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The relation international taxation - international law: formal strains and jurisprudential effect

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Abstract

The paper aims at presenting the influence of the fiscal harmonization on the international law, showing the current changes in the methods of fiscal cooperation among states, with direct influence on location of activity and indirect influence on investment and saving conduct. The international taxation globally has reached a point where unilateral regulation is not efficient anymore and the need for cooperation is present, in regional partnerships and in cooperation mechanisms, likewise. Tax law is one of the most representative division of the national law, considering the autonomous ability of the governments and of the national legislative actors to adopt the legal framework for fiscal liability. The paper addresses the challenges in tax regulation, in the context of the consequential influence of the international law developments on the domestic fiscal rules, including direct taxation for cross-border income and taxation of dividens, both from regulatory and jurisprudential perspective. The regulation formal strains and the influence of the jurisprudential approach on tax planning are analysed, pointing out the need for integrated regulatory framework.

Keywords: tax, sovereignty, international law, tax case-law developments

Introduction

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, within the scope of the international law (Tofan, 2019). The topic is acute and the difficulty in finding the reasonable and efficient regulation is generated by the dimension of divergent interests (paying less taxes and obtaining higher revenues to the state budget). The fundamental rights of the taxpayer to choose the most appropriate jurisdiction collide with the general view of the governments to reinforce the

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administrative and cooperative procedure to collect more (Gordon, 1996). The volatility of the fiscal regulation is globally present in nowadays when the global pandemic crises has put further stress/pressure on the public budgets. The necessity to rebuild the trust in legitimacy of the public budgets, not only in the spending procedure but also in collecting the income, is connected to the fundamental principle of taxing all the revenues from the economic activity and the allocation of the revenues among the states competing for fiscal legitimacy (Tofan, 2020).

In this context, the present research is pointed to answer the question whether the fiscal sovereignty of the states is a value to preserve in the present time and if the recent cooperation development within the framework of the international law affects the international taxation (IMF, OECD, UN and World Bank, 2011). Also, the extent to which the jurisprudence of the international court boosts the harmonization of the fiscal regulation is observed, particularly in the area of direct taxation of cross border activities, with direct influence on direct influence on location of economic activity and indirect influence on investment and saving conduct for the taxpayers.

The paper investigates the actual challenges in international taxation (section 1), points out the interaction international taxation and fiscal sovereignty within EU law (section 2), and observes the jurisprudential effect on unifying direct taxation, with direct influence on organizing cross-border activity and indirect influence on investment and saving decision (section3). The final part of the article includes the conclusion of the research, formulating the answers to the research objectives.

1. Actual challenges in international taxation

The present international taxation is dominated by the Organisation for Economic Cooperation and Development (OECD) recent actions (OECD, 2021), and it is accompanied by the EU struggle to identify the efficient methods to fight tax avoidance (European Commission, 2016). In the actual economic context, strongly affected by digitalization, COVID pandemic, MNEs aggressive tax planning and unilateral regulatory initiatives developed by the states, the multilateral reaction to reinforce the fight against tax avoidance is most welcomed. While EU members are long and intensively debating on the proposal for CC(C)TB directive, the OECD "Unified Approach" seems to have a more precise timeline to have it adopted. In January 2019, a Policy Note on Addressing the Tax Challenges of the Digitalisation of the Economy was issued by OCDE, proposing to undertake work on the following two pillars:

- Pillar One, which addresses the allocation of taxing rights between jurisdictions and describes proposals for new profit allocation and nexus rules based on the concepts of "significant economic presence" and the exploitation of "user participation" and "marketing intangibles" in a jurisdiction.

- Pillar Two (also referred to as the "GloBE" proposal) which calls for the development of a coordinated set of rules to address ongoing risks from structures that allow MNEs to shift profit to jurisdictions where they are subject to no or very low taxation.

The OECD proposal in pillar one is not a completely new approach on the topic, keeping the current rules based on the arm's length principle (OECD, 2019). The novelty of the proposal is the formula-based approaches in new defined nexus situations, in response to the increasing taxation tensions (Tofan, 2019). From the substantive point of view, definitions for the main used concepts are stated, bringing certainty to the proposed regulation (definition of the MNE group, consumers facing activity, remote interaction element, etc.). To satisfy the generality and the simplicity of the proposal, the MNEs under the scope of the regulation include but it is not limited to the digital companies.

The proposal addresses large consumers-facing business; consideration of size limitations for the companies under the scope of the regulation, such as the proposed €750 million revenue threshold used for country-by-country reporting requirements, is arguable. This threshold raises important limitations and challenges for the developing and emerging economies that could benefit less from the provision of the proposed regulation (Longhorn *et al.*, 2016). It is probably useful to note that the same level of the turnover (not revenue) is considered for the companies under the EU CC(C)TB proposal. The European ambitious proposal to reduce it to limit/eliminate it in 7 years is another topic to consider (Begg *et al.,* 2010).

From the procedural point of view, some methodological previsions to determine the companies under the scope of the proposal might be welcome in the proposal:

- There are some limits when considering the revenues to measure the threshold of the proposal (e-payments for a remote operation, location of the revenue using the domestic tax previsions, etc.).
- Although the proposal admits that some industries would be carved out (e.g. extractive and other) this limits the certainty of the proposal.
- Some regulatory previsions should respond to the questions how the concepts of consumer products or consumer sales would deal with the supply of goods and services through intermediaries, the supply of component products and the use of franchise arrangements.

The nexus based on the physical presence is not sufficient in the current global economy context, there is not a mandatory need to differentiate the digital company from the other industry when trying to legitimate the fiscal treatment applicable to a certain corporation (Mas *et al.,* 2021). To keep the regulatory framework as simple as possible, although in the taxation field not many things are simple, it is important to define a new nexus concept that would apply to all the areas of activity. The new OECD nexus would include some previsions for physical presence and some previsions responding to the situations when such presence may not be identified

(positive approach, i.e. defining the companies within scope and negative approach, i.e. not eliminating the presence on the market criterion). In other words, the new nexus is not about a sort of physical presence of any kind, but it is in connection with the significance of the impact of the activity of some MNEs on a certain market jurisdiction. The physical presence, when it does occur, is a secondary criterion of analysis (Fuest *et al.,* 2019). The best scenario is that every country will benefit more from the new nexus applicability, but this is possible only if the regulation will bring out the non-taxed income, which is not the goal, nor the main effect of the proposal (Escribano, 2019).

It is useful to use the level of MNE's profits to determine new allocation of revenue because it includes the income and the loss of a certain activity. Still, there are differences when the profits are determined accordingly to domestic tax regulation (deduction regime, fiscal incentives etc.), and the allocation of a portion of the profit might result in tax treatment disputes, which brings the analysis to turnover. The question of how taxing rights on income generated from cross-border activities in the digital age requires further explanatory answers. For a simple, undisputable determination of the group under the scope of the proposal, the group profit is a complicated indicator for evaluating the MNE's activity and significance on the global market. The information provided in the financial statements are the most accessible, difficult to alter and relevant for such comparison, giving solid and relevant starting point for in-depth analysis on this topic: what would be a better indicator for determining the allocation of the revenue of the MNE's under the scope of the proposal (Popescu, 2020).

Activities in market jurisdictions, and in particular distribution functions, would remain taxable according to existing rules, i.e. transfer pricing under the arm's length principle and permanent establishment allocation. There is the possibility of using fixed remunerations reflecting an assumed baseline activity, to reduce/eliminate the tax disputes related to distribution functions. The appropriate and negotiated fixed returns could provide certainty to taxpayers and tax administrations and reduce the dissatisfaction with the current transfer pricing rules, in the benefit of the taxpayers and tax administrations; it would reduce the risk of double taxation as well as the substantial compliance costs arising from the aggressive enforcement of current transfer pricing rules. The proposal should include a clear definition of the activities that qualify for the fixed return under this new nexus regulation. Still, it is arguable, as drawing the exhaustive list of industry and/or regions is a Sisyphean assignment and deciding on the percent for each one of them seems even more ineffective (Poole, 2010).

The proposal clearly states that any dispute between the market jurisdiction and the taxpayer over elements of the proposal should be subject to legally binding and effective dispute prevention and resolution mechanisms. This includes cases where a jurisdiction seeks to tax an additional profit on those extra functions in accordance with the existing transfer pricing rules.

The unified approach would include its version of definitions for the concepts used, not only for the new ones (new nexus, three tiers mechanism, amount A, B, C, etc.) but also for the already common concepts for which it might be useful to have the specific definitions within the proposal text, when drawing the field of its applicability (profits, deemed profits, fixed returns, etc.) The way the proposed unified approach would address the double taxation issue might be considered prior to other double taxation arrangements for the participating countries, while responding to the demand of considering the losses under the new nexus tax treatment (Kim, 2020).

Under Pillar Two of the OCDE proposal (GloBE), the members agreed to explore, on a without prejudice basis, issues and design options in connection with the development of a coordinated set of rules (Ricardi, 2021). The four component parts of the GloBE proposal are:

a) the income inclusion rule, taxing the income of foreign branch or controlled entity if that income was subject to tax at an effective rate that is below a minimum rate;
b) the undertaxed payments rule that would operate by way of a denial of a deduction or imposition of source-based taxation (including withholding tax) for a payment to a related party, if that payment was not subject to tax or was taxed above a minimum rate;
c) the switch-over rule in tax treaties, permitting a residence jurisdiction to switch from exemption to credit method, where the profits attributable to a permanent establishment (PE) or derived from immovable property (which is not part of a PE) are subject to effective rate below the minimum rate;
d) the subject to tax rule complementing the undertaxed payment rule by subjecting a payment to withholding or other taxes at source and adjusting eligibility for treaty benefits on certain items of income where the payment is not subject to minimum rate tax.

Like Pillar One, the GloBE proposal under Pillar Two represents a substantial change to the international tax architecture, seeking to comprehensively address remaining BEPS challenges by ensuring that the profits of internationally operating businesses are subject to a minimum rate of tax (ERPA, 2019). This will reduce the incentive for taxpayers to engage in profit shifting and will establish a legitimate floor for tax competition among jurisdictions. The proposal will affect the behaviour of taxpayers and jurisdictions, aiming to stop harmful race to the bottom on corporate taxes, which risks shifting the burden of taxes onto less mobile bases and posing a particular risk for small economies. The GloBE proposal will operate as a top-up to an agreed fixed rate and the actual rate of tax to be applied will be discussed once other key design elements of the proposal are fully developed (Devereux, 2020).

There are technicalities, bureaucratic, and tax policy issues considered in the design of the rules for addressing temporary differences in the proposal. Unless further mechanisms are introduced to limit the tax credit, the carry-forward approach

would allow the taxpayer to shelter temporary and permanent differences in the determination of the tax base. Similarly, without some limitation mechanism, the multi-year average effective tax rate computation would also average the tax effects of permanent and temporary differences. Such limitations may, however, be complicated to apply and administer. Deferred tax accounting on the other hand is more targeted to addressing only temporary differences. All three approaches described above entail some degree of recordkeeping burden (Wilde, 2021). Further consideration would be given to whether (and to what extent) credits should be eligible to be carried forward when there is a change in ownership of the subsidiary.

Similarly, an averaging approach would require transition rules to deal with acquisitions and dispositions of subsidiaries and to address the particular year in which taxpayers first become subject to the minimum tax

2. Concept of fiscal sovereignty within EU law

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. Along with the citizenship, sovereignty has changed its basic meaning together with the development of the EU construction (Caporaso, 2000). 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. Sovereignty, the main characteristic of the state authority, is nowadays in direct connection with democracy and legitimacy of regulation process. The concept of sovereignty, once relatively uncontested, has recently become a major bone of contention within international law and international relations theory (Tofan, 2020).

From the fiscal point of view, the state rules tax system, establishes tax liabilities, collects taxes, applies sanction when fiscal discipline is not respected and pardons fiscal liabilities, using amnesty acts. It is assumed that fiscal sovereignty on significant portions of national taxation is due to 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 (Christians, 2009). The fiscal sovereignty is considered by some authors an important asset for the governments, denying its transfer to EU institutions, slowing down the fiscal integration process (Howarth and Schild, 2021).

In EU, the integrated internal market and the lack of profound income tax integration is surprising. Differential or sequential integration between market and tax order has built fiscal interdependence between Member States: formal

sovereignty for income 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 favourable tax jurisdiction. The interconnection between income tax regulation and the rule of democracy in the Member States has not been affected by fiscal sovereignty (Jaakkola, 2019).

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 (Smith, 1993). Therefore, the states adjust their tax systems according to the tendencies 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 use a competitive regulatory process, which is alleged to have turned Keynesian welfare regimes into competition states.

The asymmetric European integration that has advanced trans-nationalization of cross-border market order but preserved income taxation under national political authority has established fiscal interdependence between Member States of the EU and exposed them to transnational regulatory effects (Genschel and Jachtenfuchs, 2018).

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 (Garben, 2015). 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. It is the precise case of the competence to rule fiscal system, which is yet one of the Member States exclusive prerogatives.

The Treaty on the Functioning of the European Union (TFEU) defines the internal market as the 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, especially for income taxes. With 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 unanimously. Given the requirement of unanimity, income tax remains essentially an autonomous

prerogative for Member State (CFE, 2020). The principle of unanimity 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. However, European legislation requires only a certain (but not complete) degree of harmonization of indirect taxes, in particular value added tax (Hoeller *et al.,* 1996).

It is not easy to respect the rules of unique European market and still respect the sovereignty in taxation, especially because of the market freedom and the need of the legal person to expand their business in the most profitable field. This generates the need to align the regulation for all the company's activity, including the fiscal aspects. The approximation of the corporate tax is needed to facilitate the proper functioning of the internal market, yet the legislation is mainly domestic or adopted unanimously, which is a difficult rule to comply to, in the EU 27. On one hand, it is 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, 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. 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 sovereignty (Tofan, 2020).

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. Although this prevision has led some to call for further tax integration beyond the national state, others have remained sceptical about the democratic legitimacy of Europeanized taxation (Schmidt, 2004). To respect the principle of unanimity, any tax specifically targeting a cross-border transaction could be seen as unlawful restriction; this broad understanding of the sphere of potential obstructive regulation on the internal market would indirectly suggest that the full harmonization of 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. Notable developments did not take place so far, although there is full support for unrestricted regulation of free movement on the European market, both in terms of entry and exit transactions (Scheppele *et al.,* 2020).

There are situations when exercising sovereign right in ruling taxation, the state may impose a legitimate restriction, like in group taxation, when tax regimes are in the same country as the parent company, excluding foreign group companies from the tax group (Tofan, 2021). 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%.

Few states use full consolidation of intra-group profits and losses in line with the terms of active financial accounting. Most states tax regulation for groups consider 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.

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 admit the possibility to act using the ordinary legislative procedure, only a qualified majority in the Council would be needed to adopt tax legislation (Peers, 2010). 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). 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 (Wanzenböck and Frenken, 2020).

3. Jurisprudential approach: how does the case law interact with the law in force

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 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. 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 (Shecaira, 2014). The European continental systems of law underwent through notable changes, accepting because of accessing the European integration project the guiding role of the former European Court of Justice (ECJ), today Court of Justice of the European 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. 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. The fiscal case law 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 (Helfer and Slaughter, 1997).

This phenomenon includes international tax law, both at the domestic level and treaty law. No tax expert in Europe may ignore the CJEU case-law in 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.

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

(1) Are the national tax practices discriminatory or not? In this case, the investigation targets the discrimination against cross-border activities compared to domestic ones (Tudor, 2015);
(2) Do the rules of the 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 (Dahlberg *et al.,* 2020).

As analysed 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 many jurisdictions to benefit of the complex corporate structures for the opportunities to exploit tax planning, which are not available for small businesses or individuals. Analysis of the literature has shown that it is often necessary and justified that the CJEU intervene in the fiscal conflicts, when the national court ask for it or they have failed in interpreting the EU law, considering the same fundamental values and ideas already expressed for other legal matters, stating the validity of specific transaction according to subjective elements (Pollicino, 2010).

There are two situations when the CJEU is allowed to take actions about 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 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 (Scheppele *et al.*, 2020).

CJEU 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, regarding indirect taxation, the Court 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 (Judgment from 20.2.1979, C-120/78 Cassis de Dijon[1]). It was not until the European judges decided the Schumacker case (Judgement from 14.2.1975, Case C-279/93 Schumacker[2]) 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 (Case C-307/97[3]) 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.

The rulings of CJEU in tax matters consider the proper applicability of the EU law general principles of subsidiarity and proportionality, simultaneously referring to 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 together with the limit of the principles of non-discrimination and non-restriction, reflect the possibility or the risk of international tax evasion (or tax avoidance). 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 behaviour (tax planning) (Musselli and Bonanomi, 2020). 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

[1] C-120/78, Cassis de Dijon (retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0120).

[2] C-279/93 Schumacker (retreived from from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0279).

[3] Case C-307/97, Saint-Gobain (retreived from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61997CJ0307_SUM&from=SV).

acknowledge some value-added in a statutory general anti-avoidance rule (Waerzeggers and Hillier, 2016).

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, 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 favour of protectionist and self-oriented goals of the Member States (Blockmans and Russack, 2020).

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 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, to reduce their tax liability (Case C-255/02 Halifax[4]). The illegal conduct exists when the tax planning is abusive, particularly when two conditions are met:

- 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;
- It must be clear from several objective factors that the essential purpose of transactions is to obtain a tax advantage. There is no abuse if the economic activity carried out can have another explanation, besides the simple realization of the fiscal advantage.

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, yet there is one cloud of ambiguity: the distinction between the sole purpose and the essential purpose.

Cadbury Schweppes ruling (C-196/04, regarding Cadbury Schweppes and Cadbury Schweppes Overseas[5]), answered three main questions:

1. CJEU expressly stated that the purpose of benefiting from more favourable legislation in another Member State does not in itself constitute an abuse of the freedom of establishment;
2. European court firmly holds that the advantage resulting from the establishment of a subsidiary in a low tax jurisdiction, other than the one of the parent

[4] C-255/02, Halifax and Others (retreived from https://curia.europa.eu/juris/liste.jsf?language=en&num=C-255/02).

[5] C-196/04, Cadbury Schweppes and Cadbury Schweppes Overseas (retreived from https://curia.europa.eu/juris/liste.jsf?language=en&num=C-196/04).

companies, cannot by itself authorize that Member State to offset that advantage by less favourable tax treatment of the parent company;

3. CJEU stated that, 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.

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. 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. 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 presents differences only with regards to the viewpoint of the two caselaw, not in substance.

Recently, the CJEU jurisprudence constantly gives prevalence to the national judge competence of ruling the legitimate solution, clarifying the interpretation of EU law for each national case law. Advocate General (AG) Kokott of the CJEU published her opinion concerning dividends paid by Portuguese companies to foreign undertakings for collective investment in transferable securities (UCITS), (case C 545/19[6]). The case is during the procedure and it concerns a tax-exempt UCITS established in Germany, which received capital income in the form of dividends from investments in Portuguese entities. Dividends distributed by Portuguese entities to a UCITS set up under Portuguese law are exempt from corporate income tax (CIT) and are taxed at the level of the investors in the UCITS at the time of the distribution. However, since 2015, domestic UCITS are subject to a quarterly 'stamp duty' of 0.0125 percent, that is levied on the total net asset value of the UCITS (including, inter alia, unpaid dividends). On the other hand, foreign UCITS – to the extent that they are subject in their country of residence to a CIT rate lower than 60 percent of that applied in Portugal, are subject to a final withholding tax of 25 percent (that can be reduced under the double tax treaty in force).

Kokott has examined the question from the perspective of the free movement of capital and noted that a restriction could exist if the application of the stamp duty would entail, in the present case, a significantly more favourable tax treatment of

[6] Case C-545/19, Opinion of Advocate General Kokott (retreived from https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62019CC0545&rid=1).

resident UCITS (compared to the tax treatment of non-residents UCITS). Nonetheless, it is up to the referring court to assess whether such a discrimination exists, and the AG recalled that a difference in treatment does not constitute a restriction on the free movement of capital if it concerns situations that are not objectively comparable. Non-resident UCITS are not in a comparable situation to resident UCITS because Portugal does not have the authority to tax foreign entities in the same way as it taxes Portuguese UCITS (i.e. to apply the stamp duty on the global net asset value of the foreign UCITS). The AG observed that, if the CJEU would proceed on the assumption that the domestic and foreign UCITS are in a comparable situation, the difference in treatment would be justified by the need to preserve the balanced allocation of the power to impose taxes between the Member State, avoiding 'double non-taxation' in the context of efficient tax collection and safeguarding the coherence of the Portuguese tax system. Therefore, the AG concluded that the Portuguese tax regime is not discriminatory under EU law.

Conclusions

Considering the status of implementation of OECD guidelines, our research assesses the influence of international regulation on the fiscal cooperation among states, pointing out the transformation in the international law concept globally, and in the European law. As the analysis presented in this paper points out, the relevance of the proposal is in tight connection with the global international tax context, which demands for reinforcing multilateral agreements on mechanism to fight tax avoidance. The adoption of this legal framework would have direct influence on location of activity and indirect influence on investment and saving conduct for taxpayer. Addressing the digital companies is a goal and not a regulatory topic, and the more general the legal framework would be, the easier the international multilateral agreements develop.

The fast-changing features of the trade, including digitalization, support the wide consensus of the governments/international institutions for the immediate adoption of new regulation in the international taxation framework and leave further details to be addressed. New profit allocation rules are required because it is impossible to use the existing rules to allocate profit in cases where no functions are performed, no assets are used, and no risks are assumed in the market jurisdictions. The OECD proposal for unified approach keeps the current transfer pricing rules based on the arm's length principle, adding the formula-based solutions in areas where the "traditional" approach does not work properly and the tensions in the current system are significant. Although the proposal does not use the concept consolidation (not even in the brackets, like the European CC(C)TB initiative), the operation of determining the companies within the scope of the regulation demands that some form of consolidation is considered.

As OCDE negotiations are ongoing, the fiscal cases raised within the EU Member States and taxpayers are facing the effect of harmonization created by the general addressability of the CJEU ruling. The CJEU caselaw showed 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.

The conclusion is that CJEU used in its decisions the argument of the economic reality of the transaction to infirm tax avoidance, another path to influence taxpayers' saving conduct.

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