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An EU Corporate Income Tax Filling the Hole in the EU Budget: An End to Tax Competition and "Tax Abuse"?

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In his contribution to the 75th anniversary issue of the *Bulletin for International Taxation*, Professor Vanistendael proposes that an EU corporate income tax should be introduced to raise revenue for the EU Budget, end tax competition between the Member States and tax abuse, and increase democracy within the European Union.

1. Introduction: A Short Historical Note

The Bulletin for International Fiscal Documentation was founded 75 years ago in a period when the Western world was slowly but surely rising from the physical and spiritual ashes of World War II. The Treaty of Rome, establishing the European Economic Community (EEC) in 1957, and the OECD, founded in 1963, were the last in a series of new international institutions that have been shaping the international scene since then. It was the start of an era of unprecedented economic growth and exuberant optimism.

At the beginning, nobody could imagine that the Treaty of Rome would have anything to do with income tax. But, in 1986, the Treaty provisions on the fundamental economic freedoms, which did not contain any reference to income tax, suddenly became relevant for one of the essential rules of international taxation: the difference in tax treatment between resident and non-resident taxpayers.[1]

Since that momentous decision, international income tax inside the European Union has differed from international income tax outside the European Union. That coexistence of different tax orders (the international and the European Union) has been more or less accommodated until the publication of the Final Reports of the OECD/G20 Base Erosion and Profit Shifting (BEPS) initiative in 2015, when the OECD made a massive effort in the Inclusive Tax Framework to reduce international tax leakage that was legally defined as "abuse of tax treaties".

That difference of tax orders is the subject of the present article, in particular the question of whether the instruments in the fight against international tax abuse can be the same within the European Union and in the international tax order. The answer of this article is that these instruments cannot be the same, but that the European Union has an efficient instrument against tax abuse, which cannot be used in the same way in the international tax order. The final question is whether the Member States of the European Union really want to use this instrument.

2. A Summary of the Contribution

This contribution will deal with the question of whether the European Union and its Member States can subscribe and apply "*ne varietur*" to the measures proposed by the OECD Inclusive Framework to counter international tax avoidance and evasion. In particular, the question will be discussed as to whether the limitation on benefits (LOB) as elaborated in the principal purpose

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1. *See* FR: ECJ, 28 Jan. 1986, Case 270/83, *European Commission v. French Republic (Avoir Fiscal)*, Case Law IBFD.

test (PPT) for the abuse of tax treaties in article 29 of the OECD Model[2] is compatible with the objectives of the internal market as provided for in the EU treaties.

The article starts from the fundamental objectives of the European treaties – avoiding military conflicts through economic integration of the EU Member States, by way of market competition and approximation of the legal framework of the Member States for that competition (*see* section 3.). In the original institutional set-up of the European Community, the decision-making power to achieve these objectives originally rested exclusively with the Member States (*see* section 4.). That is no longer the case, except for initiatives of approximation of the legal framework for taxation of the Member States. This exception has repeatedly resulted in an opposition between the protection by the Member States of their national budgetary interest and the imperative of economic integration in the Union. There follows a short historical survey of the case law in the struggle before the Court of Justice of the European Court (ECJ) between the Member States, invoking their national concepts of tax avoidance and evasion, justifying their national tax barriers, on the one hand, and the fundamental economic freedoms as the legal instruments of European economic integration, on the other (*see* section 5.). Meanwhile, the ECJ, the supreme umpire of the European treaty rules, was already developing a doctrine of abuse of Community law to protect the legitimate interests of the Member States (*see* section 6.). That doctrine also found its way into EU tax law and culminated in the Danish beneficial ownership tax cases,[3] in respect of which, at the time of writing this article, the European and the international tax community were awaiting impatiently the outcome of the second round. From this analysis of the objectives of economic integration and legal harmonization, on the one hand, and the development of the anti-abuse case law of the ECJ, on the other, I will endeavour to draw reasonable conclusions as to the current tax position of multinationals that are active in the internal market of the European Union. Next, I will confront the general anti-avoidance rule (GAAR) provision in article 6 of the Anti-Tax Abuse Directive (ATAD) (2016/1164)[4] with the PPT in article 29 of the OECD Model, and illustrate the difference between the two provisions and find out the reasons for these differences (*see* section 7.). Subsequently, I will discuss why the GAAR of ATAD (2016/1164) and the new Commission proposal for a Common Consolidated Corporate Tax Base (CCCTB) are not efficient solutions to eliminate tax abuse in the European Union and to resolve the opposition between the national tax interests of the Member States and the imperative of economic integration of the Union (*see* section 8.). I will conclude with a radical solution – a proposal for a uniform European corporate income tax for multinationals doing business in the EU internal market, the revenue in respect of which will flow not to the national budgets of the Member States but directly to the annual budget of the Union (*see* section 9.). My article ends with its formal conclusions (*see* section 10.).

3. The Objective of the European Union and the Instruments to Achieve These Objectives

It is well known that the fundamental objective of the foundation of the EEC was to eliminate completely the possibility of a war breaking out between the Member States of that Community and, in particular, between France and Germany. Within 75 years, these two historical enemies on the European continent had been involved in three increasingly bloody wars. That fundamental objective is crystal clear from the Treaty of Rome (1957)[5] and even more so from its predecessor, the Treaty Establishing the European Coal and Steel Community (1951).[6] The preamble of the Treaty of Rome appeals to "... strengthen the safeguards of peace and liberty by establishing this combination of resources...". The Preamble of the Treaty of the Coal and Steel Community, which was concluded less than seven years after the end of World War II, is even more explicit: "Considering that world peace can be safeguarded only by creative efforts commensurate with the dangers that threaten it...". That peace objective has been successful. Between the Member States of the European Union, peace has been maintained for more than 75 years, the longest peace period in European history.

The instruments to achieve that objective were double: (i) gradual economic integration; and (ii) gradual legal integration, referred to as "harmonisation or approximation". Gradual economic integration would be achieved through market competition in which business from different Member States would confront each other in one single market. From that confrontation, it was expected that more products from other Member States would become available, that there would be economies of scale because of the bigger size of the market, and that competition would equalize prices and act as an incentive for best business practices. The intensification of cross-border economic activity was deemed to be the best guarantee in preventing any political conflict from escalating into a military conflict.

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2. Most recently, *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Treaties & Models IBFD.
3. *See* DK: ECJ, 26 Feb. 2019, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 v. Skatteministeriet*, Case Law IBFD and DK: ECJ, 26 Feb. 2019, Joined Cases C-116/16 and C-117/16, *Skatteministeriet v. T Danmark*, Case Law IBFD.
4. 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, OJ L 193 (2016), Primary Sources IBFD [hereinafter the Anti-Tax Abuse Directive or ATAD (2016/1164)].
5. Treaty of Rome (EEC) of 25 March 1957.
6. Treaty establishing the European Coal and Steel Community (ECSC) of 18 April 1951.

The instrument for the integration of the legal framework, within which free market access and free market competition should take place, consisted in the gradual harmonization of the different rules of the Member States. It also encompassed the establishment of common minimum rules in order to achieve equivalence between different legal systems.

4. The Decision-making Process on the Way to Economic and Legal Integration

Originally, the Council of national ministers was the exclusive engine of decision-making in the legislative process towards economic and legal integration. In the Council, the national ministers decided unanimously, which meant that the individual Member States retained full control of the integration process. As the number of Member States increased, and economic and legal integration intensified, it became more and more difficult to reach decisions unanimously. In 1986, the Single European Act (SEA)[7] introduced a limited form of qualified majority decision-making in the Council. In 1992, the Treaty on European Union (TEU)[8] extended substantially the scope of qualified majority voting (QMV), and also introduced the co-decision procedure in which approval of the European Parliament was also required for EU directives and regulations. Together, these two rules for decision-making constituted the “ordinary legislative procedure”. Since then, the majority of EU legislation is subject to QMV in the Council and approval by a majority of the European Parliament. Finally, as of 1 January 1993, the internal market was established meaning that the non-discrimination provisions of the Treaty on the Functioning of the European Union (TFEU)[9] were to be fully implemented, requiring national treatment for all foreign economic operators from other Member States.

However, article 114(2) of the TFEU provides that the ordinary legislative procedure “... shall not apply to fiscal provisions...”. In tax matters, the so called “special legislative procedure” applies. This procedure reserves legislative approval exclusively to the Council, which decides by unanimous vote. The European Parliament is only informed and has no decision-making power. This means that, de facto and legally, the Member States still have full control of the process of economic and legal integration in the field of taxation. That power is combined with full fiscal sovereignty over national tax legislation and the power to conclude tax treaties, repeatedly claimed by the Member States and jealously guarded as their legal preserve. The only limitations under EU law to this fiscal sovereignty exercised by the Member States over national tax law and tax treaties are the non-discrimination provisions of the TFEU and a handful of direct tax directives facilitating cross-border business reorganizations and payments of dividends, interest and royalties.[10] Provisions in respect of direct tax law in the fields of personal and corporate income tax are largely not harmonized in the European Union.

Common commercial policy is an exclusive competence of the European Union, but the conclusion of international tax conventions is not considered to be part of the common commercial policy, and belongs to the fiscal sovereignty of the Member States. In fact, with the exception of the customs union, taxation is not mentioned at all in the distribution of competences between the European Union and the Member States in article 3 of the TFEU. The provision in article 3(2) of the TFEU that the European Union has exclusive competence for the conclusion of an international agreement when necessary to exercise its internal competence or affect common rules has never been successfully invoked against a tax convention. The result is that, in the fields of withholding tax rates, techniques used in the elimination of double international taxation, the definition of residence of taxpayers, permanent establishments (PEs) and the distributive rules of tax competence and LOB clauses, there is a great variety in the international tax conventions between the individual Member States and third countries. With regard to tax treaties, the European Union does not present itself to the rest of the world as one single market, but as 27 different Member States.

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7. Single European Act (SEA) of 28 February 1986.
8. Treaty on European Union (TEU)/Maastricht Treaty of 1 November 1993.
9. Consolidated Versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), OJ C 115/01 (2008), Primary Sources IBFD.
10. *See* Council Directive 2011/96/EU of 30 November 2011 on the Common System of Taxation Applicable in case of Parent Companies and Subsidiaries of Different Member States, OJ C 107 (2011), Primary Sources IBFD; Council Directive 2003/49/EC of 3 June 2003 on a Common System of Taxation Applicable to Interest and Royalty Payments Made between Associated Companies of Different Member States, OJ L 49 (2007), Primary Sources IBFD; and Council Directive 2009/133/EC of 19 October 2009 on the Common System of Taxation Applicable to Mergers, Divisions, Partial Divisions, Transfer of Assets and Exchange of Shares Concerning Companies of Different Member States, OJ L 310 (2009), Primary Sources IBFD.

5. Incidence of the Instruments of Economic and Legal Integration on Abuse of Tax Law

5.1. Overview

I apologize to the reader for repeating these fundamental objectives of the European Union and the instruments for economic and legal integration, which are generally well known. But these fundamentals seem to be forgotten in discussing issues of tax avoidance and abuse of tax law by EU business taxpayers that are economically active in the whole European Union. In the decision where to locate a business activity, an enterprise is taking into account many factors, such as the availability of (skilled) labour, the cost of labour, the cost of buying or renting commercial or industrial property, the international connections and infrastructure available on the location, the general regulatory environment and the efficiency and quality of public service, and even the usual operational language. In the European Union, many of those factors have been "harmonized" through efforts of economic and legal integration and have become comparable, so that they do not make a decisive difference in the location. Significant differences still remain in the cost of labour and the cost of commercial or industrial real property. There are differences in the incidence of corruption, but the general regulatory environment has become "harmonized" and, on the continent, the English language has become the standard of EU-wide business operations. However, significant differences in tax burdens on corporate profits and in the degree of cooperation by national tax administrations have remained. Within the European Union, the differences in statutory tax rates in 2021 are substantial, ranging from 29.9% in Germany[11] and 28.4% in France to 12.5% in Ireland and 9% in Hungary. In addition, there is a panoply of special tax regimes with a lower effective rate than the statutory rate. The result is that the national corporate income tax regime in the European Union is one of the major factors in the decision of the location of a business activity.

The foregoing description represents the choices of the factors for European enterprises planning to do business in one or more of the Member States. That choice is comparable to the choice of an enterprise doing business in one of the states of the United States, with one major exception. Non-tax factors, like language, may be less divergent in the United States than in the European Union, but one factor is completely different - the corporate income tax. The US rules determining the tax base and tax compliance for corporations are almost identical. Tax rates may vary from state to state, because of state and city surcharges, but never in a relationship of 1:2 or 1:3 as in the European Union.

The question is whether an EU business enterprise has a free choice in picking the Member State in which it plans to do business mainly for tax reasons, which constitute an integral part of the business choice, or whether that choice will be restricted by some criteria. The question cuts even deeper when the question is whether an established enterprise is planning to move from one Member State to another only or mainly for tax reasons. Within the framework of the national corporate income tax systems of the Member States that same question has never been raised because, when moving within the same state, the enterprise remains subject to the same corporate income tax. However, in all Member States a very similar question has already been debated and decided for decades. The question is whether a taxpayer is entitled to choose another legal business framework that is taxwise more advantageous, when this advantageous legal business framework is well established in the tax statute.[12] In the national case law of the Member States, the answer to that question has been largely positive, provided that there is a business purpose for the transaction.[13]

When the business is investing from outside the European Union, the difference between the effective withholding rates on dividends, interest and royalties from EU-source subsidiaries is also a major factor deciding through which Member State the business will enter the European Union. In several Member States, the rate for passive income flowing to third countries is reduced to zero, by a tax treaty, but many states apply the usual tax rates of 5%, 10% and 15% of the OECD Model. These tax variations are important, and explain, to a large extent, the countries of entry for the capital flows from third countries into the European Union, in particular, for financial activities and business involving intellectual property income. Member states have steadfastly resisted any attempt to "harmonize" their withholding tax rates on income flows to and from third countries, while, within the European Union, withholding tax was abolished for flows of dividends, interest and royalties in parent-subsidiary relationships.[14] The fact that passive income can travel freely between Member States within a group relationship has made the differences in corporate income tax between Member States immediately accessible to non-EU multinationals. At the same time, it has exacerbated the differences at the gates of the European Union between Member States with zero rates of withholding tax and Member States still applying the rates of the OECD Model for passive income flowing in and out of the European Union. The question is whether the international investors from outside the European Union also have the free

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11. For Germany, including an average for the *Gewerbesteuer* (business tax) and *Solidaritätszuschlag* (solidarity surcharge).
12. In the French literature, this question is termed as "*le choix de la voie la moins imposée*". The best English translation I could find was "the lower tax route".
13. In the United States, this question was decided by the Supreme Court (SC) in US: SC, 7 Jan. 1935, *Gregory v. Helvering*, (1934) 68 F2d 809 (2d Cir.), affd. (1935) 293 U.S. 465. *See also* several essays on the application of the concept of tax avoidance in different tax jurisdictions in *Tax Avoidance and the Rule of Law* (G. Cooper ed., IBFD 1997).
14. *See supra* n. 10.

choice in picking the Member State of entry in the European Union, and whether, once inside the European Union, they then enjoy the same freedom of choice as any business established in the European Union to locate their business activities in their Member State of choice.

The question of abuse of tax law is often put in the same terms of EU law for both types of business decision, i.e. a movement within the European Union and a movement from or to a third country. For movements between Member States and third countries, however, only the free movement of capital applies. The language of the TFEU does not distinguish between principles, whether the movement originates in another Member State or in a third country. Yet the answer to the question of abuse of tax law may not be identical. Confronted with the EU objectives of economic and legal integration and the legal and economic instruments used to achieve this integration, both situations need to be distinguished. For a move within the European Union from one Member State to another, the imperative of achieving economic and legal integration is important in order to establish a level playing field in corporate income tax. However, this objective is irrelevant for a move from or to an enterprise established in a non-EU country.

From the perspective of the obligation to a closer economic and legal integration of the European Union, there is a fundamental difference which already has been used as an argument in the case law.[15] In the case of an enterprise moving out of a Member State to another Member State, there is not only the question of non-discrimination by the host state of the new establishment, but also a preliminary question of which Member State is taxwise the most attractive to move to. That is the question of the existence of a level playing field between Member States in the whole European Union. In view of the differences between the national systems of corporate income tax, it is clear that this level playing field currently does not exist. Neither the multinationals operating in the European Union as a whole nor most Member States want such a level playing field. The latter hold the key to a level playing field because only the Council with a unanimous vote has the power to decide to introduce such a system.

The combination of three factors inevitably leads to the logical and legal conclusion that business enterprises have the fundamental right to choose the national regime of corporate income tax that is the most advantageous and results in the lowest tax liability. These three factors are: (i) the persistent differences in tax burdens of national tax systems without any realistic prospect of "harmonisation or approximation", after almost 65 years; (ii) the clear objective of an ever closer legal and economic integration of the Member States of the European Union;[16] and (iii) the legal use of the fundamental treaty freedoms and the economic use of market competition as the major instruments to achieve that ever closer legal and economic integration of the Member States. Under these circumstances, the choice of a most advantageous tax regime cannot be equated in any way with an abuse of tax law. However, there is one essential condition for enjoying the freedom of that choice and that is that the cross-border establishment or transaction must be genuine or real, or in the words of the ECJ "not wholly artificial". That is the essence of the holding of the ECJ in *Cadbury Schweppes* (Case C-196/04),[17] which has been confirmed in a more recent article by the current president of the ECJ.[18]

That position is very similar to the position taken by the majority of the courts in the Member States in cases of abuse of tax law in matters of national corporate income tax, except for one aspect. Abuse of tax law is often established, even when there is a valid business purpose, but the tax advantage is clearly the dominant factor shaping the legal form of the business transaction or establishment.[19] In order to determine whether the tax factor is the dominant factor, it is necessary in some cases to make a comparison between the tax advantage and the importance of the other factors leading to the particular legal form of the transaction or establishment. That comparison is often very difficult to make, and, therefore, the PPT introduced in the new article 29 of the OECD Model (2017) that lowers the threshold of abuse to "one of the principal purposes" provides more leeway to tax administrations against instances of aggressive tax planning. The case law of the ECJ allowing only restrictions in cases of "wholly artificial transactions" is clearly a different and much narrower standard.

The objective of the European Union is full economic and legal integration. At the end stage of the internal market, this situation is very similar to the situation of a single national market. The two instruments to achieve this final stage are legal and economic competitive pressure of different national systems. However, the legal instrument of approximation of corporate income tax systems until now has been notoriously unsuccessful because of the requirement of unanimity in the Council. That

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15. SE: ECJ, 18 Dec. 2007, Case C-101/05, *Skatteverket v. A*, para. 37, Case Law IBFD.
16. The first and the last resolution of the Preamble of the TEU literally contain these objectives: "Resolved to achieve the strengthening and convergence of their [the member states'] economies …" and "Resolved to continue the process of creating an ever closer union …"
17. UK: ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, paras. 51, 55 and 72, Case Law IBFD.
18. K. Lenaerts, *The Concept of "Abuse of Law" in the Case Law of the European Court of Justice on Direct Taxation*, 22 Maastricht J. Eur. & Comparative L. (2015). *See* the five implications drawn from *Cadbury Schweppes* (C-196/04), *supra* n. 17, at pp. 340-343 and the Concluding Remarks at p. 350: "Indeed, in Cadbury Schweppes the Court of Justice ruled that, regardless of the motivation behind the exercise of the rights to free movement, in the absence of objective factors proving the existence of a wholly artificial arrangement, there cannot be an abuse".
19. *See* the comparative examples in Cooper ed., *supra* n. 13.

leaves only the instrument of economic competitive pressure and the legal pressure of the fundamental freedoms to achieve the objectives of the European Union.

Within one national tax system, the national legislator is the sole and ultimate arbiter of the variance of the tax burden, and the degree of tax competition allowed between enterprises economically active in the country. However, in the European Union as a whole, there are no overall statutory standards for minimum or maximum tax burdens between Member States.[20] Each individual Member State determines for itself the level of corporate income tax, without any minimum or maximum. There is no overall EU criterion available for determining a minimum or maximum tax rate. Applying comparisons between tax advantages and the volume of transactions or establishments in individual cases without any overall European-wide minimum or maximum tax burden is likely to result in arbitrary decisions. The tax competition resulting from the variance of national tax burdens is one of the essential engines for achieving economic integration in the European Union. As there are no common standards on minima, tax competition in the European Union is often considered to be excessive, in particular, by national ministers of finance. However, excessive tax competition in the European Union as a whole should not be mitigated by way of limiting tax abuse in individual cases of bilateral cross-border transactions or establishments but by general statutory standards defining the minimum and maximum tax rates applying to the European Union as a whole.

The argument of allowing competitive pressure of the variance of national tax burdens for economic integration of the European Union is not valid, however, for capital flows from and to third countries. These countries and the taxpayers subject to their tax jurisdictions are not subject to the imperative of economic integration with the goal of becoming an "ever closer union". That is the reason why the fundamental freedom to move capital cannot be applied in an identical way to movements exclusively inside the European Union and movements from and to third countries outside the European Union. Taxwise, the European Union does not present itself as an integrated market economy to third countries.[21] Tax access of capital flows to and from the European Union is determined by the international tax conventions of the Member States, in which withholding taxes on capital income vary considerably. Once that gate is passed, these capital flows can move freely inside the European Union to the tax jurisdiction of preference. The variance in tax burdens for capital flows from outside the European Union is even greater than for capital flows inside the European Union, without any obligation to strive for an "ever closer union". The consequence is that the interpretation of abuse of tax law and tax treaties under the free movement of capital-to-capital flows from and to third countries has a wider interpretation than for capital flows strictly inside the European Union. This seems to indicate that, under article 29 of the OECD Model, treaty benefits on capital flows between third countries and EU Member States can be denied under the same circumstances as between non-EU countries at the international level. However, this is not the case for cross-border flows of capital between two EU Member States.

5.2. Interim conclusions

The foregoing analysis demonstrates that there is a fundamental contradiction between the objective of an ever closer economic integration of the Member States of the European Union, on the one hand, and the drive against abuse of tax law as it is practised in national tax law and in international tax law between sovereign tax jurisdictions, on the other. In national tax law, only the national tax legislator is the ultimate arbiter of the criteria of tax abuse. In international tax law, there are always two arbiters with equal taxing rights, but not subject to any higher imperative of economic integration. So far, the ECJ has refused to act on this higher imperative of the TEU of an ever closer economic integration, when it decided that the prohibition of discrimination on the basis of nationality failed to provide a solution for cumulative tax burdens in cases of "disparities" between the tax laws of two Member States.[22] That failure to resolve the cases of cumulative application of disparate national tax regimes raises the question of whether the standard of abuse of tax law for the European Union can be based on criteria that are used in international tax law, where the imperative of economic integration is absent. The failure to resolve this issue constitutes a roadblock to an economically and legally coherent way of fighting abuse of tax law at the level of the Union. In order to illustrate this position, I will now briefly review the way in which national anti-abuse provisions and the concept of abuse of EU law have been used in the case law of the ECJ to "balance" the national fiscal interests of the Member States with the fundamental objectives of the Union.

20. In the Ruding Report (1992), a committee of experts recommended a minimum tax rate of 30% in a first stage and a maximum corporate tax rate of 40% in a second stage, but that recommendation never made it to the agenda of the Commission. *See* Report of the Committee of Independent Experts on Company Taxation, pp. 209 and 210, Office for the Official Publications of the European Communities (1992) [the Ruding Report (1992)].

21. That argument has already been accepted by the ECJ in *A* (C-101/105), *supra* n. 15, at para. 37: "… because of the degree of legal integration that exists between the Member States of the EU, … the taxation by a Member State of economic activities having cross-border aspects which take place within the Community is not always comparable to that of economic activities involving relations Member States and third countries …"

22. BE: ECJ, 14 Nov. 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres v. Belgische Staat*, paras. 17-22, Case Law IBFD and BE: ECJ, 19 Sept. 2012, Case C-540/11, *Daniel Levy and Carine Sebbag v. État Belge*, para. 27, Case Law IBFD.

6. The Two Strands of Abuse of Tax Law in ECJ Case Law

6.1. Introductory remarks

Historically, there have been two strands of abuse of tax law in the case law of the ECJ. These two strands are: (i) a series of cases in which Member States have been invoking national statutory provisions or doctrines to justify limitations on the fundamental freedoms under the "Rule of Reason";[23] and (ii) a series of cases in which a theory of abuse of communitarian law was developed to protect the legitimate interests of the Member States.

6.2. The conflict between national anti-abuse provisions and the objective of economic integration of the Union

Originally, the ECJ was rather hesitant to accept national measures against tax avoidance and tax evasion limiting the fundamental economic freedoms.[24] Eventually, however, the ECJ accepted in principle the concept of tax avoidance as a legal ground for restricting the fundamental freedoms. But it took some time before national anti-avoidance rules effectively restricted the effect of the fundamental freedoms because they often had been formulated very loosely and were held to be out of proportion with their objective of reducing tax avoidance, taking into account the fundamental freedoms to move from one Member State to another.[25] Only in *Marks & Spencer* (Case C-446/03)[26] did the ECJ accept tax avoidance, together with other justifications, to restrict the cross-border transfer of losses. But even in that case, the ECJ termed the cross-border transfer of final losses as "disproportionate".[27] In the name of fighting tax abuse, the possibility to transfer final losses was gradually whittled down in subsequent cases to an almost negligible theoretical possibility.[28]

6.3. The doctrine of abuse of communitarian law in taxation

Long before the first decision in *Avoir Fiscal* (Case 270/83), involving national anti-abuse measures in direct taxation, the ECJ had already developed in non-tax cases a doctrine prohibiting abuse of the fundamental economic freedoms to circumvent national rules protecting legitimate interests of the Member States.[29] That doctrine was applicable to treaty provisions of primary treaty law as well as to directives and regulations of secondary EU law. In 2000, that doctrine was applied for the first time in a tax case of circumventing fully harmonized communitarian customs rules.[30] In 2006, the same doctrine was applied to the (most recent) VAT Directive (2006/112),[31] in which the tax base had been largely harmonized.[32] Specifically, in *Halifax* (Case C-255/02), the ECJ accepted that the prohibition of abuse of communitarian law was a principle for the interpretation of EU law that was also applicable in VAT, even in the absence of a specific anti-abuse provision. In that case, there was no specific anti-abuse provision, neither in the VAT Directive (2006/112) nor in the UK law implementing the directive.

6.4. *Cadbury Schweppes*: The classical abuse case

Finally, the question of whether an enterprise doing business in the whole European Union has the free choice to pick an advantageous national tax regime came to a head in the *Cadbury Schweppes* decision.[33] In that case, the ECJ made a thorough analysis of the two strands of the anti-abuse doctrine. These two strands are: (i) the doctrine of abuse of Community law as a limitation of the fundamental economic freedoms without any link to national restrictive measures; and (ii) the scope of a particular form of national anti-abuse legislation as a restriction on the fundamental economic freedoms. In making this analysis, the ECJ answers two clear questions formulated by the referring national court. The first question was whether

23. This theory was first established in DE: ECJ, 20 Feb. 1979, Case 120/78, Rewe-Zentral *AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, para. 8, Case Law IBFD.
24. *Avoir Fiscal* (Case 270/83), *supra* n. 1, at para. 25: "Furthermore, the risk of tax avoidance cannot be relied upon in this context. Art. 52 of the EEC Treaty does not permit any derogation from the fundamental principle of freedom of establishment on such a ground …".
25. *See* UK: ECJ, 16 July 1998, Case C-264/96, *Imperial Chemical Industries (ICI) v. Kenneth Hall Colmer*, para. 26, Case Law IBFD: "As regards the justification based on the risk of tax avoidance, suffice it to note that the legislation at issue in the main proceedings does not have the specific purpose of preventing wholly artificial arrangements, set up to circumvent United Kingdom tax legislation, from attracting tax benefits, but applies generally to all situations in which the majority of a group's subsidiaries are established, for whatever reason, outside the United Kingdom".
26. UK: ECJ, 13 Dec. 2005, Case C-446/03, *Marks & Spencer plc v. Halsey (Her Majesty's Inspector of Taxes)*, Case Law IBFD.
27. Id., at paras. 55 and 56.
28. SE: ECJ, 19 June 2019, Case C-607/17, *Skatteverket v. Memira Holding AB*, Case Law IBFD and SE: ECJ, 19 June 2019, Case C-608/17, *Skatteverket v. Holmen AB*, Case Law IBFD.
29. NL: ECJ, 3 Dec. 1974, Case 33/74, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, Case Law IBFD and NL: ECJ, 7 Feb. 1979, *J. Knoors v. Staatssecretaris van Economische Zaken*.
30. DE: ECJ, 14 Dec. 2000, Case C-110/99, *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, Case Law IBFD.
31. Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax, OJ L 347 (2006), Primary Sources IBFD.
32. UK: ECJ, 21 Feb. 2006, Case C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v. Commissioners of Customs & Excise, BUPA Hospitals Ltd, Goldsborough Developments Ltd v. Commissioners of Customs and Excise and University of Huddersfield Higher Education Corporation v. Commissioners of Customs and Excise*, Case Law IBFD.
33. *Cadbury Schweppes* (Case C-196/04), *supra* n. 17.

establishing and capitalizing companies in another Member State solely to take advantage of a more favourable tax regime than that in the home state is abusing the economic freedoms of the TEU,[34] i.e. the question of abuse of EU law. The second question was whether, if Cadbury Schweppes was exercising the move to establish an International Financial Services Centre (IFSC) in Ireland in a “genuine” manner, it was correct to view the application of the controlled foreign company (CFC) to this situation as an unjustified restriction on the exercise of the freedoms or a discrimination.[35] The answer of the ECJ to both questions was crystal clear.

To the first question the answer was:

> ... the fact that a Community national whether a natural or a legal person, sought to profit from tax advantages in force in a Member State other than his State of residence cannot in itself deprive him of the right to rely on the provision of the Treaty...[36]

and further that:

> ... it follows that the fact that in this case CS decided to establish CSTS and CSTI in the IFSC for the avowed purpose of benefiting from the favourable tax regime which that establishment enjoys does not in itself constitute abuse[37]

i.e. an enterprise has the right to enjoy the benefits of tax competition between Member States.

Although the ECJ does not refer specifically to the objective of economic integration in the internal market, it is clear that its conclusion on the first question neatly dovetails with the competitive pressure as an instrument to achieve full market integration. In the absence of EU-wide harmonization of corporate income tax, tax competition is an essential instrument for the realization of an economically integrated market. The fact that enterprises, effectively active in the whole European Union, take advantage of the persisting tax divergencies between the national tax systems cannot be characterized as an abuse, on the essential condition that the cross-border transaction or establishment reflects a minimum of economic reality.

To the second question, i.e. whether the anti-abuse CFC legislation is justified and proportionate, the answer was:

> ... in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality...[38]

In the answer to the second question, the emphasis is on the condition of proportionality. The scope of the national anti-abuse provision must not be wider than what is necessary to prevent the abuse of tax law. The abuse of tax law consists in an activity that is “wholly artificial” because it does not reflect economic reality. Basically, the two strands of the anti-abuse doctrine, the EU strand and the national justification strand lead to the same conclusion. That is, there is no need for the prevention of tax abuse, when a taxpayer in the European Union makes use of advantageous disparities in tax legislation, provided that his economic activities are not “wholly artificial”. Economic activities are “wholly artificial” when they do not reflect economic activity on the basis of:

> objective factors which are ascertainable by third parties with regard in particular, to the extent to which the CFC physically exists in terms of premises, staff and equipment.[39]

That is the tax abuse doctrine to be applied for cross-border operations within the European Union. It is important to note that, in applying the proportionality test, the ECJ does not make any proportional link between the size or importance of the real economic activity and the amount of profit that is subject to the beneficial tax regime, a link that is often made in the political debate on tax abuse. That link is often used by national tax administrations to characterize an arrangement as abusive. It is very difficult to apply such a proportional link between the economic importance of the arrangement and the amount of profits benefiting from an advantageous tax regime. There are, indeed, very few objective criteria in economic theory to establish such a proportional relationship. Finally, it should be emphasized that these standards do not apply in an identical way to capital movement between third countries and EU Member States because of the absence of the imperative of economic integration, as explained in section 5. on the incidence of legal and economic integration on tax abuse.

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34. Id., at para. 23.
35. Id., at para. 24.
36. Id., at para. 36.
37. Id., at para. 38.
38. Id., at para. 55.
39. Id.

7. The Impact of the ATAD (2016/1164)

In the general picture of the fight against tax avoidance, the introduction of a general EU GAAR provision in the ATAD (2016/1164) is, of course, of paramount importance.[40] In that directive, the Council made an attempt to protect the national corporate tax base of the EU Member States against tax evasion, tax avoidance and various forms of aggressive tax planning in the internal market,[41] an objective easily carrying the unanimity of the Member States. The objective of the ATAD (2016/1164) also reflects the BEPS programme of the OECD in focussing on the protection of national tax systems against the tax competition of tax havens and countries with low corporate tax rates. Several specific measures in the ATAD (2016/1164) confirm this intention: the interest limitation rule, the introduction of exit taxes, the CFC rules and rules against hybrid mismatches. The most important measure is the introduction of a general GAAR article that will apply uniformly to purely domestic and to cross-border operations. The major question that so far has caught the attention of commentators is whether the introduction of the general GAAR in article 6 of the ATAD (2016/1164) has changed anything on the definition of tax abuse as established in the case law of the ECJ.

The wording of article 6(1) of the ATAD (2016/1164) reflects almost literally the wording of the PPT test in article 29 of the OECD Model (2017). The key words of that article are:

> the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law

which is almost identical to:

> obtaining that (treaty) benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless... that benefit... would be in accordance with the object and purpose of the relevant provision of this convention.

It means that, even when a taxpayer has other relevant business purposes that exceed his tax objectives, the tax benefit can be refused or the arrangement can be ignored under the directive as well as the convention. The treaty text is somewhat wider because it refers also to an indirect way of obtaining treaty benefits. *Prima facie*, this wording seems far away from the narrow concept of "wholly artificial transactions" in *Cadbury Schweppes*.

However, the rest of the text of article 6 of the ATAD (2016/1164) is quite different from the PPT test as proposed in article 29 of the OECD Model. The only saving grace in the PPT test is when granting the benefit in these circumstances is in accordance with the object and purpose of the relevant provisions of the tax treaty. That saving grace is also included in the ATAD (2016/1164). But that directive puts in an additional condition to deny a tax benefit and that is that the arrangement must be genuine having regard to all facts and circumstances. The latter condition does not figure in the text of the OECD Model. That is, the fact that there is a clear goal of achieving a tax benefit is irrelevant when the arrangement is "genuine". Whether an arrangement is non-genuine is determined in article 6(2) of the ATAD (2016/1164). A non-genuine arrangement is an arrangement that is "not put into place for valid economic purposes which reflect economic reality". That means that the GAAR in article 6(1) of the ATAD (2016/1164) is only applicable when the two explicit conditions are fulfilled. These conditions are that: (i) the transaction or arrangement is undertaken for valid economic reasons; and (ii) the transaction or arrangement must reflect economic reality. The conclusion is that the GAAR in the ATAD (2016/1164) and the PPT test in the OECD Model are clearly different. That difference is fully justified because the objectives of the OECD and the international tax community are not focused to full market integration with the final goal of achieving an internal market that is very close to one national market. The second condition, of reflecting economic reality, is identical to the condition formulated by the ECJ to exclude abuse of tax law in *Cadbury Schweppes*, i.e. carrying on "genuine economic activities".[42]

The first condition of the GAAR in the ATAD (2016/1164) is not mentioned in that case, but the condition follows from the reference in article 6(1) to "one of the main purposes". An arrangement or transaction may have several reasons, and the requirement is that, beyond the tax reason, there must be a valid economic reason. That will almost always be the case when an arrangement or transaction reflects the economic reality because, without an economic (non-tax) reason, it is almost impossible for a transaction or arrangement to reflect economic reality. The important conclusion is that the GAAR definition

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40. There has been a flood of literature on this subject, but I limit myself to the following three publications: (i) W. Schön, *The Concept of Abuse of Law in European Taxation: A Methodological and Constitutional Perspective*, Max Planck Institute for Tax law and Public Finance, Working paper 2019-18 (Nov. 2019); (ii) L. De Broe & S. Gommers, *Danish Dynamite: The 26 February 2019 CJEU Judgments in the Danish Beneficial Ownership Cases*, 28 EC Tax Rev. 6, pp. 270-279 (2019); and (iii) F. Vanistendael, *From abuse to base erosion, how did it come to this?*, in *A Guide to The Anti-Tax Avoidance Directive* ch. 1, pp. 1-31 (W. Haslehner et al. eds., Edward Elgar Publg. 2020).
41. *See* ATAD (2016/1164), Preamble, para. 1: "The current political priorities in international taxation highlight the need for ensuring that tax is paid where profits and value are generated. It is thus imperative to restore trust in the fairness of tax systems and allow governments to effectively exercise their tax sovereignty." and para. 3: "It is necessary to lay down rules in order to strengthen the average level of protection against aggressive tax planning in the internal market".
42. *Cadbury Schweppes* (Case C-196/04), *supra* n. 17, at para. 66, referring to paras. 52-54.

of article 6 of the ATAD (2016/1164) is fully in line with the traditionally established case law of the ECJ in matters of abuse of tax law. Therefore, within the European Union, taxpayers developing an economic activity in the whole European Union, still enjoy the right of choice of "*la voie la moins imposée*"[43] as a result of the tax competition between the Member States, on two essential conditions. These two conditions are that: (i) the transaction or arrangement must have a valid non-tax reason; and (ii) it must reflect economic reality.

8. The Regulation of Competition in the European Union

The next question is whether competition between Member States in corporate income tax can be reduced by the general competition rules of the European Union. The EU legal tax order is established on the basis of fiscal sovereignty for the Member States with the objective of market integration through free competition, not only between private enterprises but also through economic competition between regulatory systems between the Member States. Between private enterprises, competition is regulated by EU competition and anti-trust law with the objective of preventing distortions of competition by abuse of positions of market power and unfair trade practices. Between Member States, regulatory competition is restricted through the State aid rules, but also through the gradual harmonization and approximation of legal systems and the establishment of equivalences between regulatory systems. With regard to competition between private enterprises, there has been a lot of regulation and case law defining uniform or similar market or trading practices and product standards, as it has been possible to introduce EU legislation on that matter with QMV. For competition between national tax systems, the Commission has issued a few communications[44] and a considerable number of decisions but no binding texts of directives or regulations. The focus of State aid in taxation has been on special tax regimes because the mainstream regimes were considered outside the scope of State aid provisions. The differences in general corporate tax burdens between Member States, through essential rules on tax base and tax rates, have never been targeted as prohibited tax competition.[45] Yet, these essential tax rules are the most efficient weapons in tax competition. In the absence of State aid measures and of large-scale harmonization of the corporate tax base, pressure from market competition has been the driving force to bring the general tax burdens of the Member States closer together. In the non-harmonized areas of national law, the raw commercial competition was counted on to bring divergent market prices, salaries and best production and market practices together.

The latter factor is very important for corporate income tax. In VAT, another potentially important tax area, competition between Member States has been eliminated because the tax base has been largely harmonized and rate competition was eliminated because all goods and services, which were subject to consumption tax within a single Member State, were subject to an identical national VAT rate in the Member State of final destination. That position is not the case in corporate income tax. The Member State in which the enterprise is established determines in a sovereign way its corporate income tax burden and enterprises are free to establish themselves in any Member States, provided that their establishment is effective. The European Union has the power to "harmonize" these tax regimes; however, because of the existence of the unanimous voting rule in the Council, the Member States have been in a position to block this harmonization.

The conclusion is that corporate income tax for enterprises that are active in cross-border transactions or establishments is in a kind of stalemate because the tax objectives of the European Union, one the one hand, and of the Member States, on the other, are in diametrical opposition. Due to this opposition, the European Union can only achieve full market integration: (i) through the application of the fundamental economic freedoms, which has the effect of increasing tax competition between Member States; (ii) by legal harmonization of the national tax systems; and (iii) by economic tax competition flattening the divergencies in national tax burdens Member States. The final objective of the Member States is to maximize the revenue from national corporate income tax. The competence in corporate income tax belongs de jure to the Member States, which also de facto decide on the harmonization because of the unanimity voting in the Council. Harmonization that would reduce tax competition is against the national budgetary interest of the Member States. As all Member States want to attract multinationals and because of the economic freedoms, there are few barriers, and tax competition flourishes.

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43. *See supra* n. 12.
44. On 1 December 1997, the Ecofin Council adopted a Code of conduct for business taxation that was not a legally binding text with the objective of reducing or eliminating harmful tax competition. *See also* Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation, (98/C 384/03) of 10 December 1998, Primary Sources IBFD and Commission Notice on the Notion of State Aid as Referred to in Article 107(1) TFEU (2016/C 262/01) of 19 July 2016.
45. The exception was an atypical business tax in Gibraltar, specifically designed to benefit off-shore businesses, which was held to be State aid because it did not conform on the essential structure of a corporate income tax. *See* ECJ, 15 Nov. 2011, Joined Cases C-106/09 P and Case C-107/09, *European Commission and Kingdom of Spain v. Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, Case Law IBFD.

9. How to Extract the Competitive Sting from National Corporate Income Tax?

9.1. Budget competition: The root of tax competition between Member States

It is a public secret that the Commission's initiative for the ATAD (2016/1164) was inspired by the idea to convince the Member States to accept the draft directive on the CCCTB. By accepting common rules for the tax base of companies that were operating cross-border in the EU internal market, the expectation was to reduce tax competition. However, that expectation did not materialize. Instead, the CCCTB was delayed "*ad calendas Greacas*" (i.e. to never), and the national budgetary interests were immediately served by specific measures protecting the national corporate tax base, including an EU-wide GAAR. The reason for this failure was the apprehension in some Member States for a reduction in revenues from corporate income tax and the lack of consensus on the criteria for the formula for the apportionment of the CCCTB revenue among the national budgets of the Member States. The root of that problem is the budgetary competition among the Member States, which logically results in tax competition. The solution to this problem is to introduce common EU taxes that do not flow to the national budgets of the Member States, but that directly feed the common EU budget. Such a tax exists already in the form of the common EU customs system, the revenue of which goes to the annual EU budget. This is a form of tax in which competition between Member States is completely absent. The scope, the base rules, the rates and the compliance rules are identical in all Member States. The tax is administrated not by an EU bureaucracy but by the national tax administrations of the Member States. There is a striking difference between the common customs system for the access of goods to the European Union, where customs competition is zero, and the withholding taxes of the Member States at the borders of the European Union on capital movements with third countries. The only way to effectively stamp out all forms of national tax competition between the Member States is to introduce an EU common corporate income tax, the revenue of which flows exclusively to the EU budget. The direction of that flow of revenue to the common EU budget would dispense with the apportionment criteria that are the main obstacle against the CCCTB. Such a tax would not only have a single scope and tax base, but would also have one single rate in the whole Union and, therefore, would end corporate income tax competition within the European Union.

9.2. The necessity of new own resources for the EU budget

From a budgetary point of view, that additional tax would be very welcome to finance the expected increase in EU expenses to meet the three immediate challenges of the European Union: (i) recovery from the COVID-19 crisis; (ii) climate change; and (iii) immigration. In the political agreement of 21 July 2020, the European Council unanimously agreed to some fundamental changes in the EU budget. The EU budget, and not the Member States, became liable for the reimbursement of EU borrowings under the Next Generation EU programme, and a substantial amount of these borrowings was converted into non-repayable grants for the Member States. The result was a considerable increase in the amount of EU spending, which was translated into a significant increase of the spending caps on the EU budget. What was not clear was how these future expenses, which were endorsed unanimously by the Member States, would be financed. There are only two solutions for this financing, either through: (i) contributions from the national budgets of the Member States; or (ii) new own resources for the EU budgets. In view of the increased COVID-19 debt burdens of most Member States, it is clear that a direct contribution by the national budgets of the Member States in the form of an increased common VAT or a gross national income (GNI) contribution is out of the question. That leaves only the second solution of new own resources for the EU budget, financed by new levies or taxes, which apply only at the EU level, and do not burden the national budgets. The European Council has already set a first step in that direction by approving a uniform plastic levy for the financing of the EU budget.[46] A plastic levy is, of course, totally inadequate to provide for the growing financial needs of the EU budget, and the Commission has mentioned other own resources, such as a carbon adjustment mechanism, a digital levy and a common financial transaction tax. However, the introduction of an overall EU carbon adjustment mechanism and an EU digital levy could meet considerable international resistance with the risk of fiscal retaliation. There is one tax that the European Union can introduce unilaterally without international retaliation, and that is a uniform EU corporate income tax, which, on its own, would constitute a substantial own resource to finance the EU budget.

9.3. The advantages of a single EU corporate income tax at an EU level

The idea of a specific tax system for large multinationals has already been circulating for some time. The proposed CCCTB, and the minimum tax rate of 15% that has recently been agreed internationally,[47] would also only apply to very large multinational business with revenue exceeding a certain amount. For the CCCTB, an annual minimum amount of revenue

46. Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the System of Own Resources of the EU and Repealing Decision 2014/353/EU, Euratom, art. 2.
47. On 1 July 2021, 130 countries participating in the OECD Inclusive Framework endorsed the OECD statement issued in October 2020, i.e. OECD, *Tax Challenges Arising from Digitalisation-Report on Pillar Blueprint and Report on Pillar Two Blueprint* (OECD 2020), including a worldwide minimum tax rate of 15% for certain categories of global companies.

of EUR 750 million has been proposed. The main argument for this EU corporate income tax is that business enterprises of that size, which are active economically in the EU internal market, are also the main beneficiaries of the existence and the well- functioning of that market. It is only logical that these enterprises primarily contribute to the level of government that is politically responsible for the functioning of that market and that is the European Union as a whole. At present, these EU-wide enterprises mainly provide revenue for the national budgets of one single or only a few Member States in which they are established, and which have no overall political responsibility for EU market conditions. The principal reason for tax competition is also the drive between Member States to attract the establishments and activities of these enterprises within their national territorial tax jurisdiction. For smaller business enterprises that are economically active in only one or two Member States, competition is much less or non-existent, and different regimes of national corporate income taxes can continue to exist. These "local" enterprises do not compete; therefore, different national tax burdens have no distortive effect. An EU corporate income tax would also cover business enterprises from third countries with establishments in the European Union. In that way, tax competition between the Member States for non-EU business enterprises would be equalized. As with the CCCTB, there are still many details to be worked out, but that is a matter for another article. The concept of a single EU corporate income tax at EU level, all the revenue of which would flow to the EU budget, allows for a much simpler and straightforward regulation than the CCCTB. To the extent that the amount of revenue of this tax would exceed the needs of the EU budget, it could be compensated by a reduction of the GNI contribution of the Member States to that budget, reducing in the right proportion the national budgetary burdens of the Member States. Finally, a uniform EU corporate income tax is a decisive step to achieve eventually the economic integration of the internal market between the Member States, which is one of the fundamental objectives of the TEU.[48]

9.4. Obstacles to achieving a common EU corporate income tax

In order to achieve a common EU corporate income tax, two separate decisions are necessary: (i) the introduction of the EU corporate income tax; and (ii) the use of the revenue of that tax as a new own resource for the EU budget. However, there is one important legal obstacle, which, in fact, is an obstacle of a political nature. Both decisions do not require a decision of the elected representatives of the European citizens in the European Parliament, but they do require the unanimous approval of all national ministers of finance of the Member States, who are politically accountable not to the European Parliament, but to each of their national parliaments. In rare moments of crisis of the European Union, it has been possible to attain that unanimity. That happened at the time of the euro crisis when the European Financial Stabilisation Mechanism was created, at the time of Brexit when the United Kingdom left the Union and, lately, with the approval of the Next Generation EU programme on 21 July 2020, providing for a substantial increase of the expenses of the EU budget in the Multiannual Financial Framework 2021-2027. The question is whether this spirit of unanimity, which allowed the approval of all the EU borrowings for the expenses of the Next Generation EU programme, will persist to approve also the taxes and new own resources that are necessary to finance all these expenses and reimbursements of EU loans. Economically and budgetarily, taxes and own resources are inexorably linked to each other, which means that the unanimity to spend is also inexorably and logically linked to the unanimity to tax. But political decisions do not always follow a logical line. However, the European Union has no real choice. In deciding to considerably expand the spending volume of the EU budget, a decision to expand the basis for own resources must follow. This article has put forward the argument that the resources should be increased by a corporate tax on the main beneficiaries of the EU economic integration – the large enterprises economically active in the whole Union, substituting the national corporate income tax that applies at present. It is the same principle on which 130 countries agreed in the Inclusive Framework, when they approved a minimum tax on those multinationals that have benefited most from economic globalization.[49] The only difference is that this is not a direct increase on top of the existing corporate income tax, it is a substitute. Indirectly, however, it will increase the tax burden because of the effective elimination of tax competition. In that sense, both proposals have a similar effect.

9.5. Replacing unanimity by QMV

It is necessary to change the uncertain and destabilizing rule of exclusive and unanimous decision-making in the Council by the rule of co-decision with QMV in the Council and simple majority voting in the European Parliament. That rule is already applicable to most EU directives and regulations. This important change is possible, without the cumbersome procedure of a treaty change, but requires one last unanimous decision by the European Council to adapt the rules on own resources. Unanimity voting has always been defended as the last bastion of democracy because the members of the Council were politically accountable to their national parliaments. Unanimity, however, has resulted in situations in which lopsided majorities in the whole European Union have been blocked by mini-minorities of one or very few Member States. QMV is more democratic because decisions are not pushed through by wafer-thin majorities, as happens in national parliaments. It always carries the support of large majorities of EU citizens. QMV also makes it impossible to disregard a significant minority, which

48. *See* the first and the last resolution of the Preamble and art. 3(2) and (4) of the aims of the European Union as set out in the TEU.
49. *See supra* n. 48.

happens more often in national voting contests like Brexit. Individual Member States or insignificant European minorities will no longer be in a position to block a large European consensus on taxation. Reforming the existing legal system to QMV will bring decision-making in the area of exclusively EU taxes for the EU budget fully in line with the "no taxation without representation" principle of the Magna Carta of 1215, while it also puts an end to the European democratic deficit.

10. Conclusions

10.1. The difference between tax abuse in the European Union and at the international level

Tax avoidance and tax evasion is an evergreen in the tax literature because discovering the lowest legal tax route in the forest of tax law has always been one of the highest dreams of tax lawyers. Originally, the territory for the exploration of this route was the area of national tax law with famous judgments like *Gregory v. Helvering* (1935) and *Duke of Westminster* (1935).[50] Gradually, the fight against tax avoidance and tax evasion shifted from the national territory to the international and the EU level. During the last decade, this fight accelerated at both levels. New specific rules and mechanisms to counter double non-taxation were introduced as well as two GAAR concepts in the OECD Model and in the EU ATAD (2016/1164). The question discussed in this contribution is whether the way in which tax abuse is defined and countered at the international level can be transposed "*ne varietur*" to the Member States of the European Union. The conclusion of the article is that an identical transposition of the same rules and criteria is not possible.

10.2. The consequence of the commitment to an "ever closer union"

The main argument for this position is that the Member States of the European Union have committed themselves to form an "ever closer union" in order to achieve a single internal market and an Economic Union with a common currency, by using the instruments of legal and economic integration prescribed in the TEU and the TFEU. By undertaking this commitment, the Member States have agreed in successive stages to facilitate legal decision-making by eliminating the original pattern of unanimity of the national ministers in Council, in favour of QMV and co-decision by the European Parliament. However, that liberalization of EU decision-making has never been applied to tax matters.

The consequence of that commitment was that, to a large extent, the conditions of economic competition for the movements of goods, services, people and capital in the European Union have become similar by way of legal harmonization, except in the field of income tax on business profits. The result has been that the importance of corporate income tax has increased as a factor where to locate economic activities in the European Union. At the same time, the fundamental economic freedoms in the TFEU have been forcing the Member States to eliminate cross-border obstacles and discriminatory rules against non-nationals, which very often has been interpreted by the ECJ as non-resident taxpayers. This situation has led to an increase in tax competition between the Member States to attract foreign investors. That competition is a major instrument, which the founding fathers of the European Union had conceived as the instrument "*par excellence*" to achieve a "common market". That competition not only involved competition between business enterprises, but also between the regulatory systems of Member States. The regulatory competition between Member States was regulated by State aid rules in the treaty that were also applicable to income tax. However, the essential elements of the corporate tax system, such as the base rules and the main tax rates, were outside the scope of the competition rules because the Member States retained full national tax sovereignty, limited only by the fundamental economic freedoms enforced by the ECJ.

10.3. The justification of the restriction of EU freedoms in the fight against tax abuse

This contribution also briefly describes the trajectory of the case law in which the Member States made repeated attempts to maintain their national tax barriers by the justification of the fight against tax avoidance and tax evasion. That justification was accepted finally by the ECJ as a valid argument to restrict the fundamental freedoms. In practice, however, the ECJ often held that the scope of national anti-avoidance rules was too wide and too imprecise, so that restrictions on the freedoms were denied. In parallel with that case law, there was a line of case law establishing a prohibition of abuse of EU law, to circumvent legitimate national interests protected by the law of the Member States. The final outcome of those case law developments came to a head in the *Cadbury Schweppes* decision of 2006. In that decision, the ECJ held that, within the European Union, businesses have a free choice to locate their business establishments and transactions anywhere and to make use of advantageous national tax regimes, on the inexorable condition that their arrangements must be "genuine", that is that they must reflect economic reality expressed by objective criteria of premises, staff and equipment. In judging the "genuineness" of the economic reality in later cases, the ECJ has refused, however, to require a certain relationship of proportionality between the amount of profits benefiting from an advantageous tax treatment and the volume or importance of the establishment or

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50. *See* the decision of the UK House of Lords (HL) in UK: HL, 7 May 1935, *Inland Revenue Commissioners v. Duke of Westminster*, [1936] A.C. 1; 19 TC 490.

economic activity. That proportional relationship is often used by national tax administrations as evidence of tax abuse. The EU GAAR introduced by article 6 of the EU ATAD (2016/1164) has been compared to the GAAR of article 29 of the OECD Model. But this article has demonstrated that the EU GAAR, in the end, follows the same logic as the ECJ because it makes its application subject to the condition that the arrangement must be "genuine", the same word as used in *Cadbury Schweppes*.

10.4. The only effective instrument against tax abuse and tax competition is an EU corporate income tax

From this analysis follows the conclusion that the EU concept of tax abuse is not the right instrument to fight against tax competition within the European Union, because that type of tax competition is the major engine of economic integration, in view of the persistent absence of legal integration of national systems of corporate income tax. Therefore, the contribution ends with a radical proposal for a uniform EU corporate income tax for companies with annual revenue in excess of EUR 750 billion that would feed directly the annual EU budget. Such a tax would eliminate the weakness of CCCTB, the revenue of which had to be apportioned between the national budgets of the Member States. The increase of the EU budget to meet the challenges of COVID-19, climate change and immigration justifies such a tax as a new resource. But the tax is also justified by the fact that those big multinationals make their profits by the very existence of the internal market and, therefore, should contribute to the level of government that makes their business success possible.

10.5. QMV is more democratic than unanimity

The obstacle against the proposal for a uniform EU corporate income tax is the requirement that such a tax can only be introduced as a new own resource for the EU budget on the condition of a unanimous consensus between the Member States. But that condition should be changed to QMV in the Council and co-decision by the European Parliament. The main argument for that change is that QMV in the Council and simple majority voting in the European Parliament is more democratic because it guarantees a large EU consensus on taxation, and also guarantees that a substantial minority cannot be overruled by a wafer-thin majority as often happens in national parliaments. Finally, it excludes the fact that national ministers in Council representing a tiny minority of the EU citizens can block proposals supported by ministers representing an overwhelming majority of EU citizens. That situation is often criticized as the "European democratic deficit". It is a permanent violation of the principle of "no taxation without representation" in the Magna Carta, which dates back to 1215.