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Tax Treaties versus EU Law: Which Should Prevail?

This article discusses the interplay between tax treaties and EU law. In particular, the author attempts to identify a hierarchy between the two sources of law where conflicts arise between them.

1. Introduction

1.1. Introductory remarks

EU Member States have concluded tax treaties to eliminate double taxation with both third countries and other EU Member States. The result of the interaction between such tax treaties and EU law depends on the counterparty to the tax treaty (third country or EU Member State), as well as the timing of the conclusion of the treaty. In this article, the author attempts to identify, given the elements currently known, a hierarchy between the two different systems – tax treaties and EU tax law – where conflicts arise between them.

A particular scenario is highlighted in the following article, the compatibility of the new controlled foreign company (CFC) regime introduced by the EU Anti-Tax Avoidance Directive (2016/1164) (ATAD 1)[1] applicable to permanent establishments (PEs), with existing tax treaties, including an exemption method mirroring article 23A of the OECD Model (2017)[2] as a method of double tax relief. The tax treaties that might be impacted include those with other Member States and third countries.

As such a situation could be quite common in countries adopting the exemption method in their tax treaties, the author outlines the interpretation of one of the Member States, Luxembourg, on this specific matter.

In order to guide the reader in determining a hierarchy between the sources of law, the article identifies possible scenarios arising from the interaction between tax treaties and EU law, including reasoning to support the identified outcome.

1.2. Example of a conflict

Article 23A of the OECD Model (2017) provides for the exemption method to eliminate double taxation.

Assume, for example, a Company X, resident in State R, operating through a PE in State S, and a tax treaty in place between R-S mirroring the OECD Model and including an article to eliminate double taxation in line with article 23A. According to the tax treaty, State R should not be allowed to tax the income attributable to the PE when such income "may be" taxed in State S, since it would be obliged to grant an exemption. Upon the application of the CFC regime under ATAD 1, due to a low level of taxation in State S, State R would claim the possibility to tax the income attributable to the PE, disregarding the exemption granted under the R-S tax treaty. Denying access to treaty relief in State R under the CFC rule clearly creates a conflict.

1.3. Conflict rule

In principle, any conflict arising between EU law and international law should be resolved by applying one of the existing conflict rules,[3] such as the one contained in article 351 of the Treaty of the Functioning of the European Union (2007) (TFEU).[4] The first paragraph of that article embeds a grandfathering clause, protecting tax treaties concluded by EU Member States with third countries either before 1958 or before accession of the country to the European Union. The second paragraph, however, mitigates the impact of the first paragraph by requiring Member States to "take all appropriate steps to eliminate the incompatibilities established", and to "assist each other to this end and […], where appropriate, adopt a common attitude".

2. Tax Treaties with Other EU Member States

According to the wording of article 351(1) of the TFEU, the "protection" granted under this paragraph is not extended to tax treaties concluded between EU Member States. In order to confirm such an interpretation, various situations will be analysed, looking at a combination of factors, as follows: (i) the date of conclusion of the tax treaty (i.e. before accession to the European Union, after accession to the European Union but before the adoption of secondary law and after accession to the European Union and the

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1. Council Directive 2016/1164 of 12 July 2016 Laying down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, OJ L 193/1 (2016), Primary Sources IBFD [hereinafter ATAD 1].
2. *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Treaties & Models IBFD.
3. K. von Papp, *Solving Conflicts with International Investment Treaty Law from an EU Law Perspective: Article 351 TFEU Revisited*, 42 Legal Issues of Econ. Integration 4, introduction (2015).
4. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), Primary Sources IBFD [hereinafter TFEU].

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adoption of secondary law) and (ii) the interaction with different sources of EU tax law (i.e. primary law[5] or secondary law).[6] The table below clarifies the different possible scenarios that might arise. Only one outcome can be identified when tax treaties are concluded with other EU Member State: EU law always prevails. For the sake of clarity, however, the table outlines the possible scenarios, helping the reader through the analysis that leads to such an outcome.

Table 1 – Tax treaties concluded with other EU Member States

Member State/ Member State	Before EU accession (1)	After EU accession but before adoption of secondary law (2)	After the adoption of secondary law (3)
Primary law (a)	EU law	EU law	EU law
Secondary law (b)	EU law	EU law	EU law

The analysis begins with the easiest of the scenarios, the outcome of which can readily be determined and concludes with one that requires an interpretation of the current legal framework.

The provision of a tax treaty would not prevail in the event that the treaty was concluded after the adoption of secondary law in relation to the same secondary EU law and to primary EU law (situation (3)(a) and (3)(b)), or after the accession of a Member State to the European Union, but before the adoption of secondary law in respect of primary law (situation (2)(a)), as the EU Member States are bound by the primacy of EU law. The decisions of the Court of Justice of the European Union (ECJ) have long provided for the primacy of both primary and secondary EU law,[7] which bind EU Member States when exercising their sovereignty.[8] As a direct consequence, EU law has the ability to override domestic laws of every rank (including constitutional laws). Therefore, EU Member States must comply with EU law in enacting legislation and concluding tax treaties. This obligation also extends to the interpretation of the provisions of existing tax treaties.[9]

Domestic provisions are not rendered void due to the primacy principle; they cannot, however, be applied in the event of an inconsistency with the higher ranking EU law (*lex superior derogate legi inferiori*).[10]

If this were not the case, EU Member States could simply renegotiate tax treaties to circumvent the provisions of EU law, undermining, in this way, EU law primacy.

The Vienna Convention on the Law of Treaties (VCLT) (1969)[11] becomes relevant where tax treaties were concluded before accession to the European Union (in respect of primary and secondary EU law) (situation (1)(a) and (1)(b)) or after accession to the European Union but before secondary EU law is adopted in relation to the same secondary EU law (situation (2)(b)). In particular, article 30, which establishes the principle of *lex posterior*, can assist in interpreting which source of law should prevail.

Looking specifically at a conflict arising in relation to secondary EU law (situation (1)(b) and (2)(b)), article 30(3) of

5. P.J. Wattel, O. Marres & H. Vermeulen, *European Tax Law* para. 2.2.1. (Kluwer International 2019): the primary sources of EU law include the founding treaties, i.e. the TFEU and the Treaty on European Union of 13 December 2007, OJ C 306 (2007), Primary Sources IBFD [hereinafter TEU], in their amended form, the Charter of Fundamental Rights of the European Union, together with the fundamental principles developed by the Court of Justice of the European Union (ECJ) and international agreements concluded by the European Union.
6. *See* Wattel, Marres and Vermeulen, *supra* n. 5, at para. 2.2.1: acts adopted by the European Union, derived and based on primary law. Article 288 of the TFEU includes regulations, directives, recommendations and opinions.
7. IT: ECJ, 15 July 1964, Case 6/64, *Flaminio Costa v. E.N.E.L.*, Case Law IBFD, para. entitled "On the submission that the court was obliged to apply the national law".
8. FR: ECJ, 28 Jan. 1986, Case 270/83, *European Commission v. French Republic (Avoir Fiscal)*, para. 24, Case Law IBFD; DE: ECJ, 14 Feb. 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker*, para. 21, Case Law IBFD; NL: ECJ, 11 Aug. 1995, Case C-80/94, *G.H.E.J. Wielockx v. Inspecteur der Directe Belastingen*, para. 16, Case Law IBFD; NL: ECJ, 27 June 1996, Case C-107/94, *P.H. Asscher v. Staatssecretaris van Financiën*, para. 36, Case Law IBFD; LU: ECJ, 15 May 1997, Case C-250/95, *Futura Participations SA and Singer v. Administration des contributions*, para. 19, Case Law IBFD; SE: ECJ, 28 Apr. 1998, Case C-118/96, *Jessica Safir v. Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län*, para. 21, Case Law IBFD; UK: ECJ, 16 July 1998, Case C-264/96, *Imperial Chemical Industries plc (ICI) v. Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)*, para. 19, Case Law IBFD; GR: ECJ, 29 Apr. 1999, Case C-311/97, *Royal Bank of Scotland*, para. 19, Case Law IBFD; DE: ECJ, 14 Sept. 1999, Case C-391/97, *Frans Gschwind v. Finanzamt Aachen-Außenstadt*, para. 20, Case Law IBFD; DE: ECJ, 26 Oct. 1999, Case C-294/97, *Eurowings Luftverkehrs AG v. Finanzamt Dortmund-Unna*, para. 32, Case Law IBFD; DK: ECJ, 28 Oct. 1999, Case C-55/98, *Skatteministeriet v. Bent Vestergaard*, para. 15, Case Law IBFD; NL: ECJ, 13 Apr. 2000, Case C-251/98, *C. Baars v. Inspecteur der Belastingdienst Particulieren/Ondernemingen Gorinchem*, para. 17, Case Law IBFD; NL: ECJ, 6 June 2000, Case C-35/98, *Staatssecretaris van Financiën v. B.G.M. Verkooijen*, para. 32, Case Law IBFD; BE: ECJ, 4 Dec. 2000, Case C-141/99, *Algemene Maatschappij voor Investering en Dienstverleniing NV (AMID) v. Belgische Staat*, para. 19, Case Law IBFD; UK: ECJ, 8 Mar. 2001, Joined Cases C-397/98 and C-410/98, *Metallgesellschaft Ltd and Others, Hoechst AG and Hoechst (UK) Ltd v. Commissioners of Inland Revenue and HM Attorney General*, para. 37, Case Law IBFD; SE: ECJ, 21 Nov. 2002, Case C-436/00, *X & Y v. Riksskatteverket*, para. 32, Case Law IBFD; DE: ECJ, 12 Dec. 2002, Case C-324/00, *Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt*, para. 26, Case Law IBFD; NL: ECJ, 12 Dec. 2002, Case C-385/00, *F. W. L. de Groot v. Staatssecretaris van Financiën*, para. 75, Case Law IBFD; SE: ECJ, 26 June 2003, Case C-422/01, *Försäkringsaktiebolaget Skandia (publ) v. Riksskatteverket*, para. 25, Case Law IBFD; FI: ECJ, 13 Nov. 2003, Case C-42/02, *Diana Elisabeth Lindman v. Skatterättelsenämde*, para. 18, Case Law IBFD; FR: 4 Mar. 2004, Case C-334/02, *Commission of the European Communities v. France*, para. 21; FR: ECJ, 1 Mar. 2004, Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, para. 44, Case Law IBFD; FI: ECJ, 9 Nov. 2006, Case C-520/04, *Pirkko Marjatta Turpeinen*, para. 11, Case Law IBFD; DE: ECJ, 12 July 2005, Case C-403/03, *Egon Schempp v. Finanzamt München V*, para. 19, Case Law IBFD; FI: ECJ, 7 Sept. 2004, Case C-319/02, *Petri Manninen*, para. 19, Case Law IBFD; FI: ECJ, 18 July 2007, Case C-231/05, *Oy AA*, para. 16, Case Law IBFD; UK: ECJ, 13 Dec. 2005, Case C-446/03, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes)*, para. 29, Case Law IBFD; UK: ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, para. 49, Case Law IBFD and UK: ECJ, 12 Dec. 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue*, para. 36, Case Law IBFD.
9. M. Helminen, *EU Tax Law as Part of the Legal System*, in *EU Tax Law – Direct Taxation* sec. 1.2.3. (IBFD 2019), Books IBFD.
10. Y. Brauner & G.W. Kofler, *The Interaction of Tax Treaties with International Economic Laws*, sec. 2.1.1., Global Tax Treaty Commentaries IBFD.
11. *Vienna Convention on the Law of Treaties*, art. 30 (23 May 1969), Treaties & Models IBFD [hereinafter VCLT].

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the VCLT could be applicable, based on the assumption that the conflict arising between secondary law and a tax treaty is comparable to a conflict arising between two treaties. Such an assumption is based on the fact that secondary law is considered "inextricably linked"[12] to the TFEU under article 288.

According to article 30(3) of the VCLT, if all of the parties to the earlier treaty are also parties to the new treaty, the earlier treaty provisions shall apply only when they do not conflict with the provisions of the new one. Therefore, following this provision, and in light of the assumption made, considering that the parties to the previous tax treaty, as EU Member States, are also two of the parties who agreed to secondary law,[13] secondary law would prevail over the tax treaty in the event of a conflict.[14]

Turning to a conflict with primary EU law (situation (1)(a)), it would make even more sense to apply article 30(3), as no further assumption is needed since there would already be a conflict between two treaties, the tax treaty and the TFEU/TEU. The primacy of EU law over tax treaties between EU Member States has also been confirmed in a number of ECJ decisions.[15] As a result, EU Member States must comply with EU law even if this results in an outcome that conflicts with treaty obligations.[16]

An opposite conclusion could, however, be drawn from the original draft of article 351 of the TFEU, which stated that, "[t]he rights and obligations of the Member States stemming from their participation in international economic organizations are not affected by the provisions of this Treaty".[17] According to this text, it seems that the parties contemplated that the rights and obligations of the EU Member States under existing international treaties would prevail, thereby extending the protection of the article to treaties between EU Member States.[18] Considering the final version of article 351(1) of the TFEU, however, together with the above analysis, the author agrees with De Groot (2019) that EU law should always prevail over tax treaties, even when adopted at a later stage.

12. O.C.R. Marres, *Chapter Sixteen: CCCTB and Tax Treaties*, in *The KPMG Guide to CCCTB* para. 3.2. (KPMG International Cooperative 2012).
13. Assuming a directive is at issue, in order to be approved, a unanimous decision of the EU Member States is required.
14. *See also* DE: ECJ, 14 Feb. 1984, Case 278/82, *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Herbert Kureit v. Hauptzollämter Flensburg, Itzehoe and Lübeck-West*, para. 29, Case Law IBFD.
15. BE: ECJ, 27 Sept. 1988, Case 235/87, *Annunziata Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*, para 22; IT: ECJ, 27 Feb. 1962, Case 10/61, *Commission of the European Economic Community v. Italian Republic*, para. 2; NL: ECJ, 7 June 1973, Case 82/72, *C. J. Walder v. Bestuur der Sociale Verzekeringsbank*, paras. 7-8. The conclusion that EU law has priority could also be interpreted consistently with an *a contrario* reading of art. 30(2) VCLT; FR: ECJ, 10 Nov. 1992, Case 3/91, *Exportur SA and LOR SA and Confiserie du Tech*, para. 8; FR: ECJ, 20 May 2003, Case 469/00, *Ravil SARL v. Bellon import SARL and Biraghi SpA*, para. 37; AT: ECJ, 8 Sept. 2009, Case 478/07, *Budějovický Budvar, národní podnik v. Rudolf Ammersin GmbH*, para. 98.
16. I.M. De Groot, *Implementation of the Controlled Foreign Company Rules in the Netherlands*, 47 Intertax 8 & 9, p. 782 (2019).
17. Von Papp, *supra* n. 3, unofficial translation of the *Travaux Préparatoires du Traité instituant la Communauté Economique Européenne*, at p. 12.
18. Von Papp, *supra* n. 3, at p. 13.

3. Tax Treaties with Third Countries

3.1. Introductory remarks

Compliance with the principle of primacy of EU law in respect of tax treaties concluded with third countries might be more complicated for EU Member States considering that rights and obligations cannot be imposed on a third state without its consent (*pacta tertiis*).[19] Table 2 clarifies the possible scenarios and outcomes that might arise, and is based on the same variables examined in section 2.

Table 2 – Tax treaties concluded between EU Member States and third countries

EU Member State/ 3rd country	Before accession to EU (1)	After accession to EU but before adoption of secondary law (2)	After the adoption of secondary law (3)
Primary law (a)	Tax treaty	EU law	EU law
Secondary law (b)	Tax treaty	Tax treaty	EU law

As highlighted in the table, one particular scenario could be considered as an unresolved "grey area" due to the possibility for EU Member States to continue to apply the provisions of tax treaties when concluded after EU accession, but before secondary EU law is adopted in relation to the same secondary EU law. In fact, article 351(1) of the TFEU refers explicitly to treaties in place before accession to the European Union,[20] without specifying anything about secondary law later adopted. Such a specific scenario is of particular relevance in the assessment of the compatibility of the CFC regime under the EU Anti-Tax Avoidance Directive (2016/1164), with tax treaties, since most tax treaties in force between EU Member States and third countries were concluded before the adoption of ATAD 1, and in particular with regard to the example proposed in section 1.2.

3.2. Tax treaties concluded before EU accession (1)

According to the wording of article 351(1) of the TFEU, conflicts arising between primary EU law and tax treaties signed before EU accession should be resolved in favour of the tax treaty (situation (1)(a)). Such a conclusion does not deprive article 351(2) of its effect (*see* the analysis in section 3.4.1.3.).

Since, under article 351(1) of the TFEU, tax treaties prevail over primary EU law, it is *a fortiori* reasonable to conclude that tax treaties would also prevail in the event of a conflict with subsequently enacted secondary EU law[21] (situation (1)(b)), as well as the commitment of EU Member States under article 351(2) of the TFEU.[22]

19. Art. 34 VCLT.
20. P. Arginelli, *The ATAD and Third Countries*, in *The External Tax Strategy of the EU in a Post-BEPS Environment* para. 8.3.1. (A.J. Martín Jiménez ed., IBFD 2019), Books IBFD.
21. Marres, *supra* n. 12.
22. Arginelli, *supra* n. 20, at para. 8.3.1.

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3.3. Tax treaties concluded after the enactment of secondary EU law (3)

The same conclusion discussed in section 2., for a parallel scenario, can also be extended to tax treaties signed with third countries in circumstances involving a conflict between tax treaties signed after EU accession and primary law (situation (2)(a)), and between tax treaties signed after the adoption of secondary law with the secondary law itself (situation (3)(b)) and with primary law (situation (3)(a)). Also, in such scenarios, in fact, the result in favour of EU law stems from the principle of primacy of EU law.

3.4. Tax treaties concluded after EU accession but before the enactment of secondary EU law (2)

As already mentioned in section 3.1., the wording of article 351(1) of the TFEU does not expressly cover this specific scenario and therefore tax treaties do not automatically prevail. Arguments in favour of and against the priority of tax treaties over secondary EU law are discussed in the following subsections.

3.4.1. Arguments against the priority of tax treaties over EU secondary law

3.4.1.1. Shared competences with pre-emption

The conferral of shared competences with pre-emption[23] on the European Union by EU Member States, prohibits the Member States from adopting measures in the field of power conferred. Under a strict interpretation, this restriction is to be respected even in the absence of actual exercise of the competence by the European Union,[24] as any failure to do so could otherwise hinder the effectiveness of future secondary law. In other words, once a competence has been conferred by the EU Member States on the European Union, they surrender their sovereignty in respect of adopting provisions in that area.[25] Based on this interpretation, the conferral of power on the European Union (creation of the internal market) precludes EU Member States under article 46 of the VCLT from concluding a tax treaty with a third country, as this would be considered a violation of the Member State's competence. As a consequence, such a violation would invalidate the consent given by the EU Member States at an international level, thus resolving "the conflict between the international obligations of that Member State under the treaty and its obligation under EU law".[26] Such a result would legitimize treaty override, preventing the guarantee of any kind of protection of the rights and economic interests of third countries,[27] and is therefore not desirable.

3.4.1.2. Article 351(1) of the TFEU: Lex specialis

Considering article 351(1) of the TFEU as *lex specialis* would narrow its application based on a literal interpretation. In fact, a broader scope would (i) derogate from the general principle of EU law that binds the EU Member States even in the presence of a conflicting domestic or international provision and (ii) endanger the conferral of power on which EU law is based in both areas of exclusive and shared competence.[28] Accordingly, a broader interpretation of the article, which would extend its protection to tax treaties concluded before secondary law was adopted in that area, should not be accepted.[29]

3.4.1.3. Article 351(2): Commitment to eliminating incompatibilities

Even where a conflict is resolved in favour of tax treaties, article 351(2) of the TFEU requires that the EU Member State "take all appropriate steps to eliminate the incompatibilities".[30] From the wording of this paragraph, it could be inferred that article 351(1) of the TFEU only grants temporary protection to existing tax treaties, implying an EU principle to eliminate any incompatibilities arising from such treaties.[31] Therefore, it could be argued that article 351(2) attempts to carry over the EU primacy principle to arrangements that EU Member States have with third countries. This highlights a discrepancy between the two paragraphs that may lead to the conclusion that article 351(1) is "a 'fixed-term competency' of the EU Member States in the sense of an interim power to derogate from EU law"; the duration of such an interim period, together with the consequences for EU Member States that fail to comply with article 351(2) of the TFEU, is undetermined.[32] Thus, it could be possible to conclude that, since the protection granted by article 351(1) of the TFEU is only temporary, there is consequently a duty on EU Member States to amend their obligations arising from existing tax treaties so as to be compatible with those arising under EU law.[33] Arguably, this requirement actually stems from a general principle of sincere cooperation,[34] which article 351(2) merely reflects and explains.[35]

3.4.1.4. "Rights and obligations" under article 351(1) of the TFEU

The ECJ, in a non-tax case regarding gender equality, stated the following with regard to the interpretation of

23. According to Helminen, *supra* n. 9, the competences conferred by the EU Member States on the European Union can be classified as (i) exclusive competences, (ii) shared competences with pre-emption and (iii) shared competences without pre-emption.
24. For example, FR: ECJ, 8 Dec. 1981, Case 181/80, *Procureur général près la Cour d'Appel de Pau and others v. José Arbelaiz-Emazabel*, paras. 27-30.
25. Arginelli, *supra* n. 20.
26. Id.
27. C. De Pietro, *Tax Treaty Override and the Need for Coordination between Legal Systems: Safeguarding the Effectiveness of International Law*, 7 World Tax J., p. 94 (2015), Journal Articles & Papers IBFD.
28. Arginelli, *supra* n. 20.
29. For further analysis, *see* L. Pantaleo, *Member States Prior Agreements and Newly EU Attributed Competence: What Lesson from Foreign Investment*, 19 European Foreign Affairs Rev. paras. 4-5 (2014).
30. The appropriate steps could range from interpretation of the treaty in line with EU law, to renegotiation to the point of denouncing the treaty: AT: ECJ, 18 Nov. 2003, Case 216/01, *Bud jovický Budvar, národní podnik And Rudolf Ammersin GmbH*, para. 170.
31. Von Papp, *supra* n. 3, at para. 1.D.
32. Id.
33. Id.
34. Art. 4 TEU.
35. Arginelli, *supra* n. 20; Von Papp, *supra* n. 3, at para. 1.D.

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the phrase "rights and obligations" in article 351(1) of the TFEU (previously article 234 of the EEC Treaty (1957)):[36,37]

> the purpose of the first paragraph of Article 234 of the Treaty is to make clear, in accordance with the principles of International Law, the application of the Treaty does not affect the commitment of the Member State concerned to respect the rights of non–member countries under an earlier agreement and to comply with its corresponding obligations. It follows that, in that provision, the terms 'rights and obligations' refer, as regards 'rights', to the rights of non-member countries and, as regards 'obligations', to the obligations of Member States.

Therefore, it is arguable that this article safeguards tax treaties with third countries when it is in the interests of third parties, and not when this results in a failure of Member States to apply EU law.[38]

3.4.2. Arguments in favour of the priority of tax treaties over EU secondary law

3.4.2.1. Shared competences with pre-emption

Where a legislative power in a specific field is conferred on the European Union, the EU Member States should be prohibited from acting only where the case involves a conferral of exclusive competence.[39] Pre-emption would not, therefore, be considered in cases of shared competence and in situations in which the European Union has not actually exercised its legislative power, leaving, in this case, the competence to the EU Member States.[40] According to article 4(2)(a) of the TFEU, competence in the field of direct taxation should fall under the category of shared competence between the EU Member States and the European Union in respect of the creation of the internal market. According to article 115 of the TFEU, the Council can issue directives, regulations and administrative provisions to directly affect the realization of the internal market. The Council, however, has not made extensive use of this power, leading to the possible conclusion that the Member States should not be hamstrung by the mere possibility that the Council will draft legislation in a particular area of its potential competence.[41]

Therefore, a tax treaty concluded before a secondary law is adopted should not be considered as being in conflict with the latter, since EU Member States retain their sovereignty to the extent the European Union has not availed itself of the competence conferred. A conclusion to the contrary would significantly limit EU Member States based merely on a remote possibility of the European Union adopting new secondary EU law in that area.

3.4.2.2. Article 351 of the TFEU: A potential broader interpretation

A different and broader interpretation of article 351(1) of the TFEU would allow for the argument that EU law is based on international law and, as such, it cannot force EU Member States to neglect an international obligation arising under treaties signed before the entry into force of the secondary EU law. This interpretation would apply in the absence of a provision contrary to secondary law when the tax treaty was concluded. Therefore, by extension, no obligations assumed under the tax treaty were contrary to EU law.[42]

Furthermore, as mentioned in section 2., since the conflict between tax treaties and secondary EU law is considered a conflict between two treaties, article 30(4) of the VCLT could lead to an interpretation that tax treaties between third countries and EU Member States prevail over secondary EU law, as the two parties to the previous treaty are not both included in the new treaty. It is worth mentioning that Advocate General Kokott has provided a hypothetical interpretation of article 351(1) of the TFEU (at the time, article 307), pursuant to which she considered it "conceivable" that a tax treaty will take precedence over a directive in the event of a conflict between the treaty and the directive when the latter is concluded subsequent to the treaty.[43]

3.4.2.3. "Rights and obligations" under article 351(1) of the TFEU

Notwithstanding the understanding of the ECJ in respect of the phrase "rights and obligations" contained in article 351(1) of the TFEU, there are three reasons to conclude that an artificial distinction between rights and obligations is not correct: (i) such a distinction does not stem from a literal interpretation of article 351(1) of the TFEU, which simply does not support this thesis, (ii) the first draft of the article suggested preserving the rights and obligation of the EU Member States in relation to anterior treaties, and (iii) article 30(4)(b) of the VCLT refers to "rights and obligations" without specifying to which party the two terms refer.[44]

Furthermore, in order to define what the phrase "rights and obligations" means, one must examine the meaning of the term "rights" and who is the holder of such "rights". It is possible to identify rights in the hands of the state and rights in the hands of individuals, such that the term "rights" could be interpreted as including the rights of the taxpayer, the consequences of which are defined under the tax treaty. According to paragraph 10 of *Burgoa* (Case C-812/79),[45] it can be inferred that "[a]rticle 351(1) TFEU does not merely protect the 'rights' of the States as treaty parties but could also protect the 'rights' of individuals".[46] The reasoning behind such a conclusion can be traced through the following steps: (i) obligations are assumed

36. Treaty Establishing the European Community, 25 Mar. 1957, Primary Sources IBFD. This article corresponds, in principle, to the present art. 351 TFEU.
37. FR: ECJ, 2 Aug. 1993, Case 158/91, *Criminal proceedings against Jean-Claude Levy*, para. 12.
38. UK: Opinion of Advocate General Darmon, 17 Mar. 1993, Case 330/91, *The Queen v. Inland Revenue Commissioners, ex parte Commerzbank*, paras. 22-23; *Commission of the EEC v. Italy* (C-10/61), summary nr. 2; para. entitled "submission and arguments of the parties – B On the substance of the case – nr. 3"; and *Budějovický Budvar* (C-216/01), paras. 145-146.
39. Arginelli, *supra* n. 20.
40. Id.
41. Id.
42. Arginelli, *supra* n. 20.
43. AG Opinion in *Commune de Mesquer* (C-188/07), para. 95.
44. Von Papp, *supra* n. 3, at para. 2.B.
45. IR: ECJ, 14 Oct. 1980, Case 812/79, *Attorney General v. Juan C. Burgoa*, para. 10.
46. Von Papp, *supra* n. 3, at para. 1.C.

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by a state in respect of another state to protect individual "rights", (ii) the obligation is accepted based on the reciprocity guaranteed by the other state, (iii) both states are bound to protect the individual's "rights", and (iv) the "rights" of the individuals derive from an obligation.[47] To sum up, it could be argued that article 351(1) of the TFEU indirectly guarantees the rights of individuals without distinguishing between individuals of EU Member States or a third country.

3.4.2.4. The obligation under international law

According to article 27 of the VCLT, a treaty concluded with a third country should remain valid under international law even if it conflicts with EU law. This article, in fact, can be considered as a codification of customary international law, which makes it clear that a party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty". This principle could be extended so as to argue that it is impossible to invoke EU law to justify a failure to perform a treaty concluded with a third country.[48]

3.4.2.5. Reverse direct effect

Although there is case law upholding the principle of direct effect, the same cannot be said with regard to the principle of reverse direct effect, according to which a principle of EU law can be directly applied against private parties even in the absence of domestic implementation. In principle, the absence of reverse direct effect stems from previous ECJ decisions concluding that "a Directive may not of itself impose obligations on an individual and that a provision of a Directive may not be relied upon as such against sucha person".[49]

This principle was further developed in *Kofoed* (Case C-321/05),[50] which discussed whether it is possible to rely upon the anti-abuse provision of the Merger Directive (90/434)[51] in the absence of domestic implementation of the same. Paragraph 45 states that:

> all authorities of a Member State, in applying national law, are required to interpret it as far as possible in the light of the wording and purpose of the Community directives in order to achieve the result pursued by those directives. Moreover, although it is true that the requirement of a directive-compliant interpretation cannot reach the point where a directive, by itself and without national implementing legislation, may create obligations for individuals or determine or aggravate the liability in criminal law of persons who act in contravention of its provisions, a Member State may nevertheless, in principle, impose a directive-compliant interpretation of national law on individuals […]

One could argue that, if an EU Member State does not apply a "directive-compliant" interpretation of a national law implementing an EU directive, contrary to what a Member State should have done, the directive creates obligations for individuals and legal persons, putting them in a worse position compared to what they might have been in following the interpretation given by that Member State.[52]

The "Danish cases"[53] provided a recent contribution to the development of the reverse direct effect principle. Contrary to what was suggested by Advocate General Kokott, these cases concluded that:[54]

> the general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends must be interpreted as meaning that, where there is a fraudulent or abusive practice, the national authorities and courts are to refuse a taxpayer the exemption […], even if there are no domestic or agreement-based provisions providing for such a refusal.

It could be argued, based on the decision, that the Court distinctly considers that (i) an anti-abuse provision in a directive, if not implemented under domestic law, cannot be invoked against an individual due to the absence of a direct reverse effect, and (ii) there is a general principle pursuant to which an abuse of rights is prohibited under EU law.[55]

3.4.3. Examples of express prevalence of tax treaties over EU law

In the following subsections, the author provides examples of secondary EU tax law (or proposals), the drafting of which includes an explicit carve-out in favour of the application of provisions of tax treaties already in force with third countries. There are two potential comments that can be made regarding such specific provisions:

- they stem from the European Union's inability to force an EU Member State to violate its international law obligations, as the same were not contrary to the *acquis Communautaire* when approved;[56] and
- the existence of such provisions, explicitly preferring tax treaties in certain circumstances, implies that, in the absence of such specification, the intent of the Commission was not to allow for treaties to prevail over secondary law.[57]

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47. Id., at para 2.C.
48. Arginelli, *supra* n. 20.
49. UK: ECJ, 26 Feb. 1986, Case 152/84, *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority*, para. 48; NL: ECJ, 8 Oct. 1987, Case 80/86, *Criminal proceedings against Kolpinghuis Nijmegen BV*, paras. 8-9.
50. DK: ECJ, 5 July 2007, Case C-321/05, *Hans Markus Kofoed v. Skatteministeriet*, Case Law IBFD.
51. Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, art. 11(1)(a), OJ L 225 (20 Aug. 1990), Primary Sources IBFD.
52. CFE ECJ Task Force, *Opinion Statement ECJ-TF 2/2018 on the ECJ Decision of 7 September 2017 in Eqiom (Case C-6/16), Concerning the Compatibility of the French Anti-Abuse Rule Regarding Outbound Dividends with the EU Parent-Subsidiary Directive (2011/96) and the Fundamental Freedoms*, 58 Eur. Taxn. 10, p. 10 (2018), Journal Articles & Papers IBFD: "In any event, the obligation to interpret national law in accordance with EU law (e.g., an existing domestic GAAR) also exists where the result prescribed is not favorable to the individual or company, so that an interpretative inverse vertical direct effect may be created".
53. DK: ECJ (Grand Chamber), 26 Feb. 2019, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg I, X Denmark, C Danmark I and Z Denmark v. Skatteministeriet*, EU:C:2019:134, Case Law IBFD [hereinafter Danish cases].
54. Danish cases, *supra* n. 53, at para. 122.
55. B. da Silva, *N Luxembourg 1 & Others . Beneficial Ownership of Interest and Royalties. Abuse of Rights*, H & I, p. 37 (2019).
56. Arginelli, *supra* n. 20.
57. F.A. Engelen, J. Vleggeert & T.M. Vergouwen, *Belastingverdragen En Voorrang van Richtlijnen Op Het Gebied van Directe Belastingen*, Weekblad fiscaal recht 148, p. 2 (2019).

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The VCLT also comes into play in this regard. One can argue that, notwithstanding the fact that article 30(2) of the VCLT clarifies that an earlier treaty prevails when express compatibility with the same is provided by a new one, only the general rules provided by article 30(3) and 30(4) should apply in the absence of such clarification in the new provision. As a direct consequence, when the conflict arises in relation to a tax treaty signed with a third country, the earlier treaty should prevail, as it is the only one that both parties are a part of.

3.4.3.1. Hybrid mismatches: Disregarded PE in third countries

Council Directive 2017/952 (ATAD 2),[58] which extends the hybrid mismatch provisions to third countries, in particular article 9(5), provides that, when a hybrid mismatch involves a disregarded PE, the taxpayer resident in a Member State should include the income attributed to such disregarded PE when such income is not subject to tax in the Member State where the taxpayer is resident. However, this obligation cannot be applied if the EU Member State has signed a tax treaty with a third country that applies the exemption method to relieve double taxation.

3.4.3.2. Commission Proposal for the corporate taxation of a significant digital presence

The March 2018 Commission Proposal for the corporate taxation of a significant digital presence expressly excludes from its scope "entities that are resident for corporate tax purposes in a third country with which the particular Member State in question has a convention for the avoidance of double taxation".[59]

Furthermore, in the Explanatory Memorandum, the Commission recommends that EU Member States "replicate the provisions included in this Directive in the double taxation treaties with third countries since, in case there is a double taxation treaty between a MS and a non-Union jurisdiction, the rules of the applicable double taxation treaty may override the proposed provisions on a significant digital presence".[60]

3.4.3.3. Common Corporate Tax Base (CCTB) proposal

A switch-over clause is expressly excluded from the CCTB proposal in specific circumstances. Article 53 specifies that such a clause should not be applicable for foreign dividends and capital gains "where a convention for the avoidance of double taxation between the Member State in which the taxpayer is resident for tax purposes and the third country where that entity is resident for tax purposes does not allow switching over from a tax exemption to taxing the designated categories of foreign income".[61]

3.4.4. Specific arguments regarding CFC regimes

When assessing, in particular, the hierarchy between the two systems in relation to the new CFC regime implemented under ATAD 1, in addition to the theoretical analysis above, other arguments can come into play. Opting in or out of specific Multilateral Convention (2016)[62] provisions, together with the Commentary on the OECD Model (2017)[63] and previous versions, and its reservations, might provide for further elements of interpretation.

3.4.4.1. Switch-over clause

Various amendments were made between the initial draft proposal for ATAD 1 and the approved version. In the course of the public session held on 17 June 2016, the draft was defined as a "finely balanced compromise", referring in particular to the removal of the "switch-over rule". This particular provision would have obliged the EU Member States to switch from an exemption method to a credit method in respect of dividends, capital gains and PE profits when derived from third countries, where such elements are taxed at a very low or zero rate.[64,65]

This provision, which would have applied when a particular situation fell outside the scope of the CFC rule, has been extensively debated, and was opposed by many countries. The importance of its elimination is mitigated somewhat by the fact that the draft of the CFC article changed extensively during the debate and ended up including, within its scope, profits from foreign PEs.[66] As profits from foreign PEs were covered in any event, the switch-over rule could be deleted.[67] Thus, in the author's view, such deletion should not have a significant impact on the analysis.

3.4.4.2. Rights and obligations

A question arises from the analysis in section 3.4.2.3. as to whether a tax exemption granted under a tax treaty in respect of profits attributed to a PE can be considered separately as a single right or obligation, or should be considered as a whole with the other provisions of the tax treaty as a result of the negotiation process.

58. Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJ L 144 (7 June 2017), Primary Sources IBFD [hereinafter ATAD 2].
59. European Commission, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence 2018/0072 (CNS), art. 2 (21 Mar. 2018); explanatory memorandum to the proposal, para. 5, subpara. entitled "detailed explanation of the specific provisions of the proposal – scope art. 2".
60. Id., at para. 1, subpara. "Consistency with existing policy provisions in the policy area".
61. European Commission, Proposal for a Council Directive on a Common Corporate Tax Base, COM(2016) 685 final, art. 53 (25 Oct. 2016), Primary Sources IBFD.
62. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (24 Nov. 2016), Treaties & Models IBFD [hereinafter MLI].
63. *OECD Model Tax Convention on Income and on Capital: Commentary* (21 Nov. 2017), Treaties & Models IBFD.
64. E. Lebas, *Recent Amendments to EU, Luxembourg and US Tax Laws, and Their Implications for US Holding and Financing Branch Structures*, 73 Bull. Intl. Taxn. 11 (2019), Journal Articles & Papers IBFD.
65. European Parliament legislative resolution of 8 June 2016 on the proposal for a Council directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (COM(2016)0026 – C8-0031/2016 – 2016/0011(CNS)), OJ C 86, Amendment 17 (6 Mar. 2018).
66. Id., at previous text of amendment 26.
67. A. Rigaut, *Anti-Tax Avoidance Directive (2016/1164): New EU Policy Horizons*, 56 Eur. Taxn. 11, sec. 3.5. (2016), Journal Articles & Papers IBFD.

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An answer to this question could be found in the words of the ECJ, according to which a single article of a tax treaty, "cannot be regarded as a benefit separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance".[68] Although the case addressed a different application of tax treaties, the principle of the overall balance of a tax treaty and of its reciprocity has been accepted as an argument against the wrong application of the treaty.[69]

Even if it can be argued that the article related to the elimination of double taxation does not, in itself, grant taxing rights to the contracting states, this does not mean that the allocation of taxing rights is not based on reciprocity.[70] It is in relation to this concept that the artificial distinction between rights and obligations can be addressed. In the PE example, it would be a single provision of the tax treaty that would be disallowed. This raises the question of whether the contracting states would have negotiated other tax treaty provisions differently had they known, from the outset, that a subsequent law would have affected a single provision of the tax treaty, thus compromising its balance.

In order to bolster such arguments, it is worth mentioning that Navarro et al. (2016), in an article commenting on the switch-over clause included in the ATAD 1 proposal, pointed out that such unilateral action undertaken by the European Union could undermine the balance of tax treaties in relation to the application of the exemption method to eliminate double taxation.[71] Since applying the CFC regime to a PE would have the same effect as a switch-over rule, the result could threaten the balance of the treaty network.

3.4.4.3. Article 11 of the MLI as a "saving clause"

Article 11 of the MLI provides for a so-called "saving clause" that, in essence, mirrors the new article 1(3) of the OECD Model (2017).[72] This provision follows the Final Report on BEPS Action 6,[73] which is aimed at preventing the granting of treaty benefits in inappropriate circumstances. This article, which is not part of the MLI minimum standard, only grants an option to the states to specify in their covered tax agreements that the taxation of its residents is not affected by the tax treaty.

Opting in or out of this provision could trigger debate only to the extent that the inclusion of such a provision in the tax treaty is considered essential to avoid any conflict between the application of the CFC rule – considering the regime as a national measure (also according to implementation of EU law) – and the tax treaty.[74] This argument should be countered by the clarification already contained in the Commentary on the OECD Model (2017) regarding the conformity of the CFC regime with tax treaties. In particular, paragraph 81 of the Commentary on Article 1 of the OECD Model (2017) confirms that the CFC regime does not conflict with the provisions of the tax treaty, since the regime allows for the taxation of a state's own resident, which is now expressly allowed under the new article 1(3). The Commentary, however, also adds that the same conclusions could already have been reached before article 1 was amended.

The Final Report on Action 6 points out that the addition of the paragraph was necessary in order to "prevent interpretations intended to circumvent the application of Contracting State domestic anti-abuse rules".[75]

The inclusion in a tax treaty of a saving clause – especially considering the non-binding nature of the OECD Commentary – should limit uncertainties on the applicability of domestic specific anti-avoidance rules (SAARs) and limit the possibility for domestic courts to declare a CFC regime in violation of article 7(1) of a tax treaty.[76]

In contrast to the OECD arguments, *a contrario* reasoning could be argued based on the "opt-out" exercised under the MLI by a country regarding the saving clause, with the result that the application of a domestic SAAR (CFC rule) would be in conflict with the tax treaty in force. Such an argument could be sustained based on the main justification given by states "opting-out". In their view, the adoption of the saving clause would not be in line with domestic tax policy; more specifically, CFC rules would not be in line with the tax policies of those countries.[77] Even if this MLI opt-out argument is considered as irrelevant as a counter-argument to the application of CFC rules, the text of the MLI article, or of article 1(3) – together with the OECD Commentary – expressly excludes from its effect a commitment undertaken by a contracting state under article 23 of the convention/covered tax agreement. Such a provision can, in fact, be considered an exception to the general rule, from the perspective of the resident state, in that it does not restrict states from taxing their own residents.[78] In other words, one can say that a country can tax its own residents to the extent it does not deny them an exemption to relieve double taxation under a tax treaty.

3.4.4.4. MLI switch-over clause (article 5)

Article 5 of the MLI provides for three alternative switch-over options. In particular, option C provides for substitu-

68. NL: ECJ, 5 July 2005, Case C-376/03, *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, para. 62, Case Law IBFD.
69. The argument of reciprocity of tax treaties has been used, within other arguments, to exclude the possibility of extending the most-favoured-nation (MFN) clause, as it would put the whole tax treaty system under threat. Regarding MFN clauses, *see* G.W. Kofler et al., *'Dancing with Mr D: The ECJ's Denial of Most-Favoured-Nation Treatment in the 'D' Case*, 45 Eur. Taxn. 12 (2005), Journal Articles & Papers IBFD.
70. D. Dürrschmidt, *Tax Treaties and Most-Favoured-Nation Treatment, Particularly within the European Union*, 60 Bull. Intl. Taxn. 5, fn. 117 (2006), Journal Articles & Papers IBFD.
71. A. Navarro, L. Parada & P. Schwarz, *The Proposal for an EU Anti-Avoidance Directive: Some Preliminary Thoughts*, 25 EC tax rev. para. 2.3.4. (2016).
72. Of particular relevance to this analysis is art. 11(d) MLI.
73. OECD/G20, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Action 6: 2015 Final Report* (OECD 2015), Primary Sources IBFD [hereinafter *Action 6 Final Report* (2015)].
74. G. Van Hulle, *Current Challenges for EU Controlled Foreign Company Rules*, 71 Bull. Intl. Taxn. 12 (2017), Journal Articles & Papers IBFD.
75. *Action 6 Final Report* (2015), at para. 62, at p. 86.
76. In the *OECD Model: Commentary* (2017), some states have made reservations to this provision.
77. Van Hulle, *supra* n. 74, at pp. 719-724.
78. V. Chand, *The Interaction of Domestic Anti-Avoidance Rules with Tax Treaties (with Special References to the BEPS Project)* (R. Danon ed., Schulthess 2018).

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tion of the exemption method for the credit method. Thus, it can be argued that this provision, where a country elects for this option, would result in the same outcome as under the CFC regime in relation to PEs. Therefore, they would implicitly be accepting the application of the regime. On the other hand, it could be argued that an opt-out implies that the country is averse to such a different method of tax relief, and therefore to the effect of the application of the CFC rule, given the similar outcome expected.

4. Luxembourg Official Positions

4.1. The Opinion of the *Conseil d'État*

The Luxembourgish *Conseil d'État* (State Council) issued a formal opinion with Bill 7318 on 13 November 2018 related to implementation of ATAD 1, in which it takes a clear position in relation to the foreign PE issue (example in section 1.2.). According to the opinion (which reflects the different positions discussed in sections 2. and 3.), if the PE of the Luxembourgish head office is considered a CFC, the outcome may vary as follows:

– when the PE is in another EU Member State, the CFC regime prevails over the tax treaty, notwithstanding the possibility to grant a foreign tax credit in respect of taxes paid by the PE; and
– when the PE is in a third country, then the tax treaty in force should prevail over the CFC regime, and cases of double non-taxation should be addressed under the MLI.[79]

The prevalence of international treaties over domestic law (and over EU law?),[80] as also mentioned in the opinion, stems from the principle of primacy of international treaties accepted by the Luxembourgish Supreme Court in its case law.

In fact, according to the Supreme Court, treaties are in a superior position due to their higher source of origin. Once a tax treaty is ratified, the same is protected by article 27 of the VCLT, and the state cannot invoke an internal provision to justify a failure to apply the treaty. Thus, in the event of a conflict, international rules should prevail over a domestic one, regardless of its nature.[81]

4.2. Circular of the tax authorities

On 4 March 2020, the Luxembourg tax administration issued a circular[82] interpreting the new CFC regime. In the circular, among others, the subjective element of the application of the new rules is discussed.

Using vague wording, it seems to interpret the application of the CFC regime as extending to, contrary to the opinion issued by the *Conseil d' État,* PEs situated in both EU Member States and third countries with which Luxembourg has concluded a tax treaty.

5. Conclusions

Following the analysis herein, confirmed in part by the position expressed by the Luxembourgish *Conseil d'État* in its opinion on the specific example of CFC rules applicable to a foreign PE, different conclusions can be drawn depending on the scenario depicted. Such conclusions can generally be applied to any conflict between EU law and tax treaties, and in particular to the example analysed.

EU law generally prevails over tax treaties when the same are concluded amongst EU Member States.

On the other hand, with regard to tax treaties in force with third countries, the prevalence of one system over the other differs according to the scenario, and in certain cases the outcome reached is the result of the interpretation of existing provisions.

In particular, tax treaties should prevail when concluded before EU accession. EU law should prevail, however, when tax treaties are concluded after the adoption of secondary EU law or in the period between EU accession and the adoption of secondary EU law in respect of primary EU law. A grey area subject to interpretation remains regarding tax treaties concluded after EU accession but before the adoption of secondary law with reference to the same secondary law.

In the author's view, in this specific case, there should be room to grant prevalence to tax treaties over EU law. Specifically with regard to the CFC analysis, it could be helpful to take into consideration the specific options elected by each country under the MLI. Such options should provide policy guidelines and shed some light on the domestic approach to CFCs, thus bolstering the hierarchy defined in this article.

Even though tax treaties appear to prevail in respect of the grey area identified, the commitment undertaken by Member States to eliminate incompatibilities with EU law should still be considered. Member States committed to this objective at the moment of EU accession and therefore before any secondary EU law was adopted.

Notwithstanding such a commitment, it remains unclear how much time the Member States have to comply with such provisions and what the consequences are in the event they do not, with the result that the relevant treaty provisions giving rise to the conflict should continue to apply (for an unidentified period of time).

79. FR: Conseil d'État, 13 Nov. 2018, N. dossier parl. 7318 projet de loi transposant la directive (UE) 2016/1164 (n 1), p. 14.
80. ACA Europe, *Séminaire ACA Europe Du 18 Décembre 2013 – Notes Sur La Hiérarchie Des Normes – Grand Duché de Luxembourg Cour Administrative et Conseil d'Etat* "Once approved, the international standards, derived from Luxembourg's international commitments, prevail – in the pure monist tradition – over the rules of domestic law, including those of constitutional value. This primacy also concerns secondary European Union legislation. In this way, any constitutional text or internal regulation may be censured or disregarded if it does not conform to the rules of international law that are binding on it".
81. M. Besch, *Normes et Légistique En Droit Public Luxembourgeois*, sec.1 Hiérarchie des norms (Larcier 2019).
82. Administration des contributions directes, *Circulaire Du Directeur Des Contributions L.I.R. N° 164ter/ Du 4 Mars 2020* p. 1.

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