

# Tax matters

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**Tax matters: The EU Commission going astray**

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Tax matters: The EU Commission going astray

Version: Speech

## I. Looking Back and State of Affairs

When I held my inauguration speech 22 years ago, my vision was that Europe would develop towards a United States of Europe by disposing of own sovereign rights to tax European citizens. Lowering or increasing tax rates should make available more flexibility in respect of the yearly budget. More legislative powers in respect of direct taxation and the abolishment of the unanimity principle should make it possible to harmonize certain features of income and corporate tax. The EU would be prepared to create a tax environment that enables European businesses to grow and expand without being hindered by borders. None of my expectations have really come true.

The essential characteristic of a state is the capacity to exercise sovereignty in financial matters. A state is only able to fulfill its functions if it can cover the related financial needs. The disposition of financial resources should not depend on circumstances that this state cannot influence. Currently, the EU is still dependent on contributions of member states. The European Union is a Union of national states, still a state-in-the-making.

The Commission tries to use the momentum to change the system of its own resources. {The EU Treaties (Article 48(4) TEU) as well as a decision on own resources (Article 311(2) TFEU) require unanimity and the approval of the Member States' parliaments in accordance with their respective constitutional requirements.} However, years ago the discussion was orientated on finding a material link between what Europe stands for and the resources which should be attributed to the Union. Nowadays the proposals get more and more arbitrary. The Commission searches for resources and finds some which are not yet existing or have nothing to do with the community. First, it planned the digital levy as a European resource without considering that it was common consensus that such digital taxes should not be introduced. Now it is proposed that the EU should receive 15% of the revenue that states receive on basis of the future Pillar One regime. As Wolfgang Schön observes

correctly, such a proposal would lead to a result that is totally unsystematical. Pillar One that does not create a new tax but aims at a new allocation of taxing rights cannot be used to solve the European problem of financing.

We see, not much has changed during the last 20 years. Direct taxation is still an exclusive competence of the member states. Obviously, the EU Commission feels that it is in an unfortunate situation, limited by the requirement of unanimity but full of ambition to create a “fair and efficient corporate tax system”. Besides the fact that the Commission does not know how such a system should look like, it tries to be active by circumventing the legal limits in order to expand its powers, and by finding new ways how to gain influence on direct tax laws of member states. The tax agenda “for the 21<sup>st</sup> century” presented by the Commission in May 2021 illustrates well the abysmal gap between existing legal competences and the scope of the intended projects of the EU. It is not only that the EU promises the immediate implementation of both pillars, but the Commission also aims at a widespread harmonization of direct taxes in the field of company taxation.

To a certain extent, the position of the EU Commission is understandable. The public debate about abuse, tax avoidance, or aggressive tax planning puts the Commission under pressure – at least the Commission feels that it is under pressure. It is, however, questionable whether such feeling were justified. Abuse and aggressive tax planning are extremely vague concepts, and it seems that any harmonization of national tax laws can be founded on some kind of abuse. Not only the Commission, but the whole international community, in particular also the OECD, should reconsider how to deal with the concept of abuse. Tax law restricts the fundamental rights of citizens. As long as the law does not clearly formulate and justify the limit on people’s rights, we should still respect the fundamental principle that a taxpayer has the freedom to arrange his affairs in a way which is permitted by law. By piling up one measure against tax abuse after the other the taxpayer is not able anymore to arrange his affairs in a balanced way.

Also the European Parliament has discovered taxes and tax planning as a significant field of activity, at the same time putting the Commission under pressure. Aggressive tax planning offers a momentum that can be used for becoming active in this field. The obsession with

abuse and aggressive tax planning, however, leads the Parliament to the wrong track. Instead, it should focus on the problems of individuals who are represented by the members of the Parliament.

However, the EU is a community that is committed to the rule of law and the activities of the Commission in the field of direct taxation raise the question whether the Commission still observes the requirements of the TEU and the TFEU regarding direct taxation. Most recent proposals and communications raise doubts in this respect. In the following, I would like to share with you my concerns. In addition, I would like to express my discontent with the priorities the Commission sets in its work. Is it not problematic that the Commission only acts if abuse or aggressive tax planning can be used to justify action? Is the Commission not forgetting significant issues that have to be solved for the functioning of the common market?

## II. Legislative powers in the area of direct tax

The EU has the power to “make regulations, issue directives, take decisions, make recommendations or deliver opinions” (Article 288(1) TFEU). The power to act, however, is limited. The Community may only act if the powers are conferred on it by the Treaty (principle of conferral, Article 5 TEU). Treaty authority will confer legislative powers expressly (or implicitly) to the EU institutions. In addition, EU institutions have to observe the principles of proportionality and subsidiarity. Further, they have to state the reasoning that had been followed by the Community institutions when they adopted a legislative act.

While the EU has widespread competences in the area of custom duties and indirect taxes (Articles 110 to 113 TFEU), in particular in regard to the Value Added Tax, there are nearly no explicit powers in respect of direct taxation. One exception is the power to tax the employees of the EU who are in turn exempt from national taxes on salaries (Article 12 of the Protocol (No 7) on the Privileges and Immunities of the European Union). Article 192 TFEU confers to the Council the power to legislate using a special legislative procedure on “provisions primarily of a fiscal nature” that refer to the protection of the environment and of natural resources. Apart from these special cases, the EU Commission is left with Article 115 TFEU. Article 114 TFEU does not apply due to the safeguard clause of paragraph 2 which excludes fiscal provisions.

Article 115 TFEU does not refer to taxation but permits the Council to “issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market”. All directives that were issued on direct taxes have been based on this article (Nearly all, country-by-country reporting is an exception; it is like the directive on annual financial statements based on Article 50(2) TFEU (freedom of establishment): also in this case the legal base is doubtful).

Article 115 TFEU requires – as a matter of principle - that national differences of tax laws hinder the functioning of the common market. In other words: the goal of EU legislation must be to bring national laws more closely together if this is necessary for the working of the internal market. Article 115 TFEU is not about bringing national laws more closely

together. While we find a broader understanding of harmonization in other fields of law like environmental policy, social policy, and consumer protection, Article 115 TFEU still requires legislation to ensure the correct functioning of the market.

The commission seems to believe that any differences in direct tax law automatically result in a distortion of the common market. This is certainly not consistent with the case law of the ECJ. The court raises the question in several cases whether a proposed measure is indeed a contribution to the better functioning of the internal market. Interesting in this respect is especially the decision on tobacco advertising. Here the court stated that the legislative power of Article 115 TFEU (then Article 95 EC) can only be used for two purposes: either to improve the functioning of the internal market, i.e. not simply to regulate the market in general terms because of harmful and unhelpful differences in national laws; or to eliminate distortions of competition. But those distortions must be appreciable and demonstrable. The net result of this case law is that the EU institutions must take the obligation of reasoning a certain legislative act seriously. Reasoning gets indeed a major issue; we will come back to this later.

It would also like to remind you that Article 115 TFEU has a residual function. The general provision for the approximation of national laws is Article 114 TFEU having less stringent requirements than Article 115 TFEU. The difference between the two is an expression of the fact that especially direct taxation is still an exclusive competence of the member states. Such residual clauses require restrictive interpretation, which indicates that the criterion "affect the ... functioning of the internal market" should be taken seriously.

The **principles of proportionality and subsidiarity** (Article 5 TEU) that are thought of as additional limitations of the EU's power to legislate, are constitutional principles but there is a clear tendency not to observe those principles sufficiently, their existence is rather a shadowy one. Nevertheless, they are objective judicial standards, and only because the ECJ applies legal restraint in this respect, this does not change the binding legal character of the limitation. The Commission should take this matter seriously and raise questions like: Why is it necessary to regulate the issue of shell companies within the EU and also in relation with

third states, although member states have all possibilities not to apply a tax treaty if a foreign company claiming treaty protection has no or not sufficient substance.

The EU on the way to a sovereign state can only be a state of **cooperative federalism**, any other form of a state is not thinkable. Similar like in Germany, central governments feel limited by federalism and try systematically to overcome implicitly the existing restrictions. And citizens do not care, they feel that they are not really affected by financial rules and, in general, rules on finances seem to be too complex, i.e. rather a field for experts than for normal people. We should however recall that federalism also has a significant function to protect the fundamental rights of citizens. If direct taxation is an exclusive competence of the member states, and as long as the European Court of Justice protects the fundamental freedoms effectively in this area, it is essential that the responsibility for protection of the taxpayers' rights is attributed to the legislators of the member states. National parliaments, however, have to be blamed being too passive in this respect. When Protocol No. 2 "On the Application of the Principles of Subsidiarity and Proportionality" was included into the TFEU, we expected that national parliaments would make use of the opportunity to check EU legislation carefully (throughout the so-called "yellow card" mechanism), also in respect of the legal base of such legislation. I am not aware of any notification sent by a parliament to the Commission in the field of direct taxation. Frequently, the reason for such reluctance is a lack of awareness of issues as well as a lack of specific knowledge and comprehension of the complex relations between international, European and national tax regulations.

The principle of subsidiarity also includes the comparative efficiency test: the Union should not act unless it can achieve the objectives of the proposed action in a better way. Recognizing this, **reasoning** of any legislative act is of utmost importance. Consequently, the Union treaties provide that those acts "shall state the reasons on which they are based" (Article 296 TFEU). In the French version (and in other language versions) the requirement is even stronger: required is not only a reason but acts must be justified ("sont motivés"). The statement of reasons must be included in the act itself. This is the reason why all Union legislation includes an extensive preamble. But it is doubtful whether the EU legislator really meets the requirements of a solid and correct reasoning.



The Court of Justice has made it clear that a mere statement of a reason were not sufficient. The statement must be appropriate to the act at issue and the reasons must be correct. The European citizen is entitled to receive true information so that he can ascertain the reasons for a legislative measure. And the Court of Justice must be enabled to exercise efficiently its power of review. On the other hand, the institutions are not required to go into every relevant point of fact and law, it suffices if they disclose “the essential objective pursued by the institution”. The absence or the inadequacy of reasons results in an infringement of an essential procedural requirement within the meaning of Article 263 and accordingly liable to annulment (Article 263) or invalidation (Article 267).

### **115 TFEU and competition**

Article 115 TFEU has to be seen in the context of competition between states. There is a certain tension between the effort to coordinate national tax laws in a more stringent way and the tax competition between states. Any step towards more coordination, however, restricts the capacity of states’ tax policy to react independently on new challenges and to develop an own national and international tax policy. An own national tax policy still makes sense as long as each state has to determine which tax mix to choose in order to finance state expenses, how to counter harmful tax competition of other states, and how to avoid the erosion of the tax base. I would like to recall that EU member states are not only in a competitive situation with each other but also with strong competitors in Europe (UK, Switzerland) and in the whole world (USA, China). Most of the enacted or proposed EU directives put the EU at a disadvantage in regard to worldwide competition. A good example is country-by-country reporting. While the countries participating in BEPS did discuss the issue in detail and came to a more balanced solution, the EU nevertheless obliges European enterprises to make those sensible data public. EU companies are therefore confronted with a disclosure obligation which the competitors in countries like China, US, or UK do not know.

### **115 TFEU/functioning of the common market/CCCTB**

Article 115 TFEU speaks about the functioning of the common market and there are certainly cases where different national rules result in a restriction of competitive conditions within the market under specific consideration of competitive conditions worldwide. For this reason, I do think that **CCCTB** as proposed years ago can be based on Article 115 TFEU.

Different corporate tax bases and the restriction of setting off losses within the common market have strong influence on the competitiveness of European undertakings and should be eliminated.

Prof. Albert Rädler to whom I always felt very committed was a passionate advocate of the European idea. As a member of the Ruding committee which already suggested the introduction of a minimum corporate tax rate more than 30 years ago, he knew that it was necessary to find balanced compromises between competition and the need of tax harmonization. Before a minimum tax rate could be enacted in Europe, it was necessary to harmonize the tax base. I do not believe that Albert Rädler would have been happy about the GloBE proposal that uses financial accounting as a basis only for the purpose of GloBE, he knew that also the legitimate interests of taxpayers should be observed. Consequently, what we urgently need is a harmonization of the corporate tax base in the Union.

Unfortunately, the CCCTB proposal has never found general agreement. Is it not striking that a measure that improves clearly the functioning of the common market does not find general acceptance while other measures that are not necessary for the functioning of the common market are getting adopted only because they are presented under the heading of tax abuse and aggressive tax planning?

### III. Some examples

#### 1. ATAD

The first “sin” in respect of legality happened when the EU enacted the so-called “Anti-Tax-Avoidance-Directive” (short ATAD). The ATAD directive stands under the heading of ensuring that tax is paid where profits and value are generated. However, no provision of the directive really serves this objective. A limitation of the deduction of interest expenses, for instance, leads exactly to the opposite result: profits are not calculated correctly anymore from the perspective of the ability-to-pay-principle. I only want to mention that in Germany we are still waiting for a decision of the German supreme court on the constitutionality of those earnings-stripping-rules; there are indeed good arguments for assuming that those rules are unconstitutional.

Equality of taxing citizens, an infringement of property rights, or any other violation of fundamental rights, in summary the responsibility for a fair and effective tax system, cannot be guaranteed by the European institutions, not even by the ECJ. The court does not have any competences in controlling the national legislator in the field of direct taxes. In order to avoid gaps in judicial control, direct taxation must remain in the hands of the member states as long as the EU treaties have not been adopted. ATAD is in many aspects nothing else than resistance against base erosion, an object that can be better achieved by each member state separately. A harmonization of those rules is not necessary. Without the rules of ATAD the common market would exactly work as efficiently as with ATAD.

#### 2. DEBRA

The frustration with CCCTB makes the EU Commission think about alternatives. We can observe that the Commission tries to implement CCCTB piece by piece, the Commission even provides the member states with recommendations on how to deal with carry back and carry forward of losses. A recent development in this respect is the proposed directive named **DEBRA** (proposal for a Council Directive of 11 May 2022 on a “debt-equity bias reduction allowance”). My valued colleague and friend Hans van den Hurk was kidding about

the beautiful name of the directive (“Over de schoonheid van DEBRA”). And another esteemed colleague Roland Ismer raises the question whether the proposal is rather a zebra or a donkey (A Zebra or a Donkey? The European Commission’s Proposal for a Debt-Equity Bias Reduction Allowance, EC Tax Review 2022, no. 4, p. 164). Whatever it may be, the proposed directive on DEBRA is nothing else than a demonstration how far the EU exceeds the legal limits as provided by the EU Treaty and the TFEU.

The proposal consists of two parts: first, taxpayers will be granted an allowance on equity that is computed by multiplying the increase in net equity in one year by a notional interest rate; second, interest deduction will be further limited. Consequently, a case of carrot and stick: allowance in respect of equity, additional limitation of deduction of interest.

The Commission assumes that the shortage of equity and the excessive financing of businesses by debt is a problem for companies and the member states’ budgets. More equity financing – I quote - could help in recovering the European economies from COVID-19 and in ensuring stable public revenue. In this respect, the Commission oversees several fundamental considerations:

It is certainly true that companies with a high equity and low debt are more robust in times of crises. Companies with high equity were in a more favorable situation during the financial crisis as they were not dependent on the capacity and the functioning of financial institutions. But the current crisis is not comparable with the financial crisis. In addition, most companies do not have the chance to choose between equity and debt. Debt financing is a normal way of doing business (when Polonius says in Hamlet that you should neither be debtor nor creditor, few economists would agree). And not every investor wants to take the risk of a capital investor. An incentive to attract more equity may therefore be worthless and inconsistent with economic reality. At least, it is not the task of the EU institutions to tell member states how they should react on challenges like COVID-19.

The reasoning of the Commission that the proposal will help to make member states budgets more robust is obviously a spurious argument. An allowance for corporate equity (ACE) is one of the concepts which can be used for achieving tax neutrality. However, it is

only one concept among other concepts. Nowadays, countries frequently have already chosen for alternative concepts like the limitation of debt financing or the introduction of dual income tax systems. An additional ACE-regime turned up on the existing measures, will lead to confusion and mismatches within domestic tax laws.

According to Article 115 TFEU, the non-existence of ACE must lead to an obstacle for the functioning of the internal market. The Commission does not say a single word about why the internal market will not function without DEBRA. It is clear that Article 115 TFEU is not a proper legal base for this directive.

One could argue that DEBRA is only a part of a bigger project, namely the harmonization of the corporate tax base. If the EU has the power to enact a directive like CCCTB, it should also have the power to enact DEBRA, this could be the line of argumentation. In 2011, when the EU Commission presented its proposal for a directive on a consolidated corporate tax base (CCCTB) the aim was to take away the obstacles experienced by European businesses. Consolidation should overcome the problem that foreign losses were deductible, certainly a serious obstacle to the proper functioning of the common market. In 2016, the EU Commission, after many years of discussions and objections, relaunched the project. But now the reasons for justification have changed. CCTB is now understood as a principal measure against tax abuse and aggressive tax planning. Obviously, the Commission feels that it is easier to “sell” CCTB to Member States by hooking up to the parallel running work on BEPS and by leaving off the most debated parts of the project (full consolidation, allocation of the taxable base to member states by using a formula). Within the tax agenda of the Commission for the 21<sup>st</sup> century, the project is again relaunched, now under the new title “BEFIT” that should help to improve the “marketing” of the harmonization of the corporate tax base: if you are not able to sell something, you may change the name of the product. Next to this undertaking, there is no room for an early partial harmonization in member states. In a common tax base system, all features are so strongly interconnected that such a project always must be developed as a whole and not part by part.

In case of the proposed DEBRA-directive, the Commission does not even try to establish a closer link with the functioning of the internal market. The commission notices that “direct

tax legislation falls within the ambit of Article 115 TFEU” and that “the complete lack of relevant tax debt bias ... along with the existence of significantly different measures ... may create distortions to the function of the internal market and can effect the location of investment in a significant manner”. The statement that there is a distortion of the internal market is one thing, a true and correct reasoning is another.

It is obvious that the EU does not have a legal base for DEBRA. However, the real problem is a different one. If all member countries adopt a certain legislative act, there will be nobody who could challenge the council’s decision. The system of actions through which the European Court of Justice can exercise its jurisdiction is incomplete. If all member countries in case of unanimity agree on a legislative act, no country nor any EU institution will initiate proceedings against the act. Thus, unanimity implies – irrationally – a very broad scope of the internal market competence. National courts, however, can refer a case to the ECJ if they feel that the EU does not have the competence for the legislative act in question. At least in the realm of direct taxation, this has not happened until today. If national judges get the chance to challenge a directive, they should be aware of the issue. It would be even better if European citizens and in particular European undertakings had the possibility to challenge European legislative acts. Otherwise, we are running the risk that the German supreme court and possibly other supreme courts feel responsible to determine the limits of EU competences. The debate about the decision of the German supreme court on the ECB program of purchasing bonds demonstrates how dangerous this can be for the European project.

### **3. Globe**

Another problematic example is the **directive on a minimum corporate tax**. The directive is aimed to implement the OECD’s work on pillar Two (so-called GLoBE). As already said, the Commission reacted quickly by presenting a proposal of a directive to implement Pillar Two into European Law. The fact that the EU is reacting so fast already raises doubts whether the Commission has taken sufficient time to think about the OECD recommendation. Hurry is always a poor basis for decision-making, and this is especially true for making law.

I do not want to discuss the general problem of the implementation in detail. Let me only express my feeling that the directive is extremely complex, that it creates a parallel taxation scheme side by side to the existing corporate tax laws, that it uses financial accounting with some tax corrections for establishing the profits of a MNE (qualifying income), thus falling back on a regime that mainly serves for the information of shareholders and not for tax purposes, and that the existent inconsistencies may lead to both double taxation and non-taxation. The possibility to choose – as provided by the OECD Pillar Two recommendation – whether a top-up-tax (Article 5) or a tax under the undertaxed payment rule (UTPR – Article 11) was levied, this optional choice will become binding law. The subject to tax rule (STTR) requires changes of existing tax treaties without any guidance how the rule should be made effective. The proposed carve outs make the directive a toothless tiger. And the Commission did not even think about whether this legislative effort could be a reason to change or to abolish CfC, at least in respect of covered enterprises. What I personally find alarming are the extreme and expensive compliance obligations, for instance the fact that European enterprises are obliged to make four different accounts, each on basis of different rules (balance sheet of the foreign subsidiary, balance sheet in the country of residency, balance sheet of the foreign subsidiary for purposes of CfC, balance sheet for purposes of the top-up tax); and this in a period of economic distortions due to the COVID-pandemic, the high inflation, and the energy shortage. Collateral damages as well as costs of bureaucracy and compliance will be very much higher than the desired additional revenue. It is to be hoped that this global tax deal will not come into force.

I am more interested in the question whether the EU has the power to enact this directive. Again, the Commission refers to Article 115 TFEU for being the legal base. It even goes so far that it is now generalizing its reasoning: “Article 115 ... is the legal base for legislative initiatives in the field of direct taxation”. Thus, the Commission assumes that any legal regulation on direct taxes can be based on Article 115 although this provision does not make any reference to taxation. The Commission, however, is required to argue that without implementing the GLoBE rules the common market will not function properly. The Commission argues that the EU as “closely integrated economy” requires that the two-Pillar agreement is implemented in a coherent and consistent way across member states. But is it really necessary to have consistency and conformity in the EU in this respect? Pillar Two is a

project that is aimed at committing the whole world (if this could be achieved). Accordingly, it is not necessary to protect the EU from national solo efforts. The GLoBE rules as recommended by the OECD are so detailed – and the Commission follows suit anyway – that all EU member states will be obliged to implement the OECD recommendations. I cannot see what a harmonization throughout the EU could add for the better and it is clear that the implementation is not needed for the functioning of the common market.

There is another issue which is essential. Under Pillar Two as elaborated by the OECD and the Inclusive Framework, states should have the right to compensate low taxation of foreign group companies by levying a minimum tax. The Directive converts the right into an obligation to tax. The EU treaties, however, neither oblige member states to levy a corporation tax, nor do they state that this tax should set a certain minimum tax rate. Obviously, the EU uses the more technical implementation of GloBE for pushing tax harmonization in the EU. The Commission does not care anymore about the criterion of “functioning of the internal market”.

There is another interesting point that goes beyond the competence for enacting a directive on GLoBE. Article 54 of the proposed directive empowers the EU explicitly to conclude international agreements with third states. Such a delegation of power could be based on Articles 3(2) and 216(1) TFEU which confer external competences – the power to conclude agreements with third states - to the EU if - inter alia – agreements between member states and third states could affect the European common rules or alter their scope (so-called AETR-doctrine). The external competence is therefore closely linked with the internal competence of Article 115 TFEU. In the realm of GloBE the external competence may not be that relevant, but it is a signal that the Commission also wants to claim the treaty concluding competence for the EU. The later implementation of Pillar One could lead to the result that not the member states but the EU would have to sign the planned multilateral convention. The substantial increase of European legislation could even result in an exclusive EU competence to conclude tax treaties with third states, either comprehensive conventions or at least partial treaties focusing on certain distribution rules. I fear that member states are not aware of the potential loss of tax sovereignty. All the more important is a thorough assessment of primary legislative competences.



In this context, it is also worth taking a closer look at the proposed directive on shell companies. The directive obliges EU member countries to refuse treaty entitlement in case of companies without sufficient substance that are located in third countries. By doing this, the treaty rules on residency get a European dimension which could be used by the EU commission to extend its activities to the conclusion of double taxation treaties. Consequently, any further EU legislation enacted will expand the power of the EU in the area of direct taxation.

#### IV. What the Commission is not doing

When I was listening to Ms. Ursula von der Leyen in her address on the state of the European Union on 14 September, I was expecting that she would address the current hardships of European citizens. Actually, we heard a speech full of pathos about the Ukraine and all the people who gave a helping hand to the refugees. Good so. But did she not miss the chance to give people hope? Did she really understand what Europe and European citizens will have to face in near future? Or can it really be that she does not care?

It seems to me that the speech of Ms. Von der Leyen is a significant example. The EU is concerned with world politics, with the big picture, but not really with the needs of EU citizens.

Translated to direct taxation we can observe that tax abuse and aggressive tax planning overrides the real issues that the EU should tackle. The EU Commission uses the momentum of the fight against tax abuse and aggressive tax planning. With this reasoning the Commission believes that it can justify any measures to harmonize the tax laws of member states. Even the “global tax deal” that is a worldwide project with creating new taxing rights of market states and introducing a worldwide minimum tax level is planned to be implemented by European legislation. The Commission even wants to go further than the OECD. The value of such efforts is extremely doubtful.

Remarkably, the EU closely followed the work of the OECD in regard to BEPS and the challenge of the digital economy without initiating an own European tax policy. On the contrary, from the beginning EU institutions supported the efforts of the OECD positively, sometimes even enthusiastically, but at the same time without any critical analysis. It seems that the Commission wants to act as one of the major players in international taxation. However, it does not dispose of the necessary personal and material resources and more and more it loses its orientation.

The lack of resources leads to substantial shortcomings especially in two areas of mobility within the EU.

First, the mobility of workers, in particular of high-skilled employees, urgently needs attention. In 2016 the Commission announced the package about the mobility of workers focusing mainly on social security issues. Unfortunately, the package fails to deal comprehensively with the many problems faced particularly by Europe's 1.3 million workers in frontier regions who work in one country and live in another. In November 2015, an expert group published a report about "Ways to tackle cross-border tax obstacles facing individuals within the EU". The expert group provided interesting and useful recommendations on improving the situation of cross-border workers, that is a group of citizens that urgently needs assistance in removing cross-border tax obstacles. The Commission did not do anything with those recommendations. This attitude of being inactive is exactly one of the problems which the Commission has with issues that need more attention than the harmonization of corporate taxes.

Another problematic issue is the taxation of smaller entrepreneurs. At the moment, it is nearly impossible to extend a small business to the other side of the border even if both countries are member states of the EU. Entrepreneurs are confronted with two different tax systems, a situation which is extremely expensive and burdensome in respect of compliance issues. 30 years ago, the issue was heavily discussed, and many useful recommendations were made by experts and practitioners. Nevertheless, small entrepreneurs still cannot make use of the common market. I wonder how long it yet will take until we see a proposal that introduces home taxation in case of small and middle-sized enterprises.

## V. Conclusions

Even if we are determined supporters of the European project, as lawyers we should be worried about the European institutions crossing legal borders in the field of direct taxation. European institutions have been very active in this field during the last 10 years. By doing so, they challenge the legal borders of competence, the principles of proportionality and subsidiarity, and, in particular, the requirement of a correct and expedient reasoning of legislative acts.

The “functioning of the common market” describes the inherent conflict between tax competition and tax harmonization. Tax harmonization should only be used if tax competition were harmful. The European institutions demonstrate little respect for sound competition between states. Rather, the Commission and the Parliament use the given circumstances to shift more power towards the Union. They are doing this by circumventing the legal requirements of the EU treaties in a way that cannot be justified anymore.

It is not only an issue of competition. The crucial question is what the goals of the EU institutions are when they harmonize direct taxation in member states and, in contrast, which goals they should pursue. The Union is foremost a common market, committed to the rights of the taxpayers and to the freedom to move freely across borders. It is characterized through guaranteeing the freedom of entrepreneurial activity and it should aim at providing room for innovation. The policy of the Commission – pushed by an overreacting Parliament – however, has left the idea of a liberal common market. The motivation to tackle tax abuse and aggressive tax planning has gained such an excess weight that other subjects significant for completing the common market have been nearly forgotten. European enterprises suffer extremely under more and more obligations and bureaucracy.

It is about time that the EU institutions stop activities in this field, that they rethink their whole tax policy as well as the question which resources should be used to finance the EU budget in future. Commission and Parliament should work primarily on the more fundamental issues: What is still needed to complete the common market also in respect of

taxation? Do we not already have solid rules for tackling tax abuse or are there still any gaps which must be filled? And what are the needs of European citizens and which role should the EU institutions take to accommodate the people in this respect? A break from extreme activism would be healthy for EU institutions themselves as well as governments of member states. But even more important: taxpayers would get the attention they deserve.