The historical background to EU corporate tax law

1.1 Introduction

Member State corporate tax regimes are heavily influenced by European Union law. What is notable, however, is the absence of EU harmonising legislation (i.e. hard law). This is attributed to a number of factors.

First of all, the lack of Union competence in direct tax matters. Under the principle of attribution of powers, a cornerstone of the European legal structure, the Union and its institutions only enjoy competence in the areas of law assigned or conferred to them under the Treaties. This principle of attribution of powers must be respected both internally and in the Union’s external sphere of affairs. Therefore, every act must be based on a general or specific Treaty provision (the legal basis) empowering the Union, expressly or impliedly, to act.

It is widely acknowledged that Member States have retained competence in direct tax matters. Successive European Treaties have been silent on direct tax and more generally on EU taxes. While the Treaties dealt with indirect taxes to some extent, there were never any references to direct taxes. As a corollary, there has never been an explicit legislative base

1 Art. 5 Treaty on European Union (TEU). This is also called the principle of conferred powers.

2 Following the Lisbon Treaty, the TEU is amended and the Treaty establishing the European Community (EC Treaty) is amended and renamed as the Treaty on the Functioning of the European Union (TFEU). Thereafter, the name 'European Union' replaces and succeeds the 'European Community'.

3 As Malherbe et al. point out, there are no EU taxes other than perhaps taxes levied on salaries and pensions of EU officials (Reg 260/68). See Jacques Malherbe et al., The Impact of the Rulings of the European Court of Justice in the Area of Direct Taxation (Policy Department Economic and Scientific Policy, European Parliament, 2008), p. 5.

4 See Art. 28 TFEU (ex Art. 23 EC), which provides for a Union based upon a customs union. See Arts. 30 and 110 TFEU (ex Arts. 25 and 90 EC), which led to the harmonisation of excise duties. See Chapter 5 of Ben J. M. Terra and Peter J. Wattel, European Tax Law, 6th edn (Alphen aan den Rijn: Kluwer Law International, 2012).
for the harmonisation of direct taxes.\(^5\) General legislative bases under Articles 115 and 352 of the Treaty on the Functioning of the European Union (TFEU) (ex Articles 94 and 308 EC Treaty (EC)) have been used for direct tax legislation. These legislative bases focus on the attainment of the Internal Market\(^6\) and their use is strictly policed by the Court of Justice.\(^7\)

Article 115 TFEU authorises the Council to issue directives for the approximation of laws, regulations or administrative provisions of Member States directly affecting the establishment and functioning of the Internal Market. Directives can only be adopted under Article 115 on the basis of unanimity. In addition, Article 352 TFEU authorises the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament,\(^8\) to adopt appropriate measures when Union action is necessary to attain one of the objectives of the Treaties. Again, the Council (i.e. all Member States in Council) has to act unanimously. There is another general legal basis for harmonisation under Article 116 TFEU, which could be used for legislative action when differences in Member State laws are distorting the conditions of competition in the Internal Market. Although this legislative base does not require unanimity and does not exclude direct tax measures,\(^9\) it has never been used for tax harmonisation purposes.

Overall, the fiscal veto, that is the power of even one Member State to object to a harmonising measure in direct tax law, is a fiercely guarded prerogative that has survived numerous successive Treaty amendments and attempts to move to qualified majority voting.\(^10\) In addition, the

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\(^5\) By contrast, there is an explicit tax base for harmonisation of indirect taxes under Art. 113 TFEU (ex Art. 93 EC).


\(^7\) There have been a number of cases where the EU legislation was challenged on the basis of misuse of one of these general Treaty bases. See Annette Schrauwen, ‘Sources of EU Law for Integration in Taxation’, Chapter 1 in Dennis Weber (ed.), Traditional and Alternative Routes to European Tax Integration (Amsterdam: IBFD, 2010).

\(^8\) Under ex Art. 308 EC there was only a duty to consult the European Parliament.

\(^9\) Contrast with Art. 114 TFEU (ex Art. 95 EC), in the wording of which it is expressly stated that it cannot be used for direct taxes.

\(^10\) See, for example, the draft Treaty establishing a Constitution for Europe (Constitutional Treaty), which provided for qualified majority voting for measures on company taxation when the Council unanimously found that these measures related to administrative cooperation or combated tax fraud and tax evasion. See Art. III–63, which reads as follows: ‘Where the Council of Ministers, acting unanimously on a proposal from the Commission, finds that measures on company taxation relate to administrative cooperation or combating tax fraud and tax evasion, it shall adopt, by a qualified majority, a European law
Commission has always tried to base its proposals on the basis of one of the general legislative provisions that require unanimity – Articles 115 or 352 TFEU. Therefore, lack of explicit competence combined with the fiscal veto under ‘proxy’ bases meant that the regulation of direct taxes was left within the competence of the Member States. This is reiterated with the ratification of the Treaty of Lisbon.

In addition, international (direct) taxation in general is not as regulated as other areas such as trade or investment. In principle, every country has jurisdiction to tax however it pleases. Whilst there are regularly updated model tax treaties, such as the OECD Model Tax Convention (OECD Model) or the UN Model Tax Convention (UN Model) that recommend ways of allocating tax jurisdiction between the country of source and the country of residence, these models are not binding on countries and are regularly updated. It is, therefore, quite understandable why, when the EEC was created in the mid-1950s, the regulation of direct taxes was not seen as a priority; nor as an option for that matter. The main priority was the removal of the distortions caused by trade barriers – hence the concentration on the harmonisation of indirect taxes.

However, there are tax obstacles that create serious impediments to the integration of the market – tax obstacles for which the international tax community and the OECD Model do not offer solutions, or not very good ones, or for which the solutions are conflicting. As far as corporate taxes are concerned, many of the problems arise from the interaction of different systems of taxation of Member States, who have different approaches

or framework law laying down these measures, provided that they are necessary for the functioning of the Internal Market and to avoid distortion of competition.

‘That law or framework law shall be adopted after consultation of the European Parliament and the Economic and Social Committee.’

The Constitutional Treaty was never ratified by all Member States and the Treaty of Lisbon was drafted to replace it.

The same approach was followed with ex Art. 293 EC, which provided that Member States must as far as possible enter into negotiations to secure, inter alia, the abolition of double taxation. This provision has been interpreted as not having direct effect. See Case C-336/96 Gilly [1998] ECR I-2793, para. 16. Therefore, ex Art. 293 EC could not be used as a legal basis for direct tax legislation. In any case, this provision has now been abolished from the TFEU. See analysis in 4.3.3.


United Nations Model Double Taxation Convention between Developed and Developing Countries (2011).

Some countries, such as the USA, have their own models. The US Model was last updated in 2006.
to the integration of shareholder and corporate taxes. For example, under the classical system profits are taxed independently in the hands of the company and its shareholders. This leads to the phenomenon of economic double taxation – that is where there is more than one tax imposed in respect of the same income, even if the taxes are paid by different persons, and which affects domestic and foreign shareholders the same way. By contrast, under an imputation (or tax credit) system, part of the corporation tax on distributed profits is credited against income tax, so relief to mitigate economic double taxation on dividends is given at shareholder level. Under a split-rate system, relief for economic double taxation on dividends is given at company level, as a lower rate of corporation tax applies for distributed than for retained profits. To the extent that the tax credit or the lower tax rate for distributed dividends is reserved for resident shareholders, then non-resident shareholders would incur economic double taxation. As shown in this book, the OECD Model does not offer any solutions on economic double taxation, deferring to the States’ discretion in dealing with it.

Cross-border investments lead to further problems. The same person may be taxed twice by two different States over the same income. This is juridical double taxation. In the Introduction to the OECD Model this is defined ‘as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods’.\textsuperscript{15} For example, if a company is taxed on a worldwide basis, then foreign profits may be taxed in the State where they accrue (source State or, in this book, host State). The same profits may also be taxed in the State of residence of the company (residence State or, in this book, home State) leading to juridical double taxation. Similarly, cross-border passive investment income such as dividends may be taxed both in the State of the distributing company (the host State) and the State of residence of the shareholder (the home State). As will be shown in later chapters of this book, usually in such situations either the host State does not tax or does not fully tax the income, or the home State exempts foreign profits or gives a credit for the foreign (withholding) tax paid. The exemption method and the credit method are important double taxation relief mechanisms.\textsuperscript{16} The reliefs can be provided either on a unilateral basis or a bilateral basis (through tax treaties) or on a multilateral basis (through multilateral tax agreements). Some of these reliefs are contained in the OECD Model,

\textsuperscript{15} Introduction to the OECD Model, para. 1.
\textsuperscript{16} See also analysis in 6.1.
whose avowed purpose is to eliminate or mitigate juridical double taxation but not economic double taxation.

From an EU perspective, whilst both phenomena themselves are problematic as the increased tax burden creates economic distortions and inefficiencies,\(^{17}\) in the absence of EU legislation to remove the distortions, action cannot be taken unless the general Treaty provisions are breached. Here, as shown in later chapters, the major point of conflict that has empowered the Union (indirectly) to act is derived from a different stance on non-discrimination and the comparability of residents and non-residents. Under established international tax law and the OECD Model, residents and non-residents are not in a comparable situation. Under EU law, this cannot be assumed and has to be proved in each case.

As shown throughout this book, this deceptively simple issue of the (non-)comparability of residents and non-residents has had a huge impact on how juridical double taxation and economic double taxation are dealt with in the European Union and the ability of Member States to choose between classical systems and imputation systems of taxation. The non-discrimination principle, on its own and through the medium of specific fundamental freedoms, as interpreted by the Court of Justice, has also led to further developments, circumscribing Member States’ overall powers to structure their corporate tax systems. For example, a host State may not be able to tax branches of foreign companies more heavily than resident companies. In addition, a home State may not be able to limit the availability of loss relief to resident group companies or domestic branches only – it may have to extend it to non-resident companies or branches. Similar restrictions may arise in the taxation of inbound and outbound passive investment income. A host State may no longer be able to impose withholding taxes on outbound dividends when domestic dividends are exempt. Or a home State may have to extend the imputation credit to shareholders receiving foreign dividends as well. Furthermore,

\(^{17}\) See, for example, the OECD Commentary on juridical double taxation that ‘[i]t is well known that it is scarcely necessary to stress the importance of removing the obstacles that double taxation presents to the development of economic relations between countries’. Introduction to the OECD Model, para. 1. See also American Law Institute, Integration of the Individual and Corporate Income Taxes (Philadelphia: Federal Income Tax Project, 1993); Treasury Department, Report on Integration of the Individual and Corporate Tax Systems: Taxing Business Income Once (Washington Government Printing Office, 1992); Christiana HJ Panayi, Double Taxation, Tax Treaties, Treaty Shopping and the European Community, EUCOTAX Series (Alphen aan den Rijn: Kluwer Law International, 2007), Chapter 1.
reliefs and deferrals granted for domestic reorganisations may have to be extended to cross-border ones. Finally, Member State tax avoidance regimes now have to be drafted in a specific way so as to be proportional – broad and vague rules may no longer be accepted. All these issues are examined in Chapters 4 to 8.

This book strives to show how European Union law has become of prime importance as far as the cross-border movement of companies and the cross-border investment in such companies is concerned. Topics such as the harmonisation of the corporate tax base, the taxation of subsidiaries and branches, the taxation of passive investment income, economic and juridical double taxation, corporate reorganisations and anti-abuse rules are considered in detail. What becomes evident is that, notwithstanding the lack of competence in direct tax matters, this has become an area densely regulated as a result of both positive and negative integration. It is shown in Chapter 2 that the Union has legislated in a number of areas, including corporate tax law, where it was deemed expedient for the proper functioning of the Internal Market. Therefore, integration through proper legislative routes, that is positive integration, does exist, but it is scarce compared to the growing volume of case law. Topics discussed in this book illustrate how the legislative vacuum was addressed by the Court of Justice by interpreting and applying several general provisions of successive EU Treaties in the direct tax context. This is also called negative integration. In the analysis, the pivotal role of the Commission in some of the legislative and judicial developments also becomes obvious. This European institution has long been vocal on the detrimental effect of tax obstacles to the completion of the Single Market and later on the Internal Market.  

Notwithstanding these developments, it will be shown that the limitations of international tax law in these areas have not been eliminated under EU law. This is understandable given that the main generator of developments – the Court of Justice – can only respond to specific questions asked in litigated cases. It cannot act as a substitute legislator and construct a concrete tax system, free of the inadequacies of the current systems. As a result, there are still many tax obstacles that impede the completion of the Internal Market. This book considers some of these obstacles from a corporate angle.

18 Although technically the two terms (as well as ‘common market’) are not synonymous, they tend to be used interchangeably. Broadly, these terms reflect steps towards the EU’s economic integration, the common market being first, leading to the Single Market, which ultimately led to the Internal Market.
In order to understand the current situation, an overview of the historical background to some of the legislative proposals is apt. It is shown that efforts to put in place a comprehensive system for corporate taxation have long been debated, though so far none have reached fruition, with one last hope – the Common Consolidated Corporate Tax Base, which is examined in Chapter 3. By contrast, piecemeal legislative solutions (e.g. directives, conventions etc.) and soft law have always been more appealing.¹⁹

1.2 The historical background

The main concern of the Community, now to be called the Union, as far as corporate tax law was concerned, has always been the degree of harmonisation needed. Proposals for the harmonisation of corporate taxes have a long history. Whilst initial proposals recommended the unification of Member States’ corporate tax systems with a single tax rate and a uniform tax on distributed profits, subsequent proposals moved away from harmonisation to coordination and ad hoc legislative solutions. What is evident early on is that the Community oscillated between the classical system and the imputation system, with its main focus being harmonisation rather than coordination. This is reflected in the recommendations of the various reports produced in the last fifty years.

1.2.1 The Neumark Report

In 1960 the Commission set up a committee of taxation and financial experts, under the chairmanship of Professor Fritz Neumark, to investigate all aspects of taxation in relation to the common market. The Neumark Report,²⁰ published in 1962, broadly recommended harmonisation of income tax, capital gains tax, corporation tax and indirect taxes, though the committee insisted that the aim was not uniformity.²¹

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²¹ *Neumark Report*, p. 102.
Harmonisation was not a synonym for unification to the committee.\textsuperscript{22} The former should have been the guiding principle of the Commission’s policy in tax matters. The latter should have been avoided. Complete unification of the tax systems of the Member States was not considered to be ‘as necessary from the aspect of integration policy, since experience proves that on many grounds moderate differences limited to the nature (structure) and to the rate of taxes do not hinder the free play of competition’.\textsuperscript{23}

Adopting a clearly centralist approach, the Neumark committee considered it desirable to levy the same type of single tax on income in all Member States, with the same structure of scales, even if the rates were different.\textsuperscript{24} As far as company taxation was concerned, the committee recommended a special tax on companies. Under this proposal, retained profits would be taxed at 50 per cent,\textsuperscript{25} whereas distributed profits would be taxed, in the form of withholding tax at source, at a recommended rate of 25 per cent and not less than 15 per cent.\textsuperscript{26}

For distributed profits, a relatively low rate of 10–20 per cent was to be applied to EEC-resident recipient persons, who owned either registered or bearer shares. A higher rate of at least 25 per cent would apply to all other persons.\textsuperscript{27} The Neumark committee further suggested that, if dividend recipients provided information of their identity, then the withholding tax should be reimbursed to the State in which the shareholders were domiciled.\textsuperscript{28} It would seem that incentives for information exchange were suggested very early on.

Dividends distributed from subsidiaries to parent companies would be exempt from withholding tax, unless the parent company was established outside of the EC, or there was uncertainty whether the beneficiary of the dividends was a company or an individual. Under certain circumstances\textsuperscript{29} dividends received by parent companies from their subsidiaries

\textsuperscript{23} Neumark Report, p. 102.
\textsuperscript{24} Ibid., p. 119.
\textsuperscript{25} That would have been a split-rate system as existing at the time in Germany. See Neumark Report, pp. 122–3, 139. See also Appendix F: Harmonization of the Taxes on Companies and on Dividends, written by Prof. Bernard Schendstok, who discusses in greater detail how specific elements of the proposed system can be applied.
\textsuperscript{26} Neumark Report, p. 139.
\textsuperscript{27} Ibid., pp. 139–40.
\textsuperscript{28} Ibid.
\textsuperscript{29} There had to be a participation of at least 15–20 per cent of the capital of the distributing company, held at least one or two years before distribution of the dividend. See generally ibid., pp. 140–1.
would also be exempt, to the extent that the parent company intended to distribute the dividends received to its shareholders.

The Neumark committee recognised the importance of double tax treaties and the OECD Model in resolving double taxation.\(^{30}\) However, the OECD rules had to be amended and supplemented ‘in such a way that they respond more adequately to the specific needs of the Common Market’.\(^{31}\) It was further recommended that a multilateral tax convention should replace the network of bilateral conventions.\(^{32}\)

Tax harmonisation was seen as a dynamic process, divided into stages over time and put into effect in successive steps.\(^ {33}\) The Neumark committee set out a timetable for tax harmonisation measures. Three phases were identified. The first phase would entail the reform of turnover taxes. There would also be preparatory work on company tax reform and the conclusion of a multilateral convention. The second phase would entail the harmonisation of company taxes and personal income taxes, as well as the conclusion of a multilateral convention. Wealth taxes and death duties would also be considered. In the third phase all proposed reforms would be put into application. A common information service as well as a specialist tax court for appeals at European level would be explored.\(^ {34}\)

The Community never went past the first phase. This is not surprising given the hostility of Member States to rules that seek to harmonise corporate tax rates – not just back then but throughout the Community’s existence. Notwithstanding this well-known fact, subsequent reports also recommended the imposition of uniform corporate tax rates. Unsurprisingly, again none of these proposals were ever adopted.

\[ \text{1.2.2 The Segrè Report} \]

The Segrè Report was produced by a committee of experts, under the chairmanship of Professor Claudio Segrè. The committee was asked to examine the general measures that should be taken to develop a European capital market and its implications for Member States.\(^ {35}\) Chapter 14 of this report examined the tax obstacles to the development of ‘a capital market of truly European dimensions’\(^ {36}\) and made suggestions as to how to eliminate them.

\(^{30}\) Ibid., p. 143.  \(^{31}\) Ibid.  \(^{32}\) Ibid., pp. 143–4.

\(^{33}\) Ibid., p. 152.  \(^{34}\) Ibid., pp. 154–5.


\(^{36}\) Segrè Report, p. 293.
The Segrè committee identified as a general aim the attainment of a ‘degree of fiscal neutrality that will allow capital movements to take place within the Community in conditions similar to those on a domestic market’. For this aim to be achieved, the tax system had to be neutral as to the location of the investment, the type of investment (direct investment or through an intermediary) and methods of financing. There were three major obstacles to this; namely, double taxation, preferential treatment of investments made in the country of residence and different treatment (from Member State to Member State) of income paid to non-residents. To date these obstacles still plague the Internal Market.

Similar to the conclusions of the Neumark Report, here the Segrè committee found that the ideal way of eliminating double taxation was through the conclusion of a multilateral convention. As this could take some time, it was deemed appropriate in the interim to look for temporary solutions such as unilateral or bilateral measures.

As regards dividends paid to non-residents, host States could impose a withholding tax, provided that this tax was wholly allowable for the purposes of the shareholders’ tax liability in their country of residence and any excess was refundable. “To the shareholder, the withholding tax would then always be simply an advance payment of tax, and hence would hardly influence his choice of country of investment whatever the rate of the tax.” It was preferable that the rate be the same in all countries and identical with that of the withholding taxes levied on resident shareholders.

As regards inbound dividends, rather than exemption, which was the recommendation of the Neumark Report, this committee recommended the extension of the tax credit to foreign dividends, otherwise there would be discrimination ‘between income from “national” shares and income from foreign shares, and between residents and non-residents’. An even better solution was to give non-residents a refund of corporation tax.

\[\text{Ibid., p. 293.} \quad \text{Ibid., p. 293.} \quad \text{Ibid., p. 294.} \]
\[\text{This included international double taxation and double taxation of investments made through a financial intermediary. See Segrè Report, pp. 294–6.} \]
\[\text{Ibid., pp. 296–7.} \quad \text{Ibid., pp. 297–8.} \quad \text{Ibid., p. 296.} \]
\[\text{Ibid., p. 300.} \quad \text{Ibid.} \]
\[\text{Ibid. There was a similar suggestion in the conclusions in that Member States in their capacity as host States or home States should either tax income in one country only or divide revenue between the two by imposing a withholding tax in the host State and systematically allow it for tax purposes in the beneficiary’s home State. Ibid., p. 311.} \]
\[\text{Ibid., p. 301.} \]
tax equivalent to the tax credit. The Segrè committee did not address the fact that the apparent distortion arose from differences of approach to the taxation of company profits at corporate and shareholder level. Although at the time the extension of a tax credit to non-resident shareholders may have appeared to be a very drastic recommendation, it will be shown in later chapters that the case law of the Court of Justice has led to very similar, if not more drastic, results.

### 1.2.3 The Program for the Harmonisation of Direct Taxation

In 1969, under its Program for the Harmonisation of Direct Taxation, the Commission looked at direct taxes in the context of, inter alia, the movement of capital, company restructurings and inter-corporate payments. Again, as the title of the Program suggests, the emphasis was on harmonisation. The Program proposed a number of harmonisation measures such as the harmonisation of withholding taxes on dividends and interest, elimination of discriminatory tax rules against non-residents, removal of tax obstacles to cross-border mergers, elimination of double taxation in parent–subsidiary relationships and use of tax incentives.

This Program led to proposals for a directive on cross-border corporate restructurings and a directive on the taxation arrangements applicable to parent companies and subsidiaries – the precursors to the Merger Directive and the Parent–Subsidiary Directive enacted twenty years later.

### 1.2.4 The Van den Tempel Report

This report was produced by Professor A. J. van den Tempel at the request of the Commission. Similar to the previous reports, this report approached the study from a tax harmonisation perspective and looked at what is

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48 Ibid., p. 301.
52 See Chapter 7.
53 See Chapter 2.
needed to achieve it. However, contrary to the Segrè Report, here the classical system of corporation tax was recommended as the best solution.

The report considered the structures of corporation tax in the Community and the taxation of undistributed and distributed corporate profits. Three systems were considered: the classical system, the imputation system and the split-rate system. As discussed above, under the classical system, which was called the ‘classic’ system in this report, profits were taxed independently in the hands of the company and its shareholders. Under the imputation (or tax credit) system part of the corporation tax on distributed profits was credited against the income tax charge on the shareholder. Under the split-rate system a lower rate of corporation tax applied for distributed than for retained profits.

In the Van den Tempel Report it was argued that the imputation and split-rate systems were in certain respects preferable to the classical system. As noted in the report, they were more neutral as far as the choice of the legal form of the enterprise was concerned and the choice of debt or equity financing. However, they were burdened with administrative complexity. The report concluded that the classical system was ‘the most suitable to be adopted as a harmonised system in the European Communities’, offering the possibility of attaining capital export and capital import neutrality.

This proposal was not followed up.

1.2.5 The Commission’s 1975 proposal and its aftermath

Contrary to the recommendations of the Van den Tempel Report, this proposal recommended a common partial imputation system of company

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55 Three other systems diverging from the above were also summarily discussed. These were: the system of complete avoidance of economic double taxation on dividends, either by not imposing the corporation tax on the distributed profit or by fully crediting the corporation tax on the distributed profit (ibid., pp. 32–3), the system of fiscal transparency whereby all corporate profits are treated as if accruing to shareholders (ibid., pp. 33–4) and the system of deduction from corporate profit of a primary dividend corresponding to the return on debt financing (pp. 34–6). All three were rejected as unworkable.

56 This system applied, at the time, in the Netherlands, Luxembourg and the UK and formerly, to the Federal German Republic and in France. See ibid., p. 7.

57 This system applied in France and Belgium. Ibid., p. 7.

58 This system applied at the time in Western Germany.


60 Ibid., p. 41. 61 Farmer and Lyal, EC Tax Law, p. 21.

62 Proposal for a Council Directive concerning the harmonization of systems of company taxation and of withholding taxes on dividends. Transmitted to the Council by the
tax whereby Community shareholders would receive a (reimbursable) tax credit. A narrow band of rates was set both for the tax and the credit.

The Commission argued in the explanatory memorandum to this proposal that the classical system did not relieve economic double taxation of dividends and made distributions more expensive.\(^{63}\) Moreover, the imputation system offered neutrality as regards the legal form of the undertakings.\(^{64}\) It also prevented tax avoidance by persons subject to high personal tax rates through sheltering profits in a company.\(^{65}\) In addition, the Commission invoked fairness reasons. Under the classical system, shareholders subject to low personal taxes were disadvantaged compared to those subject to higher personal taxes, as dividends were taxed in the same way and no tax credit was given to reduce the excessive tax burden.\(^{66}\) As it made distributions more expensive, this created a bias in favour of the self-financing of firms rather than financing from outside sources. It also created another bias in favour of major shareholders as opposed to small shareholders who preferred distributions.\(^{67}\)

Broadly, under the Commission proposal Member States would apply a rate of corporation tax within the range of 45–55 per cent to both distributed and undistributed profits,\(^{68}\) with the possibility of derogations in certain cases.\(^{69}\) Dividends distributed would be subject to 25 per cent withholding tax ‘no matter who is the recipient of those dividends’.\(^{70}\) No withholding tax would apply to dividends distributed to a parent company.

As regards the tax credit rate on distributed dividends, this would be fixed by the Member State of the recipient but remain within the range of 45–55 per cent.\(^{71}\) The tax credit would be set off against the final tax liability of the dividend recipient.\(^{72}\) When withholding taxes collected by a Member State were set off or refunded in another Member State, the

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\(^{63}\) Ibid., p. 7, para. 5.

\(^{64}\) As reasoned in the report, individuals and partnerships were usually subject to high tax rates compared to the corporate tax rate. The difference under the imputation system was smaller. Ibid., pp. 7–8, para. 8.

\(^{65}\) Ibid., p. 8, para. 10.

\(^{66}\) Ibid., p. 8, para. 9.  \(^{67}\) Ibid.

\(^{68}\) Art. 3(1). There were also provisions for a compensatory tax to be levied in situations where the corporation tax had not been charged at the rate normally applicable in the Member State. See Art. 9.

\(^{69}\) Art. 3(2).

\(^{70}\) Art. 14(1). This would be subject to different provisions under tax treaties between Member States and a third country.

\(^{71}\) Arts. 4 and 8.  \(^{72}\) Art. 16.
Member State that collected the withholding taxes had to refund them to the other Member State. Member States could share the amount of withholding tax under bilateral agreements.

Initially, the Commission’s proposal was endorsed by both the Committee on Economic and Monetary Affairs and the Committee on Budgets of the European Parliament, subject to certain reservations. However, the proposal was eventually rejected by the European Parliament. Following this, the Commission began to study the possibility of greater cross-border cooperation, since harmonisation of taxes would be ineffective if there continued to be differences in the level of collection and, as a corollary, the effective tax burden. This led to a Council resolution in 1975 on the measures to be taken by the Community in order to combat international tax evasion and avoidance and to the Mutual Assistance Directives in 1977.

In a report to the Council on the scope for convergence of tax systems, the Commission raised the difficulties of framing a common tax policy similar to that applied by the Member States, unless substantial progress was made towards integration. Tax harmonisation was not intended ‘to serve the purpose of instituting a Community tax policy’ but rather ‘formed part of the means and powers granted to the Community to carry out its responsibilities’. The Commission recognised that aligning Member States’ tax policy was not as straightforward due to their tax sovereignty and the different economic and social underpinnings of their

73 Art. 17(1). 74 Art. 17(3).

75 In the recommendations of the Committee on Economic and Monetary Affairs, released on 26 January 1977, only the Community institutions could decide Member State derogations on the level of the corporation tax rate. The need for overall fiscal harmonisation was raised. It was important to avoid creating a situation more favourable to income from capital than to income from employment. The Committee on Budgets, adopting the proposal with amendments on 22 September 1977, stressed the need to embark on harmonisation of systems in a way that would not affect revenue and to leave the approximation of bases of assessment, tax rates and tax credits to be addressed later on. It regarded the proposed withholding tax as essential. See analysis in European Parliament Working Documents 1979–1980, Interim Report drawn up on behalf of the Committee on Economic and Monetary Affairs on the harmonization of company taxation and of withholding taxes on dividends. Rapporteur: Mr K. Nyborg (2 May 1979, Doc 104/79).

76 Council Resolution of 10 February 1975 on the measures to be taken by the Community in order to combat international tax evasion and avoidance (OJ C35, 14.2.1975, pp. 1–2).

77 See Chapter 2.


79 Ibid., pp. 5–6, para. 3. 80 Ibid.
The historical background

The harmonisation of tax rates was especially difficult and could only occur at a much more advanced stage of economic integration. Then, however, it will be absolutely necessary, since the harmonisation of structures and bases of assessment will no longer be sufficient.

As far as company taxation was concerned, the Commission recommended the adoption of its 1975 proposal on company taxation and withholding taxes on dividends. It also identified the need for some coordination of investment incentives granted by Member States in connection with the basis of assessment for taxes on profits. Overall, as far as legislative proposals were concerned, this report was imbued with a sense of pragmatism.

The 1975 proposal was eventually withdrawn. Draft proposals for the harmonisation of loss relief rules presented in 1984–1985 and 1990

81 Ibid., pp. 6–7, para. 5.
82 Ibid., p. 8, para. 7.
83 Ibid.
84 Ibid., p. 14, para. 19. See also conclusions, in paras. 101–10, pp. 64–5.
86 Proposal for a Council Directive concerning arrangements for the taking into account by enterprises of the losses of their permanent establishments and subsidiaries situated in other Member States, COM(90) 595 final. The proposal was later on withdrawn. In its 2001 Communication, the Commission identified the need for a new round of technical preparatory meetings before any action could be launched. The Commission recognised that the discussions would have to take into account the fact that loss compensation and group consolidation were intimately linked to more comprehensive solutions such as a consolidated corporate tax base. Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, Towards an Internal Market without Tax Obstacles. A Strategy for Providing Companies with a Consolidated
were also subsequently withdrawn. Furthermore, a draft proposal of 1988 for the harmonisation of the tax base of enterprises was never even tabled, due to the reluctance of most Member States.\footnote{A preliminary draft was produced by the Commission in 1988. See preliminary draft proposal for a Directive on the harmonisation of rules for determining the taxable profits of undertakings, XV/27/88-EN. See also Han Kogels, ‘Unity Divided’ (2012) 21(3) EC Tax Review 117–23, 120–1.}

The 1990 Guidelines for Company Taxation\footnote{Commission Communication to Parliament and the Council, Guidelines on Company Taxation, Brussels 20 April 1990, SEC(90) 601 final.} followed a \textit{de minimis} legislative approach. Priority was given to existing proposals for the merger directive, the parent–subsidiary directive and the arbitration convention,\footnote{The Commission mentioned two future proposals: one for cross-border loss relief and another for the abolition of withholding taxes on interest and royalty payments between group companies. Ibid., pp. 7–8.} which were eventually adopted. In the same year the Commission published a proposal for a directive on the taxation of interest and royalty payments between group companies.\footnote{COM(90) 571.} This was later revised\footnote{COM(93) 196.} but still rejected in Council. As shown in Chapter 2, it was not until this Draft Directive was included in the Monti tax package in 1998 that effective negotiations began.

\subsection*{1.2.6 The Ruding Report}

In 1990 a committee of independent experts was appointed by the Commission under the chairmanship of Mr Onno Ruding (a former Finance Minister of the Netherlands) to study the impact of taxation on the location of investments and the allocation of profits between businesses in different Member States, and to propose remedial action.\footnote{Farmer and Lyal, \textit{EC Tax Law}, pp. 296–9; Jiménez, \textit{Towards Corporate Tax Harmonization in the European Community}, pp. 131–5.} After a number of meetings, the committee produced a report to the Commission on 18 March 1992 – the Ruding Report.\footnote{See Report of the Committee of Independent Experts on Company Taxation, March 1992.}

The Ruding committee found that some national rules, such as withholding taxes on inter-corporate payments, differences in corporation tax
rates and the tax base, and methods of eliminating double taxation were biased against both inward and outward investment. This led to differences in the cost of capital and, as a corollary, a distortion of capital flows and of competition, especially in the financial sector. Market forces were not enough to eliminate these distortions.

Three main priorities were set for remedial action, namely: the elimination of corporation tax obstacles to cross-border investment,\(^\text{94}\) the establishment of minimum corporation tax rates and a minimum common tax base,\(^\text{95}\) and the transparency of tax incentives for the industry. The Ruding committee set out a detailed schedule of three phases\(^\text{96}\) for the implementation of these proposals.

Very importantly, during the first phase Member States applying imputation taxes on the distribution of profits earned in another Member State would be obliged to allow such tax to be reduced by the corporation tax paid by the subsidiary or permanent establishment in the other Member State. Relief for domestic dividends received would be extended to inbound dividends. Moreover, rather controversially, a minimum corporation tax of 30 per cent would apply on both retained and distributed income, followed by a maximum rate of 40 per cent in the second phase.

The Commission’s response to the Ruding Report was cautious.\(^\text{97}\) Whilst it agreed with the committee’s recommendations on elimination of double taxation (e.g. the extension of the Parent–Subsidiary

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\(^{94}\) This entailed the abolition of withholding taxes, the cross-border relief of foreign losses, completion of the network of tax treaties, extending the scope of the Parent–Subsidiary Directive to all taxable businesses and reducing the participation threshold, the adoption of the proposed Interest and Royalties Directive, the ratification of the Arbitration Convention by all Member States, rules/procedures for transfer pricing to be agreed, etc.

\(^{95}\) The experts looked at components of the tax base and especially the depreciation of assets, the harmonisation of dates for the payment of taxes, etc. It is noteworthy that there were dissenting views as to the form of the common corporation tax system. See Professor Radler’s proposals in Annex 10A of the Report and the dissenting view of K. Messere in Annex 10B.

\(^{96}\) The first phase was to run until 1994. The second phase was to run concurrently with the second phase of economic and monetary union. This was due to commence on 1 January 1994, according to the Treaty on Economic and Monetary Union. The third phase was to coincide with full economic and monetary union. See Farmer and Lyal, EC Tax Law, p. 298.

\(^{97}\) Commission Communication to the Council and the European Parliament indicating the guidelines on company taxation linked to the further development of the internal market, SEC(92) 118 final.
Directive, the Merger Directive and further work on transfer pricing and thin capitalisation), the Commission was much more reserved towards recommendations on harmonisation of corporate taxes. The recommendations were found to be too far-reaching and required further study. This response evinced the Commission’s clear move away from harmonisation proposals and its endorsement of piecemeal and ad hoc solutions.

The Council agreed with the Commission’s conclusions. It raised the issue of subsidiarity and rejected the Ruding committee’s proposal for a minimum rate of corporation tax of 30 per cent. While the Council recognised the importance of eliminating double taxation on cross-border income flows, it also emphasised the importance of ensuring adequate and effective taxation at least once. The Council referred to Member States’ concerns about the effect of special tax arrangements designed to attract internationally mobile capital and the ensuing loss of revenue and unfair competition. Measures were urgently needed.

At this point it became obvious that the rhetoric against unfair competition and double non-taxation had begun to emerge. The Commission’s efforts to tackle harmful tax competition seem to have moved in parallel with those of the OECD’s, whose harmful tax competition project marked the beginning of a new era in international tax law.

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98 It was proposed to replace the ‘list’ approach with a ‘residency’ and ‘subject-to-tax’ criterion. Following a positive opinion from the European Parliament (OJ C128 of 9 May 1994), negotiations started in Council, but were eventually suspended due to the priority given to the ‘tax package’. See also Chapter 2 of this book.


100 See conclusions of the ECOFIN Council of 23 November 1992.

1.3 Recent developments

1.3.1 Harmful tax competition and the tax package

The distortionary effects of harmful tax competition in the EU were first officially raised by the then Commissioner for the Internal Market, Mario Monti, in his first Memorandum. It was thought that the effectiveness of the Internal Market could be endangered by the presence of tax rules appearing as legitimate state aid but falling within the scope of harmful tax competition.

Following the Monti Memorandum, an ECOFIN Council held in April 1996 decided to create a working party to work on the coordination of tax policies, in cooperation with the Commission, and to examine closely the issue of harmful tax competition. In December 1997 a tax package to tackle harmful tax competition was launched. The tax package was meant to address three areas of concern, namely corporate taxation, savings taxation and interest and royalty payments. All three areas had to move in parallel. Lack of agreement in one area stopped progress in other areas.

The Commission proposed the following specific measures:

(a) a Code of Conduct on business taxation;
(b) a common system of taxation of interest paid to individuals; and
(c) a directive, similar to the Parent–Subsidiary Directive, to eliminate withholding taxes on interest and royalty payments between companies in different Member States.

On 1 December 1997 the finance ministers of all the Member States unanimously agreed the tax package. This included the Code of Conduct and a more rigorous application of the rules on state aid in the field of business taxation. The finance ministers also asked the Commission to submit proposals for directives on the taxation of savings, and on interest and royalty payments between companies.

103 For an analysis of the state aid prohibition in the context of direct tax law, see 4.2.6.
104 Toward Tax Co-ordination in the European Union, A Package to Tackle Harmful Tax Competition, Doc COM(97) 495 final (1 October 1997).
106 Discussed in greater detail in 2.6.
In so far as savings taxation was concerned, there were two recommendations – imposing either a withholding tax at source or an obligation to exchange information on interest income from savings. The result was the Savings Directive: an agreement between Member States for automatic exchange of information on individuals who earn savings income, in the form of interest payments, in one EU Member State but who reside in another Member State. The paying agent (i.e. the financial institution paying the interest income) would collect the tax or the information. Three Member States (Austria, Belgium and Luxembourg) had opted to apply alternative arrangements during a transitional period. The Savings Directive is examined in more detail in Chapter 2.

The Interest and Royalties Directive was meant to address similar concerns. It was the least controversial proposal of the package. In fact, agreement on a draft was reached from the outset, but as progress was linked to the Savings Directive, delays on its implementation were inevitable.

On 1 December 1998 the ECOFIN Council in Vienna approved the first progress report of the Code of Conduct group, which had been created to assess compliance with the Code of Conduct. The ECOFIN Council also asked the Commission for an analytical study on company taxation in the European Community. An official mandate was subsequently issued, which in 2001 led to the Commission’s Company Tax Study, examined next.

1.3.2 The 2001 Company Tax Study

In preparing this study, the Commission was assisted by two specifically created panels of experts. The Commission was asked to identify the main tax provisions that may hamper cross-border economic activity in the Single Market.

In this report the Commission highlighted the developments since the Ruding Report. It was noted that the globalisation process had significantly changed the international economic landscape, creating new challenges for national company tax systems and at the same time requiring more integration of international markets. Furthermore, the increase in international mergers and acquisitions had an impact on the way in which companies and tax administrations confronted the taxation of

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107 See 2.4.
108 See 2.3.
such transactions.\textsuperscript{110} Overall, the introduction of the Internal Market in 1993 significantly changed the scenery for the company tax systems of Member States.\textsuperscript{111}

Another major development was the introduction of the Economic and Monetary Union. Now that monetary and exchange rate restrictions were no longer nationally available policy tools, the question of tax competition became more prevalent. Whilst the Economic and Monetary Union increased the integration achieved by the Internal Market, it also highlighted numerous tax problems hampering the completion of an integrated EU capital market,\textsuperscript{112} such as discriminatory dividend taxation, unavailability of cross-border loss relief, unavailability of reliefs and deferrals in case of cross-border reorganisations, transfer pricing, double taxation as a result of conflicting taxing rights and so on.\textsuperscript{113} There was no attempt to provide an exhaustive list or detailed classification of any of the obstacles that were presented.

The Commission identified two approaches that could be used to tackle these obstacles. Targeted solutions could be used to remedy individual obstacles, e.g. amendments to the relevant directives and coordinating measures. The possibility of adopting a comprehensive solution was examined as an alternative. It was reiterated numerous times in the Company Tax Study\textsuperscript{114} that the existence of the fifteen (at the time) tax systems was the source of the majority of the obstacles. All the suggested comprehensive measures were predicated on a single tax base and, according to the Commission, had the potential of reducing compliance costs for European businesses.\textsuperscript{115} Four suggestions of a long-term nature were made.

Firstly, Home State Taxation was discussed. Under this method, all or a group of Member States agree to allow certain enterprises with operations in numerous Member States to compute their taxable base according to the tax rules of a single Member State – the home State.\textsuperscript{116} Only the method of calculating the base would change, as each Member State would continue to set the tax rate on its share of the group’s profits. As

\textsuperscript{110} Ibid., p. 20.  
\textsuperscript{111} Ibid., pp. 22–3.  
\textsuperscript{112} Ibid., p. 24.  
\textsuperscript{113} The Company Tax Study also looked at tax-related labour costs and issues pertaining to small and medium-sized enterprises and partnerships. See Part III of the Company Tax Study.  
\textsuperscript{114} Ibid., pp. 2, 8, 14, 372.  
\textsuperscript{115} Ibid., p. 372.  
\textsuperscript{116} Ibid., p. 373. It is acknowledged that the idea of Home State Taxation had originally been developed in academic research – see Sven-Olof Lodin and Malcolm Gammie, \textit{Home State Taxation} (Amsterdam: IBFD Publications, 2001).
the foreign subsidiaries would be treated as domestic ones subject to the existing local rules of the home State, cross-border loss relief would be attained and transfer pricing between participating Member States would be eliminated.

Secondly, a Common (Consolidated) Tax Base was considered. Here, instead of extending the application of each of the existing national tax systems across the EU, the Commission suggested an additional but optional new tax base that would be adopted across the EU.\(^\text{117}\) Following the 2001 Company Tax Study, the Commission concentrated its efforts on this suggestion, which eventually led to a proposal for a Common Consolidated Corporate Tax Base.\(^\text{118}\)

An additional variation on the ‘common base’ theme was also suggested – the European Union Company Income Tax (EUCIT). This entailed not only a new single tax base but also a uniform tax rate. The revenues raised would be used to fund the EU institutions and activities with any excess allocated between Member States according to an agreed formula. The EUCIT could be administered by individual Member States, with each Member State applying its own tax rate to its allocated share of the tax base. It was acknowledged in the Company Tax Study that this method would be politically contentious, as it led to the establishment of a federal EU Tax.\(^\text{119}\)

Finally, a compulsory harmonised tax base in the EU could be enacted. Apart from the new tax base, which would replace all Member State bases, there would also be consolidation and formulary apportionment.\(^\text{120}\)

The Commission concluded that fundamental benefits could flow from any of the comprehensive approaches, expressing its preference for the Common (Consolidated) Base.\(^\text{121}\) However, it was conceded that implementation of Home State Taxation was potentially a quicker process since it relied on existing systems.

Arguably, the Commission’s 2001 Company Tax Study set the parameters for future developments in the area of corporate tax law. Most of the targeted measures were implemented either voluntarily or as a result of the Court of Justice’s judgments. As far as the comprehensive measures were concerned, a debate on the harmonisation of tax bases

\(^{117}\) Company Tax Study, p. 375.
\(^{118}\) See Chapter 3.
\(^{119}\) Company Tax Study, p. 377.
\(^{120}\) Ibid., p. 378.
\(^{121}\) Ibid., p. 380.
(re-)started, which led to some developments. Since the 2001 Company Tax Study, Home State Taxation has been advanced as an initiative of tax simplification for small and medium-sized enterprises.¹²² Most progress has been achieved vis-à-vis the second comprehensive proposal. There is now a proposal for a Common Consolidated Corporate Tax Base (CCCTB) that is awaiting approval from the Council.¹²³

With hindsight, the ingenuity of the Company Tax Study lay in the fact that the necessity of targeted measures that could be implemented swiftly and on an ad hoc basis was decoupled from the necessity of comprehensive proposals, which were more politically controversial and required a longer ‘gestation’ period. Perhaps this is why most previous proposals failed.

### 1.3.3 The aftermath to the 2001 Company Tax Study

Since the Company Tax Study was published, the Commission began intensive follow-up work both on the various targeted measures and the long-term proposals for a common tax base. In 2003 the Commission released a Communication¹²⁴ in which it emphasised the continuing need to adapt company taxation in the EU. It confirmed the commitment taken in the 2001 Study and the two-track strategy for dealing with existing tax problems. The Commission reviewed the progress on the targeted measures and reiterated the belief that the common consolidated corporate tax base was the only means by which EU companies could overcome the aforementioned tax obstacles in a systematic way.¹²⁵ It presented ideas of a pilot scheme for the application of Home State Taxation to small and medium-sized enterprises.¹²⁶ A similar approach was followed in a Commission Communication in which the contribution of taxation and customs policies to the Lisbon strategy

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¹²³ See Chapter 3.


¹²⁶ Ibid., p. 13.
was highlighted. In 2006 the Commission reported on the progress to date, with emphasis on the CCCTB.

Apart from these general policy statements, the Commission also published a number of Communications dealing with specific tax obstacles such as cross-border loss relief, exit taxation and anti-abuse measures as well as a more general Communication on the coordination of Member State tax systems in the Internal Market. More recently the Commission’s Communications have focused on problems such as double taxation, double non-taxation of companies and aggressive tax planning and cross-border dividends. The increasing reliance on soft law to improve its performance and legitimacy suggests a shift in Commission tactics, away from its overdependence on hard law.


134 See Press Release IP/12/201.

135 Public Consultation Paper, Taxation Problems that Arise when Dividends are Distributed Across Borders to Portfolio and Individual Investors And Possible Solutions (Commission, 2011). See also previously, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Dividend Taxation of Individuals in the Internal Market, COM(2003) 810 final.

There have also been some legislative developments. The Interest and Royalties Directive and the Savings Directive were enacted and existing direct tax directives were amended.\textsuperscript{137}

The Commission also published a proposal for a Common Consolidated Corporate Tax Base. The Commission had been working on this project ever since the 2001 Company Tax Study. In September 2007 it published a technical outline of a possible proposal for a CCCTB, which was subsequently annotated. The Commission was initially expected to make a legislative proposal on the CCCTB by the end of 2008, though this was postponed following the rejection of the Lisbon Treaty by the Irish people. With the subsequent ratification of the Lisbon Treaty and the appointment of Commissioner Algirdas Šemeta, who promised, inter alia, to deliver a proposal on the CCCTB as soon as possible,\textsuperscript{138} there was optimism for further action in the near future. And indeed, on 16 March 2011 the Commission published the eagerly awaited final proposal for the CCCTB and a detailed impact assessment.\textsuperscript{139}

Although the proposal was not immediately curbed on the basis of subsidiarity and enjoys the support of the European Parliament, which in fact advocates the mandatory application of the CCCTB,\textsuperscript{140} it is thought unlikely that unanimity will be attained in the Council. There had already been suggestions to allow a few Member States to adopt the CCCTB under the enhanced cooperation procedure, even before the Commission postponed its work on it in 2008. This procedure and the CCCTB in general are explained in greater detail in Chapter 3.

\subsection*{1.3.4 Good governance in tax matters}

Another interesting development is the introduction of the concept of good governance in the tax area. At an ECOFIN meeting in 2008, one of the conclusions of the Council was to promote the principles of good


\textsuperscript{138} See summary of his pre-appointment hearing at the European Parliament on 12 January 2010, reported in Tax Analysts (2010 WTD 9–9). See also speech given by Commissioner Algirdas Šemeta on 1 March 2010 in the Brussels Tax Forum entitled \textit{Tax Policies For A Post-Crisis World}. This was reported in Tax Analysts on 2 March 2010 (2010 WTD 40–13). More recently, see speech entitled \textit{A Smart Tax Agenda for Europe} given by Commissioner Šemeta on 28 June 2010 at the ECOFIN meeting (SPEECH/10/347).

\textsuperscript{139} See detailed analysis in Chapter 3.

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governance in the tax area, described as ‘the principles of transparency, exchange of information and fair tax competition, as subscribed to by Member States at Community level’. Good governance in the tax area was identified as an essential means for combating cross-border tax fraud and evasion and for strengthening the fight against money laundering, corruption and the financing of terrorism.

This task was taken on by the Commission. A series of initiatives had already been undertaken prior to the ECOFIN resolution, which in 2009 culminated in a Communication for the promotion of good governance in tax matters. In this Communication the Commission suggested measures to strengthen the principle of good governance in the tax area within the EU and internationally. It identified existing internal initiatives, as well as proposals to improve the Mutual Assistance Directive and the Savings Directive.

The Commission urged the Council to give the issue of good governance in the tax area appropriate political priority and to include provisions to that effect in general agreements with third countries. Member States were also encouraged to establish a more unified approach towards third countries, regardless of whether those countries apply the principles of good governance in the tax area. Finally, the Commission reiterated

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144 Communication from the Commission, Promoting Good Governance in Tax Matters, pp. 9–10.


147 Communication from the Commission, Promoting Good Governance in Tax Matters, p. 10.

148 Ibid., p. 13.
its intention to pursue a constructive dialogue with all stakeholders concerned.\textsuperscript{149}

The European Parliament has also adopted a resolution promoting good governance in the area of taxation. The European Parliament condemned the role played by tax havens in encouraging and profiting from tax avoidance, tax evasion and capital flight and urged the Member States to make the fight against these a priority.\textsuperscript{150} The resolution also noted the need for an EU policy of good tax governance.\textsuperscript{151}

Furthermore, at a recent ECOFIN Council meeting the Commission was given a mandate to initiate dialogue with Switzerland and Liechtenstein to extend the Code of Conduct beyond the Union for the first time.\textsuperscript{152} This would facilitate the promotion of the principles of the Code of Conduct in third countries.\textsuperscript{153}

In a recently published report the OECD has also called for measures to improve governance through tax reform.\textsuperscript{154} There is recognition of the role of taxation as a central strategy for state-building. The report explores how taxation can improve governance and especially the development of the state apparatus, as well as notions of accountability and responsiveness.

It is obvious that the concept of good governance in taxation and its impact on the strengthening of the tax systems is increasingly being acknowledged at an international level. Revenue-raising and protection of the tax base are not the only goals of tax policy. Nevertheless, any concrete developments in this area are likely to require political will.

\section*{1.4 The future of EU corporate tax law}

It is no secret that the Commission prefers EU-wide corporate integration to promote the competitiveness of the single market and the efficient allocation of capital. In the early years its approach was over-ambitious, the focus being on harmonisation as evinced in the various reports, with

\textsuperscript{149} Ibid., p. 14.
\textsuperscript{150} See European Parliament Resolution of 10 February 2010 on promoting good governance in tax matters (2009/2174(INI)), para. 1.
\textsuperscript{151} Ibid., para. 17.
\textsuperscript{152} 3020th Council Meeting Economic and Financial Affairs, Luxembourg, 8 June 2010, PRESSE 162, 10689/10.
\textsuperscript{153} Ibid., p. 20.
some experts favouring the classical system of taxation and others the imputation system. However, in later years it became apparent that ad hoc, targeted measures against specific tax obstacles had a better chance of success than harmonisation proposals that challenged fundamental aspects of Member States’ tax systems. This approach was buttressed and to an extent became a necessity, following the erosive effect of the judgments of the Court of Justice. At the same time the Commission has not abandoned some of its more ambitious plans for reform, which appear to be resurfacing every time a political plateau is overcome.

As noted by Professor Alain Barrère in the Neumark Report:

The drafters of the Treaty of Rome were not mistaken; the Common Market will be a gradual achievement obtained by integration of economies and harmonization of the juridical framework of economic activity. It will be necessary to overcome resistance arising not only from habits of thought, or settled positions threatened with change, but also from political, economic and social structures which are the product of a long historical evolution and little by little have been engrained into habits of production, saving and consumption. The alteration of these structures and particularly of tax structures, is always slow and requires time to become effective. To the extent that policies can hasten the process, it is expedient to settle common aims, sometimes to be reached by different routes.¹⁵⁵

Whatever routes are chosen, the mission to remove tax obstacles to cross-border movement appears to be deeply engrained in the Commission’s ethos.

This book examines some of the ‘gradual achievements’ affecting EU Corporate Tax Law.

¹⁵⁵ Ibid., p. 185 (Appendix E: The Influence of Economic Growth of the Member States on Problems of Tax Harmonization).