

Workshop on Tax Treaties and European Law

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Panel 3 – Possible Solutions

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Introduction

1. Negative integration is currently removing domestic and treaty provisions that are incompatible with European fundamental freedoms
2. Secondary law (harmonization) could become redundant and its incompatibility with fundamental freedoms may not be excluded in advance
3. Negative integration is not sufficient in the field of European direct taxes, because:
 - a. European law is not a common law system
 - b. European law does not exclusively rely on negative integration in other domains
 - c. ECJ must remove obstacles through its consistent interpretation of principles, but this is not always sufficient to remove all problems
 - d. Legal certainty requires prevention of obstacles more than its removal
4. Positive integration - based on a constant technical monitoring of ECJ decisions - is needed to prevent obstacles to the exercise of fundamental freedoms
5. Positive integration – especially in a domain where unanimity is still required - does not necessarily require harmonization
6. Member States could thus coordinate their efforts with a view to preventing domestic and treaty measures liable of raising procedural and substantive obstacles to the exercise of fundamental freedoms

TAX COORDINATION IS THUS THE RIGHT ANSWER because it:

- Integrates without depriving Member States of their prerogatives, i.e. without introducing secondary Community law, and
- supplements the case-law of the ECJ through a consistent application of its principles into domestic and treaty law of the Member States

WITHOUT TAX COORDINATION AND POSITIVE INTEGRATION:

- protection of taxpayers could not be homogeneously ensured across the EU because of the different attitude of national judges towards preliminary ruling procedures (some countries more frequently refer cases to the European Court of Justice; some others do not)
- taxpayers would receive inadequate protection in countries whose judges seldom disapply national rules incompatible with fundamental freedoms
- unpredictable repercussions of negative integration on the Member States revenues may not be excluded

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I - Coordination of Tax Treaties - How?

7. Mere coordination of Member States' domestic legislation could be insufficient to address the problems of compatibility with European fundamental freedoms raised by tax treaties
8. Coordination of tax treaties could be achieved along different paths, including soft law, the judicial application of the most-favoured-nation (hereinafter: MFN) treatment, a directive, a Multilateral Treaty and an EU Model Tax Convention
9. The EC Treaty at present requires national treatment and the ECJ seems reluctant to interpret it as implying also a most-favoured-nation (MFN) treatment. Furthermore, the judicial application of MFN would possibly originate inconsistencies across the network of existing bilateral treaties.
10. Soft law has been suggested by various scholars as a possible solution to introduce common principles in the field of direct taxes for all EU Member States. However, the lack of a binding value makes this path fairly ineffective in case of in compliance by a Member State: a matter that can also arise at the interpretative level.
11. Insofar as EU Member States do not agree to regulate this domain through a directive, the solution to problems of compatibility for tax treaties requires amendments to the existing bilateral treaties, but not necessarily their replacement by one single multilateral treaty
12. Multilateral treaty vs. Model tax convention: a multilateral treaty reaches ambitious goals and would indeed be a valid long-term solution, but:

Do we need a multilateral treaty?	Is it a realistic option?
Article 293 EC Treaty requires multilateral negotiation, not a multilateral treaty	Experience of Nordic Treaty
Treaties between Member States contain different clauses: compatibility with fundamental freedoms does not require them becoming all uniform	OECD has rejected this option: can we consider it a viable strategy for EU purposes?
Bilateral relations between Member States are at present regulated by: <ul style="list-style-type: none"> - Treaties signed when both Contracting Parties were not yet Member States - Treaties signed when one Contracting Party was not yet a Member State - Absence of a treaty. This context puts them in a different condition towards European law, taking into account Art. 307 EC Treaty	

**THE EU MODEL CONVENTION:
A SECOND-BEST PRAGMATIC OPTION
TO MOVE TOWARDS COORDINATION OF TAX TREATIES**

II - What Model (and What is a Model) for European Tax Treaties?

13. Positive integration through an EU Model Tax Convention would allow Member States to keep bilateral treaties
14. Since most treaties are based on the OECD Model, the EU Model Tax Convention should in principle follow the OECD Model
15. Clauses included in the actual bilateral (and Nordic) treaties of EU Member States should only change insofar as this is required for ensuring compatibility with fundamental freedoms
16. The EU Model should not be a Model Convention in the sense commonly used by the OECD: it's not a proxy for soft law, but rather a set of rules with its own normative (binding) value that Member States would be obliged to include in their bilateral (and multilateral) treaties
17. Despite various scholars have expressed their favour for soft law, normative measures would certainly have a more effective impact on the coordination of EU Member States' national treaty policies
18. The EU Model should thus consist of a Framework Treaty² and bilateral (or multilateral) treaties between (among) EU Member States. Clauses included in the former treaty would have to be included by the Member States in their bilateral (and/or multilateral) treaties
19. The EU Model would be based on Article 293 EC Treaty. However, the removal of such provision from primary Community law would not prevent Member States from coordinating their national treaty policies with a view to securing compatibility with EU fundamental freedoms
20. The EU Model would thus be a two-tier (framework treaty + bilateral treaties) treaty system, which could remove not only bilateral, but also triangular (or multilateral) problems of double taxation
21. By signing the EU Model Member States would not surrender their taxing powers, but rather exercise them in a coordinated manner with each other and taking into account the obligation to comply with fundamental freedoms

**THE EU MODEL TAX CONVENTION:
A TWO-TIER SET OF RULES,
BASED ON A MULTILATERAL
FRAMEWORK TREATY
AND ON THE EXISTING BILATERAL TREATIES,
TO BE AMENDED**

² The terms 'framework treaty' are hereby used to express in English the main features of a treaty that German scholars would refer to as a *Rahmenvertrag* and Italian scholars would call *trattato quadro*, i.e. a treaty affecting the content of other treaties based on it.

THROUGH COORDINATED PROTOCOLS

III - What Content for the EU Model?

22. The clauses of the EU Model Tax Convention should be drafted through tax coordination among Member States, guided by the European Commission, as follows:

Legal principles contained in the decisions of the European Court of Justice should regulate the amendments to the existing provisions of bilateral (and Nordic) tax treaties.
Specific rules on entitlement to treaty benefits, definitions, interpretation and application of treaty, limitation and anti-abuse provisions, withholding taxes, mutual agreement procedures (MAP) and further issues would thus have to be included in the EU Framework Treaty
The European Court of Justice should ensure compliance of clauses of the EU Framework Treaty with fundamental freedoms through its decisions, just like it currently happens with domestic and treaty rules
The EU Model Tax Convention should follow the rules of autonomous characterization (<i>Qualifikation</i>) for European law purposes
Monitoring of the ECJ decisions is required with a view to prepare periodical updates of the EU Model Tax Convention

IV - How to move towards an EU Model?

23. The EU Commission should set up a working group, composed of tax experts and tax authorities from the EU Member States, including OECD observers and coordinated by the staff of the European Commission

24. The working group should:

Monitor
- Relevant ECJ decisions for tax treaty purposes
- Treaty decisions that are either clearly, or possibly infringing fundamental freedoms
Set up draft treaty clauses to be included in the Framework Treaty

25. The Final Draft of the Framework Treaty should then be submitted to discussion and approval according the usual formal procedures
26. Once the Framework Treaty has been finalized, the EU Commission should coordinate the adaptation of the existing bilateral treaties with the EU Model: parallel bilateral sessions among the Member States could be held in Brussels to set the appropriate text of the Protocols amending the bilateral treaties
27. The EU Model Tax Convention should then be subject to periodical revision based on a constant monitoring of the case law of the European Court of Justice

A WORKING GROUP COMPOSED OF TAX EXPERTS AND TAX AUTHORITIES FROM THE EU MEMBER STATES SHOULD DETERMINE THE CONTENT OF THE FRAMEWORK TREATY ON WHICH THE EU MODEL IS BASED

V - Relations with Third Countries

28. A conflict between tax treaties and European law also arises in the relations with non-EU Member States: its solution could, but must not necessarily, be the same adopted for intra-EU relations
29. The European Union has already signed single tax treaties with non-Member States in respect of taxation of savings
30. Nevertheless, bilateral relations of EU Member States with non-Member States in the field of direct taxes raise different problems from the perspective of the EC Treaty
31. In the light of the *open skies* decisions, tax treaties concluded by a Member State after 1.1.1958 or its Treaty of Accession would be directly infringing the EC Treaty, while all those signed before 1.1.1958 or the Treaty of Accession would remain under the safeguard clause of Article 307 EC Treaty
32. Consequently, further analysis is required in this domain, to ascertain whether
 - a. single EU tax treaties are needed to ensure the removal of obstacles to free movement of capital in the relations with third countries, or
 - b. an EU Model Tax Convention could be used in this context