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ACTUAL CHALLENGE IN INTERNATIONAL CORPORATE TAXATION: SHIFTING THE OBLIGATION OF CONDUCT INTO OBLIGATION OF RESULT

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Abstract: *The research answered whether cooperation in ruling corporate taxation, a traditional obligation of conduct of sovereign states, was undergoing profound transformation into the obligation of result. The analyzed topic was not whether the tax authorities want or should cooperate (which is answered per se), but rather how to appropriately respond to the international taxation requirements for strengthening the multilateral agreements. Tax authorities worldwide have expressed concerns about identifying efficient regulation, and the development of multilateral agreements to combat tax evasion was under long and often unproductive negotiation. The empirical analyses of relevant literature and jurisprudence helped formulate an opinion on the regulation's efficiency in strengthening multilateral taxation. The need to change the nature of the state's obligation to negotiate fiscal regulation was not mentioned explicitly in hard law. Still, it was indirectly supported by soft law instruments, such as state representatives' continuous yet divergent dialogue and the approaches presented in the international courts' jurisprudence. The consistent influence on the obligation to support developments in international law in corporate taxation was justified, given the limit when considering its conduct nature, compared to potential benefits generated by the obligation of result.*

Keywords: *Tax Sovereignty; Nature of Obligation; Mutual Agreements*

INTRODUCTION

In the actual international context, fiscal law has developed into one of the most representative areas of national law. In contrast, taxation in international law has evolved dramatically over the last decade, in line with the globalization and digitalization of the economy. The state prerogative to design a tax system has transformed from a national legislative competence to a demanding and strongly argued topic of cooperation of sovereign states in international law (Tofan 2020).

The paper presents the influence of tax harmonization on international law, analyzing the current negotiation tools used by governments, with a direct effect on corporate taxation and fighting tax evasion. The topic became important in the context of the financial strengths generated by the global Covid-19 pandemic when responsible and coordinated fiscal policies could release the constraint of public budgets. Adopting reasonable and effective regulation is

endangered by the amplitude of the divergent interests of the partners in fiscal relations: taxpayers aim to pay less taxes. In contrast, tax authorities struggle to collect more revenue for public budgets. The fundamental right of the taxpayer to choose the most appropriate jurisdiction collides with the natural action of the governments to strengthen the administrative and cooperation procedure to increase public revenues. Consequently, the volatility of fiscal regulation is higher when unforeseen global crises put intense pressure on public budgets (Tofan 2021).

The research answered whether cooperation in ruling taxation, traditionally considered the obligation of conduct of sovereign states, was undergoing a profound transformation into the obligation of result. The analyzed issue went beyond tax authorities need to cooperate, as global international taxation requires strengthening multilateral agreements to combat corporate tax evasion. While effective accountability for fair digital taxation is an objective rather than a particular topic of international taxation, developing multilateral corporate taxation agreements has become imperative under continuous negotiation. The change of nature of the state's obligation to cooperate in the fiscal area is not explicit (it was not mentioned directly in hard law), but soft law instruments indirectly support it, and it is manifested through the continuous and divergent dialogue of state representatives and the approaches presented in the international courts' jurisprudence.

The paper examines the current challenges of corporate taxation, highlights the recent evolution of international taxation in the field of fighting aggressive tax avoidance under EU regulation and assesses the available tools for indirect business tax unification globally, in line with the extraordinary development of digitization. The final part of the paper contains the results and the research limits, proposing future directions for analysis.

THE CURRENT CHALLENGES OF INTERNATIONAL CORPORATE TAXATION

A tax system is a set of rules, regulations, and procedures that: "defines what events or states of the world trigger tax liability (tax bases and rates), specifies who or what entity must remit that tax and when (remittance rules), and details procedures for ensuring compliance, including information-reporting requirements, and the consequences (including penalties) of not remitting the legal liability in a timely fashion (enforcement rules)" (Slemrod and Gillitzer 2014, 1-31).

This definition also offers a large scale of parameters to characterize tax systems when they seem similar. Globalization elevated the interest in the optimal tax system, sharing the revenue being vigorously debated by fiscal authorities. The activities within the scope of other state regulations or under the conflict of two/many different regulations are to be addressed under the terms of the mutual tax treaty/convention between two countries (Tofan 2022). The diagnosis of a particular case is more challenging while fiscal regulation is constantly changing in many countries, and the volatility of the tax regimes generates no long-term predictability for the taxpayer's fiscal optimal conduct (Noord 2003). The situation encourages tax avoidance, with all its negative consequences on the public budgets, so the fiscal authorities struggle to maintain the balance of regulation between the methods to collect more and the mechanism to dimmish, if not eliminate, aggressive tax panning.

Relevant literature (Schreiber 2013) considers tax planning equal to tax avoidance. If any situation refers to a valid justification for the option to locate or/or develop a specific business, the activity is still considered legitimate tax planning (Tofan 2022). Free will is observed by scholars and researchers and supported by the courts of law jurisprudence through their judgments in favor of the taxpayers. Taxpayers can manage their businesses to keep low tax liabilities if their actions comply with the regulation in force (Schreiber 2013). Tax planning operations are allowed and acknowledged within legal limits and sanctioned by fiscal regulation and, *in extremis*, by criminal law if the taxpayer develops tax planning operation and the economic reasoning cannot be validated. When the regulation includes different possible legitimate actions the taxpayer may choose from, aiming at obtaining the most favorable fiscal treatment, it explicitly allows fiscal planning within the milestones described by the fiscal policy.

RECENT EVOLUTION OF EU LAW AND INTERNATIONAL TAXATION FOR FIGHTING TAX AVOIDANCE

The EU is a *sui generis* state cooperation project which has confirmed its solidity, although it has been confronted with important threats and challenges (Tofan 2022). The EU currency (euro) and the function of the European Monetary Union (EMU) for the 19th of the EU Member States, although the fiscal union does not go along with it, prove the efficiency of the European model of integration (Mendoza, Quadrini, and Rios-Rull 2009). The EU members have drawn a precise and successful framework for the EU Single Market, putting the priorities of their general financial policies at the same level. After the global financial crisis in 2008, the cooperation rhythm slowed, and European integration stalled. The gaps between the EU Member States' taxation system and the global crises (the Covid-19 pandemic and the most recent war in Ukraine) negatively affect the whole process.

Formal EU Member States' sovereignty to regulate income tax systems permits significant differences between tax systems. At the same time, the global development of economic activity justifies the most dynamic companies to move the administrative quarters or the center of operation to the most favorable tax jurisdiction. At the same time, the EU Member States' option to rule the tax system is influenced by the transnational policy, when tax bases migrate from one jurisdiction with a more severe tax system to another for lower tax liability (Jaakkola 2019). Consequently, the respective states adjust their tax systems, responding to the action of companies whose flexibility on the marker has been influenced by the fiscal advantages of a certain location (Tofan 2022). Thus, it is justified that states use the regulatory process as a competitive mechanism, which is alleged to have turned Keynesian welfare regimes into competition states.

The asymmetric European integration model has developed the transnational market's order while maintaining the prerogative to rule income taxation for the national regulatory authority (Hagen and Hammond 1998). Accordingly to the European primary law, the regulation in the tax field must respect the principle of subsidiarity. EU institutions act only if the Member State cannot produce effective regulation under the general scope of the EU law (Tofan 2022). Article 5 of the Treaty on European Union (TEU) includes the definition of the principle of the assurance of competence, establishing precise boundaries of the competence of the European

Union, further conditioned by the effects of the principles of subsidiarity and proportionality (Richard 2018).

The Treaty on the Functioning of the European Union (TFEU) defines the internal market (Article 26.2 TFEU), and the features of the European internal market and the general legislative milestones support the idea that fiscal harmonization seems inevitable (Tofan 2022). There is a specific level of harmonization of indirect taxes, i.e., value-added tax (Article 113 TFEU). In contrast, regarding income taxes, Article 115 TFEU gives the European Council the mandate to adopt directives for approximating the regulation affecting the functioning of the internal market, providing that the Council shall act unanimously (Schreiber and Fuhrich 2009). The principle of unanimity, applicable when the Council decides on tax issues, shows Member States the prior option to maintain their power to act immediately and without limitation in tax policy situations (Boria 2017).

There is a particular relationship of dependence between European internal market integration and fiscal harmonization in the EU, which has been outlined by the need to protect and support fundamental economic freedoms through judicial mechanisms and the Court of Justice of the EU control tools (Tofan 2021). When the exercise of state authority to rule taxation creates disadvantages for cross-border operations, excessive tax burdens will be waived because of the judicial control, for the reasoning of unjustified taxing power (Jaakkola 2019).

The situation of cross-border investment is another research topic in connection with the fiscal regulation development at the EU level. The differences in the treatment of these investments by different EU Member States corroborates with the complexity and constant evolution of the financial markets. The taxpayers used arguments such as possible discrimination and restrictions on fundamental freedoms when their cross-border investments are treated too sever from the fiscal point of view (Pato 2008).

Regulating the option for the source jurisdictions to impose limited source taxation on certain related party payments subject to tax below a minimum rate is also debated (OECD 2021). The issue concerns less European tax authorities, where the proper regulatory framework for the income generated in digital business is quite urgent (Tofan 2021). The proposal of two directives supports the efforts to harmonize the EU Member States' vision on this topic: A proposal laying down rules relating to the corporate taxation of a significant digital presence (OECD 2021b) and a proposal on the common system of a digital services tax on revenues resulting from the provision of certain digital services (European Council 2021).

Based on the above reasoning, harmonizing the corporate tax within the EU area is justified, yet the legislation in this domain must be adopted unanimously. On the one hand, it is justified, from the constitutional point of view, to give priority to the Member States' sovereignty. On the other hand, it is crucial to observe that the unanimity vote for fiscal regulation within the EU opposes the qualified majority vote, which is considered the EU's ordinary legislative procedure (Sting 2014). While each state holds the right to block the negotiation on taxation, it is most probable that no consensus on taxation is reached because the fiscal policy is mainly different. There is a legitimate tendency to protect autonomous prerogatives.

Based on fiscal sovereignty, the states can impose certain legitimate restrictions. Discussions are needed to analyze the limitation imposed by a specific rule of law because of

different effects resulting from comparable situations. For instance, comparing the tax treatment for a total domestic economic activity that is less favorable to cross-border activity to conclude the justification of the taxpayer's possible claim (Schreiber and Fuhrich 2009). An example is group taxation, which raises questions about the fiscal treatment when assets are transferred among affiliated entities and questions about applicable exemption methods for calculating the tax liability are formulated. The regulation design for group taxation is ruled using different options (Tenore 2006). Literature presenting two systems of tax treatment (Schreiber 2013):

- Partially tax consolidated group taxation (e.g., Germany, France), including various tools for profit consolidation (aggregation, relief, contribution).
- Full tax consolidation (e.g., the Netherlands), where the group is a single subject of law.

The regulation of the integrated tax group for calculating the profit tax has the considerable advantage of consolidating the income and losses within the company and its subsidiaries. Without group taxation, corporate taxpayers are encouraged to use aggressive tax planning methods (a division of companies or mergers) to group profits and losses between groups from very different economic activities only for fiscal efficiency (Dover *et al.* 2015). Until the issue is uniformly regulated at the EU level, unilateral regulation is the within-reach solution considered by the Member States to benefit from the group taxation advantages, among which is reducing the use of separate legal entities, without economic substance, for tax evasion. For instance, Romania has adopted law no. 301/2021 establishing procedural criteria for group consolidated corporate tax, observing the imperatives of the EU legal order.

The primary EU law states sovereignty in ruling taxation for all EU Member States. However, the development of the EU integration grew based on the efficient management of the regulatory process in the fiscal field. The coordination of the EU member legal systems could not have been anticipated when setting up the European Communities. Nevertheless, the perseverance in following the economic goals has led to the *sui generis* extended integration. Professor Weiler has synthesized this evolution by saying that the EU is neither a confederation nor a federation in the traditional sense of these words. Still, at the same time, it has its own "brand of constitutional federalism" (Weiler 2001, 60). When assessing the connections built among the EU Member States, it is necessary to observe the role of fiscal regulation, directly affecting the market functionality (Craig and De Burca 2011). We observe that one of the most functional directorates of the European Union is titled Directorate for Tax and Customs Union, which is justified if we consider that the EU was built on Customs Union (Herb 2005).

The Court of Justice of the European Union (CJEU) has repeatedly stated that EU Member States can regulate taxation. The intervention of the CJEU is called to censure the tax regulation which obstructs the proper functioning of the EU internal market. While few directives prohibit specific tax arrangements that may not support the Single Market, the CJEU's judgments give Member States ample leeway to decide how to reconfigure their tax systems to eliminate the disadvantageous treatment of cross-border economic activities (Jaakkola 2019). For instance, in Judgment of Case C-375/12, para. 63, the CJEU considered the national Court's case law competent to assess a domestic tax provision that distinguishes between taxpayers depending on where their capital is invested. Recently, in Judgment of Case C-334/20, para. 5 CJEU specifically stated that to prevent tax evasion or avoidance, EU Member States may take

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measures to ensure that, in respect of the supply of goods or services involving family or other close personal ties, management, ownership, membership, financial or legal ties as defined by the EU Member State, the taxable amount is to be the open market value.

THE NATURE OF THE OBLIGATION TO NEGOTIATE IN INTERNATIONAL TAXATION

The present global challenges (the Covid-19 pandemic, the war in Ukraine, energy crises etc.) have asked for governments' prompt and efficient reactions to secure their citizens' lives and everyday habits. The severity and the absolute unpredictability of the current threats have diminished all previous collaborative processes and reinforced new ones, responding to the acute needs and risks. Particularly for EU space, where Brexit seemed to be the most demanding scenario to cope with a short time ago, the global context generated additional adverse effects for the integration process.

The EU Member States considered important measures to stop the negative impact in the fiscal area of regulation (Brodzka 2017). Derived from previously used mechanisms of tax integration in the EU, the literature observes positive results of some solutions, like enhanced cooperation, soft law and indirect harmonization through EMU (Sting 2014). Unilateral action of states is easy, requires less political action for adopting and generates short-term results, but it is not preferable in the global context, where the national fiscal systems are colliding, as the alignment of the rule of law is very arguable.

To achieve the EU tax harmonization objectives, there was various proposal such as the Directive on the Allocation of Taxing Rights (ATRiD) (Arginelli 2018), the European Commission Action Plan for a Fair and Efficient Corporate Tax System, the Corporate Common Consolidated Tax Base project (CC(C)TB) (Tofan 2019), proposal for Country-by-Country Reporting (CbCR) between tax administrations to increase transparency against aggressive tax planning schemes (Moscovici 2016). Another topic is the tax treatment for dividends, especially regarding dividends payable in another country. The option to regulate the fiscal treatment of incoming and outgoing dividends must consider the prohibition of double taxation and achieving neutrality, despite the actual status of incoming or outgoing (Pantazatou 2013).

From a broader territorial perspective than the EU, the OECD issued 15 actions targeting Base Erosion Profit Shifting (BEPS). However, the European approach seems more efficient because the implementation of the regulations included in a directive (like country-to-country reporting) is ongoing if not achieved, while some members postpone the adoption of the regulation in line with the OECD BEPS initiative.

The European tools for achieving harmonization of the fiscal regime are bold in the field of consolidation of profits for multinational corporations. The process of negotiation is long and never easy. However, the countries prioritize reaching a commonly accepted version of the rule of law and return to the discussion table with perseverance. Innovative solutions are challenged, and the proposal is reshaped, proving the determination to find the best text for the rule of law and the need to have it adopted.

In 2018, it was estimated that one year delay to the previous implementation agenda would be sufficient to address all the issues, so the regulation would be adopted and published in 2019, with applications starting by 2020. Although the previewed deadlines were not

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respected, the failure of the CC(C)TB proposal was not acknowledged because the global Covid-19 pandemic crisis emerged in 2019. It has changed the agenda for every regulatory project, justifying any delays. The draft under evaluation includes specific provisions for characterizing a country's digital presence, outlining the features considered sufficient to determine taxable profits. The regulation is meant to reduce the gaps in taxation, which have permitted digital and global companies to innovate their tax planning and to diminish their tax bills spectacularly, minimizing the tax liability in the country where they create profits. The European Parliament proposal for CC(C)TB gave a specific mandate EU Commission to determine the parameters able to characterize digital presence (i.e., number of users, the volume of data collected by digital means). This includes the personal data of the users, highly valuable information managed by companies like Facebook, Amazon and Google, and actions designated as data mining operations (Schuh *et al.* 2019).

The proposal under revision observed the consolidation of the companies' income all over the UE, which are required to calculate their tax bills by adding up the profits and losses of all their European constituent companies. To stop the arbitrary movement of the companies in low tax jurisdiction, in line with the European freedom of movement on the internal market and freedom of establishment, the consolidation of the resulting profit would then be split for all Member States where the companies' income was generated.

Although the proposal was not adopted within the framework of the initially considered agenda, it is still appreciated as a fabulous opportunity to make a giant leap in corporate taxation (Committee on Economic and Monetary Affairs 2021). When adopted, the effects of this regulation will generate a new model of taxation, in response to today's digital economy challenges, in response to the unfair tax competition between corporate tax systems within the European Single Market, by taxing profits inside the jurisdiction where they are generated.

For large and renowned digital multinational companies in digital services like Facebook and Google, the profit margins have mounted up to 40% (European Parliament 2021b). Rapporteur Tang presented his support for introducing a 'sunset clause', echoing the proposal tabled by France (Deloitte 2019) stipulating that the digital service tax proposal refers to temporary measures pending a permanent solution. It will be happily replaced by the regulation of significant digital presence, Common Corporate Tax Base (CCTB) and consolidation of such a tax (CCCTB). The necessity of a cooperation mechanism between tax authorities when a company collects profits from digital services in many jurisdictions and a revision procedure of the regulation regularly (for instance, to evaluate the scope of application, including the rate, the tax base, the threshold etc. every three years) is included.

The Commission adopted a Communication on Business Taxation for the XXI century in May 2021, proposing 'The Business in Europe: Framework for Income Taxation' (BEFIT) to provide a single corporate tax rulebook for the EU based on apportionment and a common tax base. This proposal is expected to be tabled in 2023 and to replace the pending CC(C)TB proposal. To ensure effective taxation, the EU tax mix package would be developed until 2050, a more ambitious plan with a broader timeline. Still, there is skepticism about its success in the context of the failure of the CC(C)TB proposal.

Until the necessary steps to advance on the path of fiscal consolidation are taken within the EU, unilateral action is manifested by the domestic tax authorities, like France's initiative for

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taxing digital services, adopted in 2019 (BDO Global, 2021). The Digital Services Tax (DST) has been dubbed the 'GAFA tax', an acronym of the leading US targets: Google, Apple, Facebook and Amazon (Dorin 2019), yet it applies not only to US MNES but also to other international groups from China, Germany, Spain and even France. In response to the numerous opponents of this unilateral regulation, the tax was suspended to leave room for mutual agreements on the topic. Still, no agreement has been reached at the OECD on the taxation of the digital economy. The French Minister of Economy announced the applicability of the Digital Services Tax in December 2020.

Legitimate concerns about the global effects of the French digital service tax determined the G20 group to reach an agreement concerning the international tax in July 2021. However, as the agreement is not yet implemented, the French Minister of Economic Affairs has stated that the digital service tax will be maintained in France, and the multilateral agreement on this topic, endorsed by the OECD, will probably be applicable starting in 2023 (Reuters 2021).

CONCLUSION AND LIMITS OF THE RESEARCH

As presented in the previous sections, our analysis proves the mutation, like the state's obligation to negotiate internationally, especially in the tax field. The present global threats and challenges have determined a shift in the countries' approach toward drawing multilateral agreements. Topics that seemed shortly before under national regulatory prerogative are now intensely and continuously debated, even if the consensus is not met within a predictable schedule.

The need for harmonized regulation in the tax sector within the EU and globally does not require further clarification. Assuming this need as a direction of action in the national policy, effective implementation has led to significant changes in how state authorities engage in official meetings and negotiations to obtain the best possible legal framework for the taxpayers and the public budgets. The analysis undertaken in this study shows that currently, international law facilitated an important change in compliance with the general obligation to negotiate, from the scope of participation to obtain the best possible results to the objectively measurable active participation, by the result of that negotiation, i.e., the closing of the agreement. While some literature considers that the EU is close to achieving a genuinely tangible shift towards effective prevention of tax avoidance under EU law so that the internal market functions correctly, ensuring optimal and fair allocation of resources within the EU, there are serious impediments for the fiscal integration within the internal market. The Court of Justice of the European Union has a crucial role in the interpretation and development of EU law in general and in the development of EU rules in the field of taxation. The Court has had a traditional moderate and prudential approach, reflected in most judgments. It was also influenced by the necessity to consider the significant impact of its ruling in fiscal cases on the national public budgets directly and on the EU budget indirectly.

The research limits refer to the element like identification of the territorial scope of the research hypothesis and the effects outside the fiscal regulation, both being future directions of investigation.

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This paper justifies that global international taxation has evolved to the status that proves the lack of efficiency of unilateral regulation and justifies the imperative of national legislators' cooperation, either as regional partnerships or, ideally, through the implementation of global cooperation mechanisms.

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COMPLIANCE WITH ETHICAL STANDARDS

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