

# THE ROLE OF THE INSTITUTIONS OF THE EUROPEAN UNION IN THE AREA OF DIRECT TAXES

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## Introduction

It is well known that direct taxes are still a competence of the Member States. According to the Article 5 TEU “The limits of Union competences are governed by the principle of conferral”, which implies that the Union shall only act to the extent that the Member States have transferred their own competences to it. Moreover, that Article provides for the principle of subsidiarity and the principle of proportionality, which constitute further limits on the Union’s competences. The EU Institutions still have a great impact on the field of direct taxes despite these limits.

The scheme of the Treaties, namely, the Treaty of the European Union and the Treaty on the Functioning of the European Union, (“TEU” and “TFEU” respectively) requires cooperation between the various Institutions of the European Union, especially in the legislative procedure. This need for cooperation between the various EU Institutions triggers the question as to how the Institutions of the European Union (“EU Institutions”) react with each other. The answer is far from straight forward, since the Treaties’ provisions cover only a small percentage of the actual actions of those EU Institutions. The objective of this short essay is to introduce the roles of the European Parliament, the Council of Ministers, the Commission and the Court of Justice of the European Union (“CJEU”), in the area of direct taxes, and to highlight their interaction under the TEU and TFEU provisions.

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## 1. The European Parliament

The European Parliament, the only institution of the Union whose members are elected directly by EU citizens, represents the democracy in the European Union. In order to achieve its goal which is to ensure the European Union's basic idea of "peace, freedom, stability and prosperity"<sup>2</sup>, it has a great variety of functions which affect all the aspects of the European Union.

### 1.1. Legislative functions

The EU Parliament has a crucial impact in the law-making procedure. Under Article 14 TEU it exercises legislative power along with the Council. This ordinary legislative procedure or the "co-decision" procedure, which was introduced by the Treaty of Lisbon, requires the European Parliament, the Council and the Commission to cooperate in the law-making function. However, in the area of taxation, there is a significant difference, as there the special legislative procedure applies. According to Article 289 TFEU while the ordinary legislative procedure "shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission", in the special legislative procedure, the Commission proposes and the Council adopts the legislation "with the participation of the European Parliament". This participation is actually a consultation with the Parliament without which a decision cannot be taken.

One could argue that the role of the EU Parliament is therefore not that important in the legislative procedure as those of the other institutions; the reality though is completely different. Under Article 352 TFEU, the Council has to adopt the appropriate measures "after obtaining the consent of the European Parliament". In fact, this consent gives the Parliament the right of veto. Thus, the Parliament plays a very important role in the legislative procedure, since it can actually block the proposed measures.

As part of its legislative functions the Parliament has the power to "request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties"<sup>3</sup>. This delegation of particular tasks to the Commission enables the Parliament to lead the Commission to certain proposals and, thus the Parliament has become an even more active player in the law-making procedure.

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2 See: [http://www.europarl.europa.eu/pdf/divers/EN%20\\_EP%20brochure.pdf](http://www.europarl.europa.eu/pdf/divers/EN%20_EP%20brochure.pdf) < accessed 20/02/2015 >

3 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01, TFEU, Article 225

## 1.2. Relation with the Commission

The TEU and the TFEU also accord to the Parliament certain supervisory functions over the Commission. The Parliament has the right to elect the President of the Commission, approve the Commission as a whole and dismiss it. According to Article 17 TEU after a proposal for the Presidency of the Commission from the European Council,<sup>4</sup> the European Parliament elects the proposed candidate, “by a majority of its component members”. If that majority cannot be achieved, a new candidate has to be proposed by the European Council within a month with the same procedure being followed. Moreover, according to the same Article, the members of the Commission are subject to “a vote of consent” by the European Parliament.

The Commission it is also responsible to the European Parliament<sup>5</sup>. Therefore, under the Article 234 TFEU, if a motion of censure against the Commission “is carried by a two-thirds majority of the votes cast, representing a majority of the component Members of the European Parliament, the members of the Commission shall resign as a body”.

## 1.3. Committees of the Parliament

In order to provide assistance to the plenary of the Parliament, its members are divided into a number of specialised standing committees each of which is responsible for a particular area, where it draws up, amends and adopts legislative proposals and own-initiative reports.<sup>6</sup> The European Parliament has also the right to set up special committees to address a particular issue.

### 1.3.1. Economic and Monetary Affairs (ECON)

The Committee on Economic and Monetary Affairs, according to the Rules of Procedure of the European Parliament (8th parliamentary term, January 2015) is a standing committee which is responsible for the Economic and Monetary Union,

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4 The European Council should be distinguished by the Council of Ministers. See Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01, TEU Article 15 and Article 16 accordingly.

5 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01, TEU, Article 17(5)

6 See: <http://www.europarl.europa.eu/aboutparliament/en/00aab6aedf/Committees.html>  
<accessed: 20/02/2015>

the free movement of capital and payments and the tax provisions. As part of its policies the ECON give its opinion on various tax matters.<sup>7</sup>

### 1.3.2. Tax Rulings and Other Measures Similar in Nature or Effect (TAXE)

The TAXE is a special committee which was set-up on 12 February 2015 for a six months' period. The TAXE<sup>8</sup> has a variety of roles including the right to analyse the application of the Articles regarding State Aid, the compliance with the obligations of mutual assistance in the field of direct taxation, the application of the spontaneous exchange of information on tax rulings, as well as the compliance of Member States with the principle of sincere cooperation.<sup>9</sup>

To conclude this brief discussion on the role played by the European Parliament in the direct tax area, it seems clear that the Parliament is playing a consistently increasing role in direct tax matters. Apart from its consulting role on the legislative procedure, it has the power to block the Commission's proposed measures and consequently the EU's actions. The European Parliament's Committees also continue to expand their role in relation to direct taxes. Through the ECON and the TAXE the EU Parliament implements its consultative and supervisory role on direct tax issues.

## 2. The Council of Ministers

The Council of Ministers is one of the EU institutions established in Article 16 TEU. Under that article the Council consists of "a representative of each Member State at ministerial level", who has the right to vote for its government and that way commits it.

### 2.1. Legislative function

According to Article 16 TEU, the Council, together with the European Parliament, exercises the legislative function. That is to say, the Council along with the

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7 It is of particular importance the view that the ECON took on the Report of the 17.11.2014 regarding the Financial Transaction Tax where it "reiterates the need to continue to work closely with other donors on developing further innovative financial mechanisms, such as the Financial Transaction Tax"

8 See: [http://www.polcms.europarl.europa.eu/cmsdata/upload/0713b125-bd39-4253-9e4c-d3869211502a/Text%20adopted%20in%20Plenary%20on%20Setting%20up%20a%20special%20committee%20on%20tax%20rulings%20-%20P8\\_TA-PROV\(2015\)0039.pdf](http://www.polcms.europarl.europa.eu/cmsdata/upload/0713b125-bd39-4253-9e4c-d3869211502a/Text%20adopted%20in%20Plenary%20on%20Setting%20up%20a%20special%20committee%20on%20tax%20rulings%20-%20P8_TA-PROV(2015)0039.pdf) <accessed 20/02/2015>

9 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01, TEU, Article 4

European Parliament approves the legislative proposals made by the Commission. The Council acts by qualified majority voting<sup>10</sup> except in relation to fiscal matters. Additionally, according to Article 115 TFEU “the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws”. According to Article 114 TFEU, the ordinary legislative procedure “shall not apply to fiscal provisions”. Therefore the concept of unanimity is very important in the area of taxes. Unanimity, or the “tax veto”, is needed whenever a legislative proposal of the Commission in the taxation field is to be adopted by the Council.

On that point, the view of the Commission is of particular importance. In its Communication “Tax policy in the European Union - Priorities for the Years Ahead”<sup>11</sup>, the Commission expressed the view that the decision-making process relating to the adoption of directives was extremely slow and, therefore, the Union should abandon the unanimity requirement, especially after enlargement, and move to the qualified majority voting. However qualified majority voting, results inevitably in the loss of Member States sovereignty. The Member States though are unlikely to agree to such a drastic change to current arrangements, since the current type of voting allows them to have the final decision over whether EU tax laws will be adopted or not.

## 2.2. The Economic and Financial Affairs Council (ECOFIN)

Though the Council is a single legal entity, it meets in ten different configurations,<sup>12</sup> which are divided by subject matter. In relation to direct taxes, the relevant Council of Ministers is the Economic and Financial Affairs Council (ECOFIN), made up of the 28 Ministers of Finance from the EU Member States. The ECOFIN is in charge of certain EU policies, specifically, “economic policy, taxation matters and regulation of financial services” and it is also responsible for the EU single currency, the Euro.

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10 The qualified majority voting is actually a double majority as it consists of at least 55 % of the Parliament’s members, which should represent at least 65% of the Union’s population. See Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01, TEU, Article 16(4)

11 See: Communication “Tax policy in the European Union - priorities for the years ahead”, COM (2001), 260, at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0260&from=EN> <accessed at 02/03/2015>

12 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01, TEU, Article 16(6)

### 2.2.1. Subsidiarity and proportionality: ECOFIN's limits

In the adoption of the legislative acts proposed by the Commission, the ECOFIN does not have complete freedom. On the contrary, it has to act within the scope of the TEU. More specifically, the ECOFIN has to respect the principles of subsidiarity and proportionality, which are set-out in Article 5 TEU. Subsidiarity for the purposes of the ECOFIN means that if the law can be adopted at the Member State level, it should be made there, unless “the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.<sup>13</sup> According to the principle of proportionality the ECOFIN, in implementing EU legislation on taxation matters, cannot “exceed what is necessary to achieve the objectives of the Treaties.”

### 2.2.2. Enhanced Cooperation Procedure

The Council plays an important role in the area of the enhanced cooperation procedure. The enhanced cooperation procedure is set-out in Article 20 TEU. This procedure is supposed to be a “last resort when the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole”. In other words, this procedure is to be used where some Member States are blocking legislation from being introduced, such as the Financial Transaction Tax.<sup>14</sup> The decision that authorises the use of the enhanced cooperation procedure is adopted by the Council and, in order to be authorised, at least nine Member States have to participate and support its introduction.

The Financial Transaction Tax (“FTT”) is one of the first examples where the enhanced cooperation procedure has been authorised. The FTT was first proposed in 2011 but the Member States could not reach agreement on its introduction. Subsequently, the Commission confirmed that the differences amongst Member States could not be bridged. Nevertheless, the idea of having a common Financial Tax was not completely abandoned. In late 2012, 11 Member States asked for the Commission’s permission to continue with the FTT through the enhanced cooperation procedure. In January 2013, the Council permitted the requested Member States to introduce a common FTT system through the enhanced

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13 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01, TEU, Article 5(3)

14 The Financial Transaction Tax was a proposed directive with a view to harmonising the tax base and set minimum rates for all transactions on financial markets. See: [http://ec.europa.eu/taxation\\_customs/taxation/other\\_taxes/financial\\_sector/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/other_taxes/financial_sector/index_en.htm) <assessed 23/02/2015 >

cooperation procedure.<sup>15</sup> As soon as an agreement is achieved between the respective Member States, those Member States will have to transpose that Directive into their national laws.

However, the role of the Council regarding Directives is not limited to giving its authorisation in cases where an agreement cannot be reached. The Council plays a significant role in the process of adoption and amendment of Directives. The ECOFIN is in charge of approving Directives proposed and drafted by the Commission, as well as their amendments. Amongst its greater contributions are directives that facilitate cross-border movement (namely, the Parent Subsidiary Directive, the Merger Directive, the Interest Savings Directive and the Interest and Royalties Directive) and also the Recovery of Taxes Directive and the Directive on Administrative Cooperation.

In the following paragraphs, some recent contributions of ECOFIN in the area of Directives are discussed.

### 2.2.3. Directives - Recent developments

The Council, on December 1st, 2014, amended Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation,<sup>16</sup> with a view to assist the fight against tax fraud and tax evasion. This directive extended the scope of the automatic exchange of information to interest, dividends, gross proceeds from the sale of financial assets and other income, as well as account balances.<sup>17</sup>

Also, the Council approved an amendment to the Parent-Subsidiary Directive by introducing a binding anti-abuse clause<sup>18</sup>, which aims to prevent misuses of that

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15 The UK brought a challenge to the FTT. This challenge has no suspending effect. See: Judgment in *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, C-209/13, EU:C:2014:283

16 See: Inter-institutional File 2013/0188 (CNS) Council of the European Union, Brussels, 1 December 2014, 14425/14 at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014425%202014%20INIT> <accessed at 21/02/2015>

17 See: Press Release 3356th Council Meeting Economic and Financial Affairs, Brussels, 9 December 2014, 16603/14, 20 at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ecofin/146136.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/146136.pdf) <accessed 21/02/2015>

18 See: Inter-institutional File 2013/0400(CNS), Council of the European Union, Brussels, 5 December 2014, 16435/14 at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016435%202014%20INIT> <accessed 21/02/2015>

Directive. That clause requires that Member States should avoid granting the benefits of the Parent-Subsidiary Directive to arrangements which are “not genuine” and which were put in place with a view to obtaining a tax advantage. According to the wording of the Directive, arrangements are characterised as not genuine “to the extent that they are not put into place for valid commercial reasons which reflect economic reality”.

To sum up briefly, the ECOFIN, has had a significant impact on direct tax issues. It is an active member in the legislative procedure but because of the tax veto, its members are able to protect the sovereignty of their respective States. Moreover, ECOFIN is also in charge of authorising the enhanced cooperation procedure when Member States cannot bridge their differences and also it adopts Directives, which have a great impact on Member States national legislation.

### **3. The Commission**

The Commission is given the task of promoting “the general interest of the Union and take appropriate initiatives to that end”. Its main functions are envisaged in the Article 17 TEU, while the TFEU builds upon them.

#### **3.1. Monitoring EU law**

According to Article 17(1) TEU “the Commission shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them.” In fact, this provision gives to the Commission the role of guardian of the Treaties.<sup>19</sup> In order to attain that goal, the Commission has to ensure that the Member States comply both with primary law, i.e. the TEU, the TFEU and the Charter of the Fundamental Rights and secondary law, such as the Regulations and Directives of the European Union. Monitoring EU law results in another action of the Commission demonstrating its executive power. That power enables the Commission, in certain situations, to make determinations as to whether or not a case should be referred to the CJEU.

##### **3.1.1. Infringement proceedings**

Under Article 258 TFEU the Commission is authorised to open formal infringement proceedings. Whenever the Commission finds that a Member State is in breach of its EU law obligations, it can, send a reasoned opinion to that Member State giving it a period within which that Member State should comply

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<sup>19</sup> See: [http://europa.eu/about-eu/institutions-bodies/european-commission/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/european-commission/index_en.htm)  
<accessed 02/02/2015>

with that reasoned opinion. If the delinquent Member State fails to respond to the Commission's satisfaction, the Commission can bring the matter before the CJEU. Furthermore, if the Commission finds that a Member State "has not taken the necessary measures to comply with the judgment of the Court", it may bring the matter before the CJEU, according to Article 260 TFEU.<sup>20</sup>

### 3.1.2. State Aid

The Commission is in charge of the area of fiscal aid. State aid provisions preserve the internal market by prohibiting selective measures, namely, a measure that "distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods".<sup>21</sup>

Whenever an aid is believed to be incompatible with the internal market, under Article 107 TFEU, or if the aid given is being misused, the Commission is required to act. To achieve the objective of prohibiting market distortion, the Commission needs to monitor any aid given and if state aid is found, it can ask the Member State either to abolish it or alter it.<sup>22</sup> If the Member State refuses to comply, the Commission can refer the matter to the CJEU.<sup>23</sup>

Currently, the Commission is investigating Luxembourg for state aid regarding the tax treatment of the Amazon group by the tax authorities in Luxembourg. However, Amazon is not the only company group that is being investigated. Apple and Starbucks and their tax deals with Ireland are also being scrutinised.

### 3.2. Legislative Power

The right of legislative initiative is conferred on the Commission under Article 17 TEU. Under that article, the Commission is in charge of drafting and proposing new laws, which afterwards will be assessed by the European Parliament and the Council. In other words, the Commission plays a vital role in the Union's decision making procedure, since it acts as the "motor of integration" for the EU.<sup>24</sup>

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20 Penalties may apply in such a case. See: Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01, TFEU, Article 260(3)

21 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01, TEU, Article 17(1)

22 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01, TEU, Article 108(2)

23 Ibid.

24 Paul Craig, Grainne de Burca, *EU Law: Text, Cases and Materials* (5th edn, 2011) Oxford University Press, 37

### 3.2.1. Soft Law

At this stage, it is important to distinguish such legislative proposals from what is referred to as “soft law”. The ambitious goals that the European Council established in Lisbon, namely “to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion” are rather difficult to accomplish due to a number of factors such as the “lack of political commitment and determination”<sup>25</sup>. Under those circumstances the unanimity needed in order to adopt the Commission’s legislative proposals cannot be achieved. Therefore, the Commission uses an alternative approach which has come to be known as “soft law”. This includes “legally non-binding instruments” such as Recommendations, Communications and Notices, and the Code of Conduct in Business Taxation.

### 3.2.2. The Code of Conduct in Business Taxation

The development of the Code of Conduct Group was proposed by the Commission as part of a package of measures to tackle harmful tax competition. It was a set of rules which would identify potentially harmful tax measures and provide the framework for the Member States to act according to fair competition.<sup>26</sup> The Code was approved by the ECOFIN at a Council’s meeting on 9 March 1998. The Code of Conduct in Business Taxation was not a legally binding agreement but a “gentlemen’s agreement” with political force under which the Member States committed to “rolling back” existing harmful tax measures and to refrain from introducing such measures in the future.<sup>27</sup>

### 3.3. Policy Strategies of the Commission

In addition to the tasks attributed to the Commission by the Treaties, the Commission has several other policy strategies to accomplish. In its Communication (2001) 260 “Tax policy in the European Union - priorities for the years ahead”, the Commission established its own objectives for the future and identified appropriate measures through which those objectives would be accomplished. Those objectives, in general, are the need for a simpler and a “more transparent tax system” and the “removal of tax obstacles and

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25 Ben J. M. Terra, Peter J. Wattel, *European Tax Law*, (2012), Kluwer Law International, 204

26 See: Communication “A package to tackle harmful tax competition in the European Union”, COM (97) 564, at <http://aei.pitt.edu/3494/1/3494.pdf> <accessed at 23/02/2015>

27 See: [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/harmful\\_tax\\_practices/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/index_en.htm) <accessed 19/02/2015>

distortions”.<sup>28</sup> It is quite interesting that harmonisation in the area of direct taxes is not included in those general objectives. On the contrary, the Commission indicated “that there is no need for an across-the-board harmonisation of Member States’ tax systems” as long as those tax systems comply with the EU rules. There is, though, a completely different reality in the area of indirect taxes, where such harmonisation is regarded as necessary and therefore is envisaged by the Treaty.<sup>29</sup> Moreover in its 18/02/2015 Press Release the Commission laid down “the foundation for a fairer and more transparent approach to taxation in EU”. According to that Press Release the Commissioners agreed to present a Tax Transparency Package, with a view to prevent abusive tax practices and “ensure that companies are taxed where their economic activities generating the profits are performed and cannot avoid paying their fair share through aggressive tax planning.” This is in line with developments at the international level, in particular, the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project.

These policies are implemented by one of the Commission’s departments, the directorate of the Taxations and Customs Union (“TAXUD”).

### 3.4. The Role of the TAXUD

The TAXUD covers taxation and customs matters. More specifically, the TAXUD deals with tax and customs fraud as well as with the tax obstacles which prevent individuals and companies from operating freely within the Union.<sup>30</sup>

#### 3.4.1. Good Governance in the area of taxes

TAXUD is involved with the concept of good governance in the area of taxes, which was first proposed by the ECOFIN in 2008 with a view to “combat cross-border tax fraud and evasion and strengthen the fight against money laundering, corruption, and the financing of terrorism”.<sup>31</sup> Tax Good Governance was described as “the principles of transparency, exchange of information and fair tax competition”.<sup>32</sup> It is significant to note that the European Parliament has also

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28 Ibid [11].

29 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01, TFEU, Article 113

30 See: [http://ec.europa.eu/taxation\\_customs/common/about/welcome/index\\_en.htm](http://ec.europa.eu/taxation_customs/common/about/welcome/index_en.htm)  
<accessed 02/02/2014 >

31 See: Press Release 2866th Council Meeting Economic and Financial Affairs, Brussels, 14 May 2008, 8850/08 (Presse 113) at:  
[http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ecofin/100339.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ecofin/100339.pdf),  
22 <accessed 09/02/2015 >

32 Ibid

adopted a resolution on promoting good tax governance. That Report, along with the Commission's communication, brought "the matter to the forefront of the EU's international tax agenda".<sup>33</sup>

As a measure to support the development of tax good governance, the Commission in its Communication "An Action Plan to strengthen the fight against tax fraud and tax evasion"<sup>34</sup> announced its plan to set up a Platform for Tax Good Governance. That platform aims to assist the Commission in dealing with aggressive tax planning and double taxation.<sup>35</sup>

Furthermore, as the digital economy plays a huge role in the modern world in the area of taxes with international organisations like the OECD trying to deal with it, the European Union could not remain idle. As a consequence, the Commission decided to set up the Commission's Expert Group on Taxation of the Digital Economy, which aims to deal with the evolution of digital economy and monitors how such evolution could affect taxation policy.<sup>36</sup>

#### 3.4.2. Personal Taxes

Moreover, the TAXUD is also highly involved in the area of personal taxes. One of the main problems in that area is the absence of any harmonised EU law, which will provide for the taxation of the EU citizens who move within the Union.<sup>37</sup> Therefore, and with a view to deal with complaints made by the EU citizens regarding their taxation on cross-border movement, the Commission issued in 2010 the Communication "Removing cross-border tax obstacles for EU citizens"<sup>38</sup>.

33 Tom O'Shea, "EU Tax Governance Policy Gets Boost From European Parliament" (2010) WTD 46-5 at <http://www.ccls.qmul.ac.uk/docs/staff/oshea/52176.pdf>, <accessed 26/02/2015>

34 See: Communication "An Action Plan to strengthen the fight against tax fraud and tax evasion" (2012), 722 at: [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/tax\\_fraud\\_evasion/com\\_2012\\_722\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_fraud_evasion/com_2012_722_en.pdf) <accessed 03/03/2015>

35 See: [http://ec.europa.eu/taxation\\_customs/taxation/gen\\_info/good\\_governance\\_matters/platform/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/gen_info/good_governance_matters/platform/index_en.htm) <accessed 02/02/2014>

36 See: [http://ec.europa.eu/taxation\\_customs/taxation/gen\\_info/good\\_governance\\_matters/digital\\_economy/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/gen_info/good_governance_matters/digital_economy/index_en.htm) <accessed 02/02/2014>

37 See: [http://ec.europa.eu/taxation\\_customs/taxation/personal\\_tax/crossborder-issues/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/personal_tax/crossborder-issues/index_en.htm) <accessed 19/01/2015>

38 See: Communication "Removing cross-border tax obstacles for EU citizens" (2010), 769 at [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/gen\\_info/tax\\_policy/com\(2010\)769\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/tax_policy/com(2010)769_en.pdf) <accessed 03/03/2015>

In that Communication, the Commission stressed that one of the main goals should be the elimination of double taxation. The Commission also recommended that a dialogue with the tax administration of the various Member States and stakeholders should be opened regarding “appropriate solutions to EU citizens' cross-border tax obstacles”.

### 3.5. Transfer Pricing

Another huge area of modern international taxation is that of transfer pricing. The Commission, in order to keep up to date with the international standards which continue to evolve, established the Joint Transfer Pricing Forum (“JTFT”), with a view to providing guidance on transfer pricing matters.<sup>39</sup> The JTFT works in line with the OECD guidelines and seeks non-legislative solutions to transfer pricing problems within the EU.<sup>40</sup>

In conclusion, it can be argued that the Commission plays an overarching role in the area of direct taxes. It monitors EU law and it also has the initiative of proposing legislation. Additionally, the Commission has moved into the area of soft law, which has had a significant impact on the direct tax field. Moreover, its directorate, TAXUD, implements European Union’s policies related to taxation and, in particular, deals with the concept of tax good governance and also with combating obstacles that individuals face when exercising the fundamental freedoms.

## 4. The Court of Justice of the European Union

The role of the CJEU is described in both the TEU and TFEU. According to Article 19 TEU, the CJEU “shall ensure that in the interpretation and application of the Treaties the law is observed”. Moreover, according to that provision, the CJEU consists of three different Courts, namely the Court of Justice, the General Court and specialised courts and is assisted by Advocates General. However, the main functions of the CJEU, which are described below, are set-out in the TFEU.

### 4.1. Jurisdiction of the CJEU

#### 4.1.1. Infringement proceedings

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39 See:  
[http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/transfer\\_pricing/forum/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm) <accessed 19/01/2015>

40 Ibid.

According to Article 258 TFEU, the CJEU has the power to deal with infringement proceedings, which are brought before it by the Commission. A potential breach of EU law is enough for the Commission to bring the case before the CJEU. For instance, in *Commission v. Spain* (“Lotteries”)<sup>41</sup>, the Commission opened formal infringement proceedings against Spain, because of a Spanish rule, according to which winnings from certain national institutes were tax exempt, while winnings from lotteries organised by other national bodies or foreign bodies were taxable. The Court held in that case that Spain had failed to fulfil its EU law obligations by maintaining such legislation.

#### 4.1.2. Preliminary rulings

Under Article 267 TFEU, the CJEU deals with the preliminary references made from the national courts. Whenever a national court considers that an interpretation from the CJEU is necessary in order to give a judgement in a case before it, it may stay proceedings and refer the issue to the CJEU for a preliminary ruling. Thus, in *Futura*<sup>42</sup>, a French company that set up a permanent establishment (PE) in Luxembourg was denied the carry forward of its PE losses, due to two provisions of the Luxembourg law which required that the losses should be economically linked to its Luxembourg activities and that the foreign company should keep a set of Luxembourg accounts in Luxembourg. The French company complained, and claimed that such a refusal “impaired the freedom of establishment”. Therefore, the French Court decided to stay proceedings and referred a question to the CJEU for a preliminary ruling. In *Futura*, the Court ruled that while there was no discrimination regarding the condition of the economic link to Luxembourg activities, there was a restriction in the requirement that the foreign company should keep a set of accounts there.

#### 4.2. Interpretation of EU law

The CJEU’s key function is to ensure that the interpretation and application of the Treaties is in compliance with EU law.<sup>43</sup> Although the Member States are obliged to comply with the EU law, the CJEU has provided guidance in many cases to national courts where the national rules at issue were subsequently found to be in breach of EU law. For instance, in *Avoir Fiscal*,<sup>44</sup> the French Tax authorities denied a tax credit to branches of foreign insurance companies established in

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41 Judgment in *Commission v Spain*, C-153/08, EU:C:2009:618

42 Judgment in *Futura Participations and Singer v Administration des contributions*, Case 250/95, EU:C:1997:239

43 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01, TEU, Article 19(1)

44 Judgment in *Commission v France*, Case C-270/83, EU:C:1986:37

France, while that tax credit was given to French companies receiving similar dividends from French companies. The CJEU ruled in that case that France has breached its EU law obligations, since the failure to grant the tax credit constituted a discriminatory restriction on the freedom of establishment of companies whose registered office was in another Member State.

#### 4.2.1. Use of non-tax cases

The CJEU may also use non-tax cases in its interpretation of EU law regarding taxes. For instance, in *Matteucci*<sup>45</sup> an Italian, daughter of an Italian worker in Belgium, who was born and educated in Belgium was not allowed to apply for a scholarship under the German-Belgium Cultural Agreement of 1956, as the agreement between those two countries only applied to nationals of those Member States. However, according to the CJEU, Regulation 1612/68 should be interpreted as providing that children of workers were entitled to the same tax and social advantages as Belgian workers since they had exercised free movement of worker rights in Belgium. The scholarship in question was seen as a social advantage. The Court stressed that bilateral agreements cannot prevent the application of the principle of equal treatment between workers. Therefore, since *Matteucci* was in a comparable situation to a Belgian worker, she was entitled to national treatment in Belgium. Moreover, the Court stated that Germany had to respect the fact that Belgium had to grant national treatment to foreign EU workers. Thus, Germany had to accept *Matteucci*'s nomination for a scholarship if Belgium nominated her.

#### 4.3. The Negative Integration Role of the CJEU

Since EU law takes priority over the national laws in the event of a conflict, such precedence allows for the removal of many barriers by the Court through the preliminary ruling and infringement case procedures. This negative integration role of the CJEU actually promotes the idea of the Union as an “area without internal frontiers”.<sup>46</sup> The role of the CJEU in that context is vital. The Court, by interpreting EU law, ensures a more homogenous application of its case law. Moreover, the CJEU through its rulings reminds the domestic courts of the various Member States of their EU law obligations and it has an active dialogue with them regarding the latter's conduct under the EU law. It should be mentioned though, that this dialogue is not an initiative only of the CJEU, it is supported by both sides. The national courts by referring a question to the CJEU they initiate that

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45 Judgment in *Matteucci v Communauté française de Belgique*, Case C-235/87, EU:C:1988:460

46 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010/C 83/01, TFEU, 14(2)

dialogue and by implementing the ruling afterwards they actually achieve a fruitful communication.

To conclude, the CJEU has a significant role in direct tax matters. Through its decisions over infringement proceedings and preliminary rulings it interprets the law. In those rulings the CJEU, ensures that the EU law is complied with and it continuously defines and evolves the various provisions of the TEU and TFEU. Moreover, these rulings provide a negative integration aspect to the Court's role in the internal market. The CJEU provides guidance to the national courts regarding its EU law obligations, thus ensuring a greater harmonisation in the area of direct taxes.

## **Conclusion**

Ultimately, those EU Institutions have a significant, multi-sided impact in the area of direct taxes. The interlocking nature of the scheme of the Treaties requires the European Parliament, the Council and the Commission to collaborate in the law-making procedure. In particular, for legislative acts in the area of direct taxes the special legislative procedure applies, according to which the Commission drafts the law, the Council approves it, while the EU Parliament should be consulted. That legislative procedure however is limited by the fundamental principles of subsidiarity and proportionality. The requirement of unanimity regarding Council's action is another limitation posed on the law-making function, which ensures the protection of Member States' sovereignty. It is rather unlikely that the Member States would ever agree to give up their direct tax competencies. Therefore, the Commission's proposal towards even more harmonisation, is unlikely to succeed. Moreover, the Institutions through their specific departments deal efficiently with a wide range of current tax issues. The ECON and the TAXE, two of the European Parliament Committees, supervise the implementation of particular provisions related to tax issues, such as state aid and the exchange of information. The TAXUD, the directorate of the Commission regarding tax matters, implements EU policies and deals with current issues, such as the concept of tax good governance and the obstacles that individuals who move within the Union face. Also, the Council's configuration regarding taxes, the ECOFIN, plays a major role in the adoption and amendment of directives.

Finally, the key role played by the CJEU in direct tax matters should not be disregarded. The CJEU interprets the law in cases coming before it either by infringement proceedings, which are initiated by the Commission, or by preliminary rulings from the national courts of the Member States. Through its interpretation of EU law, the CJEU continually evolves the concepts of the TEU and TFEU, such as the four freedoms of the internal market. Additionally,

negative harmonisation is a significant outcome of its judgments. Through its rulings it provides guidance to the Member States for the application of EU law and it also prohibits discriminatory and restrictive practices, thereby promoting the EU's internal market.