Taxation of Holding Companies in the Context of EU and International Tax Law

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Abstract
The objective of this paper is the analysis of the influence of European Union legal regulations, as well as international tax law on the development of tax law applicable to holding companies. It is particularly relevant for entities – holding companies conducting cross-border operation within the European Union. Currently, international holding companies create their tax strategies using internal domestic legal regulations, EU tax law, and international tax law (based on numerous agreements on avoiding double taxation). This contributes to creating tax optimisation policies that frequently boil down to international tax avoidance. Undoubtedly, the judicial decisions of the Court of Justice of the European Union have also influenced the development of tax law applicable to holding companies. Due to the lack of harmonisation of tax law applicable to international holding companies, the Court of Justice endeavours to support the processes of standardisation of the tax systems that these entities are covered by.

Keywords
tax; corporate income tax; harmonisation, holding

1 Introduction

The issue of taxation of holding companies conducting cross-border operation is becoming more and more significant both for the individual Member States and the European Commission. The problem is connected with the policy of free transfer of

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profit within a group of companies allowing the profit generated by one of the companies to be transferred to another company located in the so-called tax haven. This is, without a doubt, fostered by both EU and international tax law. Diversity of tax legislations in individual Member States is significant, as well.

The relationships among the law of the European Union, international law, and the jurisdictions of particular countries exert a considerable influence on the taxation of international holding companies. One must remember that holding structures that engage in cross-border settlements are based on rules of law established by European Union directives, international agreements on avoidance of double taxation and national legal systems in countries where holding companies and their subsidiaries are residents.

The European Union's legal provisions only partially regulate the taxation of holding structures, because it is primarily the national law that applies to cross-border settlements. Thus, it is worth considering whether we are witnessing the beginning of a new European tax law regulating holding companies or merely a process of spontaneous regulatory acceptance of legal relationships to prevent tax avoidance or evasion.

It is also essential to analyse whether European law combines seamlessly with international and national law to form a coherent system that protects particular countries against harmful tax-optimisation policies adopted by holding companies. Furthermore, it is worth considering whether European Union regulations create similar conditions for operating structures engaged in cross-border activity as are offered to national holding companies, thus complying with the principle of equality.

The influence of the phenomenon of the harmonisation of European Union law over the taxation of international holding companies must also be evaluated. Because there is only a negligible income tax harmonisation paid by groups of companies related by shares in the EU; Treaty freedoms play a key role in the European tax law.

Tax harmonisation is not intended to eliminate the national legal systems, on the contrary, it is intended to make them uniform. The process of harmonising direct taxes, which leads to national tax systems that are more coherent, is intended to obviate or at least to alleviate potential problems with their functioning. Because of this process, the negative phenomena of breaching fundamental freedoms through tax regulations and tax discrimination should be eliminated or reduced. Due to the increased effectiveness of the functioning of the internal market, the level of integration in the EU is likely to increase.

It is also worth examining whether the harmonisation process will eliminate differences among the corporate taxation systems of particular countries related to the rules on establishing a tax base. This issue is especially interesting with respect to depreciation, deductible costs, reserves, losses, capital gain taxation, tax exemptions and credits, along with methods for eliminating the double taxation of foreign income and establishing and determining tax rates.

2 The Role of the EU and International Law in the Development of Tax Law Applicable to Holding Companies

The relationship between international law and EU law and national law are important. For the purposes of this deliberation, it is necessary to provide definitions of international tax law and the law of the European Union (also called European Union law) applicable to cross-border settlements between entities forming a holding company.

There is no single coherent definition of the term international tax law, and the tax literature on the subject of its scope is usually quite controversial. It is definitely true that many rules of law related to situations involving cross-border operations (Mössner, 1974: 255–257) are associated with international tax law. A narrower and simpler definition of the rules of international tax law is readily available, if they are interpreted as rules of conflict of laws that either directly or indirectly distinguish among the tax jurisdictions of particular countries.

International tax law sensu stricto also encompasses both international common law and the case law. Moreover, one may also discuss international tax law sensu largo, which includes the rules of both public law and national law on the resolution of jurisdiction conflicts related to tax law (Haase, 2007: 5).

To put the definition of international tax law aside, it must be noted that international tax law is not a uniformly codified and formulated system, a fact that exerts an enormous influence on its application. Because international tax law is largely based on bilateral (international) tax agreements, it is a particular law that is created and applied exclusively by sovereign nations.

The rules of international tax law may be divided into rules distinguishing among the tax jurisdictions of particular countries (international rules of law) and national rules concerned with situations involving cross-border activity (national-international tax law). The sources of international tax law related to international rules of law are, foremost, agreements on the avoidance of double taxation aimed at distinguishing among tax jurisdictions of nations; those sources constitute a part of international public law, international custom and the general rules that govern international law (Schaumburg, 1998: 5). The rules that govern international common law oblige countries to follow the provisions stipulated in the abovementioned agreements. As part of international common tax law, countries are forbidden from imposing a tax obligation if there are neither subjective nor objective grounds to do so. This means that a given country may only tax activity related to that country (Vogel and Prokisch, 1992: 128–130). With respect to international tax law, general rules governing applicability of law, such as lex posterior derogat legi priori, and lex specialis derogat legi generali, along with general substantive rules, e.g. prohibition against any act aimed at circumventing the law (Seidl-Hohenveldern, 1994: 509), are of immense importance.

The primary goal of the rules of national-international tax law is to prevent double taxation as a matter of law. In contrast to international agreements that are bilateral or multilateral in nature, national tax law is unilateral (Frotscher, 2005: 21). By using the rules of national-international tax law, nations lay down the criteria for and scope of their claims related to cross-border situations. In practice, however, agreements related exclusively to taxation are applied in the vast majority of cases because after they are executed, the provisions of national-international law cease to apply. It is extremely rare for two EU Member States not to have concluded a tax agreement.

There are essentially no rules establishing the hierarchy of the sources of international tax law. Therefore, international common law, international agreements and general rules governing international law are, in principle, parallel (Verdross and Simma 1984: 413). Conflicts between the sources of international law are resolved in compliance with the general principles of how to apply the law, particularly the principles of lex specialis derogat legi generali and lex posterior derogat legi priori. This approach affects agreements on the avoidance of double taxation in that they are perceived as special rules of international law and thus displace international common law (Ipsen, 1999: 222).

One can observe the phenomena of the repeatability of legal provisions in various EU Member States and likenesses among them. Such norms of law are usually intended to prevent tax avoidance or evasion (e.g. provisions concerning a Controlled Foreign Company – CFC – or the so-called exit taxation). In particular, the last issue mentioned is directly connected to foreign situations. Although the rules of classic national-international law are not applicable in most cases because a tax convention prevails, applying these specific rules of internal law is not directly limited by any tax convention (although it is sometimes restricted by European Union law). Accordingly, it seems necessary to classify these norms of law, too, as a part of international tax law.

The term European tax law, as opposed to the notion of international tax law, is relatively new. European tax law may be defined as EU law whose subject matter is tax; it is related to taxes and influences national tax systems.

European tax law encompasses the following branches of law: the EU's own tax law (to a very limited extent), primary legislation – in particular, the Treaty freedoms, to the extent that they influence national (international) tax law – and secondary law (Weber-Grellet, 2005: 1). According to the ECJ's case law, the term tax should be based on objective criteria in the light of EU law (Judgment of the Court of 13 February 1996, Bautiaa and Société française maritime/Directeur des services fiscaux des Landes et du Finistère, C-197/94) regardless of its national law classification (Judgment of the Court of 19 March 2002, Commission of the European Communities v Hellenic Republic, C-426/98).

Because income tax harmonisation incurred by connected undertakings in the EU is only negligible, the rules of primary law (especially Treaty freedoms) are of key importance for European tax law. The ECJ uses Treaty freedoms to lift the tax barriers that prevent the efficient operation of the internal market. Consequently, European tax law is devoid of comprehensive rules governing income taxes on companies within the EU.

Compared to international tax law, European tax law is a completely different system. The will of the parties involved in international tax law establishes and shapes that law. It is a law that is simultaneously particular and widely varied. There is no centralised institution overseeing whether the legal provisions are obeyed and no court to interpret the provisions stipulated in each agreement.

In contrast to international tax law, European tax law is binding on all EU Member States. The European Commission is an EU institution that ensures that European Union tax law is obeyed; the ECJ's role is to interpret that law. From this perspective, how the law is applied (related to the Court's specific role) determines the nature of the European tax law. This exerts a direct and substantial influence over the relationship between international and European tax law.

These characteristics of international and European tax law largely determine the nature of the application of both these regimes and their rules, shaping their mutual relations.

Because national legal provisions may also influence taxation of foreign situations under certain (exceptional) conditions, the relationships among international, European, and national norms of law are significant for the taxation of international holding companies.

Major differences between international and European law are caused by their interactions with national legal systems. The main source of international law is international agreements. Ensuring that an international agreement becomes effective within a country's internal legal order might be achieved by introducing an international norm of law into the national law. An international agreement is thus executed indirectly through a national norm of law. Another solution consists of following an agreement directly. Thus, the agreement may operate within a national legal system as part of that system.

The legal systems of particular countries address the issue of the applicability of international agreements within their national legal orders (Hobe and Kimminich, 2004: 225). International law does not contain any rules about how to incorporate international rules into national law. From the perspective of international law, however, countries may not invoke national norms of law to justify failing to adhere to an international provision of law (Art. 27 of the Convention on the Law of Treaties concluded on 23.05.1969 [J. L. of 1990, no. 74 item 439]).

European law, which is external law not passed by national legislative bodies, completes the legal system that is directly applicable (Lasok and Bridge, 1991: 347–348) to Member States. The direct effect principle of European law provides that implementation of European Union law into national law depends neither on constitutional provisions that define the relationship between international and national law nor on the issuance of any act of national law, which is a rule in the case of international law. As a result, a European Union act becomes valid in all Member States at the same time and its application must be uniform. Additionally, a rule of European Union law may prevail over a constitutional provision applicable in a given state, which is unheard of in the case of international law. It must be highlighted, however, that international law is largely consensual in nature and is often applied indirectly.

The legal order in the EU Member States is multicentric in nature because instead of a classic system of hierarchy of sources of law, there are subsystems deriving from various centres (Łętowska, 2005: 4). The distinctness of the centres that pass national and European laws does not mean, however, that the norms of law created by them do not affect each other. Together, all of these laws form a common legal order that is effective not only in the entire EU but also in particular Member States, and pursuing the fundamental aims of that legal order primarily depends on the extent of cooperation among the abovementioned legislative centres. The most significant qualities of the EU law with the most profound impact on national law are as follows: the principle of precedence (superiority) of the European Union law over national law; and the direct effect of European law (Weber-Grellet, 2005: 2–3). One must note, however, that these are not specific qualities that exclusively characterise EU law: the rules of international law may have a similar effect but the distinctive feature of EU law is the intensity of both these qualities and their unique nature, which is unheard of in international law.

Clear differences concerning the scope of the applicability and validity of international and European law have a direct influence on how rules of international and European tax law are applied. International tax law has all of the characteristic features of public international law. Foremost, it is particular law, the source of which is international agreements for the avoidance of double taxation. EU Member States may freely specify the substantive rules of international tax law because no set of rules binds them with respect to determining the manners and methods of distinguishing among national tax jurisdictions. The commonness of agreements for the avoidance of double taxation (AADTs) has caused provisions of law concerning foreign situations (the so-called national-international tax law) to be of marginal importance because international tax law prevails over national tax law (Selera, 2010: 140–141).

In case of European tax law, whose qualities are determined by EU law, the situation is radically different. Actions undertaken by countries with respect to the international taxation of profits are subject to the ECJ's control but formally, that control is significantly limited with respect to European tax law because that law only exists to a very limited extent. Nevertheless, it has a major impact because of the law-making quality enjoyed by the case law of the Court of Justice, which is occasionally included in the literature among the sources of EU law. Nonetheless, EU Member States must adhere to the general rules that govern EU law when entering into tax agreements. Consequently, in the case of EU law, as opposed to international tax law, violations of tax law (general rules of EU law) by Member States are determined by an EU court. Further violations of the EU law may result in the imposition of penalties upon a country that has violated that law.

The situation is distinctive when AADTs are executed. Every time a convention (AADT) is not followed appropriately, national law (Par. 9.2 of the OECD MC Commentary) also is not followed appropriately because it is national law that imposes taxes.

For example, reducing the amount of a tax due to inappropriate application or misuse of a tax convention's provisions is tantamount to the inappropriate application of national tax law, including all provisions of national law aimed at countering tax avoidance. Therefore, it is important to determine whether a tax convention's provisions forbid countries from applying national law to counter or limit tax avoidance.

Misuse of an AADT does not necessarily denote the unlawful use of internal law. It is important to determine whether an AADT may be interpreted regardless of national law to deny a party the right to enjoy the benefits arising out of an AADT with respect to unlawful transactions (Par. 9.3 of the OECD MC Commentary to Art. 1 of OECD MC). In accordance with the Commentary on a model OECD agreement (Par. 9.4 of the OECD MC Commentary), regardless of the approach adopted by a country, the answer should always be the same: if a transaction constitutes the misuse of a convention, benefits arising out of that convention may not be provided. Such a precipitous generalisation must be limited by one condition, namely, transactions should not be "too easily" classified as a misuse.

Admittedly, the Commentary does not define a transaction constituting a misuse, however, it offers a "guiding principle" that may be employed to classify a transaction as a misuse: if its primary aim is to obtain the convention's benefits and if granting such benefits would contradict the objectives of the convention's provisions (Par. 9.5 of the OECD MC Commentary).

This claim is extremely important. It may be equivalent to the establishment of a treaty standard aimed at preventing tax avoidance. In any event, it introduces a certain element of balance. Not all transactions that lead to a reduced tax constitute a misuse. The optimisation of taxation is legal and one cannot expect taxpayers to manage their taxes so that they eventually pay the highest possible amount.

3 Judicial Decisions of the Court of Justice of the European Union and Tax Policies of International Holding Companies

An important role in the development of tax policies applicable to holding companies conducting cross-border operation is played by the Court of Justice of the European Union. There is an observable phenomenon of harmonisation of the law applicable to holding companies, which is occurring through the ECJ's case law (referred to as "backdoor" harmonisation). It consists of the introduction of similar solutions into national tax systems in reaction to the ECJ's case law. However, altering tax systems in reaction to the ECJ's case law is less of a spontaneous response by the Member States and more a demonstration of their own "common sense": if they did not alter their tax systems, Member States would have to accept the possibility that an analogous decision might be issued against them. This response is connected to the activity of the ECJ, which as authorised by the TEC (Art. 220), ensures its legitimacy in interpreting and enforcing the law (Gomułowicz and Małecki, 2008: 197–199). Since the beginning of the 1990s, the number of claims related to holding company taxation has increased considerably. Currently, it is estimated that the Court considers approximately 17 claims each year related to holding company taxation (and in 97% of the cases, the taxpayer prevails). ECJ decisions in this respect are most commonly issued based on complaints that a Member State has infringed the European Union law (Art. 226 or 227) or the consideration of a question referred for a preliminary ruling by a Member State's national court (Art. 234). Judgment on a complaint that the European Union law has been infringed binds the involved Member State and all of its authorities. If infringement of the European Union law is confirmed, the Member State is obliged to alleviate its consequences. A preliminary ruling is only binding on the national court that referred it. It might be assumed, however, that in line with the acte éclairé rule, ECJ case law issued in response to a question referred for a preliminary ruling will bind other national courts. That rule states that the courts have an obligation to use the interpretation previously made by the ECJ in a similar case provided the case has not been overruled (Mik, 2000: 520–521).

Because of the presented situation, although no ECJ judgment formally concerns all of the Member States, in practice, ECJ judgments indeed have such an effect. Disregarding judgments on providing analogy to the regulations applicable in a given country would be irrational because the Court would have rendered a similar verdict if that country had participated in the proceedings. Thus, Member States themselves engage in certain actions aimed at eliminating possible infringements of European Union law by national regulations. This is exactly how "backdoor" harmonisation is achieved.

When examining claims connected to corporate taxation, the ECJ verifies whether Member States' tax regulations infringe the TEC's provisions related to the fundamental freedoms or the non-discrimination principle because although the EU is not a regulatory authority with respect to direct taxes, by no means are EU Member States permitted to free their tax systems from the obligation comply with European Union law as a whole. Member states may shape their tax systems in line with their own preferences; however, they must abide by the EU law. The ECJ judges national tax provisions according to the principle that "even though direct taxation is within the power resting solely with Member States, they are nevertheless obliged to exercise it in line with European Union law" (Bernat, 2004: 18–19).

With respect to the taxation of holding companies, the ECJ's foremost consideration relates to regulations that implicate the fundamental freedoms and the principle of non-discrimination. The Court has also invoked the example of government assistance to entrepreneurs as a model for assessing the compliance of national tax provisions with that principle of the European Union law (Art. 87–89).

In accordance with the provisions stipulated in the TEC (Art. 163), the European Union's objective is to support Member States in their efforts directed at achieving mutual cooperation and to strive to provide entrepreneurs with the ability to fully exploit the internal market, especially by eliminating the fiscal barriers that interfere with this cooperation.

Examining the ECJ's case law, one might conclude that there remain many national tax regulations (including, inter alia, the inability to offset cross-border loss, transfer pricing, regimes concerning controlled foreign companies, burdens related to changes in tax jurisdiction, inconsistent treatment of national and foreign dividends, the withholding tax system, and thin capitalisation) that may not comply with the TEC. This conclusion has been confirmed by analyses of the compliance of national regulations related to taxation of holding companies with European Union law. If harmonisation of the legal provisions on taxing holding companies is not achieved (e.g. by introducing the concept of a common consolidated corporate tax base [CCCTB]), some harmonising processes are likely to occur through obeying the ECJ's case law (Opinion of the Economic and Social Committee on the creation of CCCTB, ECO 165, Brussels, 16.02.2006). One must remember, however, that the process of harmonising holding company taxation through ECJ activity is seriously flawed.

First, ECJ cases are long processes in which problematic issues are not comprehensively addressed. It is also commonly said that allowing the matter of direct taxation to develop through the case law and thus leaving it to chance by reacting only to taxpayers' claims is not an appropriate approach to accomplish the European Union's objectives.

Second, it seems unlikely that interpreting the TEC will be an adequate basis for solving all of the tax-related problems that are emerging relative to the operation of the internal market. This is because Court-imposed changes are not comprehensive in nature, but only partial, and they are often implemented by Member States fractionally and in an uncoordinated manner.

Third, regardless of the ECJ's voluminous case law, it is not always possible to comprehend how the TEC's general freedoms should be used within a complex tax law system. Recently, many verdicts have been announced. The case law related to the matter under discussion remains in a phase of ongoing development and essentially relates to particular tax provisions applicable in particular Member States. Therefore, full comprehension of the complete meaning of this case law and placing it into a wider context is not always easy for taxpayers, tax authorities, national courts and national legislative bodies. Accordingly, guidelines should be drawn up to inform these entities what rules may be derived from the ECJ's case law and how those rules might be applied to holding company taxation.

Fourth, the harmonisation process contributes to eliminating legal provisions that inhibit the fundamental freedoms and breach the principle of non-discrimination from the tax systems of Member States, but the ECJ may not offer its own solutions for eliminating such infringements. Its actions are undertaken in a form of negative integration, which is their major flaw. In some respect, the process might even become destructive. If the ECJ judges that some provision of a national law is discriminatory in nature, Member States are offered two possibilities. They may either remove that provision from their laws or expand its scope so that it will encompass both national and foreign entities and thus lose its discriminatory nature.

In reaction to the ECJ's case law, EU Member States adopt measures both to abolish the tax advantages offered by national tax systems and to achieve regulatory acceptance of cross-border settlements by introducing national legal regulations notwithstanding the fact that from the perspective of the fiscal policy, it is undesirable to do so. Such actions often contradict the principles that underlie the common market and interfere with the competitiveness of Member States' economies. Such a situation would be deplorable if in an attempt to avoid discrimination charges, Member States expanded measures preventing tax avoidance by cross-border operations to clearly domestic entities that pose no risk of fraud [The Application of Anti-Abuse Measures in the Area of Direct Taxation – within the EU and in Relation to Third Countries, COM (2007) 785]. The problem is that the ECJ has no influence over the direction of harmonisation that occurs in response to its case law (Keijzer, 2008: 166).

The case of Lankhorst-Hohorst (Judgment of the Court of 12 December 2002 Lankhorst, C-324/00), which involved the so-called thin capitalisation, provides the opportunity to observe how harmonisation prompted by the case law takes place. Because of the judgment in that case, some countries (e.g. Spain and Portugal) limited the personal scope of their thin capitalisation laws so that they would not apply to non-residents, whereas other countries (e.g. Great Britain, Germany and Denmark) expanded their provisions to extend to national entities. Because of actions undertaken by both of these groups of Member States, discriminatory regulations inconsistent with the TEC were removed from the law; however, this development was advantageous for entrepreneurs in the first case and disadvantageous in the second. These phenomena are referred to as downward and upward harmonisation. Downward harmonisation may cause Member States' systems of taxing holding companies to be non-discriminatory in nature but simultaneously render them equally unfavourable for domestic and foreign holding companies (Litwińczuk, 2006: 18).

Fifth, uncoordinated attempts to align Member States' tax laws may create new tax-planning possibilities: entities might be given new methods to evade taxation, thus resulting in an unintentional lack of taxation (Farmer and Zalasiński, 2007: 15).

It seems that the ECJ's case law may not be perceived as sufficient to eliminate tax barriers to the cross-border activity of holding companies operating on the internal market. Obviously, this does not mean that the ECJ's prior activity has been useless because were it not for this activity, many tax barriers eliminated in reaction to the Court's judgments would remain. It might be expected that in the future, the ECJ's case law will continue to reduce tax barriers to the cross-border activity of holding companies operating on the internal market. It will not, however, replace the comprehensive action to harmonise the taxation of holding companies that should be undertaken. If such harmonisation does not occur, the case law will continue to develop; however, in the end its effects might be negative.

4 Conclusion

Indubitably, European Union and international law exert significant influence on the development of tax policies pursued by holding companies that conduct cross-border operation. Despite the fact that European tax law related to taxing international profit is poorly developed, it exerts a considerable influence over the taxation of profits generated by international holding companies. This results from the fact that European tax law – in contrast to international tax law – is a collection of provisions of law created by a central legislative body. EU Member States are obliged to abide by European tax law. This difference is especially visible with respect to European legal provisions related to categories of international profits that are also regulated in the OECD MC and that often are included in bilateral tax agreements (i.e. so-called dividends, interest and royalty payments).

Essentially, the virtual absence of special legal rules to govern the income taxes (on profit) imposed on holding companies in the EU does not mean that EU Member States enjoy absolute freedom in this respect. On the contrary, while exercising their sovereign power, they must comply with the EU law. In such a case, the Treaty freedoms that act as general rules of law are of immense significance.

The Treaty freedoms constitute the pillars of the internal market and are derived from the general principle of non-discrimination formulated in the Treaty upon the establishment of the European Union (Art. 18 of the Treaty on the Functioning of the European Union, consolidated version: OJ C 83 of 30.3.2010, p. 47). The most significant freedoms with respect to taxing international holding companies' profits are freedom of establishment, the free movement of capital and freedom of rendering services. The Treaty freedoms protect international business activity, i.e. profits of international holding companies. Therefore, business activity by domestic entities that do not engage in cross-border activity is not subject to protection by the European Union freedoms, even if it is the subject of discrimination. Treaty freedoms affect only EU Member States and holding companies engaged in cross-border activity within the EU.

Furthermore, an important phenomenon that influences the taxation of international holding companies is the harmonisation of tax jurisdictions. Harmonisation is essentially aimed at bringing Member States' statutory regulations closer together. The TEC does not directly regulate issues related to taxing international holding companies, which lies within the domain of the Member States. However, Member States must remember that this right should be exercised in compliance with the European Union law, especially with its legal provisions on the internal market and the underlying fundamental freedoms, along with the non-discrimination principle. The taxation of international holding companies may not inhibit the fundamental freedoms and discriminatory tax events are not allowed on the internal market. The business activity of international holding companies should not be hindered or limited by tax barriers that strengthen or create either borders or divisions among EU Member States.

Nonetheless, there are numerous and serious fiscal barriers within the EU that hinder the operations of the internal market. Holding companies incur high compliance costs and encounter many other tax obstacles to their cross-border activity that are related to restructuring operations on an international scale, transferring of dividends, interest and royalty payments between subsidiaries in different Member States, cross-border losses, transfer pricing and Member State laws aimed at preventing tax avoidance and evasion.

Moreover, a vast number of adverse consequences arise from the existence of differences among the tax systems of Member States. These tax systems influence the investment decisions of holding companies, which is contradictory to the principle of tax neutrality and leads to ineffective choices of investment locations.

Another negative effect of the differences among the tax systems of Member States is the inability to compare the tax burdens of particular Member States, which means that at the European Union level, the principles of clarity and certainty in taxation are infringed. Furthermore, these differences lead to the emergence of the phenomena of tax avoidance and evasion, cause breaches of the principle of fair competition, and have a negative effect not only on the development of particular economies in an EU Member State but also on the EU economy as a whole.

These unfavourable phenomena and processes related to taxing international holding companies are not in line with the principles underlying the internal market. The reason is that these phenomena and processes emerge because of either differences among the tax systems of Member States or the national tax systems' inconsistent treatment of holding companies conducting exclusively domestic business activity versus companies conducting cross-border activity. To eliminate those inconsistencies, harmonisation of taxation is inevitable.

To date, harmonisation has clearly been insufficient, which is confirmed by the continued existence of many tax barriers that prevent the full exploitation of the internal market.

Negative consequences arising out of differences among tax systems, along with the nature of the tax barriers to cross-border activity, compel the conclusion that harmonisation aimed at the elimination of those differences and barriers should involve introducing common rules for calculating tax base, which should have the following beneficial consequences:

- the minimisation of the influence of tax considerations on business decisions made by holding companies;
- the elimination of the influence of taxes on differences in economic effectiveness and thus on the competitiveness of holding companies;
- the facilitation of comparing the tax burdens imposed in various Member States;
- the prevention of tax avoidance and evasion; and
- the elimination of compliance costs related to cross-border activity.

Simultaneously, despite the introduction of common rules for calculating a tax base, the following issues, which are problematic for holding companies with cross-border activity, might remain unresolved:

- no or limited possibility to offset cross-border losses;
- burdensome obligations related to transfer pricing;
- the double taxation of foreign income; and
- disadvantageous treatment of restructuring transactions.

To solve these problems, the harmonisation of the taxation of holding companies in the EU should be carried out on a larger scale than simply introducing common rules for calculating a tax base.

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