The EU as a Catalyst for Tax Harmonisation – Triumphs and Challenges in an Asymmetric Cooperation Model

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Abstract

This paper critically analyses the taxation chapter in the book 70 Years of EU Law – A Union for Its Citizens (2023), edited by the Legal Service of the European Union (EU) Commission. The said chapter provides a clear explanation of how fundamental freedoms, as interpreted by the European Court of Justice (ECJ), affect internal legislation of Member States related to income taxation of individuals. Its approach aligns with the overall structure of the book, which emphasises the positive impact of EU law on the daily lives of European citizens, consistent with an output legitimacy perspective on Euro-

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pean integration. However, its scope is markedly narrow. To supplement its insights, this paper expands on the topics in two ways. First, consistent with the focus on output legitimacy, it highlights the major achievements of EU law in areas such as consumption taxes, customs, and corporate taxation. Secondly, it discusses the underlying tensions that lead to the current asymmetrical model of EU tax law and the policy issues it raises, including the over-reliance on the Court of Justice to promote (negative) harmonisation and the challenges posed by the unanimity requirement in taxation matters.

Keywords

European Union – European Commission Legal Service – Tax Harmonisation – Income Taxation – Indirect Taxation – Tax Competition – Tax Policy – Unanimity

I. Introduction

Taxes are the main source of revenue for EU Member States and are essential for promoting redistributive justice, welfare, and solidarity. They are also vital for achieving the European Union's goals, from striving to keep peace across the continent to upholding the rule of law and Union values broadly considered.[1] Over the 70 years of EU law, tax harmonisation within the Union has followed a remarkable path. The level of integration reached is unmatched by any other supranational effort in this field. However, this integration remains asymmetrical.[2] While the Union has exclusive competence in customs and has achieved significant harmonisation in consumption taxes, EU primary law grants only limited powers regarding taxes on income and wealth – known as direct taxes– which largely remain under Member States' control.

Despite the significant importance of taxation within EU Law and the European Union as a joint endeavour to improve the lives of EU citizens, the

1 See articles 2 and 3 TEU. On the breadth and relevance of these values for constitutional EU Law, see Luke Dimitrios Spieker, *EU Values Before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press 2023); see also Armin von Bogdandy, *The Emergence of European Society Through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford University Press 2024).

2 At a more fundamental level, the scholarship of Fritz Scharpf stands out as the one theorising asymmetries between negative and positive integration. See Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999), 43-83.

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matter received little attention in the book '70 Years of EU Law – A Union for Its Citizens', written by the Commission Legal Service to celebrate the anniversary.[3] The only chapter specifically addressing tax matters, titled 'The removal of tax obstacles to living, working, investing, retiring and dying in another Member State' (the tax chapter hereinafter),[4] focuses on a very specific matter within EU tax law, namely, the impact of the fundamental freedoms on the internal legislation of the Member States on income taxation of individuals.[5] It covers topics such as the elimination of tax barriers to work, setting up a company, offering services, investing or retiring in another Member State, the granting of personal and family tax allowances, taxation as a result of moving out of one's own Member State, or the treatment of cross-border charitable gifts and inheritance taxes.

The tax chapter of the Legal Service's book is well drafted and one of the clearest accounts on the topic it addresses that the present author has read. Plus, the approach adopted by the chapter aligns perfectly with that of the entire book, accurately theorised by Paolo Mazzotti in his contribution to this Special Issue as embodying an incremental understanding of European integration, in line with neo-functionalist theories. It sees the EU's legal system as a primary driver of this integration, and validates the EU's legitimacy based on the tangible, real-world benefits it delivers to its citizens, viewing these benefits as part of a consistent, developing system.[6]

However, the chapter clearly fails to comprehensively account for the broader relevance of EU law in taxation matters. This contribution aims to provide a broader perspective on how EU tax law has enhanced the lives of its citizens, put the tax chapter in context, and offer a more comprehensive

3 European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023). This volume is available at <https://op.europa.eu/en/publication-detail/-/publication/f040f2c0-10d9-11ee-b12e-01aa75ed71a1/language-en>, last access 28 January 2026.

4 Wim Roels, 'The Removal of Tax Obstacles to Living, Working, Investing, Retiring and Dying in Another Member State' in: European Commission Legal Services (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 207-227.

5 The scope is defined in Roels (n. 4), 207, as follows: 'This chapter aims to give the reader a broad overview of what the European Union has achieved in the field of taxation directly affecting European citizens. It is therefore limited to the field of direct taxation: those taxes that a person or organisation pays directly to the entity that imposed it, such as income tax. The field of indirect tax, in other words taxes on goods and services, is outside the scope of this chapter.'.

6 See Paolo Mazzotti, 'An Archaeology of EU Legal Discourse: The Legal Imagination Between Continuity and Discontinuity, HJIL 86 (2026), 85-131 and scholarly references quoted therein.

view beyond the topics it addresses.[7] First, this contribution will expand on the account of the EU's output legitimacy by highlighting major achievements of EU Law in areas like consumption taxes, customs, and corporate income tax. Secondly, it will analyse the underlying tensions that explain the current asymmetrical integration model of EU Tax Law and the policy problems it raises from a dual perspective: the over-reliance on the Court of Justice to push (negative) harmonisation and the challenges posed by the unanimity requirement in taxation.

II. EU Tax Law Improves the Lives of EU Citizens Beyond the Negative Harmonisation of Direct Taxes on Individuals

As stated, the Legal Service's book openly praises the improvements in the lives of EU citizens brought about by EU Law. Nonetheless, the taxation chapter restricts itself to an account of a very relevant yet narrow field of ECJ jurisprudence, i. e., the enforcement of the EU fundamental freedoms in cases involving the taxation of individuals' income – a non-harmonised field of EU tax law[8]. Allegedly, the narrowing of the topic was due to space constraints.[9] However, EU Law has significantly impacted other matters that, in turn, played a significant role in improving the lives of EU citizens. This raises the question of whether the chapter's scope was appropriately defined. As a rather straightforward example, not many EU citizens – relative to the entire EU population – would retire in a different Member State than that of their country of long-lasting residence, yet most EU citizens pay value added tax (VAT) on a daily basis. Importantly for present purposes, VAT is a significantly harmonised tax whose adoption was one of the most significant achievements of the Union throughout its history.

7 In this regard, this contribution aims to complement the rather narrow view taken by the Legal Service's book on taxation matters, rather than to pose a direct confrontation to its content, as other contributions in this special issue do in other contexts. See for instance the outstanding contributions on EU institutional languages and narratives by Päivi Leino-Sandberg, '"70 Years of EU Law" The Politics of a Professional Language', HJIL 86 (2026), 59-83; Jacob van de Beeten, 'Festschrift or Fiction? Ommissions, Gaps and Blind Spots in 70 Years of EU Law', HJIL 86 (2026), 167-196; as well as the stark criticism to the EU human rights track record posed by Henri de Waele, 'Beyond the Posture, Beyond the Pale – Assessing the EU's Real Record as An International Human Rights Actor', HJIL 86 (2026), 245-260.

8 A similar critique is made by Johan Meeusen, 'Nothing More Than a Rights Catalogue Serving EU Citizens' Private Interests? Three Insights for an Alternative Assessment of EU Citizenship', HJIL 86 (2026), 261-297. He criticises that the chapter dealing with EU citizenship in the Legal Service's book, Jonathan Tomkin and Elisabetta Montaguti, 'EU Citizenship: In the Service of EU Citizens' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 96-114, does not account for all relevant aspects concerning citizenship in the Union.

9 This is, in fact, disclosed in the chapter itself. See Roels (n. 4), 208.

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The impact of taxes on the lives and well-being of EU citizens is manifold. In no other area of law do citizens encounter the State more frequently than in tax law,[10] and the influence of EU Law in this field is remarkable.[11] This section will highlight two phenomena that were left out of the analysis in the tax chapter to better understand the positive impact of EU tax law in EU citizens' lives: Namely, the impact of EU Law on indirect taxation and corporate income taxation.[12] As will be shown, in both strands, the achievement of greater levels of integration has strengthened the internal market, resulting in enhanced cross-border investment as a result of neutrality in the tax treatment of different types of arrangements, and a more uniform, robust, and stable tax system. These aspects constitute the normative case that links indirect and corporate tax matters with, ultimately, the enhancement of the EU citizens' lives and well-being.

1. Impact of EU Law on Indirect Taxation

A brief assessment of EU law's impact on indirect taxes, including customs, VAT, and excise duties, would have been appropriate in the Legal Service's book, as it provides the best example of integration in taxation and a successful case study.[13]

The Customs Union has been an essential component of the internal market since its inception in the Treaty of Rome,[14] as it entailed the removal

10 This sentence opens the first chapter of the 'Tipke/Lang', the manual of reference in taxation matters in Germany. See Roman Seer, 'Steuerrecht als Teil der Rechtsordnung' in: Roman Seer, Johanna Hey, Joachim Englisch and Joachim Hennrichs (eds), *Tipke/Lang, Steuerrecht* (25th edn, Otto Schmidt 2024), 1-40.

11 See an account of EU tax law as a field within EU Law in volumes such as Christiana Panayi, Werner Haslehner and Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020); Sjoerd Douma, Otto Marres, Hein Vermeulen and Dennis Weber (eds), *Terra/Wattel, European Tax Law* (8th edn, Wolters Kluwer 2022); Julianne Kokott, *EU Tax Law* (Beck-Hart-Nomos 2022).

12 Due to space constraints, other significant developments in EU law impacting taxation such as those concerning administrative cooperation – enshrined in Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ 2011 L 64, and its subsequent modifications, and Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ 2010 L 84 – are not dealt with in this contribution. Although one might affirm that EU citizens' lives were positively impact by these developments as well, the author considers that the impact of developments in indirect taxation and in corporate income taxation are more significant in that regard.

13 In fact, major EU tax law topics such as the value added tax or the customs union only merit sporadic mentions in the Legal Service's book. A word search throughout the entire book of the concept 'value added tax' hits three results (pages 15, 273, and 383), as does the word 'customs' (pages 14, 21, and 352), none of them referred to substantial issues.

14 For an overview, see Timothy Lyons, *EU Customs Law* (Oxford University Press 2018).

of internal tariffs[15] and the establishment of a comprehensive set of uniform regulations applicable throughout the Union vis-à-vis imports from third countries.[16] Its essence nowadays may be found in Article 28 Treaty on the Functioning of the European Union (TFEU), which states that the Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between the Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries. These rules, alongside those establishing the Internal Market, marked the end of fiscal protectionism within the EU and a common policy towards third countries determined by the Union itself, as customs constitute an exclusive competence per Article 3(1)(a) TFEU. For example, this allows EU citizens resident in, e. g., Italy, to purchase a Dutch bike without tariffs or other equivalent charges being levied, and thus at a comparatively lower price.[17]

Leaving aside customs, the Union has the competence to harmonise legislation on turnover taxes, excise duties, and other forms of indirect taxation to the extent necessary to ensure the establishment and functioning of the internal market and to avoid distortions of competition.[18] This competence has been exercised extensively, as VAT is largely harmonised,[19] and excise duties on tobacco, alcohol, and energy sources have been approximated in many of their essential components.[20]

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15 On the customs union, see Arts 9 to 37 of the Treaty establishing the European Economic Community. After a transition period, all customs duties and restrictions were lifted effectively on 1 July 1968.

16 See, in the version currently in force, Regulation 952/2013/EU of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code and Commission Implementing Regulation 2015/2447/EU of 24 November 2015 laying down Detailed Rules for Implementing Certain Provisions of Regulation 952/2013/EU of the European Parliament and of the Council laying down the Union Customs Code.

17 This example is inspired by an advertising image promoting the 50 years of customs union with the following text: 'Discover a Union where you can buy a bicycle without paying customs duties'. The image may be found in Ian Muscat (ed.), *The EU Customs Union @ 50 Concept to Continuum* (Malta Customs in collaboration with the European Commission 2018), 24. Document available at <https://taxation-customs.ec.europa.eu/system/files/2019-01/01_2019_the_eu_customs_union_50th_book_en.pdf>, last access 28 January 2026.

18 Article 113 TFEU.

19 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ 2006 L 347 (VAT Directive).

20 Excise duties are one-stage taxes applicable in the manufacturing stage, so that the manufacturer includes that cost in the price of the product. The taxable base is defined with respect to a physical feature of the good, such as volume. The structure and rate of these taxes is partially harmonised. See Council Directive 2020/262/EU of 19 December 2019 laying down the general arrangements for excise duty, OJ 2020 L 58/4.

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Regarding VAT, the layperson's perception of its harmonisation is probably different, as the most relevant component of this tax in the eyes of the consumer, namely the tax rate, varies from one Member State to another. Yet, even in this regard, there is a certain level of harmonisation in the form of minimum rates.[21] Aside from that, the most significant development occurred with the adoption of the first VAT Directive in 1967, which introduced a neutral system for entrepreneurs and the invoice-credit method.[22] This step implied the abolition of existing domestic consumption taxes with a cascading effect, which increased product prices at each stage of the value chain and led to a cumulative effect on the price the consumer paid. The harmonised EU VAT system, instead, allowed the entrepreneur to credit the VAT paid on purchases related to the economic activity, with the tax ultimately borne by the consumer, who thus pays a lower price compared to cascading consumption taxes.[23]

Another crucial aspect of VAT harmonisation was the introduction, in 1993, of a common system for cross-border transactions, which distinguished between intra-EU and third-country arrangements.[24] There are examples of the system's application with which many EU citizens would surely identify. For instance, until recently, intra-EU transfers of goods were taxed at the seller's country of origin, meaning the applicable tax rate was that of the seller's country. This allowed operators such as Amazon to establish themselves in the country with the lowest VAT rates in the EU, namely Luxembourg, and sell their products and services from this territory to consumers located in countries with higher VAT rates[25] therefore securing a competitive advantage in the form of lower prices vis-à-vis local sellers, who had to apply the local rates. This fact led the Member States to change the rules for intra-EU remote selling of goods to apply VAT at destination, meaning to use the VAT rate of the country where the consumer is located. Plus, this process led

21 In 1992, an amendment was introduced to introduce a 'floor' tax rate of 15 %, which still exists. See Article 97 of the VAT Directive. See also Council Directive 2018/912/EU of 22 June 2018 amending Directive 2006/112/EC on the common system of value added tax as regards the obligation to respect a minimum standard rate, OJ 2018 L 162/1.

22 Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of member states concerning turnover taxes, OJ 1967 071.

23 See Ad van Doesum, Herman van Kesteren, Simon Cornielje and Frank J. G. Nellen, *Fundamentals of EU VAT Law* (3rd edn, Kluwer Law International 2020), sec. 1.2; see also Ben Terra and Julie Kajus, *Introduction to European VAT* (IBFD 2023), sec. 7.3.

24 Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers, OJ 1991 L 376.

25 The cross-border rendering of services to consumers (B2C) generally follows the origin rule as well, although there are several exceptions. See the corresponding sections of the works quoted supra at note 23.

to significant reforms to adapt the tax to the digital economy and large online platforms.[26]

Beyond customs and VAT, there are also other significant milestones in what regards consumption and regulatory taxation, ranging from environmental taxation –the introduction of a Carbon Border Adjustment Mechanism (CBAM) constitutes a recent example[27] that was in fact addressed in a different chapter of the Legal Sevices' book[28] – to energy taxation – with the Energy Taxation Directive[29] and the proposal for its revision in the context of the EU 'Fit for 55' package.[30]

In a nutshell, the level of integration achieved in indirect taxation significantly enhanced the internal market and, therefore, enabled a more efficient exchange of goods and services, resulting in improvements in price and quality and, consequently, a direct impact on the economies and well-being of EU citizens. It is therefore surprising that the tax chapter failed to account for an entire policy field with significant implications for EU integration's output legitimacy.

2. EU Law and Corporate Income Taxation

The European Union has had a significant impact on corporate income taxes. Although there is no explicit reference in the founding treaties, EU Law is especially relevant for income tax imposed on cross-border transactions. The analysis of this strand of EU Law, specifically regarding the EU Directives on the matter, was excluded in the tax chapter, as 'most such legislation is only relevant to companies active in more than one Member

26 Council Directive 2017/2455/EU of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods, OJ 2017 L 348/7, and Council Directive 2019/1995/EU of 21 November 2019 Amending Directive 2006/112/EC as regards provisions relating to distance sales of goods and certain domestic supplies of goods, OJ 2019 L 310/1; Council Directive 2025/516/EU of 11 March 2025 amending Directive 2006/112/EC as regards VAT rules in the digital age, OJ 2025 L 516. See an overview in Terra and Kajus (n. 23), sec. 19.7.

27 Regulation 2023/956/EU of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ 2023 L 130.

28 James Flett, 'The European Union Carbon Border Adjustment Mechanism and Its Consistency With World Trade Organization Law' in: Commission Legal Services (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 272-294.

29 Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ 2003 L 283.

30 See Sabine Schlacke, Helen Wentzien, Eva-Maria Thierjung and Miriam Köster, 'Implementing the EU Climate Law via the "Fit for 55" Package', Oxford Open Energy 1 (2022).

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State, and thus not of direct relevance to EU citizens availing themselves of their freedoms under the treaties'.[31] Two remarks should be made to nuance this statement.

First, it is essential to bear in mind that while not directly impacted, citizens are indirectly bearing the burden of corporate income taxation. At the end of the day, these taxes are economically borne by the shareholders of these corporations, their workers, or the consumers of the products and services they offer, who are very often EU citizens.[32] The relevance of the establishment of an EU internal market refers mainly to corporations; therefore, including corporate income taxation in the tax chapter, even if a short mention, would have been undoubtedly sound.

Secondly, the State budget configuration largely depends on the tax mix adopted in each Member State, as taxes are their primary source of revenue. When the collection of corporate taxes decreases – irrespective of whether the cause is exogenous, such as the 2008-12 crisis, or endogenous, due to tax reductions e. g., in order to attract investment – the revenue that would be lost is usually collected through other, more efficient, taxes, such the taxation of labour envisaged in personal income taxes or the VAT itself,[33] hence affecting the EU citizens directly.

Another aspect that clearly links corporate taxation to the impact on EU citizens' well-being concerns the perception of fairness in the tax system. The taxation of multinational enterprises has been at the centre of public debate over the last ten years, mainly due to several scandals that hit the public debate and triggered a significant wave of cooperation in the EU, successfully furthered by the Commission. These concerns furthered the development of EU tax law significantly in the form of Directives aimed at the protection of domestic taxable bases against the phenomenon of base erosion and profit shifting,[34] as well as the adoption of a minimum tax on multinational enter-

31 See Roels (n. 4), 207.

32 See a recent account in Eric Toder, 'The Incidence of the Corporate Tax' in: Reuven Avi-Yonah (ed.), *Research Handbook on Corporate Taxation* (Edward Elgar 2023), 38-55; see also Yariv Brauner, 'The Non-Sense Tax: A Reply to New Corporate Income Tax Advocacy', Michigan State Law Review 59 (2008), 591-636.

33 For an empirical account, see Georg Thunecke, Are Consumers Paying the Bill? How International Tax Competition Affects Consumption Taxation (December 23, 2023). Working Paper of the Max Planck Institute for Tax Law and Public Finance No. 2023-26, available at SSRN: https://ssrn.com/abstract=4672591.

34 Anti-Tax Avoidance Directive (ATAD 1), Council Directive 2016/1164/EU of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ 2016 L 193/1, and ATAD 2, Council Directive 2017/952/EU of 29 May 2017 amending Directive 2016/1164/EU as regards hybrid mismatches with third countries, OJ 2017 L 144.

prises,[35] plus an array of amendments to the Directive on Administrative Cooperation to enhance the obtention and exchange of information on tax matters, as well as the collaboration between the tax administrations of the Member States.[36] It is mainly the legislative outcome of initiatives led by the Organisation for Economic Co-operation and Development (OECD) that has reshaped international taxation since 2013.[37]

The impact of EU Law on corporate income taxation refers to instances of negative and positive harmonisation. The latter concept comprises a number of Directives dealing with specific topics, such as those mentioned in the previous paragraphs, plus the elimination of double taxation in the area of profit distributions from subsidiaries to their parents,[38] the payment of interest and royalties within cross-border groups,[39] the neutral tax treatment of cross-border reorganisations,[40] and the establishment of a minimum tax for multinational enterprise groups and large-scale domestic groups.[41] Regarding negative harmonisation, there is a significant body of case law on the influence of the fundamental freedoms on corporate income taxation, dealing with topics such as the deductibility of losses, the taxation of dividends, the treatment of permanent establishments, or exit taxation, among others.[42] The prohibition on State Aid envisaged in Article 107(1) TFEU is also highly

35 Minimum Taxation Directive (MTD), Council Directive 2022/2523/EU of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, OJ 2022 L 328.

36 See the Directives quoted above (n. 12).

37 See the recommendations of the OECD resulting from the Base Erosion and Profit Shifting project at OECD, *OECD/G20 Base Erosion and Profit Shifting Project. 2015 Final Reports. Executive Summaries* (OECD Publishing 2015); see also OECD, *Minimum Tax Implementation Handbook (Pillar Two)* (OECD Publishing 2023).

38 Parent-Subsidiary Directive (PSD), Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ 2011 L 345.

39 Interest and Royalties Directive (IRD), 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 2003 L 157.

40 Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ 2009 L 310.

41 Council Directive 2022/2523/EU on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, OJ 2022 L 328. For an overview, see Valentin Bendlinger, *The OECD's Global Minimum Tax and Its Implementation in the EU – A Legal Analysis of Pillar Two in the Light of Tax Treaty and EU Law* (Kluwer Law International 2023).

42 For a detailed analysis, see the chapters referred to the negative integration of direct taxation Sjoerd Douma, Otto Marres, Hein Vermeulen and Dennis Weber (eds), *Terra/Wattel, European Tax Law* (8th edn, Wolters Kluwer 2022); see also Kokott (n. 11), 144-170.

relevant to corporate income tax matters[43]. Often, Member States grant selective advantages to undertakings in the form of reduced taxation, which amounts to unlawful aid. Such a strand of negative harmonisation is accompanied by a soft law instrument, i. e., the code of conduct on corporate taxation, defining limits to prevent harmful tax competition, which all Member States have agreed to accept.[44]

All these instances of integration have resulted in a more robust internal market, the enhancement of neutrality and cross-border investment. On a different note, though, the Commission's efforts towards further harmonisation have been hampered by governance issues, most notably the need for unanimity in the field of taxation, which compromise the Union's effective action in stabilising corporate tax revenues. These issues will be dealt with in section III. 2.

This section intended to expand the views of the tax chapter regarding the positive aspects of the integration process in tax matters for EU citizens so far. Overall, an account of the matters mentioned – even if brief – would have provided a clearer view of the successful integration path the EU has pursued in taxation matters over the last 70 years and would have probably highlighted the immense role the Commission played in these developments. Yet the picture would not be complete without also accounting for the existing challenges and underlying tensions behind the described asymmetric integration model, many of which the Commission has to address recurrently. This will be thematised in the next section.

III. Underlying Tensions Amid Tax Competition and Cooperation

As stated, the tax chapter of the Legal Service's book refers to the ECJ's furtherance of the internal market by eliminating obstacles in the form of Member States' discriminatory tax regulations. This approach is blind to the significant tension arising from the division of competences in income tax matters between the EU and the Member States. The lack of harmonisation in this field is one of the primary reasons that compels the ECJ to enforce the fundamental freedoms. This lack of harmonisation may be explained due to

43 For an in-depth account see also Wolfgang Schön, 'State Aid in the Area of Taxation' in: Leigh Hancher, Yvo de Vries and Francesco Maria Salerno (eds), *EU State Aids* (Sweet & Maxwell 2021), 431-490.

44 See an in-depth analysis at Martijn Nouwen, *Inside the EU Code of Conduct Group: 20 Years of Tackling Harmful Tax Competition* (IBFD 2021).

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the unanimity requirement that applies to income tax matters, which has hampered further integration in this field. The purpose of this section is to examine these matters, which are crucial to understanding the relevance of EU Law in taxation.

As EU primary law does not mention direct taxes, the Member States retain exclusive competences in this field, which traditionally have been regarded as core part of their sovereignty. After granting the EU exclusive competences on monetary policy in the Euro area and customs, as well as far-reaching competences in the field of budgetary law and consumption taxation, direct taxation remains the only truly meaningful economic policy tool largely still in the hands of the Member States, along with social security matters.

As stated in the previous section, a limited number of Directives have been approved in the field of corporate taxation. These instruments were adopted following Article 115 TFEU, which allows the issuance of Directives for the approximation of Member States' regulations affecting the establishment or functioning of the internal market.[45] The ordinary legislative procedure cannot be followed to approximate legislation in tax matters, as this possibility is expressly excluded in Article 114.2 TFEU.[46] The procedure to adopt Directives ex Article 115 TFEU requires unanimity. This feature explains the limited development of secondary EU Law in this field and constitutes a major obstacle to further integration, alongside a series of issues that will be further analysed below. The section will begin with a discussion of the reliance on the ECJ jurisprudence in taxation matters to further the internal market, which is but a consequence of the lack of meaningful harmonisation.

1. Over-Reliance on the ECJ Jurisprudence and the Resulting Lack of Policy Direction

Although the Member States retain broad competences in direct taxation, they must exercise them in accordance with EU Law, especially with respect to the fundamental freedoms and the prohibition on state aid.[47] Focusing on

45 For an analysis of the relevance of Art. 115 TFEU in tax matters, see Georg Kofler, 'EU Power to Tax: Competences in the Area of Direct Taxation', in: Christiana Panayi, Werner Haslehner and Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020), 11-50 (16-26).

46 This includes measures referred to cooperation between tax authorities. See ECJ, *Commission v. Council*, judgement of 26 January 2016, case no. C-533/03, ECLI:EU:C:2006:64.

47 The ECJ employs such formulation in practically every decision rendered in the field since ECJ, *Finanzamt Köln-Altstadt v. Roland Schumacker*, judgement of 14 February 1995, case no. C-279/93, ECLI:EU:C:1995:3, para. 21. See Roels (n. 4), 207 f.

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the fundamental freedoms – as the tax chapter does – the Court balances two seemingly conflicting realities: The Member States' competence to decide their direct taxation policies vis-à-vis the prohibition of cross-border discriminatory obstacles that the fundamental freedoms entail. It does so by applying a rule of reason test[48], hence making one or the other prevail depending on the circumstances of the case under review.[49] Therefore, absent harmonisation, the ECJ case law has great significance in this field, and as a result, the Court is a crucial player in shaping the content of EU law regarding direct taxation.[50] This setting generates a series of issues that must be stressed:

1. The fundamental freedoms have a limited and unclear reach in income taxation matters. For instance, their configuration in the TFEU applied to income tax matters in accordance with the ECJ jurisprudence limits their reach to cases where a cross-border element is present and where a foreigner is treated worse than a national in order to prevent protectionism. The freedoms allow a more beneficial treatment of a foreigner in comparison to a national.[51] Thus, tax incentives designed to attract affluent foreign individuals that do not apply to individuals already residing in the country are unproblematic from this angle. Moreover, in income taxation matters, the Court considers that the fundamental freedoms entail a non-discrimination mandate. Therefore, other types of restrictions arising, e. g., from disparities existing in the tax regulations of the Member States, are not considered relevant.[52] At a different level, horizontal discrimination – meaning the equal treatment of non-residents investing in the same Member State –, was not

48 Note that instances of discrimination in direct tax matters are always cases of indirect discrimination, as nationality does not play a role in this field, but rather tax residence. As is widely known, indirect discrimination is addressed by the Court through the application of a rule of reason test. For an in-depth account of the intricacies of this test, see Niels Bammens, *The Principle of Non-Discrimination in International and European Tax Law* (IBFD 2012).

49 On this balance, see Sjoerd Douma, *Optimization of Tax Sovereignty and Free Movement* (IBFD 2011). See also Wolfgang Schön, 'Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?', Bulletin for International Taxation 69 (2015), 271-293.

50 See Rita de la Feria, 'Pillar 2, Fiat, and the EU Unanimity Rule on Tax Matters', EC Tax Review 32 (2023), 2-8 (5).

51 This scenario is known as reverse discrimination and is not covered by the fundamental freedoms, although it is relevant in the context of State aid prohibition. See a comparison of this aspect in Rita Szudoczky, *The Sources of EU Law and Their Relationships: Lessons for the Field of Taxation: Primary Law, Secondary Law, Fundamental Freedoms and State Aid Rules* (IBFD 2014).

52 The only exception is the *Sandoz* judgement, in which the Court seemingly misapplied the usual rule of reason steps it configured. See ECJ, *Sandoz GmbH v. Finanzlandesdirektion für Wien, Niederösterreich und Burgenland*, judgement of 23 September 1999, case no. C-439/97, ECLI:EU:C:1999:499.

allowed by the ECJ in tax matters, as these subjects were not comparable,[53] although in other fields of law the Court has stated otherwise.[54]

Overall, the scope of the fundamental freedoms is unclear due to their open-ended formulation and their confrontation with the competence of the Member States in the field of direct taxation under the rule of reason. The reach remains especially unclear when the Court must address a case on which no prior jurisprudence exists for a similar matter. The *Schumacker* decision may illustrate this point,[55] as it was the first case in which the ECJ recognised comparability between resident and non-resident taxpayers under specific circumstances.[56]

Another scenario in which the scope of the fundamental freedoms becomes uncertain is when the Court issues a decision that significantly deviates from or directly contradicts previous case law, without explicitly acknowledging an override. A recent example is the overruling of *Lidl Belgium*[57] by *W AG*[58], pertaining to the much-criticised final losses saga, where the Court did not even address the fact that it was deciding against its own long-standing jurisprudence on the matter.[59] In fact, it did not even mention *Lidl Belgium* in its decision.[60]

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53 ECJ, *D v. Inspecteur von de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, judgement of 5 July 2005, case no. C-376/03, EU:C:2005:424; ECJ, *Guy Riskin, Geneviève Timmermans v. État Belge*, judgement of 26 October 2016, case no. C-176/15, ECLI:EU:C:2016:488.

54 See subsequent cases ECJ, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* judgement of 5 November 2002, case no. C-466/98, ECLI:EU:C:2002:624 to ECJ, *Commission of the European Communities v. Federal Republic of Germany*, judgement of 5 November 2002, case no. C-476/98, ECLI:EU:C:2002:631, each case referring to a different EU Member State, due to the conclusion of bilateral 'open skies' agreements with the US. For a comparison of this case with those referred to income taxes, see Christiana Panayi, 'Exploring the Open Skies: EC-Incompatible Treaties Between Member States and Third Countries', YBEL 25 (2006), 315-362.

55 ECJ, *Schumacker* (n. 47).

56 The *Schumacker* judgment is addressed in the tax chapter. See Roels (n. 4), 215.

57 ECJ, *Lidl Belgium GmbH & Co. KG v. Finanzamt Heilbronn*, judgement of 15 May 2008, case no. C-414/06, ECLI:EU:C:2008:278.

58 ECJ, *Finanzamt B v. W AG*, judgement of 21 December 2022, case no. C-538/20, ECLI:EU:C:2022:717.

59 The kickstart of the final losses' saga was ECJ, *Marks & Spencer plc v. David Halsey*, judgement of 13 December 2005, case no. C-446/03, ECLI:EU:C:2005:763. For an overview, see Johanna Hey, 'Taxation of Business in the EU: Special Problems of Crossborder Losses and Exit Taxation' in: Christiana Panayi, Werner Haslehner and Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020).

60 See an analysis in Axel Cordewener, 'We Need to Know When Previous Case-Law Has Been "Overruled"!-A Plea for More Legal Certainty in EU Tax', EC Tax Review 32 (2023), 144-151.

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The lack of clarity regarding the scope of the fundamental freedoms as interpreted by the ECJ also arises because the decisions' content is complex to extrapolate, and prone to raising further questions and concerns.[61]

2. The ECJ case law on income taxation and the fundamental freedoms has evolved like a pendulum over time. In the first stage, spanning the first cases in the 1990s until ca. 2006, the Court expanded the scope of the fundamental freedoms significantly, heavily affecting the policy options adopted by the Member States at that time.[62] This was especially so because of the Court's assessment of comparability, a crucial component of its rule-of-reason analysis. Affirming comparability could lead the Court to declare a rule as discriminatory and contrary to EU Law, while the lack of comparability would entail excluding discrimination and, thus, the non-applicability of the fundamental freedoms to the case. The Court admitted instances of comparability in scenarios in which the predominant views on international tax matters did not. Notoriously, the ECJ tore apart the distinction between residents and non-residents in a significant number of cases.[63]

The scope of the ECJ's jurisprudence on direct tax matters was soon regarded as less deferential to the national legislator than that of most Member States' constitutional courts. There were concerns at the political level that the ECJ's decisions severely hindered policy options,[64] to the point that, for instance, the negotiations that preceded the Lisbon Treaty included discussions on limiting the Court's jurisdiction in this field.[65] Such a limitation was never substantiated, though.

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61 Additionally, on the difficulties that enforcing case law instead of regulations entail, see Gerda Falkner, 'A Causal Loop? The Commission's New Enforcement Approach in the Context of Non-Compliance with EU Law Even after CJEU Judgments' in: Emmanuelle Mathieu, Christian Adam and Miriam Hartlapp (eds), *Public Policy and the CJEU's Power* (Routledge 2020); see also De la Feria (n. 50), 6.

62 In a broader view, see the majoritarian activism notion developed in Luis Miguel Poiares Pessoa Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Bloomsbury Publishing 1998), chapter 3.

63 ECJ, *Commission of the European Communities v. French Republic*, judgement of 28 January 1986, case no. 270/83, ECLI:EU:C:1986:37; ECJ, *Schumacker* (n. 47); ECJ, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt*, judgement of 21 September 1999, case no. C-307/97, ECLI:EU:C:1999:438; ECJ, *Staatssecretaris von Financiën v. B. G. M. Verkooijen*, judgement of 6 June 2000, case no. C-35/98, ECLI:EU:C:2000:294; see Frans Vanistendael, 'Tax Revolution in Europe: The Impact of Non-Discrimination', European Taxation 40 (2000), 3-7.

64 See Willem Vermeend, 'The Court of Justice of the European Communities and Direct Taxes: 'Est-Ce Que La Justice Est de Ce Monde?', EC Tax Review 5 (1996), 54-55 (54).

65 See Frans Vanistendael, 'The ECJ at the Crossroads: Balancing Tax Sovereignty Against the Imperatives of the Single Market', European Taxation 46 (2006), 413-420.

From ca. mid-2000s onwards, the ECJ began to accept grounds for justification more frequently. For overriding reasons of public policy, the Court found discriminatory measures to comply with EU Law[66]. In other words, the core of the examination shifted away from the ascertainment of comparability up to a point at which comparability was often assumed and thus not assessed.[67] Instead, the analysis focused on whether there was any justification for discriminatory treatment and, if so, whether the contested national regulations were proportionate means.[68] In light of this jurisprudence, Member States saw their chances of adopting discriminatory regulations increase as more justificatory grounds were admitted in comparison with earlier case law.[69] Still, the Court of Justice would maintain its great influence through the shaping of proportionality requirements that would significantly impact the design of anti-abuse regulations such as thin capitalisation rules, controlled foreign corporations (CFC) rules, or rules imposing limitations on the

66 Yet, the origin of these exceptions based on public policy considerations stems from ECJ, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, judgement of 20 February 1979, case no. 120/78, ECLI:EU:C:1979:42; see Frans Vanistendael, 'The Functioning of Fundamental Freedoms and Tax Neutrality in the Internal Market' in: Christiana Panayi, Werner Haslehner and Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020), 142-161 (143).

67 See the Opinion of Advocate General Kokott on ECJ, *Nordea Bank Danmark A/S v. Skatteministeriet*, opinion of 13 March 2014, case no. C-48/13, ECLI:EU:C:2014:153, para. 23, where she labels comparability as a 'doctrinal vestige', due to the admission of multiple justification grounds not listed in the Treaty. See a critique to the mixing up of comparability and justification in Peter Wattel, 'Non-Discrimination à La Cour: The ECJ's (Lack of) Comparability Analysis in Direct Tax Cases', European Taxation 55 (2015), 542-553 (548-550). Wattel especially mentions the perceived comparability of non-subject to tax, non-resident subsidiaries with taxable resident subsidiaries in ECJ, *Marks &* Spencer (n. 58) and ECJ, *X Holding BV v. Staatssecretaris van Financiën*, judgement of 25 February 2010, case no. C-337/08, ECLI:EU:C:2010:89. He also mentions that the ECJ found comparability of non-taxable income and taxable income in ECJ, *Lidl Belgium* (n. 57) and ECJ, *Finanzamt für Körperschaften III in Berlin v. Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt GmbH*, judgement of 23 October 2008, case no. C-157/07, ECLI:EU:C:2008:588.

68 For an overview, see Niamh Nic Shuibhne, 'Exceptions to the Free Movement Rules' in: Catherine Barnard and Steve Peers (eds), *European Union Law* (4th edn, Oxford University Press 2023). For more in-depth perspectives, see a collection of essays on the matter in Panos Koutrakos, Niamh Nic Shuibhne and Phil Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Bloomsbury Publishing 2016).

69 The accepted grounds of justification include cohesion, territoriality, anti-abuse, effectiveness of fiscal supervision, neutralisation in other state, balanced allocation of taxing rights, prevention of double losses, symmetry. In turn, the ECJ did not accept as valid justification grounds the lack of harmonisation, difficulties to obtain information, lack of effectiveness of tax collection assistance, loss of tax revenues, compensation by other advantages, or double taxation. See an analysis in Wolfgang Schön, EU Tax Law. An Introduction (August 20, 2019). Working Paper of the Max Planck Institute for Tax Law and Public Finance No. 2019-12, available at SSRN: https://ssrn.com/abstract=3432273, 34-44.

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deductibility of expenses, as well as other rules aimed at protecting the domestic taxable base, such as exit taxes.[70]

3. The impact of the fundamental freedoms on direct tax matters as defined by the Court leads to a policy deficit, and Member States are to be blamed by externalizing a task that should rest with them. Going back to the notion of 'removing tax obstacles' announced in the title of the tax chapter of the Legal Services' book, these obstacles – national discriminatory measures in direct taxation – arise from the lack of neutrality in the treatment of domestic and cross-border transactions. Neutrality is a key concept for advancing a meaningful internal market in direct taxation. Yet, achieving this neutrality requires a conscious policy decision. This is so because there are several options in this regard, all allegedly offering neutral outcomes but from different perspectives. One may think of the most common approaches to competitive neutrality, namely those of capital import neutrality (CIN) and capital export neutrality (CEN). CIN aims to treat profits from domestic and foreign agents doing business in the same country neutrally. CEN consists of achieving neutrality in the treatment of profits generated abroad by domestic agents and the profits of domestic agents acting domestically.[71] Achieving both at the same time is impossible. Therefore, the adoption of one or the other must be an explicit policy choice. In contrast, the rule of reason test that the ECJ applies does not follow any specific conception of neutrality but is instead triggered when discrimination arises, irrespective of the neutrality reference adopted by the country under scrutiny. Therefore, the removal of tax obstacles does not necessarily entail achieving neutrality. It only does so when the obstacles result in discrimination under EU Law. The paradigmatic example for this state of affairs is the treatment of double taxation by the Court. Double taxation is a distortive phenomenon in international taxation that impacts the behaviour of economic agents, as it generates non-neutral outcomes where cross-border activities are taxed more heavily than domestic activities. Despite double taxation being prima facie contrary to any sound

70 ECJ, *Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt*, judgement of 12 December 2002, case no. C-324/00, ECLI:EU:C:2002:749; ECJ, *Bosal Holding BV v. Staatssecretaris van Financiën*, judgement of 18 September 2003, case no. C-168/01, ECLI:EU:C:2003:479; ECJ, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, judgement of 11 March 2004, case no. C-9/02, ECLI:EU:C:2004:138; ECJ, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, judgement of 12 September 2006, case no. C-196/04, ECLI:EU:C:2006:544; see Vanistendael (n. 66), 144.

71 For an analysis of these concepts and their impact in international taxation, with further references, see Wolfgang Schön, 'International Tax Coordination for a Second-Best World (Part I)', World Tax Journal 1 (2009), 67-114; see also Werner Haslehner, 'International Tax Law and Economic Analysis of Law' in: Florian Haase and Georg Kofler (eds), *The Oxford Handbook of International Tax Law* (Oxford University Press 2023), 231-248.

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notion of internal market, the ECJ has found double taxation not to violate per se the fundamental freedoms, but only when it entails treating a cross-border event worse than a domestic one.[72]

Basing the breach of fundamental freedoms exclusively on grounds of discrimination also raises another issue: it does not provide guidance on how such a situation should be addressed. The Member State may choose how to treat domestic and cross-border instances equally, by either increasing or decreasing the tax burden to all actors. Often, the Member State opts for the former. This may be illustrated by thin capitalisation rules and their replacement by interest limitation rules, both limitating the deductibility of financial expenses. Some years ago, EU Member States included thin capitalisation rules in their corporate tax regulations, usually based on a fixed ratio comparing debt and equity, so that exceeding the adopted ratio (often 1:3) would result in the non-deductibility of financial expenses for amounts beyond the adopted ratio. Yet, these rules raised concerns under EU Law, as they applied only to cross-border transactions, allegedly to prevent corporations from eroding the domestic tax base by incurring financial expenses through payments to related entities in low- or no-tax jurisdictions. The ECJ considered these rules to be justified only on the grounds of tackling tax evasion when the non-deductible amount was to be calculated by reference to the debt payments that independent parties would have held under identical circumstances.[73]

As a result of this jurisprudence, most EU countries decided to abolish thin capitalisation rules, and some opted to replace them with an interest limitation rule, applicable as a percentage of the company's Earnings before Interest, Taxes, Depreciation and Amortization (EBITDA) and limiting the deduction of financial expenses irrespective of the cross-border or domestic character of the transactions. The design of this rule was indeed in line with EU Law, as all corporations – those operating domestically and those with a cross-border reach – were treated equally. Notwithstanding, the rule raised constitutional issues in certain jurisdictions; in fact, the German interest limitation rule is still pending review by the German Constitutional Court.[74]

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72 See ECJ, *Mark Kerckhaert and Bernadette Morres v. Belgische Staat*, judgement of 14 November 2006, case no. C-513/04, ECLI:EU:C:2006:713; ECJ, *Margarete Block v. Finanzamt Kaufbeuren*, judgement of 12 February 2009, case no. C-67/08, ECLI:EU:C:2009:92. See an in-depth analysis of the matter from different angles in the volume of Alexander Rust (ed.), *Double Taxation Within the European Union* (Kluwer Law International 2011).

73 See ECJ, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, judgement of 13 March 2007, case no. C-524/04, ECLI:EU:C:2007:161, paras 80-87.

74 See Caroline Heber, 'The Interest Limitation Rule in the Light of European Constitutional Law', EC Tax Review 31 (2022), 72-84.

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Yet, nowadays, all Member States have a harmonised interest limitation rule deriving from the EU Anti-Tax Avoidance Directive.[75]

In short, the ECJ decisions are not targeted towards improving efficiency or building the internal market further.[76] The lack of coordination in direct tax matters and the 'externalisation' of the decision on how to address these matters – that should be addressed by policymaker s– to the Court via the enforcement of the fundamental freedoms, resulting in negative harmonisation, lead to a significant 'where do we go' issue in terms of policy. Indeed, the way to go remains unclear. As expressed by Vanistendael, 'either the EU pursues the same form of non-discrimination for all Member States (either CEN or CIN), and that means the end of full tax sovereignty, or the EU continues to respect the full tax sovereignty of the Member States and that means that the quest for non-discrimination is carried on in permanent inconsistency, or simply stopped'.[77]

2. The Lock-In Effect Resulting from the Unanimity Requirement

It must be emphasised that the relevance of the ECJ case law on income taxes and the issues noted in the previous section stems from the lack of meaningful harmonisation in this field. The main hurdle in this regard is the need to reach unanimity, as required by Article 115 TFEU.[78] The unanimity requirement results in a lock-in effect that, in the opinion of the Commission, has 'hampered progress on important tax initiatives needed to strengthen the Single Market and boost EU competitiveness'.[79] Such statement clearly conveys a sense of frustration, as the Commission struggles to further integration. Yet, the statement also obviates a rather more fundamental question, i. e., whether taxing powers should be granted to the Union.[80] From that perspective, a holistic approach that also takes EU budgetary matters into

75 Article 4 ATAD.

76 See Rita de la Feria and Clemens Fuest, 'The Economic Effects of EU Tax Jurisprudence' in: Werner Haslehner, Georg Kofler and Alexander Rust (eds), *EU Tax Law and Policy in the 21st Century* (Kluwer Law International 2017), 353-384.

77 Vanistendael (n. 66), 148.

78 Article 113 also establishes unanimity for indirect taxes, although in this field the harmonisation process has advanced within a reasonable pace.

79 See COM(2019) 8 final, Communication From the Commission to the European Parliament, the European Council and the Council, 'Towards a More Efficient and Democratic Decision Making in EU Tax Policy', 2019, 3.

80 See an in-depth analysis in Martha Caziero, The Taxing Powers of the European Union: A Legal Analysis of the Levying of EU Taxes (IBFD 2025).

account, as well as a revamp of the own resources system for the financing of the Union, would be more appropriate.[81]

The Commission already tried to move to qualified majority voting in tax matters during the negotiations preceding the Single European Act without success.[82] During the 70 years of EU Law, unanimity has been maintained for income tax matters. The last attempt by the Commission consisted of a proposal to move progressively towards qualified majority voting through the *passerelle* clause in 2019.[83] Still, a number of Member States opposed this initiative. Other alternatives, such as enhanced cooperation[84] or the 'nuclear option' of Article 116 TFEU[85], have never been put into practice.

One may understand the Commission's frustration when assessing the number of rejected proposals on income taxation over the years.[86] Aside from the earlier Directives on the removal of cross-border obstacles in corporate taxation, the later Directives on Base Erosion and Profit Shifting (BEPS) and minimum taxation[87] are the result of international initiatives prompted by shocks stemming from scandals that reached the mainstream media on tax fraud, abuse, and aggressive tax planning.[88] Currently, there are several open initiatives, such as adopting a single set of rules to determine the tax base for

81 See for an overview of the current state of affairs of the own resources system in Christian Neumeier, 'Political Own Resources: Towards a Legal Framework', CML Rev. 60 (2023), 319-344. Such an approach will not be explored here, as the reach of the commented book chapter focuses exclusively on the internal market aspect of taxation measures.

82 See Claus-Dieter Ehlermann, 'The Internal Market Following the Single European Act', CML Rev. 24 (1987), 361-409; David Allen, 'European Union, the Single European Act and the 1992 Programme' in: Dennis Swann (ed.), *The Single European Market and Beyond – A Study of the Wider Implications of the Single European Act* (Routledge 1992), 26-52; De la Feria (n. 50), 3.

83 Article 48 (7) TFEU. See, in the Legal Service's book, Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law', in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 381-384.

84 See an in-depth analysis of the enhanced cooperation mechanism in tax matters in Caroline Heber, *Enhanced Cooperation and European Tax Law* (Oxford University Press 2021).

85 See Joachim Englisch, 'Article 116 TFEU – The Nuclear Option for Qualified Majority Tax Harmonization', EC Tax Review 58 (2020), 58-61. See Peter Wattel, 'Taxation in the Internal Market' in: Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar Publishing 2017), 319-349 (328).

86 See an account of the areas in which harmonisation attempts on direct tax matters have failed at Kofler (n. 45), 13 f. This includes initiatives that are very relevant to form a proper EU internal market, such as the adoption of uniform rules on tax residence and the taxation of cross-border workers, or even more ambitiously, the adoption of a multilateral convention to prevent double taxation.

87 See references at n. 34 to 36.

88 See Shu-Yi Oei and Diane Ring, 'Leak-Driven Law', UCLA L. Rev. 65 (2018), 532-618.

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groups of companies in the EU[89] or preventing the misuse of shell entities for tax purposes.[90] Bringing all Member States into agreement is fairly challenging, especially when some benefit from the current *status quo* and may see their status as tax-friendly jurisdictions hampered. Tax havens within the EU indeed pose a challenge to more harmonisation. States still compete with one another to capture investment and value, with income tax among the main tools used for this purpose. This rationale, in fact, fits well with the goal of furthering an open market economy with free competition, favouring an efficient allocation of resources.[91] The tension between competition and cooperation is evident within the EU, which explains the described blockade, given the veto power over any direct tax harmonisation initiative.[92] Some would consider that such a setting trumps the ideals of solidarity envisaged in Articles 2 and 3 TEU or is against fairness understood in a broad sense.[93] Yet, the division of competences and the room for action of the EU established in primary law delineate clear limits that can only be overcome through a new deal to be achieved through unanimity again.

From a governance perspective, De la Feria identifies four consequences of the unanimity rule.[94] First, unanimity enables member States to block initiatives that could enhance efficiency in the internal market and address pressing challenges such as those posed by the digitalised economy. Secondly, it allows countries to use their veto as a bargaining chip against other interests of their own in the European Union, as exemplified by Poland and Hungary's initial opposition to the adoption of the minimum taxation Directive to leverage it in other negotiations. Thirdly, it distorts the definition of priorities, as the Commission will tend to define proposals that could realistically reach consensus in their adoption, rather than those that properly address pressing issues. Fourthly, unanimity will often result in the approval of legislation with a lower standard due to the need to accommodate the interests of all Member States involved, e. g. by including lacunae, ambiguous language, or excessive leeway in the domestic implementation. Overall, the risk of bureaucratisation in such a governance setting is significant.

The takeaway is that the coordinating legislation to eliminate barriers and achieve efficiency in the internal market regarding direct taxation is lacking,

89 COM/2023/532 final, Proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT).

90 COM/2021/565 final, Proposal for a Council Directive Laying down Rules to Prevent the Misuse of Shell Entities for Tax Purposes and Amending Directive 2011/16/EU.

91 Article 120 second sentence TFEU.

92 See Ana Paula Dourado, 'The Commission Proposal to Replace Unanimity with a Qualified Majority in the Case of Tax Matters', Intertax 47 (2019), 341-344.

93 See references at n. 1.

94 De la Feria (n. 50), 4.

and the existing status quo does not show prospects of changing, at least not in the mid-term. Yet, ideally, the Commission and the Member States would seriously reconsider the governance model of direct taxation in the EU. This is yet another perspective missing in the tax chapter of the Legal Services' book that would have been worth noting.

IV. Conclusion

The aim of this paper was to critically address the chapter titled 'The removal of tax obstacles to living, working, investing, retiring and dying in another Member State', which belongs to the Commission Legal Service's book titled '70 Years of EU Law – A Union for its Citizens'. This is the only chapter that specifically addresses tax matters. Yet, it restricts itself to addressing a very narrow parcel of the impact of EU Law in taxation matters, i. e., the impact of the ECJ jurisprudence on direct taxes affecting individuals. While very instructive in illustrating the evolution of this specific matter, the chapter fails to address other EU tax-related aspects that should have been covered to offer a more comprehensive view of how taxation improves the lives of EU citizens.

Considering that the chapter forms part of a section of the book devoted to showing that 'EU Law Improves the Lives of EU Citizens', the paper took a two-fold approach. First, it highlighted EU Law's major achievements in areas that were not addressed, such as consumption taxes, customs, and corporate income taxation. Secondly, it offered an account of the underlying tensions that explain the current asymmetrical integration model of EU Tax Law and the policy issues it raises to illustrate existing risks on the improvement of the lives of EU Citizens through a coordinated approach to taxation, such as the over-reliance on the Court of Justice to further (negative) harmonisation, and the issues that the unanimity requirement poses in taxation matters.

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