Preventing Double Taxation in the European Union: Let's Make it a Matter of Practice instead of Principle

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Il existe peu de personnes avec lesquelles on peut affirmer être rattaché avec un lien pluriséculaire. C'est le cas avec Luc: nous sommes tous les deux héritiers de six siècles d'histoire commune, depuis 1425 et la fondation de l'université de Louvain.

Nos parcours ont été certes différents, mais se sont rejoints à plusieurs reprises. Une première fois en 2007, année où nous avons défendu notre thèse (à un jour d'intervalle) et nous avons repris le cours de droit fiscal, Luc à Leuven, et moi à Louvain-la-Neuve. Une deuxième fois en 2014, où nous avons inauguré une formule d'échange de professeurs dans le cadre de cours bilingues, qui continue encore aujourd'hui.

Tout au long de ces années, nous avons également partagé la représentation de la Belgique fiscale à l'étranger, en nous alternant lors des conférences de Vienne, où était commentée la jurisprudence récente tant en droit des traités fiscaux, qu'en droit fiscal européen. Nous avons également assisté de manière régulière le législateur belge dans ses différentes tentatives de réforme fiscale, avec des fortunes diverses.

Ces nombreuses rencontres m'ont permis d'apprécier le caractère entier et no-nonsense d'un collègue qui laissera sa trace dans l'histoire fiscale belge. Mon plus vif souhait est de pouvoir continuer cette belle collaboration avec lui et ses successeurs pour les 600 prochaines années. Ad multos annos!

1. Introduction

1. In the area of direct taxation, the case law of the Court of Justice of the European Union (CJEU) has developed in a way that is as striking as it is unexpected. Through rulings that have made the history of European legal and tax integration,

the Luxembourg judges have been able to put an end to tax differences of treatment within an internal market, even if it meant departing from the consolidated, almost customary, application of the principles of international taxation.[1] At the same time, through the application of directives and state aid rules, European institutions have considerably limited the scope for states to use their tax systems to capture revenues and investments whose circulation had been facilitated by the establishment of the internal market.[2] Nevertheless, European law appeared powerless in the face of a recurring phenomenon, which constitutes a serious threat to further tax integration: 'simple' international double taxation – which is not accompanied by a difference in treatment against cross-border situations by one of the states concerned – remained hopelessly outside the scope of the freedoms of movement[3] and is only partially addressed by secondary legislation. However, recent legislative and case law developments seem to call this situation into question, at least in part. Even if it is unlikely that in the near future a general principle of prohibition of cross-border double taxation will be recognised, EU law offers more and more tools to remedy the consequences of that phenomenon, solving the practical issues faced by taxpayers across the European Union.

2. Absence of a General Principle Prohibiting Double Taxation in EU Primary Law

2. In several decisions, the Court of Justice has ruled that the refusal of the state of residence to eliminate double taxation resulting from the fact that the source state had also exercised its power to tax the same income did not constitute a breach of the treaty. To this end, the Court used an argument that it has progressively refined. In the Kerkhaert and Morres decision, it stated that double taxation "results

1. See in particular, W. HASLEHNER, G. KOFLER and A. RUST (eds.), *Landmark Decisions of the ECJ in Direct Taxation*, Mechelen, Kluwer, 2015; I. RICHELLE, W. SCHÖN and E. TRAVERSA (eds.), *Allocating Taxing Powers within the European Union*, Berlin, Springer, 2013; J. MALHERBE, P. MALHERBE, I. RICHELLE and E. TRAVERSA, *The impact of the Rulings of the European Court of Justice in the area of direct taxation*, requested by the European Parliament's Committee on Economic and Monetary Affairs (1st edn) 2008; (2nd edn) 2011, www.europarl.eu.
2. See in particular, I. RICHELLE, W. SCHÖN and E. TRAVERSA (eds.), *Allocating Taxing Powers within the European Union*, Berlin, Springer, 2016; W. HASLEHNER and K. PANTAZATOU, *Report for the Assessment of Recent Anti-Tax Avoidance and Evasion Measures (ATAD & DAC 6)*, European Parliament, Doc. N° PE 703.353, March 2022, www.europarl.europa.eu/, and the bibliography cited.
3. Despite the indignation of some authors, including WATHELET, see in particular, M. WATHELET, "Tax Sovereignty of the Member States and the European Court of Justice" in L. HINNEKENS and P. HINNEKENS (eds.), *A Vision of Taxes Within and Outside European Borders-Festschrift in Honour of Frans F. Vanistendael*, Amsterdam, Kluwer Law International, 2008, 916.

from the exercise in parallel by two Member States of their fiscal sovereignty",[4] before adding that, under Article 293 EC, applicable at the time, the exercise of that competence was free and that in the absence of European competence or regulations the Member States could therefore choose whether to exercise their competence and whether to eliminate double taxation.[5] In Margarete Block, the Court repeated this analysis, including in particular the passage according to which:

> "Community law, in the current stage of its development and in a situation such as that in the main proceedings, does not lay any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Union. Apart from [few directives], no uniform or harmonisation measure designed to eliminate double taxation has as yet been adopted at Community law level".[6]

It then added that

> "in the current stage of the development of Community law, the Member States enjoy a certain autonomy in this area provided they comply with Community law, and are not obliged therefore to adapt their own tax systems to the different systems of tax of the other Member States in order, inter alia, to eliminate the double taxation arising from the exercise in parallel by those Member States of their fiscal sovereignty".[7]

3. It then concluded, as shown, for example, in the Jacques Damseaux case, that

> "if a Member State cannot rely on a bilateral convention in order to avoid the obligations imposed on it by the Treaty […], the fact that both the Member State in which the dividends are paid and the Member State in which the shareholder resides are liable to tax those dividends does not mean that the Member State of residence is obliged, under Community law, to prevent the disadvantages

4. CJEU 14 November 2006, C-513/04, Kerckhaert and Morres, ECLI:EU:C:2006:713, para. 20.
5. CJEU 14 November 2006, C-513/04, Kerckhaert and Morres, ECLI:EU:C:2006:713, paras 21-23.
6. CJEU 12 February 2009, C-67/08, Margarete Block/Finanzamt Kaufbeuren, ECLI:EU:C:2009:92, para. 30, which repeats verbatim para. 22 of the Kerckhaert and Morres judgment. See also CJEU 15 April 2010, C-96/08, CIBA Speciality Chemicals Central and Eastern Europe, ECLI:EU:C:2010:185, para. 27; and CJEU 3 June 2010, C-487/08, Commission/Spain, ECLI:EU:C:2010:310, para. 27.
7. Para. 31 of the Margarete Block judgment. Comp. CJEU 6 December 2007, C-298/05, Columbus Container Services BVBA & Co/Finanzamt Bielefeld-Innenstadt, ECLI:EU:C:2007:754, para. 51. See also CJEU 8 December 2011, C-157/10, Banco Bilbao Vizcaya Argentaria SA/Administración General del Estado, ECLI:EU:C:2011:813, spec. paras 39 and 46.

which could arise from the exercise of competence thus attributed by the two Member States".[8]

Hence, for the Court, "EU law, as it currently stands, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Union"[9], and therefore, the latter is permissible. In other words, respect for the external tax competences of the Member States and their right to take part or to not take part in international tax treaties preclude the absence of elimination of double taxation of a taxpayer's income by his state of residence from being regarded as a tax obstacle.[10] As a result, to eliminate double taxation that hinders the proper functioning of the internal market, positive action by Member States is desirable, but EU law does not force them to do so. For the CJEU, "Member States are not obliged therefore to adapt their own tax systems to the different systems of tax of the other Member States in order, inter alia, to eliminate the double taxation arising from the exercise in parallel by those Member States of their fiscal sovereignty".[11]

3. Recognition of Territoriality as a Legitimate Criterion for Conferring Tax Jurisdiction

4. The Court's case law does, however, offer some guidance on how taxing powers could (or even should) be allocated between Member States. A careful analysis of the Court's decisions shows that it has recognised the relationship between sovereignty and territoriality, regarding the latter as the expression of the geographical limits of the powers of taxation deriving from the former. Moreover, it shows that the principle of territoriality – in both its substantive and formal dimensions – already plays a role in the Court's analysis of the compatibility of national tax rules with EU freedoms.[12]

8. CJEU 16 July 2009, C-128/08, Jacques Damseaux, ECLI:EU:C:2009:471, para. 34.
9. CJEU 8 December 2011, C-157/10, Banco Bilbao Vizcaya Argentaria SA v. Administración General del Estado, ECLI:EU:C:2011:813, para. 31; and CJEU 11 September 2014, C-47/12, Kronos International, ECLI:EU:C:2014:2200, para. 68, and the case law cited.
10. See also CJEU 19 September 2012, C-540/11, Daniel Levy and Carine Sebbag/Belgian State, ECLI:EU:C:2012:581.
11. For examples, see 12 February 2009, C-67/08, Margarete Block/Finanzamt Kaufbeuren, ECLI:EU:C:2009:92, para. 31; CJEU 16 July 2009, C-128/08, Jacques Damseaux, ECLI:EU:C:2009:471, paras 33 *et seq.*; CJEU 21 November 2013, C-302/12, X, ECLI:EU:C:2013:756, para. 29.
12. See E. TRAVERSA and A. PIRLOT, "Tax Sovereignty and Territoriality under Siege: How Far Should the EU Freedoms of Movement Impact on the Territorial Allocation of Taxing Powers between Member States?" in C. BROKELIND (ed.), *Principles of Law: Function, Status and Impact in EU*

5. The Court has indeed held that a Member State has the "right to tax income generated by an economic activity carried on in its territory". This statement can be seen as a clear recognition of the relationship between the principle of sovereignty and the principle of (substantive) territoriality in tax matters. In Busley (C-35/08) and Rewe (C-347/04), the Court defined the purpose of the territoriality principle as being to establish, in the application of community law, the need to take account of the limits of Member States' taxing powers. While recognising the need to examine the territorial limits of Member States' taxing powers, the Court rejected the argument that the tax measures at issue complied with the territoriality principle. In Busley, however, the Court held that

> "that principle [*cf.* the territoriality principle] does not preclude the taking into account by a person liable to unlimited taxation in one Member State of negative income from immovable property situated in another State [...] Consequently, that provision – under which the applicants in the main proceedings, who are subject to unlimited taxation in Germany, are unbale to take into account the losses of their house in Spain – cannot be regarded as an implementation of the principle of territoriality".[13]

Similarly, in Rewe Zentralifinanz, German provisions restricting the right of a parent company resident in that state to deduct for tax purposes losses incurred by that company in respect of write-downs to the book value of its shareholdings in subsidiaries established in other Member States were held to be contrary to the freedom of establishment. According to the Court, such restrictions cannot be equated with "an implementation of the principle of territoriality".[14]

6. Moreover, the Court recognised that the fair distribution of taxing powers between Member States takes precedence over an overly absolute conception of EU freedoms that would shield taxpayers from any attempt of the Member States to specifically address tax planning schemes, which would exacerbate tax avoidance and tax planning as well as harmful tax competition between Member States. By referring to the need to ensure a balanced allocation of taxing powers and to respect the principle of fiscal territoriality, the Court *de facto* examines and sometimes validates – at least in part – the allocation of taxing powers between Member

Tax Law, Amsterdam, IBFD, 2014, 125-149; E. TRAVERSA, "Territoriality, abuse and coherence" in C. PANAYI, W. HASLEHNER and E. TRAVERSA (eds.), *Research Handbook on European Union Taxation Law*, Cheltenham Glos, Edward Elgar, 2020, 75-93.

13. CJEU 15 October 2009, C-35/08, Busley und Cibrian Fernandez, ECLI:EU:C:2009:625, para. 30.
14. CJEU 29 March 2007, C-347/04, Rewe Zentralfinanz, ECLI:EU:C:2007:194, para. 69.

States. This is particularly apparent in cases concerning group consolidation and the tax treatment of cross-border losses – such as Marks & Spencer, Oy AA, Lidl Belgium, X Holding BV, A Oy and Krankenheim – but also in areas such as exit taxes (particularly in N. and National Grid Indus) or transfer pricing rules (as in SGI)[15]. For example, in Oy AA, the Court held that freedom of establishment

> "does not preclude a system established by the legislation of a Member State, such as that at issue in the main proceedings, under which a subsidiary, resident in that Member State, may deduct from its taxable income an intra-group financial transfer made by it to its parent company only in so far as the latter has its seat in that same Member State".[16]

According to the Court, the difference in treatment is justified by the need to preserve a balanced distribution of power between the Member States and by the need to prevent tax avoidance. In her opinion, Advocate General Kokott also refers to the principle of territoriality

> "it would also jeopardise the allocation of taxing powers in accordance with the principle of territoriality if taxpayers were able freely to choose in which Member State profits are subject to taxation by subtracting the profits of one company from its tax base and including them in the tax base of a related company established in another Member State".[17]

Implicitly, the Court addresses the question of the legitimacy of taxing (or not taxing) income according to the territory in which it may be located. From a conceptual viewpoint, determining more precisely the territoriality criteria on the basis of which attribution powers are allocated would seem to be in perfect continuity with its case law.

15. CJEU 13 December 2005, C-446/03, Marks & Spencer, ECLI:EU:C:2005:763; CJEU 18 July 2007, C-231/05, Oy AA, ECLI:EU:C:2007:439; CJEU 15 May 2008, C-414/06, Lidl Belgium, ECLI:EU:C:2008:278; CJEU 25 February 2010, C-337/08, X Holding, ECLI:EU:C:2010:89; CJEU 21 February 2013, C-123/11, A Oy, ECLI:EU:C:2013:84; CJEU 23 October 2008, C-157/07, Krankenhein Ruhesitz am Wannsee-Seniorenheimstatt, ECLI:EU:C:2008:588; CJEU 7 September 2006, C-470/04, N, ECLI:EU:C:2006:525; CJEU 16 April 2015, C-591/13, Commission v. Germany, ECLI:EU:C:2015:230; CJEU 29 November 2011, C-371/10, National Grid Indus, ECLI:EU:C:2011:785; CJEU 21 January 2010, C-311/08, SGI, ECLI:EU:C:2010:26.
16. CJEU 18 July 2007, C-231/05, Oy AA, ECLI:EU:C:2007:439, operative part.
17. Opinion of Advocate General KOKOTT in CJEU 12 September 2006, C-231/05, Oy AA, ECLI:EU:C:2006:551, para. 53.

4. CJEU as Arbitrator of Double Taxation Situations

7. Indirectly, therefore, the Court finds itself judging questions relating to the allocation of tax powers between Member States. The question arises as to whether and how – beyond an interpretative revolution of the freedoms of movement based on the principle of territoriality that is unlikely to occur – the Court could assert itself more as an 'international tax arbitrator' between Member States. From this perspective, two developments deserve to be highlighted.

8. The first is a one off. It concerns Austria v Germany (12 September 2017).[18] This case is the first in which a Member State referred to the Court, under Article 273 TFEU, a dispute "connected with the subject-matter of the Treaties" and "submitted to it under a special agreement between the parties". Article 25(5) of the Austro-German Double Taxation Convention contains a clause stating that

> "in the case of difficulties or doubts concerning the interpretation or the application of this convention, for which no solution can be found during a mutual agreement procedure between the competent authorities arranged in accordance with the preceding paragraphs of this article within a period of three years from the initiation of that procedure, the States Parties are obliged, at the request of the person referred to in paragraph 1, to submit the dispute to the Court of Justice [of the European Union] under an arbitration procedure pursuant to Article [273 TFEU]."[19]

In this case, the Court was asked to interpret the concept of 'debt-claims with participation in profits' contained in Article 11 of the said convention, which deals with interest and is based on the OECD)model. First, to establish its jurisdiction, the Court had to establish that there was a connection with the subject matter of the treaties. To do this, it highlighted the link between the prevention of double taxation and the internal market. According to the Court

> "that is manifestly so in the present case, in the light of the beneficial effect of the mitigation of double taxation on the functioning of the internal market that the European Union seeks to establish in accordance with Article 3(3) TEU and Article 26 TFEU. As the European Commission observed, in essence, in

18. CJEU 12 September 2017, C-648/15, Austria/Germany, ECLI:EU:C:2017:664.
19. Convention between the Republic of Austria and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital of 24 August 2000, *BGBl.* III, 182/2002.

> its communication to the European Parliament, the Council and the European Economic and Social Committee of 11 November 2011, entitled 'Double Taxation in the Single Market' (COM(2011) 712 final), the purpose and effect of the conclusion between two Member States of a convention avoiding double taxation is to eliminate or mitigate certain consequences resulting from the uncoordinated exercise of their powers of taxation, which is, by its nature, capable of restricting, discouraging or rendering less attractive the exercise of the freedoms of movement provided for in the TFEU".[20]

The Court confirmed the view of Advocate General Mengozzi that

> "even though it does not fall within the subject matter of the Treaties, the fact remains that a dispute relating to the interpretation of the provisions of a convention for the avoidance of double taxation between Member States is linked to the objective of the establishment of the internal market, as provided for in Article 3(3) TEU, in that the elimination or avoidance of double taxation by convention will ultimately assist the realisation of the internal market [...] and the exercise of the freedoms of movement".[21]

This is a remarkable development compared with the position expressed in Kerckhaert-Morres, where the Court had refrained from explicitly qualifying double taxation as a measure capable of restricting the freedoms of movement.[22]

9. An even more remarkable step forward has been the adoption of Council Directive 2017/1852 of 10 October 2017 on mechanisms for settling tax disputes within the European Union.[23] This directive introduces a procedure for binding advice to states in the event of disputes between Member States where such disputes arise from the interpretation and application of agreements and conventions which provide for the elimination of double taxation of income and capital. Initially, the situation would be referred to the tax authorities of the Member States

20. CJEU 12 September 2017, C-648/15, Austria/Germany, ECLI:EU:C:2017:664, para. 26
21. Opinion of Advocate General MENGOZZI in CJEU 27 April 2017, C-648/15, Austria/Germany, ECLI:EU:C:2017:311, para. 51.
22. For an analysis of the judgment, see B. MICHEL, "Austria v. Germany (Case C-648/15): The ECJ and Its New Tax Treaty Arbitration Hat", *European Taxation* 2018, issue 58(2).
23. Council Directive (EU) nr. 2017/1852, 10 October 2017 on tax dispute resolution mechanisms in the European Union, *OJ.L* 265, 14 October 2017, 1-14. See S. PIOTROWSKI, R. ISMER, P. BAKER, J. MONSENEGO, K. PERROU, R. PETRUZZI, E. REIMER, F. SERRANO ANTÓN, L. STANKIEWICZ, E. TRAVERSA and J. VOJE, "Towards a Standing Committee Pursuant to Article 10 of the EU Tax Dispute Resolution Directive: A Proposal for Implementation", *Intertax* (Includes *EC Tax Review*) 2019, vol. 47, 678-692.

concerned, under a mutual agreement procedure. At this stage, Member States could use non-binding forms of alternative dispute resolution, such as mediation or conciliation. In the absence of agreement, a formal dispute settlement procedure would be initiated, with Member States retaining a degree of autonomy as to its form. The body to which the dispute would be submitted could be an advisory commission, made up of representatives of the tax authorities concerned and independent persons, an alternative dispute resolution commission or, with the agreement of the Member States, an arbitration commission. Admittedly, this directive does not grant the CJEU any specific jurisdiction over the application of double taxation conventions. However, it cannot be ruled out that, indirectly, in reviewing the implementation of this directive, the Court will have to deal with rules establishing mechanisms for resolving double taxation situations. In any event, this directive further confirms the recognition by EU law of international double taxation as an obstacle to the completion of the internal market.

5. The (Not So Inspiring) Lessons from Indirect Tax Harmonisation

10. Despite a large body of harmonised EU legislation, international double taxation in the field of indirect taxes has not been consistently and thoroughly prevented. As to VAT, the purpose of the common system is, even if rates and exemptions are not fully harmonised, to achieve neutrality in competition, so that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain.[24] In cross-border exchanges of goods or services, the determination of the place where taxable transactions are carried out may engender conflicts concerning jurisdiction as between Member States. The common VAT system provides for a complex and changing set of rules and exceptions for localising each of the four taxable transactions. As such, the existence of a defined set of rules for each category of taxable operation warrants that a given supply is taxed only once. This is the case, for example, in intra-community supplies of goods, as Member States will exempt the supplies of goods dispatched or transported to a destination outside their respective territory but within the community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person or for a non-taxable legal person acting as such in a Member State other than the Member State in which

24. Council Directive nr. 2006/112/EC, 28 November 2006, on the common system of value added tax, OJ L 347, 1 December 2006, 1-118, seventh recital.

dispatch or transport of the goods began.[25] In two early landmark cases[26], held by the Court before the implementation of the transitional measures applicable for intra-community operations, the impossibility of double taxation, by way of taxation of an import in one Member State although the corresponding export did not benefit from any relief of input VAT, was clearly affirmed.

11. The prohibition of double taxation within the internal market is further strengthened by the principle of neutrality within the common VAT system. Taxing a supply of services in another Member State when it has already lawfully been subject to VAT in the state of the supplier has also been considered contrary to the principle of fiscal neutrality.[27] In general, any taxable person conducting taxable activities should be entitled to deduct input VAT and, consequently, be relieved for any costs[28], thereby giving little room for a double taxation. Even within the internal market, the harmonisation of VAT is not perfect and, although not desirable, there are a number of situations where double taxation occurs. To some extent, there are also some cases of double non-taxation mainly arising from difference of interpretations between two Member States.[29]

12. A relatively recent example is KrakVet Marek Batko (Case C-276/18)[30], which dealt with the simultaneous and somehow opposite application of the distance-selling regime for cross-border supplies of goods by different Member States (in this case, Poland and Hungary). The Court recalled that one of the goals enshrined in the VAT Directive is "to avoid conflicts of jurisdiction which may result in double taxation or non-taxation" (para. 42) and that, by itself, "the correct application of Directive 2006/112 makes it possible to avoid double taxation and to ensure fiscal neutrality" (para. 50). The Court, nevertheless, did not infer any positive obligation for the tax authorities from the aforementioned objectives. Neither did the Court consider that the existence of a 'common system of cooperation' established by Regulation No. 904/2010 and the duty to cooperate set forth therein to ensure

25. Council Directive nr. 2006/112/EC 28 November 2006, on the common system of value added tax, *OJ.L* 347, 1 December 2006, 1-118, Art. 138.
26. See CJEU 21 May1985, C-47/84, Staatssecretaris van Financiën/Gaston Schul, ECLI:EU:C:1985:216; and CJEU 25 February 1988, C-299/86, Rainer Drexl, ECLI:EU:C:1988:103.
27. CJEU 11 September 2003, C-155/01, Cookies World, ECLI:EU:C:2003:449, para. 60.
28. CJEU 8 June 2000, C-400/98, Finanzamt Goslar and Brigitte Breitshol, ECLI:EU:C:2000:304, para. 37.
29. For practical examples, see E. TRAVERSA and C.-A. HELLEPUTTE, "Double (non-) taxation in VAT and direct taxes: how to achieve convergence within a *summa divisio*? A European Perspective" in M. LANG, P. MELZ and E. KRISTOFFERSON (eds.), *Value Added Tax and Direct Taxation – Similarities and Differences*, Amsterdam, IBFD, 2009, 339-368.
30. CJEU 18 June 2020, C-276/18, KrakVet Marek Batko sp. K, ECLI:EU:C:2020:485.

the correct application of the common VAT system could lead to any obligation to reach an agreement among EU Member States about the VAT treatment of a single taxable transaction. Therefore, given the current framework of EU VAT, it can be concluded that it is only at the judicial stage that the issue of double taxation caused by the misapplication of the VAT Directive by one or more Member States might eventually be settled. The Court's conclusion is understandable, albeit disappointing. It is, in fact, true that the current EU framework as regards cooperation in the field of VAT does not provide for a dispute resolution mechanism in any way similar to the one provided by Council Directive (EU) 2017/1852 (mentioned above).

13. More recently, although in a very peculiar situation, the Court recognised the prohibition of double taxation as well as an obligation for Member States to co-ordinate. In Navitours, a case concerning the application of VAT on a territory in which two Member States exercised joint tax sovereignty (parts of the Moselle, the Sûre and the Our, which form the border between Germany and Luxembourg), the Court held that "the taxation, by one of the Member States, of [passenger transport services performed by a service transport provider] prevents the other Member State from taxing them in turn, without prejudice to the possibility for those two Member States to regulate in another way the taxation of services performed within that territory, *inter alia* by means of an agreement, provided that non-taxation and double taxation is avoided."[31]

This solution has the merit of avoiding that the taxpayers become victims of the absence of coordination between Member States, while leaving open the possibility for states to look for an alternative solution from the 'first come, first served' principle. There seems to be no impending obstacle to extend it beyond the case at stake of joint sovereignty, arguing that the internal market must be considered as one single territory regulated by a common body of law – in this case the VAT directive – but it could also extent to other harmonised taxes at the EU level, the case law in the area of excise duties shows.[32]

31. CJEU 1 August 2022, C-294/21, Navitours, ECLI:EU:C:2022:608.
32. CJEU 24 February 2021, C-95/19, Silcompa SpA, ECLI:EU:C:2021:128, para. 444. See also CJEU 5 March 2015, C-175/14, Prankl, EU:C:2015:142, para. 20 and the case law cited.

6. Double Taxation and Direct Tax Harmonisation: The Pillar Two Directive

14. The EU legislator seems to have drawn inspiration from the prevention of international double taxation, particularly evident in the recently adopted Pillar Two Directive (Directive 2022/2523).[33] This directive implements the OECD's Two-Pillar Solution developed within the BEPS project framework[34], aiming to reallocate taxing rights and introduce a minimum global taxation. Pillar Two, known as 'Global Anti-Base Erosion' (GloBE), has a dual objective: addressing persistent BEPS issues and curbing excessive tax competition among states for a more equitable global allocation of investments.[35] To achieve this, GloBE ensures that multinational enterprises (MNEs) pay their fair share by implementing a top-up tax when controlled entities are not adequately taxed. It tackles BEPS challenges through rules triggering additional taxation if the 15 % threshold is not met. Unlike Pillar One, GloBE does not introduce a new nexus but pioneers the concept that a participation threshold, combined with 'unfair' taxation, grants additional taxing rights to the parent company's residence. The 15 % minimum taxation is secured through the Income Inclusion Rule (IIR) and the Under-Taxed Profits Rule (UTPR)[36], applied based on a shared process in each jurisdiction.[37]

15. Although double taxation prevention is not formally recognised in Pillar Two, the directive includes mechanisms to avoid unintended duplications in top-up

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33. Council Directive (EU) nr. 2022/2523, 14 December 2022, on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, *OJ.L* 328, 22 December 2022, 1-58.
34. See J. BECKER and J. ENGLISCH, *Implementing an International Effective Minimum Tax in the EU*, Working Paper-Reihe Der Ak Wien Implementing 3 (2021); E. TRAVERSA and M. ARTEEL, "De 2021-OESO-overeenkomst over Pijlers 1 en 2 en de implementatie van een minimumbelasting binnen de Europese Unie: eerste indrukken", *TFR* 2022, issue 614, 56-73.
35. See E. TRAVERSA and F. PASCUCCI, "L'Accord sur le taux d'imposition minimum des multinationales et la taxation des entreprises numériques: une étape ultérieure vers la constitution d'un ordre fiscal international autonome", *Annuaire Français de Droit International* 2021, vol. 1, 711-728; E. TRAVERSA and F. PASCUCCI, "Chapitre II – L'émergence d'un ordre fiscal commun et le droit européen" in S. LAMBERT-WIBER (ed.), *Les nouvelles normativités fiscales extra-étatiques*, Bruylant, 2023, 53-71.
36. See OECD/G20, Chapter 2 "Charging Provisions" in *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS*, OECD Publishing, 2021, Art. 2.1-2.6. See also OECD/G20, *Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two)*, OECD Publishing, 2022, 24 *et seq.*
37. See OECD/G20, Chapter 5 "Computation of Effective Tax Rate and Top-up Tax" in *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS*, Chapter 2 – Charging Provisions, OECD Publishing, 2021, Art. 5.1-5.6.

taxes. For instance, it prevents top-up tax collection under the IIR when low-taxed entities are subject to domestic minimum taxation. If the local minimum tax qualifies as a qualified domestic minimum top-up tax (QDMTT), a full tax credit is granted, offsetting taxes in the 'source' state. Alternatively, if the domestic tax falls short, the minimum tax paid is considered a covered tax, increasing the effective tax rate and reducing potential top-up tax abroad. In cases of multiple jurisdictions seeking top-up taxes under the IIR, the directive either excludes the intermediate jurisdiction (top-down approach) or introduces an offset mechanism for a tax credit at the higher-level parent jurisdiction.

16. Specific mechanisms also prevent duplications in calculating top-up taxes, excluding dividends and capital gains from GloBE income when the investment exceeds 10 % or is held for at least twelve months (for dividends). These rules align with EU (the Parent-Subsidiary Directive)[38] and domestic corporate tax exclusions, effectively eliminating economic double taxation. The directive further ensures that withholding taxes on distributed dividends are considered covered taxes for Pillar Two purposes, increasing the effective tax rate and mitigating potential top-up taxes at the distributing entity level. Overall, these rules demonstrate the need to address double taxation concerns within the European Union.

7. Conclusion

17. This brief contribution outlines how various mechanisms, differing in scope and nature, have been developed in European law to mitigate double taxation phenomena. It attests to the fact that achieving such an objective cannot be realised through the enactment of broad general principles but requires a piecemeal approach tailored to the concrete situation. Fortunately for taxpayers, this objective seems to be gaining traction, as evidenced in the most recent Commission proposals. These proposals address the refund of withholding taxes (FASTER)[39], adopt a common approach to transfer pricing rules[40], and, of course, the relaunch of the

38. Council Directive nr. 2011/96/EU, 30 November 2011, on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast), *OJ.L* 345, 29 December 2011, 8-16.
39. European Commission Proposal, 19 June 2023 for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes, COM(2023) 324.
40. European Commission Proposal, 12 September 2023 for a Council Directive on transfer pricing, COM(2023) 529.

comprehensive harmonisation attempt of the corporate tax base through BEFIT.[41] Such a practical approach that reflects, as the French say, "le mieux est ennemi du bien", appears to be more promising, acknowledging the difficulty of striving towards the adoption of a general but potentially less effective principle of prohibition of double taxation and focusing instead on the practical consequences of what remains a lacuna in the tax integration process within the European Union.

41. European Commission Proposal, 12 September 2023 for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT), COM(2023) 532.