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The notion of tax and the elimination of international double taxation or double non-taxation

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EU Report

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Summary and conclusions

This report deals with the concept of tax in the EU analysing the provisions of the treaties and directives that take into consideration the concepts of double taxation and double non-taxation. The results of this analysis clarify a notion of tax which varies from time to time.

The concept of tax in EU law has its origin in the same concept drawn up in the Member States' legal traditions, especially in Member States that signed the Treaty establishing the Economic European Community in 1957. This concept has been further adapted to the scope and objectives of EU law, which are quite different from the domestic law of the Member States.

The European treaties state at many points that the accomplishment of the internal market is still the main purpose of the EU. According to this principle, the EU has an "exclusive competence" (among other things) in the customs union and competition rules necessary for the functioning of the internal market.

Based on these principles, the EU is competent to ask Member States to modify their tax systems only if domestic rules infringe the single market and the fundamental freedoms of movement of goods, persons, business and capital within the EU boundaries. Special competences are recognised to the EU for the so-called "harmonised taxes", which are always considered to be relevant in achieving the single market.

In the light of this fundamental objective, the purpose of all EU rules regarding taxation is normally aimed at avoiding both double taxation and double non-taxation in transactions between different Member States. In fact, only if intra-EU transactions are carried out without any differences in taxation can the single market be achieved. From this perspective, there is no unequivocal concept of "tax" in EU law, but different concepts of "fiscal provisions", "taxes", "charges" and "excise duties", as well as, more generally, revenues "of a fiscal nature", governed in primary and secondary legislation with different scopes and aims.

Accordingly, the EU concept of tax is basically a tool used to meet two major objectives: to ensure that EU law is applied with no differences in all Member States and to reinforce its effectiveness. Otherwise, under domestic law taxes are applied to share between taxpayers the burden of public expenses according to a

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specific principle (e.g. ability to pay). The main consequence is that contributions which cannot be properly regarded as "taxes" under domestic law may be considered as such under EU law.

From this view, the EU definition of tax must be investigated with a negative approach: taxes from a European point of view are all kinds of public levies having a "contributory" nature, which are different from all levies (such as "charges", "dues" or "fees") having a "retributive" nature. In regulating these kinds of levies, EU law aims to consider whether they are potentially liable to infringe the fundamental freedoms of movement in the EU and, in the end, to prevent the achievement of the single market.

Therefore, double taxation and double non-taxation are able to create negative effects in the single market (so-called "tax obstacles") and, for this reason, they must be removed.

It has been generally recognised that the current unanimity vote mechanism has over time become more and more inadequate to face tax harmonisation problems, especially after enlargement.

Moreover, while taxation is subject to the unanimity rule, decisions regarding competition follow the qualified majority rule, creating imbalance in the decision-making process regarding these subjects, which are normally connected.

As a matter of fact, EU institutions have tried to narrow down the EU concept of tax, aimed at avoiding the overturning of the unanimity rule. From this perspective, neither the concept of "tax" in the EC Treaty nor the concept of "fiscal provisions" is intended to influence domestic legislation, but rather to determine when the European institutions should apply the unanimity rule to the approval of certain measures. Considering that, the EU notion of tax cannot be examined in a theoretical way, but only in a very practical one.

Indeed, the persistence of the unanimity rule has produced a significant slowdown in the approximation process of Member States' tax systems (especially direct taxes) by deferring and in some cases preventing the adoption of regulations and directives intended for this purpose. In this scenario, the Commission has developed so-called "tax coordination", based on some tactical changes in the strategy of coordination of domestic tax policies aimed at making the Member States' direct taxation systems more synchronised with the internal market structure.

In the current state of EU law, in the absence of an EU initiative, Member States are not obliged to prevent double taxation. However, Member State rules that give preference to domestic situations as opposed to cross-border situations are contrary to the fundamental freedoms, in the absence of pertinent justifications. For this reason, it is important to understand in which cases and with what limits EU legislation must prevail over the legislation of Member States.

1. The notion of tax in the EU legal system

1.1. Taxes and the internal market

The concept of tax in EU law has its origin in the same concept drawn up in the Member States' legal traditions, especially in Member States that signed the Treaty

establishing the European Economic Community in 1957. This concept has been further adapted to the scope and objectives of EU law, which are quite different from those of domestic law.[1]

The European treaties state at many points that the accomplishment of the internal market is the main purpose of the EU.[2] According to this principle, the EU has an "exclusive competence" (among other things) in the customs union and competition rules necessary for the functioning of the internal market.[3] In some cases, the Union also has exclusive competence in the approval of international agreements.[4]

On the other hand, the Union has a "shared competence" with the Member States in the areas of (among others) the internal market, environment and energy.[5] Shared competence must be interpreted in a restrictive way.[6] This solution is compliant with the principle of conferral,[7] which ensures that the Union will act only within the limits of the competences conferred by the treaties. Exercising its competences, the Union must respect the principles of subsidiarity and proportionality.[8]

Based on these principles, the EU is competent to ask Member States to modify their tax systems only if domestic rules infringe the single market and the fundamental freedoms of movement of goods, persons, business and capital within the EU. Special competences are recognised to the EU for the so-called "harmonised taxes", which are always considered to be relevant in achieving the single market.[9]

In the light of this objective, the purpose of all EU rules regarding taxation is aimed at avoiding both double taxation and double non-taxation in transactions between different Member States. In fact, only if intra-EU transactions are carried out without any differences in taxation can the single market be achieved. From this perspective, there is no unequivocal concept of "tax" in EU law, but concepts of "fiscal provisions", "taxes", "charges" and "excise duties", as well as, more generally, revenues "of a fiscal nature", ruled with different scopes and aims.[10]

Accordingly, the EU concept of tax is basically a tool used to meet two major objectives: to ensure that EU law is applied with no differences in all Member States and to reinforce its effectiveness. Otherwise, under domestic law taxes are applied to share between taxpayers the burden of public expenses according to a specific principle (e.g. ability to pay). The main consequence is that contributions which cannot be properly regarded as "taxes" under domestic law may be considered as such under EU law.[11]

1 P.M. Herrera Molina, "Methodological premises", in B. Peeters, W.B. Barker, P.M. Herrera Molina and K. van Raad (eds.), *The Concept of Tax*, Part 2, "The Concept of Tax in EU Law", ed. P. Molina, G.T.K. Meussen and P. Selicato, IBFD, Amsterdam, 2007, p. 205.

2 In this regard, see art. 3, para. 3, of the TEU (Treaty on European Union); art. 26 TFEU (Treaty on the Functioning of the European Union).

3 Art. 3, para. 1, TFEU.

4 Art. 3, para. 3, TFEU.

5 Art. 4, para. 1, TFEU.

6 TFEU, sole article of protocol no. 25 on the exercise of shared competence.

7 Stipulated in art. 5 TEU.

8 See again art. 5 TEU.

9 See art. 113 TFEU.

10 Herrera Molina, *op. cit.*, p. 207.

11 See ECJ, judgment C-56/1998, case *Modelo SGPS*, comment of A. Martin Jimenez quoted by Herrera Molina, *op. cit.*, p. 208.

In this view, the EU definition of tax must be investigated with a negative approach: taxes from a European point of view are all kinds of public levies having a "contributory" nature, which are different from all levies (such as "charges", "dues" or "fees") having a "retributive" nature. In regulating these kinds of levies, EU law aims to consider whether they are potentially able to infringe the fundamental freedoms of movement in the EU and, in the end, to prevent the achievement of the single market.[12]

Therefore, double taxation and double non-taxation are able to create "tax obstacles" in the single market and, for this reason, they must be removed.

1.2. The unanimity rule in tax matters

As the European Commission has been stating for a long time,[13] tax sovereignty is still a competence pertaining to the single Member States, except for cases where the treaties expressly provide for a law ruling in a specific tax field.[14] However, also in cases allowed by the treaties, the Council must act unanimously.[15]

In the EU system there is no explicit law in the field of direct taxation. Only in cases where domestic laws directly affect the internal market by way of "tax obstacles" can the Council issue directives for the approximation of such laws.[16] Unanimity is also required in these cases.[17]

It has been generally recognised that the unanimity vote mechanism has over time become more and more inadequate, especially after enlargement.[18] Moreover, while taxation is subject to the unanimity rule, decisions regarding competition

[12] P. Boria, *Diritto tributario europeo* (Giuffrè, 2015), p. 465 *et seq.*, names the relationship between EU law and Member States' tax law *fiscalità negativa*.

[13] For instance, in the Communication on the Tax Policy in the European Union – priorities for the years ahead, COM (2001)260 of 23 May 2001.

[14] See art. 113 TFEU for the "harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation".

[15] See again art. 113 TFEU, comments by P. Selicato, "The concept of tax in the directives", in Peeters *et al.*, *op. cit.*, pp. 232–234; P. Selicato, "European companies and taxation: the matter of economic integration", *Int. Tax Law Rev.*, 2010, no. 1, p. 532, esp. pp. 540–543.

[16] See in this regard the analysis of the concepts of "unification", "approximation" and "harmonisation" made by Selicato, "The concept of tax in the directives", *op. cit.*, p. 227. Recently, F.A. Garcia Prats, "Source, residence and nationality in income tax matters: between international tax rules and EU Law", *Int. Tax Law Rev.*, no. 2, 2013, p. 29.

[17] See art. 115 TFEU. In the Italian literature, a general analysis on the approximation of national rules has been developed by R. Saulle, "Ravvicinamento delle legislazioni (diritto comunitario)", in *Enc. dir., Agg.*, Vol. II (Giuffrè, 1998), p. 899.

[18] M. Benigna, "European Union Enlargement and the mechanisms of decision on tax matters", *Int. Tax Law Rev.*, 2000, no. 3, p. 281; A. Amatucci, "Tax aspects of EU enlargement", *Int. Tax Law Rev.*, 2004, no. 1, p. 7; P. Selicato, "The Common Consolidated Corporate Tax Base (CCCTB) between the exigencies of harmonization of the corporate tax and the problems of compatibility with the national systems", *Int. Tax Law Rev.*, 2009, nos. 1–2, p. 145; P. Selicato, "Tax expenditures as a means to promote the economic development in the Mediterranean area and EU State aid limitations (Can economy stop war?)", in Y. Edrey and M. Greggi (eds.), *Tax Law and the Mediterranean Area: Current Issues in the Time of Global Crisis* (University of Ferrara, 2012), p. 191. Recently, P. Moscovici, "The future of tax policy: A matter for society as a whole – Closing address 'The Way Forward'", speech at the Fourth Tax Day, FEE (Fédération des Experts comptables Européens), Brussels, 29 April 2015, in http://europa.eu/rapid/press-release_SPEECH-15-4900_en.htm?locale=en.

follow the qualified majority rule, creating imbalance in the decision-making process regarding these subjects, which are normally connected. Unfortunately, the Commission's proposal presented for widening a qualified majority vote system in tax issues has not found favour in Member States.[19]

How has the unanimity vote mechanism actually influenced the EU notion of tax?

In this regard, it can be observed that, during recent years, EU institutions have narrowed down the concept of tax, aimed at avoiding the overturning of the unanimity rule.[20] For example, the European Court of Justice has legitimated this behaviour in deciding on the *PreussenElektra* case,[21] when the Court stated that payments between private parties were not state aids because they had no budgetary consequences even though they were imposed by law and no matter that the economic effect of these rules was very similar to the consequences determined by the combination of a tax (charged on the purchaser) with a state aid (paid to the vendor). However, the Court gave a negative answer, stating that this was an issue between private companies and that no public resources were involved.[22] Therefore, no reference to the notion of tax could be made in such cases.

In the same way, the rules of Directive no. 2003/87/CE dated 13 October 2003 cannot be included in the concept of "fiscal provisions" when they regulate payments related to the "emission permits" made between private undertakings, for they establish a scheme for greenhouse gas emission allowances trading within the Community.[23]

Concluding on this point, neither the concept of "tax" nor the concept of "fiscal provisions" is intended to influence domestic legislation, but rather to determine when the European institutions should apply the unanimity rule in the approval of certain measures.

From this perspective, the EU notion of tax cannot be considered in a theoretical way, but only in a very practical one.

1.3. Tax coordination and double taxation

The persistence of the unanimity rule has produced a significant slowdown in the approximation process of Member States' tax systems (especially direct taxes) by deferring and in some cases preventing the adoption of regulations and directives intended for this purpose.[24]

[19] European Commission, Commission's additional contribution to the Intergovernmental Conference on Institutional Reforms. Qualified majority voting for issues relating to the single market in the areas of taxation and social security, COM (2000) 114 final.

[20] Directive 2000/60/EC of 23 October 2000, establishing a framework for Community action in the field of water policy, which obliges Member States to increase their charges for water supplies and sewage. Directive 2006/38/EC of 17 May 2006, amending Directive 1999/62/EC, on the charging of heavy goods vehicles for the use of certain infrastructure.

[21] ECJ, judgment 13 March 2001, Case C-379/98.

[22] G.T.K. Meussen, "The concept of tax in the EC Treaty and in the failed European Constitution (2) State aid", in Peeters *et al.*, *op. cit.*, p. 224, shows surprise at this conclusion.

[23] Selicato, "The concept of tax in the directives", *op. cit.*, p. 252.

[24] This is the case of the Commission's Directive proposal on the Common Consolidated Corporate Tax Base (CCCTB), launched by Communication COM (582) dated 23 October 2001, Towards an

In this scenario, the Commission has developed so-called "tax coordination", based on some tactical changes in the strategy of coordination of domestic tax policies aimed at making the Member States' direct taxation systems more synchronised with the internal market structure.[25]

By means of this new framework, the Commission intends to propose to Member States a common interpretation of the ECJ's case law in order to find general principles and coordinate domestic tax policies with the aim of making domestic taxation systems more synchronised with the internal market structure.

From this perspective, the notion of tax adopted in the coordination process is only related to direct taxes and, particularly, to situations both of discrimination and double taxation,[26] and non-taxation and abuse as well,[27] occurring in this sphere. And, once more, the meaning of "tax" is reconstructed with a negative approach.

2. Double taxation: is it an issue to deal with in the EU (and with what meaning)?

2.1. What is double taxation (in short)?

From the economic point of view, there are two kinds of double taxation. In the case of juridical double taxation, two comparable taxes apply to the same taxpayer in respect of the same income or capital. The expression "economic double taxation" is used when different taxpayers are taxed in respect of the same income or capital.[28] It normally occurs on income from companies, taxed both on companies and on shareholders.[29]

Problems of double taxation came up first in domestic situations, where they were dealt with by deriving from the ability to pay principle a general ban on taxing the same income twice (or more).

In an international context, double taxation may arise by dual residence or by taxation in both the state of residence and the state of source. Generally, Member

cont.

Internal Market Without Tax Obstacles. A Strategy for Providing Companies with a Consolidated Corporate Tax Base for their EU-wide Activities.

25 European Commission, Co-ordinating Member States' direct tax systems in the Internal Market, COM (2006) 823 dated 19 October 2006. The paper of the Commission Taxation in the European Union, SEC(96) 487, dated 20 March 1996, is generally indicated as a key document for the U-turn of EC tax policy. Comments in this sense by A. Zalasiński and F. Roccatagliata, "A Community action to facilitate the co-ordination of Member States' tax systems. The Communication of the Commission 'Coordinating Member States' direct tax systems in the Internal Market': A new step on the strategy of co-operation between the European Commission and the Member States", *Int. Tax Law Rev.*, no. 1, p. 193.

26 European Commission, COM (2006) 823, *op. cit.*, para. 2.2.

27 *Ibid.*

28 IBFD, *Tax Glossary*, entry "double taxation".

29 In this regard, see P. Selicato, "Searching for Neutrality of Corporate Income Tax in the EU Member States", in D. Gutmann (ed.), *Corporate Income Tax Subjects* (EATLP, 2016), Chapter 9.

States already relieve double taxation through unilateral, bilateral or even multilateral measures, acting under their own tax sovereignty.

The notion of double taxation is directly influenced by the notion of tax: the notion of tax analysed case by case defines the scope of the notion of double taxation to be applied.

2.2. Double taxation versus double non-taxation

Double non-taxation occurs when a taxpayer avoids being taxed both in the residence state and in the source state. Normally, it is the consequence of an aggressive tax planning scheme, and, if it qualifies as abuse of law, it can be considered as a phenomenon of the non-compliant behaviour of taxpayers, in the same way as tax fraud, tax evasion and tax avoidance.

Double non-taxation goes against the EU principles for the same reasons as double taxation does. Indeed, double non-taxation also can jeopardise the competitiveness of EU enterprises in the same way as double taxation, allowing some of them to pay lower or no taxes.

EU institutions are strongly concerned by current situations of double non-taxation within the EU, especially in the area of corporate taxation.[30] The same issue has been considered at a global level in respect of the "stateless income" phenomenon,[31] which was analysed by the OECD when counteracting aggressive tax planning schemes,[32] and, in the end, led to the well-known actions against base erosion and profit shifting (BEPS).[33]

Indeed, while it is exactly the opposite situation, double non-taxation interferes with the achievement of the single market just as double taxation does.[34]

Moreover, in a period when Member States are looking for secure and additional tax revenues, it is important for their credibility that they take the necessary measures to remove both double taxation and double non-taxation.[35]

The notion of double non-taxation also is directly influenced by the notion of tax that is applied case by case.

[30] See Moscovici, *op. cit.*

[31] See E.D. Kleinbard, "Stateless Income", *Florida Tax Rev.*, 2011, vol. 11, no. 9, p. 699 *et seq.*; for some specific aspects regarding the so-called "Over-The-Top" (OTT), see C. Scaglioni, "La fiscalità delle multinazionali digitali: il caso italiano", *Int. Tax Law Rev.*, 2013, no. 2, p. 231; see also P. Valente and G. Ianni, "Economia digitale: principi impostivi e questioni aperte", *Riv. Guardia Fin.*, 2015, no. 4, p. 1057.

[32] OECD, *Tackling Aggressive Tax Planning Through Improved Transparency and Disclosure* (2011); OECD, *Hybrid Mismatch Arrangements. Tax Policy and Compliance Issues* (Paris, 2012).

[33] OECD, *Addressing Base Erosion and Profit Shifting* (Paris, 2013); OECD, *Action Plan on Base Erosion and Profit Shifting* (2013); OECD, *OECD-G20 Base Erosion and Profit Shifting Project. Explanatory Statement. 2015 Final Reports* (Paris, 2015).

[34] European Council, Council conclusions on corporate taxation – base erosion and profit shifting, 8 December 2015 (Press Release no. 910/15).

[35] European Commission, Double Taxation in the Single Market, COM(2011) 712 of 11 November 2011.

2.3. Why and in what measure should double taxation (and double non-taxation) be addressed inside the EU?

In the current state of EU law, in the absence of an EU initiative, Member States are not obliged to prevent double taxation. However, Member States' rules that give preference to domestic situations as opposed to cross-border situations are contrary to the fundamental freedoms, in the absence of pertinent justifications.[36]

The Commission underlined that promoting a more competitive economy as a driver of smart and sustainable growth is a real need as part of its Europe 2020 strategy,[37] adding that the full range of EU policies, and in particular the single market, must be used more effectively, removing the remaining obstacles to achieving these goals.

Among these, intra-EU international double taxation situations are obstacles having a relevant effect. In the Commission's opinion, unrelieved double taxation in the EU increases the overall tax burden and therefore can have a negative impact on non-EU capital investment.[38] The Commission considers that corporate taxation has a non-negligible impact on foreign direct investment location decisions.[39]

From this perspective, the Commission seems to welcome a notion of "double taxation" limited to direct taxation. However, it cannot be excluded that the same notion can also be extended to other kinds of tax, if the situation gives rise to a tax obstacle that can compromise the achievement of the single market.

2.4. EU actions against double taxation (article 293 TEC and its repeal)

In the past, action against double taxation in the EU has been supported by article 293 of the Treaty establishing the European Community (TEC), signed in Rome on 25 March 1957, which requested Member States to enter into agreements aimed at ensuring the elimination of the double taxation inside the EU.

Nevertheless, the wording of this article ("Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: … the abolition of double taxation within the Community") appeared to be lacking an authentic legal value and to be too respectful of domestic rule-making power and seemed to outline a mere option and not a real obligation by the Member States.

Article 293 has been repealed by the TFEU, signed in Lisbon on 13 December 2007, which entered into force on 1 December 2009.

Two possible hypotheses of interpretation of the "disappearance" of article 293 have been made:[40] the first considers its repeal as a failure of the efforts made to

[36] COM (2011) 712, *op. cit.*, p. 5 and ECJ case law cited there, at footnote 14.

[37] European Commission, Europe 2020. A strategy for smart, sustainable and inclusive growth, COM (2010) 2020, 3 March 2010.

[38] COM (2011) 712, *op. cit.*, p. 6.

[39] Again, *ibid.*

[40] For these hypotheses, see widely P.M. Herrera Molina, *Convenios de doble imposición y derecho comunitario* (Instituto de estudios fiscales, Madrid, 2009).

eliminate double taxation inside the European Union;[41] the second considers it as an extraordinary opportunity to allow European institutions to intervene directly in order to achieve this goal.[42]

According to the main literature,[43] it is commonly accepted that the doubtful wording of article 293 is itself the main reason why it could not be considered the only tool provided by the treaty in order to eliminate double taxation inside the EU. On the other hand, the Member States' failure to stipulate the agreements envisaged by article 293 would have legitimated, in accordance with the principles of subsidiarity and of implied powers, the intervention of the EU institutions. In any case, no limits to the notion of double taxation in its scope (direct, indirect or other taxes) came from the repealed article 293, nor do such limits exist today, only a general principle being in force in this sense.

2.5. EU actions against double taxation (recent trends)

Member States are aware of double taxation, but domestic measures are not effective enough to address all double taxation situations, primarily for their unilateral perspective. As the Commission has pointed out,[44] double taxation conventions (DTCs) are not sufficient either. In fact, they do not cover all taxes relevant from a single market perspective (e.g. registration duties), do not provide for the full removal of double taxation and, notably, do not provide any uniform solution for triangular and multilateral relations between Member States.

In recent years, the ECJ has confirmed many times that the fundamental freedoms cannot resolve the problem of juridical double taxation in the EU, since they do not provide criteria for the attribution of taxing rights. In the Court's view, this is why juridical double taxation is the result of the parallel exercise of taxing rights and a consequence of Member States' fiscal sovereignty.[45]

Indeed, double taxation has been addressed in the EU, but in the opinion of the Commission new steps forward must be taken.[46] However, it seems that the Commission has taken into consideration only taxes covered by the OECD DTC model (taxes on income and capital, including inheritance taxes), but no other taxes. Nevertheless, a possible extension of the notion of tax welcomed for double

[41] This seems to be the idea of M. Lehner, "A significant omission in the Constitution of Europe", *British Tax Rev.*, 2005-4, who pointed out that "the deletion of Article 293 of the EC Treaty constitutes a severe regression as far as the abolition of double taxation within the Community is concerned".

[42] Herrera Molina, *Convenios*, *op. cit.* In this regard, the opinion of P. Pistone, *The Impact of Community Law on Tax Treaties. Issues and Solutions* (Kluwer Law International, 2002), is interesting; he says that "the existence of this provision, as well as its wording, has represented the most relevant hindrance to the development of supranational rules with respect to direct taxes".

[43] Herrera Molina, *Convenios*, *op. cit.*, p. 42 *et seq.*

[44] COM (2011) 712, *op. cit.*, p. 8.

[45] See K. Daxkobler and E. Huisman, "Levy & Sebbag: The ECJ Has Once Again Been Asked To Deliver Its Opinion on Juridical Double Taxation in the Internal Market", *European Taxation*, August 2013, p. 400.

[46] COM (2011) 712, *op. cit.*, p. 8. The Commission states that "Existing instruments are insufficient to address many of the remaining double taxation situations" and that they "do not always function in an effective manner".

taxation matters could arise from the final options set out in the Communication in question, which does not refer only to direct taxes.[47]

As regards double non-taxation, the Commission[48] has proposed launching a fact-finding consultation procedure. The results of this consultation[49] seem oriented to limiting the notion of double non-taxation to direct taxation issues only, but a wider range of action of this notion cannot be excluded if aggressive tax planning schemes (as well as tax frauds or tax evasion or avoidance) occur.

3. Double taxation in the EU directives

3.1. General remarks

Proceeding towards the achievement of the single market, the EU has approved many directives on tax matters. Directives are considered the main instruments for realising the purposes of the treaty.[50] The European legislator uses directives both where the European treaties expressly require it, and in all situations where a non-binding provision is needed to leave Member States free to decide the form of their action,[51] but the approach used for "harmonised taxes"[52] is different from that used in "non-harmonised taxes".[53]

It is well known[54] that while in harmonised taxes the European legislator has ruled on the notion of tax in a detailed way according to a comprehensive approach,[55] in non-harmonised taxes the interventions of EU law are only aimed at removing specific tax obstacles with a case-by-case approach.[56] The Commission has often reiter-

[47] COM (2011) 712, *op. cit.*, p. 11, mentions: (a) creation of a Forum on double taxation for purely EU tax matters; (b) a proposal for a code of conduct on double taxation; (c) the feasibility of an efficient dispute resolution mechanism, with a view to determining the most effective ways of removing double taxation.

[48] See again COM (2011) 712, *op. cit.*, p. 11.

[49] See European Commission, Summary report of the responses received on the public consultation on factual examples and possible ways to tackle double non-taxation cases, 5 July 2012 TAXUD D1 D (2012).

[50] P. Adonnino, "Armonizzazione fiscale nell'Unione europea", *Enc. Dir., Agg.* Vol. III (Giuffrè, 1999), p. 276, particularly at p. 277.

[51] Art. 288, para. 3, TFEU. In this regard see G. Tesauro, *Diritto comunitario* (CEDAM, 2003), pp. 143–144, who points out that by using directives, the Community is more respectful of the principle of subsidiarity.

[52] Art. 113 TFEU includes in the notion of harmonised taxes "turnover taxes, excise duties and other forms of indirect taxation".

[53] A formal definition of non-harmonised taxes does not exist. It can be derived negatively: taxes that cannot be considered "harmonised" must be considered "non-harmonised".

[54] Selicato, *The concept of tax in the directives*, *op. cit.*, pp. 227–232.

[55] In the harmonisation process, the legislation of Member States has to define tax in accordance with the model adopted by the directive. See C. Cosciani, *Problemi fiscali del mercato comune* (Giuffrè, 1958); A. Pedone, "Tax harmonization policy in a changing European Union", *Riv. pol. econ.*, 2004, VII–VIII, 141. Sacchetto, *Armonizzazione e coordinamento fiscale*, *op. cit.*

[56] Non-harmonised taxes (mostly direct taxes) are subject to art. 115 TFEU, which (in general) states that "the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market". F. Roccatagliata, "Diritto

ated its belief that there is no need for an across-the-board harmonisation of Member States' direct tax systems,[57] asking time and time again for targeted measures intended to address specific (tax) obstacles existing in the single market.[58]

It must be emphasised that, according to article 267 TFEU, the ECJ has the competence to interpret EU law with respect to both direct and indirect taxes. Nevertheless, while harmonised taxes are completely shaped on a model defined in EU rules, non-harmonised taxes need only comply with the special EU rules that are aimed at modifying single parts of single domestic tax laws if they infringe the single market.

The ECJ's interpretation fundamentally differs in respect of these two groups of rules. It is wider for harmonised taxes while it is more limited in its scope when it deals with non-harmonised taxes. In the area of non-harmonised taxes, the Court has followed the path of "negative integration", warranting the progressive elimination of specific tax obstacles generated by domestic tax rules that violate the fundamental principles of the treaty.[59]

From this perspective, the term "tax" (and, consequently, the terms "double taxation" and "double non-taxation") used in each case has a different meaning and scope, depending on the "harmonised" or "non-harmonised" nature of taxes considered. In the following sections, the notion of tax in the most relevant directives will be examined, with particular attention to the notions of "double taxation" and "double non-taxation".

3.2. VAT and double taxation

VAT is a consumption tax, charged as a percentage of prices. It is collected fractionally, via a system of partial payments, and is neutral regardless of how many transactions are involved.[60] VAT rules have the maximum level of harmonisation, VAT being the main tool to ensure neutrality in the single market.[61] For the same reason, double taxation (both juridical and economic) cannot be accepted.

It is common opinion that the notion of tax harmonisation has been implicitly considered in article 3, paragraph (h) of the TEC. This article has been substantially replaced by articles 3 to 6 of TFEU, and the word "harmonisation" is a specific expression of the concept of "approximation of domestic laws" mentioned in this rule.[62]

cont.

tributario comunitario", in V. Uckmar (ed.), *Diritto tributario internazionale* (Cedam, 2005), p. 1203 *et seq.*, especially p. 1229, noticed that the notion of "harmonisation" is placed halfway between "unification" and "approximation".

57 See COM (2001) 260, *op. cit.*

58 This approach has been confirmed in the Communication The contribution of taxation and customs policies to the Lisbon strategy, COM (2005) 532 of 25 October 2005.

59 The literature shows criticism about this kind of action of the Court. In this sense, see M. Watelet, "Direct taxation in the EU law: integration or disintegration?", *EC Tax Review*, 2004, no. 1, p. 2; R. Seer, "The jurisprudence of the European Court of Justice: Limitation of the legal consequences?", *European Taxation*, October 2006, p. 470.

60 For more detail on the nature of VAT, see Selicato, *The concept of tax in the directives*, *op. cit.*, p. 235.

61 See widely *ibid.*, pp. 227–232.

62 G. Casado Ollero, "The Community legal system and the internal tax system", in A. Amatucci *International Tax Law* (Kluwer Law International, 2006), p. 337 *et seq.*, esp. 367.

Indeed, the two concepts are similar in more than one respect. In fact, neither of these concepts represents the need to realise identical rules in each Member State, being oriented only to allowing these rules to converge in a common system.[63]

Article 33(1) of the Sixth VAT Directive[64] indicates a specific prohibition of double taxation, calling on Member States to maintain or introduce "taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges" only if they "cannot be characterised as turnover taxes", under the further condition that "those taxes, duties or charges do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers".

The aim of this prohibition is to ensure the correct functioning of the common market according to the principle of neutrality and to the nature of the consumption tax of VAT.[65] Thus, this provision is important to define the concept of double taxation in turnover taxes.[66] In the opinion of the ECJ, the concept of "turnover tax" mentioned in article 33(1) must be intended in a wider sense, aiming at avoiding double taxation, which infringes the neutrality of VAT and breaches the single market. Indeed, according to article 33(1) Member States cannot maintain or introduce taxes, duties and charges that "exhibit the essential characteristics of VAT", even if they are not identical to VAT.[67]

In recent years, notwithstanding certain differences of wording, the Court's case law has found four "essential characteristics" of VAT, in the presence of which the considered tax has to be defined as a turnover tax forbidden by article 33(1):[68]

- general application by the taxable persons to all transactions;
- proportionality to the price charged, whatever the number of transactions;
- charge at each stage of the production and distribution process;
- application precisely to the added value of goods or services.

The Court has decided in this regard that taxes, duties and charges must be intended as being imposed on the movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT, "even if they are not identical to it in every way".[69] Article 33 of the Sixth Directive does not, however,

[63] This idea has been followed for a long time by the Italian doctrine. On this point see various authors, *L'armonizzazione fiscale nel mercato comune europeo*, book of the Conference of Venice, 2–3 May 1964, Naples, particularly the papers of F. Forte, at pp. 35 and 54, G.A. Micheli, at p. 111, and F. Maffezzoni, at p. 116.

[64] Dir. 77/388/EEC of 17 May 1977.

[65] In this regard see P. Farmer and R. Lyal, *EC tax law*, Oxford, 1994, p. 134; A. Comelli, *IVA comunitaria e IVA nazionale. Contributo alla teoria unitaria dell'imposta sul valore aggiunto*, Cedam, 2000, pp. 943 *et seq.*

[66] ECJ, judgment 26 June 1997, joint cases C-370/90, C-371/95 and C-372/95, *Careda*; in the same sense, see also ECJ, judgment 29 April 2004, *GIL Insurance* C-308/01.

[67] ECJ, Opinion of the Advocate General, *Banca Popolare di Cremona*, C- 475-03; see also ECJ, judgment 31 March 1992, *Dansk Denkavit*, C-200/90; 9 March 2000, *EKW*, C-437/97.

[68] The first judgment in this field was given on 27 November 1985, C-295/84, *Wilmot*. In addition, see the already cited judgments *GIL Insurance* and *EKW*; see also: 1 April 1982, C-89/81, *Hong Kong Trade*; 3 March 1988, C-252/86, *Bergandi*; 4 December 1990, C-186/89, *Van Tiem*; 17 September 1997, C-130/96, *Solisnor Estaleiros Navais SA*; 17 September 1997, C-347/95, *UCAR*.

[69] See in this sense ECJ, judgment 31 March 1992, case C-200/90, *Dansk Denkavit and Poulsen Trading*, paras. 11 and 14, and Case C-308/01, *GIL Insurance and Others*, cited above, para. 32.

preclude the maintenance or introduction of a tax "which does not display one of the essential characteristics of VAT".[70]

In its more recent judgments, the Court has stated that, in addition to these characteristics, to be compared to a turnover tax "the tax considered must be transferable to the consumer".[71] With this specification, the ECJ has pointed out that, to be in contravention of article 33(1) of the Sixth Directive, a domestic tax, duty or charge must be construed as a consumption tax. In the same way, the Court[72] has also stated that "its transfer to the consumer results from an invoice or other equivalent document that is not needed". This statement conforms with other decisions of the Court, which have explained that Member States cannot subordinate a refund to a taxpayer's evidence that the tax has not been charged on other subjects.[73]

An interesting test of the extent of article 33(1) is the judgment on the Italian IRAP (*imposta regionale sulle attività produttive*).[74] In this case, the Court stated that article 33 of the Sixth Directive does not preclude the maintenance of a tax having the characteristics of IRAP. Synthetically, the ECJ has found reason for this statement in the fact that IRAP is not proportional to the price of goods and services,[75] and is not structured to ensure that the cost of the tax will be charged to the consumer.[76]

The ECJ's interpretation is based on the analysis of the economic effects of the tax rather than on the formal reading of the rule. This impression is confirmed by article 33(1) of the Sixth Directive as a whole, which is clearly aimed at ensuring that turnover taxes must remain completely neutral for the taxable persons involved in the production and distribution process prior to the stage of final taxation, regardless of the number of transactions involved.[77]

3.3. Double taxation and "taxes having an equivalent effect to customs duties"

As seen in the case analysed above, the economic approach normally applies in the interpretation of EU law.[78]

Article 30 TFEU states that "Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature." The objective of this provision is to avoid first, that each Member State makes its own import–export policy with third states; second, that goods circulating in the single market should be burdened by one (or more) duty on their import or export from a Member State to another.

[70] ECJ, judgment 17 September 1997, C-130/96, *Solisnor-Estaleiros Navais*, paras. 19 and 20; Case *GIL Insurance and Others*, cited above, para. 34.

[71] ECJ, judgment 26 June 1997, *Careda*, joint cases C-370/90, C-371/95 and C-372/95.

[72] See again judgment *Careda*, cited above.

[73] ECJ, judgment 9 February 1999, C-343/96, *Dilexport* and 9 December 2003, C-129/00, *Commission* v. *Italy*.

[74] ECJ, judgment 3 October 2006, C-475/03, *Banca Popolare di Cremona*.

[75] ECJ, judgment C-475/03, cited above, para. 30.

[76] ECJ, judgment C-475/03, cited above, paras. 31 to 35.

[77] For a more critical analysis see Selicato, "The concept of tax in the directives", *op. cit.*, p. 235 *et seq*.

[78] See *ibid.*, p. 227 *et seq*.

This is, in the end, a way of counteracting double (or plural) taxation in import–export activities. It is clear from this wording that similarity between customs duties and other charges is evaluated according to a factual and not a legal approach.

In this regard, the ECJ draws a distinction between the prohibition of "charges having equivalent effect to customs duties" and "internal discriminating taxes" prohibited by article 110 TFEU.

Customs duties are generally considered "taxes" and not "charges". To make it clear that the concept includes charges, the provision also refers to "duties of a fiscal nature". Charges having equivalent effect are also prohibited. Nevertheless, certain charges may be permitted if they are connected with the economic advantage of a service rendered upon import of some goods, since in this case they would not have an effect equivalent to customs duties.[79]

In sum, in the opinion of the ECJ, prohibitions contained in articles 30 and 110 TFEU include not only "taxes" in a formal sense but also other levies or charges when they actually have a similar effect.[80]

3.4. Residence and source taxation

In many situations, international double taxation occurs when taxes apply on the same taxpayer both in the source state and in the residence state. These are cases of juridical double taxation. This is the typical area covered by DTCs stipulated by a single Member State with other states, Member States or not. Moreover, some domestic legislation also provides for unilateral measures against double taxation.[81]

Many years ago, the EU began enforcing measures intended to remove international double taxation considering its effect of distortion of competition in the internal market.[82] On 23 July 1990 three different measures were approved according to this effect: (a) Directive 90/434/EEC (Mergers Directive); (b) Directive 90/435/EEC (Parent–Subsidiary Directive); (c) Convention 90/436/EEC (Arbitration Convention). After some years, another group of directives entered into force: (a) Directive 2003/48/EC of 3 June 2003 (Savings Directive); (b) Directive 2003/49/EC of 3 June 2003 (Interest and Royalties Directive). Today we are waiting for other measures that also could have in different ways an impact on double taxation: (a) the CCCTB Directive proposal;[83] (b) the FTT Directive proposal.[84]

[79] According to the International Convention of 6 December 1951, the fees charged for phytosanitary inspections "cannot be regarded as charges having an effect equivalent to customs duties, provided that their amount does not exceed the actual cost of the operations in respect of which they are charged". See: ECJ, judgment C-89/76, *Commission of the European Communities* v. *Kingdom of the Netherlands*; ECJ, judgment C-39/73, *Rewe-Zentralfinanz*; ECJ, judgment C-132/82, *Commission of the European Communities* v. *Kingdom of Belgium*.

[80] See ECJ, judgment of 27 November 2003 on joined cases C-34/01-C-38/01, *Enirisorse SpA* v. *Italian Ministry of Finance*.

[81] See, for example, the "branch exemption" regimes for profits and losses of foreign branches in force in the UK and Italy.

[82] European Commission, Orientations on the taxation of companies, SEC(90)601 of 20 April 1990.

[83] European Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121 of 16 March 2011.

[84] European Commission, Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC, COM 2011(594) of 28 November 2011.

All these measures have been aimed, time and again, at removing the most important tax obstacles, among which figured double taxation on company income, particularly "withholding taxes on the *bona fide* intra-group payment of dividends, interest and royalties".[85]

3.4.1. Taxation of dividends in the EU

Article 5(1) of the Parent–Subsidiary Directive states that profits which a subsidiary distributed to its parent company "shall be exempt from withholding tax", if the parent company holds for a minimum period of one year a participation of 10 per cent.

According to the prior ECJ case law, notwithstanding article 2(c) of the directive, which enumerates companies included in its scope, the term "withholding tax" seemed not to be limited to company income taxes.[86]

This is why the Court interpreted the term "withholding tax" attending to the economic effects of the domestic tax measure and to the objective of the directive, not taking into account its form or name. Indeed, the directive's main purpose is to remove cross-border tax obstacles avoiding the international double taxation of dividends within intra-Community groups of companies.[87]

In this context, the name and the form of taxation are irrelevant if it causes the double taxation prohibited by the directive. That is the reason why the directive does not give any definition of "withholding tax", either from a general point of view or with reference to Member States' domestic law.

Nevertheless, the Court pointed out that, according to article 7(1) of the directive, the term "withholding tax" "does not include any advanced payment of the corporate tax of the member state in which the parent company is resident, made at the moment of the distribution of profits".[88] That is why article 7(1) excludes from the benefits of the directive cases where the distribution of dividends raises the obligation to pay in advance the income tax due to the payer of the dividends, such as the advance corporate tax (ACT) applied in the United Kingdom and in Ireland,[89] and limits the purpose of the directive solely to juridical double taxation.[90]

The economic approach used by the ECJ in its case law is perfectly understand-

85 European Commission, Towards an internal market without tax obstacles, COM (2001) 582 final of 23 October 2001.

86 For wide references to this case law, see Selicato, "The concept of tax in the directives", *op. cit.*, p. 235 *et seq.*

87 See, in this sense, the first "whereas" of the directive, where it is stated that its aim is to create among groups of companies of different Member States "conditions analogous to those of an internal market" and, with this aim, to remove "restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States".

88 ECJ, judgment C-294/99 of 4 October 2001, *Athinaïki Zythopoiia AE* v. *Elleniko Dimosio*, para. 29.

89 For other reasons, the British ACT was found incompatible with the treaty by the ECJ, judgment, 8 March 2001, joined cases C-397/98 and C-410/98, *Metallgesellshaft Ltd and Hoechst (UK) Ltd.*

90 This statement has been confirmed by ECJ, judgment 12 December 2006, Case C-446/04, *Franked Investment Income Group Litigation*, and only requires non-discrimination *vis-à-vis* cross-border dividends if (paras. 43–46 and 67–68) and to the extent that national multiple (including economic) taxation is mitigated. See comments of L.A. Denys, "The ECJ Case Law on Cross-Border Dividends Revisited", *European Taxation*, May 2007, p. 221. This position is compliant with

able, also considering that the Court gave in the judgment on the case *Athinaïki Zythopoiia* of 2001 statements different from the judgment on the case *Epson Europe* of 2000. In fact, in the more recent decision the Court has decided on a case where, under Greek legislation, the tax at issue was due by the subsidiary company that had paid the dividends. Nevertheless, Greek tax law was found incompatible with article 5(1) of the directive because the subsidiary could transfer the economic effect of the tax to the parent company.

The ECJ[91] also stated that domestic and intra-EU dividends must be treated equally under the tax rules on the avoidance of double taxation. From this perspective, a tax exemption for domestic dividends and tax credit for EU dividends should be equivalent.

In all cases, the Court applied in the field of direct taxation an interpretative method that had already been employed in the field of indirect taxation. So that, once more, the objective of EU provisions has been the touchstone for the correct interpretation of the European concept(s) of tax.

3.4.2. The concept of double taxation in the Interest and Royalties Directive

On 3 June 2003, the Council adopted Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.

The directive is designed to eliminate withholding tax obstacles in the area of cross-border interest and royalty payments within a group of companies by abolishing withholding taxes on royalty and interest payments arising in a Member State.

According to the directive, these interest and royalty payments will be exempt from any taxes in that state, provided that the beneficial owner of the payment is a company or permanent establishment in another Member State.

According to the identity in definitions, the statements of ECJ case law regarding the Parent–Subsidiary Directive can be applied to the Interest and Royalties Directive: any public levy charged on the payments of interest or royalties is forbidden (provided that the requirements of the directive are met). It is irrelevant whether the domestic legislation considers such levy a "tax", a "charge" or another fee. The objective of the directive must prevail.

3.4.3. Double taxation and the Savings Directive

Directive 2003/48/EC on taxation of savings income in the form of interest payments (Savings Directive) has been adopted with the aim of countering tax evasion, and ensuring the taxation of interest in the source state.

The question is whether by making taxation in the state of residence (more) effect-

cont.
former cases *Baar* and *Verkooijen*. See A. Lupo, "Reliefs from Economic Double Taxation on EU Dividends: Impact of the Baars and Verkooijen Cases", *European Taxation*, July 2000, p. 270.

91 ECJ, judgment 12 December 2006, Case C-446/04, *op. cit.*, interprets the freedom of establishment and free movement of capital as requiring equal treatment of EU dividends and of domestic dividends. See comments of Denys, *op. cit.*

ive, and therefore causing double taxation of interest in the country of source, the Interest Savings Directive should not have taken measures against double taxation in order to facilitate cross-border investments in the single market.[92]

The first reason is that the purpose of the directive is not double taxation but tax coordination, in order to eliminate tax evasion on interest. The state of residence remains free to tax interest, while the state of source retains the possibility to tax at source interest earned by non-residents. However, double taxation is actually excluded because of the mechanism of the fully refundable tax credit in the state of residence.

The second reason is that if the Savings Directive had intervened to eliminate double taxation for withholding taxes, it would have had to make a choice between exemption or tax credit methods. By following a policy of non-intervention, the directive preserved the choice of Member States on how to eliminate double taxation on cross-border interest payments.

3.5. Intra-EU transfer pricing issues

The European Commission[93] has identified the increasing importance of transfer pricing tax problems as an internal market issue. Double taxation in transfer pricing occurs when the tax administration of one Member State unilaterally adjusts the price set by a company in a cross-border intra-group transaction, without this adjustment being offset by a corresponding adjustment in the Member State concerned.

While there is evidence for aggressive transfer pricing by companies, there are equally genuine concerns for companies which are making a *bona fide* attempt to comply with the transfer pricing rules of different countries.

There is no doubt that the notion of double taxation in transfer pricing clearly refers to taxes on income.[94]

Where double taxation occurs between enterprises of different Member States as a result of an upward adjustment of profits of an enterprise of one Member State, the EU Arbitration Convention[95] establishes a procedure to resolve disputes. The Convention, which is integrated by a Code of Conduct,[96] provides for the elimination of double taxation by agreement between the contracting states including, if necessary, by reference to the opinion of an independent advisory body.

The Convention, however, leaves a number of issues unregulated and open for

92 The issue has been investigated by F. Vanistendael, General Report, in F. Vanistendael (ed.), *The EC Interest Saving Directive*, Book of the EATLP Annual Congress, Budapest, 1–3 June 2006 (EATLP, 2015), esp. p. 30 *et seq*.

93 COM 2001 (582), *op. cit*., no. 44 *et seq*.

94 According to art. 2, the Arbitration Convention applies to taxes on income and a list of existing income taxes in the Member States follows in art. 2.2. This list should not be deemed as restrictive as it states that the Convention should apply to "in particular the following".

95 Convention no. 90/436/EC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises. See P. Adonnino, "Some Thoughts on the EC Arbitration Convention", *European Taxation*, no. 11, 2003, p. 403; O. Rousselle, "The EC Arbitration Convention – An Overview of the Current Position", *European Taxation*, no. 1, 2005.

96 Revised Code of Conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, in OJ no. 322/1 of 30 December 2009.

interpretation under its procedures; and nor can the Code of Conduct resolve all the issues of uncertainty. This is the consequence of its non-legislative nature, which deprives it of any binding force. In the end, it serves mainly as a guide, but Member States may agree differently. For these reasons, the main advantage of the Convention (the elimination of double taxation within a time limit) is highly compromised.

Another problematic area is taxpayers' right to access domestic remedies, advanced price agreements (APAs) and OECD mutual agreement procedures (MAPs) during the MAP provided for by the Convention.

In conclusion, the Convention is not the end of the problem, but a good starting point in avoiding double taxation in transfer pricing. Of course, more consistent, uniform and far-reaching obligations could be imposed on a Member State by a directive that Member States, for fiscal sovereignty reasons, continue to refuse.

The result is that the Convention is neither interpreted in a binding way by any organ, that would bind Member States to a uniform interpretation, nor itself has an organ that could take action against any Member State abusing or not applying the Convention in the intended manner.

4. Counteracting double non-taxation inside and outside the EU

4.1. The "Monti package" as a starting point

Issues of double non-taxation were addressed in 1997 by the so-called "Monti package".[97] Before this time, EU law was mostly aimed at countering double taxation arising from intra-EU economic relations based on the fundamental principles of the internal market, according to the dominant ECJ case law.[98]

In the context of the Code of Conduct, the issue of hybrid mismatch arrangements within the EU has also been discussed, even though a mismatch between tax systems has not been considered a harmful tax practice of one country as such.[99] From a viewpoint of mutual trust and cooperation, all countries have an obligation neither to facilitate nor to encourage the use of mismatch arrangements. The global implementation of the technical solutions developed in the context of the G20/OECD BEPS has been highly recommended in the EU.[100]

Following the OECD recommendations, the Commission invited Member States to approve a Code of Conduct, and to commit themselves to respect principles of fair competition and to refrain from tax measures that cause harmful competition, including those implying double non-taxation inside the Union. In order

97 European Commission, A package to tackle harmful tax competition in the European Union, COM 97(564) of 5 November 1997. The package was approved by the Verona ECOFIN of 1 December 1997.

98 See in this regard Denys, *op. cit.*

99 European Commission, Report of the Expert Group on Taxation of Digital Economy, Brussels, 28 May 2014, p. 44.

100 *Ibid.*

to ensure its effectiveness, a "follow-up" review mechanism has been projected after two years of operation.[101]

Regarding its scope, the Code covers those business tax measures which affect, or which may affect in a significant way, the location of business activity in the Community. The notion of "business activity" in this respect includes all activities carried out within a group of companies. The Code also covers those special tax regimes for employees which have, or which may have, a significant effect on the location of business activity.[102]

4.2. Tax evasion, tax avoidance and abuse of (tax) law as a means to generate double non-taxation

Many directives include rules aimed at counteracting avoidance and abuse.[103] Within them can be found the principle that European directives cannot go beyond their objective. In this respect, ECJ case law has enforced a non-written general anti-abuse clause[104] having no legal base in most of the existing Member States' tax systems.[105] In so deciding, the Court has once more confirmed its preference for the economic interpretation of EU law.

However, it is well known that anti-abuse provisions are in general economically oriented, being shaped with the intent to counteract the substance of a taxable event irrespective of its legal form.[106]

More recently, the European Commission[107] encouraged Member States to include in DTCs concluded with other Member States or with third countries a clause to resolve a specifically identified type of double non-taxation. The Commission also recommended the adoption of a general anti-abuse rule (GAAR). In the Commission's view, this would help to ensure coherence and effectiveness in an area where Member State practice varies considerably.

The Commission presented its Action Plan for a more effective EU response to tax evasion and avoidance. The actions to be undertaken in the short term included a review of the EU Parent–Subsidiary Directive (2011/96/EU), the EU Interest and Royalties Directive (2003/49) and the EU Merger Directive (2009/133).

In fact, the Parent–Subsidiary Directive has been amended in order to prevent the double non-taxation of corporate groups deriving from hybrid loan arrangements.[108] The aim is to close a loophole that currently allows corporate groups to

[101] COM 97 (564), *op. cit.*, §9.

[102] Code of Conduct, §C.

[103] A deeper analysis has been made by Selicato, "The concept of tax in the directives", *op. cit.*, pp. 248–250.

[104] ECJ, judgment 22 February 2006, case C-255/02, *Halifax*; ECJ, judgment 12 September 2006, case C-196/04, *Cadbury Schweppes* (recently confirmed by ECJ, judgment 3 October 2013, case C-282-12, *Itelcar*).

[105] Italy introduced a general anti-avoidance (and abuse) clause by art. 1 of Legislative Decree no. 147 of 5 August 2015, after a long period of uncertainty dominated by a huge and contradictory case law of the Supreme Court.

[106] See Selicato, "The concept of tax in the directives", *op. cit.*, p. 227.

[107] European Commission, An Action Plan to strengthen the fight against tax fraud and tax evasion, COM 2012 (722) of 6 December 2012. See C. Putzolu, "Action plan and recommendations: The European Commission's strategy to tackle tax evasion and aggressive tax planning", *Int. Tax Law Rev.*, 2012, no. 2, p. 281.

avoid paying taxes on some types of profits distributed within the group, if profit distribution is treated as a tax-deductible payment in the country where the paying subsidiary is based.[109] Also a special GAAR has been included in the new version of the directive.[110]

The Commission, coming back to the issue in January 2016,[111] released a new anti-tax avoidance package that contains proposed measures to prevent aggressive tax planning, boost tax transparency and create a level playing field for all businesses in the EU. The package contains the following:

(a) amendments to the administrative cooperation directive to implement country-by-country (CbC) reporting;
(b) a draft anti-tax avoidance directive;
(c) recommendations to EU Member States on how to reinforce their tax treaties in an EU-law compliant manner;
(d) a communication on an external strategy for effective taxation that presents a stronger and more coherent EU approach to working with third countries on good tax governance matters.

The draft CbC and anti-tax avoidance directives reflect some of the actions in the OECD's BEPS project.

The outcomes of the BEPS project have had a substantial impact on EU legislation.[112] Nevertheless, OECD recommendations cannot automatically be transposed in the EU context. For this reason, the adoption of common rules by means of EU directives is highly recommended, because it increases legal certainty and reduces the risk of diverging interpretations among Member States, which themselves cause the problem of double non-taxation and abusive practices.

4.3. The role of administrative cooperation in the field of taxes

Transparency and exchange of information for tax matters is indeed a milestone in the fight against double non-taxation, since the taxpayer can only achieve this end if it uses jurisdictions where these tools are not in use.

Recent literature holds that a new era started in 2014, thanks to a new cooperation network spread all over the world, and not only in the EU.[113] The tools of this new legal environment (FATCA, BEPS and voluntary disclosure programmes) do

[108] Amending proposal COM (2013) 814 of 25 November 2013, approved by the Council on 8 July 2014 (Dir. 2014/86/EU).

[109] With specific reference to Belgian law, Jacques Malherbe, "Le régime mères-filiales en Belgique: la leçon d'anatomie", *Revue Pratique des Sociétés*, 2010, Hommage au Prof. François T'Kint, pp. 33–47, focuses on contradictions of the past regime.

[110] See F. Debeleva and J. Luts, "The General Anti-Abuse Rule of the Parent-Subsidiary Directive", *European Taxation*, June 2015, p. 223.

[111] European Commission, Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater tax transparency in the EU, COM(2016) 23 of 28 January 2016.

[112] E. Kokolia and E. Chatziioakeimidou, "BEPS impact on EU law: Hybrid payments and abusive tax behaviour", *European Taxation*, April 2015, p. 149.

[113] See J. Malherbe, C.P. Tello and M.A. Grau Ruiz, *La revolución fiscal de 2014* (Bogotà, 2015). A reduction in the negative impact of tax havens has been anticipated by P. Selicato, "Towards global standards in transparency and exchange of information: do tax havens still exist?", in G. Frotscher

not directly originate in EU legislation, but they can be considered as strongly connected to it.

Following this trend, on 9 December 2014, the Council adopted Directive 2014/107/EU amending provisions on the mandatory automatic exchange of information between tax administrations. The new directive extended the scope of that exchange to include interest, dividends and other types of income.

Administrative cooperation in tax matters will take another important step forward with the new directive proposal aimed at amending Directive 2011/16/EU by providing for the mandatory automatic exchange of information regarding advance cross-border rulings and APAs.[114] In the Commission's view, tax driven structures which lead to a low level of taxation of income in those Member States issuing the ruling may leave only low amounts of income to be taxed in the other Member States involved, thus eroding their tax bases. So exchanging information in this regard can prevent aggressive tax planning.

It is clear that the notion of tax has been significantly widened by the new measures adopted or to be adopted in a short time in the EU in the field of tax cooperation, their increased number and the wider scope of the tools put at the disposal of Member States with (often compulsory) cooperation in tax assessment being evident.

cont.

and P. Selicato (eds.), *Tax Havens in the Age of Global Standards: a Comparative Analysis between Germany and Italy*, Booklets on International Taxation (*Hefte zur Internationalen Besteuerung*), International Tax Institute (Interdisziplinäres Zentrum für Internationales Finanz und Steuerwese) – IIFS, University of Hamburg, September 2011, p. 5.

[114] European Commission, Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, COM (2015) of 18 March 2015. The Economic and Finance (ECOFIN) Council rejected the Commission's proposal on 6 October 2015, asking for some substantial amendments. Parliament's Economic and Monetary Affairs Committee voted its position, on 13 October 2015.

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