DOUBLE TAXATION AND DOUBLE NON-TAXATION AS THE NEW TENDENCIES OF EU E-TAX LAW

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INTRODUCTION

The digital economy provides a great field for new tax avoidance and tax evasion techniques around the world, especially by creating the opportunity to establish digital companies. The underlying principle for corporation tax is that profits should be taxed where the value is created. However, in a digitalized world, it is not always very clear what that value is, is it measurable or not, if it is, then how to measure it, or where it was created. Where digital companies have to pay their taxes? How these enterprises add value and make their profits? How the digital economy relates to the concepts of *source* and *residence* or the *characterization* of income for tax purposes? Do they have a *physical* presence (seat, side, subsidiary, etc.) or not? Is digital presence mean the place where taxes have to be fulfilled? What if a digital company is present all over the world? How do authorities exercise their supervision over them?

We can see that new techniques and methods show new tendencies of legal and illegal behaviors that require legislative answers from the states in order to maintain the legal certainty and compliance in the innovative network societies. Digital companies with cross-border activities and profit brought new challenges into taxation and tax law regulations all over the world.

International taxation conflicts may arise from the differences in tax systems, or, on the other hand, from their similarities. Double taxation, double non-taxation accompanied by tax evasion and tax avoidance mean new techniques in the digital economies. Tax avoidance may be legal or illegal, while tax evasion can only be illegal. Tax avoidance can be a method of profit maximizing by saving on tax costs (tax optimization). It does not mean that the taxpayer does not pay tax at all. Taxpayers may pay tax where it is *better to pay* – this leads us to the topic of tax heavens, (unlawful or unfair) state aids, tax discounts for foreign investors, etc.

On the other hand, tax evasion is illegal, that always mean the breaches of tax law.[4] Countries and international organizations (OECD, G20, and EU) have taken several initiatives against such taxation techniques. But, why this all means a legal issue to examine? EU member states kept their competences to impose taxes and use the principle of subsidiarity to save their national interests of legislating this field. However, the European Union gained its competences and interests regarding its financial interests. Article 325 Treaty on the Functioning of the EU (TFEU) expresses "*The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union. [...] The Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting*

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[4] See: ERDŐS, Éva (2019): A nemzetközi adójogi konfliktusok – Az adóelkerülés elleni harc kihívásai, *Miskolci Jogi Szemle*, 2019, under publishing

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their own financial interests". We can state that the financial interests of the EU are evaluated equally – at least on a legislative level − to the national financial interests of the member states. Understanding the necessity of equal evaluation of financial interests in the EU raises the question of the common legislation in the field of EU tax law, especially regarding the e-tax law. The financial interests – and their common protection – are treated in most of the cases from a criminal law perspective. However, taxation and tax law harmonization could serve as an incentive for common financial law legislation – and not only from a criminal law aspect but from a general public law one. Moreover, double taxation is already considered to be an obstacle for a free movement that should be abolished within the EU.[5] As economic development sped up hand-in-hand with digitalization, an adequate answer of the legislator became inevitable.
This article aims to examine the recent tendencies of tax avoidance, namely the double taxation and double non-taxation and to highlight those instruments that may facilitate legal harmonization of the field.

DOUBLE TAXATION AND DOUBLE NON-TAXATION

Double taxation means the application of two principles at the same time: the *residency principle* and the *source principle* (on the base of foreign residency). That means the person's double taxation for the same income which becomes the subject of taxation for the identical period in two different states.[6] This would be the case if the amount of tax levied by the residence state were higher than the amount of tax levied by the other contracting state.
Besides double taxation, a new tendency arose, the so-called *double non-taxation*. Double non-taxation means not only a policy problem but also a legal one. Important to note that not all situations where something remains untaxed means an illegal result. Using *Christoph Marchgraber*'s example "*neither Austria nor Germany levy an income tax on lottery winnings, a German citizen who wins in the Austrian lottery does not have to pay taxes in either state. Although the lottery winnings could thus be regarded as double non-taxed, it is doubtful that such an outcome would trouble the tax administrations involved*."[7] We can see that the abovementioned example is an intended international double non-taxation case, which not generates conflict. International organizations (OECD, EU, G20, etc.) fight against unintended international double non-taxation (and excessive international double taxation) because these do not fit well into the comprehensive approach as advocated by the legal principles of proportionality, fairness, non-discrimination and the rule of law.
The European Commission considers double non-taxation to be as incompatible with the internal market as double taxation. Important to point out that in the end, all illegal taxation attitudes affect the financial interests of the EU. Taxes are state revenues which not only form the interests of the member states anymore but the whole European Union's, too. However, member states still act as taxation would be only their state project and apply different taxation regulations – of course – in the framework of EU and international tax rules. The main hardship of European taxation law is that the EU only can issue directives and soft law instruments as legislative acts, but not regulations or resolutions. Until

[5] See the CJEU's decision in the C-336/96., *Gilly*-case, para 16: „*Although the abolition of double taxation within the Community is thus included among the objectives of the Treaty, it is clear from the wording of that provision that it cannot itself confer on individuals any rights on which they might be able to rely before their national courts."* Reports of Cases: 1998 I-02793
[6] ERDŐS, Éva (2019): A nemzetközi adójogi konfliktusok… quoted above
[7] MARCHGRABER, Christoph (2018): Double Non-Taxation: Not only a Policy but also a Legal Problem, *Kluwer International Tax Blog*, January 5, 2018, available: http://kluwertaxblog.com/2018/01/05/double-non-taxation-not-policy-also-legal-problem/ (downloaded on 21 March 2019)

unanimity is required for all tax directives, the direct tax harmonization remains lack. The time arrived to realize that old frames no longer fit for new (digital) purposes.

Double taxation is considered to be an obstacle for free movement.[8] As we mentioned above, the European Commission considers double non-taxation to be as incompatible with the internal market as double taxation.[9] However, "from an EU law perspective, it is still unclear what the meaning of the term double taxation is. This may seem surprising, because there is a vast consensus that by using this term reference is either to "*the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods*" (juridical double taxation) or to "*taxation of the same income in the hands of different persons*" (economic double taxation). However, from an internal market perspective, the main shortcoming of today's commonly used definition of double taxation is that the overall tax burden is disregarded."[10]

Double non-taxation is not as obvious as double taxation. It results from gaps in the interaction of different tax systems and some cases due to the application of tax treaties. As a result, income from cross-border investments or activities may go untaxed, or be subject to only unduly low taxes. European Commission considers double non-taxation to be as incompatible with the internal market as double taxation. However, the Commission is not arguing that double non-taxation *per se* violates state aid rules.[11] *"No taxation or low taxation is not per se a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it."*[12]

Fundamental freedoms are impaired if a cross-border transaction sustains a higher tax burden than a comparable domestic transaction. However, if the result is the other way around, i.e., a cross-border transaction sustains a lesser tax burden than a comparable domestic transaction, the internal market's free movement requirement is not infringed. According to the OECD *BEPS Action Plan,* double non-taxation may lead to "*a reduction of the overall tax paid by all parties involved as a whole, which harms competition, economic efficiency, transparency, and fairness*."[13] As the Article 120 of the Treaty on the Functioning of the European Union (TFEU) declares, the EU is based on the economic policy perception of "*an open market economy with free competition, favoring an efficient allocation of resources*." Article 106-107 of TFEU among other things, contains provisions aimed at avoiding distortions of competition induced by the Member States. The State aid rules of Articles 107-109 TFEU are the most relevant means to implement the competition aspect of the internal market concept. Whether a domestic measure causes a selective advantage is the most important question. According to the CJEU, if a tax measure leads to preferential treatment of certain economic operators which are in a comparable situation with non-privileged economic operators, a domestic measure causes a selective advantage.[14] The „*Court's State aid analysis is based on a comparison. To determine whether a cross-border situation is unduly privileged so that the internal market's objective of the undistorted competition is harmed, the taxation of the cross-border*

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[8] The ECJ even considered the abolition of double taxation to be included among the objectives of EU law. See: C-336/96. *Gilly-case*, EU:C:1998:221, at para. 16; C-265/04 *Bouanich-case*, EU:C:2006:51, at para. 49; C-128/08 *Damseaux-case*, EU:C:2009:471, at para. 28; C-540/11 *Levy and Sebbag* case, EU:C:2012:581, at para. 27.

[9] MARCHGRABER, C.: quoted above cites: Taxation in the European Union, SEC(96) 487 final (20 March 1996), at p. 13 ("*[t]he Single Market is clearly not compatible with either double taxation of the same taxable base or no taxation at all*")

[10] See :MARCHGRABER, C.: quoted above

[11] European Commission decision in the McDonald's case, SA.38945 Alleged aid to Mc Donald's – Luxembourg, about the topic see: HASLEHNER, Werner (2016): The McDonald's State Aid Case – The EU Commission Interprets a Tax Treaty, *Kluwer International Tax Blog*, available at: http://kluwertaxblog.com/2016/06/22/the-mcdonalds-state-aid-case-the-eu-commission-interprets-a-tax-treaty/ (downloaded 21 March 2019)

[12] OECD, *Action Plan on Base Erosion and Profit Shifting (hereinafter referred to as BEPS)* (OECD, 2013), OECD Publishing. http://dx.doi.org/10.1787/9789264202719-en ,at p. 10.

[13] OECD (2013): BEPS Action Plan, at p. 15.

[14] C-146/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke case*, EU:C:2001:598, at para. 38.

situation should hence be contrasted with the taxation of a comparable domestic situation. Against this background, when referring to double non-taxation, the European Commission seemingly refers to a situation in which a cross-border transaction sustains a lesser tax burden than a comparable domestic transaction."[15] Therefore, double non- taxation does not necessarily mean that activity, a taxpayer or an income remains untaxed. In addition to that, Member States are free to decide which property gain should be or not be taxed, that not creates an obstacle of free movements. The problem arises when a state applies a lower tax burden than the domestic situation *vica versa*. Therefore, to decide whether a taxpayer is subject to double non-taxation or not should be examined individually, on a case-by-case basis. As *Marchgraber* expresses, whether „*cross-border situation leads to double non-taxation depends on the tax burden the respective comparable domestic situation would trigger in the individual Member States which are involved.*"[16] As the German-Austrian lottery example shows, in itself, it is not a problem when an income is not subject of taxes in states. The legal and economic problem arises when this untaxed situation forms *unlawful state aid*. *State aid*[17] is defined as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities in the form of tax measures. This might cause harmful tax competition. The TFEU generally prohibits state aid unless reasons of general economic development justify it.[18] We can see that double taxation means a problem for the employee or a company doing cross-border activities that indirectly creates an obstacle for free movements and fair competition, while double non-taxation affects the states' financial interests and at the end that indirectly affects the EU's financial interests, too. These are the two sides of the coin. As we already expressed above, classical taxation is based on the *physical presence* of the company in a state. When a state provides business in more than one state, the double taxation might cause problems. Anti-double taxation agreements or bilateral tax treaties signed by states may dissolve that, but conflicts of interpretation[19] may lead to a different application of that treaty and leave double taxation unsolved in the end. The main principle of taxation is based on residency, thus on physical presence. There are companies which are not present in any of the countries physically, but they are present everywhere as they are purely *digital* (e.g., *Dot-Com Companies*[20]). Double non-taxation might happens when *dotcoms* provide services worldwide. Is digital presence could be equally evaluated to physical presence from a taxation law perspective, or not?

The appearance of *dot-coms* called to life the new tendencies of taxation regarding the profits. The digital presence incented to create new rules for sites. The necessity of harmonized digital tax laws became obvious – at least within the EU. As the OECD

[15] MARCHGRABER, C.: quoted above
[16] MARCHGRABER, C.: quoted above
[17] For detailed explanation of state aid see the page of the State Aid Monitoring Office (Hungarian; SAMO): http://tvi.kormany.hu/tamogatas and the European Commission's explanation: https://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=CELEX:52016XC0719(05)&from=EN (downloaded: 21 March 2019)
[18] European Commission: State aid and control http://ec.europa.eu/competition/state_aid/overview/index_en.html
[19] The approach of the CJEU to tax treaty interpretation could be understood better by reading the argumentation issued in C-648/15 in the *Republic of Austria v Federal Republic of Germany* case on 12 September 2017. This is a landmark decision in tax treaty dispute resolution.
[20] According to the Farlex Financial Dictionary (© 2012 Farlex, Inc.) Dot-com is a „*business, especially a publicly-traded company, that conducts most or all of its business over the Internet. Dot-coms may conduct business in one or more of the following areas: Content, Commerce, and Connection. Content companies provide information, either for free or for a charge, and earn most of their operating income from advertising. Commerce companies sell new and/or used goods directly over the Internet. Connection companies provide Internet services directly to customers."* Available: https://financial-dictionary.thefreedictionary.com/Dot+Com+Companies
According to the definition of dot-coms created by the WordNet 3.0, Farlex clipart collection (© 2003-2012 Princeton University, Farlex Inc.): *Dot-com - a company that operates its business primarily on the internet using a URL that ends in `.com'.* And according to the Investopedia „*A dotcom is a company that embraces the internet as the key component in its business."* See: https://www.investopedia.com/terms/d/dotcom.asp (downloaded on 24 March 2019)

expresses in the BEPS Action Plan "*These*[21] *weaknesses put the existing consensus-based framework at risk, and a bold move by policymakers is necessary to prevent worsening problems.*"[22] The OECD did the first step towards harmonization – even if it is only a soft law instrument – is already done: the BEPS Action Plan. The main significance of the BEPS is that it takes into account the tax avoidance techniques after it recognized the problematic phenomenon of double non-taxation. "*BEPS relates chiefly to instances where the interaction of different tax rules leads to double non-taxation or less than single taxation. It also relates to arrangements that achieve no or low taxation by shifting profits away from the jurisdictions where the activities creating those profits take place.*
No or low taxation is not per se a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it. In other words, what creates tax policy concerns is that, due to gaps in the interaction of different tax systems, and in some cases because of the application of bilateral tax treaties, income from cross-border activities may go untaxed anywhere, or be only unduly lowly taxed."[23] Lack of legal harmonization or unification threatens the financial interests of the member states, and indirectly, of the European Union's.[24] Maintaining that tax policy is at the core of countries' sovereignty where each country has the right to design its tax system may lead to financial losses. Respecting the member states' sovereignty and understanding the principle of subsidiarity, the only tool is a kind of harmonization. For a possible unification, we might wait until the *euro* becomes the only currency within the EU. When the time for monetary unification comes, the legal unification of financial and monetary policy cannot wait. At this moment the only legal way leads *via* harmonization, using directives as secondary legal sources which require the member states' implementation to be applicable. The effectiveness of this system cannot be called convincing. When we examine double taxation and double non-taxation phenomena in the light of the state sovereignty and its bastions (such as the principle of subsidiarity), we raise the question whether state legislation on tax law serves the state interest', or not anymore? As the OECD declares in the BEPS, "*the increasing interconnectedness of domestic economies has highlighted the gaps that can be created by interactions between domestic tax laws."*[25] Gaps in the laws evidently can affect the single market. As we expressed above, the coin has two sides, the double taxation's impact on the single market may discourage market participants from cross-border activities which is disadvantageous to the legal or natural person who is dissuaded, and harmfully affects the EU's financial interests, too. While double non-taxation affects the financial interest of the member states – and indirectly justifies that sovereign legislation does not serve the state's financial interest on an international or European digital level. The main difference is that by double taxation the

[21] OECD (2013): BEPS Action Plan: „*The digital economy is characterised by an unparalleled reliance on intangible assets, the massive use of data (notably personal data), the widespread adoption of multi-sided business models capturing value from externalities generated by free products, and the difficulty of determining the jurisdiction in which value creation occurs."* p.10.
[22] OECD (2013): BEPS Action Plan, at p. 10.
[23] OECD (2013): BEPS Action Plan, at p. 10.
[24] See: VAN DE VIJVER, Anne (2015): International double (non-)taxation: comparative guidance from European legal principles, available at: http://www.econtaxmons2015.be/wp-content/uploads/2015/03/Econtaxmons2015-_-International-double-non-taxation_comparative-guidance-from-law-principles_Van-de-Vijver-A_sept-2015.pdf (downloaded: 10 March 2019)
While initiatives aimed at eliminating international double taxation are generally applauded, international tax literature voices deviating views on the desirability of the OECD, G20 and EU actions against international double non-taxation. See: ARNOLD, B. – LANG, M. – VANN, R. (2014): Special Issue. Base Erosion and Profit Shifting, *Bulletin IBFD*, 2014, Vol. 68, No. 6/7, 273-391; and BAKER, PH. (2013): Is There a Cure for BEPS, *British Tax Review* 2013, No. 5, 605-606; and DOURADO, A.D. (2015): The Base Erosion and Profit Shifting (BEPS) Initiative under Analysis, *Intertax* 2015, Vol. 43, No. 1.
Moreover, the response of various countries differs. While some "high-tax" jurisdictions are rather willing to actively support the initiatives of the OECD, the "low-tax" jurisdictions adopt a more cautious attitude. See: RING, D.M. (2008): What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State", *Virginia Journal of International Law* 2008, No. 49, pp. 42-43.
Furthermore, TING observes that in the real world most governments are keen to promote the competitiveness of their tax systems for multinationals. See: TING, A. (2014): iTax-Apple's International Tax Structure and the Double Non-Taxation Issue, *British Tax Review* 2014, No. 1, (40) 70-71.
[25] OECD (2013): BEPS Action Plan, at p. 15.

member states benefit as their revenue grows, while market participants lose, which means an obstacle for free movement. Thus it harmfully affects the internal market, and therefore that has an impact on EU financial interests.
On the other hand, by double non-taxation, the member states do not benefit at all, while market participants win (save). This kind of disproportionality may cause harmful competition on the one hand and means a violation of national financial interests, which generates the violation of EU financial interest. We can see, that both phenomena affect in the end the financial interest of the EU which could highlight the need for common (at least harmonized) e-taxation rules within the EU.

LEGAL ASPECTS OF EU E-TAX HARMONIZATION

The EU taxation law perspective of double taxation and double non-taxation mainly consists of secondary law legislation, soft law instruments (both EU and international) and some relevant CJEU cases where the Court gave interpretative guidelines, and those measures of the European Commission[26] which rely on the primary law sources.
Primary sources of EU law only provide competencies (for the Commission) and name prohibitions regarding some of the tax-related matters, such as: the prohibition of state aid (Art. 107 TFEU), elimination of market distortions (Art. 116 TFEU), the prohibition of discriminatory and protective product taxation (Art. 110 TFEU), and of import restrictions (Art. 34 TFEU). These provide a general frame on the one hand but do not harmonize exactly the field.
Secondary law sources include the directives, while soft law instruments are more variable regarding the types of the documents. EU-international soft law instruments involve the *Code of Conduct for business taxation*[27] which was agreed on by 15 member states in 1997/1998, and on the other hand, the *BEPS*.[28] As a soft law instrument, the Code is not binding; however, signatories follow it by voluntary compliance. The significance of the '*Gentlemen's agreement*'[29] is that it defined harmful tax measures and called for the member states' political commitment to "*re-examine, amend or abolish their existing tax measures that constitute harmful tax competition*[30] *(rollback process); and refrain from introducing new ones in the future (standstill process).''*[31] It identified a group[32] for tax policy cooperation including the high representatives of the member states.[33]

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[26] About the role of the European Commission in tax matters we can find many sources and cases. See:
Commission Recommendation of 6 December 2012 on Aggressive Tax Planning, C(2012) 8806 final in which the Commission has suggested several measures to avoid double non-taxation.
European Commission, Staff Working Paper. The Internal Market: Factual Examples of Double Non-Taxation Cases. Consultation Document, TAXUD D1 D(2012)
Recent state aid cases: the McDonald's case: SA.38945 Alleged aid to Mc Donald's – Luxembourg, available at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38945 (downloaded at 21 March 2019)
State Aid decisions in the Starbucks (SA.38374 State aid implemented by the Netherlands to Starbucks) and Fiat (SA.38375 State aid which Luxembourg granted to Fiat) tax ruling cases. About these cases see: HASLEHNER, Werner (2015): Double (Non)Taxation, Transfer Pricing and State Aid, Kluwer International Tax Blog, available at: http://kluwertaxblog.com/2015/12/11/double-nontaxation-transfer-pricing-and-state-aid/ (downloaded: 20 March 2019)
[27] Annex to the Conclusions of the ECOFIN Council meeting on 1 December 1997, OJ C 002, 06/01/1998 P. 0001 - 0006
[28] About BEPS and the Code of Conduct see: ERDŐS, Éva (2017): Az adóversenyt korlátozó intézkedések egyes aspektusai az Európai adójogban, *Miskolci Jogi Szemle*, 12. évfolyam, 1. Különszám 61-63.o., available: http://www.mjsz.uni-miskolc.hu/2017kulon1/7_erdoseva.pdf (downloaded: 20 March 2019)
[29] About standstill and roll-back process see: ERDŐS, Éva (2018): *New problems of the International and European Tax Law – The Digital Tax avoidance*, Multiscience – XXXII. microCAD International Multidisciplinary Scientific Conference, DOI: 10.26649/musci.2018.042, available at: http://www.uni-miskolc.hu/~microcad/publikaciok/2018/e/E_Erdos_Eva.pdf (downloaded: 20 March 2019)
[30] About harmful tax competition, see: ERDŐS, Éva (2017): Az adóversenyt korlátozó intézkedések egyes aspektusai az Európai adójogban, *Miskolci Jogi Szemle*, 12. évfolyam, 1. Különszám 58.-71.o., available: http://www.mjsz.uni-miskolc.hu/2017kulon1/7_erdoseva.pdf (downloaded: 20 March 2019) and ERDŐS, Éva (2017): Állami támogatások, adóverseny kontra szubszidiaritás az európai adójogban, *Miskolci Jogi Szemle*, 12. évfolyam, 2. Különszám, pp. 114-126. elérhető: http://www.mjsz.uni-miskolc.hu/2017kulon2/14_erdoseva.pdf (downloaded on 21 March 2019)
[31] TERRA, J.M. Ben-WATTEL, J. Peter (2012): *European Tax Law*, Wolters Kluwer Law & Business series, p. 201.

Secondary legislation involves the 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 (the so-called: ATAD directive).[34] By adding the Digital Single Market (DSM) strategy[35] to the priorities of the EU policies in 2015, the EU recognized (well) the wind of change in digital economies. From a taxation perspective, it is significant, that the Commission issued its Communication to the European Parliament and the Council to a Fair and Efficient Tax System in the European Union for the Digital Single Market.[36]
The Commission collected the new ways of doing businesses in the digital era and concluded four categories: *the online retailer model* (such as the Amazon, Zalando, Alibaba, eBay); *the social media model* (e.g. Facebook, Instagram, Xing, Qzone, Researchgate); *the subscription model* (e.g. Netflix, Spotify, iQiyi); and finally *the collaborative platform model* (e.g. Airbnb, Blablacar – or its Hungarian version: Oszkár telekocsi – Didi Chuxing, Turo). The EU needs a modern tax framework to seize digital opportunities, while also ensuring fair taxation. The Commission document summarizes the policy challenges as follows: "*Where to tax? (nexus) – How to establish and protect taxing rights in a country where businesses can provide services digitally with little or no physical presence despite having a commercial presence; and - What to tax? (value creation) – how to attribute profit in new digitalized business models driven by intangible assets, data, and knowledge."*[37] A great theoretical example was provided in the document for a "*business that provides digital services to customers in the EU via an online platform: Customers located in the EU pay subscription fees to access digital services (e.g., music or video) via an online platform run by a business located outside of the EU. Although the revenue generated from the subscription fees comes from customers in the EU, the platform provider does not have a taxable presence in the EU under the current international tax framework, and therefore the business is not subject to corporate tax in the EU.*"[38] We can see, that digital income is paid at the end by the consumer and that forms an untaxed income for the corporate. The EU with its single market and the DSM is mature enough to adopt new rules for taxing the digital economy. At EU level, the Common Consolidated Corporate Tax Base (CCCTB)[39] proposal offers a basis to address these key challenges. The Commission gave some alternative options for shorter-term solutions as *Equalisation tax on the turnover of digitalized companies*[40]; *Withholding tax on digital transactions*[41]*; Levy on revenues generated from the provision of digital services or advertising activity*[42]. In the end, the question is again that do member states alone able to regulate the taxation of *dotcoms* by their sovereign acts, or the DSM and network society hand-in-hand reached that point where supranational action is needed.

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[32] See the Code of Conduct Group and its reports at the page of the Council of the European Union: https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/ (downloaded on 25 March 2019)

[33] For more details on the Code of Conduct, see: BRATTON, William W. – McCahery, Joseph A. (2001): Tax Coordination and Tax Competition in the European Union: Evaluating the Code of Conduct on Business Taxation, 38 *Common Market Law Review*, Issue 3, pp. 677–718

[34] 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 (ATAD).

[35] The Digital Single Market (DSM) Strategy, COM(2015) 192

[36] European Commission (2017): Communication from the Commission to the European Parliament and the Council, A Fair and Efficient Tax System in the European Union for the Digital Single Market, COM(2017) 547 final

[37] COM(2017) 547 fin, p. 7.

[38] Quoted above, p. 7.

[39] COM(2016)683 and COM(2016)685

[40] A tax on all untaxed or insufficiently taxed income generated from all internet-based business activities, including business-tobusiness and business-to-consumer, creditable against the corporate income tax or as a separate tax.

[41] A standalone gross-basis final withholding tax on certain payments made to non-resident providers of goods and services ordered online.

[42] A separate levy could be applied to all transactions concluded remotely with in-country customers where a non-resident entity has a significant economic presence.

Finally, we add the CJEU's general jurisdiction as a piece of EU taxation law which means that the CJEU is not taxation and financial law specialist tribunal – therefore the Court gives a general, comprehensive judgment in which it interprets all legal aspects and legislative documents related to the case. The decisions have open-access for everyone. Thus many of the market actors and lawyers can benefit from it.

There are some taxation-relevant issues of the CJEU – e.g., the abovementioned *Gilly*-case, *Bouanich*-case, *Damseaux*-case, *Levy, and Sebbag* case − but this time we chose to summarize the lesson could be learned from the decision in case C-648/15, *Republic of Austria v the Federal Republic of Germany*[43] on 12 September 2017. From a harmonization and interpretative perspective, C-648/15 is a landmark one. The significance of this case is that it shows that multi-way interpretation possibilities are available even if states have a tax treaty.

The issue was the classification for treaty purposes of "genusscheine" (*debt-claims with participation in profits*[44]), which instrument may be issued by companies established under the corporate law of some civil law jurisdictions including both Austria and Germany. The *genusscheine* issued by a German bank and held by an Austrian bank. The issue was whether payments made pursuant to the genusscheine should be treated as *dividends* or *interest* under the Austria-Germany double tax treaty, 'the *Austro-German Convention*'[45] of 24 August 2000. Article 11(2), in common with OECD Model treaties contains a definition of interest which excluded payments under instruments with "participation in profits" from the definition. The Austrian bank requested MAP under article 25 (1) of the treaty. The competent authorities were unable to resolve the issue, and so the Bank invoked binding mandatory arbitration under article 25 (5) with the CJEU as the arbitrator under Article 273[46] TFEU. As the CJEU is not an arbitration court specialized in tax matters, it started its argumentation by a general remark. The judgment is analyzing the Vienna Convention on the Law of Treaties of 1969 which declares that '*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose*.' The *Austro-German Convention* requires a term not defined in the treaty to have the meaning that it has under the tax law of the contracting state applying the treaty unless the context requires otherwise. Germany contends the certificates at issue must be regarded as debt-claims with participation in profits within the meaning of Article 11 (2) of the *Austro-German Convention* and that, consequently, Germany, as the *source State of the income*, has the exclusive right to tax the interest from that place. In addition, Austria must, therefore, avoid double taxation of that interest and reimburse the tax already levied on that basis.

On the other hand, Austria claimed that the certificates at issue must not be regarded as debt-claims with participation in profits within the meaning of Article 11 (2) of the *Austro-German Convention* and that, consequently, Austria, as the *State of residence* of the beneficial owner, has the exclusive right to tax the interest therefrom. Also, Austria holds that Germany must, therefore, refrain from taxing that interest and reimburse the tax already levied on that basis. We can see, that the basic conflict arose from the same-time-application of the source and residence principle in a case where a tax treaty exists between states to avoid and unlock this type of conflicts. An important edification of the case that

[43] C-648/15, *Republic of Austria v Federal Republic of Germany* case, ECLI:EU:C:2017:664

[44] The debt-claims with participation in profits are unknown in common law countries. The difficulty in classification arrived because the terms under which the instrument may be issued can have debt or equity characteristics, or a combination of both. See: SCHWARZ, Jonathan: *The European Court of Justice and Interpretation of Tax Treaties*, September 20, 2017, Kluwer International Tax Blog, available at: http://kluwertaxblog.com/2017/09/20/european-court-justice-interpretation-tax-treaties/ (downloaded: 30 March2019)

[45] *Convention between the Republic of Austria and the Federal Republic of Germany for the avoidance of double taxation with respect to taxes on income and capital* of 24 August 2000

[46] According to the article 273 TFEU the Court may rule on '*any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties*'.

terms in a tax treaty can have different meanings in different circumstances. CJEU declared in its judgment that the concept of 'debt-claims with participation in profits' referred to in the *Austro-German Convention* must be interpreted as excluding certificates such as those at issue in the present case. Therefore, the CJEU ordered Germany to pay the costs as it was an unsuccessful party. It is important to note that CJEU judgment is a compass for practitioners and legislators as well, and in this sense its role is significant. However, similar interpretative questions may arise due to several tax treaties among states, and under 273 TFEU, the CJEU is competent to give its judgment, but that may increase the workload of the Court and not ensures a long-term solution. In the long-run, a common e-taxation document for Europe including anti-double taxation and double non-taxation perspectives would be the most suitable solution.

SUMMARY

All in all, we can conclude that only common actions can face the new challenges of e-tax law at the international level or at least a European level. The fact is that new problems arise from the dysfunctions of the old, traditional system, in which the sovereignty of the member states is above every other interest. In our view, sovereignty and national financial interests could also be served within a common European e-tax law framework where elaborated binding rules are applicable and executive. It is time to admit that digital companies boost our e-economies, restructure our network societies and traditional legal solutions cannot keep up the pace with these new challenges.

Double taxation and double non-taxation may also arise in those cases where states have tax treaties. The interpretation – as we expressed above – of these documents may cause conflicts, which means the waste of time and money. In the long-run, all member states – also tax havens – have to understand that they can only win if they decide to play win-win games – even if their profit is a bit less sometimes. The European Union requires team-players as our common financial interests cannot allow member states to play solo games for their own profit. The EU is a club established to serve common economic interests of its members. There is a great game known from psychology, called the 'YX game.' This teaches players to play a win-win strategy after it makes them possible to experience the impact of deviancies and the power of the cooperation. The lesson of that game is that maybe in the first rounds one can win alone when everyone else loses. But later, losers understand that they remain losers unless they change their strategies and copy the winners. However, when all groups decide to behave defiantly, all lose. Then they understand that they have to cooperate, trust in each other and respect rules. In the end, if that happens, all groups win. The prize is smaller than in that case where only one group won, and others lost because they have to share the prize (profit, stc.). However, all can develop, all benefits. In the first case, one could benefit only with a bit profit, but all others were losers. This is a symbolic picture of tax and other financial matters in the EU. Within a supranational organization which is based on cross-border activities and common economy with an internal market of 500 million consumers, only team-players are welcomed. European e-tax law is only one segment. That is obvious that supranational organization cannot turn into a federal state from one step to another and at this moment, that is not a goal to achieve. However, building the Union, taking the advantages of it requires the common rules of sharing the public burdens, at least in e-tax matters. Harmonization is just the first step, then, if it functions well, other sectors of financial and monetary harmonization could come – as a spillover-effect.

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