – School of Law.

[91] Shafi U. Khan Niazi, Richard Krever – *Romance and divorce between international law and EU law: implications for European competence of direct taxes,* Stanford Journal of International Law, no. 53:2 2017, ISSN: 0731-5082, Author/Editor: Stanford University, Publisher: Stanford University – School of Law.

4. European integration in taxation

Although the sovereignty in ruling taxation of the EU members states is guaranteed by the primary regulation, the evolution of the community law and the European integration generated a tight connection for the rules in the field of fiscal policies.

The cooperation among the European states evolved in an unpredictable way from its beginning, when the economical declared purposes prevailed, to the actual status of *sui generis* integration. Professor J.H.H. Weiler has wonderfully characterized the federalism in the EU: the EU is neither a confederation, nor a federation in the traditional sense of these words, but at the same time it has its own "brand of constitutional federalism"[92]

In organizing the internal relations of the EU member states, the taxation plays an important role, in direct connection to the market regulation. Prof. Graine de Burca presents the broader legal perspective and the political perspective on EU taxation[93], confirming the analysis carried-out in the previous subsections and showing that the fiscal sovereignty is still under the ruling competence of the Member States in the EU and it was not transferred to the EU. The direct result is that the tax union is only a future possibility, not yet a present reality. Still, we take into consideration that one of the directorates of the European Union is entitled Tax and Custom Union, which reminds us that the whole European cooperation was built on a fiscal ambitious project (custom union) and, at the same time, introduce us the possibility to create a true and functional tax union.

Taxation may generate positive or negative impact on economy[94] and its mechanism may be regulated in a positive or negative manner. The "*positive taxation*" implies that the institutions of the European Union are able to regulate, independently, a tax system applicable within the union, as a result of the partial transfer of fiscal sovereignty from the national states.

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[92] Weiler, J.H.H.: *Federalism and Constitutionalism*, Europe's Sonderweg, in: The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union, Oxford: Oxford University Press, 2001.

[93] Craig, Paul De Burca, Graine – *EU Law – Texts, Cases and Material*, fifth edition, Oxford University Press Inc., New York, 2011

[94] Michael Herb - *No Representation without Taxation? Rents, Development, and Democracy* Author(s):, Source: Comparative Politics, Vol. 37, No. 3 (Apr., 2005), pp. 297-316 Published by: Ph.D. Program in Political Science of the City University of New York Stable URL: http://www.jstor.org/stable/20072891

Opposite from the "*positive taxation*", used when the legislation in force is active, legitimate and able to establish certain liabilities and procedure to follow, the "*negative taxation"* refers to limiting the fiscal sovereignty of another state, still member of the EU. The adjustment of taxes to market concerns took place through negative integration. Instead of building positive supranational tax rules, the Court of Justice of the European Union (CJEU) and the Council sporadically banned particular tax arrangements, which were to be removed from national regulatory orders. Although the promotion of markets through tax consolidation has made national tax authorities subject to national tax orders, it still leaves Member States some discretion. While the few directives certainly prohibit specific tax arrangements that may not be supported, the CJEU's judgments give Member States ample leeway to decide how to reconfigure their tax systems to eliminate the disadvantageous treatment of cross-border economic activities.[95]

The legal system derived from EU sources of law is actually influenced by the effects of "negative taxation": the rules of tax law in the treaties clearly indicate that the main objective set at European level is to identify constraints and conditions and, more generally, to limit the power to adopt regulation for the Member States, in favor of the EU specific institutions; still, there is a general desire to preserve the taxing power at the autonomous level of decision of the Member States, and not to transfer this particular regulatory competence at the central level of the European Union.[96]

The "negative taxation"[97], the original paradigm for the EU taxation, is presently considered a transitory phenomenon, which will be soon outdated by the constant changes in the paradigm of cooperation of the Member States, in line with the status of the European integration, which some authors have characterized as a form of incipient "federalization".[98]

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[95] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?,* German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55

[96] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[97] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017

[98] Lenaerts, Koen & Gutman, Kathleen - *"Federal Common Law" in the European Union: A Comparative Perspective from the United States. American Journal of Comparative Law*. 54. 1-121. 10.1093/ajcl/54.1.1., 2006.

In this context, the recent evolution of the European fiscal harmonization, when the negotiation for new regulation are longer and low productive, together with the powerful effects of the principle of non-discrimination and other principles that shape the rule of law on the European internal market, generate the conclusion that the "negative taxation" and the concept of the of fiscal sovereignty for the Member States are complementary in the European legal order, as they are constantly determining each other scope and effects. It is not a mechanism specific to the federalism pattern, but it characterizes one more time the European status of integration and cooperation.

4.1 Tax cooperation within EU

Although obstructed by the unanimity rule in the primary European law, the tax cooperation in the EU is mandatory. This is another field of *sui generis* action in the European regulation and the need to understand it arises from the multiple effects that are generated. With the first steps of the integration process, European Union institutions were paying attention to the negative effect of the tax obstacles on the internal market, as taxes are known to be an important determinant of economic behavior. [99] The first three decades of the European Communities' existence have been marked by fiscal integration on two levels: the elimination of intra-Community customs duties and the approximation of indirect taxes have begun, while integrated income taxes have remained absent. [100] The fundamental free movement of good, persons, services and capital collide continuously with the tax regulation, boosting tax cooperation within EU, despite the sovereign right of the states to rule taxation. For example, cross-border movements of goods and persons reflect the differences in the national tax burden, that may result from the articular regulation for the same fiscal treatment in different Member States.

[99] Servaas Van Thiel - *The Direct Income Tax Case Law of the European Court of Justice: Past, Trends and Future Developments,* Tax Law Review vol. 62/2008, ISSN: 0040-0041, Author/Editor: New York University School of Law, Publisher: Warren, Gorham & Lamont Series: Current periodical series, Language: English, Country of publication: United States of America.
[100] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?,* German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55

In the second half of the last century, EU institutions and representatives made efforts for tax harmonization, identifying direct taxation as first possible target of this process and searching for a uniform model for the taxes that have common features in all the Member States. Making these common taxes the uniform taxes in the community would consequently lead to the inapplicability of the special or atypical taxes of each State. This scenario is not in contradiction with the possibility to eliminate the domestic taxation instruments having an effect equivalent to the restriction of the common market.[101] In the Neumark Report of 1962,[102] the possibility of unifying the structure of Member States' tax systems has been ruled out, but the harmonization of direct taxation has been considered for its ability to diminish incidental forms of double taxation. In particular, the hypothesis of a harmonized corporate tax was proposed and the approximation of laws in relation to the taxation of personal income was foreshadowed.[103]

Despite the obvious need for uniformity when regulating capital and corporate taxation, the harmonization of income tax systems at European level remained just a plan. From a market integration perspective, the disparity of national systems was seen as a potential impediment to the functioning of the common market, as were non-harmonized indirect taxes. The acceptability of the alignment of advancing taxes on the market was, however, based on the condition that harmonization did not impede the ability of Member States to use taxation for their intended purposes.[104] Meanwhile, the applicability of harmonization to local taxes was excluded, because of the general principle of protection of the European market and because of their territorially addressability to a restricted community and thus appear overall to be unsuitable to affect the general freedom of movement protected by the EU law.[105] Later, in the Memorandum on the harmonization

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[101] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[102] Report of the Fiscal and Financial Committee (Neumark Report). 1962, available at http://aei.pitt.edu/34508/1/A677.pdf, retrived on the 3rd of March, 2020.

[103] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[104] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?,* German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55

[105] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

of direct taxes in 1965 and 1966 with the Segre report,[106] the need to approximate the structure of direct taxation in the Member States, to eliminate differences in treatment between residents and non-residents and to exclude forms of double taxation, so as to achieve a real European capital market, was emphasized.[107]

In 1970, Werner Plan[108] has seen harmonization of direct taxes as a necessary step for the effective realization of economic and monetary union; thus, a number of goals were formulated related to the approximation of direct taxation systems in different national laws, which seemed in accordance with the logic of the federal finance but did not generate effective results. In the early 1980s, there was a change in the course of European tax integration, in order to align national tax systems with the rigor of the European single market, the fundamental principle for the EU legal order. Moreover, the adaptation of taxes to the requirements of the cross-border economic movement reflects the doctrinal feeling that taxation is an obstacle and a deterrent to market activities, which requires consolidation, both domestically and transnationally, in accordance with the principle of economic efficiency.[109] The topic was taken up in the debate on the establishment of a monetary union and the Delors Report in 1989[110] described the approximation (or at least coordination) of Member States' direct tax systems as a crucial step in the process of European integration. It has been made clear that the fiscal integration can be beneficial for Economic and Monetary Union for three main reasons, namely increased economic cohesion in the internal market, improved fiscal supervision and better control of tax fraud and evasion.[111]

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[106] Segre, Claudio. (1966) - *The development of a European capital market. Report of a Group of Experts appointed by the EEC Commission*, available at http://aei.pitt.edu/31823/, retrieved on the 1st of March 2020.

[107] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[108] Report to the Council and the Commission on the realization by stages of the Economic and Monetary Union in the Community – Werne Report, 1970, available at https://aei.pitt.edu/1002/1/monetary_werner_final.pdf, retrieved on the 2nd of March 2020.

[109] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?,* German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55

[110] Delors, Jacques. (1989) *Report on economic and monetary union in the European Community*. Presented April 17, 1989 (commonly called the Delors Plan or Report) By Committee for the Study of Economic and Monetary Union, EU Commission - Working Document, available at http://aei.pitt.edu/1007/, retrieved on the 4th of March 2020.

[111] Mihaela Tofan – *The Accession of Romanian to the European Monetary Union*, All Beck Publishing House, 2008, ISBN ISBN 978-973-115-453-4, pp. 315.

Starting the mid-1990s, income tax systems have been changing their regime in the European law order, occupying a position that cannot be limited to the status of indirect regulatory effect of the four economic freedoms. While fiscal integration initially was designed to facilitate cross-border economic operations, integration has become more accurate by the tendency to limit or even eliminate the harmful consequences of the internal market order when using particular maneuver of fiscal scheme such as the erosion of national tax bases and changing on the profit allocation. It was proved that the free movement of the capital, in particular, has the ability to determine negative fiscal competition among Member States.

The previous philosophy of fiscal integration no longer keeps pace with the stages of economic integration reached by building the market. In this context, the European Union Council in its configuration for Economic and Financial Affairs (ECOFIN) has set up the Code of Conduct for corporate taxation, as the right institutional response to the erosion of tax bases and harmful tax competition (which will be widely addressed in the following section of the paper). The proposal was to abolish national tax-based arrangements that favored some taxpayers with unwarranted benefits. The measure was simultaneous with the European Commission procedure for allowing the application of the state aid rules, which in fact raised the question of potential selective tax benefits. As both measures imply challenging tax interventions, they had the effect of protecting national structure of the tax base intact: Member States preserved their right to tax or withhold tax, under the condition that the regulated tax treatment was applied without discrimination (without favoring certain taxpayers).

The first two directives on the subject of tax harmonization were issued in 1990, namely the Directive no. 90/434 concerning the operations of corporate organization and Directive no. 90/435 relating to the treatment of dividends between parent and subsidiary companies. At the same time, a multilateral Convention between the Member States (Convention no. 90/436 on the arbitration procedure for the elimination of double taxation) was agreed.[112]

[112] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

The process seemed to speed up for a short period of time and in 1992 the European Commission appointed the Ruding Committee[113] to establish the goals of a program for the harmonization of direct taxes, aiming at establishing an uniform tax base and a scale for tax rates to be used for the fiscal treatment of the companies benefits; also this regulation has targeted transparency of the fiscal incentives, when they were available for companies investments. Contrary to the conclusions of the Ruding Committee, the EU institutions manifested strong reservations about tax harmonization, considering that it was not appropriate to interfere in the political needs of Member States at that stage of the European integration. After 13 years, new regulatory initiatives in the field of direct taxation have been launched, namely two directives on the tax discipline of intra-Community capital investment: Directive no. 2003/48 on the taxation of interest paid to non-resident individuals and Directive no. 2003/49 on the taxation of interest and royalties paid between companies belonging to the same group and resident in different Member States. At present, almost two decades later, the implementation of the proposals in these directives is lacking or insufficient, with regard to withholding tax on dividends, coordination of corporate tax, taxation of dividends, the approximation of tax rates and the tax base, the determination of business income, the treatment of tax losses, the taxation of income for mobile EU workers.[114]

More sustained efforts against the measure to diminish the national income tax bases have been manifested following the financial crisis in 2008. The European Council has adopted a directive addressing the consequences of tax evasion, an important qualitative change in the nature of income tax integration, not forbitten certain concepts of the tax base but dictating the rules that should be incorporated into national law. In fact, it is a step toward the positive integration of Member States' tax systems.[115]

The approximation of tax systems of the Member States was mandatory in order to provide performance and effectiveness of the integration project. The early stage of the

[113] Ruding, Onno. (1992) *Report of the Committee of Independent Experts on company taxation. Executive summary*. March 1992, EU Commission - Working Document, available at http://aei.pitt.edu/8702/, retrieved on the 5th of March 2020.

[114] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[115] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?,* German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55

process was designed by the Members States mutual urge that the sequential steps of the internal market integration would not target the elimination of the differences between the national tax systems, in-line with the formalism of the fiscal sovereignty of the states. Integration was built on the expectations of economic prosperity, which would arise from the unrestricted cooperation of national economies, influenced by tax regulation of the Member States, where the income was generated and submitted to the domestic fiscal treatment. The integration of the national market was not perceived opposite to the national state role to intervene in the economy, unless the interventionism was obstructive to the superior goal of the internal market. Regarded from a wider international perspective, it was the experience of "embedded liberalism": the liberalization of the cross-border economic activity translated into the competing demand of nation states, when they value the power to maintain their de facto autonomy to pursue fiscal and social policies without external constraints. This legitimized the lack of European integration of income tax.[116]

We also have to take into consideration the necessity to adopt harmonizing tax regulation, especially with regards to direct taxation, in line with the fundamental principle of subsidiarity; consequently, tax harmonization has to be built by European institutions only when the particularities of transactions or operations carried out in European territories may effectively affect the proper functioning of the internal market; all other scenarios allow each Member States to regulate taxation at internal level, based on its exclusive competence.[117]

Within the EU law, the direct tax harmonization did not develop constantly, in comparison with the indirect tax, mainly because of Member States' tax sovereignty. Still, the EU law order is built on the priority of the multilateral regulation over unilateral law (the precedence of the European law over the national law) and on the direct effect of the European law, every time when the European rules are clear, precise and unconditional to be raised and argued by individuals in litigations presented to the national courts.

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[116] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?*, German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55

[117] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

As discussed in previous sections of this paper, the Member States have kept large competences in tax regulation and they are able to rule the material and procedural features of their tax systems. Accordingly, the prevalence of the EU primary law determined the EU countries to take into account the two interrelated principles when ruling their tax system: the principle of subsidiarity and the principle of proportionality, fundamental values of the EU law and foundation of the mechanism that support integration process.[118] Particularities of these principles are synthesized in the Protocol on the application of the principle of subsidiarity and proportionality, the updated version of which is the Annex II of the Lisbon Treaty. Limited only by these two principles, the Member States rule autonomously corporate taxation, making the tax integration in the EU a remote scenario. It is unanimously admitted that main legal obstacles the EU Treaties pose for harmonization of company tax shadow the benefits of the Economic and Monetary Union, namely the unanimity requirement in the legal basis of Article 115 TFEU. The most recent debt crisis and the current global pandemic situation worsen the states' urge to restrain their fiscal sovereignty, so there should be other methods to further fiscal integration in the present political climate. There may be treaty changes, enhanced cooperation, approaches to applicable laws and also indirect harmonization through the new system of economic governance. [119]

Moreover, it seems very significant at a symbolic level that tax harmonization plays a very recessive role, compared to the principle of non-discrimination and other general values of EU law, proving itself to be a less binding value and sometimes purely formal or programmatic.[120]

First, tax harmonization cannot be implemented directly only through legal interpretation, because it based on the existence of the support provided by secondary legislation. Contrary to the other European law fundamental principles (non-

[118] Karina Ponomareva – *Principles of subsidiarity and proportionality in European Tax Law,* Financial Law Review, No. 10(2)/2018

[119] Anna Sting - *Company Tax Integration in the European Union during Economic Crisis - Why and How?,* Erasmus law review, ISSN: 2210-2671, no. 1/2014, Author/Editor: Erasmus Universiteit Rotterdam.Faculteit der Rechtsgeleerdheid, Publisher: Erasmus School of Law, URL: http://www.erasmuslawreview.nl/ Language: English, Country of publication: Netherlands, retrieved from https://heinonline.org

[120] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

discrimination, the interdiction to affect the EU internal market freedom, the abolition of the customs barriers, the limitation of state aid, etc.) tax harmonization cannot be used by Member States and EU institutions in a direct manner, to justify their decisions, and it cannot be used by the courts of law when solving a particular case. Tax harmonization can be used only if there a previously described model, imposed through a legislative secondary instrument (directive or regulation) that expresses the options accepted in the specific discipline of a harmonized tax.[121]

Eventually, a possible non-EU option may be considered, if we think that the large majority of the EU member states are also OECD members[122], so multilateral agreements on tax issues are possible in this context. However, this research shows that the current EU legislative framework and the EU economic governance system led to achieving a more subtle and less intrusive tax harmonization, in comparison with treaty amendment that would increase legitimately and integration in the field of taxation. In exercising their powers of taxation, Member States have continued to rely on OECD principles, which aim primarily at allocating tax jurisdiction between states and avoiding double taxation, without necessarily including the free movement and guarantees of non-discrimination required in the in-depth process of economic integration. [123] At the same time, for more than two decades, the field of research and the regulation on taxation is reforming in all the recent members of the EU, including Romania. The Eastern European countries constantly adopt new regulation in taxation area and some of them (Estonia, Latvia, Lithuania, Slovakia, and Slovenia) have already entered the European Monetary Union (EMU), while the others (i.e., Romania, Hungary and Bulgaria) are candidate countries.

Second, at the end of the political decision-making process, three income tax directives have been adopted to remove impediments to cross-border business activities. From a technical point of view, the directives postponed the corporate restructuring tax, eliminated the chain tax on corporate dividends and canceled the source taxation of intra-

[121] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[122] The list of OECD members is available at https://www.oecd.org/about/document/list-oecd-member-countries.htm ; 22 of the EU Member States are currently members of the OECD.

[123] Servaas Van Thiel - *The Direct Income Tax Case Law of the European Court of Justice: Past, Trends and Future Developments,* Tax Law Review vol. 62/2008, ISSN: 0040-0041, Author/Editor: New York University School of Law, Publisher: Warren, Gorham & Lamont Series: Current periodical series, Language: English, Country of publication: United States of America.

group interest and royalty payments.[124] When performing a deeper analysis, it is revealed that the directions to favor direct tax harmonization used by the EU institutions mainly targeted the field of the transfer of the revenue in cross-border transactions, implying at least two of the Member States. Legislation on the approximation of direct taxation of income streams remaining in the single territory of a Member State did not have positive results and therefore it remained at the stage of simple proposal.[125]

We observe that more than half a century of European integration was not long enough to build tax integration; the corporate tax treatment, the taxation of the residents' income and other types of fiscal liability are still regulated by unilateral intervention of the Member States, and in cross-border activities, the previsions of the tax treaties concluded by the taxpayer's state of residence are incident.

4.2 Harmful tax competition

For many years, the topic of "harmful tax competition" has been one of the main justifications used by international actor, EU included, when evaluating the accordance of individual state's decisions regarding tax system, in relation to their development goals, and even to the peaceful coexistence of states in an international context.[126]

This leads to the additional problem of whether Member States have the power to introduce obstacles to cross-border activities whenever the tax disparity between them amounts to 'harmful tax competition', as defined by the OECD and the EU in their respective statements on this issue. The application of any anti-abuse doctrine or provision is subject to the institutional framework of the EU and the extreme concept of 'harmful tax competition' have been addressed either by application of Community State Aid rules or by political consensus in the form of 'soft law' i.e., the 'Code of Conduct' in

[124] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?,* German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55

[125] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[126] Pietro Boria - Taxation in European Union. Second Edition, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

1997.[127] Today, the fiscal sovereignty of the EU Member States seems to be guarded from a selfish position, aimed at keeping the autonomy of governments to decide their fiscal policy, while competing on the free market. Competition is not harmful in itself, economic theory proving its genuine results and long-term benefits. Still, in the particular context of the European integration, the fiscal competition comes in conflict with primary rules of law, such as the free movement of goods and capital, generating harmful results.

In fact, the multinational companies are designing tax planning strategies to reduce their overall tax liability and tax payments, speculating every possible advantage and technicality of tax systems, and significantly improving their final benefits. From this perspective, the definition of fiscal policies with an emphasis on territorial facilitation, aiming in particular at promoting the location of economic activities or capital investments in the country, was considered the expression of the "harmful" choices of globalization processes and therefore the element of countering or at least restricting European integration. Thus, some forms of aligning the fiscal policies of each state are promoted by international organizations, in order to reduce fiscal competition between states.[128] Considering these arguments, the situations when EU is authorized to act in a tax case are designated by:

- the principle of empowerment, namely the EU is competent to act in the particular situation that is analyzed.
- the principle of subsidiarity i.e., the delimitation of competence between the EU and the Member States is designed by the criterion of action which is best compliant with the objectives provided by the EU primary law (namely, its constituent treaties).
- the principle of proportionality, stating that the content and the form of the action do not exceed the limits necessary to achieve the established goals. [129]

[127] Wolfgang Schoen - *Abuse of rights and European tax law*, retrieved on the 23rd of July 2020 from https://www.cambridge.org/core.

[128] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[129] Kyle Richard – *Are all tax rulings state aid? Examining the European Commission recent state aid decisions,* Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018, Author/Editor: University of Houston - Law Center, Publisher: University of Houston Law Center Language: English, Country of publication: United States of America

Harmful fiscal competition within EU is manifested in concurrence with disrespect to EU State Aid rules. The regulation of EU state aid was adopted to serve a double scope: to eliminate the unjustified spending of public resources by inefficient fiscal incentives, consequently offering to the Member States the support needed to the proper management of the public budgets and to eliminating inefficient private investment by preserving the competition on the internal market. Since 1998, the Commission has been applying the ban on state aid for tax reductions, policy implemented as a result of an intensive process to gain Member States support. The dissemination of the state aid European policy was based on soft law instruments, such as notifications, recommendation, informative corespondance and other non-binding documents, which describe the application of the EU state aid ban to direct corporate taxation as necessary to promote good governance, to fight tax harmful competition and tax avoidance. The Commission's commitment to State aid in the form of fiscal measures is part of the wider objective of clarifying and strengthening the application of State aid rules in order to reduce distortions of competition in the single market. [130]

Harmful and limited competition is not permitted, and the conclusions of the Council of Ministers of Economy and Finance (ECOFIN) of 1 December 1997 established a Code of Conduct for corporate taxation. The Code is not a legally binding instrument, but given its prerogatives as an issuer, it clearly has political force. The representatives of the Member States agreed to repeal the existing tax measures which constitute harmful tax competition and to refrain from introducing such measures in the future ("standstill position"). It is not only a declarative document, as it proposed the criteria to be used when evaluating any presumptive harmful unilateral decision. The typical expression of the fight against harmful tax competition in the "Code of Conduct" was designed to achieve new favorable fiscal measures, in order to promote the gradual dismantling of existing tax regulations, dedicated to encouraging the location of economic activities in a country, capable of producing competitive situations compared to other countries. [131]

[130] Kristina Povazanova, Hana Kovacikova - *Multinational tax avoidance vs. European Commission*, Bratislava Law Review no. 1/2017, Comenius University in Bratislava, Faculty of Law

[131] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

The rules set out in the Code of Conduct have succeeded in achieving and effectively enforcing the value of harmful tax competition in the European legal system. Starting March 1998, the Code of Conduct Group has extended its scope with the mission of observing standstill conduct of the Member States and consequently reporting of its conclusions to the Council. The Code of Conduct Group's main results had impact on the rules, fiscal information exchange between tax authorities and transfer pricing transparency, administrative procedures and expanding the effect of promotion of European rules in third countries (non-EU countries). Still, the European Commission is competent to organize the whole process for the precise application of the EU State Aid rules, and for this purpose it undertake the mission to prepare and to draw up guidelines on the application of Articles 92 and 93 of the EC Treaty (Article 107 and 108 TFEU).

In order to explain the measures relating to direct business taxation, when adopting the Code of Conduct, transparency in the field of taxation was implemented through information exchange system between Member States and the assessment of all tax measures that could be covered by it; the Commission argued that the EU state the aid rules will also contribute, through their own mechanism, to the objective of tackling harmful tax competition.[132] In a different manner from the OECD report on harmful tax competition, the European Code of Conduct is not mainly focused at fighting the relocation of financial assets or business that could generate costs for the company, consequently diminishing the corporate tax base in the state where the enterprise developed its main economic activity. It rather concentrated its action on the measures to expose the reasoning of the incorporation of the company in the territory with a relaxed tax regime. The code of conduct is usually in contrast to tax practices that can result in substantial benefits, so that the company's allocation options change in a different area than usual (or where the main economic activity is expressed).[133]

There is no doubt that in the European context the sanctions for unlawful tax conduct may cumulate administrative and criminal features, without any restriction imposed by

[132] Kristina Povazanova, Hana Kovacikova - *Multinational tax avoidance vs. European Commission*, Bratislava Law Review no. 1/2017, Comenius University in Bratislava, Faculty of Law

[133] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

the non bis in idem liability doctrine. [134] The investigations carried out by European Commission are the administrative procedure to generate possible sanctions for unlawful tax conduct.[135] The affair known as "Luxembourg Leaks" contributed to the development of EU State Aid prohibition in relation to tax matters.[136] In 2014, the European Commission started investigations which received the mission to examine in depth situation in which three decisions were issued by tax authorities in Ireland, Netherlands and Luxembourg, targeting the liability to pay tax on the profit obtained by Apple, Starbucks and Fiat Finance and Trade. The questions raised were quite similar, regarding whether the proper respect was paid to the EU regulation banning state aid. Furthermore, on 7 October 2014, the Commission opened another through investigation on whether the decision of the Luxembourg tax authorities regarding the profit tax that Amazon has to pay in Luxembourg complies with EU state aid rules.[137] At the same time, the enterprises that have benefited from these advantageous tax rulings or other special tax measures are

[134] As it has been pointed out repeatedly in Lolito Fedele's the contribution (Lotito Fedele, S. (2020) - *The Ne Bis In Idem Principle in Tax Law: European and Italian Frameworks.* Central European Public Administration Review, 18(1), pp. 51–68, https://orcid.org/0000-0003-0108-9863), there is no lack of ambiguity about that. In fact, contradicting the Advocate General's requests in the Menci case the European Court of Justice has recently admitted the cumulation of criminal and administrative sanctions for failure to pay withholding taxes (Article 10-bis of Legislative Decree 74/2000 and Article 13 of Legislative Decree 471/1997), limiting itself to stating that it is legitimate to the extent that there is "coordination aimed at reducing to what is strictly necessary the additional burden that such cumulation entails for the parties concerned".

[135] Also in Lolito Fedele's the contribution (Lotito Fedele, S. (2020) - *The Ne Bis In Idem Principle in Tax Law:* European and Italian Frameworks. Central European Public Administration Review, 18(1), pp. 51–68, https://orcid.org/0000-0003-0108-9863), has been stated that such an approach would also be consistent with the requests coming from the neighboring area of European Union law - in which it has been argued that the prohibition of ne bis in idem enshrined in Article 50 of the Charter of Fundamental Rights of the European Union - is also valid concerning the sanctions formally called tax sanctions but which are endowed in substance with such a function as to assimilate them to criminal ones.

[136] Hundreds of tax ruling of the Luxembourg tax authorities were made available for public. According to these rulings, the Luxembourg tax authorities helped multinational companies to avoid payment of taxes in other jurisdictions by granting beneficial tax treatments. The European Commission press releases this could constitute a prohibited State Aid but, in consideration of the Member States sensitivity towards the regulation for taxing the revenues, the Commission presented its actions as an effort to combat corporate tax avoidance that exploits disparities in the tax policies of the Member States.

[137] All four cases concern tax rulings dealing with transfer pricing arrangements between entities of the same corporate group, which the European Commission has investigated on the assumption of illegal State Aid. After three months in-depth examinations, the Commission's report concluded that Luxembourg has granted tax advantages to Fiat's financing company, similarly to the Netherlands for Starbucks' coffee roasting company. A tax ruling delivered by the national tax authority allowed the companies concerned in each case to artificially lower the tax paid in the respective country, not corresponding to respective market conditions. As a result, a large portion of the Starbucks' coffee roasting company profits is shifted abroad, and Fiat's financing company only paid taxes on underestimated profits. Moreover, on the 30th of August 2016 the Commission has concluded that Ireland granted undue tax benefits of up to EUR 13 billion to Apple. (https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923).

advised to prepare for the possibility that tax benefits resulting from their tax planning at EU level might be unlawful State Aid and therefore they might have to expand their fiscal liability. From a wider perspective, the companies are obliged to take account not only of the applicable tax rules as part of their global tax planning and negotiation of tax rulings, but also of potential State Aid considerations.[138]

On August 30th, 2016, the European Commission ordered Ireland to collect approximately 13 Billion euro from Apple Group, through its subsidiaries Apple Sales International (ASI) and Apple Operations Europe International (AOE). The amount in question described one of the biggest tax controversies on record and generated a lot of pressure on the decisions makers.[139]

Prior to the commencement of the challenged decisions, the US Senate and the International Consortium of Investigative journalists opened separate investigations into the tax practices of multinational enterprises. The Commission investigations were opened shortly after the US Senate hearings and LuxLeaks scandal, and the targets of these investigations are well-represented in the sample of rulings chosen by the Commission for state aid analysis, providing some evidence that the Commission's recent investigations were, to some extent, triggered and informed by these prior events. The LuxLeaks scandal provides evidence of widespread Multinational Tax Avoidance. Shortly after the LuxLeaks scandal, the European Parliament and the European Commission began investigations into the tax regulatory practices and tax laws of the EU Member States that gave rise to the tax avoidance structures detailed in LuxLeaks. [140]

Although no specific definition of "harmful tax competition" is formulated in EU law, an area of state behavior (and in particular regulatory regimes adopted in national law) has been progressively identified that may be considered incompatible with the general

[138] Kristina Povazanova, Hana Kovacikova - *Multinational tax avoidance vs. European Commission*, Bratislava Law Review no. 1/2017, Comenius University in Bratislava, Faculty of Law

[139] Kyle Richard – *Are all tax rulings state aid? Examining the European Commission recent state aid decisions,* Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018, Author/Editor: University of Houston - Law Center, Publisher: University of Houston Law Center Language: English, Country of publication: United States of America.

[140] Kyle Richard – Are all tax rulings state aid? Examining the European Commission recent state aid decisions, Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018, Author/Editor: University of Houston - Law Center, Publisher: University of Houston Law Center Language: English, Country of publication: United States of America

principles set out in the Treaty.[141] However, it is just one of several European Commission decisions regarding the taxation of recently issued multinational transfer pricing activities, apparently in response to both the U.S. Senate inquiry into the tax practices of U.S. multinationals and the so-called "Luxembourg Leaks" or "LuxLeaks", documents published by the International Consortium of Investigative Journalists.[142]

The European Commission has initiated and finalized Decisions adverse to Fiat, Starbucks, Apple, and Amazon based on specific transfer pricing methodologies used by those firms, and endorsed by tax authorities in Luxembourg, the Netherlands, and Ireland, arguing that each received illegal state aid. The Commission also found that the entire tax ruling practice in Belgium constituted illegal state aid. At present, the Commission Decisions which have been finalized are each under appeal.[143]

The scheme discovered in the EU targeted more than three hundred large multinational corporations - including Fiat - and has been in place since 2002. Large multinationals would have been offered very favorable tax treatment by national tax authorities on a case-by-case basis: the authorities issued mandatory written interpretations of the law in relation to the company in question (so-called advance tax rulings). It soon turned out that the practice of early tax rulings as an instrument of international tax competition and the alleged tax avoidance for multinationals was by no means limited to Luxembourg: equal practices were used by Belgium, the Netherlands and Ireland. The latter is the scene of the Apple case.[144]

The final European Commission Decisions have been issued based on the application of the arm's length principle contained in non-binding OECD guidance, without regard to whether the Member State has implemented the arm's length principle in its national tax

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[141] Pietro Boria - Taxation in European Union. Second Edition, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[142] Kyle Richard – Are all tax rulings state aid? Examining the European Commission recent state aid decisions, Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018, Author/Editor: University of Houston - Law Center, Publisher: University of Houston Law Center Language: English, Country of publication: United States of America

[143] Kyle Richard – *Are all tax rulings state aid? Examining the European Commission recent state aid decisions,* Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018, Author/Editor: University of Houston - Law Center, Publisher: University of Houston Law Center Language: English, Country of publication: United States of America

[144] Thomas Jaeger - *Tax Concessions for Multinationals: In or Out of the Reach of State Aid Law?,* Journal of European Competition Law & Practice, 2017, Vol. 8, No. 4

legislation. It is the case of the Commission's Starbucks Decision, the Commission's Fiat Decision, the Commission's Apple Decision, the Commission Decision Regarding the Belgian Tax Ruling Practice and the Commission's Opening Decision Regarding Amazon. The affected parties have appealed each of the Commission Decisions discussed above to the CJEU, given the substantial amounts at stake in each case, regardless of the ruling in the administrative procedure; although the grounds for appeal in each case appear similar, based on the public versions of the appeals, each is analyzed separately.

However, given the summary nature of the public version of the appeal documents, the analysis of the parties' legal arguments is limited.[145] According to the European Commission's decisions, the tax advisers of Fiat and Starbucks prepared and sent special tax decisions on behalf of their clients, which were granted by the tax authorities of Luxembourg and, respectively, the Netherlands. However, these tax decisions were considered illegal under European law because they constitute state aid and Fiat and Starbucks had to pay fines. State aid was conceived as a process of capital accumulation resulting from state authorization regimes based on interactions between public and private sector actors. Thus, an observable symbiosis between the tax authorities and the transnational companies allowed the latter to use the tax regulations in a manipulative way, while the former exercised poor or unjustified control. We observe the potential illegal (even criminal) role of tax advisers and other professionals rarely held accountable for their actions. [146]

"Harmful tax competition" is thus identified with the adoption of fiscal policies by a Member State which leads to a subversive tax order compared to most other states, as it introduces elements of tax facilitation or tax benefits, which determines the location of economic agents on the territory of the same state, including the allocation of resources and factors of production, to the detriment of the state of residence (and therefore with

[145] Kyle Richard – *Are all tax rulings state aid? Examining the European Commission recent state aid decisions,* Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018, Author/Editor: University of Houston - Law Center, Publisher: University of Houston Law Center Language: English, Country of publication: United States of America.

[146] Nubia Evertsson - *State Aid and Taxation of Transnational Companies: A Study of State-Corporate Crime,* Crit Crim (2017) 25:507–522 DOI 10.1007/s10612-017-9375-6, open access publication, Corsmark, Springer, 2017

an ignorance of the "natural" development of the Business).[147] In this context, each of the European Commission Decisions finds that a Member State granted state aid in contravention of the Treaty on of the Functioning of the European Union (TFEU), Article 107(1). Although it is clear that the European Commission can examine Member State tax ruling practices for the type of discrimination or "selectivity" that would constitute an illegal grant of state aid in contravention of the TFEU, the recent Commission Decisions exceeded the scope of the Commission's authority by questioning generally applicable principles and provisions of Member State law without showing that the challenged measures were selective.[148]

The tax rates in the Eastern EU Member States are usually lower than those in the western EU Member States.[149] An exception is Ireland, with a corporate tax rate of 12.5%, but the corporate profits are taxed twice, while the profits of partnerships (and individual owners) are taxed only once. Most income tax systems address the double economic taxation of corporate profits at the level of shareholders. In line with this approach in EU law, the belief that tax competition between different Member States must be seen as a negative factor, potentially appropriate to change the functioning of the common market and to distort the effectiveness of the principle of free competition, has gradually emerged.[150] The European Commission's decisions have been harshly criticized by multinational companies and regulators, but seem to reflect previous criticisms of non-governmental organizations (NGOs) of both multinational corporations and low-tax jurisdictions. It appears that the Commission's area of competence to examine Member States' tax laws and tax regulatory practices under the principles of State aid is likely to be decided by the Court of Justice of the European Union in the next few years.[151]

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[147] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[148] Kyle Richard – *Are all tax rulings state aid? Examining the European Commission recent state aid decisions,* Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018, Author/Editor: University of Houston - Law Center, Publisher: University of Houston Law Center Language: English, Country of publication: United States of America.

[149] Tofan, Mihaela – *European Financial Law*, University Alexandru Ioan Cuza of Iasi Publishing House, 2019, ISBN 978-606-714-544-1.

[150] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[151] Kyle Richard – *Are all tax rulings state aid? Examining the European Commission recent state aid decisions*, Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018,

In-depth discussion of the tax laws of each Member State reveals the heterogeneity of the tax laws within the EU, which is essential for understanding the fundamental dispute between the Member States and the European Commission. This heterogeneity is the result of the EU's supranational and probably federalist system and has given rise to many tax minimization techniques used by US and EU multinational organizations. As a result of this structure, the European Union does not have a single, cohesive tax system. Member States are free to establish national tax law, and state aid can be found for any measure of the Member State that offers an advantage to one actor over others, and tax rulings have long been taken into account in this analysis. CJEU case law provides for a four-prong approach to determining whether State Aid exists.[152]

Some or even many or all of the LuxLeaks cases may constitute illegal State aid. For example, Apple may be such a case. However, the presence of the aid must not be confused with the mere presence of a distortion of competition. Not all distortion practices are affected by the state aid ban. Fiat's decision fails to build a convincing argument in this regard, applies a crude and therefore overly inclusive standard and focuses on the wrong aspects of the case. Detecting and identifying discriminatory practices in early tax decisions seems to be the way to go in LuxLeaks cases to address relevant state aid measures, guess and suppress the national logic of corporate tax to inflate the aid law.[153]

While analyzing the impact of the corporation taxation on the taxation of the individual income, three systems have to considered:

(i) Classical systems with full double taxation, when the corporate profits are taxed and the dividend are taxed one more time, at the moment when they are distributed; accordingly, in the classical system, the dividends are fully taxed twice.

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[152] Kyle Richard – *Are all tax rulings state aid? Examining the European Commission recent state aid decisions*, Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018, Author/Editor: University of Houston - Law Center, Publisher: University of Houston Law Center Language: English, Country of publication: United States of America.

[153] Thomas Jaeger - *Tax Concessions for Multinationals: In or Out of the Reach of State Aid Law?*, Journal of European Competition Law & Practice, 2017, Vol. 8, No. 4.

(ii) Double taxation avoidance systems, when taxes are not the liability of the company, nor the liability of the owners of the capital. The mechanism to ensure this special treatment may include the funding of the corporation taxes.

(iii) Double taxation mitigation systems, when the fiscal treatment includes taxes on both profits and shareholders income from distributed dividents, but also some measure to diminish the payments or to reduce the impact on their assets for the shareholders. Within the EU, double taxation is avoided or mitigated at the shareholder level. Most Member States reduce either the number of taxable dividends or the tax rate which applies to dividends received by natural persons (shareholder relief).[154]

The use of national fiscal law measures offering tax benefits in favor of economic operators which are incorporated in that state is able to distort for the material point of view, the common framework of competition in business, determining obstacles and misfunctions in the normal activity of the internal market. In this context, the international actors which are involved in guarding the free competition in the market have constantly developed strategies to counteract the rules and practices permitted by particular Member States, when developing promotional goals on their territory.[155] Harmful tax competition is perceived as developing source of divergence between Member States, because of its ability to impact national economic and fiscal policy decisions, which have to be antagonized by tight EU coordination. [156]

It was argued that the transfer restrictions affect the initial financing, as investors face the risk of losing the carry-over of accumulated losses in the corporation when introducing new ones or increasing the capital of existing investors. [157]

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[154] Ulrich Schreiber - *International Company Taxation. An Introduction to the Legal and Economic Principles,* ISBN 978-3-642-36305-4, DOI 10.1007/978-3-642-36306-1, Springer-Verlag Berlin Heidelberg 2013

[155] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[156] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[157] Anna Theresa Buhrle, Christoph Spengel - *Tax Law and the Transfer of Start-up Losses: A European Overview and Categorization,* no.19-037, 09/2019, DISCUSSION PAPER, Leibniz Association, ZEW.

Harmful tax competition is identified as a major cause of the transfer of the tax burden from capital to labor by Member States. In fact, the provision of preferential tax regimes is able to attract mainly higher-income entrants (such as capital and businesses), but not the labor force, which is configured as a strong factor rooted in native and poorly mobilized territory.[158] Most European Member States use anti-trafficking rules, preventing the acquisition of simple corporate companies with large tax losses carried forward so that the tax asset can be used in profitable companies. However, other corporations may be unintentionally affected by anti-abuse regulations if there is a change in ownership or activity. Design and development of loss transfer restrictions in the EU28 over a period of 19 years (2000 - 2018) proves that, over time, regulations have become more permissive, giving start-ups more opportunities to keep their losses at bay and therefore reducing the risk for investors.[159]

4.3 Jurisprudential approach on European tax regulation

Nowadays and within the limits of the EU, a complex net has replaced the traditional pyramidal structure of the sources of law. The national legislative monism ratified in the nineteenth-century domestic codes is today undermined by different types of normative acts: directives, regulations, framework decisions and community sources, on one hand and international covenantal laws, on the other hand.[160] There is a deep modification not only in the framework of the traditional sources of law, but also an important challenge for the systems of laws that mainly value the normative acts and not the jurisprudential input. The European continental systems of law underwent through notable changes, accepting as a consequence of accessing the European integration project the guiding role of the former European Court of Justice (ECJ), today Court of Justice of the European

[158] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.
[159] Anna Theresa Buhrle, Christoph Spengel - *Tax Law and the Transfer of Start-up Losses: A European Overview and Categorization*, no.19-037, 09/2019, DISCUSSION PAPER, Leibniz Association, ZEW.
[160] Lotito Fedele, S. (2020). *The Ne Bis In Idem Principle in Tax Law: European and Italian Frameworks*. Central European Public Administration Review, 18(1), pp. 51–68, https://orcid.org/0000-0003-0108-9863

Union (CJEU). The CJEU has the role of issuing the official interpretation of the European law and the mission to verify the validity of such interpretation of the institutions, bodies, offices or agencies of the Union.[161] As shown in the doctrine, the relationship between the national and supra-national judges has become important, given the powerful impact of the latter on the production and the practical impact of the domestic law.[162] The fiscal case law in particular has raised many questions about the impact and the interpretation of the supranational law regarding the fundamental values of the Member States fundamental regulation, usually named constitution.[163]

This phenomenon includes international tax law, both at the domestic level and treaty law. Nowadays, no tax expert in Europe may ignore the CJEU case-law in the area of direct taxes, without losing the key to the solution of problems raised by cross- border situations. A complete analysis of relevant case-law for direct taxes situations is no longer a matter for an article, but for more extensive publications, a challenge that concerns many scholars, doctrine being published in the various European languages. EU Member States are no longer free to exercise fully autonomous their taxing powers, but they must take into consideration the primacy of European law both in respect to the formal law and the CJEU jurisprudence.[164]

The judicial review was mainly designated to draw the answer for these two questions:

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[161] Article 267 (ex Article 234 TEC) of the Treaty on the Functioning of the European Union (consolidated version) part six: Institutional and financial prevision – Title I: Institutional provisions, Chapter 1: The institutions, Section 5: The Court of Justice of the European Union - The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

[162] Karin Leijon (2020) *National courts and preliminary references: supporting legal integration, protecting national autonomy or balancing conflicting demands?,* West European Politics, DOI: 10.1080/01402382.2020.1738113

[163] Lotito Fedele, S. (2020). *The Ne Bis In Idem Principle in Tax Law: European and Italian Frameworks*. Central European Public Administration Review, 18(1), pp. 51–68, https://orcid.org/0000-0003-0108-9863

[164] Pasquale Pistone - *Towards European international tax law*, EC TAX REVIEW 2005, vol. 1

(1) Do the national tax practices are discriminatory or not? In this case, the investigation targets the discrimination against cross-border activities compared to domestic ones.

(2) Do the rules of the particular Member States create a limitation for the exercise of economic freedoms? In this case, both direct and indirect obstructive effect of the tax national rules are addressed.

The observance of the European legal order is realized both:

- in the form of preceding control, when the national legislators (parliaments of the Member States) are obliged to carry out an intense evaluation in the course of legislative procedures, to establish the consistency of the domestic regulation with the European law;
- in the form of subsequent control, carried out by the Court of Justice the European Union, when it is properly invested.

The CJEU is empowered to rule on claims in connection with the violation of the principle of subsidiarity by the EU legislative acts, which, according to the conditions laid down in Article 263 TFEU are applied by Member States or transmitted by them in accordance with their legal order on behalf of their national Parliament or a chamber of the latter (Article 8 of the Protocol).[165]

As analyzed before in our paper, taxation is one of the intrinsic components of state sovereignty, and the interaction of national tax systems remains a source of continuous disputes. The Union and Member States take measures to prevent breaking of law and to simplify tax systems. At the same time, tax secrecy and deficiencies in solving the case where the interaction of Member States regulation is present allow companies to exploit the differences in national tax systems. In addition, multinational companies use their presence in a large number of jurisdictions to benefit of the complex corporate structures for the opportunities to exploit tax planning, which are not available for small businesses or individuals.[166] Analysis of the literature has shown that it is often necessary and

[165] Kyle Richard – *Are all tax rulings state aid? Examining the European Commission recent state aid decisions,* Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018, Author/Editor: University of Houston - Law Center, Publisher: University of Houston Law Center Language: English, Country of publication: United States of America.

[166] Kyle Richard – *Are all tax rulings state aid? Examining the European Commission recent state aid decisions,* Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018,

justified that the Court of Justice of the European Union intervene, when the national court ask for it or they have failed in interpreting the EU law. As expected, the Court of Justice should give consideration in the elaboration of the ruling in the tax matters to the same fundamental values and ideas already expressed for other legal matters, stating the validity of specific transaction according to subjective elements (the purpose of obtaining a tax advantage contrary to the EU law), to be characterized on the basis of a set of objective circumstances of the case.

There are two situations when the CJEU is allowed to take actions with regard to regulation of Member States tax systems:

a) using its legal reasoning and the interpretation of general principles of functioning of the European internal market and the subsequent effects of its judgments.
b) using limitation for the temporal effects for particular judgments.

Indirectly, the literature shows there is a third possibility, namely the potential reduction of references for preliminary rulings sent by the Member States to the CJEU, a result of the efforts to protect the Member States budgets. [167]

The Court of Justice of the European Union has identified another important reason of general interest, from a conceptual point of view very close to the second mentioned above, namely the effectiveness of fiscal controls and audits. Initially, with regard to indirect taxation, the Court of Justice recognized the relevance of the grounds for safeguarding the effectiveness of fiscal supervision as a cause of justification in relation to the EU legal framework. (in particular case 20.2.1979, C-120/78 Cassis de Dijon).[168]

It was not until the European judges decided the Schumacker case that Member States were required to exercise their taxing powers on cross-border situations in a way that respects the primacy of Community law. When the Saint-Gobain case was decided, tax treaties became in open conflict with Community law. Therefore, negative integration has so far been the engine of the development of European International Tax Law.[169]

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[167] Katerina Pantazatou – *Economic and political considerations of the court's case law post crisis: an exemple from tax law and the internal market*, CYELP 9 [2013] 77-118

[168] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[169] Pasquale Pistone - *Towards European international tax law*, EC TAX REVIEW 2005, vol. 1

The rulings of CJEU in tax matters consider the proper applicability of the EU law general principles of subsidiarity and proportionality, simultaneously referring to particular aspects of the tax regulation such are the abuse or right in fiscal conduct, non-discriminatory treatment for the taxpayers and possible limitation of rights in national legislations.

The gap between the previsions of the EU law and national tax systems, in particular the limit of the principles of non-discrimination and non-restriction, reflects the possibility or the risk of international tax evasion (or tax avoidance).[170] The concept of tax avoidance and the application of the 'abuse of rights' doctrine in this context have been discussed in many jurisdictions for the last two decades. The practical part of this debate is devoted to establishing the demarcation line for illegal conduct (tax evasion) towards to potential abusive actions (which form tax avoidance) and acceptable behavior (tax planning). From an academic point of view, most writings concern the legal requirements for the application of a doctrine on abuse of rights. While some stress the effectiveness of purposive construction in the fight against tax avoidance, others acknowledge some value-added in a statutory general anti-avoidance rule.[171]

Without considering this assumption more than a partial result of our investigation, it is obvious that EU legal system allows the national taxation system to determine the taxpayers actions targeting tax avoidance or tax evasion, simultaneously establishing some limitations to Member States ruling competence, with regards to the prohibition of restrictions for the fundamental freedoms of European law. As literature mentioned, [172] the CJEU warns about the risk of using the reason of national interest in an indiscriminate manner, which constitutes a possible way to benefit of the EU legal order in favor of protectionist and self-oriented goals of the Member States.

In the field of European secondary law, the application of anti-abuse concepts depends on the range of taxpayers' choices, which are allowed within the limits the relevant

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[170] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[171] Wolfgang Schoen - *Abuse of rights and European tax law*, retrieved on the 23rd of July 2020 from https://www.cambridge.org/core.

[172] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

provisions of directives in the tax sector. The Court does fully accept the existence of tax planning and the fact that the taxpayers may choose to structure their business, in order to reduce their tax liability (Case C-255/02 Halifax)[173]. The illegal conduct exists when the tax planning is abusive, particularly when two conditions are met:

(a) Without prejudice to the formal application of the conditions laid down in the relevant legal provisions, the transactions lead to the accumulation of a tax advantage the granting of which would be contrary to the purpose of the legal provisions.; and

(b) It must be clear from a number of objective factors that the essential purpose of transactions is to obtain a tax advantage. Accordingly, the motivation in Halifax Case (par. no. 75) specifically says there is no abuse if the economic activity carried out can have another explanation, besides the simple realization of the fiscal advantage. [174]

In a successive line of case law, the court accepted that restrictive anti-avoidance measures may exceptionally be justified, if they are particularly addressing the entirely artificial constructions, without economic substance, which seek to avoid the tax burden that would otherwise apply.[175] In the Halifax decision, the CJEU has clarified substantially the role and the concept of abusive practices in the area of VAT. However there remains one cloud of ambiguity: the distinction between the sole purpose and the essential purpose.[176]

In Cadbury Schweppes case, there were three main questions:

- Firstly, whether establishing a company in another Member State of the EU, solely to take advantage of a more favorable tax regime than in the home state constitutes an abuse of the freedoms of establishment, and the CJEU expressly stated in paragraph 37 of the ruling that the purpose of benefiting from more favorable legislation in another Member State does not in itself constitute an abuse of the freedom of establishment.

[173] Wolfgang Schoen - *Abuse of rights and European tax law,* retrieved on the 23rd of July 2020 from https://www.cambridge.org/core

[174] Frans Vanistendael - *Halifax and Cadbury Schweppes: one single European theory of abuse in tax law?,* EC TAX REVIEW 2006, vol. 4.

[175] See http://curia.europa.eu/en/content/juris/index.htm for Case C-231/05 (Oy AA), Case C-196/04 (Cadbury Schweppes plc v. Commissioners of Inland Revenue); Case C-446/03 (Marks & Spencer plc v. Halsey).

[176] Frans Vanistendael - *Halifax and Cadbury Schweppes: one single European theory of abuse in tax law?,* EC TAX REVIEW 2006, vol. 4.

- Secondly, whether the way the British CFC rules are formulated incorporates a restriction in the exercise of the right of establishment or a discrimination, when Cadbury Schweppes was exercising this right in a genuine manner and European court firmly holds in paragraph 49 of the ruling that the advantage resulting from the establishment of a subsidiary in a low tax jurisdiction, other than the one in which the parent company has been incorporated, cannot by itself authorize that Member State to offset that advantage by less favorable tax treatment of the parent company. As a result, it is obvious that diminishing tax revenue is not in itself an indicator of overriding public interest and it is not justificative for any restriction or discrimination in the right of establishment in the European internal market.
- Thirdly, the questions if the British CFC legislation would be viewed as constituting a prohibited restriction or discrimination, whether it could be justified on grounds of prevention of tax avoidance and if it was proportionate in relation to its goal were answered by the European court in paragraph 51 of the ruling, by resuming that a national regulation restricting the freedom of establishment may be justified when it specifically targets the completely artificial arrangements aimed at eluding the application of the Member State concerned legal framework.[177]

The questions of abuse in Cadbury Schweppes were raised in quite a different way from Halifax. The court explained that an agreement is completely artificial if it does not imply the goals of a real economic activity, such as "letter box" companies that are considered to lack economic substance. (Cadbury Schweppes, 2006).[178] The question was not one of artificial construction within the tax system of a particular Member State, but rather a straightforward construction to take advantage of tax benefits provided in the national legislation of another Member State. Whether the establishment in the other Member State was genuine and effective and whether the home state was entitled to defend itself by imposing Controlled Foreign Corporation (CFC) legislation were also debated.[179]

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[177] Frans Vanistendael - *Halifax and Cadbury Schweppes: one single European theory of abuse in tax law?*, EC TAX REVIEW 2006, vol. 4.
[178] Servaas Van Thiel - *The Direct Income Tax Case Law of the European Court of Justice: Past, Trends and Future Developments*, Tax Law Review vol. 62/2008, ISSN: 0040-0041, Author/Editor: New York University School of Law, Publisher: Warren, Gorham & Lamont Series: Current periodical series, Language: English, Country of publication: United States of America.
[179] Frans Vanistendael - *Halifax and Cadbury Schweppes: one single European theory of abuse in tax law?*, EC TAX REVIEW 2006, vol. 4.

Against this background, Advocate-Generals Geelhoed, Leger and Mengozzi have pointed out[180] that Member States are not able to act solely against 'harmful tax competition'. If this is true, the simple fact that the taxpayer decides to move his/her business from a high-tax state to a low-tax state does not mandatory demand for the application of anti-abuse provisions in the Member State which is deprived of its legitimate tax revenue, even if the tax benefits offered by the other Member State can objectively be qualified as elements of harmful tax competition. The conclusion is that CJEU used in its decisions the argument of the economic reality of the transaction to infirm tax avoidance. In Halifax case the economic reality of domestic VAT transactions is the major reason for the final ruling, while in Cadbury Schweppes the economic reality is the exercise of the fundamental freedom to use cross-border transactions within the European internal market. The form in which the economic reality of the transaction is explained in the reasoning of the court presents differences only with regards to the viewpoint of the two caselaw, not in substance.

A more interesting difference between the Halifax and Cadbury is in the possibility of the national courts in VAT to decide whether the tax motive is `essential' compared to some other non-tax explanations, while the cross-border economic reality of the transactions determines the refutation of tax avoidance and the purpose of targeting the tax advantage has no effect. When the CJEU, as it should, had to decide that the effective economic existence of the transactions would preclude the application of anti-avoidance provisions, it would in fact use only one single rule: if there were an effective economic transaction on the basis of objective criteria which third parties can ascertain, the tax motive becomes irrelevant, even if it is significantly more important than the economic content of the transactions. Such a rule would also come very close to existing general anti-avoidance doctrine applicable in many Member States.[181]

It is observed in the relevant doctrine[182] that the cause of reasoning was found by the CJEU in the general scope to prevent tax avoidance, regarded as a subject which must

[180] Wolfgang Schoen - *Abuse of rights and European tax law*, retrieved on the 23rd of July 2020 from https://www.cambridge.org/core.

[181] Frans Vanistendael - *Halifax and Cadbury Schweppes: one single European theory of abuse in tax law?,* EC TAX REVIEW 2006, vol. 4.

[182] Pietro Boria - *Taxation in European Union. Second Edition,* ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

weaken the effectiveness of the tax systems of Member States. In particular, most of the issues brought before the CJEU relate to cases of allocation of tax losses or tax benefits to the parent company within a group of companies established in different Member States, in order to allow taxable profits to be moved from the place of effective operations to another Member States which exercise lighter fiscal pressure on the economy, using lower taxes (case 12/13/2005, C-446/2003 Marks & Spencer; case 07/18/2007, C-231/2005 OY AA). It is reasonable to consider that this movement arrangement is not presumably artificial, if the operation reflects economic reality, such is the case of the activity of CFC, when the companies physically exist in the host state, in terms of premises, staff and equipment, while the activity is other Member States. Accordingly, the subsidiarity principle determines the competence of the national courts to decide whether the evidence for a certain operation is wholly artificial and without economic substance.

The national court are to decide if the domestic anti-avoidance measures are mainly intented to address artificial construction or whether their scope is too wide. National courts must present their decision after thorough analysis of every case law presented to them, observing the general principle of proportionality and strictly applying specific national or regional arguments, in respect to the due process requirements.

From the case law of direct tax regulation, it is clear that European legislation does not provide for a discharge, or an exception of sovereignty or any other special status for income tax. Consequently, the way in which both the home Member State and the host Member State tax cross-border income is collected by EU subjects should be "constitutionally sound" in the two/many involved countries and the direct tax regulation are to be checked for consistency with the EU law, in general, and the rights deriving from the rule of internal market and non-discrimination, in particular.[183] So, the national courts are the ones to decide whether transactions are abusive, looking into the specifics of the operation, seeking for the real substance and significance of the transactions concerned. In this respect, the national judge may take into account the purely artificial

[183] Servaas Van Thiel - *The Direct Income Tax Case Law of the European Court of Justice: Past, Trends and Future Developments*, Tax Law Review vol. 62/2008, ISSN: 0040-0041, Author/Editor: New York University School of Law, Publisher: Warren, Gorham & Lamont Series: Current periodical series, Language: English, Country of publication: United States of America.

nature of the transaction and the legal, economic and/or personal links between the operators involved in the tax reduction scheme.[184]

The CJEU also stated that the identification of the tax advantage, as an "essential purpose" of operations, is not able to stand alone for the general condition of the recognition of abuse, but it identifies a minimum threshold of unacceptability of abuse of rights (case 02/21/2008, C-425/06 Part Service).[185] The paragraph 56 of the Saint Gobain decision (C-307/97) could be the starting point in affirming the primacy of European law over that of the Member States in taxation field, even in the presence of double taxation conventions, while the European court reassured that the Member States are empowered to establish the rules for taxation of income and wealth, aiming at eliminating and allocating competence of taxation for each one of them.[186]

Considering the taxpayer autonomous right to decide the way of managing the business, limiting any kind of payment obligation (including fiscal one), the feature of any abusive conduct should be analyzed in connection with the specificity of the operating market. In line with this diagnosis approach, operations that are solely presented could be parts of the same unitary transaction, when the particular context reveals persuasively and forcibly that they all form together the same economic operation, so the tax treatment of the various segments of the operation are not to be analyzed separated, but within the principal operation (case 02/21/2008, C-425/06 Part Service). Nevertheless, the evaluation of the taxpayer motivation and the reality of the economic purpose should be different for each case, taking into consideration the particular features (case 09/12/2006, C-196/04, Cadbury Schweppes).[187]

Despite the fact that references to the prohibition of abusive tax transactions are present in particular rules dedicated to combating the fraudulent actions of taxpayers, with the

[184] Frans Vanistendael - *Halifax and Cadbury Schweppes: one single European theory of abuse in tax law*?, EC TAX REVIEW 2006, vol. 4.

[185] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[186] Mario Tenore - *The Transfer of Assets from a Permanent Establishment to its General Enterprise in the Light of European Tax Law,* International Tax Review INTERTAX, Volume 34, Issue 8/9 5 Kluwer Law International 2006.

[187] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

specific intention to respect the application of EU regulations (see art. 11, no. 1, letter A of Directive n. 90/434/EEC; art. 1, par. 2, Directive n. 90/435/EEC; art. 5, Directive n. 2003/49/ EC), the CJEU has only recently defined the notion of abuse of law.[188] At the beginning, the Court has described the autonomous concept of abuse of tax law in connection to the regulation of value added tax (VAT), deciding that the taxpayer is not allowed to deduct the VAT paid on inputs if "transactions from which derive that right constitute an abusive practice" (case 02/21/2006, C-255/02 Halifax). When the CJEU references were made to the direct taxation, the reasoning stated that the freedom of establishment of the company cannot be restricted as effect of a specific domestic tax measure, "unless it relates only to wholly artificial arrangements intended to escape the normally payable national tax" (case 09/12/2006, C-196/04, Cadbury Schweppes). Both Halifax and Cadbury decisions of the CJEU mentioned that the analyzed transactions developed by natural and/or legal persons resident in the European Union, which are built in a manner that was not directly required or implied by the economic activity (artificially constructed), proving diligence to the final goal of "obtaining a tax benefit" in contrast with the purposes pursued by the Treaty. If this hypothesis was valid, the conduct of the parties must be characterized as a typical kind of abuse of law.[189]

The CJEU has a special role to play in applying the principle of proportionality to the provisions of tax law. When considering the proportionality of a particular measure in this field, it has to establish specific indicators and proportion criteria. According to Article 5 of the Protocol on the application of subsidiarity and proportionality, the principles of reasoning lead to the conclusion that the objective of the EU can be better achieved at the latter level, it should be based on quality and, whenever possible, quantitative indicators.[190] The principle of proportionality consists of three sub-

[188] European Commission – *Guide to the case law of the European Court of Justice on Articles 56 et seq. TFEU – Freedom to provide services*, available at http://ec.europa.eu/docsroom/translations/renditions/pdf, retrieved on the 12th of May 2020.

[189] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[190] Kyle Richard – *Are all tax rulings state aid? Examining the European Commission recent state aid decisions,* Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018, Author/Editor: University of Houston - Law Center, Publisher: University of Houston Law Center Language: English, Country of publication: United States of America.

principles: suitability, necessity and proportionality in the narrow sense. [191] All these sub-principles express the concept of efficiency, mandatory when applying the principle of proportionality to the constitutional rules and it is important to use them as imperative requirements. As a direct consequence, the European concept of principle is often used instead of the term "law". When there is a suspicion that the national tax law touches the fundamental freedom of the European internal market, there is mandatory to conduct a proportionality investigation, while two test questions are to be formulated:

- If respecting the particular national rule of law is able to conduct to the achievement of the specific objective established when the regulation came into force, in other words if the rule is able to lead to the intended goals (suitability test);
- If the particular national rule of law is too demanding for the achievement of the specific objective, established when the regulation came into force, in other words if the rule is too severe for leading to the intended goals (the necessity test).[192]

The suitability test did not generate major dispute in tax literature, while the necessity test did bring on the floor of academic discussions some controversies, especially in cases where the CJEU action was under suspicion of political decisions.[193] Terra and Wattel formulated serious critics when performing the necessity test.[194] As shown in our analysis in the previous sections of this paper, there is a continuous strain in tax law doctrine to reconcile the Member States of the EU right to determine their particular tax system and to protect tax sovereignty and, at the same time to stop them from ruling tax regulation on cross-border transactions with impact to the Eu law, i.e. designing less favorable condition for extraterritorial activity in comparable to the whole national situations. The ideal conduct for every Member State is to keep the balance of the European law fundamental freedoms and the national tax law, while defending fiscal sovereignty. [195]

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[191] Alexy, Robert - *Constitutional Rights and Proportionality,* Journal for Constitutional Theory and Philosophy of Law, no. 22/2014, URL : http://journals.openedition.org/revus/2783; DOI: 10.4000/revus.2783.
[192] Douma, Sjoerd, *Optimization of Tax Sovereignty and Free Movement* (October 6, 2011). IBFD Doctoral Series, No. 21, IBFD Publications BV: Amsterdam 2011, Available at SSRN: https://ssrn.com/abstract=2997412
[193] Ghosh, J. (2014). *Tax Law and the Internal Market: A Critique of the Principle of Mutual Recognition*. Cambridge Yearbook of European Legal Studies, 16, 189-221. doi:10.1017/S1528887000002597
[194] Terra, Ben J.M. & Wattel Peter - *European Tax Law Hardcover*, Wolters Kluwer, Law&Business, 2008
[195] Terra, Ben J.M. & Wattel Peter - *European Tax Law Hardcover*, Wolters Kluwer, Law&Business, 2008

This opinion was also formulated in the area of direct taxation, for which the rules of national law were adopted in order to eliminate the iniquitous quantification of the tax base in the tax return procedure.[196] The CJEU acknowledged the legitimacy of the national regulation, when monitoring and control measures and requirements for eliminating tax evasion operations were developed, respecting the non-discrimination between residents and non-residents and the principle of proportionality. Still, the proper evaluation of the degree of proportionality is the most important criterion which often led the CJEU to consider that the domestic law is breaking the European law.

With regards to tax accounting, in particular, it has been noted that the legal framework of a special accounting system for a permanent establishment, in line with the regulation of the Member State where the permanent establishment is located, is a disproportionate rule for the purpose of ensuring tax controls, which would force the foreign company to adopt an excessively expensive organizational level (consisting of both the necessary accounting records for the permanent establishment and the normal business activity), in conflict with the needs of non-discrimination with regard to national resident companies, for which there are only regular accounts (Case C-250/95, Futura Participation SA). There is a legitimate view that the CJEU should return in due course to its more traditional Halliburton approach, when it applied Community law to an intra-Community transaction between qualified legal persons, even if they were under the joint control of an American parent.[197]

Furthermore, the national ruling of absolute or even relative assumptions, when they are able to generate discriminatory or restrictive effects for the EU fundamental freedoms, were qualified as inherently disproportionate (C-152/11 Baxter and C-55/98 Vestergaard).[198]

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[196] See https://curia.europa.eu/en/content/juris/index.htm for Case 01/28/1992, C-204/90, Bachmann; Case 05/15/1997, C-250/95 Futura Participation SA; Case 8.7.1999, C-254/97 Baxter; Case 28.10.1999, C-55/98 Vestergaard.

[197] Servaas Van Thiel - *The Direct Income Tax Case Law of the European Court of Justice: Past, Trends and Future Developments,* Tax Law Review vol. 62/2008, ISSN: 0040-0041, Author/Editor: New York University School of Law, Publisher: Warren, Gorham & Lamont Series: Current periodical series, Language: English, Country of publication: United States of America.

[198] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

The Court of Justice does not appear to provide an exemption,[199] at least in principle, to the risk of tax evasion or from the risk of loss of income due to miss interpretation of fiscal liability by taxpayers, as possible causes for breaches of the EU's fundamental freedoms.[200] However, in the more surprising income tax case law in early 2000,[201] the CJEU decided to deny EU law benefits to third-country corporate groups, not only by limiting a foreign company from a third country direct access to the European internal market but furthermore, by considering that EU companies which are controlled by non-EU parents could be excluded from the benefits of the treaty, because their common parent would not have access to the treaty.[202]

On the contrary to the fact that, in line with the presented case-law, the Court does not accept arguments which are based on purely economic reasons (for example loss of tax revenue) and despite the possible but exceptional application of the limitation of the temporal effects of CJEU judgments, it is suspected that CJEU judges always have in mind the huge sums at stake in direct taxation cases.[203] It is also important to note that a CJEU decision on the incompatibility of a national tax measure with one of the four freedoms affects national budgets in several ways:

- first, the Member State will have to eliminate the discriminatory provision which was meant to increase state budget revenue, in accordance with Article 260 of the TFEU; this liability further implies that, in order to balance its budget, the particular Member State will either have to reduce spending or increase revenue through other taxes.

[199] See https://curia.europa.eu/en/content/juris/index.htm for Case 16.7.1998, causa C-264/96, Imperial Chemical Industries; case 09/21/1999, C-307/97 Saint Gobain; case 06/06/2000, C-35/98 Verkooijen; case 8.3.2001, C-397/98 and C-410/98, Metallgesellshaft; case 09/12/2006, C-196/2004 Cadbury Schweppes.

[200] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[201] See https://curia.europa.eu/en/content/juris/index.htm for Case C-452/04, Fidium Finanz AG v. Bundesanstalt Fur Finanzdienstleistungsanfsicht.

[202] Servaas Van Thiel - *The Direct Income Tax Case Law of the European Court of Justice: Past, Trends and Future Developments*, Tax Law Review vol. 62/2008, ISSN: 0040-0041, Author/Editor: New York University School of Law, Publisher: Warren, Gorham & Lamont Series: Current periodical series, Language: English, Country of publication: United States of America.

[203] Katerina Pantazatou – Economic and political considerations of the court's case law post crisis: an exemple from tax law and the internal market, CYELP 9 [2013] 77-118

- Another budgetary challenge for the Member States arises from the retroactive effect of the CJEU rulings, meaning that the Member States that are obliged to reimburse all discriminatory taxes they have already collected, given the actual budget, even though the expenditure took place in an earlier budget period.[204]
- the effect of the CJEU decision is not limited to the defendant Member State, as usually a decision against a particular Member State might generate a flow of similar cases in the same state or versus another Member States.[205]

We observe that the CJEU has denied that the contrast with tax avoidance, which is to be conceived as a special operation dedicated to obtaining an undue tax advantage compared to the general purposes of the national tax system, could be permitted in order to allow distinctions from EU regulations. [206] Indeed, it is common in the case law of the CJEU that the sole use of tax advantages by taxpayers, attributive to the possibility to choose certain goods for a particular transactions, does not qualify as an abusive situation, but when it generates the application of artificial schemes, designed for obtaining exclusively or as the principle purpose tax benefits.[207]

Another important topic in CJEU rulings proving the changing in sovereignty design for the member States is the state aid. After the recent Commission decisions regarding state aid for some important MNEs (see section 3.2.2 of the paper), the doctrine manifested the opinion that the Commission point of views are based on an improper application of EU law, and should therefore be overturned by the CJEU, which previously decided that state aid requires an analysis of the criteria of selectivity and of advantage. However, in the rulings for this topic, the Commission seems to have mixed the selectivity and advantage into a single criterion of eligibility, minimizing the selectivity condition,

[204] It was the situation for the Romanian so called pollution tax, mandatory when registering the ownership for a vehicle; the tax was annulled by the CJEU and the Romanian government had to pay back all the revenue collected for this tax, additional penalties included (see http://curia.europa.eu/juris/liste.jsf?language=en&num=C-402/09 Case Tatu).

[205] Katerina Pantazatou – *Economic and political considerations of the court's case law post crisis: an exemple from tax law and the internal market*, CYELP 9 [2013] 77-118

[206] See https://curia.europa.eu/en/content/juris/index.htm for case 03/09/1999, C-212/97 Centros; case 09/30/2003, C-167/2001 Inspire Art; case 09/12/2006, C-196/2004 Cadbury Schweppes.

[207] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

despite the fact that selectivity is both an important element of the state aid jurisprudence and has particular relevance in the case of transfer pricing agreements.[208]

Altogether, it is obvious that the constant application of discriminatory tax measures can only be justified in exceptional cases, when there are essential reasons in the public interest to do so, for example, the necessity to combat tax evasion and avoidance and the demand to comply with the balanced allocation of tax jurisdiction. Eventually, the recent tendency to take into account all clauses of tax treaties that do not fall within the scope of the prohibition of discrimination (hidden sovereignty exception for tax treaties), on the consideration that a taxpayer protected by a tax treaty might never be in a scenario similar to a taxpayer not covered by that special tax treaty (weak substantive argument) is not convincing. Possible, the CJEU would return to its more traditional opinion that Member States are free to conclude tax treaties and decide on the algorithm for allocating their tax prerogatives, but that tax treaties cannot give rise to or justify incompatible discrimination. Therefore, the substantial tax benefits provided for residents cannot be granted or refused on mutual basis, and under European law, must be granted to all non-resident taxpayers in the same situation as the resident taxpayers.[209]

Furthermore, while recognizing the general right of Member States to adjust their tax obligations in accordance with the particular requirements of domestic law and, in particular, for reasons of simplicity, rationality and tax effectiveness,[210] the CJEU has argued in repeatedly that the singular necessity of the public administration to collect more revenues can never justify a derogation from the basic principles of EU law. [211] On other occasions, the CJEU has ruled out the eligibility of a justification case for the divergent of tax avoidance on the argument of failure to recognize rigorous evidence

[208] Kyle Richard – *Are all tax rulings state aid? Examining the European Commission recent state aid decisions*, Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018, Author/Editor: University of Houston - Law Center, Publisher: University of Houston Law Center Language: English, Country of publication: United States of America

[209] Servaas Van Thiel - *The Direct Income Tax Case Law of the European Court of Justice: Past, Trends and Future Developments,* Tax Law Review vol. 62/2008, ISSN: 0040-0041, Author/Editor: New York University School of Law, Publisher: Warren, Gorham & Lamont Series: Current periodical series, Language: English, Country of publication: United States of America.

[210] See https://curia.europa.eu/en/content/juris/index.htm for Case 26.1.1999, C-18/95 Terhoeve; case 16.5.2000, C-87/99 Zurstrassen.

[211] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

regarding the risk of tax evasion[212] or due to the lack of proportionality of the internal contrast measures of tax avoidance[213]

The Court has made clear in a strand of judgments which covers many areas of European law, including taxation, that the respect of an anti-abuse doctrine under Community law is deeply related to the purposes of the breached Community rules themselves. It is the purpose of a provision, which is essential in order to ascertain which transactions are called abusive and which are not. In one of the most recent extensive analyses of this point, Advocate General Maduro has made clear that the application of the anti-abuse doctrine finds its foundation in the 'interpretation in conformity with the purpose and objectives of Community law'. This holds true both in the field of primary law, most notably the fundamental freedoms, and of secondary law, especially with reference to the directives in the tax sector.[214] In this situation, the taxpayer's conduct may be qualified as an expression of abuse of right if the transactions show the following elements of qualification:[215]

1. Without prejudice to the formal application of the rules and conditions laid down in EU law and to the transposition in national law, such transactions shall be characterized by the "essential purpose" of obtaining a tax advantage which is contrary to the purpose of EU law.
2. The essential goal of getting tax advantages must be proved by some objective indicators.[216]

The relevant doctrine argued, while analyzing of the case law so far, that the CJEU seems to be determined in considering that the "shopping forum" in terms of group losses is against the balanced allocation of taxing powers or - as in Krankenheim and Papillon cases - fiscal coherence of the Member States.[217] The coherence principle for fiscal

[212] See https://curia.europa.eu/en/content/juris/index.htm for case 07/17/1997, C-28/95 Leur-Bloem.
[213] See https://curia.europa.eu/en/content/juris/index.htm for case 05/15/1997, C-250/95 Futura Participation SA; case 07/16/1998, C-264/96, Imperial Chemical Industries—ICI.
[214] Wolfgang Schoen - *Abuse of rights and European tax law*, retrieved on the 23rd of July 2020 from https://www.cambridge.org/core
[215] See https://curia.europa.eu/en/content/juris/index.htm for case 02/21/2006, C-255/02, Halifax.
[216] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.
[217] The cases considered so far under the group relief 'block of cases' amplify the incoherent legal reasoning of the Court and its inability to provide guidelines that would allow for more legal certainty in this area for all the players involved. See for further details Katerina Pantazatou – *Economic and political*

legislation has enlarged the number of potential successful argumentation presented by the Member States, but it made even more difficult the precise delimitation between the mutually accepted justifications (as balanced allocation of taxing powers, danger of losses being used twice and the danger of tax avoidance) and unlawful conduct. The Advocate General Leger in the Cadbury Schweppes litigation put up explicitly his opinion that the fact that a parent company establishes a subsidiary in another Member State for the avowed purpose of enjoying the more favorable tax regime in that State constitutes, in itself, an abuse of freedom of establishment. The CJEU has pointed point out the impact of new regulation of the abusive operation, showing that, in reality, if there is any misconduct, it is stated that "the transactions involved must be redefined so as to restore the situation which would have prevailed without the operations carried out by the abusive practice'.[218] The CJEU has to determine the failure of the effects of the abuse of law, with consistent regeneration of the transaction in accordance with the standards of conduct normally applicable.[219]

To synthesize our analysis, it is abuse of right in tax planning in CJEU jurisprudence when circumstances describe U transactions, company formation, re-shaping contractual obligation, unlawful relevance of taxpayer's intention. There are justified actions, such as the relevance of free choice in EU law, intention to save taxes, company internal financial efficiency but wholly artificial arrangements, when there are not any real economic activities, should always be regarded as abusive, as they are not within the scope of ruling the European fundamental freedoms of the single market. [220]

Starting with the powerful lines of the case law prohibiting exit and access restrictions using the direct taxation, it is obvious that any increased taxes on cross-border transaction, by comparison to identic domestic operation are considered discrimination, regardless if they are imposed by the State of origin on persons wishing to be dynamic form the economic point of view in another Member State or by the destination State for

considerations of the court's case law post crisis: an exemple from tax law and the internal market, CYELP 9 [2013] 77-118.

[218] See https://curia.europa.eu/en/content/juris/index.htm for case 02/21/2006, C-255/02, Halifax.

[219] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[220] Wolfgang Schoen - *Abuse of rights and European tax law*, retrieved on the 23rd of July 2020 from https://www.cambridge.org/core

those who want access to European market. In CJEU case law, there have been developed precise directions of interpretation of the European law, for eliminating the possibility to validate exit taxes resulting from the definition of taxable income items (capital gains are taxable only on exit), exemptions (only income from exempt domestic sources is taxed), deductible expenses (only internal costs are deductible), rates (higher rates for income from foreign sources or units with foreign capital), tax credits (imputation credits, foreign tax credits and incentive credits) and tax procedures. Meanwhile, powerful direction of interpretation derived from the presented CJEU case law on prohibited access taxes (which also cover definitions of the tax base, rates, credits and procedures), generating a greater tax burden for permanent units and subsidiaries held abroad, and for frontier workers or professionals (including deductions for personal and family expenses and business expenses).[221]

We also include in our final remarks for this section that a minute decrease of the number of preliminary questions sent by the Member States to the CJEU could determine a more indulgent approach of the European court towards national tax systems. It is obvious that the Court cannot directly influence the number of preliminary rulings, as it may not self-invest with such a case, but the number of solutions in favor of the taxpayer could affect the balance of the collaboration between the national and the European judge and, consequently, the Court's decisions would reflect the reduction in Member States' references.[222]

4.4. Reinforcing European integration using tax regulation

The global pandemic crise has generated two contradictory yet simultaneous reactions, determining both slowness for each collaborative process and revival of the global projects for future successful developments. Especially within EU space, the global

[221] Servaas Van Thiel - *The Direct Income Tax Case Law of the European Court of Justice: Past, Trends and Future Developments,* Tax Law Review vol. 62/2008, ISSN: 0040-0041, Author/Editor: New York University School of Law, Publisher: Warren, Gorham & Lamont Series: Current periodical series, Language: English, Country of publication: United States of America.

[222] Katerina Pantazatou – *Economic and political considerations of the court's case law post crisis: an exemple from tax law and the internal market*, CYELP 9 [2013] 77-118

challenges have generated additional constraints for the integration process, which had recently suffered many obstructive inputs, from the previous financial crises, to the budgetary entanglements, waves of immigration and BREXIT. In this complicated landscape, it seems rather justified that the integration process slowed down like never before and its reinforcing might be anything but a facile phase. At EU level, the complexity of the integration process and the cooperation between Member States necessarily require the adoption of harmonized tax rules in order for the single market to function properly. A form of tighter fiscal cooperation is inevitable, targeting fiscal harmonization and integration. With regard to direct taxes, in general, limited harmonization is justified in the current context, while avoiding discrimination, double taxation and tax evasion. Equally, closer coordination is needed to counteract the distortions generated by the allocation of resources.

Considering the taxation situations manifested on the European free market in the past and the arguments for the development of the European project, the EU Member States could use the tax regulation to relaunch the cooperation among them, in the same manner like they have used the custom union at the beginning of the communities and the progressive tax approximation during the last decades. The path to facilitate greater coordination between Member States describes the scenario for preventing tax avoidance using well-targeted corporate tax reform. Consequently, the EU Member States have taken into consideration important measures aimed at stopping profit shifting and preventing the erosion of national tax bases.[223] Analyzing the previously used mechanisms for further tax integration in the EU, the literature observes the positive results of some solutions, such are the Enhanced Cooperation, Soft Law, Indirect Harmonization through EMU Reform Legislation, Non-EU Legislation.[224]

As it has been analyzed in the previous sections of this paper, European fiscal cooperation is framed by the rule of fiscal sovereignty, but it has benefited of the effects of soft law

[223] Alicja Brodzka - *Increasing transparency in the European Union: developments of Country-by-Country Reporting*, „Zeszyty Teoretyczne Rachunkowości", Stowarzyszenie Ksiegowych w Polsce, tom 93 (149), 2017, s. 9-22

[224] Anna Sting - *Company Tax Integration in the European Union during Economic Crisis - Why and How*?, Erasmus law review, ISSN: 2210-2671, no. 1/2014, Author/Editor: Erasmus Universiteit Rotterdam.Faculteit der Rechtsgeleerdheid, Publisher: Erasmus School of Law, URL: http://www.erasmuslawreview.nl/ Language: English, Country of publication: Netherlands, retrieved from https://heinonline.org

mechanisms, namely the recommendations addressed to the Member States by EU institutions, with regard to the everyday development of the national provisions relating to the taxation of income (especially to the taxation of business income). It is expected that the level of approximation of national legislation generated by the soft law is lower than the harmonization of indirect taxes, and the literature designated for it the figurative concept of "elastic convergence".[225]

In some situations, the harmonization of EU taxation takes the opposite site from the principle of self-determining the tax system, in order to eliminate the possible mismatches between national taxation systems. In the field literature, the principle of harmonization expresses a "positive taxation" i.e., whether the fiscal power exercised by Member States will be directed towards uniform models and agreed objectives, generally compatible with European Union objectives, as opposed to the principle of non-discrimination and other values, which proves "negative taxation".[226]

The concept of fiscal integration has designed most of the key aspects of the income tax system architecture. The structures of the tax base have been shaped by both negative and positive trends of regulatory mechanism. Despite the updating of the draft tax base, the level to which these limitations and negotiations took place is surprisingly narrow. Additionally, the Member States manifest a great deal of leeway in deciding how to eliminate discriminatory and selective tax measures, because the income tax rates have kept their autonomy, outside the limit of the European harmonized measures. It is the effect of the lack of prevision for revenue taxation in the EU primary law, the aspects being regulated predominantly under the formal sovereignty of the Member States.[227]

As direct result of the LuxLeaks scandal, the European Parliament started an investigation into the tax ruling practices, which was not positively supported by the multinational company. Eventually, the Parliamentary Commission published a report, proposing country-by-country reporting system, a common consolidated corporate tax

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[225] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[226] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017

[227] Jaakkola, Jussi - *A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?,* German Law Journal; Toronto Vol. 20, Iss. 5, (Jul 2019): 660-678. DOI:10.1017/glj.2019.55

base (CCCTB), increased transparency by Member States, a broader role for the European Commission in reviewing tax ruling practices, and better protections for whistle-blowers.[228] At the same time, the European Commission proposed a measure for the exchange of tax rulings by Member States, which was unanimously approved by member states two days before the Parliamentary Commission published its report. During the European Commission investigations, numerous NGOs have published concerning reports on the tax avoidance practices of multinational enterprises and on the low-tax jurisdictions, before and after the Commission published its Decisions. For example, Oxfam's Tax Battles report ranked the Netherlands, Ireland, and Luxembourg among the world's worst tax havens. The Netherlands ranked as the third, Ireland as the sixth.[229]

Still, fiscal harmonization shows the belief that economic and trade integration is the main driver of political and social integration common ideological background, in accordance with the general principles applicable to fiscal issues, namely the acceptance of the values of freedom and economic development of the common market, in line with the principles which guarantee the competitive market.[230]

One of the steps for tighter fiscal cooperation was directed towards building a fairer and more transparent corporate taxation. The proposal for Country-by-Country Reporting (CbCR) between tax administrations targeted the identified need for transparency between fiscal administrations, aiming at facilitating the exchange of tax-related information regarding the MNE with activity within the EU territory, regardless their field of operation, for better results in tax auditing operations. Increased transparency could also help to deter multinationals from engaging in aggressive tax planning schemes.[231]

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[228] *Special Committee of the European Parliament on Tax Rulings and Other Measures Similar in Nature or Effect,* Co-rapporteurs: Elisa Ferreira and Michael Theurer - Report on tax rulings and other measures similar in nature or effect no. 2015/2066, available at https://www.europarl.europa.eu/doceo/document/A-8-2015-0317_EN.html, retrieved on the 10th of March 2020.

[229] Kyle Richard – *Are all tax rulings state aid? Examining the European Commission recent state aid decisions,* Houston business and tax law journal, ISSN: 1543-2602, Publication vol. XVIII, 2018, Author/Editor: University of Houston - Law Center, Publisher: University of Houston Law Center Language: English, Country of publication: United States of America

[230] Pietro Boria - *Taxation in European Union. Second Edition*, ISBN 978-3-319-53918-8, ISBN 978-3-319-53919-5 (eBook), DOI 10.1007/978-3-319-53919-5, Library of Congress Control Number: 2017934921, Springer International Publishing Switzerland, 2017.

[231] Alicja Brodzka - *Increasing transparency in the European Union: developments of Country-by-Country Reporting,* „Zeszyty Teoretyczne Rachunkowości", Stowarzyszenie Ksiegowych w Polsce, tom 93 (149), 2017, s. 9-22

Country-by-Country Reporting is one of the initiatives of the European package issued in the fight against tax avoidance and evasion which explicitly proves the modification of the approach towards corporate taxation. It seems that the overall aim is not limiting to protecting national tax bases, but creating a wider fiscal perspective of European market, as a whole.[232]. Last decade has brought an intensification of European initiatives aimed at fighting tax avoidance and evasion, i.e. on 25 May 2016, ECOFIN decided on the amendments to the EU Directive on the Automatic Exchange of Information, extending the CbCR scope in respect to the requirements of the Single Market and EU law, yet in line with international actions in fighting Base Erosion and Profit Shifting.[233] There is also the issues of taxing the dividends, which can be treated similar to the misfunctions arising from the simple interaction of two tax systems within EU, using the different treatment of incoming and outgoing dividends, the choice of the state to offer exemption from double taxation (home - host or none), compatibility with the method of exemption from double taxation (without the possibility of applying both the credit and the exemption methods simultaneously) and subsequently the most desirable neutrality to be achieved.[234]

At the OECD level, the members agreed on 15 actions targeting Base Erosion Profit Shifting (BEPS), including the CbCR for fiscal authorities regarding important financial information about multinationals activity. The European perspective is wider, because implementing country by country reporting on the European market in a uniform manner is important, especially if we consider that some states were prepared to adopt the necessary legal previsions in accordance with the OECD BEPS initiative, while some were not willing to implement it al all. Strengthening these requirements in EU law would

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[232] Pierre Moscovici, European Commissioner for Economic and Financial Affairs, Taxation and Customs in office at that time, said at the Tax Congress of the Berlin Tax Forum 2016: *„I must stress that it is not just our Member States that benefit from the new EU approach to corporate taxation. Businesses will benefit too. I want to shatter the myth, that fighting corporate tax avoidance and creating a competitive business environment are mutually exclusive goals. In fact, they are two sides of the same coin*", available at https://www.europa-nu.nl/id/vk53kpc3psz8/nieuws/speech_by_commissioner_pierre_moscovici?ctx=vk5qdkqbp5io, retrived on the 14th of April 2020.

[233] ALICJA BRODZKA - *Increasing transparency in the European Union: developments of Country-by-Country Reporting*, „Zeszyty Teoretyczne Rachunkowości", Stowarzyszenie Księgowych w Polsce, tom 93 (149), 2017, s. 9-22

[234] Katerina Pantazatou – *Economic and political considerations of the court's case law post crisis: an exemple from tax law and the internal market*, CYELP 9 [2013] 77-118

prevent gaps in the EU's tax transparency network and administrative burdens for businesses.[235]

In addition to the OECD initiative, EU Directive 2016/881 provides the legal grounds for Member States to implement CbCR between tax authorities, including the possibility to make the CbCR available to the public. However, with regard to the Commission proposal for a common consolidated corporate tax basis (CCCTB Directive), parliaments have been much more active, which illustrates their strong opposition to more tax harmonization.[236]

The so-called Anti-BEPS Directive 2016/1164/EU aimed at designing harmonized national regulation for the protection of the domestic corporate tax bases. Still, it covered few topics in the targeted field of application, namely interest limitation, exit taxation, a general anti-abuse rule, controlled foreign company rule to deter profit shifting and a loose rule on hybrid mismatches in the tax treatment of entities or income categories.[237]

The negative effects of the tax system disparities on the internal market are constructively solved when the effective harmonization is accomplished. Moreover, the past decades proved that the European commission efforts for various coordinating actions have proved to be ineffective or insufficient to erase the negative effects created by the tax rules elaborated individually by the Member State. In response to the obligation to eliminate possible double taxation, the countries tax the profits attributed to subsidiaries and permanent establishments based on unlimited tax liability (subsidiary) or based on limited tax liability (permanent establishment). In either case, the overall profit of a multinational company has to be apportioned to the countries where its subsidiaries or permanent establishments are located.[238]

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[235] Alicja Brodzka - *Increasing transparency in the European Union: developments of Country-by-Country Reporting,* „Zeszyty Teoretyczne Rachunkowości", Stowarzyszenie Księgowych w Polsce, tom 93 (149), 2017, s. 9-22

[236] Anna Sting - Company Tax Integration in the European Union during Economic Crisis - Why and How?, Erasmus law review, ISSN: 2210-2671, no. 1/2014, Author/Editor: Erasmus Universiteit Rotterdam. Faculteit der Rechtsgeleerdheid, Publisher: Erasmus School of Law, URL: http://www.erasmuslawreview.nl/ Language: English, Country of publication: Netherlands, retrieved from https://heinonline.org

[237] Thomas Jaeger - Tax Concessions for Multinationals: In or Out of the Reach of State Aid Law?, Journal of European Competition Law & Practice, 2017, Vol. 8, No. 4

[238] Ulrich Schreiber - International Company Taxation. An Introduction to the Legal and Economic Principles, ISBN 978-3-642-36305-4, DOI 10.1007/978-3-642-36306-1, Springer-Verlag Berlin Heidelberg 2013

It was also observed that Member States unilateral actions to fight effectively against aggressive tax planning are not successful and the international community looked for wide supported actions. It is the justification for G20 and the OECD launching of the BEPS Project and the EU Council adoption of the ATAD and double amending the Parent-Subsidiary Directive.[239] One of the current concerns in taxation is the relocation of companies' headquarters, with the intention to benefit of the residence rights in a low tax member state. The exit state is entitled to prescribed exit taxation, which most likely breaks the European law and is likely to be rejected by the Court of Justice of the European Union. [240]

The regulation on common consolidated tax base CC(C)TB in the European Union (EU) will radically change the company's taxation, a necessary measure to diminish aggressive tax planning strategies and to eliminate the difficulty in determining transfer pricing. Although the applicability of the territorial source taxation principle will be abolished, the European Commission (EC) proposal for CC(C)TB is welcome in terms of reducing bureaucracy for taxpayers but also for tax authorities.

The EC project allocates the consolidated profits of multinationals based on an apportionment formula, based on the volume of sales, the number of employees and the capital invested. We estimate that the effects of the proposal, as amended in the European Parliament in March 2018, are even wider than the previewed effects of the recommendations formulated by the OECD. The document incorporating the CC(C)TB proposal is under negotiation and the final text is subject to unanimous approval by the Council of the European Union, the current challenge being to reach the political agreement. Application of the CC(C)TB will redistribute corporate profits in EU Member States, and some of the founding states will suffer tax revenue losses as part of the taxable profits will be allocated to other states. In our opinion, the CC(C)TB project will only

[239] Paolo Arginelli - *A Proposal for Harmonizing the Rules on the Allocation of Taxing Rights within the European Union and in Relations with Third Countries*, in PistonePasquale, 2018, Part 6 – A Possible Roadmap: European Tax Integration

[240] Ulrich Schreiber, Gregor Fuhrich - *European group taxation-the role of exit taxes,* Eur J Law Econ (2009) 27:257–274, DOI 10.1007/s10657-008-9090-6, Published online: 24 December 2008, Springer Science+Business Media, LLC 2008

succeed if the proposed calculation method is applied globally, as the effects oof the new regulation will occur outside the EU borders.[241]

The CCCTB represents a comprehensive reform of the current tax regime in the EU, through deeper tax harmonization methods and mechanisms than the international taxation recommendations of the G20 and OECD anti-BEPS initiatives. From a global perspective, the competitive tax environment in the EU could be disadvantaged by the introduction of stricter measures than those recommended by the OECD / BEPS, but the proper functioning of the internal market requires a more comprehensive solution, including combating tax evasion. If in the 2011 CCTB project the focus was on the administrative burden and possibly the monitoring of transfer pricing, now the CC (C) TB regulation promotes the mechanism of consolidation and profit sharing for taxation, as a fair and efficient response to the transfer of profits and for limiting aggressive tax planning. The formula for profit sharing, which is the key element of CC(C)TB, is quite convincing from a political point of view, and not from an economic point of view, because the principle of taxation of profits at source would have been eliminated. However, due to the difficulty of determining appropriate transfer prices, the change proposed by the EC is welcome.

There are several issues that could be obstacles to a CC(C)TB, one of the problems identified being the lack of harmonization of deduction rules, which leads to the establishment of sovereign tax bases by national tax authorities. Therefore, they are at least as important as tax rates.

The effects of a single formula on Member States' tax revenues should not be neglected either. Smaller countries will lose some of their tax base, while larger countries would gain from the proposed allocation formula. This makes it extremely complex to find a sustainable solution in the EU that allows for a level playing field. Loss compensation could be politically appropriate for smaller countries.

The proposed EU regulation for the CC(C)TB is an ambitious and promising goal, which we believe will drive growth in the EU and drive research and innovation. The European Commission’s proposal to establish a common corporate tax base aims ambitious goals,

[241] Mihaela Tofan – *The challenges in CCTB/CCCTB proposal. From sovereignty to fiscal harmonization within the EU*, in Cluj Tax Forum Journal, no. 5/2019

because it significantly reduces both compliance and administrative costs for European groups. Yet, the Commission's proposal to replace separate entity accounting with a profit allocation, considering the specific formula apportionment, has some possible negative effects. The proposed formula for the apportionment of the income takes into consideration the source principle, which may place some member states in disadvantaged position, facing losses in both real economic activity and tax revenue. Moreover, anti-avoidance tax rules concerning non-EU countries must be harmonized to prevent negative tax revenue spillover effects. [242]

In order to achieve the EU tax harmonization objectives, there is a doctrine proposing a Directive on the Allocation of Taxing Rights (ATRiD), [243] that would be the most efficient and widely accepted solution, which could fit best in the framework elaborated by the European Commission in the Action Plan for a Fair and Efficient Corporate Tax System and could happily complete the CC(C)TB Proposal for reinforcing the European measures to fight aggressive tax planning and tax avoidance.

From a wider perspective, ATRiD should be adopted on the respective trend of issuing an increased number of directives for harmonizing direct taxation within the EU, shaping the action of the Member States for the proper functioning of the internal market. It is the case of the two revisions of the Directive parent-subsidiary, ATAD and ATAD II, the Tax Dispute Mechanisms Directive, CCTB, CC(C)TB and the proposed revision of the Interest and Royalties Directive. Based on all of this, the proposed ATRiD directive could be a efficient legal instrument, by enhancing the framework of the measures for the approximation of the Member States' legal systems in fiscal are, that directly affect the functionality or operationality of the internal market. In this reasoning, the proposal falls within the scope of article 115 of the TFEU, respecting the sovereignty of the states, but redesigning the cooperation within the EU boarders. Furthermore, despite the fact that direct taxation is not within the scope of the European Union's exclusive competences, the proposed ATRiD respects the the principle of subsidiarity under article 5(3) of the

[242] Ulrich Schreiber, Gregor Fuhrich - *European group taxation-the role of exit taxes*, Eur J Law Econ (2009) 27:257–274, DOI 10.1007/s10657-008-9090-6, Published online: 24 December 2008, Springer Science+Business Media, LLC 2008

[243] Paolo Arginelli - *A Proposal for Harmonizing the Rules on the Allocation of Taxing Rights within the European Union and in Relations with Third Countries*, in Pistone Pasquale, 2018, Part 6 – A Possible Roadmap: European Tax Integration

Treaty on European Union (TEU), because it targets offering a proper response to the obstructive effects on the internal market that could not be satisfactorily addressed in individual legislative approach of each Member States.

The literature presents ATRiD potential to properly coordinate the applicable rules in member States regulation to avoid antinomies. The ATRiD would not fix the income tax rates applicable, which would remain within the exclusive competence of EU Member States, except for the establishment of minimum tax rates (ideally between 25% and 30%) for taxation at source of dividends, interest, royalties and certain types of capital gains (capital gains on financial assets and intangible properties). This would help counteract phenomena of directive and tax-treaty shopping, aimed at channeling income flows through specific Member States for the purpose of avoiding or substantially reducing the tax to be paid in the EU Member State of source.[244]

The design of the actual sovereignty right to rule taxation within EU has evolved together with the fiscal cooperation among Member States. National initiatives of each country could eventually sustain the actual status-quo, which has been applicable for half a century and protects the domestic complete autonomy for ruling taxation, stimulating aggressive tax planning and allowing multiple scenarios for tax avoidance. Our research shows that law coordination is a slow process, and past results have been constantly evolving, although not very dynamic, nor particularly ambitious.

5. Conclusions and limits of the research

As our analysis points out, the continuous increase of the public spending asks for corresponding enlargement of the public revenue and the regulation to limit and, if possible, to eliminate tax avoidance by multinational companies is a priority for both the OECD and the EU. The issue is yet on debate in the USA, when a certain company collects income in several states. The difficulties in establishing the taxation system entitled to

[244] Paolo Arginelli - *A Proposal for Harmonizing the Rules on the Allocation of Taxing Rights within the European Union and in Relations with Third Countries*, in PistonePasquale, 2018, Part 6 – A Possible Roadmap: European Tax Integration

collect taxes from revenue in digital trade over the frontiers of a particular state is another European and also global challenge.

The need for harmonized regulation in tax sector within EU, if not uniform regulation, is supported by our research; the EU legislative actors have already issued some proposals for consolidating the profits of the companies which operate in many member states, addressing the allocation of the profits in accordance with specific criteria (situ taxation, virtual presence, employment and number of consumers). The subject is addressed globally by current proposal to adopt a new concept of nexus, the OECD members analyzing the possibility and the effects of this new doctrine, while for the EU Member States and the US literature the characteristics of the new nexus raise critiques and require further clarifications.

The analysis undertaken in this study shows that currently the EU law seems to facilitate tax avoidance by both EU and non-EU taxpayers, rather than prevent this phenomenon. While some literature consider that EU is close to achieving a truly tangible shift towards an effective prevention of tax avoidance under EU law so that the internal market functions properly, ensuring optimal and fair allocation of resources within the EU, there are serious impediments for the fiscal integration within the internal market.

The EU primary law respects the sovereign right of the Member States to regulate the fiscal system, situation which favors unilateral approach towards new regulation in this field, despite the multiple possible negative side effects, contrary to the fundamental principles of the European internal market (i.e France regulation for taxing the revenues from digital activities). The status of primary rule of European law for national fiscal sovereignty should not be considered opinionated or insulated attitude of nation-states, but as the performance power mechanism of the national constitutions, pending the completion of institutional processes aimed at constructing the full integration process. Actually, claiming the national fiscal power is one of the strongest protected values of the national democratic constitutions.

In this regulatory landscape, the formal European fiscal integration seems to be rather a long-time project, as the Member States are decided to cherish their sovereign right to rule taxation, especially in the present challenging pandemic times. For the time being, the legal tool to be most frequently used while addressing tax issues within EU is the directive, and not the regulation, respecting the state sovereign right to decide how to

transpose a particular fiscal objective in the national legal framework. Furthermore, the domain of regulating direct taxation, one of the most important fiscal area in the contemporary tax system, is mainly addressed within the EU through the tools of the soft law, which supports the assumption that EU legal order benefits from effect orientation and indirect legal effect, not only using the formal strict regulation. There are many activity sectors where the large public conduct is already approximated, despite the lack of formal coordination by the rule of law. Multiple actions already taken by the states in approximating their internal legislation in order to align the fiscal conduct prove that the concept of fiscal sovereignty was reshaped in order to respond to the current demands of cooperation on the internal market.

The harmonization is described in fiscal matters as a positive guiding principle, that is intended to establish a system of law characterized by gradual integration of the national tax systems. The design of a common and unified model of taxation within the EU and the removal of the gap between national fiscal laws are factors for clustering and approximating of national legal systems, with regard to the power to impose taxes.

The Court of Justice of the European Union has a very important role to play in the interpretation and development of EU law in general, and EU rules in the field of taxation, in particular. The Court has had a traditional moderate approach, reflected in its most judgments, also influenced by the necessity to take into consideration the huge impact of its ruling in fiscal cases on the national public budget, directly, and on the European budget, indirectly. In any particular tax situation, the primary effects are for the participant member states, but the power of the CJEU ruling will mandatory affect any other comparable situation within the EU, and the indirect budgetary effects might spread to the level of the European citizens level of living.

There is a constant concern of the Member States regulatory institutions to designing effective controlled foreign companies' rules, respecting their compatibility with EU law. The national legislative organisms have to find the right rules to fight the taxpayers' abusive practices within the EU, while respecting their compliance with the EU mandatory rule of law. The individual approach towards this goal is often sanctioned by the European Commission or by the CJEU, so the need to cooperate arose naturally and evolved to the current level of coordination of the fiscal regulation, maintaining the rule of unanimity when adopting a particular tax measure in the Council. The sovereign right

to rule taxation is still protected by the member states and it is expressly previewed in the EU primary law, as all member states are willing to preserve the right to rule taxation for unlimited time. Still, they are simultaneously obliged to respond to the everyday challenges of harmonizing their taxation, in accordance with the fundamental rules of functioning of the internal market. Their regulation has to address properly the tax avoidance conduct by applying uniform rules. All individual regulatory actions in the fiscal area of the Member States may significantly enhance the collaborative and common approach of various states across the world in preventing tax avoidance, redesigning the concept of sovereignty at least for the EU Member states, if not globally.

If we accept that sovereignty in taxation is untouchable and state right to decide completely autonomously on the public revenue is fundamental value for the tax systems, then our paper confirms the hypothesis that the unilateral regulation in tax field is still the formal legitimate method to rule today. Also, in response to the objectives of the research, other features and parameters were highlighted, justifying the approximation of the national tax systems. There are informal challenges in the adoption of EU tax legislation, particularly serving the sovereignty rule. The post-Lisbon EU law includes proves for the tax uniform policy regime and, undoubtedly, there is a wide acknowledged goal to cooperate among the EU fiscal authorities for tax policymaking. The unique legislative fiscal regulation is possible only when the proper respect is paid to the unanimity rule, while European tax law is indeed building up a new legal environment using two different paths (i.e. positive and negative integration) at an unprecedented speed. We are moving towards European fiscal integration, a legal framework in which Member States will act gradually self-deprived of their national tax sovereignties and European nationals will enjoy a full and immediate protection of their individual rights, under the jurisdiction of the Court of Justice of the European Union, with limited space for tax arbitrage and a substantial simplification of issues raised by cross-border taxation, both within Europe and in the relations with third countries.

If symbiosis will not be achieved by European primary law or through favorable regulatory frameworks, then it is our conclusion that the unilateral regulation will lead the integration process. The sovereign right to rule taxation, protected in the national constitution, will no longer be justified, in connection to the precise prevision in the national tax system which have moved and will evolve towards unified approach.