European Tax Integration:
Law, Policy and Politics

Editor: **Pasquale Pistone**

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Why this book?
This book focuses on the status quo of European tax integration, combining law, policy and politics. Good policy should identify and address problems when they arise, achieving suitable solutions that law implements. Within the European Union, this relation is malfunctioning or entirely missing in direct tax matters.

Positive tax integration in the European Union has mostly failed to transform supranational policy goals into actual measures of harmonization and coordination, except for the recent reaction to tax avoidance. The topical studies contained in this book hold that without a proper action that removes cross-border tax obstacles, positive tax integration shifts away from its original goals. Furthermore, such a scenario leaves the bulk of European tax integration in the hands of the limits established by negative tax integration, with little room for developing a structured policy in the interest of the European Union.

This peer-reviewed publication aims to stimulate debate among scholars, decision-makers, practitioners, politicians and interpreters of European international tax law, with a view to bringing European tax integration back on the right track.

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Preface

GREIT was born as an initiative of four (at the time) young European scholars who, on a mid-summer day in Sweden, set up an independent and self-funded small research group to promote the building up of European international tax law and the approximation of European and international tax law scholars to general EU and public international law.

Over 10 years have passed since that moment, and I am proud to see not only that the European and international tax law community now knows about GREIT and its core mission but that it also considers involvement in our research activity with due attention. Many members of this community have become GREIT fellows, and thus members of the GREIT family, taking on their shoulders part of the scientific burden of designing the contours and content of European international tax law as common supranational law of the European Union on international tax matters.

Year after year, we make our best efforts to bring together scholars around specific topics, which usually constitute spin-offs of issues addressed in one or more previous GREIT annual conferences.

Our methodology is simple: once the GREIT steering board regards a given topic as critical for European international tax law and not sufficiently explored in the scientific community, we work on the elaboration of an outline with research questions to address in the framework of the annual research project.

After the identification of the research topic and questions, we invite technical experts to analyse them in the framework of a technical conference, which constitutes a kind of a technical retreat. The conference is open to the participation of anyone (including doctoral students) who expresses a concrete interest in the specific topic, and it allows an evaluation of the pros and cons of various theories and their implications for European international tax law. After the conference, the authors of topical studies are invited to review their drafts and conclusions in the form of scientific studies, which we then include in our annual book.

The focus of this book – the first of the GREIT series to have undergone a double-blind peer-review process in line with the highest international standards for academic production – is on the interaction of law, policy and politics in respect of European tax integration. We consider this topic as an absolute priority to steer European international tax law towards the

full achievement of the goals for which EU Member States have accepted surrendering their national sovereignty. Various chapters of this book give evidence of the inconsistency of the process of European tax integration and of the implications of this within the internal market and in relations with third countries.

We truly trust that this contribution on the part of GREIT will also help spark debate among scholars, decision-makers, practitioners, politicians and interpreters of European international tax law, with a view to bringing European tax integration back on the right track. This is, in our view, absolutely indispensable in order to overcome the current situation, in which we have no satisfactory link between law and policy either at the national or at the supranational level within the European Union in tax matters. On the one hand, EU Member States are constrained in the exercise of their taxing powers at the national level by the need to comply with the supremacy of EU law; on the other hand, the scattered forms of supranational tax law are insufficient to secure a homogeneous approach on the part of the European Union to the problems of global international taxation.

Some chapters of this book supplement the main contribution with shorter pieces which serve to put forward some possible content for discussion. We hope that our readers will enjoy this innovative feature of the volume, which was used in our previous work on legal remedies.

Finally, please allow me to express my personal gratitude to IBFD for having supported all GREIT publications from the very beginning. My thanks also go to Menita de Flora and Adina Moldovan for their work in connection with the production of this book, from before the GREIT 11 conference (held on the isle of Ischia, near Naples, in Italy) to the day on which it was sent to print.

I hope and predict, along with my colleagues from GREIT, that this book will be a source of inspiration for all those who come across problems of European tax integration and wish to have them properly addressed in the interest of the European Union and its Member States.

Pasquale Pistone
Kiev, 7 February 2018

European Tax Integration: The Need for a Traffic Light at the Crossroads of Law, Policy and Politics

Pasquale Pistone*

Πάντα ῥεῖ (*panta rhei*), everything flows (and nothing stays). This is how the ancient Greek philosopher Heraclitus conceived of the world. His words perfectly describe the perpetual evolution of European law towards its ultimate goal of supranational integration and the impact of its dynamics on the essence of the tax sovereignty of the EU Member States.

European tax integration is different today from what it was yesterday, and both differ from what European tax integration will be tomorrow. The dynamic nature of the EU legal order is an intrinsic attribute of the progressive surrender of national sovereignty. This steers legal interpretation and prompts the introduction of common supranational rules for achieving supranational integration.

Legal interpretation addresses some aspects of this process by adapting the exact meaning and implications of laws to the requirements that European tax integration may have from time to time. Civil and common law systems may have a different understanding of the boundaries and role of legal interpretation in tax matters, yet both essentially share the conclusion that good policy promptly identifies and addresses problems when they arise, providing effective mechanisms that achieve suitable solutions.

Within the European Union, this relation between law and policy is either malfunctioning or entirely missing in tax matters.

In such context, the principles of supranational law have so far been the main conveyors of (the so-called negative) European tax integration, since positive tax integration has frequently failed to transform supranational policy goals into actual legal solutions based on tax harmonization and coordination. This situation is particularly evident in the field of direct taxes, where the number of judgments by the Court of Justice of the European Union (ECJ) exponentially exceeds that of directives. Accordingly, the bulk of European tax integration consists of limits to the exercise of national tax sovereignty rather than the establishment of a common supranational policy.

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Various factors may have contributed to generating this situation, including in particular the preservation of unanimity for European Council decision making.

This requirement – otherwise abolished almost everywhere in the EU legal system – is officially meant to prevent EU Member States from losing control over their tax sovereignty, thus avoiding situation in which their citizens are bound by rules agreed among those who do not represent them.[1] From this perspective, one should therefore reach the conclusion that the current standpoint of decision making within the European Union is the only legitimate and possible way forward for European tax integration.

Furthermore, this line of reasoning complies, at least from a formal point of view, with the "no taxation without representation" principle, for which taxpayers have fought over the centuries.

Nonetheless, the Group for Research on European and International Taxation (GREIT) has gathered various scholars in order to discuss whether a different alignment of law, policy and politics could enhance the process of European tax integration and improve the consistency with its underlying goals.

The key element for understanding this alternative view is the importance of preserving a meaningful commitment to removing all existing types of cross-border tax obstacles within the European internal market, which is the object of measures adopted under article 115 of the Treaty on the Functioning of the European Union (TFEU).

This alternative perspective looks with scepticism at the developments in European tax law over the past decades, which it considers neither satisfactory nor suitable tools for pursuing the goals of European tax integration in the medium-term scenario.

The efforts of the ECJ to preserve consistency in the interpretation of EU law and its application to tax law have been remarkable.[2] Still, the unstop-

1. The EC president, Jean Claude Juncker, has already emphasized the need to overcome the rule of unanimity in direct tax matters as a key element to achieve a strong Union. *See*, in this regard, H.V. Arendonk, *2017, the Year of the Dreamers; 2018, the Year of the Realists?*, in 27 EC Tax Review 1, pp. 2-4 (2018).

2. In searching for consistency and coherence in the case law of the ECJ, as well as to point out its asymmetries and mismatches, it is important to stress the work of a number of scholars, among others P.J. Wattel, *Non-Discrimination* à la Cour*: The ECJ's (Lack of) Comparability Analysis in Direct Tax Cases*, 55 European Taxation 12, pp. 542-553

pable flow of referrals steadily increases the complexity of case law on direct taxes, which should test every single time whether the exercise of taxing powers by Member States is in line with EU law and its supranational principles and rules.

Furthermore, cases such as *Kerckhaert-Morres*[3] and *Block*,[4] on the exercise in parallel of tax jurisdiction by two or more EU Member States, as well as some decisions on exit taxes,[5] show that interpretation is structurally unsuitable to address all problems of European tax integration.

This is the case, for instance, in respect of the nexus, the bilateral problems (arising in the form of advantages and disadvantages) connected with tax disparities and several other issues, which are discussed in Part 4 of this book.

A more in-depth analysis of the approved directives in the field of direct taxes confirms the critical standpoint in respect of European tax integration.

For this purpose, we group tax directives into two categories, namely those that remove the existing cross-border tax obstacles (first cluster) and those that enhance cross-border cooperation between tax authorities within the internal market (second cluster).

Both clusters of directives have their legal basis in article 115 of the TFEU. Whilst the link with such provision is immediate for the directives that remove the existing cross-border tax obstacles, those enhancing mutual assistance between tax authorities matter for primary law from a different perspective. In particular, by improving the conditions for cross-border mutual assistance between tax authorities, the latter cluster of directives makes it no

(2015), Journals IBFD; W. Haslehner, *Consistency and Fundamental Freedoms: The Case of Direct Taxation*, 50 Common Market Law Review 3, pp. 737-772 (2013); T. O'Shea, *European Tax Controversies: A British-Dutch Debate: Back to the Basics and Is the ECJ Consistent?*, 5 World Tax Journal 1, pp. 100-127 (2013), Journals IBFD; and M.J. Graetz & A.C. Warren Jr., *Dividend Taxation in Europe: When the ECJ Makes Tax Policy*, 44 Common Market Law Review 6, pp. 1577-1623 (2007).

3. ECJ, Judgment of 14 November 2006, *Kerckhaert and Morres* (C-513/04, ECR 2006 p. I-10967) ECLI:EU:C:2006:713.

4. ECJ, Judgment of 12 February 2009, *Block* (C-67/08, ECR 2009 p. I-883) ECLI:EU:C:2009:92.

5. In particular, there is uncertainty regarding the implications of case law for cases of pre-emigration accrued gains followed by post-emigration accrued losses that generate an overall lower gain within the internal market as compared to that connected with the first intra-EU emigration.

longer necessary to restrict the exercise of fundamental freedoms in order to preserve the effectiveness of fiscal control and of tax collection.

Let us now look at the actual developments concerning both clusters of tax directives.

Since the European Council approved two directives and the EU Member States signed the EU Multilateral Tax Arbitration Convention in 1990, there has been hardly any form of positive integration of the first cluster. In fact, the main target of tax harmonization ever since has been strengthening the powers of tax authorities across borders.

Subsequently, only two directives have removed tax obstacles, one limiting the levying of withholding taxes on cross-border interest and royalty payments (the so-called Interest-Royalty Directive)[6] and the other providing for settlement of cross-border tax disputes (the so-called Tax Arbitration Directive).[7] Yet both directives contain provisions that make the exercise of rights subject to limits in the interest of protecting the effectiveness of revenue collection and the fight against abusive practices.

In the case of the Interest-Royalty Directive,[8] this becomes clear if one considers the existence of numerous attestation requirements for the exercise of the rights enshrined in it, as well as the beneficial ownership requirement, which was not included in the Parent-Subsidiary Directive,[9] which pursues a similar goal in respect of cross-border flows of dividends.

Article 13 of the Tax Arbitration Directive reflects the same underlying policy goal. It addresses an area, such as the protection of taxpayers' rights, in which some kind of tacit consensus among EU Member States has brought them to consider the introduction of any supranational measure

6. Council Directive (EU) 2015/2060 of 10 November 2015 repealing Directive 2003/49/CE of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.
7. Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union.
8. Council Directive 2003/49/EC of 3 June 2003 on the common system of taxation applicable to interest and royalty payments made between associated companies of different Member States. A new proposal to recast the Directive was adopted by the EU Commission on 11 November 2011 (see COM(2011) 714 final), but has not been approved yet.
9. Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, amended first with Council Directive 2003/123/EC of 22 December 2003 and then with Council Directive 2011/96/EU of 30 November 2011.

as a hindrance to the effectiveness of the fight against abusive practices. Therefore, whilst acknowledging taxpayers' entitlement to enjoy procedural rights in the framework of the procedure for settling cross-border tax disputes, this provision makes such entitlement subject to the approval of tax authorities. This condition is, in our view, hard to reconcile with taxpayers' overall entitlement to the protection of fundamental rights in line with the standards enshrined in the EU Charter of Fundamental Rights.

The object and purpose of all other directives approved in the field of direct taxation is either to introduce forms of mutual assistance or to counter abusive practices.

Measures enhancing mutual assistance among tax authorities are numerous. One only has to think of the various upgraded versions of the directives on exchange of information,[10] including the so-called Tax Savings Directive,[11] which represents, in our view, the first form of supranational law of the European Union including provisions with a direct effect on automatic exchange of information.

The introduction of a supranational approach to abusive practices is more recent, since the core measures were only introduced in the so-called Anti-Tax Avoidance Directive (ATAD),[12] which is analysed in Part 5 of this book.[13] ATAD transforms the right of Member States to counter abusive practices into an obligation to do so, establishing in addition a minimum anti-avoidance standard and thus strengthening the common dimension of the prohibition of abusive practices resulting from the interpretation of primary law of the European Union.

Abusive practices are a critical issue within the European Union, and ATAD constitutes an example of how good policy can address the problems of the community and come up with a comprehensive solution to

10. *See* the successive amendments of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation, for the purposes of introducing automatic exchange of information, country-by-country reporting and mandatory exchange of rulings.
11. Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments.
12. Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.
13. For a comprehensive analysis of the reaction to abusive practices, *see* A.P. Dourado et al., *Tax Avoidance Revisited in the EU BEPS Context* (A.P. Dourado ed., IBFD 2017), Online Books IBFD; and the EU Report drafted by G. Kofler et al., *Anti-avoidance measures of general nature and scope – GAAR and other rules*, IFA Congress 2018.

them. Nevertheless, the leeway left to Member States to adopt stricter anti-avoidance measures can have an impact on the exercise of freedoms within the internal market and in relations with third countries. This is difficult to assess, but it may turn into the source of a tax bias for cross-border situations.[14]

Despite the extreme difficulties in producing secondary legislation in the field of direct taxes, it only took a few months for this directive to be proposed in late 2015, approved and formally signed on 12 July 2016. Certainly, the prior agreement of all EU Member States on the BEPS Project may have contributed to generating the remarkable speed of this process.

Yet this development comes on top of the amendments previously introduced in the Parent-Subsidiary Directive for transforming the right to counter abusive practices into an obligation to do so.[15] Similar measures are still missing in article 15 of the EU-Switzerland Agreement[16] and in the EU Tax Merger Directive.[17] However, one may consider their introduction being just a matter of time.

Such developments show, in our view, that tax harmonization no longer constitutes a tool mainly for removing cross-border tax obstacles but rather mainly for strengthening the powers of tax authorities.

Seen from the perspective of the links between law and policy, we believe that, whilst positive tax integration is gradually removing the obstacles to cross-border mutual assistance between tax authorities within the internal

14. In this regard, *see* the mismatches in third-country scenarios in article 7(2)(a) of ATAD. Member States are allowed not to apply CFC rules "where the controlled foreign company carries on a substantive economic activity supported by staff, equipment, assets and premises". However, when the CFC is resident in a third country, Member States could refrain from applying the above-mentioned exception.
15. *See* the inclusion of a common minimum anti-abuse rule in Council Directive 2015/121/EU of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.
16. Council Decision 2004/911/EC of 2 June 2004 on the signing and conclusion of the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments and the accompanying Memorandum of Understanding.
17. Council Directive 2009/133/EC of 19 October 2009 on a common system of taxation applicable to mergers, divisions, transfer of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.

market, it fails to do so in respect of those obstacles that directly affect the exercise of rights across borders.

Accordingly, whilst, on the one hand, the tax advantages derived from exploitation of cross-border disparities now come under the joint fire of the prohibition of State aid and ATAD, the tax disadvantages resulting across borders and giving rise to juridical double taxation still constitute the unavoidable consequence of the lack of tax harmonization.[18]

This inconsistency in fact harms cross-border situations. Let us imagine the situation of a Member State that, in line with the indication of article 3 of ATAD, goes beyond the minimum standard established by article 6 of ATAD in implementing the obligation to counter abusive practices. In such circumstances, this action may more easily give rise to cases of double taxation across borders, which can turn into a form of procedural restriction on the exercise of fundamental rights.

Therefore, even if ATAD may constitute an expression of good tax policy turned into secondary law of the European Union, the fact that it is not bundled with further measures that remove cross-border tax obstacles within the internal market turns it a tool that contributes to worsening the tax conditions applicable to cross-border relations.

This one-way process of tax harmonization requires urgent attention from a policy perspective.

An additional interesting phenomenon arises in relations with third countries, which we consider a form of hidden tax protectionism channelled through a unilateral approach on the part of the European Union, officially labelled as a reaction to tax avoidance. Part 3 of this book discusses the implications of this approach for global tax competition on the EU and non-EU side, putting the emphasis on various scenarios, including relations with the United States, the consequences arising in connection with Brexit and the legal constraints applicable under EU and international economic law.

However, we find it important to mention here at least the example of article 8 of ATAD, which also constitutes the object of a specific contribution

18. The negative impact of juridical double taxation on the internal market has been addressed by various scholars. *See*, for instance, G. Kofler, *Double Taxation and European Law: Analysis of the Jurisprudence*, in *Double Taxation within the European Union* pp. 97-136 (A. Rust ed., Kluwer 2011).

contained in Part 3 of this book.[19] Article 8 ATAD in fact allows EU Member States to apply harsher conditions for applying controlled foreign company (CFC) legislation to companies established outside the European Economic Area than those applicable within the European Union.

The compensatory effects of such measures can, in our view, create a tax bias in favour of intra-EU situations, which may go beyond what is necessary to counter actual abusive practices and thus be at odds with the principles and foundations of the European supranational legal order. The actual boundaries of this measure will be clearer once the ECJ will have judged the *X GmbH* case,[20] on the limits established by the free movement of capital to the application of CFC legislation in relations with companies established outside the EEA.

More in general, we plead for a reconsideration in the near future of this one-sided usage of positive tax integration, which, in our view, brings about a partial understanding of how legal and policy perspectives ought to interact within the European Union in order to make progress towards the ultimate goals of integration.

Positive tax integration is the only way forward, and it must comprehensively address the problems arising within the supranational legal order of the European Union. Nonetheless, it fails to make progress in the context of European politics because of the lack of actual accountability on the part of political leaders towards the European Union's population as a whole.

Over the past few years, politicians from various EU Member States have rather considered European integration as a battlefield for showing their national constituencies their skills in preserving national sovereignty or getting bargains that enhanced the competitiveness of a country without surrendering powers to the level of the European Union.

In our view, this situation essentially runs against the interest of establishing an EU-wide area without tax obstacles, which we consider an essential component of achieving the goals of European integration.

Positive tax integration should therefore aim at removing the existing cross-border tax obstacles, which legal interpretation cannot address. It should be clearly visible even in areas in which it may reduce the effectiveness of

19. R. Danon, EU Fiscal Protectionism versus Free Movement of Capital. For the case of the ATAD CFC categorical model, *see* ch. 10 of this book.
20. *See* ECJ, *X GmbH* (C-135/17), currently pending before the court.

actions taken by tax authorities when this is required in order to protect the rule of law and the effective protection of rights that constitute the cornerstones of the legal order of the European Union and of its Member States.[21] In such context, requiring a case-by-case approach to abusive practices is a valuable part of preserving a reaction to such practices that complies with the fundamental values of the principle of proportionality and that does not undermine the exercise of rights in genuine situations.[22]

We also submit that, even if States have no interest in introducing more supranational rules in areas such as, for instance, the effective protection of taxpayers' rights, it is in the interest of the internal market to secure an effective EU-wide standard and to achieve it not just by means of legal interpretation through the ECJ.[23]

We should all be grateful to the ECJ for having turned taxpayers from mere objects of cross-border tax disputes into actual holders of rights.[24] The codification of such principles in the EU Charter of Fundamental Rights has sparked up an interesting judicial trend in tax matters, which more frequently activates the competence of the ECJ on the interpretation of the principles of supranational law of the European Union and their removal of the tax obstacles that positive integration fails to address.[25]

Yet the right link between policy and law should bring legal interpretation back to the role that it normally plays within the European legal system,

21. *See* the contribution by M. De Flora, *The Right to Be Heard in European, International and Comparative Contexts*, in ch. 15 of this book.
22. Therefore, such requirement should be seen as the desirable expression of our legal culture, reflecting the values of the EU legal order, rather than a component of an approach that undermines the effectiveness of the reaction to abusive practices, as has recently been suggested in the literature. *See* L. Faulhaber, *The Luxembourg Effect: Patent Boxes and the Limits of International Cooperation*, 101 Minnesota Law Review, pp. 1641 ff (2017).
23. The European Commission has also made efforts to establish a Taxpayers' Rights Code in the European Union. *See* European Commission, *Consultation Paper – A European Taxpayers' Code*, TAXUD.D.2.002 276169 (EC 2013); and, more recently, European Commission, *Guidelines for a Model for A European Taxpayer's Code*, TAXUD (2016) 6598744 (EC 2016); *see also* L. Cerioni, *The Possible Introduction of a European Taxpayer Code: Objective and Potential Alternatives*, 54 European Taxation 9, pp. 392-403 (2014), Journals IBFD.
24. ECJ, Judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15) ECLI:EU:C:2017:373.
25. For a further analysis of the cumbersome interplay between the EU Charter of Fundamental Rights and taxation, *see* W. Haslehner, *Taxation at the Crossroads of Fundamental Rights and Fundamental Freedoms in the EU*, in *EU Tax Law and Policy in the 21st Century* pp. 155-178 (W. Haslehner, G. Kofler & A. Rust eds., Kluwer 2017); and E. Poelmann, *Some Fiscal Issues of the Charter of Fundamental Rights of the European Union*, 43 Intertax 2, pp. 173-178 (2015).

namely to understand the actual meaning and implications of the common rules required by European supranational integration.

In the presence of secondary law in the field of direct taxes, control by the ECJ would be exercised within the boundaries that characterize the existence of a harmonized legal system, thus only questioning cases of blatant violation of primary law.[26] This does not mean that States can approve anything. For instance, in the case of ATAD, article 3 should not be interpreted in a way that gives Member States carte blanche to approve any measure but should rather be scrutinized by the ECJ in a way that complies with the overall framework set by primary law, including the measures enshrined within the EU Charter of Fundamental Rights.

We do not question here the importance of an effective fight against abusive practices and of implementing the necessary measures against such practices with effective mutual assistance between tax authorities across borders. In contrast, we observe that these are the only types of measures that manages to overcome the systematic opposition of Member States to any form of surrender of taxing powers.

In the current scenario, EU Member States, on the one hand, ascribe limited importance to cross-border tax obstacles, which do not undermine their power to collect taxes, and, on the other hand, become progressively engaged in a process of smart tax competition,[27] which enhances the attractiveness of their tax systems through the possible exploitation of cross-border tax disparities.

This scenario generates a form of schizophrenia in the exercise of taxing powers. Whilst EU Member States more readily agree in defending the integrity of their tax sovereignty against any form of erosion through abusive practices and aggressive tax planning, they care less about narrowing down the scope of national tax regimes that allow for exploiting cross-border tax disparities to the detriment of other Member States.

26. On the interaction between primary and secondary law in tax matters, *see* R. Szudoczky, *Primary Law and Secondary Law in the Field of Taxation*, in *The Sources of EU Law and Their Relationships: Lessons for the Field of Taxation: Primary Law, secondary law, fundamental freedoms and State aid rules* (IBFD 2014), Online Books IBFD.
27. *See* P. Pistone, *Smart Tax Competition and the Geographical Boundaries of Taxing Jurisdictions: Countering Selective Advantages Amidst Disparities*, 40 Intertax 2, pp. 85-91 (2012).

Our view is that if Member States agree on surrendering powers in the field of direct taxes for countering abusive practices and aggressive tax planning, they should also structurally prevent situations in which the existence of cross-border tax disparities generates them.

In line with these arguments, this book promotes the strengthening of European tax integration as a way to provide a comprehensive solution to the problems of cross-border direct taxation within the European Union and puts forward, in Parts 1 and 6, some concrete ideas for achieving this. Positive integration, through a combination of harmonization and coordination, represents, in our view, a qualitatively better solution to the existing problems of European tax law.[28]

Besides achieving a better protection of taxpayers' rights, positive integration narrows down cross-border tax disparities in a way that cannot be achieved at the level of interpretation. This action removes, on the one hand, the obstacles that generate cross-border unrelieved double taxation and, on the other hand, the unintended tax advantages that may in some instances be incompatible with the prohibition of State aids.

In such circumstances, we submit that the prevailing interest of supranational integration within the internal market to forge an effective solution to such problems should not remain hostage to the will of even one single Member State that is afraid of losing leeway in terms of its tax attractiveness. Despite acknowledging the absence of a general supranational tax policy, we find it important to underline the point that good policy and good tax governance require an effective solution to all cross-border tax problems in the European Union, not only those on which all EU Member States happen to have an aligned opinion.

As indicated at the beginning of this introduction, the standpoint of European tax integration today is very different from what it was in its early days. Therefore, we further submit that politics should effectively pursue the policy needs of the EU internal market to no less an extent than those it addresses at the national level. The specific arguments put forward in this introduction and in the various chapters of this book show that the only way forward is promoting greater European tax integration. This book explores the problems that arise when turning the exercise of taxing powers at the national level into a residual matter, in most cases linked with the

28. P. Pistone & R. Szudoczky, *The Coordination of Tax Policies in the EU*, in *Introduction to European Tax Law on Direct Taxation*, 4th edn., pp. 27-51 (M. Lang et al. eds., Linde 2016).

implementation of supranational law or the regulation of purely domestic situations not affecting the internal market.

The contributions in Part 2 of this book approach this problem from the perspective of legitimacy, including the involvement of supranational democratically elected institutions, the instances of smaller countries and the possible overcoming of the principle of unanimity in tax matters along a pattern that has already affected other domains.

In general terms, this book sees European tax integration as a priority for action. The various contributions identify the causes behind and shortcomings of the process of supranational tax integration. In essence, the paradox of European tax integration is that, on the one hand, it establishes legal constraints on the exercise of taxing powers at the national level and, on the other hand, it fails to provide comprehensive solutions to the problems that arise in such context. In these circumstances, the vacuum of tax sovereignty makes the overall exercise of taxing powers a system of cross-border tax distortions in which players search for unintended benefits across borders and Member States enhance their tax competitiveness to the detriment of the effective establishment and full functioning of the internal market.[29]

The role of interpretation of the supranational law of the European Union is to find out the exact meaning and implications of laws, and it should be harmoniously exercised in a context in which the introduction of supranational rules pursues desirable goals of cross-border tax integration. In such context, the involvement of the European Parliament in the legislative process should secure the protection of the interest of the ultimate stakeholders, in line with the famous motto "no taxation without representation".

We see the progress in European tax integration as the best way to bring together law, policy and politics in the service of the European Union, eliminating the hidden beggar-thy-neighbour tax strategies that have in the past induced multinational enterprises (MNEs) to relocate and their underlying distortive effects on competition within the internal market. Furthermore, we believe that higher levels of European tax integration could also be the starting point for bringing global tax competition within the boundaries of fairness among countries.

29. Such paradoxes in the construction of the EU polity have always been recognized in academic debate. *See*, for instance, the editorial of F. Vanistendael, *No European taxation without European representation*, 9 EC Tax Review 3, pp. 142-143 (2000).

The ultimate – be it manifest, implicit, hidden or unsaid – goal of the European Union is to achieve full supranational integration, and law, policy and politics should bring us there. We know neither when nor how this will be accomplished. By contrast, we do know the supranational law that binds all EU Member States and citizens, and we know that, in tax matters, the exercise of national sovereignty must comply with the supremacy of EU law and its principles, as interpreted by the ECJ. Perhaps a traffic light should regulate the legal flows connected with European tax integration, steering traffic in the only possible direction, that of greater European tax integration connected with a residual exercise of national sovereignty in the field of direct taxes. Good policy at the EU level means the ability to address the problems of European tax integration with the appropriate legal tools in order to secure good governance to the European Union in this delicate domain, where national sovereignty merely keeps its form after having relinquished its substance to an international level of decision making.

Notes

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