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SEMINAR G SESSION REPORT

EU Tax Harmonization in light of Competitiveness & Simplification

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Chair
Prof. dr. Ana Paula Dourado (Portugal)

Panel members
dr. Jakub Jankowski (Poland)
dr. Jasper Korving (The Netherlands)
Prof. dr. Dres. h.c. Juliane Kokott (ECJ)
Ioanna Mitroyanni (EU Commission)
dr. Krister Andersson (Sweden)

Prepared by Secretary
dr. Dieter Bettens (Belgium)

1. Introduction

Seminar G of the 2025 IFA Congress in Lisbon explored the topic of "EU Tax Harmonization in light of Competitiveness and Simplification".

The session examined the evolving European Union (EU) framework for corporate tax, taking into account the tension between harmonization, competitiveness and simplification. The session covered the legal base used by the EU institutions when issuing secondary EU legislation in the field of direct taxation, recent EU legislative initiatives, including the Pillar Two Directive and its future outlook, and recent case law of the European Court of Justice (ECJ).

The issues of simplification and competitiveness within the EU are topical. In February of this year, the EU Commission unveiled its 2025 Work Programme *Moving Forward Together: A Bolder, Simpler, Faster Union*, essentially stressing the need for simplification, amongst others, with a view to strengthening the EU's competitiveness. On top of that, the topic is also prominently discussed amongst businesses and academics, who fear that the EU might be losing ground compared to the US when it comes to competitiveness, amongst others, because of the current developments in the context of Pillar Two.

The session's main objective was to discuss the role of the EU legislator and the ECJ in fostering simplification and competitiveness within the EU, and which approach to adopt: does decluttering by default result in a simpler tax environment?

2. Main Topics Discussed

2.1. Topic 1: Direct Harmonization

2.1.1. Legal base

An important issue when discussing the EU legislator's role in the context of direct taxation, is the legal base used to issue secondary EU law. The EU is only competent to the extent that it has been assigned legislative competence by a specific rule (principle of conferral, Art. 5 Treaty on the European Union). Once that competence is exercised, it becomes exclusive to the EU.

The EU Commission mainly uses Article 115 of the Treaty on the Functioning of the European Union (TFEU) as a legal base in direct tax matters. However, this has been subject to

criticism. In her opinion in case C-524/23 (Commission v. Belgium), AG Kokott raised the issue in the context of the Anti-Tax Avoidance Directive (ATAD). While Article 115 TFEU should further the functioning of the internal market, AG Kokott noted that anti-avoidance rules limit the companies' possibilities for cross-border activities. They thereby hinder the exercise of fundamental freedoms instead of promoting them, as ruled several times by the ECJ. In that context, one could wonder whether Article 115 TFEU is a valid legal base to issue anti-avoidance rules. The EU Commission on the other hand argued that Article 115 TFEU does not explicitly refer to obstacles and in the specific case of the ATAD, it could be used as a legal base to ensure that the implementation of the BEPS actions creates a level playing field in the Union, without discriminatory effect. This would contribute to a better functioning of the internal market. Nevertheless, AG Kokott was not convinced by this line of reasoning as this would *de facto* mean that the EU would be competent in all situations where differences amongst Member States would exist. This would erode the principles of conferral and subsidiarity. Amongst the other panellists, there was no consensus on whether article 115 TFEU could serve as a legal basis to adopt anti-abuse regulations. Some panellists supported AG Kokott's reasoning, while others were of the opinion that article 115 TFEU allows the EU to adopt such legislation to ensure the proper functioning of the internal market.

Further, the panel noted that the Union increasingly uses other legal bases to issue tax directives. Examples include the surplus tax (article 122 TFEU as legal basis), CBAM (article 192 TFEU as legal basis) and the proposal for a new corporate resource (article 311 TFEU as legal basis), prompting the question whether regulatory taxes justify the use of other articles than article 115 TFEU as legal basis.

2.1.2. Pillar Two

The panel noted that within the context of direct harmonization, the Pillar Two Directive is widely debated.

In light of continuing objections to Pillar Two by the US, the G7 issued a statement on 28 June 2025 indicating that the US would eliminate potential retaliatory actions under its section 899 of the One Big Beautiful Bill Act and that discussions were ongoing on a side-by-side system.

The EU Commission communicated its intention to technically implement the side-by-side system by the end of the year, emphasizing the need for clear conditions for the system. The implementation is likely to be part of a package deal, also including a permanent safe harbour for a simplified effective tax rate and potentially an adjustment regarding the treatment of substance-based incentives under the Pillar Two rules. However, it is not yet clear which form a side-by-side system may take.

There is currently a lot of discussion on how such side-by-side system could be implemented. The EU Commission argued that it could be implemented under article 32 TFEU of the Directive. However, Jasper Korving argued that even if this would technically be possible, Article 32 of the directive was never construed as a way to exclude entire jurisdictions from the scope of the rules. The safe harbour exemption was introduced in the Directive at a moment when Member States wanted to proceed with the adoption of the Directive, but they already knew that safe harbours were being debated at the OECD level. The basic concept of that OECD discussion related to no longer requiring a minimum tax calculation for certain situations, not to out-scope entire jurisdictions. Moreover, issues could be raised with regard to legal certainty, as the application of Article 32 of the Pillar Two Directive would also reduce the role of European and national parliaments, potentially creating a bad precedent for the future.

In the meantime, the panellists agreed that other issues remain with regard to the Pillar Two directive: the Belgian Constitutional Court referred a preliminary question to the ECJ questioning the validity of the UTPR and discussions are prevalent on the value of additional administrative guidance issued by the OECD. This creates legal uncertainty. Further, in light of the side-by-side system, multiple panellists stressed the importance for the EU to remain competitive. In that regard, Krister Andersson stressed the need for Member States to make up for the disadvantage vis-à-vis the US, for example by introducing tax base reductions. He argued that the EU Commission should encourage this.

This ultimately prompted the Chair of the panel to raise the question of the necessity of a Pillar Two directive. Again, the question is whether ensuring a consistent implementation of Pillar Two in the Member States is a sufficient argument for action at the EU level, also taking into account that the directive still leaves a lot of room for Member States (with exclusions and exceptions), resulting in diverging outcomes.

This raised the question of whether the EU should repeal or suspend the Pillar Two directive. In this regard, Krister Andersson was very clear: "The Pillar Two Directive was a mistake".

2.1.3. Simplification

Simplification is a horizontal initiative, going beyond taxation, and an important political priority of the current mandate of the EU Commission. In this regard, the EU Commission's objective is to reduce the administrative burden by 25% (35% for SMEs) by the end of the current mandate, saving approximately 38 billion euros. On this point, an important remark by Krister Andersson was that we should always quantify the impact of decisions on the administrative burden in the EU and on the competitiveness of the EU economy.

The EU Commission further stressed that simplification should contribute to competitiveness.

Regarding the field of direct taxation, the Commission Services have undertaken several actions, mainly consisting of consulting a large number of private stakeholders and all Member States on the basis of detailed questionnaires. These are the outcomes of mapping existing legislation. Further, the Commission would like to table two proposals by the second quarter of 2026:

- A reform of DAC together with codification.
- An Omnibus proposal, to introduce simplification proposals for the Parent-Subsidiary Directive, the Interest and Royalties Directive and the Anti-Tax Avoidance Directive.

In addition to these two deliverables, the EU Commission proposed to use soft law instruments in the form of consensual guidance, in order to deliver on topics that are not fit for hard law.

This idea was supported by Krister Andersson, who even went a step further and argued that as a medium or long-term solution, a new EU court should be established that would issue binding advance rulings on the interpretation of EU directives, with a direct fast track appeal possibility for both taxpayers and tax administrations/governments to the ECJ (as opposed to non-binding guidance). This would provide early and timely legal certainty and could also reduce the influx of cases in the ECJ.

Krister Andersson further stressed the need to first discuss with Member States whether a certain issue needs to be solved at EU-level before proposing a legislative intervention. Currently, legislative proposals are often discussed for years, despite being dead on arrival with no support by the Member States. He stressed the need to focus on ourselves and not to focus only on others, in the first place, the United States: "*We are the EU and we have our own policy and each member state also has its policy. We should be focusing on our own policies to achieve our stated objectives on competitiveness, jobs and reduced administrative burden*". That also means that we should learn from the mistakes made in the past and refrain from issuing legislation that has an extraterritorial effect, both within and outside the context of direct taxes.

Finally, Jakub Jankowski addressed the prevalent argument that CFC rules should be abolished in light of the Pillar Two directive. Although there is some sympathy for this argument, he warned for the differences between both sets of rules

2.2. Topic 2: Harmonization through the CJEU

Another way of harmonization in the EU is through the case law of the ECJ. Through its case law, the ECJ *de facto* approximates the laws of Member States that adapt their legislation to the jurisprudence of the ECJ.

This form of *de facto* harmonization is, however, not without issues itself. The panel noted that the case law of the ECJ is often inconsistent and does not provide for great clarity, as such, not contributing to legal certainty. In this regard, Jakub Jankowski discussed case C-18/23 on the indirect discrimination of a Polish tax exemption granted only to externally managed investment funds, while excluding self-managed investment funds. This judgment considerably broadened the concept of indirect discrimination, essentially deviating from earlier cases such as C-342/20 and C-478/19. AG Kokott indicated inconsistencies in the case law regarding loss relief in the EU, focussing on cases Sofina (C-575/17), Crédit Suisse (C-601/23) and Marks & Spencer (C-446/03). She also points towards potential undesired effects of the case law, potentially exposing Member States to abuse situations.

Finally, Jasper Korving and Jakub Jankowski discussed recent cases on anti-abuse, Nordcurrent (C-228/24) and Neo Group (C203/25; pending). While the case law on anti-abuse is quite consistent, they argue that it remains very factual, with judgments often creating

more questions than solving them. As a result, Jakub Jankowski concluded that case law of the ECJ can sometimes make things more complex instead of clarifying things.

On potential solutions, the Chair pointed to three possibilities. The first one would be to adopt a cohesion approach, whereby the ECJ would take better into account the consequences of its decision on the internal market. The specialisation of judges would be another solution, but creating special courts could mean a reduced representation of the Member States' judges.

However, specialisation might work if it were combined with a reduction of the workload of the judges. In such a case, there would be fewer judgments, but more “milestone judgments” that would be coherent with each other. The question is how this can be achieved. In that regard, the Chair pointed towards the proposal of Krister Andersson regarding the installation of an advance ruling court.

3. Conclusions and Key Takeaways

The panel concluded that simplification and competitiveness are an important topic for the EU in the upcoming years. Nevertheless, the EU Commission also stressed that competitiveness in Europe is not only about taxes. There are other aspects of potentially larger scale, such as trade and defence.

The last words of the panel discussion were for the Chair. She stated that we live in different times, where different values are at the forefront, prompting a different agenda for the EU to follow. This is a time for restraint in EU taxation.