CONSIDERATIONS ON THE PHENOMENON OF DOUBLE TAXATION IN THE EUROPEAN UNION

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Abstract
In the general context of economic globalization, international economic cooperation, the liberalization movement of goods, services, capital and persons, and the effect of the exercise of fiscal sovereignty, appears the phenomenon of double or multiple international taxation of income and assets, following the vocation of several legal systems, which contain legislative differences and can generate tax obstacles, such as, the laws of the country of origin of the revenue and the legislation of the country of destination of income.
Thus, more interesting becomes the study of the phenomenon of double taxation at EU level given the distinct presence of 27 sovereignties in full process of European integration
So, this paper aims to identify how the European Union handles the phenomenon of double taxation, making a shift from defining this phenomenon to identifying the legislation designed to avoid or eliminate the phenomenon of double taxation in the field of EU direct taxation.
Also, this paper deems necessary to stop a moment upon the fiscal harmonization and integration in the indirect taxation field of the European Union.

Keywords: *the phenomenon of double taxation, direct taxation, European Union, fiscal sovereignty, avoidance of double taxation.*

Introduction:

In the contemporary context of the liberalization of the movement of goods, services, capital and people, development and diversification of international economic and financial relations, moving from regional to a global plan of interdependence on the one hand, and in the context of the intensification of the integration process Europe, the European Union - Pillar I, on the other hand, it is considered a scientific approach to date this work.

The paper, entitled "*Considerations on the phenomenon of double taxation in the European Union*", is aimed at identifying how to manage the phenomenon of double taxation in the European Union.

For this purpose , I considered it necessary to structure this work on 10 chapters, for the present three important issues on the chosen theme in our opinion, they assumed, and i.e. (i) identifying the context in which they unfold and the phenomenon of double taxation appears in relation to the taxation at EU level, Chapter 1, (ii) identifying the management modality on the phenomenon of double taxation on the European Union Level by submitting legislative framework in current EU in the field direct taxation seeks fiscal harmonization at EU level and therefore eliminating double taxation and alignment of tax legislation by 27 different States, Chapters 2-9, and (iii) illustrating some aspects of indirect taxation in the European Union – value added tax (VAT), excise and customs duties, though, the phenomenon of double taxation is shown imposing taxes on only direct precisely because of this nature integration of the European Union, the Chapter 10.

Also, we watched the impact on the matter with changes made by *Treaty of Lisbon* with its entry into force.

Of course, this paper would not have been finished without a part of it treating the author's conclusions, thus, distinct from the paper itself, we'll present the conclusions we reached from the paper itself.

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In terms of bibliographic sources, they include both the professional literature in the field of tax law and EU law, and community legislation and case law with implications in the field.

1. Taxation in the European Union and the phenomenon of double taxation

In the general context of economic globalization, international economic cooperation, the liberalization movement of goods, services, capital and persons, and the effect of the exercise of fiscal sovereignty, appears the phenomenon of double or multiple international taxation of income and assets, following the vocation of several legal systems, which contain legislative differences and can generate tax obstacles, such as, the laws of the country of origin of the revenue and the legislation of the country of destination of income.

Integration into the European Union (EU further)[1] imposed solving the problems related to *fiscal harmonization*[2], implicitly *fiscal sovereignty*[3], as well as *the phenomenon of double taxation*[4] and its prevention.

Remember, first, that EU fiscal policy is founded on the General Principles of the Treaty of Amsterdam respectively, *Common intern market*, *non-discrimination* and *legislative approximation* and on the *freedom of movement of goods, persons, services and capital.*[5]

Thus, **harmonization of fiscal policy** *at European level is the result of* **the compromise made** *between the sovereignty of Member States and obstacles created by differences in the legal system for different categories of taxes and fees*. The current level of harmonization achieved by the Member States clearly shows that *the uniformity of taxes will not be spontaneous and will not evolve quickly*.[6]

However, at the EU level, according to doctrine[7], cannot talk about politics generally applicable fiscally, despite the introduction of the Single Market and Economic and Monetary Union.

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[1] With the entry into force of Treaty of Lisbon on December 1, 2009, *the European Union has a single legal personality, thus, EU substitutes and succeeds the European Community*. Also, *EU is based on the Treaty on European Union* (TEU) and the *Treaty on the Functioning of the European Union* (TFEU).

Furthermore, regarding the creation of European communities, the establishing of European Union, issues modifying treaties, EU enlargement, see, in detail, Octavian Manolache, *Community Law Treaty* (Bucharest, C.H. Beck, 2006), p.3-19; Augustin Fuerea, *European Union Manual* (Bucharest, Legal Universe, 2006), p.13-26, p.32-77; Tudorel Ştefan and Beatrice Andreşan-Grigoriu, *Community Law* (Bucharest, C.H. Beck, 2007), p.1-42; Gilbert Gornig şi Ioana Eleonora Rusu, *European Union Law* (Bucharest, C.H. Beck, 2007), p.8-23; Stelian Scăunaş, *The European Union* (Bucharest, C.H. Beck, 2008), *p.*73-98, p.276-285; see, also, www.eurlex.eu.

[2] D.D. Şaguna, op. cit., p. 617 *apud* Rada Postolache, *Financial Law* (Bucharest: C.H. Beck, 2009), p.178.

[3] *The right to establish and collect taxes on a given territory* was named *fiscal sovereignty* or, in other words, *exclusive competence of the State in the field of taxation;* right that the State does not share it with anyone and the manner in exercising this right should not be answerable to any court or international organization. Currently, this last aspect *receives new nuances in the context of globalization*. For more aspects regarding fiscal sovereignty see, in detail, Alice Cristina Maria Zdanovschi, "*The concept of fiscal sovereignty*" (communication presented at the Scientific Session of Teachers of Legal and Administrative Sciences Faculty, Christian University "Dimitrie Cantemir", (Bucharest, April 7, 2011).

[4] Regarding the phenomena of double taxation see, for example, in detail, Narcisa Roxana Moşteanu, *International double taxation* (Bucharest: Didactic and Pedagogic Publishing House. R.A., 2003), p.7-31; Guerrino Sozza, *La fiscalità internazionale* (Milano: Edizioni Fag, 2010), p.99-137, Daniela Camelia Nemoianu, "*Avoiding double taxation in the context of bringing Romanian legislation to the European Union standards"* (Ph. D. Thesis, University of Bucharest, 2005), 200-205, Alice Cristina Maria Zdanovschi, "*International Taxation*" (Ph. D. Thesis, University of Bucharest, 2011), p.183-202.

[5] Nemoianu, "*Avoiding double taxation.*", p.19.

[6] Regarding this aspect, see, in detail, Dan Drosu Şaguna and Tofan Mihaela, *Financial and fiscal European Law* (Bucharest, C.H. Beck, 2010), p.209.

[7] Nemoianu, "*Avoiding double taxation.*", p.19.

European primary law of basic treaties in the field of taxation contributes through secondary legislation, namely directives and regulations[8]. But they are not concerned about taxpayer only for certain taxes that they had *to adapt* to ensure *fundamental objective* of "*freedom of movement and non-discrimination*". For this reason *some taxes are in power of community institutions* that created *common rules on them*.[9]

Also, *Community directives into national law* **are part of positive law**[10] and *it stands under the direct control of the Court of Justice of the European Union* (CJEU further)[11]. Thus, note in this regard on the value added tax (VAT) as it became a real court of last resort for fixing jurisprudence[12].

According to specialized literature[13], *the general legal framework of the taxation at EU level* could be justified by the overall objective expressed in the *Treaty establishing the European Community* (TEC further)[14] at *article 3* according to which, certain tasks are required, and among them are relevant:

a) according to *article 3 paragraph 1 letter c TEC*, **a functioning internal market** characterized by the abolition of obstacles between Member States to the free movement of goods, persons, services and capital,

b) according to *article 3 paragraph 1 letter h TCE*, **the approximation of the laws of Member States** to the extent required for the functioning of the common market.

We still have to emphasize that with the coming into force of the *Treaty of Lisbon* on 1 December 2009, there were many changes in the founding treaties, thus, besides changing the name of the *Treaty establishing the European Community*, into the *Treaty on the Functioning of the European Union* (TFEU further), **article 3 paragraph 1 TEC**[15] **was repealed and replaced**[16] **by articles 3 to 6 TFEU**[17]. Also the communities' purpose was provided by *former Article 2 TEC*, now *repealed and replaced on the merits of Article 3* of the *Treaty regarding the European Union* (*TEU*)[18].

So, on the basis of the general legal framework of taxation, as existing in the repealed provisions and continuing into the new form in force, in **direct taxation** matter *have been issued a number of directives to remove tax barriers*.

Thus, in light of defending and application of freedom of establishment[19], there is *a common tax regime* applicable to the founding companies and subsidiaries of different Member States, mergers, separations, transfer of assets and exchanges of shares between societies in different Member States and the transfer of the registered office of a European society (SE) or European cooperative societies (SCE), between Member states, interest rates and royalty payments made

[8] Radu Bufan, *"The taxation of transactions with foreign elements (I),"* *Commercial Law Journal 1* (2005): 181.

[9] See, Postolache, *Financial law,* p. 179.

[10] See, *art.11 Romania's Constitution*.

[11] Until the entry into force of Treaty of Lisbon the former title of the Court was *the Court of Justice of the European Communities* – CJCE.

[12] Regarding this aspect, Postolache, *Financial law,p.* 180.

[13] Nicoleta Diaconu, "*Tax regulations in the European Union,*" *Commercial Law Journal* 2 (2009): p.8-9.

[14] For the present paper in regard with TEC we used the consolidated version as seen on www.eurlex.eu, OJ C325, p.33, 24.12.2002.

[15] See for the former text,
http://eur-lex.europa.eu/ro/treaties/dat/12006/pdf/ce00020090212ro00010331.pdf, 44-45.

[16] See, the correlation tables, consolidated version of the Treaties, accessed 19 January 2012.
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0361:0388:RO:PDF, 367,

[17] Now art.3-6 TFUE provides areas of EU competence.

[18] See, art.3 TEU, consolidated version - www.eurlex.eu, OJ C 83/17, RO 30.3.2010, p.17.

[19] See in this regard, Raluca Moise, "*Freedom of establishment under Community law and direct taxation,*" *Romanian Journal of Community Law* 3 (2005): p.64-70.

between the associated societies in different Member States, the arbitration procedure to avoid economic double taxation.

For all that, in the reasoning of such directives it shows that: "In a Single Market having the characteristics of a domestic market, transactions between companies of different Member States should not be subject to less favorable tax conditions than those applicable to the same transactions carried out between companies of the same Member State"[20], or "whereas mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States *may be necessary in order to create within the Community conditions analogous to those of an internal market* and *in order thus to ensure the establishment and effective functioning of the common market*; whereas *such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States*; whereas to that end it is necessary to introduce with respect to such operations *tax rules which are neutral from the point of view of competition*, in order **to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level**;

whereas *tax provisions disadvantage such operations, in comparison with those concerning companies of the same Member State*; whereas **it is necessary to remove such disadvantages**;

whereas *it is not possible to attain this objective by an extension at the Community level of the systems presently in force in the Member States*, since differences between these systems tend to produce distortions; **whereas only a common tax system is able to provide a satisfactory solution in this respect**"[21].

In the same vein a major importance, in our opinion, in harmonizing the laws for the functioning of the common market were the provisions in art.293 TEC. Thus, art.293 TEC ruled *that Member States, as appropriate, will conduct negotiations for the abolition of double taxation in the Community for the benefit of their nationals*. Today, after the entry into force of the Treaty of Lisbon, art.293 TEC was repealed as there was no correspondent in TFEU.

Concomitantly, keep in mind that this article found it's applicability in the Convention on Arbitration[22], which established a arbitrary procedure of avoiding double taxation, but it only concerns the avoiding of economic double taxation[23].

According to this Convention, **there is no obligation for the Member States to effectively eliminate double taxation**; *bilateral arrangements are limited in foreseeing the efforts made by the States in eliminating them*.

Therefore **Member States shall keep full sovereignty on direct taxes** *bearing the responsibility in this area*. Because while indirect taxes is affecting goods and services quite independently of national structures and institutions, direct taxes underlines national visions on fiscal equity; thus, direct taxes are closely correlated with characteristics of a national legal system, with that national identity; therefore *the matter of direct taxes belongs to the Member States*[24].

This is highlighted by the **CJEU jurisprudence** and then after *commenting upon this jurisprudence* both national[25] and international[26] reference materials.

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[20] According to Directive 2003/49/EC, on this act also see *infra 7.*

[21] Directive 90/434/CEE, accessed 19 January 2012, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= CONSLEG:1990L0434:20070101:EN:PDF, see also Directive 90/435/CEE.

[22] Nemoianu, "*Avoiding double taxation.*", 24; Florin Norocel Petroşel, "*Avoiding double taxation in international relations,*" (Ph. D. Thesis, University of Bucharest 2007), p.96. See *infra 4.*

[23] Postolache, *Financial law, p.*180.

[24] Bufan, "*Taxation ... (I),*" p.182.

[25] See, for example, Moise, "*Freedom of establishment,*" 64-70; Mihai Banu, Note to cause C-376/03, D. c. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen, Judgment made on the 5 of July 2005, not published, Journal of Romanian Community Law 3 (2006): 133-49.

Thus, in **Case C-298/05**[27] Columbus Container Services BVBA & Co. against Finanzamt Bielefeld-Innenstadt, Judgment of the Court of 6 December 2007, the Court decides the following:

"27. As a preliminary point, it must be recalled, that, according to *settled case-law***, in the absence of unifying or harmonizing measures adopted by the Community**, *the Member States remain competent* to determine the criteria for taxation of income and wealth with a view to eliminating double taxation by means inter alia of international agreements (see, in particular, Case C-307/97 Saint-Gobain ZN [1999] ECR I-6161, paragraph 57; Case C-290/04 FKP Scorpio Konzertproduktionen [2006] ECR I-9461, paragraph 54; and Case C-374/04 Test Claimants in Class IV of the ACT Group Litigation [2006] ECR I-11673, paragraph 52).

28. However, although **direct taxation falls within their competence**, the Member States *must exercise that competence consistently with Community law* (see Case C-265/04 Bouanich [2006] ECR I-923, paragraph 28, and Test Claimants in Class IV of the ACT Group Litigation, paragraph 36).

44. In this respect, *double taxation conventions* such as those envisaged in Article 293 EC **are designed to eliminate or mitigate the negative effects on the functioning of the internal market** *resulting from the coexistence of national tax systems* referred to in the preceding paragraph (Kerckhaert and Morres, paragraph 21).

45. **Community law**, **in its current state** and in a situation such as that in the main proceedings, **does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Community**. Consequently, apart from Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p.6), the Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p.10) and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p.38), *no uniform or harmonization measure designed to eliminate double taxation has as yet been adopted at Community law level* (see Kerckhaert and Morres, paragraph 22).

Also, previous CJEU jurisprudence established certain rules[28]:

a) elimination of double taxation within the Community represents one objective of the Treaty,

b) apart of the Convention in 23 July 1990 concerning the elimination of double taxation in connection with profit adjustments in associated enterprises (*Convention on arbitration*), there are no

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[26] In this regard see, Timothy Lyons, "*Direct taxation and the Court of Justice: the Virtues of Consistency*" (Communication presented at the "Community Taxation: Recent Developments and Future Perspectives", Trier, October 30-31, 2003).

[27] OJ C 022, p.0003-0003, 26.01.2008**.** Case C-298/05: Judgment of the Court (First Chamber) of 6 December 2007 (reference for a preliminary ruling from the Finanzgericht Münster (Germany)) — Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstadt (Articles 43 EC and 56 EC — Taxes on revenue and wealth — Conditions for taxing the profits of an establishment situated in another Member State — Double taxation convention — Methods of exempting or offsetting tax). For this case see, www.eurlex.eu, accessed May 2009.

In that respect, also see, CJEU, Case C-194/06 Staatssecretaris van Financiën against Orange European Smallcap Fund NV, Judgment of 20 May 2008, where as has been observed in paragraphs 30, 32 and 48 of this judgment*, it is for the Member States to organize their systems for taxing distributed profits and to define*, in that context, *the tax base and the tax rate which apply to the shareholder receiving them*, and that, **in the absence of any unifying or harmonizing Community measures**, *Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation*.

See also, CJEU, Case C-101/05 Skatteverket against A, Judgment of 18 December 2007, according to paragraph 19, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law.

[28] See in detail, Mihai Banu, Note to cause C-376/03, 144.

unification or harmonization to eliminate double taxation adopted at Community level or by Member States through multilateral conventions, under Article 293 TEC[29].

On the other hand, under Article 293 TEC, now repealed, Member States, joined, when necessary into negotiations between them looking for guarantees in the interest of own nationals, of eliminating the double taxation, by *concluding of bilateral agreements*[30] between them, which found inspiration from double taxation pattern conventions on income and wealth tax, drafted by the OECD.[31]

However, *it is not for the Court competence*, under art.234 TEC[32], *to rule on possible violations of the provisions of this kind of Convention by a contracting Member State*. Thus, **the Court is unable to examine the relationship between a national measure and regulations of an agreement in order to avoid double taxation**; this aspect does not fall in the Community law[33] area of interpretation. And because *the scope of a bilateral tax conventions* concluded by Member States is *limited to individuals or legal persons specified* therein[34].

According to law enforcement application priority[35] of EU law with regards to a report between conventions to avoid double taxation and Community law, within the European Union, Member States may not agree, by *bilateral tax conventions against EU rules*. In consequence, community law prevails over provisions of bilateral tax conventions. Aspect accepted in the specialized literature[36].

It may be noted, as was noted in the specialized literature[37], there is a "*negative harmonization*" *by case law in matters of taxation.* Thus, the Court, removing from application, by its jurisprudence, national legislation incompatible stipulations, cannot form a tax system compatible with the common Market; therefore this integration takes place in a negative matter, only by abolishing the incompatible systems without proposing an acceptable alternative[38].

Also, this "negative harmonization" is given in applying the article regarding non-discrimination and those regarding basic freedoms[39]. Thus, this articles, being applied directly to individuals or legal persons in the EU, they can be invoked directly before national courts which, under certain cases, may require a preliminary decision in Court. And decisions of the CJEU *exceed the individual and leads to the harmonization of national tax rules*.

However, the specialized literature[40] holds **a Single European Tax opportunity**, *in the complex context of fiscal harmonization at EU level*, process which represents *the alignment of normative rules* in taxation matter in Member States, *to diminish* and, if possible *eliminate the negative effects* produced by *different tax systems between the Member States of the common market*.

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[29] Case C-336/96, Gilly, in ECR [1998] I-2793, pct.24 *apud* M. Banu, notă la cauza C-376/03, 144.

[30] See, for example, art.9 Directive 2003/49/CE, that states a *delimitation clause*, so, "this Directive shall not affect the application of domestic or agreement based provisions which go beyond the provisions of this Directive and are designed to eliminate or mitigate the double taxation of interest and royalties". See also, *infra* 7.

[31] Mihai Banu, Note to cause C-376/03, 144.

[32] Now art. 267 TFUE.

[33] See, paragraphs 46, 47 of C-298/05, CJEU.

[34] Paragraph 50 C-194/06, CJCE,

[35] See, for exemple, Manolache, *Treaty*, 67 and next; Fuerea, *Manual*, 172 and next; Ştefan and Andreşan-Grigoriu, *Community Law,* 187 and next.

[36] Bufan, "*Taxation... (I),*" 183.

[37] Nemoianu, "*Avoiding double taxation."p.* 25; Petroşel, "*Avoiding double taxation.*" P.97; Moise, "*Freedom of establishment,*" *p.*70; Timothy Lyons, "*Direct taxation and.".*

[38] Moise, "*Freedom of establishment,*" p.70.

[39] Terra B and P.Wattel, European Tax Law, Deventer, Editura Kluwer, 1993 *apud* Nemoianu, "*Avoiding double taxation."* 25; Petroşel, "*Avoiding double taxation."p.*97.

[40] In this regard, see, in detail, Şaguna and Tofan, *Financial*, p.205-210.

Regarding the opportunity of a single EU tax, **a measure** relatively **recent** taken at EU level is the **European Commission proposal**[41] to regulate *a common system of calculating the tax base of companies* operating in the EU - **a common consolidated corporate tax base (CCCTB)**.

According to the Commission's press release[42], the purpose of this proposal is to significantly reduce the administrative burden of compliance costs and legal uncertainty currently faced by EU companies, which *to determine their taxable profits must comply with up to 27 different national systems*.

CCCTB **objective** is that *companies benefit from a* **system of "single window"** *for submitting tax returns and to consolidate all profits and losses across the EU*. **Member States will retain full sovereign right to establish its own corporate tax rate**.

However, the CCCTB is seen to be[43], at EU level, **an important initiative in the elimination of obstacles that stand in the way of completing the single market**.

However, an increasingly powerful harmonization was done on **indirect taxes**, consumption taxes, excise duties and tax that is value added. They are governed by *common rules* that define the criteria for settlement, cases of exemption, deduction rules, *Member states keeping the right to establish rules of payment and control*.

Common internal market being an area *without borders* required *the dissolution of the mechanism of formalities and delays.*[44] The abolition of tax frontiers required the replacement of the destination *principle* with that of the **home country**, bearing the tax burden taking place in the State where the goods and services were produced, no matter where they are consumed, showing importance for indirect taxes, especially VAT which has the largest share in them.[45]

However, the appreciation is that "these taxes stays a juxtaposition of national taxes, each tax retaining the essence of fiscal sovereignty; decisions in this area are continuing to be taken by unanimity, common standards staying powerless"[46]. In other words, *a fiscal union* is not possible; any state acts to prevent fiscal erosion, to keep its fiscal sovereignty. [47]

It is noted that under the *Treaty on the Functioning of the European Union*, especially the article 113 TFEU (ex-art.93 TEC) to ensure proper functioning of the single market, the European Union has harmonization competencies of the laws on indirect taxation, including the base and tax rates[48].

Also, in a first stage, the harmonization has taken the form of total suppression of customs duties between member states followed by the adoption of a common customs tariff and the elimination of taxes and measures equivalent to customs duties, realizing *customs unification*[49].

In light of the phenomenon of double taxation which can be found only in direct taxes, there is necessary an overview of the current legislative framework in the field of European Union direct taxation[50], thus preceded by a presentation.

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[41] See, in detail, the proposal for a Council *Directive concerning on a common consolidated corporate tax base (CCCTB)***,** Bruxelles, 16.3.2011, COM(2011) 121 final, 2011/0058 (CNS), accessed 19 January 2012, http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&lng1=en,ro&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=615635:cs&page=1&hwords=CCCTB~.

[42] *IP/11/319,* Bruxelles, 16 March 2011, see, accessed 19 January 2012, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/171&format=HTML&aged=0&language=en&guiLanguage=en.

[43] Press Release, "Towards a single market act- For a highly competitive social economy- 50 proposals to optimize labor, commercial activities and exchanges." - COM(2010) 608, 27.10.2010.

[44] See, in detail, Manolache, *Treaty,* 221 and next.

[45] Postolache, *Financial Law,p.* 179.

[46] J. Grosclaude, Ph. Marchessou, Procédures fiscales, 3[eme] éd., Dalloz, Paris 2004, p.6 *apud* Postolache, *Financial Law,* 179-180.

[47] Postolache, *Financial Law,* p.180.

[48] Diaconu, "*Tax regulations*," p.13.

[49] See, for example, Gornig and Rusu, *European Union Law*, p.141 and next.

2. Council directive 90/434/EEC[51] of 23 July 1990 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

This directive is destined to eliminate fiscal measures that could hamper business reorganization, and sets postponing capital gains taxation at the time of completing a merger or reorganizing of residents in European Union societies. Also, this directive was modified by Directive 2005/19/EC which brings important changes, real improvements[52], most of them related to the establishment of European societies and European Cooperative societies and they also can transfer their registered office without proceeding to their dissolution.

Thus, in this respect, the Directive establishes that *transfer of the registered office of an SE or SCE does not lead in itself to any taxation of income, profits or capital gains to shareholders*[53].

According to Article 1 of Directive 90/434/CEE, *each Member State shall apply this Directive to the following*:

a) mergers, divisions, partial divisions, transfers of assets and exchanges of shares in which companies from two or more Member States are involved;

b) transfers of the registered office from one Member State to another Member State of European companies (Societas Europaea[54] or SE), as established in Council Regulation (EC) No 2157/2001 of 8 October 2001, on the statute for a European Company (SE)[55], and European Cooperative Societies (SCE), as established in Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)[56].

3. Council Directive 90/435/EEC[57] of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

Under this directive the elimination of profits double taxation is tried between founding societies in Member States and subsidiaries in another Member State and to have it reducing the differences between national tax rules applicable to groups of societies organized at a national level of a Member State and groups of organized societies in EU.

According to article 1 paragraph 1 of Directive 90/435/CEE, *each Member State shall apply this Directive*:

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[50] See, Nemoianu, "*Avoiding double taxation.*", 23 and next; Petroşel, "*Avoiding double taxation.*", 96 and next; Petre Brezeanu, Ilie Șimon and Sorin Celea, *European Taxation* (Bucharest: Economic, 2005), p.215 and next; Petre Brezeanu, *European Finance* (Bucharest: C.H. Beck, 2007), 239 şi urm.; also see the incidence legislation.

[51] Directive 90/434/EEC, OJ L 225, p.1, 20.8.1990, with subsequent amendments. Entered into force on January 1, 1992.

[52] See, Moise, "*Freedom of establishment,*"p. 61-62.

[53] According to art.10d par.1 Directive 90/434/EEC, also see, art.10d par.2 Directive 90/434/EEC, and, art.10b par.1 Directive 90/434/EEC, accessed 19 January 2012, http://eur-lex.europa.eu/LexUriServ/ LexUriServ.do?uri= CONSLEG:1990L0434:20070101:EN:PDF.

[54] In this regard, see, in detail, Elena Emilia Ştefan, "*European Society (I) – (Societas Europaea),*" *Commercial Law Journal* 1 (2007): 105-19; Elena Emilia Ştefan, „ *European Society (II) – (Societas Europaea),*" *Commercial Law Journal* 2 (2007): 105-18; precum şi, Adrian-Milutin Truichici, "*General considerations in the commercial european society ('Societas Europaea'),*" *Commercial Law Journal* 11 (2008): p.48-53.

[55] OJ L 294, 10.11.2001, p.1. Regulation as amended by Regulation (EC) No 885/2004 (OJ L 168, 1.5.2004, p.1).

[56] OJ L 207, 18.8.2003, p.1. Regulation as amended by Decision of the EEA Joint Committee No 15/2004 (OJ L 116, 22.4.2004, p.68).

[57] Directive 90/435/EEC, OJ L 225, p.6, 20.8.1990, with subsequent amendments. Entered into force on January 1, 1992.

a) to distributions of profits received by companies of that State which come from their subsidiaries of other Member States,

b) to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries,

c) to distributions of profits received by permanent establishments situated in that State of companies of other Member States which come from their subsidiaries of a Member State other than that where the permanent establishment[58] is situated,

d) to distributions of profits by companies of that State to permanent establishments situated in another Member State of companies of the same Member State of which they are subsidiaries.

Also, this Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.[59]

The Directive prevents the taxation of profit distribution to subsidiaries or, alternatively, allows tax deduction, and also exempts distributions of income from taxation by the parent company to source. So, a common system of taxation applicable to societies that have subsidiaries in different Member States was introduced.

And the effects obtained are the withholding tax repealed for profit distribution by owned subsidiaries in proportion of 10%[60] by a company in another Member State and the possibility that another Member State can tax the profits so distributed only if it gives the founding society a tax credit for the tax paid by the subsidiary in this respect.

However, according to article 3 paragraph 2 of Directive 90/435/EEC, Member States may not implement the directive if minimum participation rates that determine ratio between society-subsidiary are not kept for a continuous period of at least two years. Also, Member States shall have the option of replacing, by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights.

Furthermore, notice the following issue, namely that this Directive shall not affect the application of domestic or agreement-based provisions designed to eliminate or lessen economic double taxation of dividends, in particular provisions relating to the payment of tax credits to the recipients of dividends.[61]

4. 90/346/CEE Convention on the Elimination of double taxation on profits adjustment between associated enterprises, *known as* the Arbitration Convention[62]

This Convention was signed by Member States under Article 293 TEC[63], introducing **an arbitration procedure** *to prevent double taxation on profits adjusted* between societies associated

[58] For the purposes of this Directive the term '*permanent establishment*' means a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on in so far as the profits of that place of business are subject to tax in the Member State in which it is situated by virtue of the relevant bilateral tax treaty or, in the absence of such a treaty, by virtue of national law, see art.2 par.2 Directive 90/435/EEC.

[59] Art.1 par.2 Directive 90/435/EEC, accessed 19 January 2012, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1990L0435:20070101:EN:PDF

[60] Initially the participation rate was at least 20%, then from January 1, 2007 by 15% and from 1 January 2009 to 10%.

[61] Art.7 par.2 Directive 90/435/EEC.

[62] OJ, L 225, p.10, 20.8.1990. The Convention was signed on July 23, 1990 and came into force on January 1, 1995 for an initial period of five years. And Finance Ministries of Member States in May 1999 signed a protocol extending the Convention, which entered into force on November 1, 2004, see, Nemoianu, "*Avoiding double taxation.*", 27; Petroşel, "*Avoiding double taxation.*", p.99;

Also, in 2006 was adopted a *Code of Conduct* for the implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, OJ C 176, p.0008-0012, 28/07/2006.

(affiliated) from different Member States. The purpose of the Convention was to establish a resolution mechanism of disputes concerning transfer pricing and double taxation through arbitration, independent procedure where Member States may not agree on necessary adjustments.

The procedure under article 6 of the Convention would imply the transmission of a request by the taxpayer towards the competent authority of that State and this State will notify the other involved. If relevant authorities of both countries cannot reach a compromise on eliminating double taxation within two years of filing the application, then, according to article 7, an advisory committee will decide on the case within six months, according to art.11.

Concomitantly, the provisions of article 12 foresee that after a decision was issued, the Member States concerned may enter into additional consultation for another six months, but if they cannot agree on an alternative solution, the opinion of the Advisory Committee shall be binding. Also, the double taxation of profits will be considered eliminated under article 14, when:

a) profits are included in calculating the taxable income in a single state;

b) or profits paid in a state are reduced by an amount equal to tax paid in the other state.

5. The code of fiscal conduct in business[64]

According to doctrine[65], this code is a useful tool for reducing the extent of the preferential tax facilities treatment of local businesses or obstacles regarding business freedom in the EU, although it is not mandatory and directly applicable.

In the same opinion, the Council and representatives of the Member States adopted on December 1, 1997 a resolution on a code of business concerning the elimination of national fiscal measures which entail a significantly reduced lower level of taxation than any other Member States and which could influence the investment location. The code contains five commitments from Member States:

1. refraining – there will be no new damaging fiscal measures;

2. correction – the existent measures will be analyzed in order to eliminate negative effects in the shortest time;

3. exchange of information – Member States shall inform each concerning measures likely to have a negative effect;

4. evaluation[66] – Member States will organize a working group that will identify fiscal measures which shall fall under the Code;

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[63] Currently repealed by amendments brought by the Treaty of Lisbon.

[64] See, in detail, Brezeanu, *Finance*, 245-246; Brezeanu, Șimon and Celea, *Taxation*, 217-218; Nemoianu, "*Avoiding double taxation.*", 28; Petroşel, "*Avoiding double taxation.*", p.100.

[65] *Idem.*

[66]The analysis group was established on March 9, 1998 with representatives of Member States and the Commission. It identified 66 measures with damaging potential and submitted the list to the finance ministers of the EU Ecofin Council meeting of 29 November 1999. Furthermore, for the past years, several transitional periods appeared to remedy these issues, an example, the period of up to 31 December 2010 for the rules applicable to Belgian centers of coordination, or the taxation of international finances of the Netherlands, and up to 31 December 2011 for the free zone regime in Madeira.

The 66 potentially damaging measures can be divided into the following categories:

a) measures regarding the low levels of taxation;

b) measures regarding insurance activities taxation;

c) measures regarding transfer prices of in-group services;

d) measures regarding holding societies;

e) measures regarding partial or total taxation reduction of certain taxation income.

The code identifies five main characteristics which can lead to a damaging fiscal measure:

1. benefits are available only for transactions concluded with non-residents or for non-residents;

2. tax benefits are defined on the internal market;

5. promotion – Member States shall encourage third party countries repeal damaging or preferential fiscal measures.

6. Council Directive 2003/48/EC[67] of 3 June 2003 on taxation of savings income in the form of interest payments

This directive tries *to eliminate distortions in the taxation on income savings*.

The Directive tries to enhance control over taxpayers' income tax that have bank accounts and securities in an EU State other than of residence, and is evading taxation in both states, because the state where the accounts are held does not impose interest towards non-residents and the state is unable to detect them without them declaring the accounts.

According to Article 7 of Directive 2003/48/CE, this Directive shall apply to interest paid by a paying agent established within the territory to which the Treaty applies by virtue of Article 299 thereof.

The ultimate goal is the exchange of information on large scale to ensure tax payments on interest by taxpayers.

Also, similar measures were agreed with Switzerland, Lichtenstein, Monaco, Andorra, San Marino and the United States of America.

However, some states go through a transition period when a withholding tax may apply when the beneficial owner is resident in a Member State other than that in which the paying agent is established, so, Belgium, Luxembourg and Austria shall levy a withholding tax at a rate of 15% during the first three years of the transitional period, 20% for the subsequent three years and 35% thereafter.[68]

Also, according to Article 12 of Directive, 75% of tax withheld will be refunded to the resident State and the State where the tax is withheld retains 25% of income.[69]

7. Council Directive 2003/49/EC[70] of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States

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3. benefits are granted without the requirement of a presence or real and substantial economic activity in the offering State;

4. rules for calculating the profits of multinational groups do not respect internationally recognized principles (OECD);

5. fiscal measures are not transposed or are implemented at the administrative level in a transparent manner.

[67] OJ L 157, p.38, 26.6.2003. Directive 2003/48/EC, with subsequent amendments, and entered into force on Julie 1, 2005.

[68] Art.11 Directive 2003/48/EC.

[69]As for eliminating double taxation, art.14 states that:

"1. The Member State of residence for tax purposes of the beneficial owner shall ensure the elimination of any double taxation which might result from the imposition of the withholding tax referred to in Article 11, in accordance with the provisions of paragraphs 2 and 3.

2. If interest received by a beneficial owner has been subject to withholding tax in the Member State of the paying agent, the Member State of residence for tax purposes of the beneficial owner shall grant him a tax credit equal to the amount of the tax withheld in accordance with its national law. Where this amount exceeds the amount of tax due in accordance with its national law, the Member State of residence for tax purposes shall repay the excess amount of tax withheld to the beneficial owner.

3. If, in addition to the withholding tax referred to in Article 11, interest received by a beneficial owner has been subject to any other type of withholding tax and the Member State of residence for tax purposes grants a tax credit for such withholding tax in accordance with its national law or double taxation conventions, such other withholding tax shall be credited before the procedure in paragraph 2 is applied.

4. The Member State of residence for tax purposes of the beneficial owner may replace the tax credit mechanism referred to in paragraphs 2 and 3 by a refund of the withholding tax referred to in Article 11".

The Directive eliminates the taxation on interest and royalties for transboundary payments between associated societies, based on a criterion of 25% stake the European Union by effective beneficiaries, provided they are made on the open market value and ownership control is to be maintained for a period of at least 2 years.

The Directive allows transitional periods for Greece, Spain and Portugal, Czech Republic, Lithuania, Latvia, Poland, Slovakia.

According to Article 2, for the purposes of this Directive:

(a) the term '*interest*' means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures; penalty charges for late payment shall not be regarded as interest;

(b) the term '*royalties*' means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films and software, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; payments for the use of, or the right to use, industrial, commercial or scientific equipment shall be regarded as royalties.

8. Directive 77/799/EEC[71] concerning mutual assistance given by the competent authorities of Member States in the field of direct taxation and taxation of insurance premiums

The Directive establishes rules concerning the exchange of information between Member States allowing the establishment of correct income and capital taxation. It does not impose an obligation to carry out investigations or provide information, if a certain State is restricted by its own law in this respect, for example commercial or state secrets. The information given will have to keep its secret character in the same measure ensured by the internal legislation.

9. Directive 76/308/EEC[72] concerning reciprocal assistance in the recovery of claims relating to certain levies, duties, taxes and other measures

This directive contributes to the harmonization of European tax systems. It requires an obligation from the Member States to collect the tax requested by another a Member State. The Directive aims to stop attempts by taxpayers to avoid paying tax obligations by settling out in another country.

According to the directive, enforcement provisions of the tax debt securities are automatically recognized and treated as directly enforceable in other Member States to expedite the collection. Member States shall treat such tax claims of another Member State as its own debts.

Although the phenomenon of double taxation is shown only in direct taxes, however, we would like to present EU integrationist character by illustrating some aspects of the indirect taxation in the EU.

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[70] OJ L 157, p.49, 26.6.2003. Directive 2003/49/CE, with subsequent amendments, and entered into force on Julie 1, 2004.

[71] OJ L 336, p.15, 27.12.1977. Directive 77/799/EEC, with subsequent amendments. See consolidated version - www.eurlex.eu.

[72] OJ L 73, 19.3.1976, p.18, with subsequent amendments, accessed 19 January 2012, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1976L0308:20040501:RO:PDF. Also see, Nemoianu, "*Avoiding double taxation.*", p.32; Petroşel, "*Avoiding double taxation.*", p.103.

10. Indirect taxation in the European Union

10.1. Directive 2006/112/EC on the common system of value added tax

Value added tax (VAT further) was instituted in the European Community since 1970.

According to doctrine[73], the purpose of this tax was to perfect national tax systems by replacing the production and consumption taxes applied in the Member States and to avoid the cascade imposition.

And, in some cases, the European Union decided that the operations subject to VAT and VAT tax base must be the same for all Member States. In terms of tax rates for VAT, there are still differences being recorded concerning the quantum in different member states.

Also, according to the same opinions, based on the provisions of article 93 EC Treaty (now, Article 113 TFEU) several directives were adopted on VAT (1-13); but the sixth Directive is most relevant, **Directive 77/388/EEC** of decided in the 17 May 1977 Council, *concerning the harmonization of Member States relations, relating to turnover taxes - common system of value added tax: uniform basis of assessment*[74].

Currently **the basic rules of the European VAT system** were established by **Directive 2006/112/EC** *on the common system of value added tax*[75].

According to section 4 of the preamble to Directive 2006/112/CE, *the attainment of the objective of establishing an internal market* presupposes the application in Member States of legislation on turnover taxes that does not distort conditions of competition or hinder the free movement of goods and services. It is therefore necessary to achieve such harmonization of legislation on turnover taxes by means of a system of value added tax (VAT), *such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level*.

Also, "(5) A VAT system achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution, as well as the supply of services. It is therefore in the interests of the internal market and of Member States to adopt a common system which also applies to the retail trade.

(7) The common system of VAT should, even if rates and exemptions are not fully harmonized, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain".

Under the provisions of The Directive 2006/112/EC, value added tax is considered *a consumption tax*. *The ultimate goal of VAT is to tax consumption goods to final consumers*.

The transferring of the tax burden on the final user, established by provisions of the Directive, is provided by the application of certain principles[76], namely: taxpayer principle; cost principle; VAT entry deduction principle; destination principle.

Regarding *the level of tax rates*, Member States applies a **standard rate of VAT**, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services[77], but this *standard rate may not be less than* [78] *15%.*

[73] Diaconu, "*Tax regulations*," p.14.

[74] J.O L 145, p.1, 13.6.1977.

[75] OJ L 347, p.1, 11.12.2006. Council Directive from 28 November 2006, entered into force on January 1, 2007, with subsequent amendments. Accessed 19 January 2012, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2006L0112:20110101:EN:PDF.

[76] See, Diaconu, "*Tax regulations*," p.14-15.

[77] According to art.96 Directive 2006/112/EC.

[78] According to art.97 Directive 2006/112/EC, which states that from 1 January 2011 to December 31, 2015, the standard rate may not be less than 15%.

However, according to art.98-99, Member States may apply **one or two reduced rates** of a list composed of a restrictive set of goods and services and the reduced rates shall be fixed as a percentage of the tax *which cannot be less than 5%.*

10.2. Directive 2008/118/EC on the general arrangements for excise duty and repealing Directive 92/12/EEC

Excise duties were introduced in early 1993 by Council **Directive 92/12/EEC** of 25 February *concerning the general arrangements for products subjected to excise duty and on the holding, movement and monitoring of such products*[79]*,* in the context involved in the development of the internal market, which involved abolition of fiscal controls at internal borders between Member States. Over time, the legislation of this consumption taxes has been extensively modified to bring it up to date with the community directives, so the European Union harmonized the structure and set a series of minimum levels of excise duty.[80]

Excise taxes represent indirect consumption taxes or use of certain products, such as, manufactured tobacco, alcoholic beverages and mineral oils.

Currently, excise regime is established by **Directive 2008/118/EC** *concerning the general arrangements for excise duty and repealing Directive 92/12/EEC*[81]*,* entered into force on the 15 of January 2009[82], and will apply throughout the European Union on 1 April 2010, at which date the Directive 92/12/EEC[83] is repealed.

For the implementation of the Directive, the Commission shall be assisted by a committee called "Committee on Excise Duties", according to article 43 of Directive 2008/118/EC. However, the rules of the Committee on Excise Duties are set out in Articles 5 and 7 of Decision 1999/468/EC[84] read in conjunction with Articles 43-44 of Directive 2008/118/EC.

According to article 1 of Directive 2008/118/EC the general arrangements for excise duty are established, directly or indirectly following certain products consumption:

a) energy products and electricity covered by Directive 2003/96/EC;

b) alcohol and alcoholic beverages covered by Directives 92/83/EEC and 92/84/EEC;

c) manufactured tobacco covered by Directives 95/59/EC, 92/79/EEC and 92/80/EEC.

Also, according to par.2 of art.1, Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the Community tax rules applicable for excise duty or value added tax as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, but not including the provisions on exemptions.

Also, Member States may levy taxes on goods other than excise goods, provision of services, including those related to excisable products that cannot be characterized as turnover taxes. However, the collection of such taxes can not result in trade between Member States relating to border crossing formalities.[85]

Products shall be subjected to excise duty rates at the time of production, extraction or their importation in the European Union.[86]

[79] OJ L. 76, p.1, 23.3.1992.

[80] See, Diaconu, "*Tax regulations*," p.15.

[81] OJ L 9, p.12, 14.1.2009.

[82] Art.49 Directive 2008/118/EC.

[83] Art.47 Directive 2008/118/EC.

[84] See, in detail, art.5 and art.7 from Council Decision no. 468 of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, published in OJ L 184, 17.7.1999, p.23.

[85] According to par.3 art.1 Directive 2008/118/EC.

[86] Art.2 Directive 2008/118/EC.

Excise duty shall be levied and collected and, where appropriate, reimbursed or remitted according to the procedure laid down by each Member State. Member States shall apply the same procedures to national goods and to those from other Member States.[87]

Also the directive established in art. 12 excisable products which are exempt from excise duty if they are intended for use[88]. However, these exemptions are subject to the conditions and limits set by the host Member State and Member States may grant exemption from excise duty by a excise return[89].

The Directive contains provisions on the production, processing and holding of excise products, and the movement and taxation after release for consumption.

Moreover, Directive 2008/118/EC specifies that to ensure the levels set by Member States is necessary for *the competent authorities to be able to track movement of excise goods* and, therefore, must *adopt on a system for monitoring these products*. Thus, according to the directive's preamble *the computerized system established by Decision no. 1152/2003/EC of the European Parliament and of the Council of 16 June 2003 on computerizing the movement and surveillance of excisable products* (OJ L 162, p. 5, 1.7.2003) *should be used*.

10.3. Regulation (EEC) no. 2913/92 establishing the Community Customs Code[90]

One of the aims of the European Union was to establish a **common market**[91], achieved by application and enforcement of the *four fundamental freedoms*, namely, *free movement of goods, persons, capital and services*. *Free movement of goods*[92] involved and calls for a *customs union* to address all categories of goods and involving the prohibition between Member states of customs duties[93] on imports and exports or other charges having equivalent effect, on the adoption of a common customs tariff in their relations with third countries and the elimination of quantitative restrictions or measures having an equivalent effect between Member States.[94]

The Customs Union[95] is defined in art. XXIV of GATT, as the replacement of a single customs territory of several customs territories. The customs union is characterized by the fact that the participating countries abolish tariff barriers between them, and in relations with third parties they apply a common commercial policy, based on a single customs tariff[96].

The customs territory[97] is described as the territory within which is in force a customs procedure, certain customs legislations. As a rule, the states customs territory corresponds to the

[87] According to art.9 par.2 Directive 2008/118/EC.

[88] See, in detail, art. 12 Directive 2008/118/EC.

[89] According to par.2 art.12 Directive 2008/118/EC.

[90] OJ L 302, 19.10.1992, p.1, with subsequent amendments.

[91] *Common market* or *internal market* comprises of an area without internal borders that must operate under the same conditions as a national market: goods, persons, capital and services to be moved into it with no border controls between Member States, following lack of border control example between regions of a state. See, Manolache, *Treaty*, 221.

[92] *TFUE* regulates this freedom to Articles 28-37.

[93] *Customs taxes* represent those duties, imposed by the state when things go over the borders, respectively for import, export or transit. The most commonly used are taxes on imports, because raising the price of goods, it will ultimately be borne by consumers, is restricting the import activity and it encourages the internal production; Dan Drosu Şaguna and Dan Şova, *Fiscal Law* (Bucharest: C.H. Beck, 2011), 242.

[94] These provisions, which regulate the customs union and the prohibition of quantitative restrictions between Member States, are directly applicable, and can be invoked before national courts, Manolache, *Treaty*, 224, 237 and next.

[95] Art.25 TFEU states:"between Member States Customs duties on imports and exports and charges having equivalent effect are forbidden.. This prohibition shall also apply to customs duties of a fiscal nature".

[96] Şaguna and Sova, *Fiscal Law*, 240.

[97] Art.3 Community Customs Code/UE defines *the coverage of the EU customs territory, thus, according to* art.3 par.3 "the customs territory of the Community/Union shall include the territorial waters, the inland maritime waters and the airspace of the Member States, and the territories referred to in paragraph 2, except for the territorial

national territory. But during the interwar period, states have agreed to issue special customs regimes through territorial expansion or reduction of customs territories. Forms of expansion of the customs territory are the *customs union* and *free trade areas*[98], and the customs territory collapse is achieved by restricting the exemption from customs regime into force of a portion of a state, in this case, the customs borders no longer coincide with those of the State, these areas are called *free zones*.[99]

The *customs union* shall involve *the prohibition on trade between Member States of customs duties and other charges having an equivalent effect*. Prohibition of customs duties has a wider range[100], applying under Article 29 TFEU, not only to goods originating from a Member State, but also to those who come from a country that will be in free circulation between Member States once entered into the commercial circuit if the import formalities have been completed and any customs duties or charges having equivalent effect payable have been received in that Member State and have not received full or partial reduction of such fees and charges.

Customs duties on imports or exports or any charge having equivalent effect **includes**, as the CJEU decided that „any pecuniary charges, whatever their size and their application or name, which are imposed unilaterally on domestic or foreign goods because they cross a border and not in the strict sense of duty"; that the fee is not required for States benefit not discriminatory or protective effect, does not increase prices because it is minimal or that the goods in question are not in competition with foreign products, is without consequence[101].

Import duties on the Community Customs Code provides that these are customs duties and charges having equivalent effect on the importation of goods and import charges introduced under the common agricultural policy or under the specific arrangements applicable to certain goods resulting from the processing of agricultural products[102].

And **export duties** are customs duties and charges having equivalent effect on the exportation of goods and export charges introduced under the common agricultural policy or under the specific arrangements applicable to certain goods resulting from the processing of agricultural products.[103]

Community Customs Code or, in light of Lisbon Treaty, EU Customs Code, Article 4 paragraph 7 specifies the following:

“ ‘**Community goods**’ means goods:

- wholly obtained in the customs territory of the Community/Union under the conditions referred to in Article 23 and not incorporating goods imported from countries or territories not forming part of the customs territory of the Community/Union. Goods obtained from goods placed under a suspensive arrangement shall not be deemed to have Community/Union status in cases of special economic importance determined in accordance with the committee procedure,

- imported from countries or territories not forming part of the customs territory of the Community/Union which have been released for free circulation,

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waters, the inland maritime waters and the airspace of those territories which are not part of the customs territory of the Community/Union pursuant to paragraph 1”. And art.3 par.2 Community Customs Code/UE presents the territories situated outside the territories that are considered part of the Community customs territory, taking into account the conventions and treaties applicable in their part.

[98] These areas groups two or more customs territories from which they removed tariffs and restrictive trade regulations. Block countries retain their independence in matters of trade policy; Şaguna and Sova, *Fiscal Law*, 240.

[99] Şaguna and Sova, *Fiscal Law*, 240.

[100] Manolache, *Treaty*, 223.

[101] C. 24/68, Comisia c. Italiei, in ECR, 1969, 193-201, and C. 485 şi 486/93, Maria Simitzi c. Municipality of Kos, preliminary judgment from 14 September 1995, par 14-16, in ECR, 1996, 7(I), 2675 *apud* Manolache, *Treaty*, 224.

[102] Art.4 alin.10 Community Customs Code. Also see, Council Regulation (EC) No 260/2009 on the common rules for imports (Codified version), OJ L 84, 31.3.2009, p.1.

[103] Art.4 par.11 Community Customs Code. Also see Council Regulation (EC) No 1061/2009 establishing common rules for exports, OJ L 291, 7.11.2009, p.1.

- obtained or produced in the customs territory of the Community/Union, either from goods referred to in the second indent alone or from goods referred to in first and second indents".

Also, under art.4 par.8 '**non-Community goods**' means goods other than those referred to in paragraph 7 article 4. Without prejudice to Articles 163 and 164[104], Community/Union goods shall lose their status as such when they are actually removed from the customs territory of the Community/Union.

With regard to *charges having equivalent effect*, from community practice it shows that the mandatory level of which no derogation can be made and it is applied in a Member State by forwarding Customs agents was not considered as a tax having equivalent effect to a customs duty within the meaning of the Treaty, *if importers can actually choose whether or not to use the services of such persons with the result that the fee is not mandatory for anyone wishing to make a customs declaration*[105]. However, although a charge was applied similarly to domestic and imported products, it was considered to be *discriminatory if it was intended only to support activities that bring benefits to domestic product*[106]. And, in another case[107] in which the tax was imposed on both domestic products and those imported to finance a certain products industry, it was considered that a fee has equivalent effect to a customs duty if *three conditions* are fulfilled: *1)* It has the sole purpose of funding specific activities for the benefit of the domestic product.; *2)* the domestic product subject to tax and the domestic product that benefits are the same; *3)* taxes imposed on domestic products are collected in full.

Another condition for the existence of the *customs union* is *the adoption of a* **common customs tariff** *in their relations with third countries*, which is required at Community/EU borders. Any goods that will enter Community/EU territory shall be subject to this tariff, regardless of country of entry.

At the beginning of European integration during the transition period for establishing the common market, Member States declared their readiness to contribute to the development of international trade and the lowering of customs barriers by specific agreements based on reciprocity and mutual benefit, to reduce tariffs below the general level that could beneficiary to them as a result of establishing a customs union between them. These goals were achieved either by agreements with various countries, independently, or in GATT trade rounds throughout time (Dillon, Tokyo, Uruguay).[108]

But the desire for uniform application of Community law materialized by Regulation no.950/68 of the Council of 28 June 1968 which established the Common Customs Tariff, which replaced the tariffs of the Member states. And from 1 January 1988 a new integrated tariff was established and statistical nomenclature system by Council's Regulation no.2658/87. *The Combined Nomenclature of the tariff rates* are based *on integrated tariff,* called "Taric", and takes into account the International Convention on the harmonized goods description and coding system adopted by the Customs Cooperation Council and signed by the Community.[109]

Common Customs Tariff nomenclature consists of afore mentioned tax percentages, other relevant taxes, tariff measures and tariff arrangements set out in the community[110], the current

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[104] These articles deal with the internal transit goods in the Community.

[105] C. 119/92 Comisia c. Italiei, judgment from February 1994, in ECR, 1994, 2, 393 apud Manolache, *Treaty*, 226.

[106] C. 77/72, Capolongo c. Azienda Agricola Maya, preliminary judgment from 19 June 1973, in ECR, 1973, 1, 611 (quoted in J.Steiner, L.Woods, op.cit., p.143) *apud* Manolache, *Treaty*, p.226.

[107] C. 77/76, Fratelli Cucchi Enterprise c. Alvez SpA, preliminary judgment from 25 May 1977, in ECR, 1977, 987 (quoted in J.Steiner, L.Woods, op.cit., pp.143-144) *apud* Manolache, *Treaty*,p.226.

[108] See, Manolache, *Treaty,* p.226.

[109] Manolache, *Treaty*, p.226-27.

[110] See,P.J. Kapteyn, P. ver Loren van Themaat, op.cit., p.365; W. Cairns, op.cit. pp.227-232; G. Druesne, op.cit., p.550 *apud* Manolache, *Treaty*, p.227.

version of the tariff is published annually in the Official Journal. There was also a **Community Customs Code**, adopted by Regulation no.2913/92 and for its application Regulation no.2454/93 of 2 July 1993 on the implementation of Council Regulation no.2913/92 establishing the Community Customs Code was adopted[111].

It is the responsibility of the Union in order to ensure that the imposition of taxes has a uniform impact on all Member States on trade with non-member States to determine and, if necessary, to change the customs duties and taxes payable on products from those countries[112]. We can deduce that **customs duties are the same**, *without the need to distinguish according to the day of importation, as the* **Union's external border protection is the same**, *what distinguishes the customs union of simple free trade area where each member country retains its own customs tariff*[113].

Common Customs Tariff does not apply for a Community authority separated standing alone, but by national authorities of the Member States in whose territory the goods enter, acting on behalf of Communities/EU where they are framing the respective tariff classifications. But, according to Article 31 TFEU, the Common Customs Tariff duties are set by the Council on a Commission's proposal.[114]

Also, free movement of goods can be affected not only by imposing customs duties or charges having equivalent effect, but also *quantitative restrictions or other measures with equivalent effect or by controlling trade*. Expressly prohibited by Articles 34 and 35 TFEU quantitative restrictions on import and export, and also all measures having equivalent effect.

According to specialized literature[115], *measures having equivalent effect to quantitative restrictions* have been defined by the Commission as any regulations and administrative provisions constituting a barrier to the import or export to be achieved, including those provisions and practices that would be more expensive making the import or export more difficult compared with domestic sales on the domestic market, but discrimination provisions applicable to imports and local products not constituting measures as having equivalent effect to quantitative restrictions.

In this subject Article 36 TFEU establishes the following exception: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public order, public safety, protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value or the protection of industrial and commercial property. However, prohibitions or restrictions shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

Furthermore, the EU external trade relations can meet certain *unfair practices*[116], and among them are **dumping practices** and **subsidies (subsidies)**, and Regulation no.1225/2009[117], governing the protection against dumping imports from countries not members of the European Union and Regulation no.597/2009[118] on protection against subsidized imports from countries not members of the European Union are relevant in the matter.

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[111] OJ L 253, 11.10.1993, p.1.

[112] C. 126/94; Aprile Srl c. Amministrazione delle Finanze dello Stato, preliminary judgment from 5 Octomber 1995, par. 34-37, in ECR, 1995, 9/10 (I), 2950-1 *apud* Manolache, *Treaty*, p.228.

[113] In this regard, G. Druesne, op.cit., p.549 *apud* Manolache, *Treaty*, p.228.

[114] Manolache, *Treaty*, p.228-29.

[115] Doc. WQ 64, J. Of. C. 169/12/1967. Prohibition of quantitative restrictions and all measures having equivalent effect applies not only to national measures, but also to measures adopted by Community institutions – C. 114/96, Criminal proceedings against René Kieffer and Romain Thill, preliminary judgment from 25 June 1997, in ECR, 1997, 6 (I), 3630 *apud* Manolache, *Treaty*, p.237-38.

[116] See, in detail, Manolache, *Treaty*, 629 and next. Other unfair practices are obstacles to trade and counterfeiting.

[117] OJ L 343, 22.12.2009, p.51.

[118] OJ L 188, 18.7.2009, p.93.

Conclusions

The phenomenon of international double taxation erodes the development of international economic relations between states, representing a brake on the liberalization of the movement of goods, services, capital and persons.

This phenomenon is found only in cases of direct taxes, and in light of this, according to EU law, direct taxation is for the Member States, the latter must exercise that competence in accordance with EU law. This aspect is certified and resumed constantly by the jurisprudence. Often the best way to avoid this phenomenon is represented by double taxation conventions that eliminate or mitigate the resulting negative effects on the internal market resulting from the coexistence of national tax systems.

As for the relationship between double taxation conventions and European Union law, according the application priority of EU law in the EU, Member States may not convene, by bilateral tax conventions against Union rules. In consequence, European Union law prevails the provisions of the bilateral tax conventions.

However, the Court may not examine the report of a national measure and the provisions of an agreement to avoid double taxation, because the scope of a bilateral tax agreements concluded by Member States is limited to natural or legal persons specified therein.

Today there is no obligation for Member States to effectively eliminate double taxation, bilateral agreements sustain that the States are making sustained efforts to eliminate them. However elimination of double taxation in the European Union represented and represents one of the objectives of the Union.

Through the jurisprudence in the way of taxation, there is a "negative harmonization" manifestation. The Court of Justice of the European Union removes, by law, incompatible national legislation that cannot set up a tax system compatible with the common market; therefore this integration is a negative matter only by abolishing all incompatible systems, without proposing an acceptable alternative.

Nevertheless, the steps taken by now, for example, the directives issued on the basis of subsidiary principle in the field of direct taxation, establishing an arbitration procedure to avoid double taxation, are hailed, under the criticism of priority to safeguard the legal persons to the individuals' loss.

We also consider commendable the European Commission proposal to regulate a common system of calculating the tax base of companies operating in the EU - a common consolidated corporative tax base (CCCTB), which ultimately seeks significant reduction in administrative burden, the compliance costs and legal uncertainty currently faced by EU companies, offering companies a unique set of rules for calculating the tax base and the ability to transmit a single consolidated tax return of a single administration for all activities conducted within the EU. Of course, it remains to follow the implementation of this possible Directive.

Thus, in the contemporary context of liberalization of movement of goods, services, capital and persons, and economic diversification of international financial relations, moving from regional to a global plan of interdependence on the one hand, and in the context of the integration process intensifying the European Union, the European Community - Pillar I, on the other hand, we believe that the management of the double taxation phenomenon in the EU is in the early stages, although European construction has over 50 years since it was established.

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