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COORDINATORE Prof. Ciro Grandi

Towards tax harmonization in the Eurasian Economic Union: An analysis of legal and institutional framework on comparative basis with the European Union

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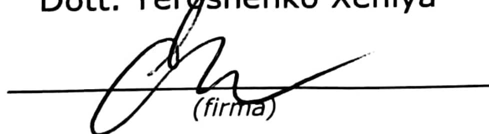

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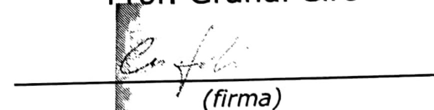

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Abbreviations

CJEU	Court of Justice of the European Union
EAEU	Eurasian Economic Union
EAEU Treaty	Treaty on establishment of the Eurasian Economic Union, 2014
EC Treaties	Treaties of the European Community
EEC Treaty	Treaty of the European Economic Communities
EU	European Union
SES	Single Economic Space
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1. Regional economic integration and the notion of tax harmonization

1.1. Introduction

With the globalization of the world economy and in the context of the recent global financial crisis, it is becoming of countries' current interest to integrate into regional blocks.[1] The creation in 2015 of an international organization for regional economic integration - the Eurasian Economic Union (EAEU) is not an exception.[2] The 1st January 2015 commenced the beginning in the functioning of the Eurasian Economic Union between four Eurasian countries - Armenia, Belarus, Kazakhstan and Russia.[3] Kyrgyzstan has joined the Union later in 2015 and became the fifth member state.[4] The Eurasian Union is a result of ongoing integration, which started between the former Soviet Union member states in early 1990s with the initiative to create customs union and Single Economic Space (SES) for the free movement of goods, services, labor and capital.[5] Economic cooperation between members imply expansion in domestic trade, exercise of coordinated macroeconomic and monetary policies, cooperation in the field of industry and labor migration, the formation of a single financial market, and the unification of taxation principles and the harmonization of certain elements in the national tax laws.[6]

The initiatives of these states to move on with the regional economic integration during 1990s and early 2000 did not result in much success.[7] Partly it could be explained by the immaturity of the statehood in each of the countries in the region, because after the collapse of the Soviet Union and the soviet regime, many countries were left with no experience of managing the system independently, countries needed to develop local markets, establish the relations with the rest of the world, even create new legislations for almost all the spheres of law and therefore, it was of much more importance for them to give attention to the local development, rather than establishing new supranational organization for new economic or political integrations, although the idea of the same persuaded the leaders of some countries already at that time.[8] Another reason for delayed regional integration may be explained from the legal perspective and the nature of agreements concluded on the same issues – these initially drafted international agreements on establishment of the customs union or single economic space were of declaration character, envisaging the ideas and intentions of the states to move towards this direction, but not giving any instruments, deadlines or explicit measures to go and apply in the same direction, neither provided anything on establishment of supranational organization to coordinate the same.

The first visible results on regional integration in the post-Soviet area were achieved only in July 2010 when the Customs Code of the Customs Union entered into force between Belarus, Kazakhstan and Russia. Further on, in 2012 was proclaimed beginning in the functioning of the Single Economic Space between the countries, which implied the free movement of persons, services, labor and capital. However, nothing changed much with respect to realization of other freedoms than movement of goods and elimination of technical, sanitary and other barriers for development of the

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[1] See for instance, Trans-Pacific Strategic Economic Partnership Agreement; Community of Latin American and Caribbean States, the negotiation of Transatlantic Trade and Investment Partnership.

[2] See O.Zakharova, "Tax harmonization as inseparable part of common economic integration processes in the member states of Eurasian Economic Union", Molodoj Uchenyj, 2016, No.11, pp.750-753. Original in Rus. O. O. Захарова, *Налоговая гармонизация как неотъемлемая часть общеэкономических интеграционных процессов в государствах-членах Евразийского экономического союза*, Молодой ученый, 2016, №11, с. 750-753.

[3] On the basis of the Agreement on Eurasian Economic Union, dated 29 May 2014 and effective from 1 January 2015.

[4] Agreement on joining the Eurasian Economic Union by Kyrgyzstan dated 29 May 2014.

[5] See Art. 3, Agreement on Customs Union and Common Economic Space dated 26 February 1999
Herewith, there were also earlier proposals for regional integration, e.g. the initiative of CIS and its agreement dated 24 September 1993 on creation of economic union and gradual creation of customs union, SES and economic union. Also, the attempt to create Union State of Russia and Belarus in the 1990s, creation GUUAM (Georgia, Ukraine, Uzbekistan, Azerbaijan and Moldova) grouping launched in 1997 – see. "Eurasian union: the real, the imaginary and the likely" by N.Popescu, European Union Institute for Security studies, 2014.

[6] Zakharova, Ibid.

[7] For more information about development of integration stages see section 1.4 and 1.5 of this work.

[8] See for instance, N.Dobronravin et.al, USSR after the dissolution, Economicheskaya shkola, High School of Economy, 2007. Original: Н.Добронравин и др., *СССР после распада,* Экономическая школа, Высшая Школа Экономики, 2007.

mutual trade with the entry into force provisions of the SES. A year later, heads of the states initiated the work on creation of agreement for establishment of the Eurasian Economic Union.[9] The agreement was supposed to correct the ineffectiveness of the previously adopted law and ensure realization of the freedoms and creation of internal market. The agreement, was signed later on 29 May 2014 as the EAEU Treaty (Treaty on Establishment of the Eurasian Economic Union) and entered into force on 1 January 2015. To certain extent, the EAEU Treaty is a codification of the previously adopted laws, but it also provides for the newly elaborated principles, creation of new institutions within the Union and attributes respective capacities.

Elimination of tax restrictions and unification of national tax laws is an integral part of the overall process of economic convergence in countries. Meanwhile, it is necessary to understand that the harmonization of tax systems is connected with the resolution of the very sensitive issues for any country, since the tax policy is an important element ensuring the financial stability of the state. Budget revenues of the countries are formed mainly by collection of tax and, therefore, any state is interested in an independent tax policy for the effective development and improvement of the country's welfare[10].

1.1.1. Thesis question and purpose of the study

The author of this work aims to analyse the EAEU Treaty from a tax law perspective, to identify the legal and institutional basis for potential tax harmonization in the Union and the extent they are comparable to the European Union; whether current legal and institutional basis in the Eurasian Union are sufficient to undertake necessary tax harmonization in the region and to what extent the experience of the European Union may be relevant for the Eurasian Union.

The author is motivated to do so because no similar research was undertaken with respect to the current EAEU Treaty and neither with respect to the predeceasing agreements on regional Eurasian integration. The absence of such fundamental legal research and understanding of functioning of the EAEU from tax law perspective and legal basis for tax harmonization therein, does not allow to undertake more in-depth research on a specific technical tax issue and neither to provide any recommendations on adoption of the relevant measures.[11] Along the whole work the author compares the EU and the EAEU in order to:

a) Identify the differences and similarities between the EU and the EAEU in various tax related issues and questions;
b) Identify weaknesses in the EAEU system and if necessary, to propose changes for improvements on the basis of the EU experience.

1.1.2. Hypothesis

The EAEU is often compared to the EU in terms of its objectives and means of their realization, mainly, the achievement of internal market with realization of four fundamental freedoms – the movement of goods, services, labour and capital. The same is attempted to be achieved in both unions by means of elimination of internal barriers and harmonization of national legislations of the member states, including tax legislation with the use of supranational institutions and shared competences in certain areas. The author of this work assumes that as long as there are common objectives between the Unions, there should be comparable legal and institutional basis in both Unions for achievement of the same. Consequently, the author believes that the experience of the European Union in the sphere of tax harmonization may be useful in the Eurasian Union and can serve as a practical example to learn from and inherit applicable lessons.

1.1.3. Research plan and content of the work

[9] Which eventually became the EAEU Treaty.
[10] Zakharova, Ibid.
[11] Initially, in this doctoral work, the author planned to have more specific research topic on taxation of investment income in the EAEU region, its compatibility with the EAEU freedoms and potential tax harmonization measures required at supranational level. However, as stated in this paragraph, in view of absence of the fundamental legal research and analysis of the EAEU treaty from tax law perspective, it was impossible for the author to go in depth with the above topic and the decision was to focus the research on a fundamental issues necessary for tax harmonization in the region.

To test the hypothesis and answer the thesis question, the author undertook qualitative legal research, which is structured in the work as follows:

- Section 1 continues further with the background on the topic of tax harmonization and its place and role in the regional organizations on economic integration. It also provides detailed review of tax harmonization level achieved in the EU and the EAEU at the various stages of their integration, compares the directions, objectives and means for the past and also upcoming processes of tax harmonization in both unions. The section concludes with intermediate conclusion.
- Section 2 continues with the review, comparison and analysis of the institutional structures in the EU and the EAEU. Since the study is carried out from a tax law perspective, the author pays particular attention to the institutions that have capacity to participate in the process of tax harmonization: the author assesses and compares these capacities between the Unions institutions to determine the extent the EAEU institutions are actually able to contribute to the process. On the basis of review, the author identifies potential weaknesses in the EAEU and as an intermediate conclusion drafts recommendations for improvement based on the EU experience.
- Section 3, on the basis of EU, the author formulates the potential tax issues associated with realization of each freedom, as well as examines and compares the fundamental freedoms on the movement of goods, services, labor and capital in the EAEU Treaty and TFEU. The examination is undertaken solely from a tax law perspective with the purpose to identify the extent of similarities and differences between the ways the freedoms are formulated in each treaty, and consequently on this basis to determine the extent to which the EU experience and approaches in tax harmonization may be applicable in the EAEU. There is an intermediate conclusion provided with respect to each fundamental freedom.
- In section 4 the author demonstrates the practical implication the EAEU freedoms may have on the member states' tax systems. The author undertakes this part of the study by interpreting the fundamental freedoms of the EAEU Treaty and testing the compatibility of the national regimes in the EAEU member states on dividends taxation with the same. The choice is justified in view of several factors. First of all, there are two freedoms in the EAEU Treaty that shall have influence on the systems for taxation of dividends – freedom for investments and freedom for incorporation. Secondly, the recipients of dividends can be easily and often discriminated and subject to economic and also juridical double taxation due to interactions of two different national tax systems. And finally, based on the EU experience, discussed under section 1 of this work, harmonization of dividends taxation was number one in agenda for harmonization of direct taxes. The overall purpose of the section is to demonstrate importance of fundamental freedoms on a practical example with dividends taxation and to demonstrate the weaknesses of the current freedoms in the EAEU Treaty. The section concludes with intermediate conclusion.
- Section 5 is devoted to consideration of other tax related issues important in the process of regional integration and tax harmonization. It considers the legal order in the EAEU in order to understand the position of the supranational law sources in the national legal systems of member states and on this basis to propose the potential instruments for tax harmonization in the EAEU. It also considers the first case decided by the EAEU Court, where indirectly the Court was commenting on tax issues and its position to act as a potential body for tax integration in the region.
- Section 6 is the conclusion, where the author summarises the findings of the study.

1.1.4.Limitation

The author of the work does not aim to suggest particular methods or areas for tax harmonization in the EAEU region, and neither aims to analyse the instruments of tax harmonization adopted in the European Union from a technical perspective.

The work will be performed in a form of the research and studies of the EU and EAEU legal sources, academic literature and court practice in both Unions.

1.2. Link between the stages of regional economic integration and notion of tax harmonization

Idea of regional economic and political integration is not new and there were several different experiences of similar undertakings around the world during last 100 years.[12] While such undertakings may vary in their sizes, initial economic positions of member states, in general they all persuade similar objectives – to strengthen the position of each particular member state by closer integration between the members and liberalization of certain freedoms. The history witnessed many unsuccessful examples of regional integration as well, where the reasons for failure were different and could have been linked to poor integration within the states themselves, failure to set certain deadlines to eliminate barriers and inability and unwillingness to implement the objectives of the initially agreed objectives.[13]

Among the critical factors that positively influence regional integration one could distinguish between various groups of factors, such as geopolitical (e.g. the location of the states and ease of movement between them), as well as actual relationship between the states and presence of common interests (e.g. common problem that needs to be addressed or common target that needs reached and so on). Political and economic stability, including macroeconomic position of member states is also important, since it allows member state to concentrate and direct their recourses towards realization of common objectives, rather than neglect common objectives while being disturbed by economic or political instability and, in addition, transfer these problems to partner states.[14] Additionally, such factors as rule of law, good governance and democracy are essential for close cooperation of states. Good governance and rule of law should assure proper functioning of national and supranational organization governing the regional integration, while the democracy positively influences the political formation in the countries, and stable and strong, reliable governance assures attraction of investments.[15]

The last factor to achieve successful economic integration lies in political commitment and readiness of member states to share sovereign powers.[16] This factor equally concerns sovereign tax powers of states, since as practice shows and as will be elaborated further, countries may need to share their sovereign power in such delicate area as taxation for coherent elimination of tax obstacles that may undermine idea of economic integration. Division of sovereign power is in particular necessary when states within regional integration agree on implementation of objectives through supranational institutions.[17] As was correctly stated by the European Commission long ago in 1980, tax harmonization is not an objective of an economic integration itself, but it is an evitable means or instrument to achieve the same and facilitate the creation of common or internal markets for the movement of goods, services, labour and capital.[18] Taxation primarily influences wide range of issues, such as level and type of consumption, profitability of companies, the location of investments

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[12] For instance, the European Union (EU) is an example of monetary and economic union, the CARICOM Single Market and Economy (CSME) and the MERCOSUR are the examples of the economic unions, the Association of Southeast Asian Nations (ASEAN) is an example of the common market, the Andean Community (CAN) and the East African Community (EAC) are the examples of the customs unions, the European Free Trade Association (EFTA) and the North American Free Trade Association (NAFTA) are the examples of the multilateral free trade areas.

[13] See for instance the examples of the Eurasian integration, which was unsuccessful for about first 20 years. See section 1.5 of this work for more details. See also the experience of the European Union with respect to the same described in the section 1.4.1. of this work.

[14] See EU Commission Communication COM (95) 219, European Community support for regional economic integration efforts among developing countries, available at: http://ec.europa.eu/development/body/legislation/recueil/en/en13/en131_1.htm

[15] Ibid., COM (95) 219

[16] For other factors see, *The success or failure of a regional integration initiative should be evaluated in the context of the,* Chapter 3, available at: https://nccur.lib.nccu.edu.tw/bitstream/140.119/33930/7

[17] Ibid., COM (95) 219. The European Union is an example of regional integration with supranational power of institutions, where the decisions of institutions prevail over the national laws of the member states and directly influence the formation of legal framework of the union. The same is true for the Eurasian Economic Union, where decisions of supranational bodies may influence and direct the policy of the member states in agreed areas.

[18] See EU COM 80(139), "Report on the Scope for Convergence of Tax Systems in the Community", ch.1, p.6.

and also the conditions of competition,[19] where all these factors should be kept neutral from tax point of view for achievement of fair marketable conditions of any economic integration. For the European Union, as to the pioneer in the sphere at this level of economic integration, it was difficult to foresee in advance the level of tax harmonization needed for establishment and functioning of the economic union,[20] but currently it is recognised that such level of tax harmonization is required as to assure taxation that would exist in one single market, or in other words – single state. Therefore, for the Eurasian Economic Union it is slightly easier now to move in this respect taken the experience of the EU and also other regional undertakings.

In general, the process of regional economic integration is a gradual development, where countries are expected to pass one stage in terms of both – legal and practical terms, before moving to the next one. Balassa defines economic integration *as a process and as a state of affairs, which encompasses the measures designed to abolish discrimination between economic units belonging to different national states*.[21] When viewed as a state of affairs, it can be represented by *the absence of various forms of discrimination between national economies*.[22] Balassa divides the forms of traditional economic integration into the following stages: free trade areas, customs union, common market, economic union and complete economic union.[23] Below the author summarises the definition given by Balassa to each form of integration and comments on the required level of tax harmonization to facilitate the same. In general, it has already been attempted in the past to answer the question whether the particular level of economic integration corresponds to a particular degree of tax harmonization. Earlier in 1985 Heller Pelkmans have stated that the first three stages of integration as defined by Balassa – free trade zone, customs union and common market may be characterised by the obligation of the member states not to do certain things in order to facilitate the economic objectives pursued by integration – the so called "negative integration" may be common at these stages.[24] Consequently, they noted that other two stages – economic union and complete economic union are in contrast associated with the positive means of harmonization – which implies the adoption of instruments to facilitate the realization of economic objectives set by the union. At the same time, another group of researchers, Velayos et al., come to a different conclusion.[25] They believe that it is not entirely true that earlier stages of integration require lesser commitment to tax harmonization and lack the positive instrument of tax harmonization. As an example, Velayos et al. talk about the Common External Tarriff, which is an example of positive tool for harmonization, but which is adopted at the second stage of integration. Additionally, authors illustrate examples from integrations in Latin America, which are not yet at the stages of unions, but nevertheless undertake the attempt of tax harmonization and coordination through adoption of positive hard law instruments.[26] Veloyos et al. in their research also tried to answer the question whether the exact legal instrument may be associated with a specific degree of harmonization and with no other. As such, they do not draw a precise answer, however, come to the conclusion that during the evolution of integration there may be also several layers of harmonization measures taken and the more subtler is the former instruments, the more sophisticated may be the latter instruments at a later stage of integration.[27] They additionally note that taken the sensitivity of an issue, the more flexible kind of instruments may be needed to achieve tax harmonization at a later stages of integration.

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[19] See EU COM 80(139), ch.1, p.8.

[20] See EU Com80(139), ch. 2, p.13.

[21] See B.Balassa, The theory of economic integration, Routledge Revivals, 2011, p.1.

[22] See Ibid, p. 1.

[23] See ibid, p. 2.

[24] See T.Heller, J.Pelkmans, *The Federal Economy: law and economic integration and the positive state – the USA and Europe Compared in an economic perspective*, in A political, legal and economic overview, p.324 (Capeleltti et al. eds.Walter de Gruyter 1985).

[25] See Velayos, F.Velayos, A.Barreix and L.Villela, *Regionl Integration and Tax harmonization: issues and recent experiences,* Taxation and Latin American integration. - Washington, DC [u.a.], ISBN 978-1-59782-058-5. - 2008, p. 79-128. They base the conclusion on the basis of review of the literature on tax harmonization, p.30.

[26] See Valayos, Ibid. For instance, CARICOM agreement on the harmonization of tax incentives to industry dated 1973, CARICOM multilateral agreement for the avoidance of double taxation and the prevention of tax evasion and fraud dated 1994.

[27] Velayos, Ibid.p.31.

Free trade area is the first stage on regional integration and is classified by elimination of tariffs and quantitative restrictions on trade of goods between the member states, but each country preserves its individual tariff policy with respect to the third states.[28] The accent at this stage of integration is made on elimination of barriers usually with respect to goods and services only, and as long as measures agreed within the free trade areas cover only internal movement of goods and services, and do not envisage for the free movement of goods and services produced outside the member territories, they do not concern import related taxes, such as VAT and excise, upon importation of goods from third states. However, between the member states may be agreed on a bilateral basis certain standards for collection of indirect taxes in order eliminate potential obstacles caused by the discrepancies in VAT systems in each member states: such as place of supply rules or certain administrative requirements. Countries may also be willing to have double tax treaties concluded with each other in order to stimulate cross-border activities and minimize the risks of income double taxation.

The stage of customs union is the next stage after the free trade area and is classified by abolishment of customs payments between the member states for the internal cross-border movement of goods and also by establishment of a common customs policy with respect to third countries. Herewith, customs union by default does not envisage harmonization of consumption (indirect) taxes, but member states may be often tending to do so as a precondition for efficient, easy and non-discriminatory movement of goods between themselves. Tax harmonization of indirect taxes is usually perceived as the first essential, since indirect taxes if applied discriminately or imposing difficult compliance obligations on traders very visibly affect the trade of goods. Therefore, tax harmonization of indirect taxes aims at elimination of tax frontiers, e.g. abolition of discriminatory import taxation in respect of trade between Member States, introduction of common approach of export taxation and introduction of similar administrative requirements and compliance obligations in order to facilitate creation of a genuine common market for the movement of goods and services among member states.

The common market stage, the stage after the customs union, is characterised by abolishment of restrictions not only with respect to trade, but also with respect to other factors, as may be proclaimed by the member states. At this stage often becomes essential to address direct tax matters, associated with the movement of factors, such as persons, services and capital to eliminate fiscal obstacles associated with their movement. In the field of direct taxation, the harmonization is also necessary to ensure that corporate tax burdens, to which companies are exposed to in different Member States, provide for the similar conditions of fair competition and that capital movements and freedom of establishment are not prompted by tax considerations. As specifically outlined by Terra and Wattel (2012)[29] from the tax perspective, the obvious obstacles for the internal market may be caused by:

- differentiation in tax treatment of domestic and imported goods and services;
- tax burden upon exit of legal persons or emigration of natural persons from one member state to another;
- differences in national tax systems of member states leading to disparities in tax treatment;
- complicated tax compliance obligations for the large business operating in more than one member state due to the differences in domestic law requirements;
- differential tax treatment of resident and non-resident taxpayers;
- differential tax treatment of domestic and foreign income;
- international economic and juridical taxation due to mismatches in income and expense characterization, transfer pricing adjustments, tax accounting differences and other reasons.

Such tax obstacles may prevent businesses and persons from entering into transactions, investments and other business activities in other member states, since the tax outcome from purely domestic transactions may be more beneficial rather than tax outcome in cross-border business activities. In addition, differences between the national direct tax systems may distort the allocation of resources

[28] See Ibid, Balossa, p.2.

[29] See B. Terra, P. Wattel, *European Tax Law,* Introduction (Wolters Kluwer Law & Business 2012)

and generate double taxation, which hinders the achievement of single market. Therefore, the coordination over national tax systems may be necessary.[30]

Balassa describes economic union as a distinct form of integration from the common market, which is characterised not only by elimination of restrictions for the mutual cross-border flows of factors, but also by harmonization of national economic policies to remove the discriminations caused by the disparities in the national policies. From a tax perspective, at the level of the economic union it becomes absolutely necessary to harmonize national tax systems to reflect realization of any advanced aims and elaborated principles perused by this level of cooperation. For some integrations, this stage may be a kind of additional level to proceed with the adoption of harmonization measures which are necessary but for some reasons were delayed at the previous stages.

Finally, in view of Balassa, to the complete economic union is attributed creation of common supranational institution who is authorised to issue binding decisions for the member states and establishment of unified monetary, fiscal, social and countercyclical policies by the members. Depending on the level of integration when the supranational institutions are introduced and attributed certain power may appear new instruments of tax harmonization – such as directives in the EU, or directly the decisions of institutions. With creation of the supranational court may also appear the phenomenon, which is known in the EU as negative tax integration – where the Court by prohibiting certain domestic measures as incompatible with the principles of the Union, force member states to amend the same.

On the basis of the above, it may be concluded that different level of economic integration may be associated with the different level of tax harmonization – addressing direct and indirect tax matters. However, there is no prescribed obligatory form of tax harmonization that shall take place at certain time, instead, tax harmonization may be triggered by the market forces and the way the fundamental principles are drafted in the founding documents of each integration.

The European Union is an example of the strongest and also deepest economic integration between the states. It reached the stage of complete economic union. One of the means to achieve the EU goal is to create a single/internal market (Art. 3(3) TEU). The concept of internal market has been gradually developed from the concept of "common market", contained in the treaties preceding the Treaty on the Functioning of the EU (TFEU) – i.e. EEC Treaty (Treaty of the European Economic Communities) and EC Treaties (Treaties of the European Community). The common market was defined by the CJEU in 1982 as the "elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market".[31] Although, the definition of common market given by the CJEU did not say anything on other freedoms, the freedoms were equally provided under the previous EC and EEC treaties, although in a slightly different form. The definition of "common market" given by the CJEU is slightly confusing, because it refers to the conditions of both the "single" and also "internal" market, making it thus very difficult to distinguish the terms and understand whether there is a difference between them that would matter in practice upon drafting the legislations to assure the realization of level of market required. The concept of "internal market" is defined under article 26(2) of the TFEU and shall comprise: "an area **without internal frontiers** in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties". When reading the literature about the EU, especially the literature during the 1980s, one can notice that the terms "common market", "single market" and "internal" were used interchangeably making it thus impossible to capture the difference that shall be reflected in practice. The gradual evolution of the EU markets and related tax developments at each level are discussed in more details under section 1.3. of this work. This, in view of the author, shall clarify the link between the different level of integration and tax related matters that require to be harmonized to facilitate achievement of the same.

The name of the EAEU implies that the integration currently reached the stage of economic union. However, taken the intentions of member state to limit the cooperation only to the economic matters, the EAEU does not aim to advance to the level of complete economic union. In the EAEU context, the member states aim to strengthen the economies of each member state, by assuring harmonized

[30] See B. Terra, P. Wattel, *European Tax Law,* Introduction (Wolters Kluwer Law & Business 2012)

[31] See Terra Wattel Ch. 3 p. 35 and Case C-15/81 Gaston Schul.

development and convergence between the states, stable business growth, balanced trade and fair competition between the states and competitiveness of each particular member state on global market.[32] The main objectives of the EAEU is to create proper conditions for sustainable economic development of the member states in order to improve the living standards of their population. The EAEU equally seeks the creation of a common market for goods, services, capital and labour within the Union as well as comprehensive modernisation, cooperation and competitiveness of national economies within the global economy.[33] The terms "common" and "single" market in the EAEU are also used interchangeably and even one common definition is provided for both and stands as follows: "single (common) market" means a set of economic relations within the Union ensuring the freedom of movement of goods, services, capital and labour.[34] Herewith, for the movement of goods, the EAEU Treaty encompasses the creation of the internal market. The exhaustive definition of the term is not provided, in contrast the EAEU defines that internal market *shall include the economic space with free movement of goods, persons, services and capital ensured under the provisions of this Treaty*,[35] which in substance is very similar to the definition given to the common and single market. The EAEU Treaty however, also gives some clarification of what the internal market shall comprise with respect to the movement of goods – such as, elimination of import and export customs duties, non-tariff regulatory measures, safeguard, anti-dumping and countervailing measures in mutual trade. With respect to other freedoms, such as movement of labour, investments and establishment activities, the EAEU tends to achieve single economic space, which is defined as the space consisting of the territories of the Member States implementing similar (comparable) and uniform economy regulation mechanisms based on market principles and the application of harmonised or unified legal norms, and having a common infrastructure.[36]

Approximation of laws and the establishment of a common market are inextricably linked, since harmonised law is perceived as one of the main instruments to build a common market and differences in the legal orders are seen as obstacles to the free movement of production factors, the core element of the internal market. (E.J.Lohse, 2012)

1.3. Legal and economic basis for tax harmonization in the EU

1.3.1. Defining tax harmonization

The term "tax harmonization" has no definite and commonly accepted definition neither within the EU member states, no worldwide.[37] With this respect, absence of common definition leads to various understanding about the substance of the process also with respect to tax law harmonization. E.J.Lohse writes that d*ue to this lack of definition, the description of legal and judicial instruments of harmonisation and their effects can easily be mistaken for attempts to define the overarching process. Equally, critical accounts of the objectives of harmonisation and alternative ways to reach them are used as a definition".*[38] E.J.Lohse says that many actors participated to the harmonization and development of the EU legislation, but there was no precise definition given to this term and this in view of E.J.Lohse is problematic, because harmonization may lay closely to some other processes, such as unification or convergence, europeanisation or spill-over, but has it is own features, which are different from others.[39]

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[32] Preamble to the EAEU Treaty.
[33] See article 4 EAEU Treaty.
[34] See article 2 EAEU Treaty.
[35] See article 28 EAEU Treaty.
[36] See art. 2 and Section XV of the EAEU Treaty.
[37] See F.Velayos, Ibid.
[38] See E.J.Lohse, *The Meaning of Harmonisation in the Context of European Union Law – a Process in Need of Definition*, in M.Andenas and C.B.Andersen, Theory and Practice of Harmonisation, Edward Elgar, 2012.
[39] See. Lohse Ibid.

The TFEU makes a few references to the similar terms , such as the "harmonization of legislation",[40] "approximation",[41] "coordination",[42] but without defining those terms and explaining the difference. Since the beginning of the functioning of the EU these terms have neither not been distinguished one from each other. They all are interpreted as the processes of approximating and making the national systems of member states similar and used interchangeably in practice in the positive law and also by the institutions of the EU.[43]

The process of harmonization in the EU reflects the peculiarities of the EU legal order. The notion of harmonization has been developing here over time together with the development of the Union. At the initial stages, the complete harmonization was considered necessary to achieve objectives in certain spheres and single fiscal space. However, after the adoption of Single European Act in 1986 member states realized that actually healthy competition between them is also a necessary feature of the market development, and thus the approach of the legislator shifted from complete to a minimum level of harmonization. The idea of single fiscal territory was thus abandoned in view of the inability of the states to achieve the full harmonization and division of sovereign power in tax matters. Tyc writes that idea of single fiscal market was replaced by the idea to achieve fiscal neutrality[44] to assure that trade is not distorted by fiscal influence and equal conditions of competition are granted on the territories of member states.[45]

Lohse identifies six defining parameters of EU harmonisation, which are 1) conscious setting of a standard, 2) contribution by the Member States, 3) actors involved, 4) objectives, 5) object and standard, and 6) result.[46] According to Lohse, with respect to the first factor, harmonization is differentiated from other similar processes by that fact that its intention is clear from the beginning and it sets the common EU standards which member states shall endeavour to achieve. In contrast to harmonization, the convergence for instance, is uncontrolled process, the ultimate result of which is neither standardised nor known in advance. The instruments to achieve harmonization are both – positive laws and also negative integration by means of court practice and interpretation of fundamental principles, which establish the permissible level of national measures. The second factor of harmonization implies the close involvement of member states in the process. First of all, member states contribute towards establishment of the standard towards which the harmonization should lead, secondly, member state shall implement the established standard domestically either by means of additional national legislation, changes therein or through the national court practice and finally, they shall assure uniform interpretation of that standard in practice, for instance with the use of preliminary ruling instrument. The third factor – actor – may vary depending on the type of instrument used for harmonization and it may be both – the institutions of the EU, member states and also national courts. As the fourth criteria of harmonization, Lohse, indicates the objective, which is to prepare the law to be uniform, but not yet complete, in order to promote economical, social and political changes in the Member States and achieve single market and realization of other Union's objectives. As the fifth criteria is identified the object and direction, which can be any law, the policy, the practice of member states or absence of the same in certain issue. Finally, the legal result of harmonization shall not be confused with its objective. The result of harmonization may vary – it may either evolve and replace all existing national legislations or it may only harmonize the

[40] See for instance art. 2(5) TFEU that talks about the competences of the EU, art. 19(2) where the TFEU empowers the Council to act on adoption of legislation against discrimination in certain matters, art. 113 TFEU which is specifically devoted to approximation of tax legislations of member states by means of measures adopted by Council.

[41] See for instance art.67(3) TFEU related to measures for prevention of crime, art. 81(1) TFEU, 83(2) TFEU, art. 114(1) TFEU on the competence of the Council to take measures for realization of objectives proclaimed in art.26 TFEU, art. 115 TFEU that authorizes Council to take measures for realization of internal market idea and other articles.

[42] See for instance art. 5(2) and (3) TFEU, which authorize the Union to coordinate the employment and social policies in the EU, art.52(2) which empowers council to coordinate certain aspect by adoption of directives, art. 67(3) TFEU and other articles.

[43] Lohse, Ibid.

[44] Fiscal neutrality means that elimination of customs payments shall not be replaced by the discriminatory tax measures. For more see Tyc, Ibid.

[45] See V.Tyc, *Harmonization of indirect taxes in the European Union*, International Journal of Law and Management, 2008, Vol. 50 Issue: 2, pp.87-92.

[46] This paragraph is summarized on the basis of ideas expressed by Lohse, Ibid.

minimum standard to which the national legislations shall aim for. On the basis of the above, Lohse concludes that harmonization is not a single term implying approximation of laws by concreate instrument, but instead a complex process throughout which member states aim to bring national legislation closer. It starts from creation of common EU standard, and then involves gradual incorporation of the same into the national systems of member states. There may be different instruments used to achieve harmonization – the instruments of secondary legislation, but also primary upon interpretation by the court of the fundamental principles. Upon incorporation of EU standard into domestic systems, the process of harmonization is not finished, but require gradual polishing of the same, where the CJEU and principle of mutual recognition are useful. Further on, the harmonization shall result into the harmonized application of standard throughout the Union, but not merely achieving formal similarities in the national text or rules. Finally, harmonization shall be used to achieve the objectives of the Union.

Based on the review of the European literature on tax harmonization one could reveal that term "harmonization" is often used to describe the process of approximation and coordination of indirect taxes among the member states by means of directives.[47] The term is also used, although less often, to characterise the process of approximation of direct taxes by means of directive – such as parent-subsidiary directive and others.[48] However, more often with respect to approximation of direct taxes in Europe is used the term "negative tax integration" which is been carried out through the judicial practice. On this basis it may be concluded that tax harmonization in Europe is perceived as a process, which is controlled and coordinated by the member states and institutions of the EU, it is achieved with the use of legal instruments, in particular directives, and it does not unify the law of the Union, but rather makes it similar in certain critical aspects.

In the European Union the coordination over national tax systems is undertaken by two distinct ways, known as "positive" and "negative" integration. Positive integration of tax systems is undertaken by legislative means at the Union level though issuance of regulations and directives that harmonise or coordinate the national laws. Negative integration is happening though the practice of the Court of Justice of the EU (CJEU), which assess the national tax systems on compatibility with the EU law and in case the EU law is violated requires changes to the national law. Harmonization of indirect taxes at the EU level is mainly achieved through the process of positive integration. It is easier for the countries to reach the consensus on harmonization of indirect tax since indirect taxes very openly represent the obstacle for the free movement of goods and services across the state borders, whereas direct taxes are mainly coordinated by court practice, because member states are hesitant to share their sovereign powers over such sensitive policy instrument, and effect of direct taxes on free movement of goods and services is less visible.

As such, over the almost 70 years of the EU functioning, there has been significant impact of the EU law over national tax laws. In terms of indirect taxation were abolished internal and unified the outside customs duties, was introduced VAT system and harmonised base for all national turnover taxes. In the sphere of direct taxes, by means of few supranational directives and mainly through the CJEU practice are gradually eliminated the national tax measures, which make it less attractive for natural and business persons to move, invest or establish business activity abroad than domestically.

In the EAEU, the issue with the terms may seem more simple, because some of the terms are defined in the EAEU Treaty. For instance harmonization is defined as "the approximation of legislation of the Member States aimed at establishing similar (comparable) legal regulations in certain spheres".[49] In view of the author, there are two identifications in the definition itself which proclaim that in the context of the EAEU, harmonization of laws does not mean making the laws the same. These are in particular the terms used, such "similar or comparable", but also the term approximation – which make the author of this work conclude that harmonization does not mean achievement of the identical laws or standardized laws. The definition is quite general, because it does not say anything on the means by which the harmonization of legislations shall be achieved and neither specifies who shall be the actors responsible for harmonization, thus the definition is leaving the choice and freedom to

[47] See for instance, A.Bénassy-Quéréa, A.Trannoyb and G.Wolffc, *Tax Harmonization in Europe: Moving Forward*, Les notes du conseil d'analyse économique, no 14, July 2014.
[48] See for instance M.Göndör, *What about direct tax harmonization in the EU?,* Offtax ltd. 2016, accessed on 9 June 2017.
[49] See article 2 EAEU Treaty.

the member states to decide on actors and instrument, which perhaps may be different in each case depending on the area of law and object of harmonization. In addition to this, EAEU Treaty gives definition of the term "unification" of national legislations, which shall mean the approximation of legislation of the Member States aimed at establishing identical mechanisms of legal regulation in certain spheres as specified by the EAEU Treaty.[50] This term is more precise and under this policy member states shall endeavour to agree unified laws to coordinate certain aspects. Therefore, further on in the work, when analysing the basis for approximation of the tax legislation in the EAEU Union, the author will precisely consider the extent to which the approximation of tax legislation is envisaged by the EAEU treaty and whether it is unification or harmonization, which shall be achieved.

The review of the regional EAEU literature on tax harmonization revealed that local scholars tried to propose their understanding of tax harmonization in the Eurasian region, which was formed by and perhaps inspired in accordance with the local practice. For instance, in 2001, Mambetaliyev defined tax harmonization as a system of mutually agreed views on common goals and priorities for the formation of the legal framework of the Customs Union in the tax sphere, the ways, measures, mechanism and stages of their practical implementation.[51] He believed that the basis of harmonization should be the voluntariness and independence of states in determining the direction and depth of participation in the process of convergence, harmonization and unification of national tax laws, their gradual and stage-by-stage implementation. In his view, the goal of harmonization shall the establishment of a uniform (unified) order of regulation of interstate tax relations for the purpose of which, such basic principles as coherence of legal regulation, synchronization of adoption of acts on tax legislation issues, and the sequence of harmonization steps shall be used. In view of the author, the definition of harmonization proposed by Mambetaliyev in 2001 was quite blurry without defining properly what were the instruments used, actors involve and objectives persuaded by tax harmonization. In addition, he is not clear whether the harmonization is about bringing the national laws and policies closer to each other or achievement of unification of the same. Another scholar Lukashuk gave slightly different definition, in his view harmonization is the process of a purposeful approximation of legal systems in general or of individual industries, approval of common institutions and norms, elimination of contradictions.[52] Danilov takes into consideration the local and foreign perspectives and defines tax harmonization as a systematic process of convergence of national legal systems, manifested in the formation in various national legal systems of similar institutions, sub-branches and branches of law similar to legal regulation, and the single legal regulation of certain social relations. Similarly, as other local scholars, Danilov gives blurry definition, which also uses both terms of harmonization and convergence simultaneously.

To summarize on the above, there is no one universally accepted definition of tax harmonization in the world. Each economic integration, which faced this issue defined it differently in view perhaps of the different approaches used, but also high number of literature on the same issue contributed to the appearance of different views what the harmonization shall mean. While, for instance in the EU some scholars refer to harmonization as to the measures adopted by the EU institutions to coordinate certain tax aspects, other scholars use the term to generally describe the process of approximation of national laws, which encompasses other similar terms and processes, such as coordination, assimilation, convergence. However, what is commonly acknowledged is that harmonization is the gradual process which shall pursue certain idea, which may vary. For the purposes of this work, the author will stick to the definition of tax harmonization and tax unification given under the EAEU Treaty – as the processes of approximation of national legislations either by trying to make them similar or comparable or to unify the same. It is one of the objects of this work to clarify what are the institutional basis (what are the actors) for tax harmonization provided under the EAEU legal framework and what are the instruments that may be used to achieve the same.

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[50] See article 2 EAEU Treaty.

[51] See N.Mambetaliyev, Zh.Mambetaliyeva, "On the perspectives of harmonization of national legislations of member states of the Eurasian Economic Community", Nalogovyj Vestnik, 2001, No.6., Мамбеталиев Н.Т., Мамбеталиева Ж.Н. О перспективах гармонизации национальных налоговых законодательств государств - участников Евразийского экономического сообщества, Налоговый вестник. 2001. N 6.

[52] See I.Lukashuk, "Globalization, state and law", XXI Century, 2000, p.45. Original: Лукашук И.И. Глобализация, государство, право, XXI век. М., 2000. С. 45.

1.3.2. Why to harmonise?

1.3.2.1. General perspective based on the EU lessons

There may be different reason for tax harmonization within the economic unions. The reasons may also vary depending on the type of tax to be harmonized. The main reason for harmonization of indirect taxes arise in the need for elimination of barriers for the movement of goods, which includes the non-discriminatory tax treatment of imported goods and also equal tax conditions for exporters. However, further on, harmonization may be caused by the need to simplify the compliance procedures associated with imposition of indirect taxes: the various compliance obligations imposed in different member countries, penalties and other administrative fees associated with the failure to comply with tax system could demotivate producers and exporters to expand the trade to the new markets. The harmonization may also be dictated by the consumer behaviour – when, due to the differences in indirect tax rates and proximity of countries, consumers may prefer to do shopping in one countries, rather than others, because on the saving they can make from the differences in VAT and excise taxes charged on goods.

The reason was harmonization of direct, in particular, income taxes may vary from the need to eliminate barriers for the movement of capital to the need to fight tax competition and tax avoidance. Initial reasons for direct tax harmonization in the EU were connected with idea to eliminate obstacles for the free circulation of persons, investments and capital. The Ceccini report "The cost of non-Europe" prepared by the group of researchers at request of the EU Commission in 1988 identified the potential advantages and disadvantages with the realization of the single market and elimination of the remaining fiscal barriers, including taxation.[53] The report has assessed and forecasted an economic growth and increased competitiveness of the EU with the realization of the single market. Therefore, the argument for harmonization was stimulation of the efficient functioning of the single market in view that elimination of fiscal barriers should have improved the capacities of investors and motivate them to invest based on the efficient allocation of capital and availability of resources, which should be undistorted by the levels of taxation in the member states.[54] However, only small number of proposal for income tax harmonization resulted in adoption of directives. The higher number of proposal were refused on the basis of unwillingness of the states to agree on the measure proposed by the Union. Later on, the direction of tax harmonization in Europe partially shifted from idea to eliminate obstacles to the need to effectively fight tax avoidance and also the tax competition.

The phenomenon of tax competition between the states may be defined as the situation when the states do not coordinate their fiscal measures and this affects the allocation of tax revenues between those states.[55] The tax competition is not bad as such, because it allows countries to assure wellbeing of their economies and consequently the wellbeing of people. However, tax competition is often associated with the policies of the states aimed at attraction of as much tax revenues as possible with attraction of investors by granting favourable tax conditions, while the side effect of such policies, is the potential shift of tax revenues from one member states to others. The problem became more visible in the 1990s with the increase in e-commerce, digitalization of doing business and the ease of moving the mobile taxable bases to more favourable jurisdictions. The tendency of tax competition in Europe eventually resulted in erosion of tax basis in one states, while increased tax revenues in the others at the costs of the former ones.[56] These bad practices are known as the harmful tax competition and call for actions at the global level to resolve the problem, including the supranational level at the EU. In the EU, in particular, initially was adopted the Code of Conduct for Business Taxation[57] as a soft law instrument to fight harmful tax practices. The adoption of the Code also triggered the more active use of article 107 on state aid, which is considered as a hard law instrument against the harmful tax practices of the member states. Further on, in 2015, the EU Commission has

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[53] Europe 1992: the overall challenge [summary of the Cecchini report]. SEC (88) 524 final, 13 April 1988

[54] See G.Matei, D.Pirvu, Reasons for tax harmonization in the EU, Finance – Challenges of the Future, Year XI, No.13/2011.

[55] See Matei, Pirvu, Ibid.

[56] Reference to BEPS action 5?

[57] EU Council conclusion of the EcoFin meeting on 1 December 1997 concerning taxation policy, 98/C 2/01. The Code of Conduct for Business Taxation Group is composed of Member State representatives to deal with harmful tax competition in the EU, in a non-binding way, on the basis of peer pressure, See EU Com(2015)302 final.

issued the plan for fair and efficient corporate taxation in the EU.[58] The plan aims to reform the corporate tax framework in the EU, in order to tackle tax abuse, ensure sustainable revenues and support a better business environment in the Single Market. Among other measures, the Commission decided to reinitiate the proposal for the CCCTB[59] in view that the common tax base would introduce complete transparency on the effective tax rate of each jurisdiction, thereby reducing the scope for harmful tax competition.[60]

Finally, the tax avoidance and evasion practices became one more reason to revive the plans on tax harmonization in the EU. As the EU commission noted, while some companies still struggle from inefficiency of mechanism for resolving the double tax issues and existing barrier for the free movement, others engage in aggressive tax avoidance practices benefiting from mismatches in the income tax systems of member states.[61] To address the same, in January 2016 the Commission has proposed the Anti-Tax Avoidance Package of measures as a part of its plan for more fair and efficient taxation.[62] The Package contains several initiatives, such adoption of Anti-tax avoidance directive, recommendation on tax treaties, revised administrative cooperation directive and communication on external strategy. On its basis was very quickly adopted the Anti-Tax Avoidance Directive, which reflected the OECD recommendations on three actions points in BEPS project and additionally included measures on GAAR an exit taxation.

On the basis of the EU experience, it may be summarised that tax harmonization is necessary for several reasons: 1) with respect to indirect taxes – it is necessary to eliminate potential discrimination of foreign products and also to ease the tax administration and compliance processes associated with the free movement of goods and services; 2) with respect to direct taxes – it is necessary to first of all, to eliminate existing barriers for the free circulation of capital and movement of persons, elimination of potential discriminatory measures applied to foreign investors and foreign income of national persons, as well as, it is necessary to coordinate the tax competition between the member states in order to prevent the erosion of tax bases in one states and harmful tax practices in the other states and finally, also to close the loopholes between the national tax systems that may facilitate tax avoidance.

1.3.2.2. The reasons in the EAEU

In the above section the author has considered the major general reasons for tax harmonization as learned from the EU experience. In this section the author will consider the situation in the EAEU with respect to the same matters to assess whether they constitute the reason and whether there are any other additional factors that shall be taken into account.

National tax policies – is there any signal of coordination?

National tax policies of the EAEU member states have been reviewed by the local scholar V.Tyutyuryukov with the objective to understand whether there is a coordination among the member states in terms of aligning their national tax policies with each other and also with the EAEU Treaty. With respect to policies regarding income taxes, Tyutyuryukov comes to conclusion that countries tend to compete with each other, rather than coordinate and even less likely to harmonise the same. Thus, Tyutyuryukov states that, for instance, Armenia openly aims at improving its tax competitiveness in the region, Belarus, Kazakhstan and Russia aim at attracting more investors to their territories, which also may give a signal of competition. Tyutyuryukov notes that in this race for investments, Armenia and Kyrgyzstan are weaker than their partners in terms of fiscal and tax administration capacities. In none of the national tax policies, Tyutyuryukov identified any provisions on the need or plans for regional tax harmonization. This is an interesting observation, because although the EAEU Treaty does not specifically call countries to work on harmonization of direct taxes, it does address certain indirect taxes as will be discussed later in this work. In addition to certain rules, that are already harmonized and fixed in the EAEU Treaty, the Treaty invites member states to work on further harmonization of indirect taxes, including excises. However, it looks like member states neglect this by not only avoiding the provisions on the same in the national policies, but also by intentions to replace the VAT by the sales tax – as was proposed in Kazakhstan – which

[58] COM(2015) 302 final.
[59] See COM(2016) 685 final, Proposal Council Directive on a Common Corporate Tax Base.
[60] See the action plan, COM(2015) 302 final, p.7.
[61] See COM(2015) 302 final, p.2.
[62] See

would completely undermine the idea of single market and make the principles provided under the EAEU Treaty with respect to indirect taxes inapplicable.

In view of the author, the discrepancy identified by Tyutyuryukov may be partially explained by the fact that most national policies were adopted before the entry into force of the EAEU Treaty and as noted by Tyutyuryukov himself, are not updated regularly. Thus, for instance, Armenian strategy for country development covers the years from 2014 to 2025, which indicates that perhaps upon drafting of the program the EAEU Treaty was also under preparation and the country couldn't foresee provisions with reference to the EAEU Treaty. The National Strategy for Sustainable Social and Economic Development in Belarus was adopted even earlier in 2004 and covers the period till 2020, and obviously could not include anything on the plans with tax harmonization, except for the general tendency of Belarus to follow up on the developments in Russia with respect to fiscal policy and individual integration between these two countries.[63] About Kazakhstan, Tyutyurykuov has analysed the general program of President "Strategy of Kazakhstan 2050", and the reports prepared by the National Bank and the government in 2013 and 2014 respectively.[64] On Kyrgyzstan were also cited the plans of the President proclaimed in 2013.[65] Finally, with Russia, Tyutyuryukov has considered the latest documents prepared by the Russian Ministry of Finance in 2014 and 2015, but neither there were expressed any plans for tax harmonization. To the similar conclusions as Tyutyuryuov also comes another local scholar Yakupov. He claims that in the current work on amendments of tax systems, member states hardly coordinate any intentions or action,[66] as an example he refers to Belarus, which is considering to reduce the level of income taxes from 18% to 15%, while in contrast to increase the VAT rate to 22%. To continue the list, Kazakhstan is considering to replace the VAT system with sales tax. However, despite this, Yakupov belives that it is better not to intervene into the national sovereignty and harmonise the direct tax systems of member states without strong economic need for the same.

Can the tax policy of EAEU clarify the discrepancies between the national tax policies?

What concerns the tax policy announced at the EAEU level, then in the report on fiscal policy issued by the Eurasian Commission in 2015 was included the section devoted to tax policy.[67] As proclaimed in the report, the fiscal policy of the EAEU comprises the policy on budget, currency, monetary and tax matters. As a preamble to the section is included the following statement: *"One of the most important conditions for the development of integration processes, the formation of the single market for goods, services, capital and labor is the provision of equal competitive conditions and coordination of key tax policy aspects in the EAEU member states".*[68] Having reviewed the document, one can observe that the section of tax policy does not further provide any information and elaborate on the policy for the future. The section basically describes: 1) past activities of the Commission; 2) emphasises certain provisions in the EAEU Treaty; 3) shares information on the international relations between the Commission and international tax organizations and institutes. Among the relevant information on policy matters is only mentioned that the Committee is currently working on the following: 1) drafting the Protocol on electronic exchange of information among the tax authorities of the EAEU member states for tax administration purposes (on separate types of

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[63] Tyutyuryukov, 2015 Ibid.

[64] Kazakhstanskaya Pravda. 2015 on the 100 concrete steps on realization of five Presidential reforms. Original: Казахстанская правда 2014, Опубликованы 100 конкретных шагов по реализации пяти реформ Президента. Available at http://www.kazpravda.kz/rubric/politika/opublikovani-100-konkretnih-shagov-po-realizatsii-pyati-reform-prezidenta/

[65] Text of the national strategy of sustainable development of the Kyrgyz Republic for the period 2013-2017, approved by the Decree of the President dated 21 January 2013 No. 11. Текст Национальной стратегии устойчивого развития Кыргызской Республики на период 2013-2017 годы, утвержденной Указом Президента Кыргызской Республики от 21 января 2013 года № 11. Available at: http://www.president.kg/ru/news/ukazy/1466_tekst_natsionalnoy_strategii_ustoychivogo_razvitiya_kyirgyizskoy_respubliki_na_period_2013-2017_godyi/

[66] Якупов З. С., Развитие евразийской экономической интеграции и ее налоговые аспекты, Проблемы современной экономики, N 3 (51), 2014. с.60-63.

[67] See Eurasian Economic Commission, 2015, *Fiscal policy within the framework of Eurasian Integration,* pp.64-74, available at: http://www.eurasiancommission.org/ru/Documents/EEC_finpolit_150629_2.pdf accessed on 10 June 2017.

[68] Translated by the author from Russian.

income of physical and legal persons; on separate types of property and its owners); 2) drafting agreement on the principles of tax policy in the sphere of excise taxes on alcohol products; 3) drafting of agreement on the principles of tax policy in the sphere of tobacco products in the EAEU member states. Taken the absence of clear tax policy at the Union level, it is not surprisingly that national tax policies are not amended to reflect any potential developments on tax harmonization.

Notion of tax competition – is it relevant in the EAEU?

What concerns tax competition in the Eurasian Economic Union, an extensive research and analysis was undertaken by local scholar Assilova.[69] She has studied the notion of tax completion as endorsed by the OECD, the EU and WTO law, and had concluded that in EAEU region there is currently no discussion at policy level of the same. However, she has indicated the potential signs of harmful tax competition in place in the founding members of the EAEU (Belarus, Russia and Kazakhstan).[70] She recommends countries to develop at least a standard on good governance in direct taxes before the proliferation of harmful tax measure.[71]

Another group of local scholars, studied tax competition in the region from the transfer pricing perspective and selected issues. They have identified that in the three founding member state operate different regimes for taxation of transactions with intangible properties, neither there is a single definition of the same.[72] Moreover, each country operates number of non-coordinated incentives in relation to scientific and experimental activities and respective results, as well as different levels of taxation of royalties apply upon payment of royalties abroad. The scholars conclude that prior accepting any OECD recommendations in this respect, the countries should coordinate the measures at the level of the EAEU for effective implementation and result. [73]

For the purposes of this work, the author has reviewed the tax treaty network between member states and treaty network of each member state to understand the states' positions, attractiveness for foreign investors and potential indicators of preferred jurisdictions in the EAEU.[74] The first common observation is that there are tax treaties in place between all the member states of the Union, except for the relations between Armenia and Kyrgyzstan – where there is no double tax treaty in place. The largest treaty network belongs to Russia – 84 tax treaties (as of 16 January 2017), followed by Belarus – 66 tax treaties (as of 15 January 2017), Kazakhstan – 51 tax treaties (as of 1 March 2017), Armenia – 45 tax treaties (as of 1 June 2017) and Kyrgyzstan – 26 tax treaties (as of 15 January 2017).

The closer look at Armenian treaties revealed that to the number of income and countries may be granted the zero rate or very low rate of income taxation, which creates loopholes in the whole system. For instance, zero rate on dividends paid to qualifying companies applies in relation to income paid to Spain or Sweden if amount of capital invested exceeds certain threshold and holding period is longer than two years. Dividends paid to other companies and individuals may be taxed at a lower rate of 3% (the UAE), while the average tax rate applied in this case is comparatively high – 12,5%. Zero rate on interest and royalties may apply to payments to UAE, Ukraine, Russia without any restrictions.

Armenia				
	Dividends – CIT qualifying companies	Dividends - PIT. and CIT non-qualifying companies	Interest	Royalty
National tax rate – CIT	10	10	0/10	10
National tax rate – PIT	n/a	10	10	10
Max. tax treaty rate	15	15	10	15
Min. tax treaty rate	0	3	0	0
Average tax treaty rate	4.1	12,5	5.2	6,25
Treaty With:				

[69] See 3. M.Assilova, Business taxation and potential harmful tax competition in the Eurasian Economic Union based on the experience of the European Union and the OECD initiatives, monography, 2017.

[70] The remaining two members (Armenia and Kyrgyzstan) were out of scope of the research.

[71] See Assilova, Ibid.

[72] Великова Е.Е., Гуляева С.А, Корниенко Н.Ю., Постникова Н.Ю, Налоговая конкуренция между странами и объединениями стран на постсоветском пространстве, 2015.

[73] Ibid.

[74] The review was possible due to the IBFD research platform and collection of tax treaties and national reference tables therein. Available at: www.ibfd.org

Belarus	15	10[75]	10	10
Kazakhstan	10	10	10	10
Kyrgyzstan[76]	-	-	-	-
Russia	10	5[77]	0	0

The revision indicates that Belarus in a number of treaties provide for the zero taxation rate with respect to all types of income. Such treaties are concluded in particular with the UK (all types of income), Denmark (interest), Spain (interest) and the USA (royalties). Sometimes countries tempt to apply zero rates on income aid to government structures or authorised banks of other states, however, for the purposes of this study in the line "min.tax treaty rate" the rates granted to such government entities were not included. In other words, the zero rates granted are easily available to any entity or individual.

Belarus				
	Dividends – CIT qualifying companies	Dividends - PIT. and CIT non-qualifying companies	Interest	Royalty
National tax rate – CIT	12	12	0/10	15
National tax rate – PIT	n/a	13	0/13	13
Max. tax treaty rate	18	18	15	18
Min. tax treaty rate	0	0	0	0
Average tax treaty rate	5	6,25	4,67	7,68
Treaty With:				
Armenia	15	10[78]	10	10
Kazakhstan	15	15	10	15
Kyrgyzstan	15	15	10	15
Russia	15	15	10	10

As illustrated in the table below, Kazakhstan has very consistent and stringent policy applied to dividends. In case of individuals, very rarely the rate is lowered to 10% from 15%. The average rate amounts to 14,1% and is the highest among five countries. With respect to intercompany dividends, the lowest rate is usually 5%, with exception of two countries (the Netherlands and Switzerland) where the 0% rate may apply if the conditions are met. With respect to other types of income, Kazakhstan equally demonstrates the consistency and stringent approach. However, with such policy the country may be the least attractive as a holding jurisdiction in the Union.

Kazakhstan				
	Dividends – CIT qualifying companies	Dividends - PIT. and CIT non-qualifying companies	Interest	Royalty
National tax rate – CIT	15	15	15	15
National tax rate – PIT	n/a	5/15[79]	15	15
Max. tax treaty rate	15	15	12,5	15
Min. tax treaty rate	0[80]/5	10	10[81]	10
Average tax treaty rate	5,95	14,1	9,58	10

[75] The rate applies if the recipient company holds at least 30% of the capital of the Armenian company.
[76] There is no tax treaty in place with between these EAEU member states.
[77] The rate applies if the recipient company holds directly at least USD 40,000 of the capital of the Armenian company.
[78] The rate applies if the recipient company holds at least 30% of the capital or the voting power in the distributing company, as the case may be.
[79] 5% rate applies to resident individuals, while 15% rate applies to non-residents. In both cases exemption is possible.
[80] Zero rate applies in case of two countries – the Netherlands and Switzerland. However, only under the condition if (i) the recipient company owns 50% of the capital of the paying company; (ii) that participation has a value of at least USD 1 million; (iii) the head office's state of residence has secured the participation. The 5% rate applies if the recipient company owns at least 10% of the capital of the paying company.
[81] Only in case of Czech Republic the rate could be lowered to 0% if paid to Central bank or the subdivision of the government. Most favorite nation clause may apply in some treaties.

Treaty With:				
Armenia	10	10	10	10
Belarus	15	15	10	15
Kyrgyzstan	10	10	10	10
Russia	10	10	10	10

The tax treaty policy of Kyrgyzstan looks quite inconsistent. While keeing the withholding taxes reasonably high – 10/15% in some cases, with several low tax jurisdictions, Kyrgyzstan agreed not to apply withholding taxes at source on dividends and interest at all, for instance with the UAE, Sauda Arabia, Qatar or to apply minimum rate of 5% in many other cases, making the average withholding rate applicable to dividends to be 5% and to interest - 7.5%. With royalties, the situation is slightly better – no country can benefit from the 0% rate and the average constitutes to 7.5%.

Kyrgyzstan				
	Dividends – CIT qualifying companies	Dividends - PIT. and CIT non-qualifying companies	Interest	Royalty
National tax rate – CIT	10	10	10	10
National tax rate – PIT	n/a	10	10	10
Max. tax treaty rate	15	15	15	15
Min. tax treaty rate	0	0	0	5
Average tax treaty rate	5	5	5,5	7,5
Treaty With:				
Belarus	15	15	10	15
Kazakhstan	10	10	10	10
Kyrgyzstan[82]	-	-	-	-
Russia	10	10	10	10

Review of Russian treaties indicate an interesting tendency. Russia looks consistent in its tax treaty policy with respect to dividends taxation – payments to many low tax jurisdictions are taxed without application of tax treaty or in case of application of the later (treaty with UAE does not apply to individuals), the rate is not much different from the domestic tax rate (Switzerland, the Netherlands, Luxembourg). With respect to other types of income, tax rate may be lowered to zero rate. What concerns treaty network with other EAEU members, the treaty with Armenia brightly stands out from other treaties by its lowed rates.

Russia				
	Dividends – CIT qualifying companies	Dividends - PIT. and CIT non-qualifying companies	Interest	Royalty
National tax rate – CIT	15	15	9/15/20	20
National tax rate – PIT	n/a	15	0/30	30
Max. tax treaty rate	15	15	15	15
Min. tax treaty rate	5/0[83]	5	0	0
Average tax treaty rate	6,08	12,5	6,875	9,11
Treaty With:				
Armenia	10	5[84]	0	0
Belarus	15	15	10	10
Kazakhstan	10	10	10	10
Kyrgyzstan	10	10	10	10

Based on the above it may be concluded that there is a good tax treaty network between the member states and also of the states with third countries, which shall assure elimination of double taxation and provide the tools for tax authorities for cooperation in tax matters. However, the presence of treaties does not only mean the prevention of potential double taxation, but also existence of risks

[82] There is no tax treaty in place between these EAEU member states.
[83] In most case zero rate is available only in case of state participation, rarely in case of participation of pension fund or financial institution.
[84] The rate applies if the value of the holding is at least USD 40,000.

for tax planning and avoidance by taxpayers, as well as potential for tax competition between the states, which, as was explained above, is not always a positive element. Absence of tendencies in the tax treaties of most countries indicate the potential for tax planning opportunities, together with the fact that some countries tend to conclude treaties with countries with privileged tax treatment, such as the UAE, Ireland, Singapore and others and what is worse – agree with them on very low or absence of withholding taxes. In addition, in the domestic rates of some of the countries one can observe that more than one rate may be applicable to certain income and this could indicate at least one of the following: 1) lower rate is available if taxpayer satisfies certain conditions – e.g. holding period, percentage of investment and etc. or 2) lower rate is applicable to residents only, in which case it may indicate signals of discriminatory measures, which are usually prohibited in the single market. Taken that tax treaties is a good tool for coordination of certain tax aspects, but not for elimination of barriers in the single market, [85] as well as the risk of tax avoidance, there may be a need to develop further instruments for income tax coordination and harmonization in the EAEU, including the common policy with respect to external tax relations and tax treaties.

Direct tax harmonization – reasons dictated by local practices

The same idea on the need for direct tax harmonization was expressed by the local scholar Zakharova,[86] who correctly states that besides the indirect tax harmonization, which is envisaged in the EAEU Treaty and with respect to which were taken number of actions, the direct taxes also require gradual adjustments and unification. Zakharova underlies that in comparison to indirect taxes, the income taxes may not contribute as much more to the state budgets with the increase in the mutual trade between the member states, but from another side, the differences in the tax rates, the ways the tax base is formed and the list of available tax incentives lead to the different income tax burdens and consequently create different levels of attractiveness of countries for foreign investors. Consequently, she believes that in order to prevent revenue losses, it is necessary to undertake gradual harmonization of the elements of the income taxes in the member states.[87]

In view of Zakharova, it is better to initiative direct tax harmonization from simplification of the administrative procedures, which are often complex and diverse among the member states, and complicate the process of approximation of the tax systems.[88] She correctly believes that simplification and harmonization of administrative procedures may be less sensitive issue in the tax systems and policies of member states, and therefore shall be feasible taken the current development level of the Union, but at the same time it will constitute the first necessary brick towards harmonization of other income tax elements.[89] Administrative burden with tax compliance is quite diverse among the member states, which in turn influences on investment attractiveness of member states. Thus, based on research undertaken by the World Bank and PWC in 2017, the first country in the rating of ease of paying taxes is Russia – 45th in the world, followed by Kazakhstan, Armenia, Belarus and Kyrgyzstan. However, Russia together with Belarus have the highest overall total tax rate, which is for instance 2.5 times higher than in Armenia. Kazakhstan and Kyrgyzstan stand equally with respect to overall tax rate. What concerns the time burden, three founding member states stand much better with this respect that Armenia and Kyrgyzstan.

Country	Overall rankig	Total Tax Rate %)	Time to comply (hours)	Number of payments	Post-filing index
Armenia	88	18.4	313	14	49.08
Belarus	99	54.8	176	7	50.00
Kazakhstan	60	29.2	178	7	49.08

[85] Pirvu D., Corporate Income Tax Harmonization in the European Union, Palgrave Macmillan UK, 2012, p.1. Ibid.
[86] Захарова (Zakharova), Ibid.
[87] See also K.Kurcer, “Problems with unification of tax law in the context of Eurasian integration”, Evrazijskij juridicheskij zhurnal, No. 2, 2012. Original: Курцер К. М. Проблемы унификации налогового права в условиях евразийской интеграции // Евразийский юридический журнал № 2, 2012.
[88] See also M.Zelenkevich, “Problems with unification of tax systems in the framework of customs union”, Vestnik, Mezhdunarodnaja economica, No.4(217), 2012. Original: Зеленкевич М. Л. Проблемы унификации налоговых систем в рамках таможенного союза // Вестник. Международная экономика № 4 (217), 2012.
[89] Zakharova, Ibid.

Kyrgyzstan	148	29.0	225	51	36.93
Russia	45	47.4	168	7	87.59

* Table is composed based on the data available at PWC global Overall ranking and data table, http://www.pwc.com/gx/en/services/tax/paying-taxes-2017/overall-ranking-and-data-tables.html.

For unification processes may be used the positive example of one of the member states, where certain tax procedures perform better than in other countries.[90]

Mambetaiyev also identified main directions for direct tax harmonization, which in his view shall be:

- to approximate and unify the national tax systems;
- to analyse tax competition between the member states, the impact it has on the tax payments, the level of investment and movement of capital therein in order to assure equal tax liabilities in the member states;
- to analyse the double tax treaties in place;
- to develop a single common list of black-listed jurisdictions, which provide for privileged taxation;
- introduce effective measures for transfer pricing control;
- to develop and apply the effective means and instruments for taxation of multinational corporations and natural monopolies to assure equal conditions for their activities;
- to develop favorable conditions for labor migration, including common rules for determination of tax residency and social benefits;
- to increase the investment attractiveness of each member state.[91]

While the directions identified by Mambetaliyev are relevant, it is difficult to draw precise conclusion and recommendations based on his ideas, because in most cases he does not specify the particular issue to be addressed or resolved within each action he proposes. Exception to this is the idea to draw the common list of black-listed jurisdictions, which may be a useful kit against tax avoidance practice and example of one can witnesses in the EU practice now. However, in general, he is correct in identifying the broad scope of actions to be necessary in the sphere of direct tax harmonization.

Indirect tax harmonization – reasons dictated by local practices

With respect to indirect tax issue, local scholars emphasise the need work on harmonization of rates for excise and VAT. VAT rates currently range from 10 to 20% in the member states, including zero rate, which is applicable to some products in some member states. Excise rates also vary, which as explained by Yakupov, may have a negative impact on the budgets of countries. He makes a local example, where at the beginning of the functioning of customs union between Belarus, Russia and Kazakhstan, Russia had the highest level of excise taxes, which led to inflow of alcohol production from Kazakhstan and Belarus, the part of which was illegally realized for lower prices and led to deficiency of excise taxes in the Russian federal and regional budgets.[92] Yakupov is also of the opinion that discrepancy among the rate and administrative burden affect the volume and proportion of investment among countries. All the attempts for harmonization, as will be discussed in the following section, concerned the administrative issues and principles for base determination, but not yet the rates. However, there are still mismatches in the national systems due to still existing administrative processes and various privileges which in view of the scholar need to eliminated for creation of single investment space.[93] Another problem in the region in connected with different policies of countries with respect to VAT refund. Kazakhstan for instance delays the refund of input VAT especially in case of exporters of natural minerals from the country: this is linked to the huge

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[90] Zakharova, Ibid.

[91] See Mambetaliyev, book. Ibid. 2012.

[92] See Yakuov. Ibid.

[93] Ye.Trunina, "Legal regulation of customs relations in the Eurasian Economic Union", Evraziistvo: na puti k Bolshoi Evrope, 2015. Original: Трунина Е.В., Правовое регулирование таможенных отношений в Евразийском экономическом союзе // Евразийство: на пути к «Большой Европе»: учеб пособие / кол. авт.; науч. ред. Ю.Н. Сушкова. – Саранск: Изд-во Мордов. ун-та, 2015. – С. 167-205. See also: I.Nabirushkina, "To the issue of unification of the rates of excise taxes within the framework of functioning of the EAEU", Nalogi, 2015. Набирушкина И. С. К вопросу об унификации ставок косвенных налогов в условиях функционирования ЕАЭС / И. С. Набирушкина // Налоги. – 2015. – № 2. – С. 26-27.

amounts of input VAT involved and inability of the budget system to refund in the recent year the VAT paid for instance in the periods of 2009-2011, simply due to the fact that it was spent. In Belarus it is the reverse the situation and companies get their refunds, which some scholar consider as a subsidy taken the situation in other countries.[94]

With respect to other taxes that may influence cross-border trade in the EAEU, it was noted that Kazakhstan charges an export rent tax on the exported coal to other member states. There was a court proceeding on the same in front of the Court of EurazEC, however, the Court considered the issue to be outside of its competence. Later on, member states agreed to include this tax in the list of barriers for the single market.

1.3.3. Legal basis for tax harmonization in the founding treaties

1.3.3.1. EU

The cornerstone of the European legal structure is the principle of attribution of powers by the member states upon the Union.[95] This principle is also known as "the principle of conferred powers" and implies that the Union has competence and may act only in matters conferred upon it by the member states.[96] The competences not conferred upon the Union remain with the Member states.

There are mainly three levels of competence the EU has in different areas: exclusive, shared and competence to support, coordinate or supplement actions of the member states, without superseding the member states' competences. Exclusive competence means that EU is solely responsible for legislation and adoption of legally binding acts, whereas the EU member states are able to do so themselves only if so empowered by the EU or for the implementation of Union acts.[97] Shared competence implies that both, the Union and the member states, may legislate and adopt legally binding acts in certain area. However, the member states shall exercise their competence to the extent that the Union has not exercised its competence or to the extent that the Union has decided to cease exercising its competence.[98] Finally, there are areas, where the EU has no competence to act and thereby supersede the competence of member states, but it may support, coordinate or supplement the actions of the member states.[99] This right the EU may in particular exercise in the areas of (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection and (g) administrative cooperation.[100]

Article 3 of the TFEU provides for the list of areas, where the Union shall have exclusive competence and among other areas in includes competence in customs union matters,[101] which by default implies the exclusive power of the Union to act on abolishment of all internal tariff and non-tariff barriers.[102] The tax barriers are however not considered as a part of the customs regulation, but instead may fall under the internal market issues, which is considered as area of shared competence between the EU and the member states. In indirect tax matters the EU has exercised greater competence than in direct tax matters.

In the TFEU itself there are also explicit provisions which call for harmonization of indirect taxes – these are article 110-113. Article 110 establishes principle of non-discrimination with respect to foreign goods and prohibits member states to use internal tax measures in a way to directly or indirectly protect their domestic products. Article 111 requires member states to assure equal repayment of internal taxation upon exportation of goods to other member states – thus encouraging the export. Article 112 prohibits the use of charges other than indirect taxes with respect to imported products and equally prohibits repayments of charges in respect of exported products – assuring the discrimination does not take place with the use of such other measures similar to indirect taxes. Article 113 TFEU –attributes the power to the union institutions to act with respect to indirect tax harmonization. The Council may adopt provisions for harmonization of legislation concerning

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[94] See V.Tyutyuryukov, What can VAT Statistics Tell Politicians? (with a Focus on EAEU Data), In: NISPAcee Journal of Public Administration and Policy, 2016, Vol.IX, No.2, pp.239-269. ISSN 1337-9038.

[95] C.Hji Panayi, *European Union Corporate Tax Law* ch.1 (Cambridge University Press 2013)

[96] See article 5 para. 2 TEU

[97] See article 2 para. 1 TFEU.

[98] See article 2 para. 2 TFEU.

[99] See article 2 para. 5 TFEU.

[100] See article 6 TFEU.

[101] See article 3 para. 1 subpara. A) TFEU.

[102] See article 2 para. 1 TFEU.

indirect taxes to the extent necessary to ensure the establishment and the functioning of internal market and avoid distortion of completion. The Council may adopt such decision only by acting unanimously and after consulting the EU Parliament and the Economic and Social Committee. Herewith, as indirect taxes are considered taxes on turnover (VAT), excise duties and recently, based on the proposal of the EU Commission the attention was turned to taxation of financial sector. The initial attention of the EU was mainly paid to harmonization of indirect taxes – up to the mid of 1980s, which indicates the primary objective of the Union was to assure the free trade area. Only when the level of free trade area was more or less achieved, the EU turned its attention to harmonization of direct taxes, which mainly represent obstacles towards completion of internal market by creating distorting effect on decisions of economic operators as to the place of investment, business or personal establishment, place of trade or employment.[103]

In direct tax matters the Union has no competence to act, member states reserve their sovereign powers to regulate on the same. However, in doing so they have to respect the fundamental principles of the Union law – in particular, principles non-discrimination as applicable to each freedom. However, although, there is no explicit capacity granted to the Union, there is article 115 in the TFEU on the basis of which were taken several directives on direct tax matters. Article 115 is general in nature and authorises the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, 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.[104] This article serves the basis for the Union to act on the matters of direct taxes, but only to the degree it is necessary for the functioning of the internal market. However, once the Union has used its power to regulate on direct tax matter by way of directive or regulation, the member states respectively lose their individual power to regulate on the same issue.[105] Herewith, each member state also reserves the right of veto – and in case the Council is considering new directive, its adoption can be blocked by the single member state exercising the right of veto. This slows down the legislative process and resulted in a number of non-adopted or postponed legal acts in the sphere of direct taxation. In view of this fiscal veto right belonging to each member states, some European scholars believe that this effectively means that the Union does not have competence in the direct tax matters. [106] The areas in which the Union has no competence to act, but may only support and coordinate member states are provided in article 6 TFEU.

The harmonization of direct taxes has smaller Treaty basis than harmonization of indirect taxes.[107] Article 115, which provides for the general power of the Council to adopt directives for approximation of laws of the member states, which affect the functioning and establishment of internal market, is the only legal basis for harmonization of direct taxes. Similarly to article 113, it requires the Council to act unanimously and consult the EU Parliament and the Economic and Social Committee.

Although there is legal basis provided in the TFEU, based on which the Union may adopt measures for tax harmonization, it may only exercise its power in cases, when such actions are necessary to achieve the purposes of the Union and where member states would not be able to achieve the same level of harmonization if acted independently. This is known as principle of subsidiarity. The member state, therefore, preserve their sovereign power to formulate and organize national tax systems, however, the provisions of national legislation shall comply with the principles envisaged in the TFEU.

These freedoms are directly applicable and even though this explicitly is not provided in the agreement on EU, the taxation (in particular direct taxation) should not prevent their legal power and therefore should equally comply, irrespective that Union may have no competence in this area (case of the EU – see. Ch.4 Panayi). In the EU, the direct applicability of the freedoms was decided in the case Case C-1/93 Halliburton Services BV v. Staatssecretaris van Financiën [1994] ECR I-1137, para. 16.

[103] See B. Terra, P. Wattel, *European Tax Law,* Ch.2 (Wolters Kluwer Law & Business 2012), p.13.
[104] See art. 115 TFEU.
[105] See B. Terra, P. Wattel, *European Tax Law,* Ch.1 (Wolters Kluwer Law & Business 2012), p. 9.
[106] See C.Hji Panayi, *European Union Corporate Tax Law* ch.1 (Cambridge University Press 2013)
[107] See B. Terra, P. Wattel, *European Tax Law,* Ch.2 (Wolters Kluwer Law & Business 2012), p.22

Tax harmonization in the EU is happening by means of so called "positive" and "negative" integration. Positive integration implies harmonization of laws by means of issuance of legislative instrument at the level of the EU, such as Directive or Regulation. Positive tax harmonization is more commonly used for indirect taxes, because adoption of such instrument requires unanimous agreement of all member states and it is achieved easier in case of indirect taxes, than direct taxes. Positive integration is also common for direct taxation, however, is used less frequently. Harmonization of direct taxation thus mainly happens through the process of negative integration – which is happening through the work of the CJEU, which assesses the national tax legislation of member states on its compatibility with the Union law – i.e. freedoms, market equality, market distortion, non-discrimination and others. In case of non-compliance of national tax law provisions with the principles of the Treaty – the member state shall amend the legislation and make it compliance with the EU law. The court decisions create precedents for the future similar cases. The Commission may also assess the compatibility of other member state similar measures on compatibility with the EU law based on the interpretation of these principles, provided by the CJEU. Since national tax systems are very diverse and mainly harmonization is happening through the court practice, the harmonization of direct taxation until the current moment was chaotic and unsystematic therefore.

Directives issued by the Council of the EU are the laws of the EU, but are not exactly the sources of national law of the member states, but instead require to be implemented at national level to become separate national law or amend the existing one. Directive provides for guidance (which may be general or quite detailed) what the domestic legislation should provide for, whereas member states are free to implement directive and realize its purpose in different ways, with the only obligation to achieve the result of the directive. Each directive contains the date, by which member state should transpose it into national law. After that date, the Commission is eligible to look for inconsistency of the national law with the Directive or disputes could arise between the tax authorities and taxpayers, in cases when taxpayers may find their rights violated due to late or non-compliance of national law with the directive. As said above, the directive usually provides for the general purpose to be achieved and gives certain guidance for the member states on how to do it – e.g. eliminate economic double taxation of dividends by prohibiting source state to levy withholding tax on dividends and requiring resident state to provide for exemption or indirect tax credit with respect to foreign dividends, however, as long as directive does not provide for specific wording of the provision, which has to be implemented by the member states in the national legislation, it cannot assure complete harmonization of tax rules. The Commission itself admits that from the outset the Member states have a lot of power and options on how to implement the directives and this often leads to divergent implementation of the same principles envisaged by the directive by different member states.[108]

1.3.3.2. EAEU

The preamble to the EAEU Treaty together with the articles 1-4 indicate the main objective of establishment of the Eurasian Economic Union and basic principles of the functioning of the Union. They particularize, among others the Unions founding values, such as principle of the sovereign equality of states, respect for the universally recognised principles of international law, ensuring mutually beneficial cooperation, equality and respect for the national interests of the member states; respect for the **principles of market economy** and **fair competition**.[109] The main objectives of the Union consist of creation of proper conditions for sustainable economic development of the member States in order to improve the living standards of their population, as well as the **creation of a common market for goods, services, capital and labour** within the Union and to ensure comprehensive modernisation, cooperation and competitiveness of national economies within the global economy.[110] The member states shall create favourable conditions to ensure proper functioning of the Union and shall refrain from any measures that might jeopardise the achievement of its objectives.[111] The common market is defined as "a set of economic relations within the Union ensuring the freedom of movement of goods, services, capital and labour".[112] The principle of fair

[108] See Com(96)328 dated 22 July 1996, available at: http://aei.pitt.edu/4035/1/4035.pdf accessed on 27 October 2016
[109] See article 3 EAEU Treaty.
[110] See article 4 EAEU Treaty.
[111] See article 3 EAEU Treaty.
[112] See article 2 EAEU Treaty.

competition shall be observed by the member states by application of competition (antitrust) legislation to economic entities (market participants) in an equitable manner and to the equal extent irrespective of the legal form and place of registration of such economic entities (market participants).[113] In selected spheres member states are required to work on harmonization of national legislations to facilitate the creation of common market.[114] Thus, the EAEU Treaty explicitly calls the EAEU member states to determine "the directions, forms and procedures for the harmonisation of legislation in respect of taxes affecting their mutual trade so as to prevent violation of any terms of competition and interference with the free movement of goods, works and services at the national level or at the level of the Union, **including:** 1) harmonisation (convergence) of excise tax rates for the most sensitive excisable goods; 2) further improvement of the system of collection of value added taxes in mutual trade (including the use of information technology)".[115] The call for development of harmonised directions, forms and procedures in the sphere of taxation may be interpreted very broadly, which in addition to explicitly highlighted indirect taxes, may also cover call for harmonization of direct taxes, which affect the "mutual trade" and "violate the terms of competition". This however is debated and require clarification by the competent authority.

The above provision is the only one in the Treaty, which calls for harmonization of taxation. In the Treaty, however, there is no provision that would explicitly confer the necessary power on the EAEU institutions to work on harmonization of taxation. As will be discussed further, the Supreme Council of the Union has very generally defined capacity, which effectively gives it authority to act in all sphere regulating the functioning of the Union, including the capacity to direct the work of other institutions. Thus, in one of its decision,[116] the Supreme Council approves the responsibilities inside the Board of the Commission and in particular attributes the "function of the Commission in the sphere of taxes and taxation" to the Commission Minister responsible for the economy and financial policy of the EAEU. The decision in its essence is important, because it seems to be the sole legal basis based on which the Commission undertakes activities related to taxation within the Union. Although, the author failed to identify the provision that would confer rights on the Union institutions to act in the sphere of tax harmonization, there is one more important phenomenon – the Disposition of the Intergovernmental Council[117] (the institute of the Union standing one level below the Supreme Council), which invites the Commission to work on development of measures aimed at harmonization of excise tax rates on alcohol and tobacco products in the EAEU member states. Taken the existence of such disposition and absence of explicit provision[118], one could assume that perhaps general provision on the need to "harmonise of legislation in respect of taxes affecting the mutual trade so as to prevent violation of any terms of competition and interference with the free movement of goods, works and services at the national level" may be considered as authorising institutions to act on it.

1.4. Review of integration stages in the EU and respective tax developments at each level of integration

The current extent of tax harmonization among the EU countries was achieved gradually and took more than 60 years.[119] Hence, the national tax systems are far from being completely harmonised, are not perfect and achieved level of harmonization does not solve many issues with respect to in particular, income taxation, the national tax systems changed a lot over this period to accommodate the objectives of the Union. In the coming section, the author of this work overviews the development of the EU Union and its gradual shifts in the policy that made the current level of tax harmonization possible.

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[113] See article 75 EAEU Treaty.

[114] In contrast to the EU treaties, in the EAEU Treaty there is no one general provision that would explicitly call for harmonization of national laws for facilitation of the creation and functioning of the common market. See example of such provision in article 114 TFEU.

[115] See article 71 para. 3 EAEU Treaty.

[116] Decision of the Supreme Council of the EAEU No. 37 dated 21 December 2015.

[117] Disposition of the Intergovernmental Council No. 14 dated 29 May 2015.

[118] For instance, one similar to the article 113 in the TFEU.

[119] European integration started in 1951 with establishment of Coal and Steel Community.

The economic integration of European states started with the Coal and Steel Community back in 1951.[120] The respective agreement provided for intention of the states to join forces and build common market to expand the basic production of member states, to raise the standard of living and further growth of employment.[121] The idea of common market in the initial agreement did not address free movement of goods in general, but only called for elimination of barriers that could complicate the cross-border trade of coal and steel between the states, such as import and export duties, other charges having equivalent effect and quantitative restrictions on the movement of products.[122] Additionally, agreement prohibited measures that would discriminate between producers, purchasers and consumers, however, within the context of the provisions and precise wording such measures could be understood as only the ones affecting prices, delivery terms and other fees relevant to cross-border trade.[123] Tax matters were not explicitly addressed by that agreement, neither the free movement, other than coal and steel, was envisaged therein. Nevertheless, the agreement provided for the need to abolish restrictions "based on nationality upon the *employment in the coal and steel industries* of workers who were nationals of Member States and had recognized qualifications in a coal mining or steelmaking occupation, *subject to the limitations* imposed by the basic requirements of health and public policy."[124] Although that provision was subject to certain limitations and applied only with respect to employment in coal and steel industry, it was the first brick towards free movement of labour and principle of non-discrimination.

1.4.1. Common market in the EU, the period from 1957 to 1986

The initial proposal for common market with the free movement of goods, services, labour and capital was expressed in 1956 with the Spaak report of High Authority.[125] The report constituted a foundation for the upcoming treaty of Rome signed in 1957[126] and brought to attention the idea of horizontal integration of the economies, rather than sector by sector integration preferred earlier. The report addressed the distortions that could negatively affect the competition in the common market by proposing member states jointly with the Commission to study national regimes to identify the provisions that could possibly distort the competition of the common market.[127] Although, the intention was generally formulated, it could concern every aspect of national legislation, including taxation.

Following up on the concepts in the Spaak report, the next Treaty on European Economic Community (EEC Treaty) – also known as the treaty of Rome of 1957, contained important principles on establishment and functioning of the common market. Wherein, the EEC Treaty did not give precise definition of "common market", but rather elaborated on the principles inherent to common market throughout the agreement. As a fundamental principle for the common market, the

[120] Was established by the Treaty constituting the European Coal and Steel Community, signed in Paris on 18 April 1951, available at: http://www.consilium.europa.eu/uedocs/cmsUpload/Treaty%20constituting%20the%20European%20Coal%20and%20Steel%20Community.pdf, accessed on 7 September 2015

[121] See preamble and article 2 of the Treaty constituting the European Coal and Steel Community

[122] See article 4 of the Treaty establishing the European Coal and Steel Community

[123] See article 4 of the Treaty establishing the European Coal and Steel Community

[124] Article 69 of the Treaty establishing the European Coal and Steel Community

[125] Formally known as Brussels report on the general common market, prepared by the Spaak Committee in 1956, available at: http://aei.pitt.edu/995/1/Spaak_report.pdf, accessed on 7 September 2015 The proposal did not give explicit definition of common market, but rather explained the idea throughout the report addressing separately each attribute. The freedom for movement of capital is expressed in Chapter 4 under Title III in the Annex to the report and is defined as "The States agree at the end of the transitional period to establish among themselves the free movement of capital – which embraces the unrestricted right of nationals of member States to obtain, to transfer, and to use capital obtained within the Community anywhere in the common market and including the right to create new enterprises, to acquire shares in existing enterprises and to participate in their management." Free movement of labor is addressed in Chapter 3 under Title III in the Annex to the report.

[126] Treaty establishing the European Economic Community (signed in Rome on 25 March 1957 and known as Treaty of Rome) and Treaty establishing the European Atomic Energy Community (signed in Rome on 25 March 1957), available at: http://www.cvce.eu/content/publication/1999/1/1/cca6ba28-0bf3-4ce6-8a76-6b0b3252696e/publishable_en.pdf

[127] See chapter 2 under Title II in the Annex to the Brussels report on the general common market.

EEC Treaty included the principle for free movement of capital,[128] labour[129] services,[130] right of establishment[131] and the need to abolish any obstacles towards its realization.[132] Apart from freedoms, the EEC Treaty generally prohibited discrimination on the grounds of nationality[133]. The Treaty envisaged 12 years to achieve the common market.[134] Herewith, although the general principles prohibited "discrimination" and called for abolition of restrictions for realization of freedoms, the EEC Treaty for a long time did not serve as a legal basis to regulate tax issues with respect to free movement of labour, capital, services, and right of establishment. In contrast, the EEC Treaty contained precise provisions calling for harmonization of indirect taxes and a lot has been done in this area in the period from 1957-1986.[135]

1.4.1.1. Indirect taxation

In the area of indirect taxation (turnover taxation with VAT and excise taxes) was achieved high level of tax harmonization. In 1967 were adopted first two directives in VAT that required member states to introduce VAT instead of other cascade taxes that were applicable as turnover taxes in all member states,[136] except for France. The Neumark report,[137] produced by the Fiscal and Financial Committee who studied the extent to which the tax systems of member states conflicted with creation of common market, found that cascade taxes distorted competition at national markets and international trade because upon applying the cascade taxes it was impossible to calculate exact turnover tax burden beard by specific commodity and upon application of destination principle for charging turnover consumption tax it was impossible to determine the corresponding countervailing duties or refunds.[138] Therefore, it was decided to introduce common system of VAT in all member states. However, the first two directives gave very little guidance in terms of harmonization[139] and the national implementation of directives among member states varied significantly. Member states introduced different approaches towards treatment of agricultural activities, retail stage of business activities, exemptions, deduction of import taxes and the treatment of cross-border services, which

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[128] See article 67 para. 1 the Treaty of Rome, which provides that: *"Member States shall, in the course of the transitional period and to the extent necessary for the proper functioning of the Common Market, progressively abolish as between themselves restrictions on the movement of capital belonging to persons resident in Member States and also any discriminatory treatment based on the nationality or place of residence of the parties or on the place in which such capital is invested."*

[129] See article 48 para. 1 and 2 the Treaty of Rome, which provides that: *"1. The free movement of workers shall be ensured within the Community not later than at the date of the expiry of the transitional period.*
2. This shall involve the abolition of any discrimination based on nationality between workers of the Member States, as regards employment, remuneration and other working conditions."

[130] See article 59 the Treaty of Rome, which provides that: *"Within the framework of the provisions set out below, restrictions on the free supply of services within the Community shall be progressively abolished in the course of the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person to whom the services are supplied."*

[131] See article 52 the Treaty of Rome, which provides that: *"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be progressively abolished in the course of the transitional period. Such progressive abolition shall also extend to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to engage in and carry on non-wage-earning activities, and also to set up and manage enterprises and, in particular, companies within the meaning of Article 58, second paragraph, under the conditions laid down by the law of the country of establishment for its own nationals, subject to the provisions of the Chapter relating to capital."*

[132] See article 3 subpara. c) of the Treaty establishing the European Economic Community that call the Community to take actions *"for the abolition, as between Member States, of the obstacles to the free movement of persons, services and*
Capital".

[133] See article 7 of the Treaty establishing the European Economic Community

[134] See article 8 of the Treaty establishing the European Economic Community

[135] See article 95 of the Treaty establishing the European Economic Community

[136] Directives 67/227/EEC and 67/228/EEC dated 11 April 1967.

[137] The Report of the Fiscal and Financial Committee, 1963, available at: http://www.steuerrecht.jku.at/gwk/Dokumentation/Steuerpolitik/Gemeinschaftsdokumente/EN/EEC%20Reports.pdf accessed on 5 September 2015.

[138] See B. Terra, P. Wattel, *European Tax Law,* Ch.4 (Wolters Kluwer Law & Business 2012), p.168.

[139] See table part 1.4.3. of this work, which briefly described aspects that were addressed by the Directives.

created the most serious problem.[140] Along with that national rules differed in terms of defining the place of supply of services, the distinction whether certain transaction should have been considered as supply of goods or services, as well as in defining exportation transactions.[141] This resulted in market distortions caused by double tax and non-taxation.

This led to adoption of another important Council Directive known as the Sixth Directive in 1977, which required introduction of uniform tax basis for assessment of VAT.[142] It repealed the second directive and set out the detailed rules of VAT: e.g. 1) provided definition of the place of supply for goods and services; 2) provided definition of taxable amount including taxable amount of imported goods; 3) introduced minimum standard rate of 15%; 4) provided for the right of member states to have one or two reduced rates, which however should not be less than 5%; 5) introduced scope of possible exemptions; 6) established list of situations, where member states were obliged to grand deduction or refund of input VAT.[143] Last important directive on harmonization of VAT within the common market period was adopted in 1979[144] and dealt with refund of VAT to taxable persons not established in the territory of the member states.

In 1979 were adopted two directives on mutual assistance between the member states in VAT matters. The Initially adopted Council Directive 77/799/EEC[145] was adopted for mutual assistance by the competent authorities of member states in the field of direct taxation, but was extended to cover VAT in 1979.[146] It was, however, not very effective for VAT purposes. The second directive of 1979 concerned the mutual assistance for the recovery of claims[147] and its scope was extended by the Council Directive of 1979 to VAT matters.[148]

During the common market period no legislative measures were adopted for harmonization of excise taxes. There was, however, draft proposal for directive issued by the Commission on progressive harmonization of excise duties and indirect taxes other than VAT.[149] It proposed member states to apply harmonized system of excise duties to mineral oils, manufactured tobacco, alcohol, beer and wine. It also proposed to discontinue application of other taxes on goods than turnover taxes, and taxes which did not require border control or tax adjustments.[150] The Council was also to retain to have power to harmonize excise taxes on other products. However, this draft was never adopted.

1.4.1.2. Direct taxation

Although the were no measures of harmonization taken with respect to direct taxes during the first three decades of the Union (community) existence, the proposal for harmonization of direct taxation have been under discussion for many years and started in early 1960s with the Neumark report; in 1970 it continued with the Van den Tempel report; in 1969 was issued the proposal for the first directive for harmonization of withholding taxes on dividends; in 1971 the Council Resolution of 22 March on requirement of the Commission and Council to work on further harmonization of taxes that have direct influence on movement of capital, including taxes on dividends and interest, as well as company taxation;[151] in 1975 was issued the Commission proposal for a Directive providing for

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[140] See B. Terra, P. Wattel, *European Tax Law,* Ch.4 (Wolters Kluwer Law & Business 2012), p.172.
[141] See B. Terra, P. Wattel, *European Tax Law,* Ch.4 (Wolters Kluwer Law & Business 2012), p.172.
[142] Sixth Council VAT Directive 77/388/EEC dated 17 May 1977.
[143] Summarized by an author on the basis of information available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al31006 accessed on 12 October 2016.
[144] Eight Council VAT Directive 79/1072/EEC dated 6 December 1979.
[145] Council Directive 77/799/EEC dated 19 December 1977.
[146] Council Directive 79/1070/EEC of 6 December 1979. The directive was extended to excise duties only in 1992.
[147] Council Directive 76/308/EEC of 15 March 1976.
[148] Council Directive 79/ 1071 /EEC of 6 December 1979 on mutual assistance for the recovery of claim, available at: http://publications.europa.eu/resource/cellar/e40351ec-dcfd-4ce3-9b9e-7596639b95e0.0008.02/DOC_1 accessed on 12 October 2016.
[149] See B. Terra, P. Wattel, *European Tax Law,* Ch.7 (Wolters Kluwer Law & Business 2012), p.464.
[150] See B. Terra, P. Wattel, *European Tax Law,* Ch.7 (Wolters Kluwer Law & Business 2012), p.464.
[151] OJ C 28 of 27. 3. 1971. Although this proposal was not approved and transferred into legislative instrument it inspired member states (i.e. Belgium, France, Ireland and the UK) to take individual actions and change corporate tax regimes. Several member states before 1980s introduced so-called tax credit system of taxation, which allowed imputation of corporate income tax paid on distributed profits to be imputed/credited towards shareholder tax on dividends. This led to elimination of economic double taxation, which was typical to the

the adoption of a common system of company taxation granting partial relief from double economic taxation of dividends through the introduction of a tax credit and for the adoption of a harmonized system of withholding taxes on dividends;[152] in 1979 the proposal for a Directive concerning personal income tax payable by workers who carry on their activity in a Member State other than that in which they are residents.[153] However, nothing of the above resulted in adoption of legislation. The slowness of direct tax harmonization could be explained by at least two equally important reasons – the unwillingness and also the fear of the states to share tax sovereignty over the power to issue laws on direct taxes, which resulted in failure to achieve the required unanimity[154] and also the fact that issues with direct taxation are less visible as an obstacle towards free movement of goods, which was the primary purpose of the Union (community) at an early stage of integration, and states could have been simply unwilling to act on it.

As a response to the failed attempts, in 1980 the Commission issued communication concentrated on measures to complete the internal market.[155] In the report, the Commission made high-level overview of harmonization measures taken by the EU (EC) by that time in indirect tax sphere, as well as provided for the list of its attempts to propose measures on harmonization of direct taxes – mainly personal income tax, tax on dividends and interest. The Commission paid special attention indicating the measures that needed to be taken in the next following years for a genuine establishment of common market.[156] With respect to the future initiatives, the Commission commented on importance of taking further steps towards tax harmonization to address tax competition and the need to agree on "normal" basis of assessment (concerning partially tax incentives as well and determination of taxable base for CIT purposes) to eliminate distortions of competition and achieve certain level of tax transparency.[157] The Commission expressed the view that there should be common measures taken at the level of the Union (Community) to combat the international tax avoidance. The need to combat international tax avoidance resulted in adoption of Directive in 1977 on mutual assistance by the competent authorities of the member states in the field of direct taxes.[158] In general with respect to further direct tax harmonization the Commission commented: "*firms' tax burdens will have to be brought more closely into line so that production costs, the location of investment projects and the return on invested capital in the Member States are not influenced to unduly differing degrees by taxation and so conditions of fair competition between firms in different Member States can be established*."[159] In its communication, the Commission defines corporate tax harmonization as introduction of:[160]

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classical system of taxation. See EC Com 80/139, ch. 4, pp.46-47 for highlevel overview of corporate tax systems of member states as of 31 December 1979. For more on the different system for taxation of corporate profits and dividends see part 5 of this work.

[152] EC COM(75)392 dated 23 July 1975.

[153] OJ C 21 of 26. I. 1980; Bull. EC 12-1979. point2.1.58. The purpose of the proposal was to eliminate the discrimination and disadvantages with which such workers might have to contend.

[154] See EU Com80(139), "Report on the Scope for Convergence of Tax Systems in the Community", available at: http://aei.pitt.edu/8583/1/8583.pdf, ch. 1, p.7.

[155] See COM 80/139 "Report on the Scope for Convergence of Tax Systems in the Community".

[156] See Com 80/139 ch.4 pp.46-50. The Commission in particular discussed the differences in approaches for determination of taxable base of CIT: 1) definition of assets that are subject to depreciation vary between member states, as well as the value and the period, percentage and the methods of depreciation (straight line vs. reducing balance depreciation); 2) some member state apply distinct tax treatment to capital gain and losses in comparison, others apply general regime, while differences also exist in exemptions, allowance for the effects of inflation in determining the taxable amount, the distinction made between long-term and short-term capital gains, the rules applicable in the event of mergers, divisions or contributions of assets, and the rules and others; 3) differences in valuation of companies assets and liabilities and the extent to which the effects of inflation are taken into account; 4) differences in the creation of reserves and provisions and the·carryover of losses.

[157] See Com 80/139 Ch. 2 p.12.

[158] OJ L336of27. 12.1977; Bull. EC 11-1977.point 2.1.51.

[159] See Com 80/139 Ch. 2 p.13. The Commission highly expected the directive in 1975 to be adopted, which in fact didn't happen. Two other problems that would have to be tackled in view of the Commission were namely, "whether the wealth tax should be made generally applicable to enterprises or abolished; and how the tax burden on profits earned by companies not subject to corporation tax is to be treated."

[160] See EC Com 80/139, ch.5, p.60.

1) a common scope of application (subjects of taxation – to prevent tax competition and provide for similar consideration of, for instance, partnerships, which is often an issue and also leaves the space for tax avoidance due to mismatches);
2) a common tax system and similar rates of tax – concerning the system of corporate profits' taxation and treatment of distributed profits at the level of shareholders;[161]
3) a common basis of assessment – addressing basically the tax base for CIT purposes. At this point, the Commission admitted that such work would be premature at that stage of integration and that taken the tremendous differences between member states tax regimes would require years to be completed.

Considering the above and the proposal of the Commission in more details,[162] it may be confirmed that already at the level of common market (1957-1986) there were legal basis for the Union to act on adoption of measures for harmonization of direct taxes. The conclusion is drawn on the basis of wording of Article 100 of the EC Treaty on approximation of laws[163] and formulation of freedoms. The proposed measures for harmonization in particular were supported by arguments for realization of freedom for movement of capital. Some scholars believe that it is currently too premature to think of harmonization of dividends or other passive income taxation at the level of the Eurasian Economic Union, however, as stated above, the author disagrees with this view since elimination of tax barriers for freer movement of capital and freedom of establishment is equally important objective of the economic integration as free movement of goods, and despite that the attempts for harmonization may initially result in objection of member statse, it is important factor for the functioning of the common market. The same view may be confirmed by earlier initiatives taken at the EU level although they did not result in adoption of legislation.

The existence of the need to address direct tax obstacles for realization of freedoms is also confirmed by the very first CJEU case – Avoir Fiscal,[164] which was brought to attention of the CJEU in 1983 before the adoption of single market concepts and respective amendments to the EC treaties that are discussed in the next part of this work.

1.4.2. Transitional period from common to single market in the EU, the period from 1986 to 1993

The period from 1985 to the end of 1992 might be regarded as a transitional period in the EU of movement from the common market policy to completion of single market. During that time number of policy documents and legislative acts were adopted to introduce measures necessary to advance the economic, but also political cooperation between the member states and establish the single market.[165] As was noticed by the author of this work the term "single market" is often replaced by the term "internal market" in the literature and documents about the EU, which speak about the same time period and objectives of the Union. Therefore, along this section in addition to overview of tax measures/policy documents adopted by the Union during this period, the author will also aim to answer the question of why these terms are used interchangeably: whether they indeed refer to the same concept and whether the different or the same extent of tax harmonization measures are required to achieve single/internal market.

In 1985 the EC Commission published a White paper for "Completing the internal market".[166] The paper consisted of three parts and addressed three distinct areas respectively, where the joint measures were required to achieve single market: removal of physical barriers, removal of technical barriers and removal of fiscal (tax) barriers. The development of White paper was partially coerced by the European Council (represented by heads of the member states), where during its meetings

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[161] For particular recommendations given by the EC see Com 80/139 ch.5, pp.60-61.
[162] EC proposals for company taxation are discussed in more details in part 1.4.1. of this work.
[163] See article 100 in the Treaty of Rome, "The Council, acting by means of a unanimous vote on a proposal of the Commission, shall issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market. The Assembly and the Economic and Social Committee shall be consulted concerning any directives whose implementation in one or more of the Member States would involve amendment of legislative provisions." Similar to the current article 115 TFEU.
[164] Case 270/83 decided on 28 January 1986 (Commission v French Republic).
[165] These legislative and policy acts will be discussed further in this section.
[166] See Com(85)310 dated 14 June 1985 on "Completing the internal market", available at: http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf accessed on 13 October 2016.

since 1983 it was repeatedly recalling to the needs for creation of "internal/single market" (used interchangeably in the documents), including the meeting on 29-30 March 1985, where it invited the Commission to *"draw up a detailed program with a specific timetable before its next meeting"* to *"achieve a single large market by 1992 thereby creating a more favourable environment for stimulating enterprise, completion and trade"*. In the White Paper the Commission reiterated that from its outset, the EC Treaty envisaged *"the creation of a single integrated market free of restrictions on the movement of goods; the abolition of obstacles to the free movement of persons, services and capital; the institution of a system ensuring that competition in the common market is not distorted; the approximation of laws as required for the proper functioning of the common market; and the approximation of indirect taxation in the interest of a common market"*.[167] It also recalled that the objective of completing the internal market has three aspects:

1) Welding together national markets into one single market;
2) Ensuring that single market is expanding and growing, but not static;
3) Ensuring that market is flexible and that resources of people, material, capital and investment flow into the areas of greatest economic advantage.[168]

The discussion of White Paper focused on the first aspect only, while also addressing exclusively VAT matters under Part III of the paper. For details see the sub-section on indirect taxes below.

The Single European Act[169] (further "SEA") was signed in 1986 to add changes to the Treaty of Rome and complete the formation of internal market.[170] With respect to tax issues, it was important that Act amended provisions of the treaties and provided for the right of the Council on a proposal from the Commission and in cooperation with the European Parliament "to adopt rules designed to prohibit discrimination" on the basis of nationality[171] and also act with respect to each particular freedom and enact measures to foresee its realization.[172] Act, therefore, gave the power to the supranational institutions to regulate the issues on tax matter in cases, where it was necessary to implement the objectives of the internal market. This was supposed to facilitate the amendments to national legislation and eliminate the barriers for internal market. The new deadlines were provided by the act to achieve the internal market by 31 December 1992, where the Commission was expected to report to the Council on the progress of the work before 31 December 1988 and again before 31 December 1990.

In the EU context, the term "internal market" has characteristics of a national market, which in particular implies the realization of freedoms for the movement of goods, services, persons and capital without internal national frontiers,[173] undistorted conditions of competition (i.e. level playing field)[174] and requires harmonization of national laws[175] necessary for the establishment and functioning of the internal market. The concept of "internal market" has gradually developed from the concept of "common market", contained in the previous EU Treaties (EEC and EC Treaties).[176]

1.4.2.1. Indirect taxes

In the White paper, the Commission discusses several VAT and excise tax related proposals. Thus, the Commission is discussing the proposal for Fourteenth VAT directive and the system of postponed accounting, which would shift the accounting procedures for VAT frontiers to inland tax offices, which in other words may be explained as postponed liability to pay and account for import VAT by

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[167] See COM(85)310, Introduction, para. 4.

[168] See COM(85)310, Introduction, para. 8.

[169] Single European Act (signed at Luxembourg on 17 February 1986 and at The Hague on 28 February 1986)

[170] In the SEA the term "internal market" is used instead of the term "common market"

Article 8a of the SEA provide a definition of the internal market: "internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."

[171] See article 7 para.2 of the Treaty establishing the European Economic Community, which was amended by Article 6 (2) of the SEA.

[172] See the following articles: article 49 for the free movement of workers, article 54, 56 and 57 for the freedom of establishment, article 70 for the free movement of capital.

[173] See article 26 para. 2 TFEU.

[174] See articles 101-109 TFEU, and in particular article 107-109 as applicable in the tax context.

[175] See article 114 TFEU.

[176] See B. Terra, P. Wattel, *European Tax Law,* Introduction (Wolters Kluwer Law & Business 2012)

the taxpayer.[177] This in view of the Commission should have facilitated the increase of cross-border trade due to abolishment of the fiscal frontier controls. The Commission also proposed to establish special Community Clearing Houses to ensure that VAT that was collected in the state of export and deducted in the state of import is reimbursed to the state of import. The Commission planned to work on proposals for further harmonization of VAT rates to achieve complete approximation by the end of 1992. As for excise taxes it was planned to achieve in the nearest future the adoption of directive on the structure of the excise duties on alcoholic drinks, mineral oil products, and the third stage of the cigarette duty structure. The Commission also discussed the need for proposal to introduce the excise rates band to retain each excise duty on tobacco products, beer, wine, intermediary products, spirits and mineral oil products. The Commission planned that member states would adjust the coverage of the excise duties, by introducing excises on the above products where missing, approximate the rates and abolish or reduce the excise on products other than the common ones - e.g. such as coffee and tea.

Later in 1987 the Commission issued several more proposals for harmonization of VAT, which in general addressed four aspects: 1) the approximation of rates within the given range, where minimum and maximum VAT rates would be limited for both standard and reduced VAT rates; 2) intra-community supplies of goods, where the VAT would be charged on exported goods in the member state of exportation, while in the state of importation the deduction of foreign VAT will be granted as if it was a domestic transaction, taken that the goods are further used for taxed transactions; 3) the clearing mechanism, where the Commission stepped back from idea to introduce the system of Community Clearing Houses but instead use central account serviced by the Commission, where the net exporting states will be required to pay and the net importing states will receive payments from the account; 4) services, where Commission proposes to treat intra-community supply of services similar to the supply of goods.[178] This proposal was, however, considered as too radical and Commission presented the new one in 1989.

In the new proposal of 1989,[179] the Commission observed the objections of member states and proposed more moderate approach. In terms of rates, it proposed only two criteria: 1) the minimum standard rate of not lower than 14% and reduced rated could have been maintained by the member states within the range from 4% to 9%. The Commission also proposed to retain 0% rate but only to the very limited range of products applied at that time by member states. The Commission also proposed special VAT rules to apply for mail order (distance) sales, where such sales undertaken by operators to be taxed under the conditions applicable in the country of destination. For acquisition of cars, the Commission proposed to regard the place of registration of the car by purchaser as the place of supply for VAT purposes. The Commission proposed two possible options to treat purchases by non-taxable persons, such as state institutions, and exempt persons, such as banks and insurance companies: to avoid shift of purchases from one member states to another due to VAT rate differences it was proposed to 1) self-supply procedure under which the goods purchased in other member state would be taxable under conditions applicable in the country of supply or 2) to introduce differential tax, which would be equal to the difference between the VAT paid on purchase and the national VAT chargeable on the similar goods or services. Finally, last proposal concerned the treatment of transactions of enterprises linked within the same group. It was proposed not to apply VAT to certain approved intra-community group transactions, since such transactions were already subject to precise control and such enterprises offered a high degree of security. The chargeability of the tax would be deferred to the moment of resale by one of the associated enterprises to a non-approved non-associated purchaser. Enterprises would be able to operate under this arrangement only on the basis of the prior and conditional authorization of the member state in which they were established.

In 1991 was adopted next important VAT Directive, which starting from 1993 abolished fiscal frontiers between member states by eliminating obligation to pay VAT on goods at the moment of crossing the borders between the member states.[180] In particular, it required purchases by individuals

[177] See COM(85)310, Part III, para. 171.

[178] See B. Terra, P. Wattel, *European Tax Law,* Ch.4 (Wolters Kluwer Law & Business 2012), p.184.

[179] EC COM(89)260, available at: http://aei.pitt.edu/3777/1/3777.pdf accessed on 25 October 2016.

[180] See Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers.

to be taxable only in the state of purchase. For B2B transactions, it abolished the concepts of "importation" and "exportation" for the purposes of intra-community trade and instead introduced new concept of "intra-community acquisition of goods", which implied application of VAT in the country of destination and "exempt supply of goods", which implied exemption from VAT in the country of departure. The difference between the previously existed concept in B2B transactions and new one was that from 1993 the VAT on intra-community acquisition of goods was paid by means of regular VAT return in the country of destination, rather than at the border. The seller was supposed to indicate in the VAT return in a separate box the total of its exempted intra-community sales and to indicate the VAT number of his customers in the other member states and respective amounts of sales.[181] In return, the buyer was supposed to apply VAT to its purchases in the state of its residence, which were named as "acquisition" and indicate the total amount of acquisitions, for which he was also eligible to request the immediate deductibility. The outcome resulted in actual non-payment of "import" VAT by the purchaser, but instead the immediate offset of the amount taken that such purchaser had input VAT.

The next Directive adopted in October 1992, among resolving other issue, required application of minimum standard VAT rate of 15% and permitted the use of reduced VAT rates on certain products of social and cultural nature (maximum of two reduced rates), but not lower than 5% from 1 January 1993.[182] Finally, the last directive adopted during this transitional period was Directive 92/111/EEC on simplification measures with regard to VAT.[183] The Directive mainly aimed to clarify how the VAT shall apply to operations carried out with third states and inside the Community.[184]

With respect to excise taxes, the Commission realizes that member states are not ready to agree on totally harmonized rates of excise taxes, which was partially caused by the fact that member states were in different circumstances with respect to whether they were producers of excisable products or not. Additionally, the degree to which public health requirements were reflected in the level of excise taxes varied widely from one member state to another. Therefore, the Commission proposed to apply minimum rates only. On alcohol and tobacco products was proposed to apply differentiated minimum rates starting from 1 January 1993. With respect to products in the mineral oil sector, the Commission proposed to develop and apply either single rates or rate bands due to excessive divergences between the duties applied to different oil products by member states.

Finally, the discussions led by the Commission resulted in adoption of the first directive for harmonization of excise taxes, known as horizontal directive at the end of 1992, which provided the framework for the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products.[185] The Directive covered mineral oils, alcohol and alcoholic beverages and manufactured tobacco products. Subjects to excise taxation were the goods produced or imported to the territory of Community, however the chargeable event occurred only at the time of release of the good for consumption, which implied 1) any departure from a suspension arrangement; 2) any manufacture of those products outside a suspension arrangement; 3) any importation of those products where those products have not been placed under a suspension arrangement.[186] The Directive in general prescribed the structure of tax, whereas the chargeability conditions and rate of excise duty were set individually by each member state. Similarly, excises were levied and collected according to the procedure laid down by each member state

[181] See N.Moussis, Access to European Union, 2011, Intersentia, ch. 14 pp.267-271.

[182] See Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers.

[183] See Council Directive 111/92/EEC of 14 December 1992 amending Directive 77/388/EEC ad introducting simplification measures with regard to value added tax.

[184] See preamble to the Directive 111/92/EEC.

[185] See Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products. See also Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the rates of excise duty applied on alcohol and alcoholic beverages, COM/2004/0223 final.

[186] See article 6 of the Directive 92/12/EEC.

independently.[187] Further on, seven directives adopted in the same year provided for specific rules applicable to each product and established the minimum rates.[188]

1.4.2.2. Direct taxes

In 1980s the CJEU started to deal more and more with the cases considering whether particular national income tax regime is compatible with the envisaged treaty freedoms. Before that time, there was a tendency between member states to impose a kind of protective tax measures, for instance to limit tax advantages only to domestic situations or impose more burdensome taxation and administrative requirements on cross-border deals. The CJEU in most of its decisions disallowed such an approach of member states and gradual reformations of the national tax systems started among the member states.[189] Analysis of jurisprudence of that time shows that three quarters of cases were decided not in favour of the states.[190]

1.4.2.2.1. First Directives on income taxation and EU Arbitration Convention on TP matters

In the beginning of 1990s in the EU were adopted two important and also first directives with regard to income taxes. There were: the so called Parent-subsidiary directive[191] and the Merger Directive,[192] as well as was adopted the Arbitration Convention on resolution of Transfer Pricing disputes.[193] The Parent-Subsidiary Directive established common principles for taxation of inter-company dividends paid within the EU companies. The Directive required states to provide exemptions with respect to outbound dividends and also required the dividends to be either exempt from taxes with the right to account for underlined corporate income tax in the state of resident of the recipient company. The main objectives pursued by the Directive was elimination of economic double taxation of dividends. However, only certain types of companies with the minimum 25% holdings were covered by the Directive, which resulted in non-absolute resolution of problem of economic double taxation of dividends.[194] The Merger Directive applied to neutralize negative tax consequences upon reorganization of companies of different member states within the EU. The main purpose of the Directive was to achieve the similarity from tax point of view of the outcome upon pure domestic corporate reorganization with the reorganization, which involved several companies located in various EU member states, in order to strengthen the position of multinationals in the EU and help them to adopt to the new environment of the single market.[195] The initial directive applied only to the specific companies, which were tax residents in one of the EU member states and covered only mergers, divisions, transfers of assets and exchanges of shares with involvement of these companies. The effect achieved by the Merger Directive was basically the deferral of tax, which for instance in case of transfer of assets could have been charged on the difference between the real value and the tax value of transferred assets, and in case of other transactions the tax on capital gains derived by the shareholders.[196] The Arbitration Convention was adopted with the purpose to eliminate by means of arbitration the economic double taxation resulted from transfer pricing adjustments in one member state without corresponding adjustment in another. The main advantage and difference of the Convention from the OECD mechanism on mutual agreement procedure was the fact that Convention

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[187] See Ibid.

[188] See Council Directives 79/92 and 80/92 of 19 October 1992 applicable to tobacco products, Directives 81/92 and 82/92 of 19 October 1992 and Directive 510/92 with regard to mineral oils, and finally Directive 83/92 and 84/92 of 19 October 1992 with respect to alcohol and alcoholic beverages. See P.Boria, Ibid. p.78.

[189] See for overview P.Genschel and M.Jahctenfuchs (2009), "The Fiscal Anatomy of a Regulatory Polity: Tax Policy and Multilevel Governance in the EU"

[190] Genschel, Kemmerling, and Seils

[191] See Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

[192] Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.

[193] See Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 90/463/EEC.

[194] For more on the Parent-Subsidiary Directive see M.Tenore, *The Parent-Subsidiary Directive,* ch.5 in M.Lang et. al *Introduction to European Tax Law: Direct Taxation,* pp.133-156, Linde Verlag 2016.

[195] For more on the same see M.Hofstätter and D.Hohenwarter-Mayr, *The Merger Directive,* ch.6 in M.Lang et. al *Introduction to European Tax Law: Direct Taxation,* pp.157-182, Linde Verlag 2016.

[196] See also http://ec.europa.eu/taxation_customs/business/company-tax/merger-directive_en.

obliged member states to resolve an issue, but not merely to endeavor to resolve it. Secondly, it provided for set timeframe of 3 years, which granted certainty to the investor.[197]

1.4.2.2.2. Ruding report

In 1991 the Commission established the special committee of independent experts, known also as a Ruding Committee.[198] The Committee was established to evaluate the importance of taxation for business decisions with respect to the location of investment and the international allocation of profits between the enterprises. It was necessary to determine whether the existing differences in corporate taxation and the burden of business taxes among member states lead to major distortions affecting the functioning of the internal market and if so, what were the possible remedial measures, what were the priorities and by when such measures would need to be implemented. The Committee was also supposed to give its opinion on the legal nature of any envisaged measure in order to determine whether the objective is to harmonize certain aspects or to limit it to the establishment of a framework for national tax legislations.[199] In carrying out its work, the Committee answered the following questions:

1. Whether the difference in taxation among member states cause major distortions in the internal market, particularly with respect to investment decisions and competition? Special attention was focused on those distortions considered to be discriminatory.
2. In so far as such distortions arose, were they likely to be eliminated simply through the interplay of market forces and tax competition between member states, or was action at the Community level required?
3. What were the specific measures required at the Community level to remove or mitigate these distortions?[200]

The Committee's report was delivered by the Commission on March 1992 and is known as the Ruding Report. The main findings are summarized below.

The Committee found major differences in the corporate tax systems applied among member states,[201] as well as considerable variations in the statutory CIT rates and bases. In addition to this, were identified specific differences in the tax treatment of cross-border income flows, mainly dividends, interest and royalty payments. The identified differences concerned not only the withholding tax rates in the source countries, but also methods and extent of double taxation relied in the residence countries. Another major difference was identified in tax treatment of losses incurred by branches and subsidiaries in one member states and to be offset against the profits of the parent company in another member state.[202] By means of simulation studies, the Committee determined that withholding taxes on cross-border dividend payments between related companies constituted the main reason for bias against inward and outward investment. Other significant bias, which required attention were summarised as follows:

1) Differences among member states in the method of providing relief for double taxation on cross-border income flows;
2) Differences in corporate tax rates between countries; and
3) The discriminatory effect of unrelieved imputation taxes (precompute, advance corporation tax, etc.) related to distributions by parent companies from profits earned abroad.[203]

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[197] For more on the same see P. Plansky, *The EU Arbitration Convention,* ch.9 in M.Lang et. al *Introduction to European Tax Law: Direct Taxation,* pp.257-270, Linde Verlag 2016.

[198] Retrieved from http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.11.2.html accessed on 29 November 2016.

[199] See Mandate given to Mr. Onno Ruding for the Committee established to examine company taxation in the EC, dated 25 October 1990

[200] Report of the Committee of independent experts on company taxation (Ruding Report), European Commission, 1992, p. 11, available at: http://aei.pitt.edu/8702/, accessed on 29 November 2016.

[201] See Ruding report, 1992, Chapters 3 and 10, p.194. At that time two member states (Luxembourg and the Netherlands) operated classical system of companies' taxation, where the distributed profits in the form of dividends are taxed twice – once at the level of the distributing company and later at the level of the shareholder. Other 10 member states provided for various mechanisms and degrees for elimination of double taxation.

[202] Ibid. Ruding report, 1992, p.11.

[203] Ibid. Ruding report, 1992, p.12.

The empirical survey conducted by the Committee also suggested that identified tax differences among member states distort foreign location decisions of multinational firms and cause distortions in competition, especially in the financial sector.[204] The Committee also noticed some convergence of different countries' tax regimes, even though there was not concrete action taken to achieve the same. The Committee concluded that many of these changes were seem to have arisen from a general desire of countries to establish neutral tax regime from domestic view point. This had mainly led to reduction of corporate and personal statutory income tax rates.[205] In view of the Committee the observed convergence did not eliminate the existing differences in member states' tax regimes, and that some of these differences distort the functioning of internal market both for goods and for capital, and it was unlikely that these distortions would be reduced through independent actions by member states and therefore, the actions at Community level were required.[206] So, at that stage of the Community development, the Committee formulated the following priorities:

1) Remove those discriminatory and distortionary features of countries' tax arrangements that impede cross-border business investments and shareholdings;
2) Set a minimum level for statutory corporate tax rates and also common rules for a minimum tax base, so as to limit excessive tax competition between member states intended to attract mobile investment or taxable profits of multinational firms, either of which tend to erode the tax base in the Community as a whole; and
3) Encourage maximum transparency of any tax incentives granted by member states to promote investment with a preference for incentives, if any, of a non-fiscal character.[207]

The Committee, however, at that point of time did not propose total harmonization of corporation tax systems, but considered adoption of unified tax system by all member states as desirable in a long-term perspective.[208] Following the above, the Committee developed specific recommendations and grouped them as follows: 1) measures for elimination of double taxation of cross-border income flows, 2) measures addressing corporate taxes and 3) measures addressing other issues. Additionally, each recommendation was attributed with a phase, which indicated the timing of when the measure should have been taken. There were three phases: I – which provided that measure should be implemented by the end of 1994, II – which provided that the measure should commence immediately and be implemented during the second phase of economic and monetary union, and III – which provided that the measure was concurrent with full economic and monetary union.[209] Below the author summarises each group of recommendations.

Elimination of double taxation of cross-border income flows

This part of recommendations concerned six issues: 1) and 2) taxation of intercompany dividends, 3) taxation of interest and royalties, 4) double taxation arising from transfer pricing disputes, 5) treatment of cross-border losses and 6) double tax treaties.

With respect to inter-company dividends taxation, the Committee recognised that withholding taxes on intercompany dividends constituted a major obstacle to cross-border capital flow within the Community. Therefore, it proposed amendments to the Parent-Subsidiary directive for more efficient elimination of associated double taxation. In particular, the Committee proposed to extend the scope of the directive to cover all enterprises subject to CIT, irrespective of their legal form (phase I) and subsequently to all enterprises subject to income tax (phase II). Second recommendation concerned the reduction in the participation threshold prescribed by the directive, which at that point of time was 25%. In addition to this, with the view to combat tax avoidance, the Committee proposed to introduce 30% withholding tax on dividends distributed between parties other than qualified parent-subsidiaries (phase II). The Committee considered that sufficient level of taxation in the source state should be ensured to combat tax evasion by shareholders residing in the Community. This was supposed to involve uniform withholding tax, which would be waived provided the shareholder

[204] Ibid. Ruding report, 1992, p.12.
[205] Ibid. Ruding report, 1992, p.12.
[206] Ibid. Ruding report, 1992, p.13.
[207] Ibid. Ruding report, 1992, p.13.
[208] Ibid. Ruding report, 1992, p.202.
[209] Ibid. Ruding report, 1992, p.13.

(individual or company) submits proof of being an EC resident.[210] The same waiver could have been extended to third-country investors in appropriate circumstances.

With respect to the interst and royalty payments, the Committee advised to speed up the adoption of interest-royalty directive. The Committee, however, recommended to extend application of directive to all such payments between enterprises within the Community. It also recommended to include accompanying measure to ensure that the corresponding income is effectively taxed within the Community in the hands of beneficiary (Phase I).[211]

With respect to transfer pricing disputes, the Committee endorsed the agreement by member states on Arbitration Convention, which was designed to resolve disputes caused by transfer pricing adjustments, and urged the ratification of the Convention (phase I).[212] The Committee additionally recommended to the Commission together with member states to establish rule or procedures concerning transfer pricing adjustments by member states: for example, to make national tax authorities to consult each other prior any profit adjustment.

With respect to offset of cross-border losses, the Committee recommended member states, first of all to adopt draft directive dealing with losses of permanent establishments and subsidiaries in another member states (phase I), in view that absence of means by which groups of enterprises could offset losses incurred in one member states against the profits arising in another member states constituted an impediment to cross-border investments.[213] As the second phase of developments in area, the Committee recommended to introduce full vertical and horizontal offsetting of losses within the groups of enterprises at the national level, which meant not only offset of losses incurred by the subsidiary or PE at the level of the parent company, but which would allow loss-offsetting between different subsidiaries of the same parent company. As the third phase, the Committee recommended extension of the directive to allow full community-wide loss-offsetting within groups of enterprises.[214]

The last recommendations in this group concerned tax treaties. With this respect, first of all, the Committee urged member states to conclude double tax treaties between themselves where missing and also extend those, which had limited scope (phase I).[215] The Committee also recommended member states together with the Commission to define common attitude with regard to policy on double taxation agreements with respect to each other and also with respect to third countries (phase I).[216]

Corporate taxation

With respect to corporate taxes the Committee addressed three issues – the income tax systems, the tax base and the rate. The first issue concerned the taxation of individuals on dividends. It was observed by the Committee that member states used different systems – while some were trying to mitigate the effect of economic double taxation by provision of lower rates on domestic dividends, other countries tent to tax dividends with standard (hjgh) rates, but provided for the right to offset the underlined corporate income tax paid by the company. In view of the Committee it was desired to have only one system among the member states or at least to assure that foreign dividends were not taxed less favourably than domestic under both systems, in other words, the tax treatment of foreign dividends received by individuals should be the same irrespective of the source of dividends.[217] At the same time, the Committee stressed the importance to achieve fully harmonized system in particular with respect to dividends taxation, but to assure that such system is neutral with

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[210] Ibid. Ruding report, 1992, p.203. Such proof might entail shareholders submitting some sort of tax identification number as a proof of beneficial ownership, either directly to the company distributing dividends, or to the financial intermediary or agency involved.

[211] Ibid. Ruding report, 1992, pp.204-205.

[212] Ibid. Ruding report, 1992, p.205.

[213] Ibid. Ruding report, 1992, p.205.

[214] Ibid. Ruding report, 1992, p.206.

[215] Ibid. Ruding report, 1992, p.206. The recommendation also concerned double tax treaties on estate taxes, gifts and inheritance.

[216] Ibid. Ruding report, 1992, p.206. The Committee in particular considered important to define the common policy regarding anti-avoidance and anti-treaty shopping rules in the treaties to prevent situations of discriminations against the community enterprises.

[217] Ibid, Ruding report, 1992, p.208.

respect to different legal structures, the different methods of financing, especially with respect to distributed and undistributed profits and whether the investment was made to domestic or foreign companies. It also noted that the system should guarantee the fair distribution of revenues between source and residence countries, be simple in terms of compliance and administration, but also able to prevent tax evasion.[218] With respect to tax rate and the base, the Committee recommended to establish the minimum degree of harmonization in order to prevent excessive corporate tax competition between the members. Thus, the Committee proposed to have 30% as a minimum corporate income statutory tax rate, with the right of the states to manage the neutrality of their corporate income tax on budgets by means of adjustments to the corporate tax base.[219] At the same time, the Committee noted that introduction of minimum statutory corporate income tax rate would not be effective without at least partial harmonization of tax base. With respect to the later, the Committee proposed the Commission to initiate the work on development of measures for reduction of differences between the commercial and tax accounts used for definition of taxable profits in the member states, to develop measures on depreciation practices, as well as to work on harmonization of regimes applicable to intangibles, which in view of the Committee constituted a major distortion and reason for tax competition. With respect to deduction of business expenses, the Committee believed that existing differences did not constitute sizable distortions of competition and may not need to be harmonized immediately.[220] The Committee paid special attention to the treatment of headquarter costs and recommended the Commission to develop proposal for Directive to establish rules for allocation of headquarters' costs and the order for invoicing for inter-company pricing of centrally provided group services.

Measures addressing other issues

The Committee has also commented on tax administration issues. It recommended the Commission to initiate the work on harmonization of dates at which taxes of common application shall be payable.

In overall, based on the careful study of the Ruding report, it may be concluded that the Committee not only recommended harmonization measures necessary to eliminate fiscal barriers for the movement of capital investments, but also aimed to address the problem of tax competition and tax avoidance. Major part of recommendation with respect to the design of corporate tax systems was not followed immediately, but over the time: one can observe that the current actions of the EU Commission and actions at the global perspective tend to follow the recommendations of the Committee given almost 30 years ago – such as development of common standards for treatment of intangibles, accounting for intergroup services, introduction of common bases of anti-avoidance measures and many others. The author believes that Ruding report could be a good source of inspiration and material to be used by the policy makers in the Eurasian Economic Union. Although, the sizes of the economies between the member states inside the unions and also between the unions vary – the ultimate idea both unions persuade with respect to the movement of capital and investments is the same and this allow the author to conclude that initial estimation, assessment and stimulation studies undertaken in the EU are also relevant for the EAEU environment.

1.4.3.Single market period - from 1993 and onwards

1 January 1993 is considered as the date when the single market concept entered into force. Since that time no more were used the inter-union cross-border customs controls for goods, services, labour and capital.

1.4.3.1. Indirect taxes

The 1990s and early 2000 resulted in adoption of number of directives on VAT amending the sixth VAT Directive and addressing specific selected issues, such as VAT treatment of second-handed goods such as antique goods, treatment of goods used for investment purposes, VAT treatment of radio and TV broadcasting services and other issues.[221] However, already in 1996 the Commission has issued Paper on the final system of VAT "A Common System of VAT", where it revealed that the VAT system imposed was not effective enough: it was difficult from the perspective of

[218] Ibid, Ruding report, 1992, p.208.
[219] Ibid, Ruding report, 1992, pp.208-209.
[220] Ibid, Ruding report, 1992, pp.215-216.
[221] See M.Pirvu, Ibid, Corporate Income Tax Harmonization in the European Union , Ch.2.

implementation in the national systems, complicated in terms of administration and as a result provided for legislative gaps that were exploited by the taxpayers.[222]

Later in 2000 the Commission has issued another report where it proposed the necessary actions for improvement of the VAT system, in particular emphasising the need to simplify the adopted then legislation; to create a standard for the national implementation of VAT directives and finally to enhance the cooperation between the competent authorities of the member states.[223] It considered necessary to adopt few proposals pending in front of the Council, including the proposal for improving mutual assistance on recovery of VAT, proposal on the right of deduction and proposal on the person liable for VAT, and also developing new measures with respect to treatment of postal services, e-commerce, electronic invoicing, revision of rules on administrative assistance.[224] The efforts of the Commission were not unnoticed and resulted in revision of the common system of VAT with adoption of the Directive 2006/112/EC from 1 January 2007, which established revised and systemised common system of VAT. This Directive eventually became the legal basis of the currently functioning VAT system in the EU, however, in fact it did not change the substance of the previously existing directives, but in turn has systematised the rules, which were provided in various directives, and introduced few changes.[225] The details of the directive are discussed in the net section of this work.

Current VAT system in the EU - what has been harmonized?

The VAT Directive provides common definition of taxable person for VAT purposes, which is defined as a person "who, independently, carries out in any place any economic activity, whatever the purpose or results".[226] Still, the member states reserve the right to classify certain persons as taxable, which may not meet the general definition. Interesting in this respect is that closely related companies may register as a group for VAT purposes and account for VAT as one single person, having the right to submit only one VAT return and not to charge VAT among the group members.[227] The Directive provides quite detailed guidance on what shall qualify as taxable transaction for VAT purposes, which includes: supply of goods and services, intra-community acquisition of goods and importation of goods from third states. With respect to each type of transactions, the Directive gives precise definition of terms and conditions.[228] To determine the taxable amount, the Directive gives precise guidelines defining and clarifying taxable amount upon supply of goods and services, importation of goods and intra-EU transactions. It defines what shall be included and what shall not into the taxable amount, comments on the currency consideration and situations of non-payment.[229]

With respect to payment of VAT in the EU member states, it may be equally the obligation of the supplier and also the customer in certain cases. For instance, the basic rule imposed by the Directive requires the supplier to collect and pay the VAT, unless it shall be done by the customer. So, the later, has to pay VAT individually when for instance, it is an intra-community acquisition of goods, or when the customer acquires the natural gas, or in B2B situations with supply of services. Along with that, in certain cases the Directive prescribes that the customer has to pay VAT instead of the supplier, while in other predetermined cases it allows the EU member states to decide individually on the person who shall pay the VAT.[230]

The VAT Directive harmonises the time when the VAT becomes chargeable in particular situation, including supply of goods and services, intra-community acquisition of goods and importation of

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[222] See COM(96)328. See also M.Pirvi, BookIbid above, ch.2 *The Evolution of tax harmonization in the European Union, pp.25-*

[223] See Pirvu, Ibid. Corporate Income Tax Harmonization in the European Union, Ch.2, See also COM(2000)348 final, A strategy to improve the operation of the vat system within the context of the internal market.

[224] See Ibid, Com(2000)348, p.7.

[225] See Pirvu, Ibid, Corporate Income Tax Harmonization in the European Union, ch.2.

[226] For more see article 9 VAT directive.

[227] For more see article 11 VAT directive. See also http://ec.europa.eu/taxation_customs/business/vat/eu-vat-rules-topic/taxable-persons-under-eu-vat-rules_en accessed on 23 June 2917.

[228] For more details see article 14-30 VAT Directive.

[229] For more information see http://ec.europa.eu/taxation_customs/business/vat/eu-vat-rules-topic/taxable-amount_en accessed on 23 June 2017.

[230] For more details see http://ec.europa.eu/taxation_customs/business/vat/eu-vat-rules-topic/person-liable-tax_en#customer_must_pay accessed on 23 June 2017.

goods from the non-EU members.[231] The Directive also harmonizes the rules and procedure on deduction of input VAT, prescribing the types of input VAT that can be deducted fully and partially and respective conditions, that may vary depending on the type of supply.[232] It also provides clear rules for the determination of the place of supply. Thus, upon supply of goods, the place where VAT shall be paid may vary depending on where the customer is located, what type of good is acquired and whether it requires installation by the supplier, as well as the point of departure and destination of product.[233] With respect to services, the place of taxation is determined in accordance with two factors – the status of customer (whether the person who undertakes economic activity or not) and type of service.[234] In general, during the last few years, the tendency in the EU is developing more towards taxation of services at the place where consumption takes place.[235]

The rates were not harmonized, but countries managed to agree on the standard minimum rate of 15% and one or two reduced rates, which, however, cannot be lower than 5%.[236] The reduced rates usually apply only to the first essential goods and services of cultural and social nature, which are mentioned in the Directive, but not to the e-services.[237] Inspite the agreement, some member states continue to apply special reduced rates of lower than 5% (even 0% rates) in frame of transitional period.[238]

The rule on the exempt supply has been standardized in the EU. The EU VAT Directive prescribes the types of supply that must be exempt and gives the list of supply that may be exempt by the member states. In this respect distinguishes three types of exempt supplies: 1) exemptions without the right to deduct; 2) exemption with the right to deduct and 3) other exemptions. To the first category of supplies are attributed the goods and services of public interest, such as medical goods and services or education, but also various services of financial and insurance nature. With respect to each group of supplies, the VAT Directive provides conditions under which the exemption shall be granted, but the member states preserve the right to impose further conditions.[239] The group of exemption with the right to deduct is similar to the traditional concept of zero VAT, because in fact the supply is exempt, but the right for deduction of input VAT remains. The examples of the exempt transaction with the right to deduct in the EU are, for instance, the inter-community sales of goods – when upon exportation the product is exempt from the VAT, but the respective acquisition in the country of importation is taxed in accordance with the local rules.[240] Another example is international transportation services, involving both persons and goods, including various services in relation to air and sea transport – such as maintenance and other.[241] Equally, exportation of goods from the EU member states is exempt from VAT, but gives the exporter the right to deduct input VAT.[242] With respect to all types of such supplies the VAT directive has certain exemptions and conditions. Finally, the last group of exempt supplies include other situation – such as exemption of goods upon importation by business and physical persons, taken that similar good produce domestically is

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[231] For more information on the same see article 62-71 VAT directive.

[232] For more see article 167-185 VAT Directive.

[233] For more see article 31-41 VAT Directive.

[234] For more information see article 43-58 VAT Directive. See also http://ec.europa.eu/taxation_customs/business/vat/eu-vat-rules-topic/where-tax_en accessed on 23 June 2017.

[235] See for instance, Council Directive 2008/8/EC

[236] For the overview of rates applied in the EU member states refer to Taxud.c.1.(2017) VAT rates applied in the member states of the European Union, as of 1 January 2017, available at: http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf accessed on 23 June 2017.

[237] See Article 98(2) and Annex 3 of the VAT Directive.

[238] See COM (2007) 380 Communication from the Commission to the Council and the European Parliament on VAT rates other than standard VAT rates. See also the press release IP/07/1017, MEMO/07/277 and COM(2007)381.

[239] For more details see http://ec.europa.eu/taxation_customs/business/vat/eu-vat-rules-topic/exemptions/exemptions-without-right-deduct_en accessed on 23 June 2017.

[240] See article 138 VAT Directive.

[241] See article 148(f) VAT Directive.

[242] See article 146 VAT Directive. For more on the types of supplies exempt from VAT with the right to deduction see also http://ec.europa.eu/taxation_customs/business/vat/eu-vat-rules-topic/exemptions/exemptions-with-right-deduct_en accessed on 23 June 2017.

exempt, reimportation of previously exported goods and importation of goods by certain internal bodies of the EU. [243]

The single rules on invoicing were harmonised by the VAT directive, but certain member states also maintain the national rules applicable together with the EU rules in certain fields.[244] The VAT directive prescribes when the VAT invoice shall be compulsory, but the member states may introduce additional requirements, the directive also prescribes the information that shall be reflected in the invoice and leaves some flexibility in terms of what else may be included in the invoice. Member states are not allowed to require more information on invoice and cannot on this basis refuse the deduction of input VAT.[245]

With respect to refunds of VAT, the Directive distinguishes between the standard situation, which implies involvement of the two EU business entities and non-standard, which implies involvement of the business entity from outside the EU. With respect to foreign entities having taxed acquisition in the EU, the Directive prescribes the unified rule, which empowers such entities to deduct their input VAT by means of refund.[246] Additionally, the Directive prescribes the procedures that must be followed to receive the refund[247] and respective conditions to be fulfilled by the taxpayer, which are also different for EU and non-EU businesses. Along with that, the EU members have the right to limit the right for deduction or to introduce additional limitations

What concerns the administration of VAT, then for instance with respect to VAT return, the VAT directive provides only minimum standards, but not fully harmonises the process. For instance, it says that VAT return shall be filed at least once a year, but national legislation may impose requirement for more submission.[248] It prescribes the list of persons who shall submit the return and obligatory information that shall be required in the return.[249] The Directive allows member states to introduce special simplified VAT regimes for the small enterprises.[250]

Current VAT system in the EU – what is on agenda?

Although many aspects in the functioning of VAT had been harmonized or at least standardised, the EU Commission continues to work on further harmonization of VAT for realization of single VAT area. In the latest action plan issued by the Commission on 7 April 2016, the Commission aims to simplify the current system, to address the VAT gap caused by fraudulent actions of taxpayers and to adopt the VAT system for the needs of digital economy and SME taxpayers.[251]

The Commission believes that the current system is complex and causes tax compliance burden for the taxpayers, especially for the smaller one. In addition, the VAT system is not fully adjusted to reflect the specificity of the current digital economy. Therefore, with respect to SMEs, the Commission is planning to review the national measures for VAT regimes granted to SMEs and propose a simplification package by the end of 2017.[252] Equally, the Commission aims to simplify the measures for VAT compliance in e-commerce. Further on, although, the VAT revenue accounts for about 7% of the total EU GDP, there is a significant revenue loss each year estimated to EUR 170 billion, which is equivalent to almost 15% of the total revenues. With this respect, the EU Commission is preparing several urgent actions, including 1) improvement of cooperation between

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[243] See article 143 VAT Directive. For more on the same see http://ec.europa.eu/taxation_customs/business/vat/eu-vat-rules-topic/exemptions/other-exemptions_en accessed on 23 June 2017.
[244] For more on the same see Explanatory notes VAT invoicing rules (Council Directive 2010/45/EU).
[245] For more information see http://ec.europa.eu/taxation_customs/business/vat/eu-vat-rules-topic/vat-invoicing-rules_en accessed on 23 June 2017.
[246] See articles 170-171 VAT Directive.
[247] See Council Directive 2008/9/EC and Council Directive 86/560/EEC.
[248] See article 252 VAT directive.
[249] See articles 250-260 VAT Directive.
[250] For more see article 281-293 VAT Directive.
[251] See COM(2016)148 final, Communication on an action plan on VAT Towards a single EU VAT area - Time to decide.
[252] See Ibid, Com(2016)148, p.6.

the member and non-member countries; 2) increase in efficiency of tax administration; 3) improvement of voluntary compliance.[253]

On top of this, the Commission is considering the idea to issue the proposal for a definition of VAT system, which, among other things, imply introduction of the destination principle for VAT and collection of VAT by suppliers also in the cross-border transactions. Consequently, the Commission believes that taken that destination principle for VAT may be introduced, it shall also grant more authority for the member states to determine their tax rates policies, but still subject to certain safeguards to prevent the distortion of competition.[254]

To conclude, although, the VAT systems among the member states are highly harmonized, the Commission continues to work on constant improvement of the system so that to enable it to cope with and reflect the contemporary challenges and changes of the way the business is carried out with the development of technologies and also new products. In view of Pirvu, such policy of the Commission for constant modernization and simplification of the system is justified and should leave to approximation of the member states' systems.[255]

Current excise system in the EU – where it stands?

Today the level of harmonization of excise taxes is not so advanced as with the VAT. The EU law obliges member states to apply excise taxes on alcohol, tobacco and energy products. Member states may also apply excise taxes on other goods and services, but when doing so they shall not give rise to cross-border challenges and increase of associated formalities.[256] Application of excise taxes to these products are guided by separate rules. What's common, the EU legislation comments on the definition of products, which shall be subject to excise taxation, it prescribes the minimum rates and scope of possible exemptions, as well as general rules for producing, moving and storing these goods around the EU.[257] It also prescribes a definite rule on when the excise tax arises and where it shall be payable. Consequently, as taxable event is considered the stage of manufacturing or importation to the EU territory, but the payment of tax occurs only when the product is put for consumption and shall be acquitted in the country of actual consumption.[258]

Currently is under discussion the idea to amend the existing directives on excise taxation. Thus, for instance, with respect to Directive 2011/64/EU on structure and rates for manufactured products, is discussed to up to date the list of excisable goods and their respective definitions, because many new products fall within the borderline between the taxable and non-taxable products. Another point is to work on simplification of the use of dual classification, which is currently different for for excise and custom purposes. This causes the confusion and the double treatment of the same entry may provoke higher administrative costs.[259]

With respect to another excise directive on alcohol, the EU Commission also initiated public consultation to revise and discuss the possible amendments.[260] Among the discussed measures for improvement of implementation and enforcement and simultaneous simplification of existing legislation are: 1) clarify the rules for the different types of denatured alcohol, mutual recognition of denaturing methods by and between Member States and third country;2) to revise the reduced rates

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[253] For details of each action see EU Commission, *"20 measures to tackle the VAT gap",* available at http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/tax_cooperation/vat_gap/2016-03_20_measures_en.pdf accessed on 23 June 2017.

[254] See Ibid Com(2016)148, pp.11-13.

[255] See D.Pirvu, Ibid, Corporate Income Tax Harmonization in the European Union, p.30.

[256] See Council Directive 2008/118/EC on the general arrangements for excise duties.

[257] Retrieved from http://ec.europa.eu/taxation_customs/business/excise-duties-alcohol-tobacco-energy/general-overview_en accessed on 23 June 2017. See also Council Directive 2008/118/EC.

[258] See Mousis, Ibid.

[259] See the European Commission, Inception Income Assessment, Possible proposal for revision of Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco, available at: http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_taxud_004_tobacco_excise_duty_en.pdf accessed on 23 June 2017.

[260] Public consultation was launched on 28 August 2015 for the evaluation of the Directive (92/83/EEC) on the structures of excise duties on alcohol and alcoholic beverages.

for small producers of alcohol and alcoholic beverages across all sectors and 3) revise and adjust the levels of low strength alcohol as appropriate.[261]

To conclude on the same, similarly as with the VAT system, the Commission continues its efforts for enhancement of excise tax system to ease the way of doing business, eliminate elements that distort competition and prevent tax fraudulent activities.

1.4.3.2. Direct taxes

Treaty of Maastricht signed on 7 February 1992,[262] having transferred the European Community into the Union, introduced substantial changes to the Treaty of Rome in particular with respect to institutional structure, decision making process and extension of EU competences.[263] Thus, for example the Parliament of the EU became co-responsible with the Council to adopt Union legislations in many areas, but not in the sphere of direct taxation specifically.[264] Along with that, the fundamental principles were slightly elaborated, where the freedom for the movement of capital was reworded, which allowed its interpretation in the Court, as of the provision having direct effect. However, with respect to the rest, upon entry into force of the Treaty of Lisbon, the essential part of provisions related to taxation remained unchanged. Only some adjustments were made to the discipline of legislative procedures regarding the enactment of tax rules.[265] Equally, with the Treaty of Lisbon was repealed article 293, which required member states to enter into negotiations with each other for abolishment of double taxation.

Although, the changes to the fundamental treaty did not introduce any fundamental changes with respect to taxation, since 1993 and till nowadays the process of direct tax harmonization was developing more intensively than during the predeceasing periods. Thus were adopted few instruments of soft and hard law direct tax harmonization and coordination. Among the soft law instruments, once could emphasise the Code of Conduct for effective business taxation, which is an important instrument till today. Among the hard law instruments – the interest-royalty-directive, the saving directives, few directives amending parent-subsidiary directive and the merger directive, directives in the field of exchange of tax information and two recent directives to fight tax competition – ATAD 1 and ATAD 2. The same was accompanied by the constant research and studies undertaken by various dedicated groups, including Monti report of 1996 "Taxation in the EU: Report on the development of tax systems", the Staff report in 2006, as well as the Commission communications, including in 1996 "Taxation in the European Union",[266] in 1997 entitled "Towards tax co-ordination in the EU – a package to tackle harmful tax competition", Commission communication 2001 – "Towards an internal market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities.[267] Below the author will outline the most important elements of these instruments.

A few years after the adoption of the first two directives on direct tax matters and arbitration convention, in the Communication of 1996 "Taxation in the European Union", the Commission has outlined the main challenges of taxation policy in the EU: 1) stabilization of Member States' tax revenues; 2) smooth functioning of the Single Market and 3) the promotion of employment. With respect to the tax revenues, the Commission indicated arising tax competition as a potential reason. It noted that revenues from labor taxation overtime constituted higher percentage of countries GDP than corporate income taxes, which could have been the sign of developing tax competition.[268] The greatest threat in view of the Commission was represented in the area of international mobile business

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[261] See European Commission, Inception Impact Assessment "Structures of excise duties on alcohol and alcoholic beverages", 2017 available at: http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-1097709 accessed on 23 June 2017.

[262] Subsequently it was amended by the Treaty of Amsterdam in 1997, the Treaty of Nice in 2001 and the Treaty of Lisbon signed 2007.

[263] Statement made by P.Boria, p.31

[264] Retrieved from http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.4.1.html accessed on 13 December 2016.

[265] See P.Boria, p.34.

[266] See COM(96)487 final, available at: accessed on http://www.verginet.net/UserFiles/File/Avrupa_Birligi/Taxation/General_Information/taxation_sec(1996)487_en%204%20Ek%203.pdf 24 June 2017.

[267] Com(2001)582.

[268] See Ibid. Com(96)487, p.3.

and capital. The Commission noted that "*the diversity of national tax regimes for capital income, and particularly the generally favorable treatment given to interest paid to non-residents, produces economic distortions both within and between Member States, non compatible with the notion of a single capital market within the EU. Capital mobility should be preserved, while also preserving the right of Member States to tax capital income".*[269] With respect to the second challenge, the Commission said that while various regulatory barriers are removed towards achievement of single market in accordance with the fundamental freedoms, the taxation is only gradually started to be perceived as factor that may prevent realization of the same.[270] In view of the Commission, for realization of the single market was required more simple and uniform tax systems in the member states that would treat intra-Community transactions similarly to the domestic ones.[271] As the major tax obstacles the business at that time indicated the problems with national taxation of permanent establishments in comparison to domestic companies, cross-border taxation of interest and royalty payments, domestic treatment of losses incurred by permanent establishments and subsidiaries in other member states.[272] Finally, with respect to the last challenges, the Commission stressed the need to stop over taxation of labor in order to promote higher employment in the EU states. In general, the Commission emphasized the growing need for further co-ordination in direct tax matters. The problem indicated in that Communication became the agenda for Commission for the next almost decade.

As a follow up to the Commission Communication was created a high level group chaired by the taxation and Single Market Commissioner Mario Monti. The result of its work were summarized by the Commission in the next Communication "Report on the development of tax system".[273] First of all, the Communication reported that the meeting allowed the group to discuss and exchange the views on the central challenges of tax policy, which further perhaps helped to find a compromise on the adoption of hard law measures. However, members of the group did not come to any particular recommendations during that work, but only acknowledged few facts: that changes in the structure of revenues could been the result of the tax competition and that the Commission shall work more closely with the member state with respect to this issue,[274] they also agreed that taxation measures were an important element for realization of the single market idea. With respect to the taxation of capital income, there were discussion of several alternative solutions, including minimum level of taxation of income from savings, or minimum withholding tax and also exchange of information. The members of the group also agreed that taxes on labor shall be reduced.

A year after in 1997 the Commission is issuing the package of proposed measures to tackle harmful tax competition.[275] Among the measures were proposed:

- the code of conduct for business taxation and in parallel a Commission communication on fiscal state aids. The Code of Conduct was considered to be the central instrument in the package, but still later was adopted as the soft law measure enforced by political commitment, which was supposed to prevent member states from the use and introduction of harmful tax measures. The Code was supposed to be supplemented by actions of the Commission against state aid measures used by the member states and prior that the issuance of the communication by the Commission, where it was supposed to share its policy related to identification of such state aid measures applied by the member states.
- measures to eliminate distortions to the taxation of capital income, as the income, which has the most mobile tax base. With respect to this issue was mainly discussed taxation of individuals on the income from savings and potential introduction of directive for coordination of taxation to ensure than income is taxed.

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[269] See ibid. Com(96)487, p.5.
[270] See Ibid. Com(96)487, p.6.
[271] See Ibid.Com(96)487, p.7.
[272] See Ibid. Com(96)487, p.7.
[273] Com(96)546 final, Report on the development of tax system, available at: http://aei.pitt.edu/38300/1/COM_(96)_546_final.pdf accessed on 24 June 2017.
[274] See Ibid. Com(96)546, pp.2 and 5.
[275] Com(97)495 final, Towards tax co-ordination in the European Union A package to tackle harmful tax competition, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51997DC0495&from=EN accessed on 24 June 2017.

- measures to eliminate withholding taxes on cross-border interest and royalty payments between companies.

All of the three measures above were in fact adopted. The Code of Conduct was approved later during the Council ECOFIN meeting on 1 December 1997 and still serves as a guiding instrument to fight unfair tax competition. The Directive for taxation of income of individuals in a form of interest was adopted in 2003.[276] The directive basically provided for the automatic exchange of information about the income paid to the individuals in a form of interest, which allowed member states of residence of such individuals to tax arising interest on the foreign bank accounts. The member states, which refused to exchange information were required to impose withholding tax on such income paid to non-residents during the transitional period (Austria, Belgium and Luxembourg). That Directive, however, was repealed with the adoption of a more general and broader directive on mandatory automatic exchange of information later in 2014.[277] In the same year as the saving directive, was adopted Interest-Royalty Directive on taxation of cross-border payments of interest and royalties. The Directive is still effective today and requires exemption of these types of income from taxation in the country of source and allows only the country of residence to tax the same. Although all member states have implemented it, the Commission has identified certain issues that needs to be addressed for improvement of directive, such as: enlargement the list of companies to which it applies, lowering the ownership threshold percentage from 25 to 10 percent and assurance that source states do not grant exemptions from withholding taxes in cases, where the countries of residents do not tax respective income.[278] The proposal, is however, still at the level of discussion.

What concerns other hard law measures, then were amended the previously adopted directives – the Merger Directive and the Parent-Subsidiary Directive. The scope of the Merger Directive was extended to a higher number of legal entities, including the SE (European Company) and SCE (the European Co-operative society), and also transparent entities, which allowed their shareholders to benefit from the Directive.[279] Additionally, the Directive became applicable to a new type of transaction, known as “split off” or partial division, when the company in question does not end to exist, but simply is split and gives its assets and liabilities to the new entity, while the receiving entity issues compensatory securities transferred further to the shareholder of the first mentioned entity.[280] Also, was reduced the ownership threshold from 25 to 10% and due to amendments the branches transferred into legal entities also receive relieve on the conversion. Both directives were codified in 2009.[281] The Parent-Subsidiary directive on taxation of dividends was also amended several times. In 2003 the ownership threshold was similarly reduced, the list of companies was also extended and on top of this, the subsidiaries of subsidiaries were also granted the benefits under the Directive.[282] Similarly, as the merger directive, the parent subsidiary directive was codified in 2011 into the new directive.[283] Further on in 2014 was adopted amendment to the Directive, which introduced hybrid mismatch rule – which required the parent state not to grant the exemption, if the profits of subsidiary were left untaxed with the income tax in the state of source.[284] Finally, in 2015 was adopted the

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[276] Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments.
[277] See Directive 2014/107/EU on mandatory automatic exchange of information.
[278] See COM (2011) 714: Proposal for a COUNCIL DIRECTIVE on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.
[279] See Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.
[280] See Ibid.
[281] See Council Directive 2009/133/EC of 19 October 2009.
[282] See Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.
[283] See Directive 2011/96/EC.
[284] See Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. For more on the same, see also W.Haslehner, *Anti-Hybrid Measures in the Parent Subsidiary Directive and the EU's Competence to Harmonise,* dated 31 August 2015, Kluwer International Tax Blog, available at: http://kluwertaxblog.com/2015/08/31/anti-hybrid-measures-in-the-parent-subsidiary-directive-and-the-eus-competence-to-harmonise/ accessed on 27 June 2017.

proposal for inclusion of the general anti-avoidance measure in the Directive.[285] There are concerns among the scholars and countries, that if in the past the measures of the Council were more oriented to dictate member states what not to do in order to eliminate double taxation and obstacles towards realization of the single market idea, then with the few recent directives the Council dictates what member states have to do in their national tax systems.

With the development of the single market and growing tendency for the use of fundamental freedoms, the EU was faced with the problem of tax avoidance, which required joint actions for more effective resolution. Thus, in 2011 the EU council adopted the comprehensive directive on administrative assistance in tax matters between the competent authorities of the member states.[286] Directive provided for various tools to be used by the tax authorities, including different types of exchange of information, simultaneous control, participation in administrative inquiries and decisions on tax cases. Recently the Directive was amended to facilitate exchange of information on financial accounts of taxpayers[287] and cross-border tax rulings and advanced pricing arrangements on transfer pricing cases.[288] On top of this, in July 2016 was adopted the so called Anti-Tax-Avoidance Directive, which established the minimum standards for introduction of anti-abuse rules domestically in each member states.[289] The Directive is inspired by the recommendations on the OECD BEPS project and requires member states to introduce domestic CFC rules, domestic GAAR, domestic rule on hybrid mismatches, rules for prevention of excessive interest deduction and also exit tax – which is a EU specifics. The rules are not detailed, but instead give general structure and minimum standards for the domestic anti-avoidance rules. Later on in May 2017 was adopted the latest directive on hybrid mismatches, which shall prevent corporate tax avoidance with the use of disparities between two and more jurisdictions.[290]

Along with all these developments, in parallel the EU member states discuss the possibility to introduce one common consolidated corporate tax base (CCCTB). Despite all the efforts, the income taxation is still diverse among the member states and this causes avoidance problems and impact on the financing and investment decisions.[291] The CCCTB system would prescribe the common rules for determination of the taxable base. The system may be convenient for the multinationals, because it will simplify the compliance obligations by requiring to comply with the one set of rules, rather than number of specific tax rules in each member state separately. Additionally, it will also allow offset the losses inside the group, but at the same time it shall eliminate the opportunities for tax avoidance – which is good for the states, but may not be that attractive for companies. While the CCCTB would introduce one common rules for determination of the taxable base, each member state would preserve the right to tax income in accordance with its domestic income tax rate. The group profits are planned to be allocated between the member states involved based on the predetermined formula. The first proposal for CCCTB in 2011 was rejected by the member states.[292] However, in October 2015 the Commission decided to relaunch the idea, but taking gradual approach – starting from the common base only, and only later moving towards the stage of consolidation and formula

[285] Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.
[286] See Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.
[287] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.
[288] See Council Directive 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.
[289] See Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.
[290] See Council Directive (EU) 2017/952 of 29 May 2017amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.
[291] See SWD(2016) 341 final, Commission staff working document impact assessment Accompanying the document Proposals for a Council Directive on a Common Corporate Tax Base and a Common Consolidated Corporate Tax Base (CCCTB) {COM(2016) 683 final.
[292] See COM(2011) 121/4, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB).

apportionment.[293] The relaunch of the CCCTB initiative is included into the Commission's work program.[294]

1.4.4. Intermediate conclusion

In the above section the author has presented an overview of the tax harmonization processes in the EU with the emphasis on both – the tax policy elements and actual developments. From the EU experience it may be concluded that tax harmonization is a long lasting, gradual process, which is complicated by the unwillingness of the states to share their sovereign powers in tax matters, the presence of tax avoidance, and is often dictated by the market forces. In the indirect tax issues, especially with respect to VAT, the EU managed to achieve higher level of harmonization than with respect to direct taxes. This phenomenon is explained by the fact that VAT and excise duties are very visible obstacles towards the free movement of goods and their impact on the cross-border trade is obvious. While with respect to direct taxes, the harmonization is moving not so rapidly, because often income taxes represent the hidden barrier towards realization of freedoms. Although, in the EU the initial proposals for harmonization of income taxes started to appear at the very early stage of its existence (in 1969), the first actual steps done towards this direction were only in 20 years after, when the parent subsidiary and merger directives were adopted. The EU experience demonstrates that with respect to direct taxes – the initial objective of harmonization was to eliminate double taxation of cross-border income flows associated with realization of freedoms. Gradually this objective has shifted towards the needs to eliminate double non-taxation and tax avoidance practices. It may also be observed that member states are more willing to cooperate on tax harmonization issues when the need is caused by the tax avoidance practices and loss of state tax revenues, rather than when the problem is double taxation of cross-border income.

Irrespective the absence of higher level of direct tax harmonization in the EU, it is acknowledged that taxation, especially, of the capital income (income from investment) has significant influence on development of cross-border investments and overall attractiveness of the states. Uncoordinated policy with respect to capital income taxation leads towards tax competitions between the member states, provides the legislative loopholes exploited by the taxpayers for tax avoidance purposes and in overall contributed towards unequal allocation of resources and appearance of tax gaps. The EU Commission plays an important role in the process of tax harmonization by issuing the policy studies, communications and recommendations. The EU experience shows that although member states are usually not ready to act immediately on many of the EU Commission proposals, they still do follow those proposals but sometimes many years after – when the problem outlined by the Commission is becoming critical and requires immediate action.

1.5. Review of integration staged in the EAEU and respective tax developments at each level of integration

The history of regional economic integration in Eurasia is a little bit confusing due to the high number of agreements taken to peruse economic integration, which often duplicated and overlapped each other. For instance, during the period from 1995 to 2007 were concluded four agreements on establishment of the Customs Union, where only upon the detailed review one may notice that the first agreements were more of a declarative character and the later ones in contrast provided for mechanism for realization of established objectives.[295] In this section, next to the development in tax matters, the author will be briefly outlining the integration stages and respective fundamental agreements to show the overall picture and dynamics happening in the region in addition to consideration of tax aspects.

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[293] See Ibid, p.30.

[294] See action plan on building a capital markets union, COM(2015)468final, 30 September 2015.

[295] The respective agreements were concluded between Russia and Belarus on 6 January 1995; on 20 January 1995 was signed new agreement on Customs Union, which was joined by Kazakhstan, Kyrgyzstan and Tajikistan. On 26 February 1999 was concluded new agreement between the same members on Customs Union and Single Economic Space. Finally, on 6 October 2007 was signed new agreement on Creation of Customs Union and single customs territory between Belarus, Kazakhstan and Russia. Good overview of periods of regional integration was prepared by A.Kashirkina, A.Moroz, *International legal models of the European Union and Customs Union: A Comparative Analysis: monograph*, Institute of Legislation and Comparative Law under the Government of the Russian Federation, Contract (2012), pp.50-.

The harmonization of tax legislation in the Eurasian region started[296] prior the adoption of EAEU Treaty and was undertaken through the work of CIS (Commonwealth of Independent States) and the Eurasian Economic Community ("EvrazEs") under the framework of earlier integration agreements.[297] Further in this section the author will review stages of integration between the Eurasian countries starting early in 1990s after the collapse of the USSR and comment on relevant tax issues that were addressed. The author will not consider in this work each agreement taken in different periods, but only fundamental ones, and will summarise the outcome of work undertaken under the CIS framework, EurazEC and finally will the EAEU Treaty.

1.5.1. Tax harmonization under the CIS framework

The CIS was created immediately after the dissolution of the Soviet Union in 1991 and was an attempt to re-establish the regional integrational block of new independent countries.[298] Among others was signed an Agreement on establishment of Economic Union in 1993, which was based on the western (EU) model and encompassed the gradual integration through creation of free trade zone, customs union, the common market and monetary union. The agreement was based on the idea of common market grounded on the free movement of goods, services, labor and capital and exercise of coordinated policies in monetary, tax, customs and external policies. Under its framework in 1995 on 6 January was concluded another agreement between Russia and Belarus on the Customs Union, which was later on 20 January 1995 joined by Kazakhstan. However, the CIS did not succeed in this particular area and did not progress even to the stage of free trade zone.[299] In view of Byakishev, CIS was a soft form of regional coperation, where at earlier stages of its existence a lot more was declared than actually performed.[300] Despite this, the still existing CIS and the work of its Interparliamentary Assembly has an important outcome on the tax harmonization process in the region through its work devoted to the development of model laws.

The Interparliamentary Assembly of CIS member states was created as an intergovernmental organization of CIS and consists of parliamentary delegations from the member countries. Among other functions, it develops non-binding recommendations on approximation of laws, including tax law. [301] Additionally, the CIS members signed an Agreement on the common principles of national tax policies, which still serves as the basis for unification of laws.[302]

Thus, within the above framework, was developed the CIS Model Tax code, which serves as a recommendation and non-binding guidance for the member countries in developing their national legislation.[303] It consists of two parts – general and special and the tax codes of Belarus, Kazakhstan, Kyrgyzstan and Russia currently follow the structure proposed by the Model, while Armenia is still working on the codification of the tax laws.[304] The first edition of general part of the Model Tax Code

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[296] See R.Zorina, Perspectives on the harmonization of tax legislations in the EAEU member states, Legislation, No.7, 2015, Original: Зорина, Р., "Перспектива гармонизации налоговых законодательств стран участниц ЕАЭС", Законодательство, №7, 2015

[297] EvrAzEs stopped its functioning with the entry into force of Treaty on EAEU on 1 January 2015

It was created in 2000 as an international economic organization for facilitation of integration process between the member states aiming to promote the development of customs union and common economic space.

[298] The current members of CIS are: Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine.

[299] Retrieved from: http://www.krugosvet.ru/enc/gumanitarnye_nauki/ekonomika_i_pravo/EVRAZISKOE_EKONOMICHESKOE_SOOBSHCHESTVO_EVRAZES.html accessed on 11 February 2016.

[300] See Byakishev et. al., "Internationally legal basis for creation and functioning of EAEU", 2015, p.138. Original: Бякишев и др., «Международноправовые основы создания и функционирования Евразийского Экономического Союза», 2015, стр. 138.

[301] Information it retrieved from the official website of Interparliamentary assembly, available on http://www.iacis.ru/about/ accessed on 12 February 2016.

[302] Agreement dated 13 March 1992 between CIS members on "Coordinated principles of tax policies", available at: http://base.spinform.ru/show_doc.fwx?rgn=4577

[303] For the process of adoption and implementation on the national level see I.Kucherov, "Theoretical aspects of realization of provisions in the tax model acts", JurInfor 2008. Original: И.Кучеров, *Теоретические вопросы реализации норм модельного налогового права, ЮрИнформ, 2008,* available at: http://www.jurinfor.ru/elib/articles/kii08s01/kii08s01-index.php

[304] See draft work, V.Tyutyuryukov, N. Tyutyuryukov, G.Ternopolskaya, "Вторoе поколение Модельного налогового кодекса СНГ: упреждая время…".

was developed in 2000,[305] and updated in 2013. The high-level overview of the initial version and its implementation by the member countries was undertaken by the group of Russian researchers in 2014. According to their findings, the general part established the set of common principles, such as principles of universality of tax law, certainty, prohibition of discrimination, neutrality, as well as prevalence of international law over the domestic one.[306] Interestingly, but researchers identified that only the Russian Tax Code currently envisages all these fundamental principles, whereas, for example, the legislations of Kazakhstan and Belarus miss the non-discrimination, certainty and neutrality principles.[307] At this point, it is questionable, whether Russia was and is the most compliant member state among other members or simply the model tax code was inspired by already existing Russian code? The same group of Russian researchers suggest that Russian tax legislation is a good role model for further legal harmonization in the region since a lot of efforts and also foreign expertise were invested into its formation,[308] and this suggestion in view of the author gives a hint that probably the previously done model tax codes were also mainly inspired by the Russian legislation, which in turn explains its high compliance.

Continuing further on the substance of the model tax code, the Model sets the basic rights of taxpayers and obligations of the tax authorities, as well as measures for enforcement of tax liability, which are in most cases implemented in the national legislations of member countries. It also encompasses definitions of critical terms, including the terms of tax and tax liability, principle for determination of transfer price, related parties, property, goods, works and services, dividends and interest, and many other terms.

The general part of the Model tax code was revised in 2013.[309] Along with that were issued several sections of the Model Tax Code addressing specific taxes and comprising the components of the Special part of the Code, including: section on VAT,[310] excise taxes,[311] corporate income tax,[312] personal income tax,[313] special tax regime for small and medium enterprises,[314] property tax,[315] land tax,[316] state duty,[317] social contributions and social taxes,[318] taxes on the use of natural resources,[319] state and local license duties.[320] Herewith, even though the existence of Model Tax Code could have been a good base for the harmonization, and to certain extent unification of the national tax laws, the member countries were not strictly following the model provisions and as a result there are still large divergences between the systems.[321] The author believes that the development of model laws is accompanied by proper study and analysis to meet the possible tax challenges that will be arising with the integration and also if continued to be developed further to account for the fundamental

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[305] Adopted by the Interparliamentary Assembly Regulation of the CIS No.16-5 dated 9 December 2000, available at: http://online.zakon.kz/m/Document/?doc_id=30076754

[306] For review of implementation of CIS Model tax code into the national tax systems refer to: V.Tyutyuryukov, N. Tyutyuryukov, G.Ternopolskaya, Модельный налоговый кодекс СНГ: что он дал странам СНГ и что он может дать России?

[307] In case of Kazakhstan, the absence of these principles may be linked to unfair application of special measures on fraudulent activities that in addition to fraud activities, also target the fair taxpayers, who as a result become responsible for the damages caused by fraud transactions – e.g. connected to VAT and false invoicing. Additionally, due to inefficient functioning of refund mechanism, the principle of neutrality would be violated should it exist in Kazakhstan.

[308] See Ibid. 296.

[309] Adopted by the Interparliamentary Assembly of the CIS Regulation № 39-10 dated 29 November 2013, available at: http://online.zakon.kz/

[310] Adopted by the Interparliamentary Assembly of the CIS Regulation № 18-8 dated 24 November 2001

[311] Adopted by the Interparliamentary Assembly of the CIS on 7 December 2007

[312] Adopted by the Interparliamentary Assembly of the CIS Regulation № 23-11 dated 17 April 2004

[313] Adopted by the Interparliamentary Assembly of the CIS Regulation № 22-9 dated 15 November 2003

[314] Adopted by the Interparliamentary Assembly of the CIS Regulation № 21-8 dated 16 June 2003

[315] Adopted by the Interparliamentary Assembly of the CIS Regulation № 28-9 dated 31 May 2007

[316] Ibid.

[317] Ibid.

[318] Adopted by the Interparliamentary Assembly of the CIS Regulation № 31-10 dated 25 November 2008

[319] Adopted by the Interparliamentary Assembly of the CIS Regulation №31-11 dated 25 November 2008

[320] Adopted by the Interparliamentary Assembly of the CIS Regulation № 34-11 dated 7 April 2010

[321] This is the general public perception, however, to the knowledge of the authors there was no any comparative analysis undertaken of the member countries tax systems to identify the degree of convergence and similarities derived from the Model tax code.

principles envisaged in the EAEU Treaty. This issue, however, deserves a separate analysis and study.

Further on, under the framework of Agreement for common principles of national tax policies, countries agreed to follow a common model of bilateral tax treaties (the CIS Model), which was based on the OECD model enacted at that time.[322] However, current practice shows that member countries deviate significantly from the established model and prefer to be guided by their own political agenda, sovereignty and investment interests.[323] Current treaties of CIS members, including the members of the EAEU, in many aspects follow the UN model, which is a right approach for developing countries, but however, it also indicates that perhaps the CIS model tax treaty needs to be revised to take into account the interests of member states and also to account for the latest best practices in terms of measures for fighting tax avoidance and evasion.

Thus, in view of the author, the current Eurasian Economic Union has inherited from the CIS a good starting point for further development and enhancement of tax harmonization process in the region. The fact that for the CIS members the developed models were not of binding nature, but rather of recommendative or illustrative, resulted in not convergent implementation of the models by the states. However, taken the reality of Eurasian Economic Union, should there be a consensus for the use of the similar type of instruments it may result in positive outcome in terms of harmonising the national laws, at least on certain agreed aspects. However, upon development of the new provisions of potential model tax code, it is recommended by the author not to simply copy the provisions from Russian legislation, as it is proposed by some local scholars, but instead, carefully review currently existing legislations of other member states, analyse the interactions between different types of taxes in each particular state, as well as the influence of each particular tax on and the composition of the state revenue, account for the fundamental principles envisaged in the EAEU treaty and foresee other tax challenges that integration will cause before any binding recommendations may be proposed to the states.

1.5.2. Tax harmonization within the EurazEC, 2000-2014

Creation of EurazEC (Eurasian Economic Community) was a response to delayed integration within the framework of CIS. Therefore, several countries continued this initiative independently and by 2000 was created an international economic organization for facilitation of integration process between the republics of Belarus, Kazakhstan, Kyrgyzstan, Russia and Tajikistan, aiming to promote the development of customs union and common economic space.[324] The EurazEC had its own supranational institutions, which were: the EurazEC Intergovernmental Council at the level of presidents and prime ministers of the member states, Integration Committee and its Secretariat, the Parliamentary Assembly and the Commission of the permanent representatives.

Under the EurazEC framework was adopted additional Agreement on the Customs Union and Common Economic space dated 26 February 1999. Further, on 26 October 1999 the EurazEC Intergovernmental Council made decision No. 52 on “The Program for harmonization of national legislations and other legal acts of the member states participants to the agreement of 26 February 1999”.[325] Additionally was taken Agreement on the legal basis for the formation of the Customs Union and Single Economic Space dated 26 October 1999. As was correctly noted by T.Neshatayeva, in contrast to the Customs Union, which focused only on the free movement of goods and legal system to facilitate the same, the agreement on the Single Economic Space also provided for the purpose to achieve free movement of labor, services and capital, to carry out agreed macro-economic policy, as well as harmonization and unification of national legislations in the areas of finance, tax,

[322] Protocol dated 15 May 1992 on “Unification of approach to enter into agreements on avoidance of double taxation on income and capital”, available at: http://www.lawrussia.ru/texts/legal_524/doc524a264x940.htm

[323] T.Balco, X. Yeroshenko, The relationship between international tax law and the domestic legal order: the case of Kazakhstan, Studi Tributari Europei, 2015, available at: https://ste.unibo.it/article/view/5664.

[324] See Agreement on creation of Eurasian Economic Community dated 10 October 2000.

[325] In the article of K.Anopriyenko it is stated that this decision was not published. Ibid.

investment, competition and antimonopoly policies, also with the use of international agreements having direct effect (similar to the Code of the Customs Union).[326]

The EurazEC resulted to be more effective than CIS: within its framework were concluded around 200 international agreements on different subjects, by means of which certain general aspects of internal legal systems in relation to economy and trade were unified.[327]

From the tax policy perspective, one of the important institutions of the Community was Parliamentary Assembly, which among its other functions was responsible for development of legislation basis, which were considered as directly applicable acts in the member countries.[328] Among this was adopted the "Concept on the fundamentals (basis) of tax law in EurazEC",[329] which had the legal power in contrast to the CIS models, and mainly addressed the general and administrative tax issues concerning the rights of the parties, the relationship between the tax law and other national laws and international agreements, the general rules for calculation of taxes and enforcement of tax collections, but not the technical and substantive aspects of the specific taxes.[330]

Besides the above, the Parliamentary Assembly was responsible for development of model laws on harmonization and unification of the national legal systems, including tax systems, and aligning the national legal systems with the requirements of EurazEC agreements. As a result were adopted several recommendations on harmonization of tax systems of the member states, including recommendation on direct taxes, aiming to harmonise the approach of countries towards common terminology, common rules for determination of taxable base, unification of tax rates, unification of approach for taxation of non-residents.[331] The review of these recommendations indicated to the author that the recommendations were of a very general and high-level nature, identifying the issues that were important to be harmonised, however, not proposing any concreate actions or methods. Consequently, each country was probably following the suggested directions on "what" to harmonise (or introduce in many cases) – e.g. "to list the types of income subject to income tax from sources in that country", however, since there were no concreate instructions on "how" to do it and "what to include" in the provisions, countries were going in different directions with respect to the same issues.

In conservative view of the author, the names of the programs, act and agreements sound very promising, and probably the ideas behind were not bad, however, in fact, there was not much of a substantive measures incorporated into these documents, and no proper follow up work was undertaken by institutions. In view of the author, it is a kind of missed opportunity for tax harmonization in the region, because in comparison to the position of countries back 15-20 years ago, the current national tax systems are more solid and probably would be harder to change in

[326] T.Neshatayeva, "On creation of the Eurasian Union: integration and supranationalism", Zakon, No. 6, 2014. Original: Т.Нешатаева, «К вопросу о создании Евразийского союза: интеграция и наднационализм», Закон, 2014, № 6.

[327] See Shumilov, Boklan, I.Lifshic, "Legal novels of the EAEU Treaty", Russian foreign economy messenger 4-2015. Original: В.Шумилов, Д.Боклан, И.Лифшиц, «Правовые новеллы договора о ЕАЕС», Российский внешнеэкономический вестник, 4-2015.

[328] For about 11 years was enforced the EurazEC Agreement "On the status of the Basis of the EurazEC Legislation, the order of its development, adoption and implementation", dated 18 June 2004, (Договор о статусе Основ законодательства Евразийского экономического сообщества, порядке их разработки, принятия и реализации) available at: http://evrazes.com/docs/view/55

[329] Dated 30 May 2007, available at: http://www.vkp.ru/104/106/118/339.html

[330] In fact, this agreement to certain extent mirrored the principles established in the general part of the CIS Model Tax Code. To the knowledge of the author, there was no follow up work by the Institutions and it was not examined whether the member countries fully complied with the proposed principles in their national tax legislations.

[331] See Zorina, Ibid. For the recommendations, see:
Постановление Бюро Межпарламентской Ассамблеи Евразийского Экономического Сообщества от 2 декабря 2009 года №10 "О Рекомендациях по гармонизации законодательства государств - членов ЕврАзЭС **по налогу на прибыль** (на основе сравнительно-правового анализа национальных законодательств)", available at: http://base.spinform.ru/show_doc.fwx?rgn=30286. See also Постановление Бюро Межпарламентской Ассамблеи Евразийского экономического сообщества от 2 декабря 2009 года №9 "О Рекомендациях по гармонизации законодательства Государств - членов ЕврАзЭС **по подоходному налогу** (на основе сравнительно-правового анализа национальных законодательств)", available at: http://base.spinform.ru/show_doc.fwx?rgn=30285

substance rather than before – when the states and their tax systems were younger and still forming, where the states were lack of necessary knowledge, experience to independently create tax systems and missed understanding of market economy and therefore, would probably be more reluctant to follow any strong model as an example in absence of any better option.

One of the impetus for further integration to the level of Customs Union was inability and also unwillingness of some EurazEC member states to ratify and apply the international agreements concluded within the EurazEC framework. Thus, three member states decided to proceed separately to the level of customs union and creation of supranational bodies to share certain competencies and responsibilities of supervision over member states compliance with international agreements on integration.[332]

1.5.2.1. Customs Union and Single Economic Space

The Customs Union formally started to function on 1st July 2010 with entry into force of Common Customs Code between Belarus, Kazakhstan and Russia, eliminating the internal barriers for the movement of goods between the countries.[333] Very soon after entry into force of the Common Customs Code was established Common Economic Space, which was the next step towards regional integration and is considered to be established on 1 January 2012 with the entry into force of several fundamental agreements, which among other principles, provided for the free movement of services, labor and capital.[334]

At the stage of the Customs Union was achieved the most progress in terms of indirect tax harmonization. Several international agreements were concluded to enhance the common approach for imposition of indirect taxes.[335] Among such agreements were concluded:

1. Agreement on the principles of collection of indirect taxes upon export and importation of goods, rendering of works and provision of services in the Customs Union, dated 25 January 2008.
2. Protocol on the procedure for collection of indirect taxes and mechanism for control over the payment of indirect taxes upon export and import of goods in the Customs Union dated 11 December 2009.
3. Protocol on the procedure for collection of indirect taxes upon rendering of works and provision of services in the Customs Union dated 11 December 2009.
4. Protocol dated 11 December 2009 on the changes to the Agreement on the principles of collection of indirect taxes upon export and importation of goods, rendering of works and provision of services in the Customs Union, dated 25 January 2008.
5. Agreement on establishment and application of the order for collection and distribution of import customs duties (other duties, taxes and fees, having equivalent effect) dated 20 May 2010.

The good overview of harmonised aspects of indirect taxes under the above agreements is provided in a comparative analysis by Golodova and Rachinskaya (2012).[336] Accordingly, on the basis of international agreements the national tax systems of the member countries were modified and the following was achieved:

- 1) was set the common principle for determination of origin of goods, produced in the third countries, including natural resources, agricultural products, animals and others.
- 2) was implemented place of supply rule, allowing application of zero-rate VAT upon exportation of goods in the country of export and imposition of import VAT upon importation of goods, including intra-community transactions. The same principle applies to excise taxes.
- 3) offset (deduction) of VAT is allowed in connection to exported zero-rated goods in intra-community transactions;

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[332] See Shumilov, 2015 ibid.

[333] See Customs Code of the Customs Union entered into force on 1 July 2010, available at: http://www.tsouz.ru/Docs/Kodeks/Pages/default.aspx

[334] See Decision of the Supreme Eurasian Economic Council No.9 dated 19 December 2011

[335] All these agreements were terminated with the entry into force of Agreement on Eurasian Economic Union, which encompasses and detailizes the previously agreed principles.

[336] Zh. Golodova, Yu.Rachinskaya, "Analysis of indirect tax harmonization in the countries of CIS and Customs Union", International Accounting, No.25, 2012

- 4) the import VAT should be paid by the owner of the imported goods (or the authorized commissioner or agent)
- 5) set the common date for submission of declaration and payment of indirect taxes on imported goods
- 6) determined the principle for collection of indirect taxes for provision of works and services – taxes should be collected in the state, which is recognized as the place of realization of works and services. Place of realization is set as following: upon provision of services associated with immovable property – place of location of the property. In case of auditing, accounting or consulting services, marketing, design and engineering, information processing services, research and development, experimental and construction, expiremental and technological works, secondment services – in case of the location of the buyer, and in case of location of the seller in all other circumstances.
- 7) indirect taxes on works and services should be collected in accordance with the rules of the country, recognized as the place of realization: tax rates, collection procedure and any applicable tax incentives or privileges.
- 8) VAT should apply to works on processing of customer-furnished raw materials imported to the territory of one member state from the territory of another member-state with subsequent re-export of products of processing to the territory of that other state.
- 9) The place of supply of auxilary services should coincide with the place of supply of main services.
- 10) the agreement is reached on the order and timing of electronic information exchange on indirect taxes paid and tax incentives/ privileges provided.
- 11) for the time being the contract amount is considered as the base for indirect taxes.

Direct income taxes

What concerns laws on direct taxes in member states, even though there were recommendations issued by the CIS and also the EurazEC Inter-Parliamentary Assemblies, and some aspects of the laws were more or less harmonised ("unified" as the term is used in the local documents), there are still no concrete unanimity or harmonization in any particular tax, and this area calls for attention of legislators in the light of recent formation of EAEU. As noted by Zakharova, the tax systems of the EAEU member states do still have certain similarities, explained by the common historical background and the work of the predeceasing regional organizations.[337] However, it shall be noted that many deviations appeared in the systems due to the natural market, economic and modernization processes, as well as the willingness of the states to increase the tax revenues, but also stay competitive and attractive for investors. Nowadays, however, one could again observe the common tendency for approximation of national legal systems, writes Zakharova. This policy in her view is reasoned by the understanding of the member states that only with the harmonized approached towards tax policies and fair competition policies, it will become possible to realize the idea of the single market of goods, capital and labour.

Similar to the EU, where the approximation and decrease of income tax rates of member states was observed in a relatively short period from around 40% to 25% and lower,[338] the tax competition was also progressing in the Eurasian region, where since the 1994 countries gradually started to soften the national laws, favouring investments and decreasing the income tax rates.

Comparative table on CIT rates in EAEU member countries 1992-2016*

Country	**Years**					
	1992	**2000**	**2005**	**2010**	**2013**	**2016**
Armenia	12%-30%	20	20	20	20	20
Belarus	30	25	24	24	18	18
Kazakhstan	30	30	30	20	20	20
Kyrgyzstan	n/i	10	20	10	10	10
Russia	32	35	24	20	20	20

* Developed by author with the use of: www.concourt.am, www.ey.com

[337] Zakharova, see Ibid.

[338] See B. Terra, P. Wattel, *European Tax Law,* Introduction (Wolters Kluwer Law & Business 2012)

Comparative table on WHT CIT rates in EAEU member countries 1992-2016*

Country	Years											
	1992			2005			2010			2016		
	D	I	R	D	I	R	D	I	R	D	I	R
Armenia	12-30% (sep.accounting)			10	10	10	10	10	10	10	10	10
Belarus				12			12	10	15	12	10	15
Kazakhstan				15	15	20	15	15	15	15	15	15
Kyrgyzstan				10	10	30	10					
Russia	15	15		15	20	20	15	20	20	15	20	20

* Developed by author with the use of: www.base.spinform.ru, www.concourt.am, www.ey.com
Various incentives, exemptions and special regimes are not taken into account.

Herewith, the latest document issued by the Economic Council of CIS provides for several good steps that could be considered more precisely by members of the Union with respect to direct taxes.[339] The orientation proposed by the CIS, may not only guide the EAEU countries towards further harmonization, but may force them to address social problems and inequality of tax burdens existing in the countries. Thus, the proposed measures are based on the review of the current situations in the CIS member countries, global developments and include:

1. Personal income tax: consider introduction of progressive rate, including income taxes on passive income of physical persons, in particular in the form of dividends. Reconsider approach with respect to personal deductions and qualify certain types of first need expenses as deductible for personal income tax purposes. In view of the author, this recommendation is essential for establishment of fair taxation in the region and also boost the revenue collections by countries. Currently, member states have quite low personal income tax rates (e.g. in Kazakhstan it is only 10%, in Russia - 13%) and also provide number of exemptions from capital gain, dividends and interests – where in many cases the most benefits are granted to wealthy individuals, who benefit from such exemptions on passive income taxation and contribute to the state budget as much revenue as average individual does taken the low rates of PIT and not always true disclosure of income. Additionally, in contrast to the western tax systems, there are very little tax allowances and deductions usually granted with respect to individual income taxes in the EAEU member states. Population there in general does not benefit from deduction of the costs associated with the medical expenses, education of children, availability of dependent parents or spouses.

2. Corporate income tax: increase corporate income tax rate by at least 10-12%, however provide certain investment incentives for development of strategically important areas, in particular by providing accelerated depreciation allowances and tax credits. With this respect, should be introduced the mechanism for effective control over the incentives and estimation of its economic efficiency. Special attention should be paid to tax regime imposed on companies, which employ the handicapped people, produce medical equipment and products, and provide special services and products to socially deprived classes of society. At the same time, special attention should be drawn to the tax avoidance measures: strengthening the requirement on disclosure of beneficial owner information, strengthening the control over the ambiguous transactions, review of transfer pricing legislation, follow the international recommendations and strengthen the personal (individual) responsibility. With respect to the rates, in view of the author, only the simultaneous and coordinated increase in tax rates may be beneficial for the region, because of the potential threat of tax competition. The author supports the idea that incentives deserve more attention and estimation of their effectiveness, because the ineffectiveness of incentives, or better to say their "non-justification" is the current problem of the region.

3. Property tax: any reforms on property taxes should account for general ability of public to pay taxes, the tax so amended should not be burdensome for the general population mass. It is proposed to introduced exempt amount of property (in square meters) per person. It is also proposed to consider introduction of tax on the wealth or expensive property items – such as expensive cars, where the

[339] Protocol Decision of the CIS Economic Council, dated 13 March 2015 О вопросах налогообложения в государствах - участниках СНГ

applicable tax rate would reflect the ability of the owner to pay, and not vice versa as for example is currently practiced in Kazakhstan. In view of the author, the property taxation may be more sensitive than income taxation because of the need to balance the ability to pay principle. From the one side it is true that property taxes shall be revised in the region because they contribute very low tax percentage of tax revenues and there is a potential for higher collection, but from another side, incorrectly designed system may hurt the vulnerable layers of population and make poor people even more poor. However, the idea on introduction of taxation with respect to luxuries items of personal and corporate property may be very appropriate in the region.

1.5.2.2. Economic Union

Agreement on establishment of the economic union entered into force on 1 January 2015. In terms of tax harmonization it had not introduce many new measures. Instead it codified the agreements reached previously during the EurazEC with respect to use of indirect taxes and clarified a few rules. Detailed overview of indirect tax harmonization in the EAEU is presented in the section 3.2.5. of this work.

With establishment of the economic union, for the first time in the region was addressed issue of direct taxes. In particular, as will be discussed later, the EAEU Treaty requires member states to grant equal tax rates of personal income tax to residents and non-residents on the income from employment from the first day of employment. This requirement was introduced to eliminate the discriminatory tax treatment of non-resident taxpayers, when they exercise the employment in the other member state. For instance, in Russia, employment income received by non-residents is taxed at the rate of 30%, whereas employment income of residents at the rate of 13%. With such an approach, until the moment the taxpayer received a tax resident status, it would be discriminated with a more burdensome taxation than residents.

With respect to assistance and cooperation in tax matters, there are several agreements enforced between the member states. One of such agreement is the Protocol on exchange of information in the electronic form between the tax authorities of the member states with respect to amounts of indirect taxes paid.[340] The protocol is concluded at the institutional level between the competent authorities of the member states and is limited only to the exchange of information on indirect taxes and information provided by the taxpayer in a certain form. Apart from that there are also agreements concluded among the member states on cooperation and mutual assistance in respect to tax matters. These types of agreements are more general and provide the basis for cooperation between the competent authorities on the matters for prevention of tax violations, exchange of information on request or spontaneously about the income, property and other objects of taxation and other information related to taxation; exchange of information on the national tax systems and changes therein; assistance in creation and functioning of the information systems for the work of tax authorities, organization of work with taxpayers, training of employees and other tax matters, which require mutual actions.[341] These agreements provide general basis for cooperation, whereas more detailed procedures may be set by the competent authorities. In view of the author the current set of rules may be sufficient for moment, but closer integration may require the member states to extend the agreement to cover also direct tax matters.

With respect to the current developments, the first step on agenda of Eurasian Economic Commission stands the harmonization of excise taxes' rates on alcohol and tobacco products.[342] Further on, taken the sectional approach of integration and the current plan to create a common market of carbohydrates, with this respect it is discussed that perhaps, the second step should be the harmonization of excise taxes on these types of products. For the Commission it is also among priorities the development of strategic and coordinated approaches among the member states for taxation of electronic goods. Currently, the Commission is developing a harmonized mechanism for

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[340] Original in Rus: Протокол об обмене информацией в электронном виде между налоговыми органами государств-членов евразийского экономического союза об уплаченных суммах косвенных налогов от 11 декабря 2009 года (в редакции от 8 октября 2014 года и от 31 декабря 2014 года).

[341] See, for instance, Соглашение между Правительством Республики Казахстан и Правительством Республики Беларусь о сотрудничестве и взаимной помощи по вопросам соблюдения налогового законодательства (г. Минск, 22 мая 2000 г.)

[342] See the news on the EAEU Commission web-portal dated 25 April 2017, available at: http://www.eurasiancommission.org/ru/nae/news/Pages/25-04-2017-2.aspx

taxing electronic commerce. In doing so, the Commission grounds the potential mechanism on the report prepared by OECD with respect to Action 1 of BEPS Project on Taxation of Digital Commerce.[343] At the same time, the Commission acknowledges that it is important to establish an exchange of information between the tax and customs authorities to track commodity flows.[344] Among other coordination measures and BEPS project, the EAEU Commission is also emphasising the importance to work towards the development of the coordinated approaches and rules on transfer pricing and exchange of information of fiscal character between the tax authorities. In addition, in 2017 shall begin the functioning the working party on the exchange of experience in the application of the double tax treaties. The working party shall consist of the representatives of the EAEU member states and function within the framework of the Advisory Committee on Tax Policy and Administration under the EAEU Commission Board. During the meetings, the experts will be discussing specific problems and situations arising from the application of the tax treaties between the member states and exchange of experience in priority matters.[345]

1.5.3. Intermediate conclusion

Tax harmonization in the EAEU has been carried out at three different levels of integration – CIS, EurazEC and EAEU. Harmonization in the region addressed currently only the indirect tax issues, and only very briefly touched upon the tax rates of personal income tax. The inheritance in terms of attempts for tax harmonization received from the CIS work is quite a good base for further development: under the CIS framework member states agreed to follow the model tax codes and model tax conventions, which are developed in accordance with the needs of the member states. In view of the author, the idea with the model legislation is good, but in contrast to the existing approach, it is required to incorporate more detailed and specific provisions in the model laws - so that member states see a concreate example of good practice and detailed recommendations (e.g. like a minimum standard), rather than pure recommendation of doing something without concreate details. Additionally, to benefit from the model law, there shall be a binding agreement for the member states to follow the models, because currently, the model laws are issued only in the form of soft laws and this causes their ineffectiveness.

1.6. Intermediate conclusion

In the first section the author has studied the notion of tax harmonization and its place, as well as the role in the process of regional economic integration based on the examples of the European and Eurasian Unions. In general, it may be concluded that harmonization of indirect taxes in both unions is associated with the free movement of goods and services and takes primary importance, in contrast to the direct tax harmonization – which, based on the fundamental agreements establishing the unions, is not considered by the states as the issue of primary importance and is often delayed due to this reason. At the same time, harmonization of direct taxes becomes important when the level of integration comes to realization of principles for the free movement of persons, capital or investments – and harmonization at this stage implies acceptance of common measures for elimination of double taxation of cross border income, establishing fair conditions for national and foreign investors, prevention of harmful tax competition between the member states and also prevention of tax avoidance. At the same time, the practice of different economic integrations shows that there is no particular standards that require certain level of tax harmonization at concreate stage of economic integration (e.g. harmonization of indirect taxes at the level of common market and direct taxes at the level of economic union) – instead, it is up to the member states to agree on the desired level of tax harmonization and means for its achievement. Based on this, the author concludes that there is no prescribed international standard or rule that should be followed by the Eurasian Economic Union with respect to the level and form of tax harmonization required during its current and further stages of development. Instead, the policy makers in the EAEU shall be guided by the market conditions in the Union (including both – the level of economic cooperation between the member states and also the differences in the legislative sources in the member states), the primary objectives of the agreement to assess the required level of tax harmonization necessary to achieve the objectives of

[343] For more see news report on the EAEU web-portal dated 27 March 2017, available at: http://www.eurasiancommission.org/ru/nae/news/Pages/29-03-2017.aspx
[344] Ibid. news report dated 25 April 2017.
[345] See Ibid, news report dated 25 April 2017.

the Union and respectively, they shall take into account the permitted degree of such harmonization based on the principles of the EAEU and member states' laws.

Further on, in this section the author has also undertook the detailed review of tax harmonization levels achieved by the EU and the EAEU at the various stages of their integration and has compared the directions, objectives and means for the past and also upcoming processes of tax harmonization in both unions. The study has revealed that the development of tax harmonization in the EU and EAEU regions has some similarities and also obvious differences. First of all, although, both organizations formally reached the status of economic union, they are not on the same or at least close levels of developments, neither in general in terms of economic development and legislative harmonization, nor specifically they are close on the issues of tax matters to be resolved. The EU is older than EAEU for approximately 50 years, and respectively much more issues were resolved and achieved in terms of tax harmonization there than in the EAEU. What concerns the general notion of tax harmonization – then both organizations acknowledge the need for the same, but neither specifically determines the extent to which tax harmonization may be required. In contrast, both unions specifically in the fundamental documents outline the importance of indirect tax harmonization for realization of the freedom for movement of goods and services and achievement of single market. Herewith, the respective extent then is the level, when the single market is achieved and one of the characterization of the single market is the absence of barriers, restrictions and discrimination with respect to foreign goods and services. With respect to direct taxes, with exception of single provision in the EAEU Treaty, both Unions do not include specific legislative basis and direction for its harmonization.

Both unions started tax harmonization from addressing the indirect taxes – introducing the VAT and the fundamental principles of its functioning and administration. Over the years, the EU managed to achieve a so called common system of VAT, which harmonizes very many aspects of its functioning and leaves only minor powers with respect to the member states and mainly with respect to issues that should not hamper and negatively influence the development of mutual cross-border trade. With respect to excise taxes, the EU did not achieve as much progress as with regard to VAT, but still persuades the strategy for closer integration on these matters. The EAEU is not far back from the EU in terms of excise tax coordination and the current objective to reach common rates of excise taxes looks more ambitious that attempts of the EU on the same. With respect to VAT, the EAEU has already achieved partial harmonization of national systems at earlier stages of its integration,[346] and there are basis for further and closer integration on VAT matters provided in the EAEU Treaty.

With respect to direct taxes, the situation is not straightforward. In the EU the discussion on harmonization of aspects of direct taxation started in the late 1960s and only in 30 years resulted in adoption of the first instruments, but so far, mainly regulating taxation of passive income. The direct tax harmonization in the EU is driven not only by the objective to eliminate barriers and discrimination in the mutual flow of capital and persons, but is also driven by the market forces – such as tax competition and desire of the states to diminish harmful tax competition between themselves and also eliminate harmful effect of unfair competition on businesses. Taken the sensitivity of the issue, these are not always the hard law instruments adopted for coordination of direct tax matters in the EU, but also soft law instruments. As shown by practice, for effectiveness of the soft law instruments is important the existence of the formal state commitment and also the existence of supranational institutions, the actions of which may support the soft nature of instruments, which in more details is discussed in section 2 of this work. In the EAEU, the discussion of direct tax harmonization has not yet formally started in a broader terms, but aspect of personal income taxation were partially addressed in the EAEU Treaty. EAEU Treaty prescribes member states to apply the same personal income tax rates on income from employment irrespective of the person's tax residency status – thus promoting the movement of labour. In the TFEU one cannot find similar provisions and neither the same was included in any secondary instruments. The EAEU Treaty is different in this respect from the TFEU, because it directly prescribes and includes the rule right inside the fundamental treaty. Taken the current developments in the region, the current developments on the global tax arena, and inspite the absence of the provisions calling for direct tax harmonization in the EAEU (as will be discussed in more details in section 3 of this work), the author predicts that in a relatively short time the EAEU Treaty may be amended to explicitly call for the

[346] More details on the issues harmonized in the EAEU are discussed in part 3.2. of this work.

actions of the member states to work on harmonization of direct taxes. In this respect, the work of the Interparliamentary assemblies of the CIS and previously existed EurazEC on tax harmonization may be a good basis and examples for the EAEU to rely on and consider in its future agenda. In particular, the author believes that if in its future work the EAEU policy makers would decide to follow similar instruments as was done by the CIS – i.e. using the model laws, then such laws shall be more detailed and substantive than CIS models, and also shall have the binding force to become effective instruments.

Further on, what concerns the actual instruments of tax harmonization in place, then the unions use different approaches to act on it. In the EU, harmonization of taxation is carried out through the adoption of directives at the level of the European Council, which is composed of the ministers from the relevant authorities of the member states. The directive is a secondary instrument, which is based on the fundamental treaty of the functioning of the EEEU (TFEU) and it is binding on the member states. The directives on taxation can be adopted only unanimously and impose obligations for the member states to act in certain manner to achieve specific objectives. For instance, directive provides for specific objective to be achieved and gives certain frame or basic rules, which member states shall stick to, but it may leave the power for the member state to choose the form and the way in which the objective will be fulfilled – in other words, directive is not a concreate rule, but basically the legislative guidance for adoption of the domestic legislative to achieve certain goal. In the Eurasian Union, national tax laws are harmonized by means of conclusion of international agreements, which are usually very precise and detailed and do not give much space for deviations. However, these international agreements, although, may be directly applicable, are often incorporated by the member states into the national laws. For instance, in the Tax Code of Kazakhstan, the section on VAT is subdivided into two distinct parts – the general rules for imposition of VAT with third countries and specific rules for imposition of VAT within the EAEU customs union, whereas the second part is based in most extent on the standards agreed among the EAEU members. With the entry into force of the EAEU Treaty those international agreements on harmonization of taxation were codified in the EAEU Treaty and therefore, currently, it is the fundamental treaty, which in addition to general principles regulating the functioning of the EAEU also contains specific rules on imposition of indirect taxes. What concerns future measures on tax harmonization, in view of the author, there are several ways in which they will be taken: it may be again separate agreements concluded between the member states, it may be the soft law adopted by the member states in a form of the model laws, and also the amendments introduced in the fundamental treaty itself.

"Nobody would have deliberately designed a government as complex and as redundant as the EU"
(c) Tom Reid, Washington Post

2. Review of institutional basis for tax harmonization in the EAEU – the extent of differences and similarities with the EU

2.1. Introduction

In the European Union high degree of tax harmonization was achieved due to at least several factors, including the willingness of the states to do so, but also the presence of the competence of the Union institutions to take necessary actions to ensure the realization of the four freedoms and creation of the internal market.[347] The notion of competence in the EU was addressed in the section 1.3.3.1. of this work, where it stated that in direct tax matters only the member states have exclusive competence to act and competence to act in indirect tax matters is shared between the member states and the EU institutions. The specific competence of each institution (i.e. list of permissible actions and functions) in the EU is defined separately and usually in the general form, which means if the institution has certain power to act it applies to all spheres of relations, including taxation, unless specifically stated otherwise. Currently there are seven independent institutions established in the EU. They are listed in article 13 of the Treaty on European Union and include:

1. the European Parliament
2. the European Council
3. the Council of the European Union
4. the European Commission
5. the Court of Justice of the European Union (CJEU)
6. the European Central Bank
7. the Court of Auditors.

Most of these institutions were created in the 1950s with the establishment of European Community, however, later during the years many changes were done in terms of shifting and balancing the capacities and powers between them. Initially, the EU countries were hesitant to have *supranationalizm* and tried to limit the powers attributed to the institutions, which resulted in attributing more powers to the Council to overview the activities of the executive bodies.[348]

The purpose of creation supranational institutions is to have the supranational authority and control over the agreed spector, in order to supervise over compliance by the member states with the provisions of supranational law and basically to enforce the supranational law.

In this work the author will closely consider the functioning of only five key institutions: the European Parliament, the European Council, the Council of the European Union, the European Commission and the CJEU and the respective function they perform to harmonise the national tax laws. The institutional basis and capacity of the EU institutions to act in tax matters will be compared to the institutional basis of the EAEU to identify the similarities and differences, and on the basis of the same, to assess the effectiveness of the EAEU institutions to promote tax harmonization in the region and if necessary to draft the recommendations for potential improvement of the system in the EAEU. In comparison to the EU, the EAEU institutional system is comprised of the Supreme Economic Council, the Intergovernmental Council, the Commission and the Court of the EAEU. In practice and also in the literature, one can often hear that institutional structure in the EAEU is similar and is basically grounded on the EU experience. The author of this word does not support this view, because inspite the similarities one can observe in the names of some institutions, in her view, there are very different backgrounds of institutions in each union and consequently, very different powers and capacities attributed to them. The author believes that there are limitations in the current structure of the EAEU institutions that may in general hamper realization of the single market and also postpone the tax harmonization processes in the region. The section will aim to support and explain the view of the author. It will start from reviewing the institutional basis in the EU and will specifically focus on how the institutions contribute towards tax harmonization in the EU, it will continue on the same matter about the EAEU experience and will conclude to sum up on the extent of compatibility between institutions and drafting the potential recommendations.

[347] See, for instance, articles 113 and 115 of the TFEU.
[348] See the case of France and High Authority

2.2. Comparison of institutional structures and respective capacities to act in tax matters

2.2.1. The EU

2.2.1.1. The European Parliament

The European Parliament[349] was initially functioning as the Common Assembly of the of the European Coal and Steel Community and was later renamed into the Parliamentary Assembly and only later became the European Parliament. It neither had its current powers at earlier stages of the EU integration and only gradually got elected by public (1979). Comparatively recently (with the Lisbon Treaty), it acquired the capacity to share the legislative responsibilities with the Council on an equal footing[350] and take part in the so called "ordinary legislative procedure"[351], which implies qualified majority voting (QMV) in the Council and simple or absolute majority by the Parliament. Besides having legislative responsibilities, it also has supervisory role and exercises the right to elect the president of the Commission, approve the Commissioners nominated by member states and approve the Commission as a body.[352] There are 751 members of the European Parliament (MEP), which are directly elected by the citizens of the EU. The number of members from each country depends on the total population of a country, however, neither member state can have less than 6 and more than 96 representatives.[353]

However, the role of the Parliament in the tax related legislative procedure is quite minor and is limited to consultative function only. Which means that where the proposed legislation concerns direct or indirect tax matters, the Parliament is called upon to consider the proposal and issue the non-binding opinion to the Council.[354] The legislative power of the Parliament in tax related matters is therefore questionable, and sometimes the scholars criticize the tax legislative system as lacking "democratic legitimacy in the face of creation of the norms".[355] However, although the Parliament's position has no legal weight in adoption of legislation, in fact its Committee on Economic and Monitory affairs (ECON) works closely and actively with the Commission on legislative initiatives and issues regular reports and opinions on the proposed acts. Moreover, should the ordinary legislative procedure apply also in tax related sphere, requiring unanimous approval by the Council and certain degree of approval by Parliament, it might have complicated the adoption of acts even more taken the sensitivity of issues.

At the same time, the proactive work of Parliament on taxation should not be underestimated. Thus, for example since the start of the economic crisis, the EU Parliament was forcing for greater tax transparency and was in charge of several initiatives.[356] In 2015 it has adopted detailed recommendations spelling out the legal steps the member states should take to fight aggressive corporate tax planning. It was also the Parliament, who called for the EU Commission to work on preparation of legislative proposals for country-by-country (CBC) reporting and development common definition of the tax heaven in the EU.[357]

With respect to the recently adopted Directive on exchange of tax rulings between the EU countries, the Parliament expressed its perplexity that the new rule only apply to cross-border rulings but leave out tax deals within member states. MEPs has also criticised and insisted on the fact that the information obtained through exchange of tax rulings be available to the Commission in greater extent that is currently envisaged.

It is considered that Parliament plays a key part in public transparency rules for multinationals.

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[349] Governing provision about the European Parliament are provided in articles 223 – 234 of the TFEU.
[350] See article 114 para. 1 TFEU
[351] See articles Article 289 and 294 TFEU, and also http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.4.1.pdf
[352] See https://europa.eu/european-union/about-eu/institutions-bodies/european-parliament_en
[353] See https://europa.eu/european-union/about-eu/institutions-bodies/european-parliament_en
[354] See article 113TFEU for indirect tax issues and article 115 TFEU on direct tax issues.
[355] P.Boria, *European Tax Law: institutions and principles* ch. 2 (Giuffre Editore 2014)
[356] See http://www.europarl.europa.eu/news/en/news-room/20160502STO25468/overview-the-european-parliament's-work-on-taxation
[357] See http://www.europarl.europa.eu/news/en/news-room/20160502STO25468/overview-the-european-parliament's-work-on-taxation

2.2.1.2. The European Council

The European Council[358] brings together the heads of the states or governments, the President of the European Council and President of the Commission by means of summit meetings, which usually take place four time a year on a quarterly basis. It represents the highest level of political cooperation between the EU countries. It neither relates its activities to legislative, supervisory or executive nature, but rather limits its role to defining the general orientation and direction for the Union, setting its main political priorities. It may, however, deal with sensitive or complex issues that cannot be resolved at lower levels of intergovernmental cooperation.[359] Among such responsibilities, the European Council is able to periodically revise and amend the EU treaties.

The European Council is chaired by the President, who is elected by the members of the European Parliament among themselves each two and a half years. The Council usually takes decisions by consensus, however, some may be made by unanimity or qualified majority. Only the heads of states or governments have a right to vote.

2.2.1.3. The Council of the European Union

The Council of the EU[360] is a legislative body, which is different from the European Council. It does not have fixed members, but rather gathers together the government ministers from each member state to discuss, amend and adopt the laws. The Council may meet in 10 different configurations, where each corresponds to the policy area being discussed. Depending on the configuration, each country sends their minister responsible for that policy area.[361] For example, when the Council meeting on economic and financial affairs (the "Ecofin Council") is held, it is attended by each country's finance or economy minister. EcoFin Council is in particular responsible for consideration of tax issues and is held on a monthly basis. The configurative approach thus allows competent authorities of member states to represent the position of their governments in a particular field, bind their government with the taken position, but also assures protection of national interests.

As was discussed in the previous section, the Council has special status when the issue concerns taxation and shall act in accordance with the special legislative procedure, which requires it to take decision unanimously and only to consult the Parliament or obtain its consent with respect to the proposed legislation. The involvement of the Council of EU into the legislative process is supported by working groups and the Committee of Permanent Representatives, who are the nationals and mostly employees of the member states' competent authorities. Since the decision of the Council may be taken only unanimously, it complicates the adoption of directives on tax matters, often because of the unwillingness or better to say, inability of the states to find a compromise and the use of the "veto" power by certain member states. Because of this "veto power" some scholars believe that effectively it indicated the absence even of the shared competence of the Union to take decisions in tax matters.

The Presidency in the Council rotates on a biannual basis between the member states. The member state in charge of the presidency may influence and direct the EU policy over the period of presidency (six months). It in particular represents the EU outside the union, sets the agenda of meetings, proposes guidelines and leads the initiatives perused by the Union. Since 2014, member states also issue specific road map on tax work, setting out its future planned work for the coming months on BEPS and other taxation issues.

2.2.1.4. The European Commission

The EU Commission[362] is an executive body of the Union. It is composed of 28 appointed representatives – one from each state (commissioners). Each commissioner is responsible for certain policy area. The day to day work of the Commission is performed by its staff organised in departments known as directorates-general, where each is responsible for a specific policy area.[363] Among its other responsibilities, the main two responsibilities, which have greatly contributed towards tax harmonization in the EU, include:

[358] Governing provision about the European Council are provided in articles 235 – 236 of the TFEU.
[359] https://europa.eu/european-union/about-eu/institutions-bodies/european-council_en
[360] Governing provision about the Council of the EU are provided in articles 237 – 243 of the TFEU.
[361] https://europa.eu/european-union/about-eu/institutions-bodies/council-eu_en
[362] Governing provision about the Commission are provided in articles 244 – 250 of the TFEU.
[363] https://europa.eu/european-union/about-eu/institutions-bodies/european-commission_en

- Preparation and proposal of draft legislation in a form of directives and regulations;
- Supervision over the implementation of the EU legislation by the member states.

What concerns, the first role, the Commission is responsible for development of proposals for the new EU legislation and its submission to the Parliament and the Council. The Commission, upon its own initiative or on the basis of request for legislative proposal from the European Council, the Parliament[364] or other institution, may work on development of the legislative proposal observing at the same time and acting in the EU interests. The legislative proposals by the Commission are always accompanied by the thorough research and analytical work to assess the economic, environmental and social impact of legislations, as well as communication with the stakeholders and only then drafting of the proposal. It shall be noted that Commission does not take legislative decisions itself, but is only responsible for legislative proposals and drafting of legislation, whereas the final decision on adoption of the same is kept with each member state. The union legislation on tax matters may be adopted generally only by unanimous consent by member states. The unanimity requirement, however, especially in the sphere of direct taxes – makes it complicated to reach consensus between member states on adoption of certain instrument, and this resulted in more often issued recommendations and communications of Commission on direct tax issues as of alternative means to positive approximation of the national laws. Communications and recommendations of the Commission are not binding on member states, but rather serves as soft law instruments aimed to provide example for coherent implementation of certain practices and often are followed up by in the CJEU decisions.[365]

With respect to the second responsibility, the Commission is considered as the guardian of the EU Treaties and other EU legislation (directives and regulations) since it has to ensure compliance of the member states legislations and actions with the EU law. Should, for example, the member state violate the EU legislation, the Commission may send it a notice on required changes or sue it in a CJEU.[366] The failure of a member state to meet EU law obligations often arises due to 1) legislative or administrative decisions or practices taken by the member states; 2) positive action (adopting measures contrary to EU law or refusing to repeal any that are in contrast) and 3) negative action (delays in implementing EU law or failing to inform the Commission of the progress being made).[367] So, should the Commission find any of the above measures as inconsistent with the EU law it may send member state a notice asking the EU country concerned to respond to the charges that it is breaking EU law and on the basis of its reply, the Commission issues an opinion, either closing the case or setting out the changes the country must make.[368] If the member state concerned fails to comply with the Commission's opinion within the provided timeframe, the Commission may refer the case to the CJEU.[369] When the Commission refers a member state to the CJEU for failure to communicate national measures implementing EU law, it can also ask the CJEU to impose financial sanctions.[370] If the CJEU finds that member state concerned failed to fulfil an obligation under the Treaties, it may require the state to take necessary measures to comply with the judgement.[371] If the Commission believes the member state is not complying with the decision of the CJEU, it can refer the case to the Court a second time, recommending the size of fine it considers should be paid, after giving a right to the member state to submit its observations.[372] If the Court finds that the judgement is still not being respected, it can impose a lump sum and/or penalty payment on it.[373]

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[364] See Art. 225 TFEU
[365] See B. Terra, P. Wattel, *European Tax Law,* Ch.2 (Wolters Kluwer Law & Business 2012), p. 24.
[366] See article 258 TFEU.
[367] Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l14550 accessed on 28 October 2016.
[368] Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l14550 accessed on 28 October 2016.
[369] Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l14550 accessed on 28 October 2016.
[370] See article 260 para. 3 TFEU.
[371] See article 260 para.1 TFEU.
[372] See article 260 para. 2 TFEU.
[373] See article 260 para. 2 TFEU.

The Commission is almost exclusively (except for CJEU powers) responsible for guarding the TFEU provisions on state aid.[374] State aid rules prohibit member states to introduce any measures that may distort or threaten the competition by favouring certain undertakings or the production of certain goods.[375] Among such measures could be for instance tax incentives, which are selectively granted by the member states, or in vice versa more burdensome taxation imposed by member states on selected persons or goods. First of all, the EU law requires member states to notify the Commission upon introduction of any measure that may fall under the scope of article 107 TFEU. The Commission in return has the capacity to either approve or reject the national measure, should it find such measure to be incompatible with the Treaty. Secondly, the Commission may itself assess the national tax measures on their compatibility with the EU law and issue the respective decision requiring the member state to amend or discontinue the measures should these measures be incompatible with the EU law. The CJEU is the remedy that may help the Commission to enforce its decision should the member state refuse to comply.

With respect to VAT issues in the Union, the Commission is assisted by special VAT committee, which monitors the VAT system and makes recommendation to the Commission.

2.2.1.4.1. Decision making process

As outlined above, there are three institutions in the EU that take part in adoption of supranational legislation in tax matters: the Commission with the right to initiate the legislative proposal, the European Parliament with the right to provide a non-binding opinion on the same and the Council of the EU, being represented by ministers of member states, which makes final decision on adoption of legal act. This procedure is known as intergovernmental method of EU decision making due to the reduced role of the EU institutions and.[376] The intergovernmental decision making is opposed to the community method, where the decisions are taken in accordance with ordinary legislative procedure and more decision-making power is attributed to the EU Parliament in particular.[377] The intergovernmental method of decision making is also known as the special legislative procedure.

There are no detailed rules provided on application of special legislative procedure in tax matters under the TFEU. With respect to indirect taxes, article 113 of the TFEU gives general guidance and provides that *"the Council shall, acting unanimously in accordance with a **special legislative procedure** and **after** consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation"*, requiring thus the Council only to consult the European Parliament and afterwards to adopt the legislation. For direct taxes, there is no separate article authorising the Council to act on the same, therefore, the generally applicable article 115 of the TFEU serves as a legal base for adoption of legislative act in direct taxes by the Council. Rule established in articles 113 and 115 are the same.

Therefore, applying the special legislative procedure to tax matters, one could observe the following: the legislative proposal for tax matters is usually prepared by the Commission, however, member states, as well as other EU institutions retain the right to ask the Commission to act on development of such proposal.[378] Once the proposal is ready, the Commission needs to assess the possible impact of proposed legislation including both direct and indirect implications that can be caused by proposed measures on businesses, trade, employment, the environment and health.[379] The result of assessment is made public. Based on this, if the Commission adopts the proposal, the proposal is further sent to the European Parliament. The European Parliament shall review the proposal and provide its opinion. The opinion of the European Parliament is not binding, however, the Commission may adhere to it and amend the proposal accordingly before the proposal being presented to the Council. In practice,

[374] See articles 107-109 TFEU.

[375] See article 107 para. 1 TFEU.

[376] Art. 31 TEU.

377 The community method of decision making in the EU is characterised by 1) the sole and exclusive right of the Commission to issue legislative proposal; 2) qualified majority voting in the Council; 3) involvement of European Parliament to co-decide jointly with the Council and 4) the role of the Court in ensuring judicial accountability. For more, see G. De Baere, Constitutional Principles of EU External Relations, Oxford University Press 2008.

[378] See art. 289 (4) TFEU.

[379] This is known as an "impact assessment method". For more information, see http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.htm accessed on 13 December 2016.

the Council may adopt the decision on the proposal, only after having received the opinion of the European Parliament, however, in fact, the bodies often work simultaneously on the proposal and are encouraged to exchange information.[380] The Council in this respect is supported by the national competent authorities, who together with the Commission, and the member state in charge of presidency in the Council closely work with each other to review and if necessary to amend the legislative proposal in a way that would also take into account the positions of member states and ease the adoption of final decision at the Council level. Even though, in practice institutions may work closely with each other and have also the Commission assisting in the process, the Council may take the decision only having consulted the European Parliament with the latest version of the legislative proposal.

2.2.1.5. Special role of the Court of Justice of the European Union

The CJEU[381] is a judicial body of the Union. It is the only Court that has the power to interpret the treaties of the EU to make sure it is applied in the same way in all member countries. It has the power to decide the legal cases between the member states, institutions and persons of the EU. The functioning of the Court in addition to the provisions of the TFEU, is regulated by the Protocol No. 3 on Statute of the Court of Justice (Statute) annexed to the treaties[382] and by the Rules of Procedure of the Court of Justice,[383] which implement and supplement the Statue.

The functions performed by the CJEU may be classified into several types: interpretation of EU law (preliminary rulings), enforcement of EU law (infringement proceedings), annulment of EU legal acts (actions for annulment, ensuring the EU takes necessary action (actions for failure to act), sanctioning the EU institutions (actions for damages).[384] Below, the author elaborates on each function in more details.

Interpretation of the EU law

The CJEU is responsible for interpreting the law and issuance of the preliminary ruling where, based on a request from a national court, the CJEU considers the national case and determines how the EU law should be interpreted in a particular situation or comments on the validity and interpretation of European instrument of secondary law.[385] The reference by the national courts to the CJEU is known as “the reference for the preliminary ruling procedure”. The national court may refer question to the CJEU either based on its own decision or based on the request of the party to the case, whereas in the latter case it is not obliged to do so. Article 267 TFEU provides that the national court, which acts as a final resort is obliged to refer the question to CJEU for preliminary ruling, unless the Court has already ruled on the matter or the interpretation of the EU rule of law in question is obvious.[386] All national courts are obliged submit the case for preliminary ruling by the CJEU when they doubt regarding the interpretation of a EU law provision.[387] It should also be noted, that the CJEU is not an appellate body in area of tax law and the relationship between national court and the CJEU are only reference-based.[388]

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[380] See “Introduction to the legislative processes for European Union directives and regulations on financial services matters”, report prepared by Slaughter and May, 2014, p.4, available at: https://www.slaughterandmay.com/media/1934583/introduction-to-the-legislative-processes-for-european-union-directives-and-regulations-on-financial-services-matters.pdf accessed on 13 December 2016.

[381] Governing provision about the are provided in articles 251 – 281 of the TFEU.

[382] The Protocol No. 3 on the Statute of the Court of Justice of the EU was amended by the Regulation 2015/2422 of the European Parliament and of the Council of 16 December 2015, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32015R2422

[383] See The Rules of Procedure of the Court of Justice of 25 September 2012, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf accessed on 28 October 2016.

[384] Retrieved from https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en accessed on 13 October 2016.

[385] See article 267 TFEU.

[386] Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l14552 accessed on 28 October 2016.

[387] The preliminary ruling procedure is also governed by the recommendations 2012/C 338/01 issued to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32012H1106(01)

[388] See M.Dahlberg, *Direct taxation in relation to the freedom of establishment and the free movement of capital,* Kluwer Law International, 2005, p.17.

In its judgment of 1990 in Factortame case,[389] the CJEU additionally indicated that national courts, as part of a preliminary ruling on the validity of a national law, must immediately suspend the application of this law until such time as the CJEU gives its recommended solution and the national court gives its ruling on the substance of the issue.[390] Additionally, the proceeding itself in the member state shall be stayed until the CJEU gives its ruling.[391] The CJEU, however, only gives a decision on the constituent elements of the reference for a preliminary ruling made to it. The national court therefore remains competent for the original case.[392]

The CJEU may refuse to consider the question only in cases when the question does not fall within its competence.

The interpretation provided by the CJEU on the EU law gradually promotes uniform interpretation and application of the EU law by the member states and national courts due to the precedence principle of EU law and res judicata principle.[393] The principle of res judicata means that ruling of the CJEU is binding not only on the country, which referred for the ruling, but also on all of the national courts of other member states.[394]

Enforcement of the EU law

The CJEU is responsible for enforcing the law – where the case is open against the particular member state for non-compliance with the EU law (also known as "infringement proceedings"). If the country is found responsible for the failure to act in accordance with the EU law, it may be forced to put things in order (e.g. to amend national legislation) and even be fined.[395] The infringement proceedings cases are usually brought by the Commission in front of the Court. In more details the infringement procedure is described under the section devoted to the functions performed by the EU Commission.

The CJEU may also annul the EU legal acts should the acts violate the EU laws or fundamental freedoms. It may also observe and rule over the performance of various EU institutions so that to ensure institutions take required actions in time and their actions do not harm interests of other persons and companies.[396]

Composition of the Court and procedural rules

The CJEU consists of 3 bodies: Court of Justice, General Court and Civil Service Tribunal. The Court of Justice usually deals with tax related cases and issues preliminary rulings on requests from national courts. Some tax-related cases may also be considered by the General Court, especially those concerning the state aid provisions. Both, the Court of Justice and the General Court are composed of 28 judges – one from each member state, plus 11 advocate generals work for the Court of Justice.[397]

The cases are processed in 2 stages: written and oral. During the written state the parties submit their statements to the Court.[398] The willing national authorities, EU institutions and sometimes private individuals can also submit their observations. The submitted documents are reviewed by the judge-rapporteur assigned to the case and them discussed at the Court's general meeting where it is decided how many judges will consider the case (3, 5 or 15), whether the oral stage (hearings) is necessary and whether an official opinion of the Advocate general is necessary.[399] During the oral stage the

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[389] See C-213/89, The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others, decided on 19 June 1990.

[390] Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l14548 accessed on 28 October 2016.

[391] See para. 29 Recommendations 2012/C 338/01 to the national courts.

[392] See para.7 Recommendations 2012/C 338/01 to the national courts.

[393] See article 267 TFEU

[394] Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l14552, accessed on 28 October 2016.

[395] See article 258, 260 TFEU

[396] See article 263, 269, 271 TFEU

[397] See article 252 TFEU, which provides that there are 8 advocate generals working at the Court of Justice. In accordance with the article, the number of judges could be increased by request of the Court and approval by the Council.

[398] See article 20 Statue of the Court of Justice.

[399] For further details on written part of the procedure and appointment of chamber refer to Chapters 5 and 6 Rules of Procedure of the Court of Justice.

parties deliver their statements in front of the court and advocate general, who may also question them. The Court may request the advocate to prepare an opinion, which is usually delivered in few weeks after the hearing.[400] After all judges issue the decision.[401]

Role of Advocate General

The advocate general is a special position in the CJEU, which has the same status as the judges of the Court, but different duties.[402] His duty regulated by art. 252, which provides that the advocate general shall make, in open court, reasoned submissions on cases, where the CJEU requires his involvement. Advocate general may participate in the oral hearing, but its main duty is to provide independent written opinion on the case at issue. The opinion is provided prior the decision of CJEU. Its structure usually includes the facts of the case, analysis of applicable national and EU legislation, including review of relevant principles developed with the previous CJEU cases, positions of parties to the case and the personal opinion of advocate general.[403] The opinion is not binding on any of the parties and neither the Court is bound.[404] However, it is well known that very often in its decisions and reasoning the Court follows the opinion of advocate general as recommendations.

2.2.1.6. The European Central Bank

The European Central Bank[405] together with the national central banks forms the European System of Central Banks and defines the monetary policy of the Eurozone countries. No more details about the Central Bank will be discussed in this work due to absence of analogous institute in the EAEU and its non-relation to the tax policy and administration issues.

2.2.1.7. The Court of Auditors

The Court of Auditors[406] is an independent external auditor of the EU. It exercises control and checks the proper functioning of the EU budget. It does not have a legislative power, but works to improve the European Commission's management of the EU budget and reports on EU finances.[407]

The Court of Auditors can check any person or organization, which is in charge of handling the EU money, including the institutions of the EU, member countries and also countries, receiving the EU aid. Especially closely are audited the European Commission and the national authorities. It thus helps to prevent fraud, corruption and other illegal activity. The Court of Auditors serves the interests of the citizens of the EU to ensure their money are well spent and well used.[408]

2.2.2. The EAEU

In contrast to the structure of European Union institutions, the structure of EAEU institutions is hierarchical, were one institution has an authority over another. In the further section the author will discuss the powers and responsibilities of the EAEU institutions with respect to tax matters, while as an introduction below is presented the overview scheme of the EAEU institutional structure. The list of EAEU supranational institutions is provided in article 8 of the EAEU Treaty and includes:

1. The Supreme Economic Council
2. The Intergovernmental Council
3. The Eurasian Economic Commission and
4. The Court of the EAEU.

The idea of the upcoming section is to understand the organizational structure of the Union, the respective functions and rights attributed to institutions and the interaction between the same. The review of EAEU institutional structure will be carried out based on a comparative basis with the EU to identify similarities and differences of adopted models. The ultimate idea is to evaluate the

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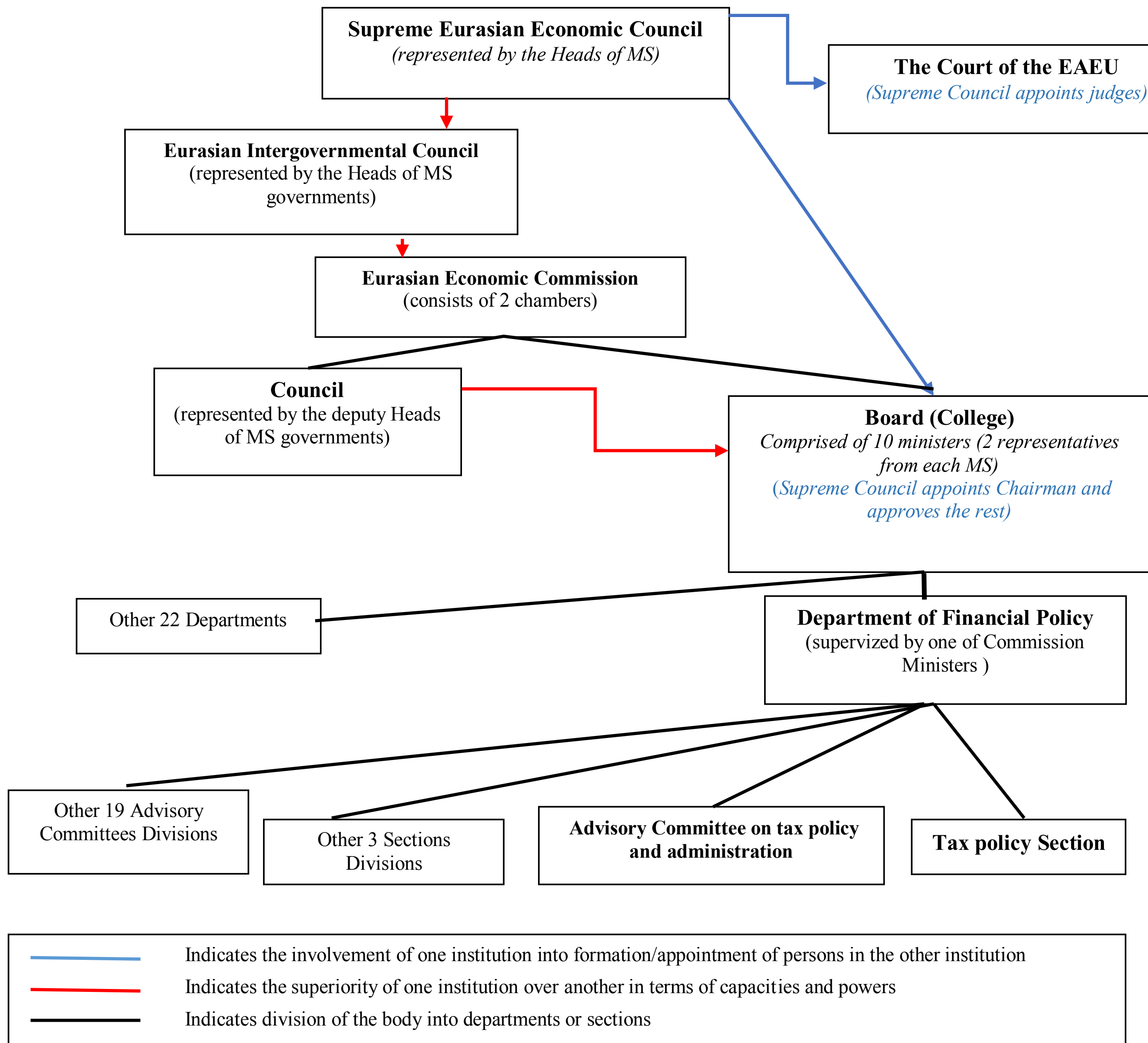
[400] For details on oral part of the procedure refer to Chapter 8 Rules of Procedure of the Court of Justice.
[401] The paragraph is based on information retrieved from https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en accessed on 15 September 2016.
[402] See M.Dahlberg, *Direct taxation in relation to the freedom of establishment and the free movement of capital,* Kluwer Law International, 2005, p.16.
[403] Ibid. Dahlberg, 2005, p.16.
[404] Ibid. Dahlberg, 2005, p.16.
[405] Governing provision about are provided in articles 282 – 284 of the TFEU.
[406] Governing provision about are provided in articles 285 – 287 of the TFEU.
[407] https://europa.eu/european-union/about-eu/institutions-bodies/european-court-auditors_en
[408] Cf.Craig and de Burca, *EU law,* 3rd ed., Oxford University Press, 2003, p.94. as reference 27 in Dahlberg, Ibid.

Eurasian model and assess whether the current structure and attributed institutional powers are sufficient to assure and facilitate necessary level of tax harmonization, and if not, what should be modified and to what extent the experience of the EU in this regards could be practical. The author would like to note, that the below analysis is not intended to provide extensive legal analysis on the functioning of the EAEU institutions, but only focuses on the same from the perspective of tax lawyer and further perspective of tax harmonization.

It the literature is often possible to notice the statements that Eurasian Union "in many aspects looks to the European Model"[409] and that its institutional design has been "loosely based" on the model of the EU.[410] In this section the author will try to clarify on the same.

[409] F.Hett, S.Szkola, 2015, See Ibid below.
[410] G.Pozo-Martin, "The EAEU: Ambitions - Analysis", Elcano Royal Institute, 2015.

Illustration 1. Institutional structure in the Eurasian Economic Union



2.2.2.1. The Supreme Eurasian Economic Council

The Eurasian Economic Council is the "supreme"[411] is the intergovernmental institution of the Eurasian Economic Union.[412] It is represented by the presidents of the member states and mainly considers the most important issues of the Union's activities. It defines the strategy, sets the direction and prospects of integration development and makes decisions on implementation of objectives of the Union. The power of the Supreme Council is really broad and among decision making powers on many strategically important issues, also includes authority and supervision over other supranational institutions, including the power to override or cancel the decisions taken by the lower standing bodies.

Thus, for example, with respect to the Eurasian Economic Commission, the Supreme Council is responsible for approving its composition, setting the responsibilities of its members and appointment of chairman.[413] It shall also approve the agenda of Commission and may change or cancel the decision of the Commission, should any member state propose to do so. It may equally change or cancel the decisions of the Intergovernmental Council, it appoints Judges of Eurasian Economic Court and acts on many other organizational and staff-related issues, which in the EU context are divided between several institutions.

The decisions of the Supreme Council are taken by the consensus only[414] and are regarded as the sources of law in the EAEU.[415] Taken the broad capacity attributed to the Supreme Council and its supreme power over other EAEU institutions, it may be observed that the heads of the states attempt to fully control the functioning of the Union and effectively influence over the decisions of other union institutions. Furthermore, taken the current rights of the Supreme Council, the author takes the liberty to assume that the Supreme Council should be able to take any decision or disposition on any tax related issue within the Union, including the decision on adoption of supra-national instrument should there be the necessity identified and the consensus reached among the heads of the state. From one point of view, such an approach greatly simplifies the legislative procedure, but from the other hand violates the usual legislative order and excludes the role of parliament and consequently of nations in the decision making process. The decisions of the Supreme Economic Council are binding on member states, however, are not directly applicable and require member states to take necessary national measures for their implementation, where in turn the national parliaments should be involved. Perhaps this could partly justify the model taken by the leaders of Eurasian Union, however, it would pose further questions on what would happen if national parliaments would not pass (permit) the legal act for adoption of the Union's decisions. To the awareness of author, this question was not yet addressed by the scholars and has not appeared in practice.

The author has reviewed all decisions and dispositions taken by the Supreme Council since the date of its establishment (since the year 2011 for decisions and since the year 2015 for dispositions) and would like to highlight several of them for the purposes of this work.[416]

Several decision of the Supreme Council concerned the functioning of the Commission. In particular, in its decision No. 98 dated 23 December 2014, the Supreme Council adopts the "Regulation on the functioning of the Commission",[417] where it provides for the order of functioning of the chambers of the Commission and divides the respective responsibilities and powers between them. Further details of the decision are provided in the next sections of this work, devoted to the Commission, but in brief, one chamber created by the decision of the Supreme Council is responsible for the tax policy matters.

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[411] The term "supreme" may be literally translated from Russian as "the highest", which triggers the question of relationship between the Supreme Council and the Court of the EAEU. Since both are regarded as institutions, the above provision in the EAEU Treaty provides that the Supreme Council is the highest among all, which by default downgrades the role of the Court.

[412] See article 10 EAEU Treaty.

[413] For the detailed list of powers allocated to the Supreme Council refer to Art. 12, EAEU Treaty.

[414] Article 13, EAEU Treaty

[415] See article 6 para. 1 EAEU Treaty.

[416] Decisions and dispositions of the Supreme Council are available at: https://docs.eaeunion.org/ru-ru/Pages/AllDocuments.aspx#npbdocumentbelongstaxId=%5B%5D

[417] Available at:

In its Decision No. 37 dated 21 December 2015,[418] the Supreme Council approves the responsibilities inside the Board of the Commission and in particular attributes the "function of the Commission in the sphere of taxes and taxation" to the Commission Minister responsible for the economy and financial policy of the EAEU. The decision in its essence is important, because as will be discussed later it may be considered as the sole legal basis based on which the Commission undertakes activities related to the taxation within the Union.

One more important decision taken by Supreme Council concerns the realization of main intergration directions.[419] Another decision of the Supreme Council (even though not related to taxation) concerns the imposition of import custom duties. In its Decision No. 16 dated 8 May 2015[420] the Supreme Council preserves its exclusive right to ammend the import customs duties on the most sensative products (roughly estimated by author as 7,700 items).

In contrast to decisions, among the dispositions taken so far by the Supreme Council there are no dispositions that would concern tax issues or would present an interest on the same.

2.2.2.2. The Eurasian Intergovernmental Council (EIC))

The Intergovernmental Council is represented by the heads of the governments of the member states – i.e. prime ministers.[421] The Intergovernmental Council shall act to "ensure implementation and control over the performance of the EAEU Treaty, international treaties within the Union and decisions of the Supreme Council".[422] In addition to this broadly defined responsibility, the EIC has a right to issue instructions to the Commission, make decisions on the issues, where the Commission could not reach the consensus and also reconsider and suspend the decisions of the Commission.[423] At this point, the responsibility of the Council may be similar to certain extent to the responsibility of the EU Commission itself, in terms of guarding the TFEU and making necessary decisions. A local scholar, V.Tolstyh, takes the view that representation of states in more than one supranational institution, in particular he speaks about the Eurasian Intergovernmental Council and Supreme Economic Council, is inappropriate and may lead to duplication of functions, competition and disagreements between the institutions.[424] In view of Baildinov, the existence of Intergovernmental Council as of separate institution appears to be more as "filter position" between the Supreme Council and the Commission, so that to assure that no "accidental" decision is taken by the Commission without the agreement and absolute satisfaction of states and should it happen, such multilevel hierarchical structure will prevent undesired decisions to exist. He also notes that the functions of Intergovernmental Council could have been easily attributed to the Commission, should the leaders of the EAEU have clear vision on the way they would to like to see the Union functioning and were not afraid to trust each other and supranational institutions.[425]

However, the Intergovernmental Council is not a fixed constantly functioning institution, but rather a meeting held regularly (at least twice per year) between state officials. The respective agenda is set

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[418] The decision is available at: https://docs.eaeunion.org/docs/ru-ru/0149146/scd_22122015_37 The previous decision governing on the same also attributed the function over tax policy to the Commission Minister of economy and fiscal policy. See the Supreme Council Decision No. 2 dated 19 December 2011.

[419] Decisions no. 21 dated 19 December 2012, available at: https://docs.eaeunion.org/docs/ru-ru/0044375/scd_20122012_21

[420] Available at: https://docs.eaeunion.org/docs/ru-ru/0147697/scd_12052015_16

[421] See Art. 13, EAEU Treaty

The current functions of Advisory Committee are limited to:

1) review the proposals of the Commission on improvement of acts, which comprises the law of the Union in tax matters and

2) preparation of proposal on common approaches and principles with respect to collection of indirect taxes in mutual trade

3) preparation of proposals for mutual cooperation for prevention of tax law infringements by the business persons of the member states in the mutual trade

enhancement of cooperation in tax information exchange.

[422] See Art.16, point 1, EAEU Treaty.

[423] See art. 16 point 1, EAEU Treaty.

[424] V.L.Tolstyh, Problemy Evraziiskoi integracii, Eurasian Legal Journal, No.3, 2015, pp.17-22. Original: Толстых В. Л. Проблемы Евразийской интеграции, Евразийский юридический журнал, №3,2015, стр. 17-22.

[425] See Baildinov, 2015, Ibid. One step forward, two steps back.

by either the Chair of the Board of the Commission based on the proposals from member states or by the decision of the Commission Council (organization of the Eurasian Economic Commission is discussed in the next subsection). This, in view of the author, triggers a question on actual responsibility and capacity of the Intergovernmental Council to effectively supervise the implementation and realization of the EAEU Treaty, if the agenda for meeting is proposed by the lower level institutions and in fact, there is no special committee or other organization under the Council that would effectively and independently support it with the supervision over the performance of the Treaty and brief on activities and developments in the Union representing an independent from Commission point of view. Assuming, the particular situation, when the Intergovernmental Council needs for example to consider the draft decision on tax matters, on which the lower standing institutions failed to reach the consensus. Taken that Intergovernmental Council is represented by the prime-ministers, for whom specific tax issues may be not so clear as to the competent authority, it is questionable to the author of this work, how the Intergovernmental Council should take the decision, who supports it in explaining the relevant concepts and informs on consequences of decision concerned. Therefore, for the author it is questionable whether the Intergovernmental Council is the institution competent enough to deal on tax technical issues assuming they come up as unresolved matters from the lower standing institutions.

The Intergovernmental Council may take decisions and dispositions by consensus.[426] Should the member state disagree with the decision of the Intergovernmental Council, the Supreme Council may consider issues relating to the cancelation or amendment of the same.[427] Similarly, the Supreme Council may consider the issues, on which the consensus was not reached by the Intergovernmental council.[428] In its turn, the Council is the body, which is superior over the Eurasian Commission. As mentioned above, it may give instructions (dispositions) to the Commission, consider the decisions of the Commission, on which the consensus was not reached,[429] as well as cancel or amend the Commission's decisions on the proposal of member state.[430] Even though this right is not often exercised by the Council, there are several precedent of amending Commission's decisions in the last 3 years.[431] None of the amended decisions by the way concerned tax issues, nor were any decisions taken by the Intergovernmental Council with respect to tax issues yet. With respect to the issue, whether the Council is authorised to take decisions on tax matters in particular, the author assumes that, since in the EAEU Treaty there is no explicit provision that would clarify the same, but instead the Eurasian Intergovernmental Council is attributed with the power to look over the decisions and actions of the Commission, it by default should be authorised to intervene and take decisions on any outstanding issue the Commission is dealing with, including tax issues, although the authority to direct the work of the Commission is provided as the general right of the Intergovernmental Council.

The dispositions taken by the Council also require consensus and may address the member states, the institutions of member states and also the Commission of EAEU. The dispositions of the Council in contrast to is decisions cannot be cancelled or amended by the Supreme Council. Dispositions are usually brief and issued in a form of high level instruction. Among the dispositions taken by the Intergovernmental Council in the last two years one concerned tax issues. It was the disposition No. 14 dated 29 May 2015[432] - on measures aimed at harmonization of excise tax rates on alcohol and tobacco products in the EAEU member states. In the given disposition the Council invites the Commission jointly with the member states to continue working on development of agreements on

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[426] Art. 17, EAEU Treaty

[427] See Art. 12, point 8, EAEU Treaty

[428] See Art. 12, point 9, EAEU Treaty

[429] See Art. 16, point 3, EAEU Treaty

[430] See Art. 16, point 7, EAEU Treaty

[431] See for example Decision of Intergovernmental Council No. 42 dated 25 September 2013 on amendments of the Commission's decision No. 143 dated 25 June 2013 and available at: https://docs.eaeunion.org/docs/ru-ru/0144140/icd_26092013_42 In its decision the Council was acting on the request of Kazakhstan and reconsidered the decision of Commission on application of special safeguard measure by means of application of special duty on combine harvesters and modules of combine harvesters imported to the Common customs territory of the Customs Union.

[432] Available at https://docs.eaeunion.org/docs/ru-ru/0147899/ico_02062015_14 accessed on 20 September 2016.

principles of tax policy in the areas of excise taxes on alcohol and tobacco products. Taken the existence of that disposition, the author concludes that the Intergovernmental Council may issue specific instructions to the Commission and set it agenda also on tax related work, although this right of the Intergovernmental Council is not specifically mentioned in the EAEU Treaty.

2.2.2.3. The Eurasian Economic Commission (the EAEC)

2.2.2.3.1. Introduction

The Eurasian Economic Commission is an executive body of the Union. It consists of two chambers – the Board (Collegium) and the Council of the Commission. Among other issues, the Commission shall enable the functioning and development of the Union, as well as to develop proposals in the sphere of economic integration within the Union.[433] In course of its operation, the Commission may adopt binding decisions,[434] administrative dispositions and non-binding recommendations.[435] The decisions of the Commission are directly applicable in the member states, however, may be amended or cancelled by the supreme institutions on request from member state.

The Commission performs its functions mainly on the basis of Annex 1 to the EAEU Treaty named and often referred in literature as "Provisions on the Eurasian Economic Commission". Additionally, The Supreme Economic Council has adopted the Regulations on the functioning of the Commission, which it also cosequently amended several times.[436] The EAEU Treaty provides that Commission may exercise its power in the following spheres:[437]

1) customs tariff and non-tariff regulation;
2) customs regulations;
3) technical regulations;
4) sanitary, veterinary-sanitary and phytosanitary quarantine measures;
5) transfer and distribution of import customs duties;
6) establishment of trade regimes for third parties;
7) statistics of foreign and mutual trade;
8) macroeconomic policy;
9) **competition policy;**
10) **industrial and agricultural subsidies;**
11) energy policy;
12) natural monopolies;
13) state and/or municipal procurement;
14) **mutual trade in services and investments;**
15) transport and transportation;
16) monetary policy;
17) intellectual property;
18) labour migration;
19) financial markets (banking, insurance, the currency market, the securities market);
20) **other spheres as specified in the Treaty and other international treaties within the Union.**

The extent of its power, however is different in each sphere and shall either be regulated by separate articles of the Treaty or separate international agreements that can be concluded within the Union

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433 See para. 1 Annex 1 to the EAEU Treaty.

434 On of the recent decisions of the Commission concerns application of VAT in Kyrgyz Republic. According to the Commission's decisions, Kyrgyz Republic violates article 71 of the Treaty by discriminating imported goods. Kyrgyz Republic exempts from VAT products, which are produced from domestic raw-materials, whereas similar products imported from other member states are subject to 12% VAT rate. Commission issed a note to Kyrgyz Republic on 6 October 2016.

435 See points 13 and 43, Annex 1 to the EAEU Treaty

436 The initial decision on adoption of Regulation for the functioning of the Commission was taken by the Supreme Economic Council earlier in 2011 when the Commission was established – Decision No. 1 dated 18 November 2011. Later on, in 2014 that decision was cancelled almost entirely with exception of few paragraphs and new Decision on the same was taken – Decisions No. 98 dated 23 December 2014. This decision was also amended few times with the Decision No. 21 dated 16 October 2015, Decision No. 22 dated 16 October 2015 and Decision No. 4 dated 31 May 2016. The consolidated decision with incorporated amendments is available at: http://docs.cntd.ru/document/420242713, accessed 6 December 2016.

437 See annex 1, para. 3 to the EAEU Treaty.

framework.[438] Due to the lack of one clear provision on the spheres and degree of Commission's competence, it is complicated to analyse in which spheres the Commission has power, and whether it is exclusive or shared with the member states.[439] Additionally, since the list of spheres is non-exhaustive, the Commission may be attributed with additional capacity anytime by means of international agreement concluded within the Union framework.

Turning to the issue of competence to act on tax matters, based on the above, the competence to work on tax issues was not explicitly attributed to the Commission by means of the Treaty. At the same time, it shall be noted that the tax issues are inseparable aspects of perhaps most spheres, where the Commission is responsible for integration, including the completion policy, industrial and agricultural subsidies, establishment of mutual trade and investments, financial markets and other spheres.

In December 2015 the Supreme Economic Council took the decision No. 37 dated 21 December 2015,[440] where it approves the responsibilities inside the Board of the Commission and in particular attributes the *"function of the Commission in the sphere of taxes and taxation"* to the Commission Minister responsible for the economy and financial policy of the EAEU. The decision in its essence is important, because it seems to be the sole explicit legal basis based on which the Commission undertakes activities related to the taxation within the Union. There is also article 72 *"Taxes and taxation"* in the EAEU Treaty, which in general calls member states to harmonize taxes affecting mutual trade, but that article does not explicitly call for the actions to be taken or proposed by the Commission, however, since the Commission is the only permanently functioning institution of the EAEU, it may be assumed that the article implicitly authorises Commission to work on tax harmonization together with the member states.

In the following subsections, the author will discuss briefly the history of the Commission, its organizational structure and respective capacities to work on tax policy. Special attention will be devoted to the functioning and capacities of the Board of the Commission, as to the executive department of the Commission.

2.2.2.3.2. History, organization and capacity attributed to the Commission in tax policy matters

The Commission started to function on 2 February 2012 as an executive body of Customs Union and Eurasian Common Economic Space[441] and was retained as supranational institution when the Eurasian Economic Union was established.[442] Its main objective is to enable the functioning and development of the Union, as well as to develop proposals in the sphere of economic integration.[443]

The Eurasian Commission consists of two chambers - the Board (Collegium) and the Council, where effectively the chambers are not independent from each other and the Council has certain authority over the activities and decisions of the Board.[444] The order of Commission activities is regulated and approved by the Supreme Council and is known as the "Regulation on the functioning of the Commission",[445] which is reviewed and updated by the Supreme Council from time to time. In general, the decisions of the Commission may be cancelled or amended by the Supreme Economic Council based on the proposal of the member states.[446] Similarly, in case the Commission cannot

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[438] See annex 1, para. 3 to the EAEU Treaty.

[439] Local scholar E.T.Baideldinov makes a note on the same regarding the Union competence in general. In his article *"Agreement on Eurasian Economic Union: one step forward, two steps back"* he correctly notes that the scrupulous analysis of the Treaty and its annexes leads to the conclusion that although the Union has been formally attributed with the competence, this competence is almost neutralized due to the number of reservations made in favour of the member states, which provide them with a right to deviate from the EAEU Treaty in their own interests. As such reservations Baideldinov considers art.29(3), art. 33(2), art. 40, art. 47(1), art. 102 and few more.

[440] The decision is available at: https://docs.eaeunion.org/docs/ru-ru/0149146/scd_22122015_37

[441] See article 1 Agreement on Eurasian Economic Commission dated 18 November 2011.

[442] See article 99 para. 3 EAEU Treaty.

[443] See annex 1 para. 1 to the EAEU Treaty.

[444] There are scholars who compare the Eurasian Commission to the EU institutions and who tend to believe that in the EU context the Board would correspond to the European Commission, and Council of the Commission to the European Council. In view of the author it is not entirely correct due to the functions and powers attributed to each body.

[445] See Ibid on decisions above.

[446] See Art. 12, point 8, EAEU Treaty

reach the consensus on a particular issue, the issue can be referred for the consideration by the Supreme Council.[447] Decisions of both the Eurasian Supreme Council and Intergovernmental Council have a priority over the decisions of Commission and will prevail in case of contradictions.[448]

The Council of the Commission is responsible for general regulation of integration processes in the Union, as well as for the general management of the Commission's activities.[449] Herewith, the Council of the Commission is composed of the Deputy Heads of the Governments of the member states,[450] which act in their capacities on behalf and in the interests of the member states. The author would like to emphasize several functions performed by the Council and analyse the influence it may have, in other words the influence the member states have, on the Commission activities, including activities in tax matters. The Council of the Commission is responsible for:[451]

1) **considering the cancellation of the Commission's decisions taken by the Board** of the Commission **or the introduction of amendments thereto** in accordance with the proposal of any member state;
2) considering the results of monitoring and control of the implementation of international treaties that form the Union law;
3) **instructing the Board of the Commission;**
4) exercising **other functions** and powers in accordance with the Treaty, international treaties within the Union and the Regulation.

The functions of the Council are mainly of administrative or organizational nature, with exception that it may interfere into the decisions of the Board with the right to amend or cancel them, whereas the decisions may be of a very technical nature and concern very specific issue.[452] For instance, the decision of the Board may relate to a matter on the order of collection of VAT on imported goods, the Council should be eligible to reconsider such decision and make necessary amendments. Perhaps, the Council will be supported with the working groups formed of representatives of competence authorities from member states and should be able to decide correctly, however, this is not discussed in the law. It may be also assumed that by default the Council of the Commission shall be eligible to deal with issues in any areas, where the Board has capacity to act. At this point, the author does not make any conclusion, neither assess it, but simply explains the model and how it supposed to function.

Another interesting point is that the Council is authorised to instruct the Board, however, taken that the Council of the Commission is composed of member states' representatives, acting on behalf of their states - these are the member states, which may also direct the work of the Board.

The Board of the Commission is the executive body of the Commission, comprising of two representatives from each Member States, who are appointed as Ministers of the Commission,[453] and where each is responsible for certain sector of activity – e.g. economy and financial policy, trade, technical regulations, industrial production, agriculture, energy and infrastructure and other areas. The appointed ministers and other employees of the Board are the international employees as defined by the EAEU Treaty and cannot request or receive any instructions from their member states and neither from other states,[454] which perhaps presume that the Board shall be independent in its actions and decisions from any parties. The composition is based on the principle of equal representation of each member state,[455] where the single vote of the Board member (minister of the Commission) is equal to one vote[456] and decisions are taken either by the two-thirds of qualified votes or in case of sensitive issues - by the consensus.[457] The detailed list of sensitive issues is provided under Annex

[447] See Art. 12, point 9, EAEU Treaty
[448] Art. 6, para.4, EAEU Treaty
[449] Point 22, Annex 1 to the EAEU Treaty
[450] Point 23, Annex 1 to the EAEU Treaty
[451] Purely administrative responsibilities were not included in the above list, for the full list of functions performed by the Council of the Commission see point 24 Annex 1to the EAEU Treaty.
[452] Point 24, Annex 1 to the EAEU Treaty
[453] In total there are 10 members of the Board since 1 February 2016.
[454] See annex 32 para. 2 to the EAEU Treaty.
[455] Point 31, Annex 1 to the EAEU Treaty
[456] Point 21, Annex 1 to the EAEU Treaty
[457] Article 18, EAEU Agreement

2 of the Regulation on the functioning of the EEC, but it does not include any issues that would relate to taxation or in general to harmonization of national legilsations, which effectively provokes an assumption that decisions in relation to taxation may be taken by qualified majority. As qualified majority qualify two thirds of votes of the total number of members of the Board.[458]

Specialized departments within the Commission

The activities of the Commission are performed through the work of specialised departments, which are created by the Council of the Commission.[459] The work is divided between 23 departments (currently) based on functional areas and is supervised by the Commission ministers, where each is responsible for specific area.[460] For the example, the Commission minister of Economy and Financial Policy is supervising three departments: 1) department of financial policy; 2) department for development of business activities and 3) department of labour migration. Inside each department the activities are further divided among sections. The Department of Financial policy has four sections: 1) Tax policy section, 2) Section on Monetary and Foreign Exchange Policy, 3) Section on Payments and Budget Policy Coordination and 4) Financial Markets Section. The Commission ministers and departments interact closely with the authorised national authorities within the area of their activities.[461] In tax matters, the Board of the Commission is indeed working closely with the member states and this is mainly possible through the cooperation with the Consultative Tax Committee, which is composed of representatives from member states.

The role of Consultative Tax Committee

In the Annex 1 to the EAEU Treaty it is provided that the Commission has a right to establish consultative committees for the consultation purposes in the areas, where it has an authority and competence to make decisions.[462] The members of the consultative committees are representatives of national competent authorities.[463] On request of member states, as members of the consultative committee may also participate the representatives of business community, public organizations and other independent experts. In total, there are currently 20 advisory committees established to support the departments in developing proposals for the Commission Board on the issues attributed to its capacity. The suggestions made by the members of the Consultative Committee are not considered as final positions taken by the member states.

The functioning of the Board with respect to tax matters is supported by the Consultative Committee on tax policy and administrations (Consultative Tax Committee), established in 2012 by the decision of the Board of the Commission (Decision on the Consultative Tax Committee).[464] The Consultative Tax Committee is an advisory body of the Commission on the matters related to the:

1) tax policy,
2) improvements of mechanism for collection of indirect taxes in the mutual trade in accordance with Section XVII of the EAEU Treaty and
3) matters related to the development and implementation of member states' programs and projects in the sphere of tax policy and administration.[465]

With exception of the second point, which is specific and is incorporated under the EAEU Treaty (Section XVII and respective annex), the role of the Consultative Tax Committee is defined very broadly and may be considered as generally covering all issues with respect to tax policy and

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The Supreme Council shall compile a list of sensitive issues to be resolved by the Board of the Commission by consensus. Such list is provided under Annex 2 to the Regulation on the functioning of the EEC, approved by Supreme Council Decision No. 98 dated 23 December 2014.

[458] See article 18 para. 2 EAEU Treaty.

[459] See para. 12 Annex 1 EAEU Treaty.

[460] See the current structure of the Commission, available at: http://www.eurasiancommission.org/en/Pages/structure.aspx accessed on 21 September 2016.

[461] http://www.eurasiancommission.org/ru/Pages/about.aspx

[462] See para. 7 Annex 1 to the EAEU Treaty.

[463] See para. 45 Annex 1 to the EAEU Treaty.

[464] The initial decision No.13 dated 15 March 2012 was overruled by the new decision of the Board of the Eurasian Economic Commission No. 128 dated 28 September 2015 on the Consultative Committee on tax policy and administration.

[465] See point 1 para. 1 the Provisions on the Consultative Tax Committee as provided in the Decision on the same.

administration. The Decision on the Consultative Tax Committee (as replaced in 2015) provides for the exhaustive list of *main* tasks, attributed to the Committee and includes:[466]

1) preparation of recommendations for the Commission with respect to harmonization of national tax legislations within the agreed areas and preparation of recommendations with respect to the resolution of problematic situations;
2) development of proposals for the Commission on the following matters:
    a. Formulation of unified approaches for conduction of tax policies by the member states in the agreed areas;
    b. Iimprovement of member states' national legislations on indirect taxes applicable in the mutual trade on the territories of member states and to the turnover of excisable goods (including alcohol production), **as well as direct taxes**;
    c. Improvement of tax administration in the member states, **including the control over transfer pricing**;
    d. Enhancement of cooperation between the member states in terms on information exchange, necessary for control over the collection of both - indirect taxes applicable in the mutual trade and direct taxes (income and property taxes) due from legal and natural person with respect to income and property received from the territory of another member state;
3) Discussion of practices on application of international agreements and acts, which comprises the law of the Union in tax matters. Herewith, once should note that the bilateral double tax treaties for avoidance of double taxation concluded by member states do not comprise the law of the Union.

Further on, the Decision on Consultative Tax Committee provides for the list of functions attributed to the Consultative Tax Committee to undertake the above listed tasks, which includes:[467]

1) Preparation for the Commission the proposals on the following matters of tax policy and administration:
    i. Development of the unified approaches on the principles of collection of indirect taxes applicable in the mutual trade;
    ii. Provision of mutual assistance for prevention and suppression of tax law violations by the business persons of member states in the mutual trade and in the other foreign-trade transactions between the business persons of member states;
    iii. Enhancement of cooperation between competent authorities of the member states in terms on information exchange;
2) Consideration of the Commission's proposals on improvement of legal acts, comprising the law of the Union on tax matters.

If to compare the tasks attributed to the Consultative Tax Committee with its current functions, one could observe that the list of functions is comparatively narrower than the tasks and it excludes the functions that would enable the Committee to carry out the work on formulation of unified tax policy, including development of proposals for improvements of national legislations on both direct and indirect taxes in general. It may be observed and concluded that currently, the Board expects the Committee to focus all its efforts on enhancement of procedure for collection of indirect taxes and enhancement of mechanism for mutual exchange of tax information. This may be justified as long as member states and business persons do not file complains with respect to compatibility of national tax systems with the fundamental principles for free movement. The author tends to conclude that ones such claims start to appear, the Consulatitive Tax Committtee should perhaps be granted functions for realization of tasks related to direct taxes and improvement of national legislations.

At the same time, review of recent news (as of November 2016) published on the official webpage of Eurasian Commission, indicates that the Consultative Tax Committee in pactice actually does not confine itself to the tasks outlined above, but also discusses issues related to the international taxation (i.e. issue with certificates of residence and the order of mutual recognition of the same between Kazakhstan and Russia), as well as issues with realization of BEPS projects recommendations. The

[466] See point 3 the Provisions on the Consultative Tax Committee as provided in the Decision on the same.
[467] See point 4 the Provisions on the Consultative Tax Committee as provided in the Decision on the same.

Committee also proposed to create working group for exchange and sharing of experience in administration of double tax treaties.[468]

Another point that calls for attention is the fact that the Consultative Tax Committee is mainly comprised of representatives of national competent authorities – such as ministries of finance, ministries of national economy or specialised ministries of revenues. Although, member states may also appoint independent experts or representatives from business community, the appointed people will still represent the position of states, but not their independent views. The Composition of the Committee thus pose a question on overall independency of the Commission from the member states. The protocol/minutes of meeting of Consultative Tax Committe are not publicly availale.[469]

The work of the Consultative Tax Committe partialy reminds the author the role that the Council of the EU plays with respect to tax matters. Herewith, the author sees similarities only to the extent that the Council of the EU also serves as a platform for the competent authorities of member states, being led by the president member state, to meet, to communicate with each other and to agree on details of the legislative proposed to be taken on the Union level. It turns out that in the Eurasian Union, the competenet authorities similarly participate to the legislative processes, may bring forward their positions and concerns, however, in contrast to the competent authorities in the EU, do not have authority to vote on adoption of legislation on behalf of the member state and neither bound member state with their position expressed during the consultation process. The legislative decision in fact is taken by the Board of the Commission, as mentioned above, by persons, with backgrounds in various spheres.

To sum up at this point, the EAEU Treaty and respective annexes do not contain any precise statement on the role the Commission may play in harmonization of taxation – neither direct, nor indirect taxation. However, the existence of article in the EAEU Treaty on taxes and taxation that call member states to work on tax harmonization, the establishment of the Section on tax policy matters in one of the departments under the Commission and also of a special Consultative Committee on tax policy and administration, jointly indicate that the Commission may act and acts with respect to tax policy matters and may take necessary measures for tax harmonization. On the basis of current legal analysis, the author takes the view that the Commission certainly has shared right to act on indirect tax policy matters, whereas the exclusive capacity to act on direct taxes is currently attributed to the member states only. However, at the same time, the author takes liberty to believe that in theory and based on legal analysis and interpretation of the EAEU law, the Commission may be attributed with a function to act on direct tax harmonization as well together with the member states ones the need calls for the same. This view is also supported by the news on activities and plans of the Consultative Tax Committee, which closely works with the Commission and the power of the upper standing institutions, which have the right to explicitly authorise the Commission to act on the same.

2.2.2.3.3. Functions of the Board of the Commission in tax matters

The functions of the Board of the Commission are provided in a form of exhaustive list under point 43 of Annex 1 to the EAEU Treaty and among other administrative and organizational functions, which will not be much discussed in this work, include the authority of the Board for:

1) **developing own proposals and compiling proposals submitted by the Member States in the field of integration within the Union (including the development and implementation of the main directions of integration);**
2) **adopting binding decisions,[470] administrative dispositions and non-binding recommendations;**

[468] See news reported on the official website of the EAEC Commission dated 14 November 2016 on the meeting of Consultative Tax Committee on 4 October 2016, available at: http://www.eurasiancommission.org/ru/nae/news/Pages/14-11-2016-1.aspx accessed on 16 December 2016.

[469] See http://www.eurasiancommission.org/ru/act/finpol/dofp/kknpa/Pages/default.aspx, as of 14 December 2016.

[470] On of the recent decisions of the Commission concerns application of VAT in Kyrgyz Republic. According to the Commission’s decisions, Kyrgyz Republic violates article 71 of the Treaty by discriminating imported goods. Kyrgyz Republic exempts from VAT products, which are produced from domestic raw-materials, whereas similar products imported from other member states are subject to 12% VAT rate. Commission issed a note to Kyrgyz Republic on 6 October 2016.

3) implementing decisions and dispositions adopted by the Supreme Council and the Intergovernmental Council and decisions adopted by the Council of the Commission;
4) monitoring and controlling the implementation of international treaties that form the Union law and decisions of the Commission as well notifying the Member States of the requirement for their implementation.
5) developing recommendations on issues relating to the formation, functioning and development of the Union;
6) preparing expert reports (in writing) regarding all proposals from the Member States received by the Commission;
7) assisting Member States in the settlement of disputes within the Union before applying to the Court of the Union;
8) ensuring representation of the interests of the Commission **in courts,** including the Court of the Union;
9) within its powers, interacting with public authorities of the Member States;
10) considering incoming requests to the Commission;
11) drafting international treaties and decisions of the Commission adopted by the Council of the Commission, as well as other documents required for the exercise of powers by the Commission;

Thinking of the above functions from the perspective of tax lawyer and looking for their practical application, the author formulates the following responsibilities of the Board, which are of particular importance for the process of tax harmonization in the Union, these are:

1) legislative role of the Board to initiate, draft and also take decisions;
2) executive/regulatory role of the Board – monitoring and controlling the implementation of Union law by the member states and
3) responsibility to assist member states in resolution of disputes.

Below the author will discuss each function in more details.

2.2.2.3.3.1. Legislative role of the Board

The Board of the Commission is attributed with the power to participate in the legislative processes happening within the framework of Eurasian Union. The Board not only supports member states and other institutions with development of programs for integration, drafting of documents and decisions taken by other Union institutions,[471] but it also has a separate role, which entitles it to initiate and adopt binding decisions itself, which in theory could mean that the Board may initiate and take measures necessary for tax harmonization.

The first point *"developing of proposals and compiling of proposals submitted by member states"* is interpreted by the author as the responsibility of the Board to work on development of its own proposals of legislative acts (decisions), and also to compile and work on the proposals submitted by member states. The member states, are however, limited in this right and may present proposals to the Board only within the areas, where the Board was attributed the capacity to act. As a response, the Board shall provide expert reports (in writing) regarding all proposals from the Member States received as provided under point 6 above. At this point, the author detects the similarity between the Eurasian and European Commissions, since both Commissions do have legislative indicatives and may also adhere to proposal of member states with the same respect.

However, in contrast to the European Commission, the Board of the Eurasian Commission may not only develop the legislative proposals, but also to adopt them in a form binding and directly applicable decisions. In its turn, the European Commission may also take decisions, but each such decision may concern only one particular state and require elimination of distortion or discrimination caused by national measure (the right exercised by the EU Commission prior the infringement procedure), whereas under the EAEU Treaty there is no similar limitation and decisions taken by the Board of the Commission are of general nature, unless specifically stated otherwise in the decision

[471] See art. 11 EAEU Treaty. Also, based on the list of functions attributed to the Board, it seems that the Board and its staff among their other functions, fully support the functioning of other EAEU supranational institutions, including the functioning of the Supreme Economic Council by organizing their meetings, planning agendas based on the request of member states and also drafting the text of the decisions and other legal acts issued further by these institutions.

itself. Herewith, the binding decisions of the Board should not necessarily be similar in nature to the EU secondary law instruments, but instead be of a nature, which would be suitable and acceptable in the region. The nature of possible supranational instrument for tax harmonization is discussed under section 5 of this work.

Furthermore, the Board of the Commission may also issue non-binding recommendations and by exercising this function may, similarly to what the European Commission does through the communications and recommendations, contribute towards the common understanding of the Eurasian law through the soft law approach.

Lastly, the Board of the Eurasian Commission has also the right to *develop recommendations on issues relating to the formation, functioning and development of the Union*. In view of the author, these recommendations may be addressed to the member states and also concern the areas and matters, where the Commission has currently no capacity to act, but where the Board realizes the actions are necessary by member states to achieve better functioning and development of the Union. In this way, the Commission takes an initiator role, whereas, if member states agree, they can enter into international agreement, which are allowed under the Union law for further closer integration. Author believes that this recommendative role may be especially useful in the matters of direct taxation, that may be necessary to address over the time, but for harmonization or co-ordination of which there are no specific guidelines in the EAEU Treaty, except for the few fundamental principles that require interpretation and are discussed under section 3 of this work.

Decision making process in the Board of Eurasian Economic Commission

In this sub-section the author will describe the decision making process applicable to the decisions taken by the Board, the legal weight of the Board decisions and outline once again the respective roles of each unit composing and supporting the functioning of the Board. The general procedure is discussed as if the decision concerned relates to tax matters.

The initial proposal for decision, which relates to taxation should be presented to the Commission Minister in charge of Economy and Financial Policy. The initiative may come from the competent authorities of member states, members of the Board and also other Union's institutions.[472] Herewith, the member states and the Council of the Commission may only propose an initiative, on the matters where the Board has competence to act. No similar rule is provided for other institutions,[473] and at this point it is not clear whether this requirement was omitted intentionally or not. The case with intentional omission may also be interpreted differently – firstly, as if the other institutions might bring issues, which fall outside of the Commission's competence or either because other institutions are supposed to know by default that Commission may only consider proposals, which are attributed to its functions. The question, however, remains to be answered in practice.

Once the Commission Minister familiarizes with the proposal, the proposal is further discussed by the specialised structural unit of the Board, which in case of taxation should be the Tax Policy Section of the Department of financial policy. Further on, the Tax Policy Section should prepare draft legal act to implement the initiative and send it to the Consultative Tax Committee and other authorized bodies of the member states.

The next step – the draft regulatory legal act is reviewed and discussed by the Consultative Tax Committee. With the support of Tax Policy Section, the draft legal act undergoes the amending procedure following the session of the Consultative Tax Committee, taking into account the positions of member states. At this point, the EAEU Treaty clarifies that positions expressed by the representatives of member states at this stage are not final and representatives of the competent authorities cannot bind its state.

Once the draft document is amended, it is further brought up to the meeting of Commission's Board and sent to the authorised bodies of member states. During the meeting, the Commission Minister in charge brings up draft legal act for consideration of the Board. The Board votes and makes decision, which is further sent to the Ministries of Foreign Affairs and the governments of the member states. The decisions of the Board on tax matters are made by qualified majority, since tax issues are not

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472 See para. 60 and 63 Regulation on the functioning of the EEC.

473 See para. 62 and 63 Regulation on the functioning of the EEC. The author of this work does not make any conclusion, of whether the rule was intentionally omitted in order to give power for highest EAEU institutions to bring up the initiative on any matter, or whether the rule was simply missed without any grounding basis.

included in the list of sensitive issues on which the consensus is required.[474] One peculiarity may be observed at this point: although, the content of the legal act is closely discussed with the competent representatives of member states, the last word belongs to the Board, who drafts the decision and these are also the members of the Board (Commission ministers) who formally adopt the decision. However, as discussed above, the members of the Board are currently 10 Commission ministers with various backgrounds, where only one of them is competent in finance and economic matters, they are employees of the Union and do not represent the position of the member states of their origin and its unclear what rationale they use when they take the decisions. Considering this the above procedure, the approach of the Eurasian Economic Union towards making supranational decisions, which in theory could serve as instruments for positive tax harmonization, is very different from the European approach.

It should be noted, that the same procedure applies to issue the non-binding recommendations. Dependency on member states' position through the work of consultative tax committee is noticeable even at this point.

Legal weight of the Board's decisions

It is necessary to say a few words regarding the legal weight of the Board's decisions. Para. 13 of Annex 1 to the Treaty, states that decisions of the Commission shall constitute the law of the Union and shall be "directly applicable on the territories of the Member States", where in contrast decisions of Intergovernmental and Supreme Economic Councils have no direct effect and shall be implemented by member states in accordance with the national law.[475] Further on, para. 30 of Annex 1 to the EAEU Treaty, provides that member state reserves the right to disagree with the Commission decision, and should it happen, the decision may be reconsidered by the upper standing institutions – the Council of the Commission, the Intergovernmental and the Supreme Councils – where as a result, the upper standing institutions may amend or cancel the decision of the lower body entirely.[476] At this point one could observe that decisions of the Board may appear to be very ineffective. Additionally, the local scholar E.Baideldinov, correctly observed another paradox regarding the direct applicability of the decisions and their respective legal weight. In particular, he notes that although the decisions of the Supreme Economic Council and Intergovernmental Council stand higher in the hierarchy of legal power than the decisions of the Commission, but they do not have direct effect and require implementation by the member states, in contrast to the decisions of the Commission, which are directly applicable, but at the same time can be easily amended or cancelled. Baideldinov comments that attribution of powers and features in this case, demonstrates absence of mutual trust among states and lack of vision regarding further integration. He additionally notes, that draft EAEU Treaty provided for stronger principles requiring legal acts of institutions to have direct effect on the territories of member states and have clear priority over the national legislation, with exception of cases clearly stated in the draft treaty. However, the draft provision was not included into the Treaty.[477]

2.2.2.3.3.2. Executive/regulatory role of the Board

The Board of the Eurasian Commission is responsible for monitoring and controlling the implementation of international treaties that form the Union law and decisions of the Commission as well as notifying the Member States of the requirement for their implementation. This function of the Board may be compared to the role of European Commission, which is responsible to assure that member states' national tax law and tax treatment comply with the Union law; which is entitled to issue notification addressed to individual member states with the requirement to adjust domestic law measure in compliance with the EU laws and to initiate an infringement procedure and bring member state in front of the CJEU in case of non-compliance with the EU law and its notification. The work exercised by the EU Commission and subsequently, the decisions taken by the CJEU have led to negative tax integration, by forcing non-compliant member states to comply with the Union law and demonstrating instructive lessons to others.

From the list of functions attributed to the Board of the Eurasian Commission, it is clear that the Board shall monitor state practices, it may also address clarification questions on the same to the

[474] See Ibid. Annex 2 to the Regulation on the functioning of the EEC.
[475] See art. 6(1) para. 2EAEU Treaty.
[476] See para. 30 Annex 1 to the EAEU Treaty.
[477] E.T.Baideldinov, 2014, Ibid.

member states and finally issue notification requiring member state to comply. Herewith, from the EAEU Treaty text, it is not clear whether the right of the Board to "notify" member states on the need to amend legislation is issued in a form of binding decision or non-binding recommendation. The first precedent, when the Board exercised this right and notified member state to adjust national tax law to comply with the tax law principles established by the EAEU Treaty happened in October 2016.[478] Notification was issued in a form of decision, which therefore shall be binding on member state. In the decision the Board requires Kyrgyz Republic to comply with art. 71(2) of the EAEU Treaty and treat foreign products from member state in the same manner it treat local similar products.

The text of point 2 in article 71 is the following and establishes national treatment of products coming from other member states: *"2. In mutual trade, the Member States shall levy taxes and other fees and charges in such a way to ensure that taxation in the Member State where goods of other Member States are sold is no less favourable than the taxation applied by this Member State under the same circumstances in respect of like products originating from its territory."* The decision, however, is very badly written. From the text of the decision, which is only one and a half page, it is not clear in which aspects the Kyrgyz Republic fails to comply with the above, whether it is the rate of applicable VAT or the way the tax base is determined, or excessive administrative requirement, the combination of measures or something else. Perhaps, the decision was accompanied with a note, which would explain the requirement of the Board, but there is no evidence of such document available publicly. Only from the news it is becoming clear that Kyrgyzstan indeed applies different VAT treatment towards the products produced from local agricultural components and similar products produced from agricultural components grown in other member states by exempting from the VAT the former ones and applying 12% to later group of products.[479]

The decision of the Board becomes binding in 30 days after official publication[480] and after that, within 10 days the member state concerned shall inform the Board on the measures taken to comply with the decision.[481] Herewith, the member state has the right to disagree with the Board decision and ask the Board to reconsider it. In this case, the decision will be suspended untill the upper-standing institutions take the decision on either to retain, amend or cancel the decision.[482] The Commission, however, has no competence to bring member state in front of the Court of the Union. It in general, does not have any enforcement right, including the cases when the member state has lost the case in the EAEU Court, it will not be Commission who could force member state to comply, but the last resort to force member state to comply with the decision of the Board or decision of upper-standing institution or even the EAEU Court is the Supreme Economic Council. Infringement procedure therefore, as it is known and carried out in the EU, is not currently possible in the Eurasian Union simply due to a reason that the Commission has no right to bring member state in front of the EAEU Court and neither the member state may be economically liable for infringement of rights and material damages it causes to persons. The current limitation and inability of the Commission to bring the non-compliant member state in front of the Union supranational Court makes the whole function of the Commission on enforcement the law questionable. For realization of the Union's aims and objectives, enforcement of the law is necessary and if there is no institution, which could do it in practice, the whole idea of integration may fail.

2.2.2.3.3.3. Responsibility to assist member states in resolution of disputes

Lastly, the Board of the Commission shall assist member states and business persons in resolution of disputes. What's important, the case cannot be referred to the EAEU Court prior it was brought for attention of the Board or the member state and tried to be resolved via the consultation, negotiation or alternative procedure.[483] Only if the dispute cannot be resolved by the Board or the

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[478] See Decision of the Board of the EAEC No.113 dated 4 October 2016, available at: https://docs.eaeunion.org/docs/ru-ru/01411313/clcd_06102016_113 accessed on 16 December 2016.

[479] See news reported on the official website of the EAEC Commission dated 14 November 2016, available at: http://www.eurasiancommission.org/ru/nae/news/Pages/14-11-2016-1.aspx accessed on 16 December 2016.

[480] The date of official publication is date of publication on the official website of the EAEU. See art. 111(1) EAEU Treaty.

[481] See point 16 Annex 1 to the EAEU Treaty.

[482] See point 30 Annex 1 to the EAEU Treaty.

[483] See point 43 Annex 2 to the EAEU Treaty.

member state, it may be referred to the EAEU Court.[484] Paradoxically, but the Board of the Commission thus plays the role of alternative dispute resolution body, in addition to its legislative and executive role, which effectively means that the Board together with the EAEU Court eligible to interpret the Union law, which in case of the EU is absolutely opposite and no one, but only the Court has prior role in legal interpretation.

Good analysis on this function is prepared by Y.Trunina. She notes that requirement for the resolution of disputes via the Board is not a simple formality, but rather a real step that shall be taken by applicants, which in her view may also be an efficient way for resolution of disputes if clear and comprehensive legal procedural regulation is developed.[485] Y.Trunina identifies several deficiencies intrinsic to the EurazEC Commission and inherited by the Eurasian Commission. She notes that for business person it is challenging to resolve the dispute via the Commission, because the parties may have different positions on the issue and for example if the Commission believes that the rights of the business person were not violated, it will not actually start the resolution of dispute.[486] In her view there are also several procedural deficiencies that complicate the process and in fact cause further delay with in judicial trials.

There is no statistics indicating the efficiency and effectiveness of the Commission as of alternative dispute resolution body and whether it is indeed useful mechanism or vice verse contributes towards the delay in starting judicial proceedings.

2.2.2.4. The Eurasian Economic Court

The Eurasian Economic Court (the EAEU Court or the Court) is a permanent judicial body of the Union.[487] The legal basis for creation, organization the functioning of the Court is comprised of provisions of the EAEU Treaty, Statute on the EAEU Court (annex No. 2 to the EAEU Treaty) and any decisions taken by the Supreme Economic Council for the implementation of the EAEU Treaty,[488] which currently includes Decision of the Supreme Economic Council of the EAEU No. 101 dated 23 December 2014 on the Regulation on the functioning of the EAEU Court (Regulation).[489]

The EAEU Court started to function with entry into force of EAEU Treaty on 1 January 2015. It succeeded the previously functioning Court of EurazEC,[490] which ceased to accept new applications on 14 October 2014.[491] The Court was established to assure **uniform application** of the EAEU Treaty, as well as other treaties concluded within the Union framework, agreement of the Union with the third states and decisions of the Union's bodies.[492] To exercise justice, the Court shall be guided

[484] See point 44 Annex 2 to the EAEU Treaty.

[485] See Y.Trunina, "Topical issues related to the implementation of the Eurasian Economic Commission its authority for resolution of disputes", Eurasian Legal Journal, No. 2, 2016, Original: Е.Трунина, «Актуальные вопросы реализации евразийской экономической комиссией полномочий по досудебному урегулированию споров", Евразийский юридический журнал. №2, 2016.

[486] Y.Trunina at this point makes an example of Request sent to the EurazEC Commission by OOO "ZabaikalResurs" and OOO "Nika" to recognize the decision of the EuraES Commission No.851 of 18 November 2011 as incompatible with the international agreements concluded within the Customs Union framework and other international agreements.

[487] See article 19 EAEU Treaty.

[488] See articles 12, 19 EAEU Treaty and Annex 2 to the EAEU Treaty.

[489] See Decision of the Supreme Council of the EAEU No. 101 dated 23 December 2014, available at: https://docs.eaeunion.org/docs/ru-ru/0147026/scd_25122014_101 In contrast to the predecessors of the EAEU Court, which independently adopted the Regulation for their internal procedures, in case of the EAEU Court, the Regulation was adopted by the Supreme Council.

[490] The Court of EurazEC was governed by the Statue on the Court of Eurasian Economic Space dated 5 July 2010, available at http://online.zakon.kz/Document/?doc_id=30827408. The legal basis of the previously existing court were envisaged at: Договор об обращении в Суд Евразийского экономического сообщества хозяйствующих субъектов по спорам в рамках Таможенного союза и особенностях судопроизводства по ним от 9 декабря 2010 года available at http://online.zakon.kz/Document/?doc_id=30862214, and Протокол о внесении изменений в Статут Суда Евразийского экономического сообщества от 5 июля 2010 года, подписанный 10 октября 2011 года available at http://online.zakon.kz/Document/?doc_id=30862347. All accessed on 29 October 2016.

[491] The Court stopped to accept new application in accordance with para. 5.2 of the Agreement on termination of the functioning of the Eurasian community dated 10 October 2014.

[492] See point 2 and point 39 Annex 2 to the EAEU Treaty.

by, among other: 1) the generally recognised principles and regulations of international law; 2) the international custom as evidence of the general practice accepted as a rule of law.[493]

2.2.2.4.1. The competence of the EAEU Court

The competence of the Court may be divided into two categories: so called 1) direct competence on resolution of disputes and 2) indirect competence on issuance of consultative conclusions on requests of member states and its authorised state authorities.[494] The competence of the Court may be extended through the conclusion of intergovernmental agreement.[495] The Court may consider the disputes on realization of the Union law, which might be brought in front of the Court only by the member states and also business persons (economic entity), including business persons of third states, but not brought by other institutions of the Union. Below the author will discuss and analyse the types of disputes that may be referred to the Court, the types of decisions the Court may issue and will outline the respective limitations.

Cases that member states can address to the EAEU Court

The member state may bring the dispute, which concerns:

1) assessment of compatibility of **international agreements** concluded within the Union or its separate provisions with the EAEU Treaty;
2) assessment of compliance **by other member states** with the provisions of the EAEU Treaty and other laws of the EAEU;
3) assessment of compatibility of the **Commission's decision or its separate provisions** with the EAEU Treaty and other laws of the EAEU;
4) actions or inactions of the Commission.[496]

Interest for discussion represents here the term "inaction of the Commission". In the EU context, as "inaction" of the institution, which may be further brought before the EU court, is understood as the infringement situation, where the institution was firstly called upon to act on it and only if hadn't within two months of being so called upon defined its position.[497] So, in other words, solely, the undefined position of the institute in the EU is considered as inaction, whereas in the EAEU context, as inaction is considered the situation, where the Commission (the only body, which can be brought before the EAEU Court for inaction) does not act in accordance with the will and understanding of the member state (or business person, as will be mentioned later), which brought the claim against another member state before the Commission. For example, in the situation, where the Commission in its response believes, for example, that the considered member state does not violate the EAEU law and consequently does not make any actions, the first member state (who addressed the case to the Commission) may refer the case further to the Court on the basis of inaction by the Commission, where the inaction of the Commission is simply caused by the fact that the Commission does not agree with the position of the first mentioned member state. The established procedure means that EAEU Commission does not act as filter between the Court and the applicants, and doesn't decide which cases can or cannot be considered by the Court, in contrast to the EU Commission, which in case of agreement with the applicant can start infringement procedure. The EAEU Commission can only reduce the number of cases referred to the Court by trying to eliminate the problem by means of negotiation with the member states, as will be discussed further.

In response to the above applications, the Court may issue the following decisions:

1) in the first case a decision on either compliance or non-compliance of an international treaty within the Union or its certain provisions with the Treaty;[498]
2) in the second case, similarly, the Court may issue decisions on either compliance or non-compliance by member-state with Union law or its separate provisions;[499]

[493] See para. 50 Annex 2 to the EAEU Treaty.
[494] See also Myslivsky, 2015 ibid.
[495] See para. 40 Annex 2 to the EAEU Treaty.
[496] See point 39 Annex 2 to the EAEU Treaty.
[497] See art.265 TFEU.
[498] See point 104 Annex 2 to the EAEU Treaty.
[499] See point 105 Annex 2 to the EAEU Treaty.

3) consequently, in the third case, the Court may issue a decision on either compliance or non-compliance of a decision of the Commission or its certain provisions with the Union law;[500]
4) and finally, in the last case, the Court may issue decision on recognition of the disputed actions (inactions) by the Commission as either conforming or non-conforming to the Union law.[501]

The above decisions will be binding on the parties to the dispute.[502] However, the scope of decisions the Court may issue is precisely determined, which does not leave the space for the Court to go beyond what is asked by the parties. Another issue at this point is the fact that the EAEU Court is not entitled to consider the agreements concluded by the Union with the third states on their compatibility with the EAEU law.

Cases that business persons can address to the EAEU Court

What concerns disputes, brought by business persons (economic entities),[503] the EAEU Treaty provides that the Court may consider such disputes, but only if the rights and legitimate interests in the area of entrepreneurial or other economic activities of such business person are directly affected. The Court may consider the cases regarding:

1) the compatibility of **Commission's decision or its separate provisions** with the EAEU Treaty and other laws of the EAEU;
2) **actions or inactions of the Commission**, if these actions or inactions led to violations of rights and legitimate interests of a person provided under the EAEU Treaty or other international treaty concluded within the Union.[504]

The Court, however, shall dismiss without prejudice all claims for damages or other material claims.[505] This is considered as a serious limitation by the local scholars, since it also negatively affects the attractiveness and importance of the Court.[506]

Following the application of business person, the Court may issue the following types of decisions:

1) In the first case, on either conformity or non-conformity of the **Commission's decision or its separate provisions** with the EAEU law,[507] and
2) In the second case, on either conformity or non-conformity of **actions or inactions of the Commission with the EAEU law.**[508]

From the above, few observations may be made regarding the rights and respective limitations of business persons. First of all, it can be observed that business person can only refer to the Court the case against the decision or action/inaction of the Commission, but not against the member state, which violated his or her respective rights. The consequence is that, assuming that member state fails to comply with the provision of the Treaty and this directly affects the economic rights of the person, the person may only address this question to the Commission[509] and based on the outcome, further refer to the Court, should the Commission be unwilling or unable to resolve the problem. And the case referred to the Court will concern the inaction of the Commission in this case as of the intermediary between the business person and non-compliant member state. Should the Court consider the case referred and issue the decision in favour of the business person, confirming that his or her economic rights were indeed violated, the decision will however also concern only the action or inaction of the Commission, which was unable to assure that member state concerned complies

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[500] See point 106 Annex 2 to the EAEU Treaty.
[501] See point 107 Annex 2 to the EAEU Treaty.
[502] See point 99 Annex 2 to the EAEU Treaty.
[503] For the purpose of Court Statute, the business person is defined as "a juridical person registered under the legislation of a Member State or a third State or a natural person registered as an individual entrepreneur in accordance with the legislation of a Member State or a third State."
[504] See point 39 Annex 2 to the EAEU Treaty.
[505] See point 61 Annex 2 to the EAEU Treaty.
[506] See Z.Kembayev, Z.Kembayev, "Comparative legal analysis of the functioning of the EAEU Court", Scriptorium, Justicia, No.2 (18) 2016. Original: Ж.Кембаев, «Сравнительно-правовой анализ функционирования Суда Евразийского Экономического Союза», Scriptorium, Justica, №2(18) 2016.
[507] See point 108 Annex 2 to the EAEU Treaty.
[508] See point 109 Annex 2 to the EAEU Treaty.
[509] This is the outcome if the business person decides to resolve the case via the supranational bodies, but not through the national courts.

with the EAEU rules and again based on the EAEU decision it will be requirement on the Commission to communicate with the member state to eliminate the problem in the legal system disputed in the case. In this situation, the member state will play the role of observer, although it may be the one primarily responsible for the problem. In cases it wishes, member state may apply for the right to participate in the case as interested party should it believe that decision may be of its interest.[510]

What's more, the business persons seems to be limited even more on the issues they may bring to the Court, and in particular, since the business person can sue only the Commission, for instance for its action or inaction, the issue of the case should only concern the matters attributed to the Commission capacity, because on the issues or areas, where the Commission has not capacity to act, it respectively cannot be sued for action or inaction. In view of the author, this may represent serious deficiency and limitation of business persons (i.e. taxpayers') fundamental rights under the EAEU law, because unless the EAEU law explicitly provides that Commission is authorised to work on tax issues, it may be difficult to invoke the case against the Commission should the member state violate the fundamental rights or principles envisaged in the EAEU Treaty with the discriminatory tax system.

From the preceding two sections it may be concluded that these are not only the rights of the business persons, which are limited, but in general the jurisdiction of the EAEU Court is narrow and limited, since the types of cases, which the Court may consider are precisely listed and the Court cannot go beyond what was attributed to it, neither the Court in its decisions may go further that is expected from the decision in accordance with the EAEU Treaty.

Can the EAEU institutions bring the case to the EAEU Court?

One perhaps already noticed that the Union institutions, including the Commission, cannot bring the case in front of the Court neither against each other not against other member state. The Commission may only request the right to participate in the case as interested party should it believe the decision on the issue may be of its interests.[511] The EAEU institutions, including the Commission may only ask the Court to issue consultative opinion on interpretation of the EAEU law. The consultative role of the EAEU Court is discussed in the below section. Consequently, the infringement procedure in the form it is known in the EU is not possible under the EAEU law and consequently, the Eurasian Commission is very weak in front of the member states, since it cannot force member state to act in the interest of the Union.

Paradoxically, but during the EurazEC time, the certain form of infringement procedure was possible in the Eurasian region and the Commission had a right to bring the case in front of the EurazEC court against the member state for non-compliance of the later with the law enacted at that time.[512] However, the Commission lost this right with entry into force of the EAEU Treaty. T.Neshatayeva notes that prejudicial inquiry (preliminary ruling procedure) was not very well welcomed by the national and also the EurazEC court itself, as well as by national authorities, because the countries were not used to this specific feature and this perhaps could explain why this function was withdrawn from the Commission.[513]

Is the EAEU court able to issue preliminary rulings?

As was mentioned earlier, the EAEU Court is entitled to provide consultations (clarifications) on the request of the member state on the provisions of the EAEU Treaty, other agreements concluded within the Union and decisions of the Union institutions.[514] The consultation may be provided upon request of the member state or body of the Union.

> "46. At the request of a Member State or a Body of the Union, the Court shall provide clarifications to provisions of the Treaty, international treaties within the Union and decisions of the Bodies of the Union and, at the request of employees and officials of the Bodies of the Union and the Court, to provisions of the Treaty, international treaties within

[510] See point 60 Annex 2 EAEU Treaty.
[511] See point 60 Annex 2 to the EAEU Treaty.
[512] See art. 13(3) Statute of EurasEZ court dated 5 July 2010.
[513] T.Neshatayeva, Ibid, Zakon 2014.
[514] See point 46 Annex 2 to the EAEU Treaty.

the Union and decisions of the Bodies of the Union regarding labour relations (hereinafter "the clarifications").”[515]

However, it is up to the member state to define the list of competent authorities, which may refer the question to the Court on behalf of the state, and it depends on the particular state will whether the natonal courts will be able to ask the EAEU Court for consultative opinion. In Kazakhstan the right to request consultative opinion of the Court is attributed only to the General Prosecution Office, Ministry of foreign affairs, Ministry of investments and development, Ministry of national economy and Ministry of Justice of the RK.[516] The national courts of Kazakhstan thus do not have authority to ask for consultative opinion of the EAEU Court directly. Additionally, the Ministry of Finance of Kazakhstan neither has a right to request opinion of the EAEU Court, and this represents even higher limitation from the tax perspective, because it is the Committee of State Revenue of the Ministry of Finance, which is responsible for tax administration and enforcement of tax legislation, whereas the Ministry of Economy, which is empowered to refer cases to the EAEU Court, is responsible only for the tax policy matters and is not involved in day to day administration of the law. In Russia, it is only the Ministry of Justice, which has the authority to initiate the case on behalf of Russia and ask for consultative opinion of the EAEU Court.[517]

At this point one could observe the fundamental difference between the jurisdiction the EU and EAEU courts are entitled to. The competence of the EAEU court does not include the right of the Court to interpret the EAEU law on request of the national court, which in case of the EU is known as the “preliminary ruling procedure”, which is binding to adhere to in its nature and gradually ensures uniform understanding and interpretation of the supranational law. The clarification of the EAEU Court in contrast is not binding and is considered as “advisory opinion” only and “and shall not deprive the Member States of the right for joint interpretation of international treaties”.[518] Having considered the above, the question arises on the extent the application of the EAEU law would be uniform if the Court can only play an advisory role and member state may agree between themselves on the common, but different from the Court, understanding of the EAEU law?[519]

In this respect, again the EAEU Court has more narrowly defined competence than its predecessor – the Court of EurazEC.[520] The former was responsible for both – the provision of advisory consultations on request of institutions, member states and the national courts and also for interpretation of Customs Union law in a form of preliminary ruling procedure on request of the highest judicial bodies of the member states, whereas the highest national courts were obliged to refer the case for interpretation, if the case concerned the provisions of EurazEC law and decision of that court couldn’t be appealed further.[521] Additionally, business persons had a right to request national court to refer the case for preliminary ruling by the EurazEC Court. However, the legal status of such preliminary ruling was not provided in any international agreement, but only in the Regulation of the EurazEC Court, approved by the Court itself, which stated that preliminary rulings

[515] See point 46 Annex 2 EAEU Treaty.

[516] See Decree of the President of Kazakhstan No. 20 dated 6 May 2015.

[517] See Decree of the President of Russia No. 252 dated 21 May 2015. The Author couldn’t find any decisions on the same issued by Belarus, Armenia or Kyrgyzstan. The decisions were probably issued, however, might have been issued in the national languages.

[518] See point 47 Annex 2 to the EAEU Treaty.

[519] In view of the local scholar Z.Kembayev, the member states will play the dominant role in this respect. See Z.Kembayev, Sravnitelno-pravovoi analiz, Ibid.

[520] See also A.Ispolinov, “EAEU Treaty as instrument of defeat in the rights of the Court of EurazEC”, available at: https://zakon.ru/blog/2014/6/11/dogovor_o_evrazijskom_soyuze_kak_instrument_porazheniya_v_pravax_suda_evrazes_chast_1, accessed on 6 November 2016. Original: А.Исполинов, Договор о Евразийском союзе как инструмент поражения в правах суда ЕврАзЭС, электронный портал Закон, дата опубликования 6 июня 2014.

[521] See article 3 para 3 of the Agreement on the cases referred to the EurazEC Court by the business persons regarding issues on Customs Union and the features of the proceedings thereon dated 9 December 2010. Original: Договор об обращении в Суд Евразийского экономического сообщества хозяйствующих субъектов по спорам в рамках Таможенного союза и особенностях судопроизводства по ним, Принят Решением Межгоссовета ЕврАзЭС (на уровне глав государств) от 9 декабря 2010 года № 534

shall be equivalent and issued in the form of the Court's decision.[522] In view of Neshatayeva, the decisions and also consultations provided by the EurazEC court were of obligatory nature, in contrast to the EAEU consultations, which are of advisory character only.[523]

It is surprising that the supranational court capacities were diminished taken the purpose of concluding the new treaty and forming the economic union was to proceed to the further and more sophisticated level of integration. Some local scholars believe, that the decrease in the Court's power was partially caused by the fact that the EurazEC Court had been exceeding its capacities and was going beyond what was expected from it in accordance with the law.[524] For example, Z.Kembayev noted that the EurazEC Court expressed itself as a proponent of judicial activizm and attempted to go beyond the formal boundaries envisaged under the internal agreements concluded by the member states and on the basis of its decisions tried to anchor its own vision for development of the Eurasian integration.[525] At this point Z.Kembayev refers to the decision of the EurazEC court in the case *Yuzhnyj Kuzbas,*[526] where the Court stated that since the member states had created the Court and empowered it for interpretation of the EurazEC law[527] to achieve the common understanding, it in turn should have been obliged member states to adhere to and follow the legal position of the Court, whereas the decisions of the Court should be strictly implemented. In that decision the Court had additionally prescribed national courts to adjust their national judicial practice on the same or similar issues in accordance with its decision in *Yuzhnyj Kuzbas*.[528] For the EU perspective this requirement would not be surprising, since the CJEU decisions from the outset are considered as sources of law, the CJEU had elaborated on many outstanding issues and even gaps in the EU Treaties and in general the role of the supranational court prescribes the court to function in this way. In contrast, in the Eurasian region this approach by the EurazEC Court was not welcomed by the member states due to the absence of previous experience and also civil law system, where the precedent law is not followed. This and few other incidents in the EurazEC court practice could perhaps explain why member states decided to revoke this function of the Court. The Author would like to believe that this is only temporally measure and soon the governance of member states will realize that true integration is not possible without the effective judicial power.

Neshatayeva and Myslivsky also believe that the competence of the EAEU Court shall be broaden by incorporation and development of system of, what would be understood in the EU context, as "preliminary ruling procedure", where the national court of last resort would be obliged to refer the case dealing with EAEU law for preliminary consideration and interpretation by the EAEU Court and where the view taken by the court would be binding to adhere to.[529] The author of this work supports this view and also believes that court may play crucial role in unanimous application of supranational laws by the member states.

Special role of the EAEU Commission as of a dispute resolution body

Herewith, one interesting point: article 112 the EAEU Treaty requires that **any disputes** related to the interpretation and/or application of provisions of EAEU Treaty **shall be settled** through consultation and negotiation processes.[530] Point 43 of the Statute of the Court further requires that

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[522] In one of its preliminary rulings dated 10 July 2013, the EurazEC stated that the ruling shall be of binding nature, cannot be appealed, shall be effective since the date of its issuance and directly applicable on the territories of the member states.

[523] See T.Neshatayeva, "Eurasian Court: back to the future", Law, No.9, 2012. Original: Т.Нешатаева, Евразийский Союз: назад в будущее, Закон, №9б 2012. However, Neshatayeva does not fully support the theory that EurasES court had broader competence.

[524] See Ispolinov, Ibid. see also Z.Kembayev

[525] See. Z.Kembayev, Сравнительно-правовой анализ суда.

[526] See the Regulation of the Grand Chamber (Bolshaya Kollegia) of the EurazEC Court dated 8 April 2013.

[527] At this point the Court in particular refers to the Agreement on establishment of EurazEC dated 20 October 2000 and Agreement on creation of common customs territory dated 6 October 2007.

[528] For more details see A.Ispolinov, "The decision of the Grand College of the EurazEC Court in the case Yuzhnaj Kuzbas: to what extent the judicial activism is justified", Eurasian Legal Journal, No.5(60), 2013. Original: А.Исполинов, «Решение большой коллегии Суда Евразийского Экономического Сообщества по делу Южного Кузбаса: насколько обоснован судейский активизм», No.5(60), 2013.

[529] Myslyvsky, Ibid, 2015, p.137.

[530] Article 112 EAEU Treaty. Recent example of consultation – case of Belarus: currently Belarus applies different VAT rates on the products imported from other member states than on the similar products produced

any party willing to apply to the Court, shall first refer the case to the Commission **or** the Member state.[531] Only, if no agreement is reached within 3 months from the date the formal written request for consultations or negotiations was sent by one party to another, the dispute may be referred by either of them to the Court of the Union.[532] The established procedure provokes the view that the Court is not the sole body responsible for the interpretation of the EAEU law, taken also that instead of preliminary rulings it may issue only advisory consultations, but also the Commission and member states may agree on their own understanding and interpretation of the law. This is in general opposite to the EU practice.[533]This view is not shared unanimously by the local scholars. O.Popova considers the stage of dispute resolution procedure at the level of the Commission as more of administrative nature, where the parties should find common understanding and agree on the solution, rather than the real dispute resolution mechanism, where the Commission had power to interpret the laws.[534] Another local scholars, Neshatayeva and Myslivskiy consider the Court as the sole responsible body for interpretation and in support of this position they refer to the decision of the EurazEC Court in "OOO "Vichunay Rus v. Commission", dated 7 October 2014 where the EurazEC Court finds itself as the sole body responsible for interpretation.[535] Herewith, although the author of this work finds it irrelevant to refer to the decision of EurazEC court when discussing the issue on the competence of EAEU Court, since there are several key differences between the powers attributed to the EAEU and EurazEC Court, it is not entirely incorrect, because there is an agreement, which provides that all the decisions reached by the EurazEC Court shall continue to exist and apply in the legal form they were taken even after the dissolution of EurazEC.[536] In view of the author, the decision to continue to apply the EurazEC court practice in full is at least strange because of the fundamental differences attributed to both courts and the high possibility that certain issues, like the one on the Court competence may be interpreted differently – because one parties will be referring to the current fundamental treaty and respective agreements, while others may still refer to the previous practice of EurazEC court.

Herewith, in the above mentioned decision in OOO "Vichunay Rus v. Commission" case, local scholars find another interesting moment. In that decision, the EurazEC Court empowers the Commission to refer to the Court the request for interpretation of international agreement composing the Customs Union framework, if the Commission finds that the same international agreement is being interpreted and applied differently by the member states or applied differently by the same member state with respect to different business persons. This provision is discussed by Z.Kembayev, who further elaborates it and takes the view that in practice, this should mean that any complain of business person referred to the Commission concerning the actions of the member state may be referred further by the Commission to the Court, whereas any response of the Commission allows member state to apply to the Court on the basis of inaction of the Commission, which consequently in view of Z.Kembayev leads to the conclusion that the Court may actually control the national legislations of the member states on compliance with the integration law.[537]

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domestically. Consultation on the same was held on 21 October 2016 at the Department on the functioning of the internal market of the Eurasian Commission, where the parties agreed that Belarus shall charge the VAT rates on imported goods, which are not higher than those imposed on the domestically produced goods. Retrieved from http://www.eurasiancommission.org/ru/nae/news/Pages/25-10-2016.aspx accessed on 29 October 2016.

[531] See point 43 Annex 2 to the EAEU Treaty.

[532] See point 44 Annex 2 to the EAEU Treaty.

[533] This view is also supported by Baildinov, See "Agreement on Eurasian Economic Union: one step forward, two steps back", Eurasian Law Journal, No.10(77), 2014. Original: Байльдинов, Договор о Евразийском Экономическом союзе: один шаг вперед, два шага назад, Евразийский Экономический Журнал, №10(77), 2014.

[534] See if to include and elaborate further: in the EU, the Commission also functions as pre-judicial authority, but exactly for the purpose to resolve the issue, but rather as the body responsible for investigation. This is for example typical in the cases, where one MS wills to apply to the against another MS and prior doing so, the MS shall refer the case to the Commission, so the later could investigate it. Such cases often end up in the Commission suing the member state itself should it agree with the presence of violation.

[535] See work of Myslivsky, 2015, pp.133-134.

[536] See Art. 3 point 3 Agreement on the cease of EurazEC activities dated 10 October 2014.

[537] See Z.Kembayev, Sravnitelno-pravovoi analiz, Ibid.

2.2.2.4.2. Legal weight of court decisions

As discussed above, generally the acts of the EAEU court may be divided into two categories: 1) court decisions on the disputes, where the decision is binding and 2) non-binding recommendation provided on request of the member state. The binding decisions, are however, not compulsory for all the member states, but only to the parties of the case[538] – this is an explicit provision in the EAEU Treaty.

> 99. Having reviewed the disputes envisaged in sub-paragraph 1 of paragraph 39 of this Statute (*author:* cases which might be brought by member states), the Court shall issue a decision that shall be binding on the parties to the dispute.
>
> 100. Having reviewed the disputes provided for in sub-paragraph 2 of paragraph 39 of this Statute (*author:* cases which might be brought by business persons), the Court shall issue a decision that shall be binding on and enforceable by the Commission.

This is totally opposite to the EU practice, where the decisions of the Court, either on a case or issued in a form of preliminary ruling are binding on all member states. In the EAEU, the principle of law *"erga omnes"*, which implies "rights or obligations are owed toward all" and is usually attributed to the supranational courts, is questionable or perhaps absent in case of EAEU court. This limitation of the EAEU Court restrains or diminish even further the main function and ability of the Court to effectively ensure uniform application of the EAEU law. In the years of EuraES Court similar issue on the universal binding nature of EurazEC decisions was addressed.[539] Thus, Tolstych[540] and Ispolinov[541] took the position that decisions of EurazEC Court could not have binding nature on all parties, since this was not provided under the relevant agreements and EurazEC Court should have adhered towards it. This view is opposed by Neshatayeva and Myslivsky, who referring to the decision of EurazEC court, take the opposite view and believe that decisions of EAEU court have generally binding nature on all parties.[542] In the referred case, the EurazEC Court considered that in particular its decisions might be of a binding nature for all parties, should the court decide that certain legal act (mainly the decision of the Commission) is not compatible with the at that time law on Customs Union and Single Economic Space. The author of this work is, however, hesitant to share this position and by defalut apply it also in case of EAEU. First of all, because the provisions currently incorporated in the Treaty and referred above, explicitly provide for the opposite and secondly, because the referred court case only indicates that generally applicable decision of insititution, should it be found incompatible, would be nulified generally for all parties. The same logic would not apply, however, in cases, where one member state brings an action against other member state and this limitation would be especially important. Should in such case, the EAEU court decide that the sued member state indeed violates the EAEU law norms, let's say, by violating the national treatment principle and charging higher VAT on certain imported goods than charged on equivalent domestic goods, the decision of the Court to correct the situation would only apply to the sued member state, but not by default to others, although other member states may violate the EAEU law in a very similar manner and also in theory in accordance with the law shall eliminate such situations. The limited binding force of EAEU court decisions would undermine the effectiveness of the Court as of supranational institution created with the purpose to ensure uniform application of EAEU law.

Moreover, no decision of the Court may extend beyond the issues stated in the application,[543] and as mentioned above the Court is strictly limited by types of decisions it may issue and none of its decisions may alter and/or override the effective rules of the Union law and the legislation of the

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538 See point 99 Annex 2 to the EAEU Treaty.

539 For discussion see Myslivsky, ibid, 2015, p. 152.

540 V.Tolstych, "Recent decisions of EurazEC court: attempt for doctrine analysis", Eurasian legal journal, No.8(63), 2013. Original: В.Толстых, Недавние решения суда ЕврАзЭС: попытка доктринального анализа, Евразийский экономический журнал, №8(63), 2013.

541 A.Ispolinov, "Decision of Grand Chamber of the EurazEC Court in the Yuzhnyj Kuzbass case: to what extent the judicial aktivizm is justified", Eurasian Legal journal, No.5 (60), 2013. Original: А.Исполинов, «Решение большой коллегии суда ЕврАзЭС по делу Южного Кузбаса: насколько оправдан судейский активизм», Евразийский юридический журнал, №5 (60), 2013.

542 Myslyvsky, 2015, p. 151.

543 See point 101 Annex 2 to the EAEU Treaty

Member States, nor may it create new ones.[544] This is also the new development, which was incorporated as explicit provision in the EAEU Treaty. A.Ispolinov proposes that this development was probably also provoked by the judicial activism and in particular by the decision of EurazEC Court, where the Court in a very explicit and radical manner interpreted the key provisions in the EurazEC agreements contrary to the positions of the member states.[545] Ispolinov further notes that the interpretation given by the Court in that case would radically change the perception of the Court decisions and the legal consequences, including the consequences of the decisions on the national legal systems. Perhaps, this is what is supposed to be done by the supranational court, however, the states were not ready to accept it.

In addition, all the decisions of the Commission or its certain provisions recognised by the Court as non-conforming to the Union law shall continue in effect after the entry into force of the relevant decision of the Court until the time the Commission executes and complies with the decision, [546] unless the Court in its decision specifically provides otherwise.[547] In general, the Commission will have 60 calendar days to comply with the Court decision.[548] Herewith, in case the decision of the Court is not implemented, the respective member state or the business person shall be entitled to apply to the Supreme Eurasian Economic Council for the later to take measures required for execution of the Court.[549] Thereby, one may conclude that the Supreme Economic Council in fact is the last remedy after the Court of the EAEU, which may force countries and the Commission to follow the EAEU law. With this respect, Z.Kembayev notes that obviously, if the Supreme Council fails to agree on measure to enforce the decision of the Court, the decision will simply remain unexecuted.[550]

Furthermore, the decisions of the Court are not considered as sources of law in the EAEU,[551] where the absolutely reverse role is played by the CJEU, whose decisions are considered as sources of law together with the founding treaties and secondary law of the Union.

2.2.2.4.3. Composition of the EAEU Court

The judges of the Court (two judges from each member state) are appointed for 9 years by the Supreme Council of the Union.[552] The Supreme Council has also approved special Regulation on the functioning of the EAEU Court (Regulation).[553] The Regulation provides that the Court shall exercise justice acting as the Grand chamber of the Court (highest level), Appeal chamber of the Court (appeal chamber) and Board of the Court (court of first instance).[554] The decisions of the Grand chamber and the Appeal chamber of the court are final and cannot be appealed.[555] The Grand Chamber consists of all judges and only considers cases referred by the member states and requests for consultations. In contrast, the cases brought by the business persons are initially considered by the Board of the Court and in case of appeal by the Appeal Chamber. The Board of the Court consists of one judge from each member state, whereas the Appeal Board consists as well from one judge from each member state, which did not participate in the case as members of the Board of the Court. The cases on resolution of disputes shall be carried out in two stages: written and oral. The written part includes submission of claims and support materials, as well as the conclusion of the specialised group in case

[544] See point 102 Annex 2 to the EAEU Treaty
[545] See A.Ispolinov, “Eurasian justice: from the Court of the Community to the Court of the Union”, Gosudarstvo i parvo, No.1, 2015. Original: А.Исполинов, «Евразийское правосудие: от Суда Сообщества к Суду Союза», №1, 2015.
[546] See point 111 Annex 2 to the EAEU Treaty
[547] See point 111 Annex 2 to the EAEU Treaty, upon reasonable request of the party to the dispute, the Court may suspend the decision of the Commission or its certain provisions recognised as nonconforming to the Union law, on the date of entry into force of such decision of the Court.
[548] See points 111 and 113 Annex 2 to the EAEU Treaty.
[549] See point 114 Annex 2 to the EAEU Treaty.
[550] See Zh.Kembayev, Ibid, Sravnitelno-pravovoi analiz.
[551] See Art. 6 EAEU Treaty.
[552] See point 10 Annex 2 to the EAEU Treaty.
[553] See Decision of the Supreme Council of the EAEU No. 101 dated 23 December 2014, available at: https://docs.eaeunion.org/docs/ru-ru/0147026/scd_25122014_101
[554] See article 24 of the Regulation on the functioning of the EAEU Court
[555] See articles 81 and 83 Regulation on the functioning of the EAEU Court.

when such groups are established.[556] The oral part includes the report of the reporting judge,[557] hearing of parties, conclusions of experts and specialists,[558] as well as announcement of materials and conclusions by the Court.[559]

Judges in any composition shall take decision by the majority, where all judges involved shall vote.[560] In case the judge does not agree with the decision taken by the majority it can issue its personal opinion on the case within the five days the decision of the Court was made.[561]

The appointed judges are the international employees as defined by the EAEU Treaty and cannot request or receive any instructions from their member states and neither from other states.[562] Herewith, local scholar Z.Kembayev warns that judges may not be truly independent from the member states, because member states reserve the right to revoke the judge from the position anytime and the EAEU law does not provide any clear basis in accordance with which the judge could be displaced.[563] This right of the member state in view of Z.Kembayev may cause "serious negative influence" on the independent status of judges provided under the EAEU law. In comparison, the EU judges in this respect have more solid rights and cannot be revoked by the member states. The judges of the CJEU may only be dismissed based on the unanimous decision of other judges and advocates general.[564] Additionally, Z.Kembayev notes that the judges of the EAEU court may anytime be deprived from the immunity again based on the decision of the member state of its origin. And this fact even more supports the view that it is very challenging for the judges to preserve their independence under the given circumstances.[565] In contrast, in the EU, the immunity of the judge may only be pulled off by the CJEU, and in general the immunity is granted for the whole life of the judges, which means it continues after retirement.[566]

The EAEU Treaty also provides for the new rule on establishment of special specialized groups, which may be created to support judges in taking decisions on certain issues.[567] The specialized groups may in particular be created if the issue of the case concerns the provision of industrial subsidies, agricultural state support measures, the application of safeguard, anti-dumping and countervailing measures.[568] Expert groups shall consist of 3-5 persons[569] – one from each member state, whereas the experts are proposed by the member states each year (may be more often than annually) in advance per each respective type of dispute. The composition of a group is approved by the Court on a case by case basis.[570] The opinion of a specialized group is non-binding for the Court,[571] unless it concerns the relevant compensatory measures.[572] In formulating its conclusions, the expert groups may consider and include the facts and materials presented by the parties to the case, the international practice on resolution of similar issues and application of relevant norms, the

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[556] See article 25 para. 2 Regulation on the functioning of the EAEU Court.

[557] The definition of the role of the reporting judge is provided in article 26 Regulation on the functioning of the EAEU Court. The definition of chairing judges is provided in article 27 of the same Regulation.

[558] As experts and specialist may act other persons than those participating in the specialized groups. See article 29 para. 5 Regulation on the functioning of the EAEU Court. These may be independent persons invited by the Court to provide a written opinion on the case issue. The experts and specialists act in their own personal capacities and may not represent any member-state or international organization.

[559] See article 25 para. 3 Regulation on the functioning of the EAEU Court.

[560] See Art. 77 para. 3 Regulation on the functioning of the EAEU Court.

[561] See Art. 79 Regulation on the functioning of the EAEU Court.

[562] See annex 32 para. 2 to the EAEU Treaty.

[563] See point 13 Annex 2 to the EAEU Treaty. See also Z.Kembayev, "Comparative legal analysis of the functioning of the EAEU Court", Scriptorium, Justicia, No.2 (18) 2016. Original: Ж.Кембаев, «Сравнительно-правовой анализ функционирования Суда Евразийского Экономического Союза», Scriptorium, Justica, №2(18) 2016.

[564] See Art. 6 Statute of the Court of Justice of the EU.

[565] For more see Z.Kembayev, "Comparative legal analysis of the functioning of the EAEU Court", Scriptorium, Justicia, No.2 (18) 2016.

[566] See Art. 3 Statute of the Court of Justice of the EU.

[567] See point 82 Annex 2 to the EAEU Treaty.

[568] See point 82 Annex 2 to the EAEU Treaty.

[569] When there were 3 member states, there was requirement to have 3 persons in the group.

[570] See point 84 Annex 2 to the EAEU Treaty.

[571] See point 91 Annex 2 to the EAEU Treaty.

[572] See point 92 Annex 2 to the EAEU Treaty.

conclusion on whether the norms of the EAEU law were violated, conclusion on application of compensatory measure, as well as other information the group considers important to include.[573] At this point local scholar A.Ispolinov notes that the specialised groups in fact take the decision instead of the Court itself when the issue concerns the compensatory measure and this may eventually lead to different interpretation of the same provision in the EAEU law by the Court and the Specialised group.[574]

In addition to expert groups, the functions of each judge are supported with the personal advisor and assistant, known as *secretariat of judge*.[575] The judicial assistant shall provide organisational support to the judge,[576] whereas the advisor shall provide informative and analytical support to the judge.[577] The judges of the EurazEC court also had personal advisors and in view of T.Neshatayeva and P.Myslivsky, the role and functions of advisors were approximated to the role of advocate generals in the CJEU.[578]

Limitation about the functioning of the EAEU Court is that it cannot consider cases on compensation for material damages or any other cases of material nature.[579] The EurazEC Court had the same limitation,[580] where the local scholars T.Neshatayeva and P.Myslivsky have already correctly noted this as deficiency earlier in 2013, when they argued that the Court shall be empowered to consider such cases on the basis of general international law principles and practice of other international judicial bodies in order to fully recognize and realize the rights of persons.[581]

2.2.2.4.4. Few words about the practice of EuraES court

A few fundamental problems in the decisions of EurazEC Court tried to formulate the local scholar A.Smbatyan. As the first fundamental problem, she denominates the lack of reasoning in the EurAsES Court's decisions.[582] She notes that formally, obviously, decisions often contained the parts, which were supposed to explain Court's reasoning, but in fact instead often provided the description of facts and unsupported statements, rather than explanations. In her view, the Court did not consider it necessary to explain how and why it came to a particular conclusion, and how the public would perceive the decision.

The second problem in view of Smbatyan lies in the fact that from the EurAsEC Court's decision it was almost impossible to understand what arguments were presented by the parties. The decision often contained the information that applicant disagrees with certain issue based on certain legal provision, however, the justifications presented by the parties were missing in the decisions. This obviously prevents public from understanding of the whole picture and evaluate the validity of decision. She correctly notes that the decisions of the Court shall contain the detailed positions of parties, their argumentation and consequent reasoning of the Court.

2.2.2.5. Why the EAEU missing Parliament and how it what impact it may have on tax harmonization?

The discussion of supranational parliament is conjugated with political issues in the region. When the question arises regarding the establishment of supranational parliament, the member states usually underline that the Eurasian Economic Union is an instrument for economic cooperation and

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573 See article 59 para. 2 Regulation on the functioning of the EAEU Court.
574 A.Ispolinov, Ibid. Ot suda soobshestva k sudu souza.
575 See point 24 Annex 2 to the EAEU Treaty.
576 See point 33 Annex 2 to the EAEU Treaty.
577 See point 30 Annex 2 to the EAEU Treaty.
578 T.Neshatayeva, P.Myslivsky, "First year of functioning of the EurazEC Court", International justice, No. 2, 2013. Original: Т.Нешатаева, П.Мысливский, «Первый год существования Суда Евразийского Экономического Союза: итоги и перспективы», Международное правосудие, №2, 2013.
579 See para. 61 Annex 2 to the EAEU Treaty.
580 See art. 11 Agreement dated 9 December 2010.
581 Supporting the argument, they refer to International Law Commission's Draft articles on responsibility of States for internationally wrongful acts, 2001 on obligations of states to fully compensate the mental and material damages of person in case of violation of norms of international law, and also to International Law Commission's draft articles on responsibility of international organizations, 2011, on the same.
582 A.S.Smbatyan, Resheniya susa EvrazES ne vyzyvaut nauchnogo interesa? Eurasian Legal Journal, No.6(73), 2014, pp. 63-68. Original: А.С. Смбатян, Решения суда ЕвразЭС не вызывают научного интереса? Евразийский Юридический Журнал, №6(73), 2014, стр.63-68.

there are no plans to persuade creation of political union and thus the parliament. From the Russian side suggestions were expressed for creation of parliament elected on the basis of direct democratic voting, however this idea found now support in Kazakhstan and Belarus. In particular, the president of Kazakhstan is openly opposing the ideas of integration that go beyond the economic issues and due his insistence the provisions on the parliament were deleted from the initial draft EAEU Treaty.[583] The President of Kazakhstan is concerned that Union is becoming politicized in particular because of the composition of Eurasian Economic Commission, where the majority is represented by Russian members and they also regularly take part in the Russian government meetings, which should not be the case and members of the Commission should not be subordinated to the governments of member states.[584] By not having the parliament and having established the hierarchy of institutions with direct participation of high state officials and rights for veto, the members of the Eurasian Economic Union tend to preserve the power for final decisions at the level of the states.

In view of Shumilov et. al, the regional integration is based on the efforts of executive power and is not backed up with the representative institutions.[585] Moreover, in their view, taken the powers attributed to the Supreme Economic Council the whole structure of the Union depends on the views and personal composition of the Supreme Economic Council, i.e. particular senior officials. In view of Zonenko, absence of interparliamentary assembly will have negative effect on integration. Herewith, he believes that if new countries join the Union, the negative effect could be minimized and the role of representative institution could be played by the Council of the Commission, where the number of members could be increased and make them appointed by the national parliaments (similar as was done in the European Economic Community at certain point). The Commission would still remain as executive body, where the Board of the Commission and the Council would function equivalently to the EU Commission and the Parliament.[586]

In view of another two local scholars, Malko and Elistarova, the major problem of legal maintenance of activity and functioning of the Eurasian Union should be the creation of a supranational parliament. The supranational parliament, if established, in view of scholars must be different from the earlier versions of inter-parliamentary assemblies in CIS practice and other regional organizations in the former Soviet Union and have more power, than simply power to issue decisions of recommendatory nature. [587] Therefore, scholars believe that the EAEU needs a more "credible" parliamentary body, that the region witnessed before. They agree with the opinion of Naryshkin and Habrieva that creation of parliament would provide necessary impetus to the integration process, especially in terms of strengthening its legal framework and improve its legitimacy, would contribute towards strengthening the democratic principles of the Eurasian integration. Taking into consideration the EU experience, these scholars further note that formation of a supranational parliament should not lead towards total exclusion of national parliaments from the preparation and decision making processes related to integration, as the Member States do not lose their sovereignty and national parliaments retain the right to control the foreign policies of their countries. Malko and Elistarova recomend to define clearly the role and position of parliament, as one of the EAEU institute, in the future acts of the Eurasian Union. Along with attributing it with legislative function, they believe it is necessary to allocate the parliament with the right to expresses the interests of member states‘ nationals.

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[583] See Stanislav Secrieru, ‘Bumps on Russia’s road to the Eurasion Economic Union: postponed integration, costly enlargement and delayed international recognition’, PISM Policy Paper, no. 10 (93), Polish Institute of International Affairs, July 2014. Available at: http://www.pism.pl/files/?id_plik=17741

[584] F.Hett, S.Szkola, “The EAEU: Analyses and Perspectives from Belarus, Kazakhstan and Russia”, 2015, Friedrich Ebert Stiftung.

[585] V.Shumilov, D.Boklan, I.Lifshic, “Legal novels of the EAEU Treaty”, Russian foreign economy messenger 4-2015. Original: В.Шумилов, Д.Боклан, И.Лифшиц, «Правовые новеллы договора о ЕАЕС», Российский внешнеэкономический вестник, 4-2015.

[586] All the above paragraoh is retrieved from Balytnikov and Boklan, ibid., p.77.

[587] A.Malko and V.Elistarova, Ob ispolyovanii pravovogo opyta mezhgosudarstvennoi integracii pri sozdanii Evraziiskoho Economicheskogo Souza, Eurasian Legal Journal, No.2, 2014, pp.40-43. Original: Малько, А. В. , Елистратова, Об использовании правового опыта межгосударственной интеграции при создании Евразийского экономического союза/ /Евразийский юридический журнал, №2., 2014, стр. 40 - 43

During the EuraszES functioned so called the "Interparliamentary Assembly", which served as a platform for cooperation of legislative institutions of the member states, while its main task was to coordinate the legislative processes at the level of the parliaments in the member states, such as adoption of laws and codes of recommendative nature, support with the development of legal and organizational basis for the member states to implement the agreements taken within the EurazEC and inline national legislations accordingly.[588]

2.2.3. Comparative analysis and observations with respect to unions' structures and decision making processes

In contrast to the structure of European Union institutions, the structure of EAEU institutions is hierarchical, were one institution has an authority over another. Additionally, only the Eurasian Commission and the EAEU Supranational Court may be regarded as supranational institutions of the EAEU, whereas the other two institutions – in particular, the Supreme Economic Council and the Intergovernmental Council, are intergovernmental institutions. The structure of the EAEU institutions is also different. In the EAEU there is no supranational Parliament and there is no equivalent institute as the Council of the European Union, but the functions of the later may be considered as shared between other institutions and the specialized consultative committees represented by the competent authorities of the member states that work with the Commission on different issues.

With respect to the roles of Commissions

The commissions in the EU and EAEU although having the similar names are absolutely two different kinds of institutions taken their capacities and functions. Looking from the EU perspective, the Commission plays an important role in area of tax harmonization by making legislative proposals for adoption of supranational legislation, having and exercising the right for infringement procedure and also due to its numerous non-binding communications and recommendations on selected tax issues that guide member states and help them to have common understanding and follow the fundamental principles as they were elaborated by the CJEU. The author of this work takes the view that Eurasian Economic Commission is not equivalent to the EU Commission, when the issue is considered from tax law perspective and the ability of the Commission to contribute towards tax harmonization. In the next paragraphs the author summarises points, which support current conclusion.[589]

First of all, the Eurasian Commission seems to be not an independently functioning body of supranational organization, but in view of the author, it serves as a platform of international cooperation for the governments to meet, discuss and agree on certain issues, although it has its own legal personality and permanent employees. The Eurasian Commission is supposed to ensure that the Union law is observed by the member states, but at the same time, the Union law requires it to act in a way that satisfies and meets the interests of each member state – this is becoming visible when looking into the process of decision making and the input, but also influence the Commission is receiving from the Consultative Tax Committee, which is composed of representatives of member states' competent authorities. In view of the author, this is not a bad feature as such, but instead may at early stage help member states and the Commission to find compromise and agree on the legislative measures in question. However, there is a degree of risk, of course, that employees of the Commission instead of being proactive, may in contrast get used to work closely with member states and adhere to their positions and will not look further than member states do, and indeed continue working to satisfy the interest of the member states, but of the Union. Another point, which indicates the dependency of the Commission on the member states, is the fact that all the binding decisions taken by the Commission, may be suspended or amended by the Intergovernmental Cuncil or the Supreme Economic Council, which in their turn directly act and represent member states. This supports the view that Commission is not an independent body from the member states, but rather serves as a plaform and assist member states to move integration processes. This view is shared by V.Tolstykh, who believes that supranationality should imply the independency and the right of supranational institute to take binding decisions on the member states, whereas in the context of the

[588] O.Popova, "Legal basis for compliance with the court decisions in the EAEU member states", Sovremennyj jurist, No.2, 2014. Original: О.Попова, «Правовые основы исполнения судебных решений в странах Евразийского Экономического союза в свете глобализации», No. 2б 2014.

[589] Look of there are any devoted publications on this.

EAEU the supranationality of Commission is either absent or is very insignificant, which consequently is intrinstic to the whole EAEU.

Furthermore, if to assess, strictly from the perspective of a tax lawayer, whether the EAEU Commission has the same responsibilities as the EU Commission, then, from the first glance, one may conclude so, because both commissions are entrusted with the same task to be guardian of the unions law, ensure that member states comply with the union laws are shall also be involved in the legislative processes. However, if to look closer and compare precisely the actual rights and functions performed by both commissions with this respect, one would immediately realise the differences. First of all, the Eurasian Commission is authorised not only to initiative legislative acts, but also to adopt these legislative acts itself and these legislative acts (decisions) are binding and directly applicable in the member states. The decisions taken, may however, concern not only one particular member state and require compliance with the Union law, but be of a general nature, and since in the Eurasian model such instruments as directives or regulations are not provided, it may be assumed that decisions of the Commission can serve as instruments for tax harmonization purposes. There is of course very small probability, that decision taken by the Commission on harmonization of certain tax aspect will be smoothly and silently accepted by all member states, but this in theory should be possible, which makes the Commission the body, which may be solely responsible for adoption of legislation. Until this moment, the Commission has not taken any decision that woud call for harmonization of certain tax aspects and be simoultaneously addressed to all member states,[590] however, the author does not exclude that this may happen at some point.

Another major difference between the rights of EU and Eurasian Commission lies in the inability of the Eurasian Commission to effectively monitor and assure the compliance of member states with the Union law. As was discussed, the Eurasian Commission has no right to bring member state in front of the EAEU Court. The only thing the Eurasian Commission can do is to present member state with the binding decision, requiring changes of domestic legislation. In the situation, where the member state does not appeal the decision to the upper institution, but either also fails to act on, the Commission will have no power to force member state to take necessary action. The only power to force member state to follow the decision is for another member state to bring this case in front of the EAEU Court. In case, member state neither complies with the Court decision, only another member state, but again, not the Commission, may bring the case in front of the Supreme Economic Council and ask for appropriate measures.

Finally, the Board of the Eurasian Commission serves as a body for resolution of disputes between the parties, prior the disputes could be directed for the consideration by the EAEU Court. The Commission thus has a right to interpret the Union law prior the EAEU Court has done so, which is not inherent to other bodies but the supranational courts in the EU model.

With respect to the Courts of the Unions

At the current stage of existence of the EAEU Court, it is difficult to say that the Court of EAEU is similar to the CJEU in terms of its functioning and attributed powers. Yes, both courts are the supranational organizations represented by judges from the member states called for uniform interpretation of the unions' laws, but at this general point and formal definition of both courts the similarities would perhaps exhaust themselves. This is so, because in the EU, the CJEU has become an instrument of integration, which promotes uniform application of the supranational law and gradually leads to adjustments of national legislations towards realization of Union's objectives. First of all, this has only become possible due to list of principles, either developed or envisaged in the EU law, which are currently missing in the Eurasian law and also in the national legislations of member states. Among them: principle of precedence of the EU law over the national laws, including national constitutions, and principle res judicata, which makes the decisions of the CJEU compulsory to adhere to not only for the future CJEU cases, but also to the national courts of member states. In the context of the Eurasian Economic Union, the provisions on the functioning of the EAEU Court, explicitly provide that decisions of the EAEU Court are only binding on the parties to the case. This limitation in fact will reserve the right of the member states not to follow the interpretation provided by the EAEU Court, if there were not the parties to the case concerned. This may perhaps be

[590] This conclusion is made by an author on the basis of review of all the decisions taken by the Commission on economic and financial matters since the beginning of its functioning.

explained by the legal tradition in the member states of Eurasian Economic Union, where the precedent law is absent in the judicial system.

Secondly, the EAEU region, there is no capacity attributed to the Court to issue preliminary ruling procedures based on the requests of the national courts. In fact, the national courts are not allowed to send the questions for preliminary rulings, but only the authorised competent authorities which differ from one member state to another have the power to direct the questions to the EAEU court for interpretation. Herewith, as long as the member states retain the power to agree on other interpretation than provided by the Court, they can use such interpretation. This effectively diminishes the role of the EAEU Court even further, because its interpretation might be neglected by the member states if they manage to agree on their own views for interpretation of the EAEU law.

The CJEU has general capacity to enforce the Union law – whether the area of question is attributed to the Union competence or not. This general power made it possible for the CJEU to interpret the Union law from a perspective of tax law and thus influence on formation of the national legal systems. The CJEU proclaimed that although the competence in direct tax matters belong exclusively to the member states, they nevertheless have to comply with the Union law upon its drafting and application. In view of the author, the EAEU does not have this general capacity to deal with any areas of questions. This is not an explicit limitation in the statue or the EAEU Treaty, but instead the conclusion one can made after having studied and analysing the functioning of the EAEU Court. In the EAEU, the Court may work on enforcement of the EAEU law only in few limited cases: 1) when the application is made against the Commission for non-acting of the later on the realization of the Union law or acting not in compliance with the Union law and 2) when the application is made by the member state against another member state for non-compliance with the Union law and 3) on compatibility with the Union law of international agreement concluded within the Union or the Commission's decision. In the first case, in view of the author, the role of the Court will be very limited, because it will be able to deal only with the cases on the matters, where the Union has explicit competence to act, because in areas, where the Union has not competence to act, the Commission cannot be suited for non-acting or acting against the law. Consequently, if it is decided by the Court that tax matters are within the exclusive competence of the member states, then it perhaps would not be able to deal with cases against the Commission for non-acting of the later on realization of certain Treaty provisions on tax matters – e.g. harmonization of indirect taxes. This is not an explicit limitation in the EAEU Treaty, but instead is a consequence of the fact that applications to the Court may be submitted only by the member states or the persons on the issues, where the Commission has failed to act on realization of the Union law. With respect to the second issue, there may be a little bit more space for enforcement of the law by the EAEU Court, because member states may bring any issue for consideration, which is not limited by areas, where the Union has competence. At this point, in view of the author, there is a chance for enforcement of the EAEU law with respect to national tax matters. However, in practice and taken the EU experience, it is very unlikely that one member state would bring a case against another member state for non-compliance of the later with the union law. In case of any issues like that it is very probable that member states would prefer to resolve the same between themselves without involvement of the Court. Finally, the Court may assess on compatibility the international agreements between the states and the decisions of the Commission, which again limits its capacity only to the issues covered in such legal documents.

And finally, the last difference is the fact that in the EU, only the CJEU is responsible for interpretation of the Union law and the member states have the right to decide on the issues involving the Union law, only if the CJEU has already given its opinion on the interpretation of provision in the similar case. In contrast in the EAEU, the national courts are empowered to consider cases with involvement of the EAEU law and are not obliged to ask the EAEU court for preliminary ruling, even more – they are not eligible to do it.

Taken the current set of functions and powers attributed to the EAEU Court there is very small probability that the Court will have any influence on harmonization of national tax systems from the negative integration processes. This is so, because 1) the Court can consider the cases only on certain issues predetermined by the EAEU Treaty; 2) the decisions of the Court are binding only to the parties of the case and are not considered as general sources of law; 3) advisory opinions of the Court are not binding and member states may agree on another interpretation of the same issue; 4) there is no right and consequently no obligation of the national courts to refer the cases an questions for interpretation by the EAEU Court; 5) the Court has no right to consider and shall dismiss without

prejudice all claims for damages or other material claims, which effectively eliminate the incentive for the member state to comply immediately with the Union law or the Court decision; 6) together with the EAEU Court, the provisions of the EAEU Treaty may be interpreted by the national courts and also by the EAEU Commission in the process of pre-judicial dispute resolution and finally, 7) if the decisions of the Court are not followed or executed, the last resort to enforce the decision is the Supreme Economic Council, which effectively undermine and diminish the role of the Court even further, because it is not the ultimate resort to enforce the EAEU law.

With respect to other institutions

In the Eurasian context, there is no institution similar to the Council of the EU – which would be represented by the member states' ministers able to independently adopt binding decisions for its states in accordance with area of its expertise. This function in the EAEU is probably shared between the Council of the Commission, the specialized consultative committees, which work together with the Commission and are composed of the representatives of the competent authorities of the member states, the Intergovernmental Council and the Supreme Economic Council, where the later has a power to make final decision. Taken the absence of institution similar to the Council of the EU, consequently the legislative process is different in the EAEU.

The Supreme Economic Council of the Eurasian Economic Union may be considered as similar to certain extent the European Council due to its composition – represented by the heads of the member states and are empowered to take strategic and policy decisions on behalf of the Union and resolved the issues, which could not be resolved at the lower institutional levels. However, in fact, the powers undertaken by both Councils are not the same, and whereas the European Council stays aside from routine, though important, legislative matters, and mainly work on development of the strategical program for the Union and only in rare cases may issue decisions on complex and sensitives issues, the Supreme Council of the EAEU is more involved into the decision making processes, including the legislative, and in addition has the power to overrule the decisions of other institutions, requiring thus interference into the functioning of the supranational bodies. The Supreme Economic Council in the EAEU may therefore be considered as an ultimate decision maker in the hierarchy of institutional structure of the EAEU, triggering a question of independency and authoritativeness of other EAEU institutions. The cautions of member countries may perhaps be explained by fear to lose control over the sovereign matters, similarly as was experienced in Europe in early 50-60s with the High Authority. What concerns, its capacity to act in tax matters, then it is not as such envisaged in the Treaty, but taken the overall rang and general power of the Supreme Economic Council, in view of the author, it may easily act on tax matters or issue respective decision empowering the lower level institution to do the same.

The role of Intergovernmental Council in the Eurasian context to limited extent may be compared to the role of the EU Commission, however only in terms of requirement to ensure proper implementation and realization of the EAEU Treaty.

The absence of Parliament in the EAEU may perhaps also be explained by an early stage of its integration. However, the existence of Parliamentary Assembly of member states may signify that in some time the countries may be ready and willing to have an elected Parliament.

2.2.4. To what extent EAEU has competence to act on tax related matters?

2.2.4.1. General understanding of "competence" under the EAEU law

Having studied the competences of the EAEU institutions, the author will summarise the same from the perspective of tax law and will try to determine the level of competence, the EAEU institutions, in particular, the Commission, have to act on tax related matters.

Similarly to the EU, the Eurasian Economic Union may act only within the competences conferred upon it by the member states.[591] However, the term "competence" is not defined, and in contrast to the TFEU,[592] in EAEU Treaty there is no separate article that would explicitly list and name the areas, in which the Union was granted the competence and its respective degree.

[591] See article 3 EAEU Treaty.

[592] See articles 3 and 4 TFEU, where it is defined in which areas the EU shall have exclusive and shared competence.

Article 5 of the EAEU Treaty is named "The competence", however, in fact it is very general and only provides that the competence of the Union to act in certain areas is determined by the EAEU Treaty and *other international treaties concluded within the Union*,[593] which means that Union may be attributed with additional power anytime should the relevant international treaty be concluded between the member states. The article further provides that member state *shall exercise* **coordinated** or **agreed** policy in the spheres and limits agreed in the EAEU Treaty and *other international treaties within the Union*, whereas in other spheres of economy the member states shall *endeavour* to exercise coordinated or agreed policy in compliance with the main principles and purposes of the Union.[594] To support member states in their endeavours to exercise the coordinated or agreed policies, the EAEU Supreme Council may order to create special support bodies in each sphere (e.g. council or the board of leaders of the national state authorities, working groups and special commissions), it may as well give orders to the Commission to coordinate the relationship between the member states in certain spheres.[595]

In contrast to the EU, in the EAEU law there is no use of such terms as "exclusive"[596] or "shared"[597] competence, and therefore, some local scholars opinion that the competence of the Union and its degree is determined by and derived from the level of legal unification, which member states agreed to achieve in each sphere.[598] Respectively, Article 2 of the EAEU Treaty provides for three different levels of legal unification, namely – single, coordinated and agreed policy.[599]

Single policy is defined as the policy implemented by the member states in certain spheres as specified in the EAEU Treaty and envisaging the application of **unified** legal regulations by the member states, *including on the basis of decisions issued by Bodies of the Union within their powers.* This is the highest degree of competence in the EAEU. Herewith, having reviewed the EAEU Treaty, one may conclude that single policy has very limited scope and is required only in the areas of customs (customs-tariff regulations, the system of tariff preferences and common measures of non-tariff regulations),[600] external trade and protection of industrial production (competition policy). Further on, although the "single policy" is the highest degree of legal unification, the Author is hesitant to conclude that the Union has the exclusive power to legislate on the same, since the definition of single policy explicitly provides that it may be acvhieved "also" by means of the decisions of the Union, but not that it shall be achieved exclusively by the decisions of the Union. Respectively, the Author is more likely to assume that single policy implies more the shared competence, where the result can be achived by both – by measures taken by the Union, but also by measures taken by the member state, although those that have been discussed and agreed through the Union framework.

In the advisory opion dated 4 April 2017, the EAEU Court clarified that in order to refer certain areas to the single policy, there should be: 1) existence of unified legal regulation and 2) transfer of competence in that sphere by the member states to the bodies of the Union and their supranational power.

The next two levels of policies, namely, coordinated and agreed, are defined in the following ways: *coordinated policy* means policy implying *the cooperation* between the member states on the basis of common approaches *approved within the Bodies of the Union and required to achieve the objectives of the Union* under the Treaty, whereas *agreed* policy is defined as policy implemented by the Member States in various areas *suggesting the harmonisation* of legal regulations, *including on*

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[593] See article 5 para. 1 EAEU Treaty.

[594] See article 5 para. 2 and 3 EAEU Treaty.

[595] See article 5 para. 3 EAEU Treaty.

[596] In the EU context, the exclusive competence means that in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts. See article 2 para. 1 TFEU.

[597] In the EU context, the shared competence means that the Union and the Member States may legislate and adopt legally binding acts in certain areas. However, the Member States shall exercise their competence to the extent that the Union has not exercised its competence or to the extent that the Union has decided to cease exercising its competence. See article 2 para. 2 TFEU.

[598] See, for instance, P.Myslivsky, 2015,

[599] See article 2 EAEU Treaty.

[600] See P.Myslivsky, "International legal framework for establishment of the Eurasian Economic Union and means for dispute resolution", dissertation, Российский государственный Университет правосудия, 2015.

the basis of decisions of the Bodies of the Union, to the extent required to achieve the objectives of the Union under this Treaty.[601] In view of the Author, both policies imply the exclusive capacity of the member states to legislate on the matters, however, require it to be exercised in accordance with the objectives of the Union and even being discussed and approved within the Union.

The current Union competences and the respective degrees are therefore defined under the different articles of the Treaty with respect to each area separately. Below the author considers selected articles that may be relevant for determination of whether the Union has any competence to act on tax matters.

2.2.4.2. What is the degree of competence attributed to the EAEU with respect to tax matters?

First of all, there is no precise provision in the EAEU Treaty that would comment on the level of competence attributed to the Union to act in tax matters and this inevitably results in different views and perceptions.

There are only three articles in the Treaty that exclusively and explicitly address tax matters: 1) principles of cooperation between the member states in the sphere of taxation (art. 71); 2) principles for collection of indirect taxes (art.72) and 3) taxation of income received by individuals (art.73). The articles aim to regulate the relationship between the member states in tax sphere by establishing certain norms and principles, hereby, neither of them attributes any power to the Union to act on the same by any means: neither it calls for the legislative measures to be adopted by the Union, nor invites the Union to support the member states in achieving the same, nor invites the Union to supervise and assess the compliance of the member states with the prescribed norms and principles. Equally nothing on the competence of the Union to act in tax matters is provided under Annex 18 to the Treaty, which is based on the above articles 71 and 72 and provides for the detailed rules on collection of indirect taxes upon exportation and importation of goods, and also provision of services. Annex 18 is a codification of the previously concluded agreements between current member states on application of indirect taxes.

On this basis local scholar Reut concludes that “exercise of coordinated or agreed policy in tax matters is not provided under the EAEU Treaty, neither the competence of the Union is defined on the same.” He also correctly notes that in the articles it is even “highlighted the independence of the states to choose the directions, forms and ways for tax harmonization”, in respect of taxes affecting their mutual trade so as to prevent violation of any terms of competition and interference with the free movement of goods, works and services at the national level or at the level of the Union.[602] On the basis of the above, the author takes the liberty to conclude that indeed perhaps the Union was not attributed with any competence to legislate on the tax matters. Herewith, in view of the author, the currently absent competence to legislate on tax matters, does not by default exclude the competence of the Union to oversee the compliance by the member states with the EAEU law and also to support their endeavours to exercise the coordinated or agreed policies in tax matters.

In the recent EAEU Court decision in the case Tarasik vs. Commission, there are statements made by the EAEU Commission and the Court regarding the competence of the Commission to act in tax matters, which may provoke the view that the Union is not competent to interfere into the tax matters of member states. In that case the applicant (individual entrepreneur Mr.Tarasik), having exhausted domestic remedies applies to the Commission with the request to assess the lawfulness of actions of the customs authorities of Kazakhstan that in his view were contrary to the law of the Customs Union and incorrectly led to application of excise taxation upon importation of goods on the customs territory of the EAEU. The Commission refused to assess the case, having referred it to the national tax authorities of Kazakhstan in view that member states had exclusive competence in tax matters and neither it perceived itself with authority to assess the lawfulness of actions by the national customs authorities.[603] This position was supported by the Board of the EAEU Court, which stated that as long as in the EAEU Treaty there is no provision, which would attribute the power to the Commission to legislate on the indirect taxation, the exclusive competence belongs to the member

[601] At this point, the Author struggles to differentiate between the coordinated and agreed policies.

[602] A.Reut, “The Competence of the EAEU in the sphere of taxation”, Financial law, 2015, No. 3, Original: A. Реут, “Компетенция Евразийского экономического союза (ЕАЭС) в сфере налогообложения”, Финансовое право, № 3, 2015.

[603] See Decision of the Board of the EAEU Court dated 28 December 2015, page 8.

states.[604] The Author does not entirely support the position of the EAEU institutions and tends to believe that, even though the Union does not have explicit power to legislate on tax matters and neither the Commission was explicitly attributed with the power to take legally binding decisions on tax matters (which in general it can make), the Commission shall have the right to assess the lawfulness of actions of the national authorities and even the compliance of the same and also of the national tax legislation with the general principles of the EAEU law and also with the substantive tax law of the EAEU to the extent it is established under Annex 18 to the EAEU Treaty discussed above.

This view perhaps is radical for the EAEU environment, where everyone is used to literal interpretation of the law, but at the same time would be logical in the EU context, where, it became generally accepted that the member states shall exercise their competence in tax matters in accordance with their obligations under the EU law and in particular with the fundamental freedoms,[605] where respectively the Commission is empowered to oversee the application of the EU law by them.[606] The Author sees the similarities in the way the EAEU and the EU law may be interpreted in this respect and would like to discuss several general articles from the EAEU Treaty and also the roles and the functions of the tax department and consultative tax committee established under the EAEU Commission to support her view regarding the potential power of the EAEU Commission in tax matters.

In the EAEU Treaty, it is article 28, which in general gives legislative competence to the Union to take necessary measures to achieve the internal market, however, such competence shall be exercised in accordance with other parts of the treaties, which as a result limit the competence of the Union.[607] Herewith, the internal market is defined as the economic area for the free movement of goods, services, labour and capital. [608] Herewith, in the TFEU there are also similar provisions on the Union competence and internal market in the EU law – see article 14(1) EC Treaty. If to follow the logic of the EU and respective interpretation of articles 3 and 4 in the TFEU on the competences of the Union,[609] then article 28 in the EAEU Treaty may be interpreted in a similar manner as generally giving the power to the Eurasian Union to take measures to regulate on the various issues, including taxation, at the level of the Union to assure the functioning of internal market. Herewith, since the definition of internal market includes the freedom for movement not only of goods and services, but also of labor and capital, the assumption is made by the Author that Union may act on both – indirect and direct tax issues.[610] The degree of Union competence is however not precisely clear. Following the article further, it gives more details with respect to movement of goods within the borders of internal market. The article highlights that member states shall refrain from imposition of import and export customs duties (other duties, taxes and fees having equivalent effect), non-tariff regulatory measures, safeguard, antidumping and countervailing measures unless otherwise is provided by the EAEU Treaty.[611] With this respect, since the article allocates the right to the Union to "take measures" and at the same time calls member states *to refrain* from imposition of certain duties and taxes, the author tends to assume and interprets the article as providing for what would be recognised in the EU context as "shared competence between the Union and member states" to act in indirect tax matters. This assumption is confirmed in view of the author by the fact that in some areas, the EAEU Treaty precisely names the functions that shall be exclusively performed at the Union level by its institutions, but neither such provision gives exclusive power to the Union or its institution to act on tax related area. As illustrative example, the EAEU Treaty explicitly provides that the Eurasian Economic Commission shall for instance 1) determine the rates of import customs duties, including

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[604] See Decision of the Board of the EAEU Court dated 28 December 2015, page 22.

[605] For instance, see the decisions in cases C-279/93 Schumacher, para. 21, see also C-196/04 Cadbury Schweppes, para. 40.

[606] See article 17 TEU.

[607] See article 28 para. 1 EAEU Treaty.

[608] See article 28 para. 2 EAEU Treaty.

[609] See B. Terra, P. Wattel, *European Tax Law,* Ch.1 (Wolters Kluwer Law & Business 2012), p.9

[610] This assumption is made by the author, however, since the article is provided under the part two of the Treaty that regulates "Customs Union" and may thus by default cover the only aspects, which are essential for the customs union and thus exclude direct taxes, the author will try to support this assumption when analysing the next part of the Treaty on "Common Economic Space".

[611] Refer to Art. 28 in the EAEU Treaty for the definition. The definition in this article was simplified by the authors.

seasonal rates; 2) determine the cases and conditions for granting tariff exemptions; 3) set out the application procedure for tariff exemptions; 4) specify the conditions and application procedure for the common system of tariff preferences of the Union.[612]

At the same time, it seems like there is a difference between the ways competence is attributed to and realised by the Union in the EU and in the EAEU. In the EU case, the competence, once attributed is attributed in full, meaning that if the Union has competence to act in the area of customs union, it has competence to regulate on all included sub-areas, such as sanitary, legal, technical and other customs union issues and regulations. While in the EAEU context, there is a division of powers between the Union and the member states on a lower scale. For example, the Union has general power to act on the matters of internal market and take measure to assure its functioning, however, in many cases there are separate provisions in the agreement that would take away or limit the power of the Union to act on area, which may be considered as a sub-area of internal market.

Another more precise question, is whether the Union has competence to legislate on tax matters – e.g. whether the Commission has right to take binding decision on tax matters. As was discussed above, in the EAEU Treaty there is no precise provision that would give the right to the Union or its institutions to do so. However, in Annex 1 to the EAEU Treaty there is a general provision, which empowers the Commission to establish consultative bodies on the matters, *on which the Commission is able to take binding decisions*, so that the Commission could hold the consultation with the national authorities prior making the decision.[613] One of such consultative bodies established by the Commission in 2012 and functioning till nowadays is the Consultative Committee on tax policy and administration (Consultative Tax Committee), and the existence of this Committee supports the view that the Commission is able to consider the tax issues.[614] The Consultative Tax Committee is an advisory body of the Commission on the matters related to the:

1) tax policy,
2) improvements of mechanism for collection of indirect taxes in the mutual trade in accordance with Section XVII of the EAEU Treaty and
3) matters related to the development and implementation of member states' programs and projects in the sphere of tax policy and administration.[615]

With exception of the second point, which is specific and is incorporated under the EAEU Treaty (Section XVII and respective annex 18 also mentioned above), the role of the Consultative Tax Committee is defined very broadly and may be considered as generally covering all issues with respect to tax policy and administration. The Decision on the Consultative Tax Committee (as replaced in 2015) provides for the exhaustive list of *main* tasks, attributed to the Committee and includes:[616]

1) preparation of recommendations for the Commission with respect to harmonization of national tax legislations within the agreed areas and preparation of recommendations with respect to the resolution of problematic situations;

2) development of proposals for the Commission on the following matters:

a. Formulation of unified approaches for conduction of tax policies by the member states in the agreed areas;
b. Iimprovement of member states' national legislations on indirect taxes applicable in the mutual trade on the territories of member states and to the turnover of excisable goods (including alcohol production), **as well as direct taxes**;
c. Improvement of tax administration in the member states, **including the control over transfer pricing**;

[612] See article 45 EAEU Treaty.

[613] See in conjunction points 7, 44-47 Annex 1 to the EAEU Treaty.

[614] The initial decision No.13 dated 15 March 2012 was overruled by the new decision of the Board of the Eurasian Economic Commission No. 128 dated 28 September 2015 on the Consultative Committee on tax policy and administration.

[615] See point 1 para. 1 the Provisions on the Consultative Tax Committee as provided in the Decision on the same.

[616] See point 3 the Provisions on the Consultative Tax Committee as provided in the Decision on the same.

d. Enhancement of cooperation between the member states in terms on information exchange, necessary for control over the collection of both - indirect taxes applicable in the mutual trade and direct taxes (income and property taxes) due from legal and natural person with respect to income and property received from the territory of another member state;

3) Discussion of practices on application of international agreements and acts, which comprises the law of the Union in tax matters. At this point, one should note that the bilateral double tax treaties for avoidance of double taxation concluded by member states, as any other international agreements entered independently by the member states and not for the formation of the EAEU, are not considered as the law of the Union.

Further on, the Decision on Consultative Tax Committee provides for the list of functions attributed to the Consultative Tax Committee to undertake the above listed tasks, which includes:[617]

1) Prepares for the Commission proposals on the following matters of tax policy and administration:

i. Development of the unified approached on the principles of collection of indirect taxes applicable in the mutual trade;
ii. Provision of mutual assistance for prevention and suppression of tax law violations by the business persons of member states in the mutual trade and in the other foreign-trade transactions between the business persons of member states;
iii. Enhancement of cooperation between competent authorities of the member states in terms on information exchange;

If to compare the tasks attributed to the Consultative Tax Committee with its current functions, one could observe that the list of functions is comparatively narrower than the tasks and it excludes the functions that would enable the Committee to carry out the work on formulation of unified tax policy, including development of proposals for improvements of national legislations on both direct and indirect taxes in general. It may be observed and concluded that currently, the Board expects the Committee to focus all its efforts on enhancement of procedure for collection of indirect taxes and enhancement of mechanism for mutual exchange of tax information. This may be justified as long as member states and business persons do not file complains with respect to compatibility of national tax systems with the fundamental principles for the free movement. The author tends to conclude that ones such claims start to appear, the Consulatitive Tax Committtee should perhaps be granted functions for realization of tasks related to direct taxes and improvement of national legislations.

At the same time, review of recent news (as of November 2016) published on the official webpage of Eurasian Commission, indicates that the Consultative Tax Committee in pactice actually does not confine itself to the tasks outlined above, but also discusses issues related to the international taxation (i.e. issue with certificates of residence and the order of mutual recognition of the same between Kazakhstan and Russia), as well as issues with realization of BEPS projects recommendations. The Committee also proposed to create working group for exchange and sharing of experience in administration of double tax treaties.[618]

Another point that calls for attention is the fact that the Consultative Tax Committee is mainly comprised of representatives of national competent authorities – such as ministries of finance, ministries of national economy or specialised ministries of revenues. The work of the Consultative Tax Committe partialy reminds the author the role that the Council of the EU plays with respect to tax matters. Herewith, the author sees similarities only to the extent that the Council of the EU also serves as a platform for the competent authorities of member states, being led by the president member state, to meet, to communicate with each other and to agree on details of the legislative proposed to be taken on the Union level. It turns out that in the Eurasian Union, the competenet authorities similarly participate to the legislative processes, may bring forward their positions and concerns, however, in contrast to the competent authorities in the EU, do not have authority to vote on adoption of legislation on behalf of the member state and neither bound member state with their

[617] See point 4 the Provisions on the Consultative Tax Committee as provided in the Decision on the same.
[618] See news reported on the official website of the EAEC Commission dated 14 November 2016 on the meeting of Consultative Tax Committee on 4 October 2016, available at: http://www.eurasiancommission.org/ru/nae/news/Pages/14-11-2016-1.aspx accessed on 16 December 2016.

position expressed during the consultation process. The legislative decision in fact is taken by the Board.

Another question to answer, is whether the EAEU Commission has competence to oversee the application and realization of the EAEU law. In the general, the Commission has to exercise monitoring and control over the implementation of EAEU law by the member states and in case of a need to inform them on the need to comply. There is, however, no any provision that would empower the Commission to monitor and control whether the national tax regimes imposed by the member states comply with the general EAEU legal principles and precise tax rules incorporated under Annex 18 to the EAEU Treaty. At the same time, the author believes that there is no need to have such separate provision devoted to tax matters, but instead the Commission shall be able to control and monitor over implementation by the supranational law by the member states, also in tax matters.

To sum up at this point, the EAEU Treaty and respective annexes do not contain any precise statement on the role the Commission may play in harmonization of taxation – neither direct, nor indirect taxation. However, the existence of article in the EAEU Treaty on taxes and taxation that call member states to work on tax harmonization, the establishment of the Section on tax policy matters in one of the departments under the Commission and also of a special Consultative Committee on tax policy and administration, jointly indicate that the Commission may act and acts with respect to tax policy matters and may take necessary measures for tax harmonization. Herewith, at the current stage in practice, it seems that the Commission limits itself to the advisory role and platform for the competent authorities to meet and discuss issues.

2.2.5. Recommendations for the EAEU

In her recommendation the author does not aim to restructure the model of the EAEU Union, she respects the approach taken by member states, however, from the position of tax lawyer and the experience of the EU model, sees few deficiencies that in hew view may delay or provoke inefficiencies in the work of the EAEU Union when the work concerns the harmonization of national legislations in tax matters. The recommendations bellow address separately only the supranational institutions, but not the intergovernmental ones. The recommendations below are brief and concise, whereas the detailed reasons for the same are explained in the previous section. As will be noticed from the below section, most of the recommendations are based on the EU experience – this is so because the EAEU is already trying to copy and implement some parts of the EU model, but does it not in precisely the same form and sometimes omits the key necessary features, the lack of which may diminish the whole idea of supranational organization and supranational law.

The author does not give any recommendations with respect to the intergovernmental institutions, because their existence in general reminds the filter mechanism and pyramid structure, where the last decision is kept with the presidents, which in general and as a whole undermine the whole idea of supranational union with independent supranational institutions and mechanisms.

2.2.5.1. With respect to the functioning of the Commission

With respect to the functioning of the Eurasian Commission, the author recommends to consider few issues concerning the power of the Commission and also the decisions and decision making process.

First of all, the author believes that it is necessary to clarify on a legislative level the role the Eurasian Commission may play in the matters of taxation. As was discussed, there are currently no explicit provision in the EAEU Treaty and related documents authorising the Commission to do anything on tax policy matters. But at the same time, there are evidences implicitly confirming actual involvement of the Commission to act on tax policy matters and its potential capacity to do even more.

Further on, there is an issue concerning the decisions and decision making process within the Commission. In view of the author, to understand better the role that the Commission may play in harmonization of taxation, the author believes that it is necessary to introduce clarifying provisions in the EAEU Treaty on the nature of decisions that can be taken by the Board of the Commission and the purpose of such decisions. In particular, the norms of the EAEU Treaty clearly envisage that the Board may issue decisions notifying the individual member state on the need to adjust national legislation in accordance with the EAEU principles and this enables the Board to exercise the monitoring role over the compliance of member states with the EAEU law. However, the norms of the EAEU Treaty are not clear on the matter, whether the Board can issue decisions, which could serve as instruments for harmonization of legislation in the member states and be addressed to all

member states simultaneously. To the author, the current decisions of the Board look more like decisions, which address administrative and procedural issues, rather than technical substantive legal issues. In personal interpretation of the author, the Board of the Commission shall be able to issue decisions aimed at harmonization of national legislations, however, it is better to clarify this in the law.

Furthermore, following the above comment, the author sees deficiencies and irrationality behind the process of decision making by the Commission, where the Commission being represented by the Commissioners competent in various fields, vote jointly on acceptance of one or another decision, which is always of a very specific and narrow issue. The author invites to reconsider the process and bring it closer to the EU model by empowering national competent authorities., e.g. in charge of tax policies (i.e. ministries of finance or economy or revenue authorities) with the right to make decisions on behalf of their states. This is how the EU works in this respect. In the EU, the initiative for legislative act is developed and brought up by the Commission, whereas the final drafting and compromise on the content is happening at the Council of the EU with the direct participation of representatives of competent authorities from member states and final decision on enactment of decision is taken by the national ministers in charge of the field in which the decision is taken. Such an approach would assure the quality of the decision because the decision would be taken by the competent authority of each state, which understands the issue behind the decision and potential implications in the state and also at the level of the Union. Additionally, the author believes that it is also necessary to eliminate the right of the upper standing institutions to cancel the decisions of the Commission or in general of one another – because in this way, the status of the supranational law becomes questionable and not strong if it can be cancelled anytime.

With respect to the functions of the Eurasian Commission, the author believes it is necessary to empower the Commission with the right to bring the member state in front of the EAEU Court for non-compliance of the later with the provisions of the EAEU law: this would achieve two things. First of all, the Commission would truly become the guardian of the EAEU law and will facilitate enforcement of the law. Secondly, eventually, it may force member states to apply the EAEU law to all spheres of relations, including tax law, because as will be explained in the next section, there are general principles in the EAEU law, which shall apply to all spheres of relations (as the fundamental freedoms in the EU), but currently member states do not interpret them from tax law perspective, and therefore, the right of the Commission to notify the member state on compliance in certain sphere with the EAEU law and consequent right to bring the state in front of the Court, would help to realize the EAEU law.

2.2.5.2. With respect to the functioning of the Court of the EAEU

The author also has few recommendations with respect to the Court of the EAEU. First of all, the author believes that jurisdiction of the Court shall be enlarged to cover all other issues arising in relation to interpretation the EAEU law, but not only those specifically provided now in the EAEU treaty. Secondly, the Court shall receive the right to issue preliminary rulings, or as they are known in the EAEU, the advisory opinions, on request of the national courts, but not only on request of authorised state institutions of the member states. Such opinions of the Court shall have binding nature on all member states, but not only to the parties of the case as it is envisaged now. This will ensure common understanding and application of the EAEU law. Finally, it is necessary to include the decisions of the EAEU Court, in the sources of law of the Union, so that they become obligatory for compliance for all the member states, but not only to the parties to the case. This is the list of the minimum issue that shall be corrected about the functioning of the EAEU Court in view of the author.

3. Analysis and comparison of the fundamental principles in the TFEU and the EAEU Treaty from tax law perspective

In this section the author will analyse the fundamental principles for the movement of goods, services, labour and capital as envisaged in the EAEU Treaty and compare the same to the principles in the TFEU. The analysis and comparison will be done from a tax law perspective to understand the way the fundamental principles may be interpreted, the extent to which tax harmonization may be required for their realization and at the same time, the extent to which tax harmonization is possible under those principles. The comparison between the freedoms is undertaken to assess in general the similarity of fundamental goals persuaded in each Union, and consequently, degree to which the EU experience may be relevant and applicable when interpreting the EAEU Treaty and working on realization of the fundamental principles therein. The first part of the next section will start from giving general overview and structure of the EAEU Treaty to familiarize the reader with the new document and to outline certain ideas incorporated therein. The next and major part of the work will consider in details fundamental principles incorporated in the agreements and comment on their similarities, differences and respective potential outcome on tax matters in the EAEU. That part is subdivided into logical sub-parts devoted to each freedom. The intermediate conclusions and recommendations are drafted under each sub-part of the section devoted to particular freedom.

3.1. High level review of EAEU Treaty and general principles therein

The EAEU Treaty is a codification of international agreements on regional co-operation and integration previously concluded among member states, including agreements on EurazEC, Single Economic Space and Customs Union.[619] It clarifies and details previously agreed principles and also envisages new norms for further integration. The EAEU Treaty consists of four parts, 28 sections (total of 118 articles) and 33 Annexes.[620]

First part of the Treaty, which is *"Establishment of Eurasian Economic Union"* consists of general provisions, main principles and aims, defines the competences and rights of the Union and its institutions. The Union is defined as international organization of regional economic integration, which has international legal personality.[621] Within the Union shall be assured free movement of goods, services, labour and capital and shall be exercised coordinated, agreed or single policy in economic areas defined by the Treaty.[622] The aims of the Union are defined very carefully and include: 1) creation of "proper conditions for sustainable economic development of the member states in order to improve the living standards of their population"; 2) "t*o seek*" the creation of a common market for goods, services, capital and labour within the Union; and, finally, 3) to ensure comprehensive modernisation, cooperation and competitiveness of national economies within the global economy. At this point, local scholars comment that using the term *"seek the creation"* member states explicitly outline the intention only for "gradual formation" of common market for the four freedoms so not to harm any of local economies.[623]

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[619] Most of these agreements were terminated with entry into force of EAEU Treaty. These terminated agreements are listed in Annex 33 to the EAEU Treaty.

[620] As of 3 February 2016.

[621] See article 1 para. 2. The status of the EAEU is however debated among the local scholars. Some classify it as international organization with the features of intergovernmental organization (see Myslivsky, 2015 ibid), others as kind of confederation, see Bazanov, "Agreement on Eurasian Economic Union, "Complex legal analysis", Eurasia Law, 2015, available at: http://www.eurasialaw.ru/index.php?option=com_jcontentplus&view=article&id=6530:-i-ii-&catid=99:2010-06-02-08-56-30&Itemid=196 See also opinion of K.Byakishev on whether EAEU is international organization or international regional integration, available at: http://www.eurasialaw.ru/index.php?option=com_content&view=article&id=6870:2015-01-12-09-19-56&catid=99:2010-06-02-08-56-30

[622] See article 1 para. 1

[623] See V.Balytnikov, D.Boklan, "Eurasian Economic Union: background for establishment, problems with formation and perspectives for development", Comparative Constitutional Review, pp.69-82, No.3(106), 2015. Original: В.Балытников, Д.Баклан, «Евразийский Экономический Союз: предпосылки создания, проблемы формирования, перспективы развития», Сравнительное Конституционное обозрение, стр. 69-82, No.3(106), 2015.

One of the acomplishments for the EAEU Treaty, is considered to be the defined term "law of the Union",[624] which provides for the superiority of the EAEU Treaty over *other international treaties concluded within this regional integration*.[625] Besides this principle, Annex 31 to the EAEU Treaty contains direct reference to the Agreement of 2011 on the functioning of the Customs Union in the multilateral trade system, where the relationship between the (current) EAEU law and the WTO law are defined.[626] This and other issues of relationship between EAEU and national laws of member states, and also EAEU and international agreements of member states will be discussed in more details under section 5 of this work. What concerns the competence of the Union, there is no separate article, which would explicitly define the areas, in which the Union or its institution shall have the competence to act. In contrast, the competences of each institution are discussed separately under different article and was analysed in part 2 of this work. Lastly, the first part provides for the general information regarding the functioning of the Union institutions, which are the Supreme Economic Council, Intergovernmental Economic Council, the Eurasian Economic Commission and the Court of the Eurasian Economic Union. The details on the functioning an organization of these institutes were provided in part 2 of this work.

The second part of the Treaty is devoted to the "Customs Union" and its legal framework. It generally addresses certain areas, that are important for the functioning of the customs union, whereas further details on the same are provided in the annexes to the Treaty. Thus, it comments on the information exchange within the Union, cooperation in the sphere of statistics, outlines the principles and rules for the functioning of the customs union and internal market for the movement of goods, provides specific regulations for the circulation of medical and medicine products, customs regulations, establishes common principles for the foreign trade policy, establishes general framework for technical regulations and standards of the Union, sanitary, veterinary-sanitary and phytosanitary quarantine measures and measures on consumer protection. As correctly indicated by Balytnikov and Boklan, depending on the readiness for the certain degree of economic integration, member states provided in the Treaty for two types of policies – common (united) policy for higher level of integration and agreed (coordinated) policy for lower integration level. Under the customs union framework, the member states embody mainly common policy: Common Commodity Nomenclature (SCN) of Foreign Economic Activities, establish Common Customs Tariffs (CCT) and common requirements of technical regulations. The Customs Union as such is one of the spheres of the highest degree of integration in the EAEU. Exceptions to this are the areas of sanitary, veterinary-sanitary, phytosanitary quarantine measures and measures on consumer protection, where the member states aim to have coordinated policy. General exceptions from the common customs union policy in the mutual trade are permitted and are similar to cases, envisaged under GATT[627] and in particular include cases of protection of human life and health; protection of public morals and public order; environmental protection; protection of animals, plants, or cultural values; fulfilment of international obligations; national defence and security of a member states.[628] It is important to outline that Treaty provides for the existence and functioning of the special (free) economic zones (SEZ) and warehouses on the territory of the Customs Union. The conditions for the creation and functioning of such zones are determined under other international treaties within the Union. From the tax research point of view, this is an interesting area for further discussion and research, however, it will not be specifically addressed further in this work and neither detailed research was carried out by the local scholars on the same to refer to in this work.

The third part of the Treaty deals with the *"Single (Common) Economic Space"* (SES). It contains codified and slightly elaborated provisions of the agreements, concluded within the SES, on: agreed macro-economic and monetary policies, trade of services, investments, establishment and activities, regulation of financial markets and taxation, general rules and principles of competition,[629] legal

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[624] Ibid. Balytnikov and Boklan consider this to be an accomplishment for this agreement.
[625] Before that, the term "law of EurazEC" was used in para. 1 and 2 of the EurazEC Court regulation, which was also approved by its own decision No. 21 on 12 July 2012. See Shumilov, 2015, ibid.
[626] See Balytnikov and Boklan, Ibid.
[627] See Balytnikov and Boklan, Ibid.
[628] See article 29 EAEU Treaty.
[629] Together with Annex 19, this section provides for the general rules on competition and trade. Among other principles, the section contains provision that require member states to prohibit "agreements between state government authorities, local authorities and other agencies or organisations exercising their functions or

regime for natural monopolies and industries of energy, transport and state procurement, intellectual property, manufacturing industry, agricultural sector and labour migration. Almost in all of these spheres, member states exercise coordinated policies, except for the sphere of industrial subsidies, where member states agree on common rules for granting subsidies for industrial goods.[630] The separation of Treaty into parts two and three, where one deals with internal market and second one with single economic space is not accidental. It illustrates greater intention of member states to achieve internal market with respect to free movement of goods and single economic space for the free movement of other market elements. This also explains why the rules for the movement of goods are elaborated and more detailed rather than principles envisaged for the movement of capital, services and labour. However, it does not mean that member states will limit themselves in providing conditions for the free movements of these elements, but rather they preserve their right to act on it gradually. It is the interest and purpose of this work to identify the place and role the taxation, mainly direct taxation may and shall play in achieving the aims of the Union.

Major attention and substance of this work will be devoted and based respectively on section XV of this part of the Treaty and annex No.16 attached to it on the establishment of common economic space for the trade of services, establishment, activities and investments.

Last fourth part of Treaty provides for transitional and final provisions. Among other things it clarifies the status of supranational institutions and international agreements, which were inherited by the Union from predeceasing integration stages – i.e. Customs Union and Eurasian Common Economic Space. Thus, the international agreements, which were recognised as valid upon entry into force of the EAEU Treaty shall be used further as long as they do not contradict to the EAEU Treaty.[631] Similar rule applies to the decisions of the supranational institutions (Supreme Council, Intergovernmental Council and the Eurasian Economic Commission) – their decisions taken by and effective at the date of entry into force of the EAEU Treaty shall remain valid as long as they are compatible with the EAEU Treaty.[632] The EAEU Treaty does not prevent member states from entrance into other bilateral agreements between each other, which would provide for closer integration.

As was mentioned above there are 33 annexes concluded to the EAEU Treaty, which elaborate on rules and principles envisaged in the Treaty. The most important annexes for the purposes of this work will be:

- Annex 1 – Regulation on the Eurasian Economic Commission
- Annex 2 – Statute on the Court of the Eurasian Economic Union
- Annex 5 – Protocol on the procedure for transfer and distribution of import customs duties (Other duties, taxes and fees having equivalent effect) and their transfer to the budgets of the member states
- Annex 6 – Protocol on Common Customs Tariff Regulation
- Annex 7 – Protocol on non-tariff regulatory measures in relation to third countries
- **Annex 16 – Protocol on trade in services, incorporation, activities and investments**
- Annex 18 – Protocol on the procedure for collection of indirect taxes and the mechanism for controlling their payments on export and import of goods, performance of works and provision of services
- Annex 19 – Protocol on general principles and rules of competition
- Annex 28 – Protocol on the common rules for granting of industrial subsidies
- Annex 31 – Protocol on the functioning of the EAEU within the multilateral trading system

agreements between them and economic entities (market participants), if such agreements result or can lead to any prevention, restriction or elimination of competition, except in cases provided for by this Treaty and/or other international treaties of the Member States". It also requires states to prohibit "provision of state or municipal preferences, except as provided by the legislation of the Member States, and with account of the specifications set out in this Treaty and/or other international treaties of the Member States".

[630] See Balytnikov and Boklan, Ibid. See article 93 and Annex 28 to the EAEU Treaty.

[631] See article 99 para. 1 EAEU Treaty. High number of international agreements concluded at stages of Customs Union and Eurasian Common Economic Space were abolished due to their incorporation into the EAEU Treaty. For agreements that were terminated see Annex 33 to the EAEU Treaty.

[632] See article 99 para. 2 EAEU Treaty.

Other annexes do not represent much interest for tax lawyer and therefore will not considered in this work.

3.2. Fundamental principles for the movement of goods and services and related tax aspects

3.2.1. Legal framework

There are three articles in the EAEU Treaty and one annex thereto, which explicitly address tax issues.[633] Two of the articles deal with indirect tax matters and the annex establishes the procedure for collection of indirect taxes and the mechanism for controlling their payments on export and import of goods, performance of works and provision of services. In addition, there are several more provisions in the Treaty that in general comment on the power of states to levy taxes. On top of this, there are also fundamental principles that affect free movement of goods, services, labour and capital, and among other aspect, shall have the equal importance on taxation in the region.

3.2.2. Fundamental principles for the free movement of goods

3.2.2.1. Provisions in the EAEU Treaty

With respect to the movement of goods, the EAEU Treaty provides for the functioning of the Customs Union, which shall provide for:

1. the functioning of the internal market of goods;
2. the Common Customs Tariff of the Eurasian Economic Union and other common measures regulating foreign trade with third parties;
3. the common trade regime in relation to the trade with third parties;
4. the common customs regulations
5. free movement of goods between the territories of the member states without the use of customs declarations and state control (transport, sanitary, veterinary-sanitary, phytosanitary quarantine.[634]

Article 28 of the EAEU Treaty defines the internal market as the economic space with free movement of goods, persons, services and capital ensured under the provisions of the EAEU Treaty. At this point, the Author would like to emphasize that in her view article 28 already emphasizes the point that free movement of goods, persons, services and labor is not an absolute freedom, but rather the limited principles, where each of them is further elaborated under the treaty.

Article 28 also calls the Union and empowers it to adopt measures to assure the functioning of internal market. Herewith, within the functioning of the internal market in the mutual trade the member states are not allowed to apply import and export customs duties (other duties, taxes and fees having equivalent effect), non-tariff regulatory measures, safeguard, antidumping and countervailing measures. In spite this, the member states are allowed to apply restrictions (but not measures of unjustified discrimination) in the mutual trade for protection of public health and security.[635] On the same basis, the turnover of certain goods may be restricted.

In principal, these are all the principles that may be considered as fundamental with respect to the moment of goods. In general, based on this, in the mutual trade the EAEU member states are not allowed to apply import and export customs duties, which include, but are not limited to various import duties, taxes and fees having equivalent effect; neither member states may apply non-tariff regulatory measures, safeguard, antidumping and countervailing measures. Another important rule derived from these provisions concerns the power that was attributed to the Union to adopt measures to assure the functioning of internal market. However, no further explicit and clear details on realization by the Union of this power is provided under the treaty.

3.2.2.2. Comparison of the fundamental principles for the free movement of goods under the EAEU Treaty and TFEU

Fundamental principles envisaged under the EAEU Treaty for the movement of goods are very similar to the principles regulating free movement of goods in the EU.[636] In the EU, the member states are equally not able to apply customs duties on import and export of goods together with all

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[633] Art. 71-73 EAEU Treaty and Annex 18 to the EAEU Treaty.
[634] Article 25 EAEU Treaty.
[635] For more details see Article 29and Annex 11 to the EAEU Treaty.
[636] See article 28 TFEU.

charges having equivalent effect.[637] Similarly to the EAEU member states, the EU countries may apply quantitative restrictions on import and export of goods in case the latter is required and justified on the basis of public morality, public policy or security.[638] Such measures, however, cannot be used as means of arbitrary discrimination or disguised restriction on trade between the EU member states.

The above principles were interpreted by the CJEU initially in a non-tax related cases, but nevertheless received further application also in the tax cases. Among the ground-breaking cases were: the Case C-152/73 Sotgiu, the Case C-8/74 Dassonville and the Case C-120/87 Cassis de Dijon. In the first Sotgiu case, the CJEU declared that the rules on unequal treatment forbid not only direct discrimination by reason of nationality, but also indirect forms of discrimination which, "by the application of other criteria of differentiation, lead in fact to the same result".[639] In Dassonville case, the Court elaborated further that not only discriminatory measures were prohibited under the Treaty (In TFEU Article 36), but also other forms of measures restricting the free movement of goods. In the Case of Cassin de Dijon, the CJEU elaborated on its rule-of-reason doctrine saying that "obstacles to movement within the Community resulting from disparities between the national laws … must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer".[640]

In both case, the EU and the EAEU, the fundamental principles affecting free movement of goods in larger extent concern customs duties and similar payments, whereas tax payments associated mainly with the movement of goods are covered under the separate articles: in EAEU case under articles 71 and 72 of the EAEU Treaty, and in the EU case under articles 110-113 TFEU. These rules are considered in section 3.2.5 of this work. B.Terra and P.Wattel correctly noted that for indirect tax purposes, the existence of fundamental principles for the movement of goods and services, is not so important as for instance for direct tax purposes, because the TFEU includes number of specific provisions on indirect taxation, such as provisions on the community customs union, harmonization of indirect taxes and ban on discriminatory and protective product taxation, as well as further developed kit of secondary EU legal instruments on indirect taxes that are also based on the specific TFEU provisions on taxation.[641]

3.2.3. Fundamental principles for the free movement of services

3.2.3.1. Fundamental principle for the free movement of services in the EU

Under the EU fundamental principle encompassed under article 56 TFEU, the service provider established in one member state shall be free from any restrictions to provide services to the persons of other member states. This principle was further endorsed by the CJEU in a tax-related case, which stated that *"in a perspective of a single market and in order to permit the attainment of the objectives thereof, Article 49 EC precludes the application of any national legislation which has the effect of making the provision of services between member states more difficult than the provision of services purely within one member state".*[642] In addition to that, although not provided so explicitly under the freedom, the CJEU considered that freedom for movement of services "confers rights not only on the provider of services but also on the recipient" of services.[643]

Additionally, the TFEU clarifies that the freedom to provide services shall apply only in cases, where it may be considered that "services" in question are provided for the remuneration and are not governed by other freedoms, such as freedom of movement of goods, capital and services.[644] In other words, these other freedoms should prevail in case they may be simultaneously apply with the freedom to provide services.

These are the basis on which further rules on application of VAT in a cross-border supply of services has evolved in the EU, and the numerous grounding decision on income taxation associated with the

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[637] See article 28 TFEU.
[638] See article 36 TFEU.
[639] See Case C-152/73, Sotgiu, para. 11.
[640] See C-120/78 Cassis de Dijon, para. 8.
[641] See B.Terra, P.Wattel, 2012, Walters Kluwers, European Tax law.
[642] See Case C-381/93, Commission v. France, [1994], ECR 1-5145, para. 17.
[643] See Joined cases C-286/82 and C-26/83 Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro.
[644] See article 57 TEFU.

acquisition or provision of services and related issues were taken by the CJEU. Selected CJEU cases on taxation of services are discussed under section 3.2.3.3. further in this work.

3.2.3.2. Provisions in the EAEU Treaty

Fundamental principles for the movement of services in the EAEU are provided under section XV of the EAEU Treaty together with the principles affecting investments, activities and incorporation. Additionally, provisions of Annex 16 to the EAEU Treaty provide for further rules and principles. In the section below, the Author will discuss and will attempt to analyse these principles from the tax law perspective.

3.2.3.2.1. Interpretation of the national treatment principle

First of all, the EAEU member states shall guarantee the national treatment in respect of all aspects related to the trade in services, including the national treatment with respect to traded services, provider of services and recipient of services:

> "21. The **treatment** accorded by each Member State in respect of **services**, **service suppliers** and **service recipients** of another Member State **regarding all measures affecting trade in services** shall be no less favourable than that accorded under the same (similar) circumstances to its own same (similar) services, service suppliers and service recipients".[645]

At this point, since the provision clearly indicates that it concerns all measures affecting the trade in services, it shall equally concern taxation measures and require member states to provide national tax treatment (regimes) with respect to foreign traded goods, foreign service providers and recipients of services taken that they are under the same (similar) circumstances to the national same (similar) services, service suppliers and recipients.[646] Herewith, the EAEU law further clarifies that such treatment may be formally similar or formally different from the regime provided with respect to the same (similar) domestic parties.[647] The EAEU Treaty, however, clarifies that in case the regimes provided are formally different, the regime provided to the foreign services, service providers and recipients shall not be less favourable and affect the conditions of competition in favour of the domestic parties or services of the member state concerned.[648]

If to interpret further this provision from a tax perspective, then the EAEU member states are not allowed to 1) discriminate the services provided by the service suppliers of other member states, which mainly may happen by means of VAT rules; 2) discriminate the service suppliers of other member states, which may happen mainly by use of income tax measures; and 3) to discriminate recipients of services in other member states, which again may happen mainly with the use of both – income tax and VAT measures. The above interpretation is valid only in case the foreign services, foreign service providers and recipients are regarded as the same or similar to the domestic ones and are under the same or similar circumstances as domestic services, service suppliers and service recipients.

The discrimination of foreign services in general may occur in different ways and in practice it may be difficult to distinguish whether it is the discrimination of the foreign service or whether it is the foreign service provider who is discriminated. Or may be both? For example, the foreign services may be subject to higher VAT rate in B2B transactions and in such case, it is the product (service), which is subject to higher VAT, however, in overall situation it is the foreign service provider who is put into disadvantageous position, because its services are becoming less attractive and competitive than services of similar domestic service providers. The foreign service may also be discriminated, if for instance the deduction of expenses associated with acquisition of such services is not deductible for income tax purposes, whereas in case similar services is acquired from the domestic service provider, it is possible to deduct the associated cost. Additionally, the foreign supplier of services may be discriminated (put in a less competitive position) if for instance it has created the PE in the member state, where the service is provided, but the tax rules applicable to the PE of foreign company would different from the tax rules applicable to the domestic companies. In this later case, based on

[645] See para. 21 Annex 16 to the EAEU Treaty.
[646] As "foreign" for the purposes of this section one should understand the services, supplies and recipients from other EAEU member states.
[647] See para. 22 Annex 16 to the EAEU Treaty.
[648] See para. 22 subpara.2 Annex 16 to the EAEU Treaty.

the EU experience, it will be equally important whether the overall business of provision of services is associated with realization of the freedom to provide services or the freedom of incorporation (establishment), and consequently which of these two freedoms should apply. This is discussed later in part 3.2.3.3. of this work.

3.2.3.2.2. Interpretation of the most favourite nation principle (MFN principle)

In addition to the national treatment principle, the EAEU law also provides for the most favourite nation principle with respect to the trade in services. It states that "the treatment accorded by each member state, under the same (similar) circumstances, with regard to services, service suppliers and recipients of any other member state, shall be no less favourable than that accorded to the same (similar) services, service suppliers and recipients of third states".[649]

These are the two basic principles provided under the EAEU law with respect to the movement of services. Herewith, it shall be also noted that each member state preserves and utilizes its right not to follow this principles with respect to certain goods and may apply domestic restrictions and limitations for some time.[650] Such domestic restrictions and limitations are listed under Annex 2 to the Annex 16 of the EAEU Treaty.

3.2.3.2.3. Common market of services

Finally, the member states are not allowed to introduce any new discriminatory measures in relation to services provided by persons of the other member states in addition to those measures effective as of 1 January 2015.[651] Further on, to assure freedom to provide services, member states shall undertake gradual step-by-step liberalization of conditions of mutual trade. Member states shall endeavour to achieve the single market of services. Herewith, these two fundamental provisions are worded in the EAEU Treaty not as an obligation (the word "shall" was added by an author upon translation from Russian to English), but rather in a declarative form and in a present tense, as if member states are already undertaking the gradual liberalization of conditions in the mutual trade and as if they already endeavour to achieve the single market of services. The author pays attention to this, because in her view, such formulation of fundamental principles in the Treaty makes it harder to challenge legally the member state for not acting in accordance with the Treaty and not acting on the issues the Treaty assumes it to act on, because the Treaty does not oblige member state to do so, but rather states that member states are already doing this and doing this *gradually*. Literal word to word translation of the article, which incorporates the above principles sounds as follows:

> Article 66
>
> 1. …
>
> 2. In order to ensure freedom of trade in services, incorporation, activities and investments, the Member States **conduct gradual liberalisation** of mutual conditions of trade in services, incorporation, activities and investments.
>
> 3. The Member States **seek to establish and ensure the functioning of a common market for services** as set out in paragraphs 38-43 of Annex 16 to this Treaty for the maximum number of service sectors.

Liberalization of trade in services to achieve the common market shall be undertaken in accordance with the international principles and standards by means of harmonization of legislation and mutual administrative cooperation between the competent authorities of the member states.[652] The procedures and stages of formation of the common market for trade in services are provided in the liberalization plans, which shall be developed jointly by the member states and the Eurasian Commission and approved by the Supreme Economic Council.[653]

Respectively, the common market of services is defined as the market condition under which with respect to each particular type of services, the member states provide for the right to supply and

[649] See para. 27 Annex 16 to the EAEU Treaty.
[650] See para. 23 and para.28 Annex 16 to the EAEU Treaty.
[651] See Article 66 para. 1 EAEU Treaty.
[652] Article 67 para. 1 EAEU Treaty.
[653] See para. 42 Annex 16 to the EAEU Treaty.

receive services in accordance with the fundamental principles discussed above in this section – national treatment and MFN principles (condition 1), unless they reserved their right under Annex 2 to the Annex 16 not to do so. Further on, the common market of services implies that persons of one member state may provide services on the territories of another member states without incorporation therein and on the basis of permit issued by the first member state (condition 2). Common market of services also means that professional qualifications of personnel of the service provider are recognised in the other member states (condition 3).[654] Herewith, the common market of services shall function only in the service sectors approved by the Supreme Economic Council (condition 4).

From the above definition of common market, one could observe that only the first condition may represent the obligation for the member states to adjust national tax regimes for achievement of common market, whereas conditions from to 2 to 4 are not related to taxation. These other factors (conditions) do not have any implications for the national tax regimes, because they focus on elimination of non-fiscal barriers, such as elimination of requirement to register in the other member state to provide services therein, requirement to mutually recognise the licenses and professional qualifications issued to the natural and legal persons. At the same time, the tax obligation, which may derive from the first condition shall in general apply in the territories of member states with respect to taxation of services, irrespective whether the common market is planned for these services. This conclusion of the Author may also be supported by the provision in Annex 16 to the EAEU Treaty, which states that with respect to services, "for which the provision of common market for trade in services do not apply, still apply the provisions of section 1 to 4 of Annex 16", which are fundamental principles and include national treatment principle and most favourite national clause discussed above.[655]

On the basis of the above, in view of the Author, when talking about tax harmonization upon provision of cross-border services, equal level of tax harmonization is desired and may be legally reasoned and based on the above principles for all types of services, irrespective whether the member state aim to achieve common market with respect to this sector of services or not.

3.2.3.2.4. Definition of trade in services

The trade in services is defined as "the supply of services, including manufacture, distribution, marketing, sale and delivery of services, conducted in the following ways:

1) from the territory of one member state to the territory of any other member state;
2) on the territory of one member state by a person of this member state to a service recipient of another member state;
3) by a service supplier of one member state through its incorporation on the territory of another member state;
4) by a service supplier of one member state through the presence of natural persons of that member state on the territory of another member state".[656]

Under the points 3) and 4) above, the definition of the trade in services thus implies in parallel the realization of two other freedoms – right of incorporation (establishment) of service provider of one member state on the territory of another member state under point 3) and also the freedom for movement of natural persons to the territory of another member state under point 4) (unless it is also considered as realization of freedom of establishment). This definition is contrary to the definition of services under the TFEU, which in opposite defines the services as activities "provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons."[657] This definition in the TFEU requires in practice to prioritize, whether in the situations in question, the person is exercising the freedom to provide services or other EU freedom. This in particular becomes important in the EU when the issue concerns freedom for movement of capital, because this freedom is also granted to the third countries nationals and upon disputable situations it is becoming essential to determine based on which principle the person is acting.

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[654] See para. 38 Annex 16 to the EAEU Treaty.
[655] See para. 44 Annex 16 to the EAEU Treaty.
[656] See para. 6 subpara, 22) Annex 16 to the EAEU Treaty.
[657] See article 57 TFEU.

In the EAEU practice, it is not yet clear, which implication the definition of services will have in practice and in particular in tax related matters. In the later parts of this work, the Author will also compare the definition of services and such other definitions as capital, investment activities, incorporation (establishment activities, movement of persons).

3.2.3.3. Types of tax discrimination upon realization of freedom to provide services based on the EU experience

The EU practice demonstrates several scenarios of tax discrimination upon realization of freedom for provision of services. Thus, discrimination or restrictions for cross-border services may equally occur in the place of destination of services (mainly where the recipient is located) and also in the place of origin of services (where the service supplier is residing). In this section, the Author has grouped the possible ways of discriminatory (less favourable) tax regimes, which are sometimes granted upon cross-border provision of services and put foreign services in a less competitive or less advantage situations than domestic services.

3.2.3.3.1. Limitations for deduction of expenses associated with acquisition of foreign services

First group of CJEU cases deals with the deduction of expenses associated with the acquisition of services from the suppliers from other member states. Suppliers of services from other member states may be discriminated (put in a less favourable position) in case the deduction associated with the acquisition of such services is limited (restricted) in comparison to deduction, that would be possible upon acquisition of the same services from domestic supplier. In the CJEU cases Commission vs. Germany (318/05), Schwarz (76/05) and Zanotti (56/09), the issue concerned the deductibility of the tuition fee paid to the private educational organizations in the other member states. In those cases, the CJEU found that member states cannot differentiate between local and foreign suppliers of the similar services and on these basis set the differentiated tax rules on partial or complete non-deduction of expenses associated with acquisition of services from such organizations. The Court also noted that in case the deduction of education cost paid to the supplier in the other member state is limited, it shall be corresponding to the limit applied to the cost of services paid to the domestic supplier.[658]

Similarly, in the CJEU cases Danner (136/00), Skandia and Ramstedt (422/01), the issue concerned the deductibility of pension contributions for the income tax purposes. The CJEU found it incompatible with the fundamental freedoms to disallow deduction (or allow it only under certain condition) of such contributions paid to the insurance companies and pension providers located in the other member states, whereas similar insurance contributions were deductible in case the services were acquired from the domestic organizations, assuming that respective income derived in the future from these types of organizations was subject to income taxes under the same rules. Another case, where the CJEU disallowed different treatment of services provided by residents and non-residence suppliers was the Eurowings case (294/97), where the Court found it incompatible with the fundamental freedom the unfavourable tax treatment associated with the leasing of goods (aircrafts in the case concerned) from abroad instead leasing the same under the same circumstances from domestic supplier. The discriminatory tax outcome was not so obvious and direct, but rather followed from the application of national tax provision on trade tax, but however, was considered by the CJEU as incompatible.[659]

Finally, there was one more case, Svensson and Gustavsson (484/93),[660] where the CJEU found it incompatible to grant more favourable condition for deduction of interest payments on loans obtained from the credit institutions, established domestically than those established in other member states. The requirement of the national law in question was not straight forward and discriminatory: the national law simply granted subsidies on loans obtained from the credit institutions approved in that

[658] See IP/A/ECON/ST/2010-18, "The impact of the rulings of the European Court of Justice in the area of direct taxation 2010", ECON 2011, European Parliament.

[659] Another cases on the similar issue with deductibility of cost for the services received in another member states are: C-55/98 Skatteministeriert v. Bent Vestergaard.

[660] Decision dated 14 November 1995, C-484/93.

member state, which the CJEU interpreted as implying the requirement for such credit institution to be established in the member state concerned.

3.2.3.3.2. Discriminatory taxation of income in hands of the service provider in the state of activity (taxation of non-residents in the state of activity)

As the EU experience demonstrates, with respect to income taxation derived from cross-border services may be discriminated both – the foreign providers of services and also domestic recipients of the foreign services.

With respect to the first type of discrimination, there was interesting case in Germany – Scorpio (290/04).[661] At that time, Germany was requiring resident companies to collect WHT tax from non-residents working under the service-provision agreements, whereas no similar obligation existed with respect to the resident service providers. The tax so charged was possible to refund later if the respective double tax treaty allowed for its exemption or reduction. In the case concerned, the CJEU found such domestic law provision incompatible with the freedom for provision of services, since it was creating an obstacle for cross-border services. Herewith, the CJEU also found that such obstacle could be justified in view to assure proper taxation of non-residents. Nevertheless, it found the legislation in question still as non-compatible for another reason. Upon application and calculation of withholding tax, as is customary under international tax law rules, Germany was not allowing deduction of related expenses, whereas local service providers had a right for immediate deduction and therefore were taxed on the net basis. The CJEU considered such treatment of non-residents as incompatible with the EU law and stated that under the EU law it is prohibited under the national legislation *"not to allow a recipient of services who is the debtor of the payment made to a non-resident provider of services to deduct, when making the retention of tax at source, the business expenses, which that service provider had reported to him and which are directly linked to his activity in the member state in which the services are provided, whereas a provider of services residing in that state is taxable only on his net income, that is, the income received after deduction of business expenses"*.[662] The same decision was reached by the CJEU also in earlier case Gerritse (234/01). In Gerritse, the CJEU concluded that EU law preclude national provisions, *"which as a general rule, take into account gross income when taxing non-residents, without deducting business expenses, whereas residents are taxed on their net income, after deduction of those expenses"*.[663] Herewith, as business expenses in question should be understood the "economically connected business expenses" that are directly linked, within the meaning of the line of case-law starting with Gerritse, to the economic activity generated the taxable income.[664] The requirement for expenses to be economically linked to the income in question was found by the CJEU compatible with the EU law in the case Centro Equestre da Leziria Grande (345/04).[665] In accordance with the series of decisions on this issue and infringement procedure initiated by the European Commission, several member states had to amend incompatible domestic legislation.[666] In particular, such states include Luxemburg,[667] Belgium[668] and Portugal.[669]

Herewith, even though the EU experience demonstrates a tendency of similar decisions on this matter, it shall not be interpreted as default and absolute principle, because in practice the details of the case may change the actual outcome and consequences for the taxpayers and therefore, each particular situation and legislation may require additional analysis. Similarly, in the case Truck Center (282/07), the CJEU concluded that for instance upon payment of interest on financial loan, the non-residents and residents recipients are not considered to be in the similar circumstances. The payment of interest to foreign undertakings was subject to WHT tax, whereas the same payment to the domestic recipients was not, however, the CJEU found that provision to be compatible with the

[661] Decision 3 October 2006, C-290/04.
[662] C-290/04, Scorpio, para. 49.
[663] Decision dated 12 June 2013, C-234/01, para. 55.
[664] C-290/04, Scorpio, para. 44.
[665] Decision dated 15 February 2007, C-345/04, Centro Equestre da Leziria Grande.
[666] See IP/A/ECON/ST/2010-18 (referred above), p. 50
[667] See law on amendments of articles 157, 157 bis and article 157 ter LIR, Memorial A-No.120 dated 28 July 2010.
[668] See the Law dated 4 May 2007.
[669] IP/A/ECON/ST/2010-18, Ibid, p. 50

EU law, because the domestic recipient was equally subject to tax with respect to the interest received, but not by means of WHT tax, but by means of CIT.[670] In view of the Court, the fact that resident taxpayer is subject to CIT at higher rate justifies the fact that non-resident is taxed on a gross basis, but at the lower income rate than domestic recipients.[671]

3.2.3.3.3. Discriminatory taxation of residents (service recipients) with respect to income received from cross-border services

With respect to the second issue, in the European Union there were several court cases associated with taxation of income of the service recipient from foreign provider. As such, in the case Lindman (42-02)[672] and Commission vs. Spain (153-08),[673] the CJEU found as not compatible with the Treaty freedoms the more beneficial taxation of income received from local companies engaged in organization of lotteries, whereas income from the similar services provided by the companies established under the laws of another member states, was not subject to the similar preferential tax treatment. The CJEU Concluded that *"Article 49 EC prohibits a member state's legislation under which winnings from games of chance organized in other member states are treated as income of the winner chargeable to income tax, whereas winnings from games of chance conducted in the member state in question are not taxable"*.[674]

The similar decision was taken by the CJEU in the case Commission vs. France (334/02), where the court found incompatible to the fundamental freedoms the national measure in France, which provided for the fixed income taxation with respect to the proceeds from insurance and investments received from residents companies and subjected the same types of income received from foreign institutions to progressive income tax rate, which resulted in more burdensome taxation of foreign income.

3.2.3.3.4. Discrimination of foreign service-recipients (non-residents)

Finally, under certain national income tax regimes may be also discriminated the foreign recipient of services. Example of such situation is the case Jobra (330/07).[675] In that case the CJEU was asked whether the national tax measure is contrary to among others to the principle for the free movement of services, if under such measure *"the grant to a trader of a tax advantage (investment growth premium) for the acquisition of unused tangible assets is conditional also upon those assets being used exclusively in a domestic place of business, whereas that tax advantage is not available for the acquisition of unused tangible assets which are used in a foreign place of business, including, thereof, in a place of business that is located elsewhere in the European Union"*.[676] The Court found that the principle for the free movement of services precludes member states to use such measures, *"pursuant to which undertakings which acquire tangible assets are refused the benefit of an investment premium solely because the assets in respect of which that premium is claimed, which are hired out of the remuneration, are used primarily in other member states"*.[677]

3.2.3.3.5. Excessive administrative burden for foreign service providers as contrary measure to the fundamental principles for the free movement

The CJEU has also considered that imposition of excessive procedural rules for the foreign service providers or their counterparties in the state of activity may create an obstacle for the free movement of services and thus hinder the realization of the Treaty freedoms. With this respect, in the case Commission v. Belgium (C-433/04), the CJEU found that domestic law requirement obliging resident companies to withholding income tax from their foreign contractors, not registered in Belgium, and imposing on those resident companies joint and several liability for the tax debts of

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[670] Decision dated 22 December 2008, C-282/07, Etat belge – SPF Finances v Truck Center SA, para. 44
[671] Ibid. para. 49.
[672] Decision dated 13 November 2002, C-42/02.
[673] Decision date 6 October 2009, C-153/08.
[674] C-42/02, para. 27.
[675] Decision 4 December 2008, C-330/07, Jobra Vermogensverwaltungs-Gesellschaft mbH v. Finanzamt Amstetten Melk Scheibbs. Another case, but not tax case on the same issue of discrimination of foreign service recipient is C-384/93 Alpine Investments.
[676] Ibid. para. 11.
[677] Ibid. para. 41.

such foreign contracting partners, as disproportionate and not compatible with the principles for the free movement of services.[678]

3.2.3.3.6. Discrimination of foreign services

Foreign services may also be discriminated by measures of indirect taxation. In the EU this didn't happen much and there are not so many CJEU cases on the same. This may be explained by the fact that harmonization of indirect taxes started very early in the EU[679] and common system of VAT was established with the second VAT directive in 1967[680] and the sixth VAT directive 10 years after.[681] If further court cases were arising, then they mostly were based already on the legal instruments issued by the EU rather than on primary law and fundamental principles. Nevertheless, the discrimination of foreign services may happen at least under several conditions.

First, the resident VAT payer (business entity) may be discouraged to buy foreign services, if for instance such foreign services would be subject to reverse charged VAT at a higher rate than similar domestic services would be subject to. Such regime would encourage the residents to buy mostly local services. Another kind of discrimination may occur if for instance, the resident VAT payer would not be allowed to offset (deduct) VAT on the services it acquired from abroad, whereas input VAT on the similar services provided by the local supplies would be deductible. In the EU such kind of discrimination was prevented by introduction of a rule via directive which granted the right to deduct input VAT accumulated from intra-community transactions.[682]

3.2.3.4. Comparison of the fundamental principles for the free movement of services under the EAEU Treaty and TFEU and intermediate conclusion

In view of the Author, from a tax law perspective, the fundamental principles in the EAEU treaty with respect to the movement of services are formulated well. Based on the wording, they should provide sufficient legal basis to prevent common types of tax discrimination associated with the cross-border provision of services, including both direct and indirect tax measures. There are legal basis to reach similar decision, as were reached in the EU practice, on the cases with most likely forms of tax discrimination in this sphere. So far, however, there were no court cases in front of the EAEU Court on interpretation of these freedoms.

However, in view of the author, it is necessary to clarify on the legislative level in the EAEU Treaty the order of priority of application of the fundamental principles in case more than one principle may be applicable and one may assure higher protection than the other. As was discussed in the above sub-part 3.2.3.2.4. from the definition of service provider under the EAEU Treaty it may be assumed that service providers may be potentially protected under the freedom of incorporation and also freedom to provide services.

3.2.4. Provisions affecting future harmonization of indirect taxes in the EAEU

3.2.4.1. In general

In comparison to the EU law, the fundamental treaty of the Eurasian Economic Union contains sometimes quite elaborated and detailed rules, in addition to principles that should be followed by the member states. Such rules perhaps are common for the national legislations and specific international agreements, but less frequently may be found in the founding treaties. Thus, for instance, the EAEU law provides for the general rule that the indirect taxes shall apply to the goods imported from the territory of one member state to the territory of another member state and details on the way for collection of the same.[683] This rule is further elaborated in annex 18 to the Treaty. Therefore, to certain extent the founding treaty itself provides for specific rules, which harmonize certain tax aspects.

In general with respect to indirect taxation, what is important, the EAEU law encodes the non-discriminatory clause by prohibiting member states to impose more burdensome taxes on imported

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[678] Decision dated 9 November 2006, C-433/04, Commission of the EC v. Kingdom of Belgium, para. 41-42.
[679] For the brief on the same B. Terra, P. Wattel, *European Tax Law,* Ch. 4.1. (Wolters Kluwer Law & Business 2012) p. 167-198.
[680] Council Directive 67/288/EEC, dated 11 April 1967.
[681] Council Directive 77/338/EEC dated 17 May 1997.
[682] See article 167 Recast VAT Directive.
[683] Art. 71 para. 1 EAEU Treaty

goods in comparison to domestically produced ones.[684] Furthermore, the EAEU Treaty invites member states to determine the directions, forms and procedures for the **harmonisation of legislation in respect of taxes affecting their mutual trade so as to prevent violation of any terms of competition and interference with the free movement of goods, works and services** at the national level or at the level of the Union.[685] In particular, the EAEU Treaty explicitly underlines the need to harmonise the rates of excise taxes for the most sensitive goods and continue to further improve the system of collection of VAT in mutual trade. The text of the first article is copied below.

> "**Article 71**
>
> 1. All **goods** imported from the territory of one Member State to the territory of another Member State shall be subject to indirect taxation.
>
> 2. In mutual trade, the Member States **shall levy taxes and other fees and charges in such a way to ensure that taxation** in the Member State where **goods** of other Member States are sold **is no less favourable** than the **taxation applied** by this Member State under the same circumstances **in respect of like products** originating from its territory.
>
> 3. The Member States shall determine the directions, forms and procedures for the **harmonisation of legislation in respect of taxes affecting their mutual trade so as to prevent violation of any terms of competition and interference with the free movement of goods, works and services** at the national level or at the level of the Union, including:
>
> 1) harmonisation (convergence) of excise tax rates for the most sensitive excisable goods;
>
> 2) further improvement of the system of collection of VAT in mutual trade (including the use of information technology)".

3.2.4.2. Some thoughts about the wording of article 71 in the EAEU Treaty

There seems to be the space for interpretation of article 71. First of all, it leaves the space to determine the directions, forms and procedures for the harmonization, which in general presumes that direction may go further than two suggested points on excise tax rates and further improvement of system of VAT collection. With this respect, there are scholars who believe that the article may equally address direct taxes, since they may also affect mutual trade and terms of competition.[686] Thus, for instance, local scholar Zorina believes that this provision was inspired by article 110 in the TFEU, which also intends to prohibit hidden measures that could put foreign goods into less competitive position. The Author supports the view to the extent that indeed para. 3 of article 71 may be interpreted as calling for member states to work on harmonization of both direct and indirect tax measures and this is especially noticeable if to read para. 3 of the article separately from the predeceasing paragraphs. The same conclusion may be achieved if to interpret this call for harmonization in the context of the fundamental principles for the movement of services for instance, the principle of national treatment and MFN principle, where member state shall prevent discrimination of cross-border services and this requirement applies to measures in all spheres, and as was discussed in the previous section 3.2.3.2., may equally concern direct tax measures and income taxation.

However, in view of the author, due to the very general nature of para. 3, which is not the rule as such, but only the invitation for member states to think of it, it is unlikely that it can be used to prevent individual member state from imposing certain corporate income tax incentives or other income tax measures that indirectly undermine the competitiveness of foreign producers. Simultaneously, the predeceasing para. 2 is quite specific and only prohibits discriminatory measures by means of indirect taxes applied to the goods. Concluding on the same, principle envisaged under article 71 generally prohibits member states to tax more heavily imported goods than comparable domestic products under the same conditions. The principle envisaged therein cannot prevent member state from imposition of direct internal tax measures that distort mutual trade or violate the

[684] Art. 71 para. 2 EAEU Treaty
[685] Art.71 EAEU Treaty
[686] See R.Zorina, Perspectives on the harmonization of tax legislations in the EAEU member states, Legislation, No.7, 2015, Ibid.

terms of competition. In the EU law, articles 110-113, which talk about principles and harmonization of indirect taxes, neither include such prohibition, however article 107 on state aid serves this purpose.

Secondly, coming back to article 71 in the EAEU Treaty, neither therein or in the other article of the EAEU Treaty one can find anything on the conferral of rights to the Union or any of its institutions to act with this respect to tax harmonization. Article 71 invites exclusively member states to work on determination of directions, forms and procedures of tax harmonization. However, taken the respective capacities attributed to the Union institutions that were discussed in part 2.2.2. of this work, the Author takes the liberty to believe that the same may be agreed by the Supreme Council of the EAEU (presidents) based on the proposal of a lower level institutions and consultative tax committee, since it is the Supreme Council, which is responsible for setting the direction and prospects of the integration development and makes decision on implementation of objectives of the Union.

Annex 18 to the Treaty provides for the mechanism for collection of indirect taxes upon exportation and importation of goods, and clarifies details, which were not provided under the previously enacted international agreements within the region: e.g. provided the rule for determination of the place of supply of goods, in cases, when transportation of such good started in one member state and finished in the other; the clarifications provided for determination of the price of the good expressed in foreign currency for tax purposes; new norms were introduced, which allow taxpayers to present documents in electronic forms.

3.2.5. Rules on indirect taxation in the EAEU Treaty

This section is developed solely with the purpose to demonstrate the current level of tax harmonization achieved with respect to indirect taxes and the manner in which it is done in the EAEU. In this work, the Author does not aim to assess the measures of indirect tax harmonization and neither attempts to provide recommendations on the substantive rules on the same.

As discussed above, article 71 allows member states to apply indirect taxes to goods imported from other member states. Herewith, similarly to article 110 in the TFEU, article 71 in the EAEU Treaty prohibits discriminatory tax measures applied with respect to the foreign goods. Further rules on collection of indirect taxes are provided under article 72 and annex 18 to the EAEU Treaty. Article 72 establishes the principle of destination for collection of indirect taxes, which implies zero VAT rate and (or) exemption from excise taxation upon exportation of goods, and imposition of the same upon their importation to another member state. Taxation of works and services with indirect taxes shall happen in the country, which is determined as their place of supply. The term "indirect taxes" is defined only for the purposes of Annex 18 and stands solely for VAT and excise taxes.[687] Therefore, all the rules and principles provided so far under the EAEU law and discussed in this work concern only these taxes and does not include other consumption taxes and fees that may be imposed by member states upon importation and exportation of goods or provision of works and services.[688]

Annex 18 defines several critical terms, such as: auditing services, accounting services, movable property, designer services, import and export of goods, engineering services, consulting services, marketing services, immovable services and few more.[689] Annex 18 has three distinct parts, which deals and thus harmonizes the rules on collection of indirect taxes upon exportation of goods, importation of goods and provision of works and services. Further this work considers each part.

3.2.5.1. Tax rules upon exportation of goods

3.2.5.1.1. General rule

When the taxpayer exports goods from the territory of one member state to the territory of another member state, it shall be entitled to a zero VAT rate and/or exemption from excise taxes upon

[687] See point 2 of the Annex 18 EAEU Treaty.

[688] For example, Kazakhstan applies rental tax on export of certain minerals. This tax is not covered by the rules under the EAEU Treaty. This issue was discussed before the EAEU Court, where taxpayer tried to argue that imposition of such type of tax violates the fundamental principle of internal market, which prohibits member states to use any import or export custom duties and their equivalents in the mutual trade.

[689] To the knowledge of author, there is no study undertaken yet to analyse whether national tax legislation use the same definitions as provided under annex 18 or not.

exportation. Additionally, it has the right to deduct (offset) the incoming amount of indirect taxes similar as it is provided under domestic legislation and applied in respect of goods exported from the territory of that member state outside the Union. Herewith, to exercise these rights, the taxpayer will have prove the fact of export and submit to the tax authority in the country of exportation the prescribed list of documents.[690]

3.2.5.1.2. The place of supply

The place of supply of goods shall be determined in accordance with the national legislation of each member state. So far, the EAEU law harmonizes the determination of the place of supply only in one case of sale of goods by a taxpayer of one member state to a taxpayer of another member state. It determines that when transportation of goods commences outside the Union and ends in another member state, the place of supply shall be deemed as the territory of the member state where the goods are placed under the customs procedure of release for domestic consumption.[691]

3.2.5.1.3. The tax base

With respect to the determination of tax base, the annex provides only very limited rules. It says that, unless stated otherwise in the national legislation, the VAT base of exported good may be adjusted in the tax period, when the reasons to do so happen – e.g. the VAT base needs to be reduced because the goods were returned or the VAT base needs to be increased because the price of transaction was increased.[692] With respect to goods sold under leasing agreement, the tax base is determined as of the date specified in the lease agreement for each lease payment, in the amount of the initial cost of goods under each lease payment. Tax deductions (offsets) shall be executed in the procedure provided for by the legislation of a Member State to the extent attributable to the cost of goods (leased items) under each lease payment.[693]

The VAT tax base for goods exported from the territory of one member state to the territory of another member state under a credit on goods (commercial loan, material loan) agreement shall be represented by the cost of goods transferred (provided) provided for by the agreement, if no cost is specified therein, by the cost indicated in the shipping documents, and if no cost is specified in the agreement and shipping documents, by the cost of goods recorded in accounting records.

The tax base for excise taxation of goods representing results of works performed under the tolling agreements shall be represented as the volume and quantity of excisable tolling goods, in kind, in respect of which fixed (specific) excise tax rates have been set, or the cost of excisable tolling goods in respect of which the ad valorem excise rates have been set.

3.2.5.1.4. Documentation requirements to support the fact of export

In order to exercise its right to apply zero VAT rate and/or exemption from excise taxes, the taxpayer shall confirm the fact that goods were exported to the territory of another member state. To do so, the taxpayer shall submit to the tax authority in the country of export the following documents:[694]

1. tax returns;
2. agreements on export concluded with a taxpayer of another member state or a taxpayer of a third country; in the case of a lease of goods or a sale of goods through commercial loan – the respective agreements shall be also provided. In case applicable, the taxpayer may also be required to present agreement on the manufacture of goods or tolling agreements;
3. a bank statement confirming the actual receipt of proceeds from the sale of exported goods at the account of the exporter. In case of cash transaction, the exporter shall submit the bank statement confirming the respective amounts received. Herewith, in both situations, other rules may be provided by the national legislation – e.g. prohibition to exercise cash transactions, which exceed certain amount. Additional financial documents are required in case of lease sale, barter agreement;

[690] Point 3 Annex 18 to the EAEU Treaty.
[691] Point 3 Annex 18 to the EAEU Treaty.
[692] Point 11 Annex 18 to the EAEU Treaty.
[693] Point 11 Annex 18 to the EAEU Treaty.
[694] Point 4 Annex 18 to the EAEU Treaty.

4. a statement of import of goods and payment of indirect taxes, which shall be stamped the tax authority of the Member State to the territory of which the goods are imported indicating the payment of indirect taxes (or confirming exemption if applicable); In the case of placing the goods concerned under the customs procedure of a free customs zone or a free warehouse on the territory of another Member State, a copy of the respective customs declaration, certified by the customs authority of another Member State, shall be submitted instead of the above statement;
5. transport (shipping) and/or other documents required by the national legislation and confirming the movement of goods between the territories of the member states. These documents shall be submitted if this is required by the national legislation;
6. other documents confirming the validity of a zero VAT rate and/or exemption from excise taxes provided for by the legislation of the Member State from the territory of which the goods are exported.

However, the above list is of recommendative nature and leaves the right to the member state to enlarge or shorten the list of required documentation. Exception applies only to the statement of import and payment of respective taxes in the other member state referred in para. 4, which has to requested by the national legislation. This requirement was introduced as a measure to fight common VAT fraud schemes in the region. Herewith, it may be not necessary to present the statement should the tax authority in the state of exportation receive confirmation on importation of respective goods and payment of taxes by means of electronic exchange of information from the tax authority in the state of import of the goods concerned.[695]

Most of the above documents may be submitted in electronic form.

3.2.5.1.5. Timing guidance

To qualify for zero rate export VAT, the taxpayer has to present the support documents within 180 days since the date shipment (transfer) of goods. The date of shipment is regarded as the date of the first primary accounting (reporting) document, which was issued to the purchaser of the goods (or first carrier) or the date of issuance of another binding document provided under the national legislation[696]. For excise tax purposes, in case of export of on excisable goods manufactured of own raw materials, the date of shipment shall be the date of the first primary accounting (reporting) document issued to the purchaser (consignee) of the goods; and on excisable tolling goods, the date of shipment shall be the signing date of the acceptance certificate for the excisable goods, unless otherwise provided for by the national legislation of the member state, where the excisable goods were manufactured.[697]

In case of failure to do so within 180 days, the taxpayer will have to pay the indirect taxes to the budget of the state from which the goods were exported, he will however, preserve its right to deduct (offset) corresponding VAT amounts according to the national legislation. In case of later presentation of the prescribed documents, the paid taxed could be refunded from the budget, except for the penalties and interest paid for violation of deadlines.

3.2.5.1.6. Transfer pricing

The transfer pricing legislation of the member states may apply to assure complete (full) payment of indirect taxes.

3.2.5.2. Tax rules upon importation of goods

3.2.5.2.1. Subject (VAT payer/ payer of indirect taxes)

The payment of VAT generally has to be done by the owner of the goods in the country of importation. If the national legislation permits so, the payment may also be done by the commissioner or agent.[698] As owner of the goods is defined the person exercising the right of ownership with respect

[695] Point 7 Annex 18 to the EAEU Treaty.
[696] Point 5 Annex 18 to the EAEU Treaty.
[697] Point 5 Annex 18 to the EAEU Treaty.
[698] Point 13.1 Annex 18 to the EAEU Treaty.

to the goods or a person to which the right of ownership for the goods is transferred under the agreement.[699]

Annex 18 clarifies on the subject responsible for payment of VAT in situations, where more than two countries and more than two parties are involved. Thus, for instance, when the agreement on purchase-sale is concluded between the taxpayers of the member states, but the goods in question are imported from the territory of the third state, the respective indirect taxes shall be paid by the owner of the goods on the territory of which the goods were imported.[700] If the transaction is done between the taxpayers of member states but through the intermediary, the indirect taxes are paid by the owner of the good in the country of importation or by the commissioner or agent if the national legislation allows to do so.[701] Similarly, if the agreement is concluded between the taxpayer of the member state and the third state and the goods are imported from the territory of another member state, the owner of the goods on the territory of which the goods were imported is responsible for payment of indirect taxes, and only in case the national legislation permits, this function may be performed by the agent or the commissioner.[702]

3.2.5.2.2. Tax base

For the VAT purposes, the tax base shall be determined on the date of registration of goods by the taxpayer owner of the imported goods.[703] The base shall be determined on the basis of the cost of purchased goods and excise taxes payable on excisable goods (including those produced under a manufacturing agreement), as well as goods received under the commercial loan agreement, tolling goods. The cost of purchased goods shall be taken as the transaction price to be paid to the supplier for the goods (works, services) under the terms of the agreement. The tax base for the import of tolling products into the territory of one Member State from the territory of another Member State shall be taken as the cost of tolling and excise taxes payable on excisable tolling products.

The cost of goods obtained under a barter agreement, as well as under a commercial loan, shall be represented by the cost of goods specified in the agreement, if no cost is specified in the agreement then by the cost indicated in the shipping documents, and if no cost is specified in the agreement and shipping documents then by the cost of goods indicated in accounting records.

The cost of goods expressed in foreign currencies generally shall be converted into the local currency at the exchange rate of the national bank of the member state on the date of acceptance of the goods for registration.

The tax base for the import of goods into the territory of one member state from the territory of another member state under a lease agreement providing the transfer of ownership to the lessee shall be specified as the portion of the cost of goods (leased items) provided for by the lease agreement (contract) as on its payment date (regardless of the actual amount and date of payment). Lease payment in foreign currencies shall be converted into local currency at the exchange rate of the national (central) bank of the Member State on the date corresponding to the time (date) of determining the tax base.

3.2.5.2.3. Tax rates

The annex only provides that tax rates of indirect taxes shall be set by the national legislation. Article 72 of the EAEU Treaty in this respect clarifies that indirect tax rates applicable upon importation to the foreign goods shall not be higher than the rates applicable upon realization of goods domestically.[704]

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[699] Point 13 Annex 18 to the EAEU Treaty.
[700] Point 13.2 Annex 18 to the EAEU Treaty.
[701] Point 13.3 Annex 18 to the EAEU Treaty.
[702] Point 13.5 Annex 18 to the EAEU Treaty.
[703] Point 14 Annex 18 to the EAEU Treaty, but not later than the time limit determined by the legislation of the member state into the territory of which the goods are imported.
[704] Point 5 article 72 EAEU Treaty.

3.2.5.2.4. Place of payment of VAT

Collection of VAT is done by the tax authority in the country of importation of goods in the place, where the owner of the goods is registered for tax purposes.

3.2.5.2.5. Timing for payment of VAT

Indirect taxes on imported goods shall be paid by 20th of the month, following the month when the imported goods were recorded for accounting purposes.[705] In case of leasing agreement, the indirect taxes shall be paid no later than 20th of month, following the month of payment as determined under the lease agreement. With respect to the marked excisable goods, the date of payment shall be determined by the national legislation.

3.2.5.2.6. Transfer pricing

The transfer pricing legislation of the member states may apply to assure complete (full) payment of indirect taxes.

3.2.5.2.7. Tax declaration (return)

The taxpayer shall submit to the tax authority the respective tax declaration in the form determined by the member state into the territory of which the goods are imported, including under a lease agreement. The return shall be submitted not later than on the 20th day of the month following the month of registration of imported goods for accounting purposes (the date of payment provided for by the lease agreement).

Together with the tax declaration, the taxpayer shall submit to the tax authority the following set of documents:

1. a statement on importation of goods and payment of indirect taxes;
2. a bank statement confirming the actual payment of indirect taxes on imported goods, or any other document confirming the fulfilment of tax obligations, if provided for by the legislation of the member state. The bank statement may not be required if the import taxes were offset by the overpaid earlier indirect taxes. In case of a lease agreement, the documents confirming the payment of indirect taxes shall be submitted when due under the lease agreement;
3. transport (shipping) and/or other documents required by the legislation of the member state and confirming the movement of goods from the territory of one Member State to the territory of another. These documents shall not be submitted if execution of these documents is not provided for by the legislation of the Member State;
4. detailed tax invoices issued upon sale of goods. If the legislation of the member state does not provide for the execution of a detailed tax invoice or if the goods are purchased from a taxpayer of a non-member state, other document issued by the seller and confirming the cost of goods imported shall be submitted to the tax authority;
5. agreements under which the goods were imported into the territory of a member state;
6. additional documents are required in case transaction involves more than two parties and importation of goods happens either from the third member state or third state in general;
7. commission or agency agreements (if concluded).[706]

Herewith, the annex clarifies that presentation of these documents, except for the statement on importation and documents required in case of involvement of more than two member states, together with the tax return shall be obligatory only if required by the national legislation of member states.

3.2.5.2.8. Return of goods

When imported goods are returned in the month of their registration, the transactions for import of these goods shall not be recorded in the tax declaration should the return happen due to inadequate quality and (or) incomplete delivery. Such return of goods shall be confirmed by the claim agreed by the parties to the agreement, as well as by documents corresponding to subsequent transactions with such goods.[707]

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[705] Point 19 Annex 18 to the EAEU Treaty.
[706] Point 22 Annex 18 to the EAEU Treaty.
[707] Point 23 Annex 18 to the EAEU Treaty.

When imported goods are returned on the above grounds after the expiration of the month in which they were accepted for registration, the taxpayer shall submit to the tax authority a corresponding updated (additional) tax declaration and the support documents referred above.

In the case of a partial return of goods due to inadequate quality and/or incomplete delivery, an updated statement shall be presented to the tax authority without information on the partially returned goods. In the case of a full return due to inadequate quality and/or incomplete delivery of goods the details of which were recorded in the previously submitted statement, the updated statement shall not be submitted to the tax authority. The taxpayer shall inform the tax authorities on the details of the previously submitted statement containing information on the goods returned in full in the form and procedure determined by regulatory legal acts of tax authorities of the Member States or other regulatory legal acts of the Member States. In case of a partial or full return of goods due to inadequate quality and/or incomplete delivery, the VAT previously paid on the import of these goods and deducted as input VAT shall be paid again in the tax period in which the goods are returned, unless otherwise provided for by the national legislation.

3.2.5.2.9. Adjustment of tax base

In case the price of transaction was increased, the taxpayer shall present additional tax return reflecting on the difference in the price and pay additional indirect taxed by the 20th date of the month, following the month in which the price was changed. Together with the tax return, the taxpayer shall submit the statement, which indicates the change of price, the agreement, which confirms the change of price and invoice, which reflects the same.[708]

3.2.5.2.10. Deduction (offset) of import VAT

The amounts of indirect taxes paid on imported goods shall be subject to deduction (offset) as provided under the national legislation of the member state into the territory of which the goods were imported.[709]

3.2.5.2.11. Exemption from import VAT

The import taxes are not collected on goods, which are exempt by the member state from import taxes, the goods, which are imported by natural persons for individual consumption (not for entrepreneurial purposes) and up to certain limit.[710] Additionally, import taxes are not due on the goods, which are transferred within one legal person (national legislation may require formal notification on the transfer of such goods by the taxpayers).

In the situation, when the imported good was exempt from import taxation, but eventually was used for the purpose other than those provided by the national legislation for exempt goods, the import VAT will be due.[711]

3.2.5.2.12. Special rule on goods subject to excise marking

The EAEU law only provides that excise taxes on goods subject to excise marking (accounting and control marks, labels) shall be levied by the customs authorities of the member state, unless otherwise provided for by the legislation of member states.[712]

3.2.5.3. Tax rule applicable upon provision of works and services

3.2.5.3.1. General rule

With respect to indirect taxes due upon the cross-border provision of services, the EAEU Treaty provided very limited principles, which mainly concern the determination of the place of supply. In general, the EAEU law provides that indirect taxes on the performance of cross-border works and provision of services shall be collected on the territory of a member state, which is recognised as the place of supply of such works and services.[713] It also provides that upon the performance of works

[708] Point 24 Annex 18 to the EAEU Treaty.
[709] Point 26 Annex 18 to the EAEU Treaty.
[710] Point 6 Article 72 EAEU Treaty.
[711] Point 25 Annex 18 to the EAEU Treaty.
[712] Point 27 Annex 18 to the EAEU Treaty.
[713] Point 28 Annex 18 to the EAEU Treaty.

or provision of services, the tax base, the rates of indirect taxes, the procedure for their collection and tax exemptions shall be determined by the member states.[714]

3.2.5.3.2. The place of supply

The territory of a member state shall deem to be the place of supply if the works and services directly relate to immovable property located on its. The same rule applies to lease, rent and other types of arrangement related to the use of immovable property.[715] The territory of a member state is also recognised as the place of supply if the works and services directly relate to movable property or vehicles located on its territory. Further on, the territory of a member state will be recognised as the place of supply if the services in the sphere of culture, art, education (training), physical culture, tourism, leisure and sports are provided on its territory.

The territory of the member state will be also considered as the place of supply, if the taxpayer of that member state buys consulting, legal, accounting, auditing, engineering, advertising, design, marketing, data processing services. The same rule applies upon purchase by the taxpayer of scientific research, design and experimental services, technological and experimental works, works and services for the development of computer programmes and databases (computer software and information products), adaptations and modifications thereof, support for such programs and databases, recruitment services if the recruited staff works at the location of the buyer. This rule also applies upon transfer, granting, assignment of patents, licenses and other documents certifying state-protected industrial property rights, trademarks, trade names, service marks, copyright, related rights or other similar rights; rent, lease and other types of provision of movable property, except for the rent, lease and other types of provision for use of vehicles. The rule equally applies upon provision of services by a person recruiting on its behalf for the main party to an agreement or on behalf of the main party to an agreement another person to perform the works, services listed above.[716]

Finally, in all other cases, as the place of supply will be recognised the territory of the member state, if the works and services are provided by its taxpayer. This rule also applies in case of rent, lease and other types of arrangements for the use of vehicles.[717]

If the taxpayer performs several types of works and services the taxation of which is governed by the EAEU law, and the performance of certain works and services is auxiliary to the performance of other works and services, then the place of supply of the main works and services shall also be regarded as the place of supply of auxiliary works and services.[718]

3.2.5.3.3. Documents to support the place of supply

The following documents shall confirm the place of supply of works or services: 1) agreement for the execution of works or provision of services concluded between taxpayers of the member states; 2) documents confirming the execution of works, provision of services; 3) other documents required by the legislation of the member states.

3.2.5.3.4. Special rule with respect to works on tolling (processing of raw materials)

The EAEU law provides for the common rules for tax treatment of works related to the processing of raw materials (tolling), which is very specific type of service but is common between the EAEU member states and involves high volumes of cross-border activity and money flows.

First of all, tolling works assume that the initially the raw materials are transported from the territory of one member state to the territory of another member state for processing – import stage 1. Upon completion of the processing (tolling) works, the processed materials are exported back to the territory of the first mentioned member state – reimportation stage. To avoid double collection of import VAT, the VAT is collected only once at the moment of reimportation. The tax base to determine the respective VAT is determined as the cost of tolling works. As for the rest, the collection

[714] Point 28 Annex 18 to the EAEU Treaty.
[715] Point 29 subpara. 1 Annex 18 to the EAEU Treaty.
[716] Point 29 subpara.2-4 Annex 18 to the EAEU Treaty.
[717] Point 29 subpara. 5 Annex 18 to the EAEU Treaty.
[718] Point 33 Annex 18 to the EAEU Treaty.

of import VAT is regulated by the section of the EAEU law, which deal with taxation of imported goods and the national legislation of member states.[719] Herewith, to confirm the zero rate of import VAT at stage 1, the taxpayer (who performs processing services/tolling works) has to complete the work within the time limits provided under the agreement and submit the following list of support documents to the tax authorities:

In order to confirm the validity of application of a zero VAT rate to the performance of tolling works the following documents shall be submitted to the tax authorities, simultaneously with the tax declaration:

1. agreement between the taxpayers of the member states;
2. documents confirming the fact of execution of works;
3. documents confirming the export (import) of the referred goods;
4. a statement or a list of statements, unless the final processed products are exported to the territory of the third state. In the case of export of tolling products to the territory of another member state and placing thereof under the customs procedure of a free customs zone or a free warehouse, a copy of the customs declaration, certified by the customs authority of another member state shall be submitted to the tax authority of the first member state instead of the above statement;
5. a customs declaration confirming the export of tolling products outside the Union;
6. other documents provided for by the legislation of the Member States.[720]

The above documents, except for the statement, shall not be submitted to the tax authority unless required by the national legislation.

3.2.6. State aid rules under the EAEU Treaty

3.2.6.1. General principles of competition in the EAEU

The EAEU Treaty contains general rules and principles on competition. While these rules are mainly oriented to tackle the behaviour between the business undertakings and their actions that may produce negative impact on competition, it contains principles, which prohibit member states to provide an aid to the businesses.[721] Accordingly, under general competition rules in their national legislations member state shall prohibit "1) agreements between state government authorities, local authorities and other agencies or organisations exercising their functions or agreements between them and economic entities (market participants), if such agreements result or can lead to any prevention, restriction or elimination of competition, except in cases provided for by this Treaty and/or other international treaties of member states", and also "2) provision of state or municipal preferences, except as provided by the legislation of the Member States, and with account of the specifications set out in this Treaty and/or other international treaties of the Member States".[722] The definition of "state and municipal preferences" is provided further under Annex 19 to the EAEU Treaty, which shall be regarded as the "provision of benefits to individual economic entities (market participants) by executive and local authorities of the member states and by other authorities or organisations exercising the functions thereof, ensuring more favourable terms for activities through the transfer of state or municipal property and other objects of civil rights or property preferences, state or municipal guarantees". From the above, the notion of "property preference" requires further interpretation, but as was correctly noted by Assilova, it is not elaborated under the EAEU law.[723] To define this term, Assilova refers to the law of Russian Federation on Protection of Competition, which contains similar definition of state and municipal preferences and the respective court practice, where the term "property preference" was defined.[724] Having analysed the court decision, she concludes that taken the Russian practice, the property preference may be interpreted as "any

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[719] Point 31 Annex 18 to the EAEU Treaty. For more on the same, see D.Orazbayeva, Taxation of tolling works in the Customs Union, Database "Параграф", 2011. Original: Д.Оразбаева, Налогообложение работ по переработке давальческого сырья в Таможенном союзе, Информационная система «Параграф», 2011.

[720] Point 32 Annex 18 to the EAEU Treaty.

[721] Section XVIII of the EAEU Treaty.

[722] See Article 75 EAEU Treaty.

[723] See M.Assilova, Business taxation and potential harmful tax competition in the Eurasian Economic Union based on the experience of the European Union and the OECD initiatives, monography, 2017, pp.222-223.

[724] Decision of the Arbitration Court of Nizhnedorod in the case NA432709/2010, dated 21 May 2010, Government of Nizhnedorod vs. Office of the Federal Antimonopoly Service.

preferential tax measure" "due to the fact that a property in the form of money is saved when a tax is mitigated". Assilova believes that perhaps the possible interpretation of the term given by the Russian court, was not the definition meant by the EAEU legislator because in such case any preferential tax measure would be regarded as the state or municipal preference and this therefore would undermine the fiscal sovereignty of the member states.[725] The Author of this work agrees with the position of Assilova in this respect, because this general principle is defined very broadly under the EAEU Treaty and indeed sounds as prohibiting member states to provide any state or municipal preferences that may hinder the competition, without at the same time requiring such preferences to be restricted to certain undertakings, regions, or other factors. At the same time, there are important deviations from these principles, where the first principle prohibits special agreements "except cases provided for by this Treaty and/or other international treaties of member states" and the second, also allows use of state and municipal preferences as long as the legislation of the member states allows the same taking into consideration the peculiarities of the EAEU Treaty. Such peculiarities include the rules for provision of industrial subsidies discussed in the next section.

3.2.6.2. Rule on industrial subsidies in the EAEU Treaty

3.2.6.2.1. **General** *rule*

In order to enable stable and efficient development of the economies of the member states and to create a proper environment for the promotion of mutual trade and fair competition, the common rules for granting subsidies for industrial goods were developed and are incorporated in the EAEU Treaty article [illegible] nd Annex [illegible] hall be applied [illegible] e territ[illegible] of the member states, includi[illegible] provision [illegible] production, sale and c[illegible] dustrial [illegible] bsidies and fair [illegible] on only t[illegible] ces. T[illegible] ould be [illegible] he fact that [illegible] J is stil[illegible] the very early s[illegible] velopm[illegible], and as a pr[illegible] developm[illegible] er sta[illegible] ave chosen to gi[illegible] acc[illegible] te industrial deve[illegible] increase [illegible] eness [illegible] dustrial complexes [illegible] arri[illegible] n the industrial sector. [illegible] the realiz[illegible] ese [illegible] tives, they agreed [illegible] al p[illegible] y that is at the Commissi[illegible] coordinat[illegible] g [illegible] things, the policy inc[illegible] n r[illegible] for granting the subsidies [illegible] industri[illegible] rt ar[illegible] tra[illegible]

Among [illegible] of a mem[illegible] benefits a[illegible] have bee[illegible] In this ca[illegible] when int[illegible] duties an[illegible] a subsidy [illegible] measure [illegible] includes [illegible]

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725 Ibid, p[illegible]

726 See A[illegible]

727 See [illegible] 2015, [illegible], accessed on 26 February 2017.

728 See Annex 28 para. 1 to the EAEU Treaty. As industrial goods are understood produces classified under the groups 25-97 of the Customs Nomenclature of EAEU, which includes salt, sulphur, stone, plastering materials, lime and cement, products of the chemical and related industries, including pharmacy, plastics and articles thereof; rubber and articles thereof, raw hides and skins, leather, fur and articles thereof, travel goods, handbags and similar items; wood and wood products, textile materials and textile product, shoes and hats, Articles of stone, plaster, cement, natural or cultured pearls, precious or semi-precious stones, precious metals, base metals and articles thereof, machinery, equipment, electrical equipment and parts thereof, vehicles, aircrafts, vessels and associated transport equipment, but also other products. The precise definition of industrial goods is provided under Annex 28 para. 2 to the EAEU Treaty.

729 See Article 93 para. 3a) EAEU Treaty.

of industrial goods from the territory of any member state or increasing the exportation of industrial goods into the territory of any member state with resulting advantages".[730]

The subsidies are classified into three types: specific subsidies, prohibited subsidies and permitted subsidies. As the names imply, the prohibited and permitted subsidies are either completely forbidden or permitted, whereas the specific subsidy may be permitted on the EAEU Commission's approval, unless it simultaneously meets the definition of prohibited subsidy. If it will be established during the special state aid investigation procedure (undertaken either by the member states or at the later stage by the Commission) that subsidies provided by one member state harm the national economies of other member states, the compensatory measures shall apply.[731] In case the member state, which provided subsidies fails to follow the decision on provision of compensatory measures within the provided time limit, the member state, whose national economy has been affected by subsidies, has a right for temporary application of response (counter) measures.[732] In this respect, the response measure is understood as temporary suspension of its obligations under any existing trade and economic treaties in respect of the Member State against which the response measure is introduced (except for those related to the oil and gas industry).[733]

Rules on subsidies started to apply from 1 January 2017, herewith, the rules on subsidies are not applicable with respect to subsidies, granted by the member states before 1 January 2012.[734]

2.6.3.2. Specific subsidies

As specific subsidy is regarded the subsidy, which is accessible only to certain enterprises or industrial sectors, but not to all industrial enterprises or industrial sectors on the territory of the subsidising member state.[735] If the subsidy is provided only to enterprises located in the specific geographical point, it is considered as geographically restricted.[736] The subsidies are not specific if they apply automatically and are provided based on objective criteria and conditions, clearly defined and strictly followed by the law of the member states.[737] As objective criteria and conditions, are understood neutral criteria, which do not create privileges to one undertakings over another, are economic in their nature and horizontal upon application (e.g. number of employees).[738] Herewith, inspite that legally the subsidy may qualify as non-specific, it may be reclassified into specific in case it is actually applied only by the limited number of certain enterprises, or certain enterprises get disproportionately high amount of subsidies, or the subsidising authority has a discretionary power to grant the subsidy.[739] The specific subsidies may be used by the member states, if they agree on this with the EAEU Commission and upon the condition that specific subsidy does not qualify simultaneously as the prohibited subsidy.[740] Member States do not apply compensatory measures to subsidies that are provided for the period, on the terms and in the amounts approved by the Commission.[741]

Exceptionally, to some of the specific subsidies the counter measures cannot apply, which automatically makes such subsidies qualify as permitted specific subsidies or non-specific subsidies. Under certain conditions, to this group of subsidies are included subsidies provided for research and development (R&D) activities and also subsidies provided for development of underdeveloped regions. In particular, R&D subsidy is allowed if it is provided to support research activities carried out by economic entities, as well as universities and research institutions engaged contractually by such economic entities, provided that such support covers not more than 75 percent of the cost of

[730] See Article 93 para. 3b) EAEU Treaty.
[731] See Annex 28 para. 86 to the EAEU Treaty.
[732] Annex 28 para. 94 to the EAEU Treaty.
[733] Ibid.
[734] See Article 105 para. 2 to the EAEU Treaty.
[735] See Annex 28 para. 3 subpara.1) to the EAEU Treaty.
[736] See Annex 28 para. 4 and para. 82 to the EAEU Treaty.
[737] See Annex 28 para. 3 subpara. 2) to the EAEU Treaty.
[738] Ibid.
[739] See Annex 28 para. 3 subpara. 3 to the EAEU Treaty.
[740] See Annex 28 para. 6 and para. 15 to the EAEU Treaty.
[741] Ibid.

industrial research[742] or 50 percent of the cost of developments at the pre-competitive stage and that it is provided solely to cover: 1) personnel costs (for researchers, technicians and other support personnel engaged solely in the research activities); 2) the cost of tools, equipment, land and buildings used exclusively and permanently for the research activities (except for sale on a commercial basis); 3) the cost of consulting and equivalent services used exclusively for the research activities (including the purchase of research results, technical knowledge, patents, etc.); 4) additional overhead costs incurred directly as a result of the research activities; 5) other current expenses (for materials, software, etc.) incurred directly as a result of the research activities.[743] In light of the current discussion on the nexus approach, it shall be noted that under the EAEU law there is no requirement to execute the above services within the territory of the subsidising member state or the territory of the Union. In theory, such services may be performed anywhere to qualify for subsidy, in case it is provided in a form of tax incentive.[744]

Second group of exceptional subsidies include subsidies, provided as part of the general regional development[745] to support the disadvantaged regions on the territory of a member state. Such subsidies shall be distributed between the respective regions, provided that each disadvantaged area represents a clearly demarcated and compact administrative and economic zone and such region is deemed disadvantaged based on neutral and objective criteria indicating that the region's difficulties arise not only due to temporary circumstances.[746] As the criteria shall be used the measurement of economic development based on at least one of the following parameters measured for a 3-year period (such measurement may be complex and may take into account other factors): income per capita or per household or the gross domestic product per capita, which shall not exceed 85 percent of the average rate for the territory concerned; the unemployment rate, which shall be at least 110 percent of the average rate for this area.[747] If to consult the rate of unemployment among regions, then in Kazakhstan for instance, the average unemployment rate by the end of 2016 constituted to 4.9%, whereas the highest rate of unemployment amount to 5.3% in Almaty city.[748] Assuming that the same rate lasts for 3 years and the second criteria is used to assess whether the particular region may qualify as disadvantageous, then perhaps only Almaty city will be close to qualify as such (5.3% unemployment rate v. 5.39%, which constitutes 110% of the average in the country). Based on this assumed calculation, only Almaty city shall qualify for specific industrial subsidies, which are provided to companies registered there. With this respect, an interesting, but separate point for research represents the functioning of ten special economic zones on the territory of Kazakhstan and compatibility of tax incentives provided therein with the subsidy rules of the EAEU.[749] The same question is also relevant regarding other member countries, which apply tax incentives on the territories of the special economic zones.

2.6.3.3. Prohibited subsidies

As prohibited subsidies may qualify:

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[742] As industrial research activities qualify any planned research or critical studies aimed at discovery of new knowledge in the hope that such knowledge may be useful in developing new goods, processes or services, as well as for the significant improvement of existing goods, processes or services. See Annex 28 para. 79 to the EAEU Treaty.

[743] Annex 28 para. 78 to the EAEU Treaty.

[744] This may be an interesting area for further research.

[745] See Annex 28 para. 82 to the EAEU Treaty. As general region development shall be considered regional subsidy programmes forming part of an internally consistent and universally applicable regional development policy, implying non-provision of regional development subsidies to individual geographical locations which produce no or almost no impact on the development of the region. For definition refer to Annex 28 para. 83 to the EAEU Treaty.

[746] Ibid. Such criteria shall be clearly specified in the laws, regulations or other official documents so that they can be verified.

[747] Ibid.

[748] For official statistics in Kazakhstan refer to http://stat.gov.kz/, accessed on 27 February 2017.

[749] For the list of economic zones in Kazakhstan refer to https://business.gov.kz/ru/free-economic-zone/, accessed on 27 February 2017.

1) an export subsidy, that is contingent, as the sole or one of several conditions for its provision, with the results of the exportation of industrial goods from the territory of the member state providing this subsidy to the territory of another member state;
2) a replacement subsidy, that is contingent, as the sole or one of several conditions for its provision, with the use of industrial goods originating from the territory of the member state providing this subsidy;[750]
3) the subsidy provided by one member state, which results in damage to the sector of the national economy of another Member State.[751] The evidence of damage may be only evidenced by the facts.[752]

All types of the prohibited subsidies above may take form of tax measure. The provision clarifies that the subsidy "shall be deemed contingent with an activity", if there is evidence that the provision of this subsidy is not legally bound to the results of the exportation of industrial goods or their use, but is in fact, associated with the actual or expected export or export income, or with the requirement for the use of industrial goods originating from the territory of the subsidising member state.[753] The mere fact that a subsidy is provided to an economic entity doing exportation may not serve as a ground for its consideration as an export subsidy.[754] The non-tax related conditions under which the measure may qualify as prohibited are not discussed in this work. Finally, Annex 28 provides for non-exhaustive list of prohibited subsidies, which among others include: 1) "full or partial exemption, deferral or reduction of taxes or any other fees paid or payable by economic entities and contingent with the results of export or the use of goods originating from the territory of the member state providing these benefits. A deferral, in this case, shall not represent a prohibited subsidy if penalties subject to payment are levied for the non-payment of taxes. Charging the VAT at a zero rate from exported goods shall not indicate a prohibited subsidy", 2) "special deductions contingent upon export and reducing the tax base of goods to a greater extent as compared to like products sold domestically", 3) "exemption, reduction, deferral of taxes or special deductions applicable to calculate the tax base of goods and services used in the production of exported goods to a greater extent as compared to the exemption, reduction, deferral of taxes or special deductions applicable to calculate the tax base for goods and services used in the production of like products sold domestically".[755] If any member state has a reason to believe that another member state provides a prohibited subsidy and/or introduces measures required to obtain specific subsidies, the first Member State can apply to that other member state requesting consultations on the cancellation of prohibited subsidies or measures.[756] If, within two months from the date of receipt of the notice, the member states fail to reach a mutual agreement, the existing disagreements shall be resolved with help of the Commission as discussed in section 2.2.2.3. of this work.

2.6.3.4. Permitted subsidies

Permitted subsidies are those that are not prohibited and do not represent specific subsidies.[757] The provision of permitted subsidies shall not distort the mutual trade between the member states.[758] The member states may provide permitted subsidies without limitation and without obtaining pre-approval of the Commission, while the countervailing and response measures do not apply in respect of such subsidies.[759]

2.6.3.5. Role of the EAEU Commission

The EAEU Commission is entrusted with a power to control the realization of the subsidy rules by the member states. It shall monitor and conduct comparative legal analysis of the legislation of the member states for compliance with the provisions on subsidies, as well as to prepare annual reports

[750] See Annex 28 para. 9 to the EAEU Treaty.
[751] See Annex 28 para. 10 to the EAEU Treaty.
[752] See Annex 28 para. 10 and 22 to the EAEU Treaty.
[753] Ibid.
[754] Ibid.
[755] See Annex 28 para. 14 to the EAEU Treaty.
[756] See Annex 28 para. 16 to the EAEU Treaty.
[757] See Annex 28, para. 19 to the EAEU Treaty.
[758] Ibid.
[759] See Annex 28, para. 19 and 20 to the EAEU Treaty.

on the same.[760] It shall also facilitate the organisation of consultations between the member states on the harmonisation and unification of their legislation on the provision of subsidies.[761] It has to adopt binding decisions for the member states on the basis of voluntary coordination of planned and provided specific subsidies, including: 1) adoption of decisions on the admissibility or inadmissibility of specific subsidies; 2) holding a hearings on provision of specific subsidies; 3) resolution of disputes on matters relating to implementation of rules on industrial subsidies; 4) to request and obtain information on granted subsidies.[762]

"If any member state has grounds to believe that provision of a specific subsidy by another member state may damage the sector of its national economy, such member state can initiate respective proceedings by the Commission. If the results of the proceedings confirm the presence of damage to the sector of the national economy, the Commission shall decide that the member state providing such specific subsidy is obliged to eliminate the conditions leading to the damage, unless the member states involved in the proceedings have agreed otherwise".[763] If a Member State in respect of which the above decision is adopted, fails to execute it within the determined time limit, other Member States may apply to the EAEU Court.[764] In the Court decides that common rules on provision of industrial subsidies are not followed by the sued member state, the applicant member state may apply the compensatory measures.[765] The member states have five years to challenge the specific subsidy since the date if was granted.[766]

Herewith, even though the Commission may initiate and investigation procedure as discussed above, the member states are also encouraged to resolve the issues by means of consultations and negotiations between themselves prior making application to the Commission. Section V of Annex 28 even provides for the special procedure on investigation of the state aid that member state may undertake with the use of its own resources. If member states do not manage to resolve the situation independently, the affected member state may ask the Commission to initiate the investigation procedure.

2.6.3.6. Difference between the EU and the EAEU rules on state aid

The primary difference between the state aid rules under the TFEU and the subsidies rules under the EAEU Treaty is that, the rules of the later are limited in their nature and apply only with respect to industrial goods and services related to their production, sale and consumption. As was correctly concluded by Assilova, the given rules may assure facilitation of fair trade only in the limited sectors, but do not support the "*creation of internal market in all the respects, which also includes services, labor and capital, as if the Eurasian Economic Union was trade organization as opposed to Economic Union"*.[767] With this respect, Assilova recommends to amend gradually the rules and make them cover also the mobile capital, which in her view will not undermine the national sovereignty, but instead will facilitate gradual creation of internal market. In addition, Assilova noted that the current rules on subsidies in greater extent resembles the WTO rules[768] in the Agreement on subsidies and countervailing measures[769] than the EU state aid rules, which one more time proves the greater similarity of the Eurasian Union with the trade organization, rather than economic union aimed at creation of single market. The EAEU rules on subsidies are similar to WTO rules on subsidies in the following aspects: 1) subsidies are prohibited not based on their effect on the trade, but rather on the objective criteria established in advanced by the member states;[770] 2) both have limited application scope in contrast to the EU state aid rules; 3) the same two types of subsidies that by default

[760] See Article 93 para. 6 subpara. 1) EAEU Treaty.
[761] Ibid, subpara. 2).
[762] Ibid, subpara. 3).
[763] See Annex 28 para. 6 to the EAEU Treaty.
[764] Ibid.
[765] See Article 93 para.7 to the EAEU Treaty.
[766] See Article 93 para. 8 EAEU Treaty.
[767] See M.Assilova, Ibid, p. 238.
[768] See M.Assilova, Ibid, p. 251.
[769] WTO Agreement on subsidies and countervailing measures (WTO Agreement on SCM), 1995, available at: https://www.wto.org/english/docs_e/legal_e/24-scm.pdf
[770] WTO Agreement on SCM, article 2, para. 2.1 (b) and Annex 28 para. 3 subpara. 2 to the EAEU Treaty.

considered as prohibited;[771] 4) the same criteria to establish whether the subsidy is de facto specific although de jure it is not specific;[772] 5) subsidies are similarly prohibited if they are limited to certain geographical points, unless that point qualify as disadvantageous;[773] 6) the same criteria used to establish whether the geographical point may qualify as disadvantageous;[774] 7) similarly, the subsidies provided to support R&D activities are not considered as specific and the definition of qualified R&D activities is precisely the same;[775] 8) member states are encouraged to resolved the conflicts on provision of prohibited subsidies by means of negotiation and consultations between the themselves prior filing application to the superior body.[776]

With respect to the similarity between the EU and EAEU rules, Assilova in her work points out to another interesting fact. She notes that in case of the EAEU, the subsidies are permitted if they are based on the objective criteria, whereas the absolute effect of such subsidies, whether it is harmful or not, is not assessed. At the same time, the objective criteria, although explicit, may be discriminatory de facto, in case for example the criteria are expressed in monetary terms, which are too high or economic indicators (e.g. number of employees), which may be common only for certain types of undertakings and in fact be specific and selective.[777] Assilova concludes that approach taken by the EAEU is contrary to what is commonly taken to assess the state aid against its effect on trade and competition and perhaps requires modification to assure fair competition.[778]

The author of this work, would like also to add that although the EAEU member states have agreed on the subsidy rules, they at the same time allow too many derogations from the same. Thus, for instance it is not allowed to provide subsidies selectively to enterprises located in the specific geographic regions, whereas such subsidies are allowed if the geographical point constitutes as disadvantageous (similar as under the WTO rules). At the same time, what constitutes in absolute terms as disadvantageous in one state, may not constitute as such in another member state, because member states are at different levels of economic developments, and the support of those regions by subsidies may in fact harm economic development of similar regions in the other member states, which are not regarded as disadvantageous therein, but as said above in absolute terms are comparable and similar to those, where the subsidies were granted. In the WTO context, this may not be so important and devastating as for the Eurasian Union context, because of the differences in the fundamental objectives (other than social) these two organizations have: where for the first one the objective is to promote and facilitate fair trade of goods and services with the minimum level of trade barriers,[779] while for the later, the primary objective is to assure single market of goods, services, labor and capital.

Another point, which represents major deviation is that in fact, the specific subsidy may be allowed if it is approved by the Commission, which is strange, because such subsidy would perhaps be selective and benefit only certain undertakings, which would hinder the establishment of fair competition and single market in general. Moreover, even though member states have a right to object against granting the permission to apply the specific subsidy, it may be challenging to assess prior its introduction, whether there will be harmful effect on economy of other member states, because each case has to be assessed separately and the evidence are required to prove the same.

From reading the provision of the EAEU Treaty on industrial subsidies, the Author of this work got an impression that EAEU member states take cautious steps towards introduction of legal measures for closer integration within the Union. From one side, their approach is not bad, because member states are only testing themselves in new positions of “member states of the economic union” and are learning to follow mutual obligations and co-exist with the first supranational institutions (even

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[771] WTO Agreement on SCM, article 3, para. 3.1. and Annex 28 para. 9 to the EAEU Treaty.
[772] WTO Agreement on SCM, article 2, para. 2.1(c) and Annex 28 para.3 subpara. 3 to the EAEU Treaty.
[773] WTO Agreement on SCM, article 2, para. 2.2, article 8, para. 8.2 (b) and Annex 28 para. 4 and 81 to the EAEU Treaty.
[774] WTO Agreement on SCM, article 8, para. 8.2(b) and Annex 28 para.82 to the EAEU Treaty.
[775] WTO Agreement on SCM, article 8, para. 8.2(b) and Annex 28 para. 78 to the EAEU Treaty.
[776] WTO Agreement on SCM, article 4 and Annex 28 section V To the EAEU Treaty.
[777] See M.Assilova, ibid, p. 239.
[778] Ibid.
[779] See WTO official webpage, available at https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm accessed on 28 February 2017.

though not fully functioning as such). But at the same time, the current approach and quite limited rules under the EAEU Treaty may not be sufficient in a long run to assure realization of fundamental objectives of the union, which may imply that serious changes of fundamental rules may be required in the founding treaty in the future.

3.2.7. Intermediate conclusion

Based on the analysis presented in the above section, the author concludes that the fundamental principles for the movement of goods are very similar in the TEU and the EAEU Treaty. But since the principles are drafted in a very general nature, they mainly represent interest for customs and other purposes rather than taxation and tax harmonization. The specific tax principles associated with the movement of goods are provided in both treaties under separate articles and equally prohibit discriminatory taxation of foreign products imported to the territory of one member state from the territory of another member state (articles 71 in the EAEU Treaty and 110 in the TFEU). Those articles in both treaties mainly were included to assure that foreign goods are not discriminate with unfavourable or more burdensome indirect taxes, and as thus do not address income tax matters associated with the movement of goods. Consequently, what concerns direct tax measures and movement of goods – then in the EAEU Treaty there is no explicit principle that would prohibit in general foreign goods and their producers and assure fair competition and creation of internal market, in a way that Article 107 on state aid prohibition may do under the TFEU. The author believes that it is a limitation of the EAEU Treaty, because currently, the rules therein on state aid aim to prohibit the use of subsidies only with respect to certain limited industries, and cannot assure creation of internal and fair market conditions with respect to all types of goods, when the issue concerns tax aspects.

Another deficiency observed by the author, concerns the fact that although the EAEU Treaty calls for the member states to work on further harmonization of taxation necessary to assure free movement of goods, it does not explicitly attribute any capacity to any of the Union's institution to facilitate and force the work of the member states on the same. The lack of such authorised institution under the Treaty may result in delaying the overall process of harmonization and cause also practical issues on the extent the Commission does in fact exercise some work together with the member states and consultative tax committee on these matters.

With respect to movement of services, in view of the author, the fundamental principles in the EAEU treaty are formulated well and in substance are similar to the principles in the TFEU from a tax law perspective. Consequently, based on their wording, they should provide sufficient legal basis to prevent common types of tax discrimination associated with the cross-border provision of services as was witnessed in the EU practice, including both direct and indirect tax measures. The author believes that in the EAEU there are legal basis to reach similar conclusions on the issues of discriminatory taxation and provision of services, as were reached in the EU practice in the cases with the most likely forms of tax discrimination. However, in view of the author, it is necessary to clarify on the legislative level in the EAEU Treaty the order of priority of application of the fundamental principles in case more than one principle may be applicable and one may assure higher protection than the other. As was discussed in the above sub-part 3.2.3.2.4. from the definition of service provider under the EAEU Treaty it may be assumed that service providers may be potentially protected under the freedom of incorporation and also freedom to provide services. To avoid potential conflict in application of principles in practice, the author recommends to clarify the same on a legislative level.

3.3. Fundamental principles for the free movement of labour and direct tax aspects

3.3.1. Principles for the free movement of persons under the TFEU

Freedom of movement of person is one of the EU fundamental and essential objective.[780] This is also an important element of the internal market – an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the EU Treaties.[781] In the EU, freedom for movement of persons implies the right of individuals for employment in other member states and also the right to be self-employed and carry out business activities in other member states, including establishment of companies. The right of employment is envisaged under

[780] See Explanatory memorandum to the EU Commission recommendation of 21 December 1993, para. 1

[781] See Article 26 para. 2 TFEU.

article 45 TFEU and is commonly referred as the free movement of workers or labour. The right for individual business activities is envisaged under article 49 and is commonly referred as the right of establishment and is equally applicable to business undertakings. The EU attaches great importance to the promotion of workers mobility and especially in the border regions.[782] The distinction between whether the person is exercising the freedom for movement of services or free movement of labour was clarified in the CJEU Case C-55-94 Gebhard, where the Court stated that freedom for provision of services shall refer to a more temporary activity, whereas free movement of workers and freedom of establishment are of more fundamental and long-lasting activity in its nature.[783] In the following section the author will examine the provision from the perspective of movement of labour and compare the same to the EAEU principle for the movement of labour, because in contrast to the TFEU, which has general principle for the movement of persons, the EAEU has specific freedom regulating movement of labour.

Article 45 assures free movement of workers by prohibiting any discrimination based on the nationality between workers of the member states. It states that "freedom of movement for workers shall be secured within the Union. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work and employment".[784] Article 45(3) provides certain cases, in which the limitations to the free movement of workers may be justified, and in particular include cases justified on the basis of public policy, public security or public health.

In a court practice, the article was interpreted as prohibiting indirect discrimination: "conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or the great majority of those affected are migrant workers, where they are indistinctly applicable but can be more easily satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of migrant workers".[785] However, such discrimination may also be justified in case it is explicitly provided in the TFEU or based on objective justification as was defined by the CJEU. With respect the rule-of-reason, the Court stated that "it is otherwise only if those provisions are justified by the objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by national law."[786]

From a tax law perspective, the article 45 was interpreted by the CJEU as the freedom, which addresses both states – the state of which the worker is the national (the state of origin or home state) and the state, where employment is exercised (state of employment or source state) – and prohibits discriminatory treatment of nationals of other member states, including tax measures that may preclude cross border movement of labour. Particularly with respect to tax discrimination, the Regulation 1612/68 explicitly requires member states to assure that workers from another member states "enjoy the same social and tax advantages as national workers".[787] The rule encompassed under the Regulation 1612/68 explicitly addresses only the state of employment by requiring it to grant the same social and taxation benefits, as it grants to its own nationals. Over the years, the principle of non-discrimination in taxation of individuals and income derived from employment received a great development and interpretation in the EU. The great portion of attention was in particular devoted to determination of tax base for personal income taxation and treatment of allowable personal deductions and allowable deductions associated with personal expenses, especially this problem was highly visible in case of frontier workers. More rarely the cases concerned other issues, such as tax rates and payroll taxes.

With respect to the right of establishment, article 49 of the TFEU similarly requires member states to eliminate national measures that may prevent free movement of persons for this purpose. Article states that "restrictions on the freedom of establishment of nationals of a member state in the territory of another member state shall be prohibited." This article is also general and equally imposes

[782] See Explanatory memorandum to the EU Commission recommendation of 21 December 1993, para. 1
[783] See Case C-55/94 Gebhard, p.17 and 25.
[784] See Article 45 TFEU.
[785] Case C-237/94 O'Flynn, para. 16.
[786] Case C-237/94 O'Flynn, para. 17.
[787] See art. 7, Regulation 1612/68 dated 15 October 1968 on the Freedom of movement for workers within the Community, available at: http://aei.pitt.edu/36408/1/A2602.pdf accessed on 2 March 2017.

obligations on member states of origin and establishment requiring them not preclude the right of establishment by imposition of restrictive or discriminatory national measures. This article was also frequently invoked by the CJEU in cases related to taxation of personal income. Such cases often concerned the deductibility of business expenses related to activities exercised in the member state of establishment, but also other personal expenses and other issues. In one of the first cases, the CJEU acknowledged that comparison of articles 45 and 49 of the TFEU showed that "they are based on the same principles both as regards entry into and residence in the territory of the member states by persons" covered by the EU law "and as regards the prohibition of all discrimination against them on grounds of nationality".[788] The same the CJEU believes applies to the pursuit of an economic activity in the territory of the member states by persons covered by the EU law.[789]

3.3.2. Tax impediments on the way for the free movement of labour – as EU experience shows

Freedom of movement for persons is still frustrated by the existence of a number of tax provisions which, when applied, usually trigger persons exercising freedom of movement in the state other than the one where they are residents to be taxed in that other state in a less favorable manner than the residents of that other state.[790] Therefore, associated tax obstacles may arise in state of employment, who is discriminating foreign employee usually on the basis of tax residency , but also they may arise in the home state (state of origin or nationality), which will try to limit the incentive for the person to move for employment in other member state. Based on the EU Commission estimates, there are hundreds of thousands of people who are subject to discrimination, including very often frontier workers, recipients of pensions and other similar remuneration in consideration of past employment, self-employed and employed persons, persons exercising agricultural, forestry, industrial and commercial activities.[791]

What happens, persons exercising fundamental freedom for the free movement are taxed in the states of employment (activity) and such member states treat them under non-residents tax regimes, which are usually different from those applied to tax residents. Among other issues, major problem is associated with deduction of personal expenses for PIT purposes. Such deductions are usually provided by states exclusively to tax residents there, while non-residents do not have such right and are taxed on a gross basis. In case of person, who is employed in one state, but remains to be tax resident of another member state, the right for deduction may be completely lost, because in the state of residence he may have no or very little taxable income, so that he cannot utilize his right for deductions, whereas in the state of employment, where he has most or major part of his income, he may not have the right for personal deductions, because he is not considered as tax resident there. Basically, under this arrangement, only income from sources within the country of employment is taxed, with no provisions being made for tax reliefs on grounds of family circumstances or for the various deductions for which residents are eligible, considering that such advantages should be granted by the country of residence.[792] The personal deductions may of different nature:

1) personal allowances, for example, fixed amount of base minimum salary that is non-taxable, fixed amounts associated with personal circumstances of taxpayer: such as number of young children and other family dependents);

2) personal expenses, such as cost of children education, medical expenses, interest on mortgage loan, payment of social and insurance contributions and other similar expenses. The often problem associated with these types of expenses is that person, being employed in one state, may incur the above expenses in the other state (e.g. state of its origin, where his family is residing or pension fund is located), and on this basis, the state of employment may not be willing to accept for deduction such payments.

3) business expenses, associated with individual business activities.

4) additionally, in some member states, the married couples may be disadvantaged on other grounds. Depending on a member state, married person may be granted a right for joint assessment with his

[788] See C-106/91 Ramrath v Ministre de la Justice [1992] ECR I-3351, para. 17.
[789] See C-107/94 Asscher v Staatssecretaris, decision dated 27 June 1996, para. 29.
[790] See Explanatory memorandum to the EU Commission recommendation of 21 December 1993, para. 1
[791] See Explanatory memorandum to the EU Commission recommendation of 21 December 1993, para. 1
[792] See Explanatory memorandum to the EU Commission recommendation of 21 December 1993, para. 2

spouse through "splitting" system or a family coefficient relief or other allowances. However, if couple resides or works in different member states, such right may be limited.[793]

In case of EU, person can move for employment or self-employment in another member state in two different ways, which for tax purposes present significant importance and cause difference in tax treatment. The person exercising freedom for movement may qualify either as "migrant worker" or the "frontier worker". The term "frontier worker" is defined under the EU law as worker who pursues his occupation in the territory of one member state and resides in the territory of another member state to which he returns as a rule daily or at least once a week. What distinguishes frontier workers from traditional migrant workers is the fact that the migrant worker leaves his country of origin completely, with or without his family, to live and work in a different country.[794] The frontier worker, by contrast, has a dual national allegiance, stemming from his place of residence and his place of work.[795]

From the tax perspective, migrant worker has a high chance to be treated as a tax resident in the country of his employment after some time (e.g. after six months of employment), which means that problem with deduction of at least personal allowances may be of a temporary character, unless such person remains to be tax resident in the state of his origin due to strong family connection, place of domicile or other factor determined by the national tax law.[796] However, although, the migrant worker may at some point qualify as tax resident in the state of employment, other personal deduction may still represent a problem for him, because the new state of tax residence may disallow the deduction of personal expenses, connected or incurred in another member states, such as for instance, insurance contributions or expenses associated with education of children in the state of initial tax residence (state of nationality).

What concerns the issues with frontier worker, in the EU, this class of workers is especially vulnerable for tax discrimination. Because of the proximity between the EU bordering cities, it is very common for person to undertake employment in one member state, while having the place of his residence and the place where his family lives in the other member state. This implies that person will be tax resident in the state of his nationality, will be liable to tax there on his worldwide income and will have the right for personal deductions. In contrast, in the state of employment, the person will have source of his income, will be liable to tax there only with respect to this income, but usually will not have right for deductions there and may be taxed on a gross basis.

3.3.2.1. Treatment of personal allowances and expenses

Gross taxation of non-residents and net-taxation of residents is in line with international tax law standards, because residents and non-residents are considered to be in different positions and therefore may be taxed differently. In the EU practice and due to the EU fundamental principles this internationally accepted standard is not always applicable and correct. The issue of determination of tax base of the employment income started in the EU with the Schumacker case in early 90s, where a Belgian citizen and tax resident was earning his entire income in Germany. Upon calculation of personal income tax liability in Germany he was denied the right to account for personal allowances provided under the German legislation, since he was not tax resident therein and at the same time he could not use personnel allowances provided by Belgium, since he did not have sufficient income from Belgian sources. In that and also in the following cases on employment income taxation, the CJEU takes the view that resident and non-resident employees are usually not in the same or similar objective circumstances and this should justify source states in denying national tax treatment to non-resident employees.[797] The Court takes the general view that source (employment) state is 1) first of

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[793] For this see Explanatory memorandum to the EU Commission recommendation of 21 December 1993, para. 2

[794] See Directorate General for Research Working Paper, W16A, "Frontier workers in the EU", European Parliament, available at: http://www.europarl.europa.eu/workingpapers/soci/w16/summary_en.htm accessed on 2 March 2017.

[795] Ibid., section 1.1.

[796] Depending on the definition of tax residency in the home state and provisions of Art.4 in the relevant double tax treaty if applicable.

[797] See also Gschwind, C-391/97, which was decided after Schumacker and was based on the German law updated after Schumacker case. See also Renneberg, C-527/006, where the required the state of employment to accept the deduction of interest associated with the mortgage in the state of residence of person, although

all is not in the possession of information about the resident of other member state, its family situation and ability to pay tax and 2) secondly, the court assumes that most part of income of non-resident is concentrated in other member state (residence state) and therefore the right for personal allowances should be utilized there.[798] In Schumacker case, however, the Court makes an exception from its general view and requires the source (employment) state to grant the right to individual for deduction of personal allowances taken that individual earns *"major part of his income and almost all his family income in a member state other than of his residence"* and *"discrimination arises from the fact that his personal and family circumstances are taken into account neither in the state of residence nor in the state of employment."*[799] This decision serves as a grounding basis in many further cases, requiring in general only the residence state to grant personal tax allowances, and only in very exceptional cases requiring the country of source to do the same.

There are scholars who do not support the position of CJEU in these matters and believe that the justification provided by the CJEU in the grounding and further cases is generally incorrect.[800] They believe that the source (employment) state should equally be obliged to account for personal allowances upon calculation of personal income tax of non-residents. The source state however, may allow deduction of only fraction of personal allowances taken the proportion of income earned therein to the total income of individual.[801] This logic is explained by the fact that although in some cases the allowances may be fully deducted in the residence state, this benefit of deducted personal allowance may be taken away upon granting of tax relief with respect to foreign income and also it is unfair to make the state of residence to allow 100 per cent of deductions.[802]

The same principle requiring source states to treat non-residents as if they were tax residents and grant deduction of personal allowances in proportion to the income earned therein to the total income of non-resident was expressed in earlier EU (EEC at that time) Commission proposal for directive concerning the harmonization of income taxation provisions with respect to freedom of movement for workers in 1979.[803] This was the principle proposed by the Commission with respect to taxation of ordinary non-resident workers (migrant workers). The same article also provided for the right of the source state to determine applicable tax rate to the non-resident income, as if he would be a resident, which implies consideration of worldwide income of non-resident for determination of the rate, should the rate be progressive in the source state. Herewith, with respect to the taxation of frontier workers, at the same proposal for directive the Commission proposed exclusive taxing right for the resident states, with an option for the source state to apply the withholding tax and obligation of the resident state to grant full tax credit with respect to the foreign income paid and refund of excessively collected withholding tax.[804] The proposal of 1979 additionally required member states of employment to provide equal tax advantages for the payments made by individuals with regard to acquisition of services for the personal needs, irrespective of the place where the recipient of this payment situated. However, the proposal for directive was later withdrawn by the Commission in view that member states are better to resolve the problem on a bilateral basis and inability of the source states (states of employment) to unilaterally refuse from the taxing right.

Later in 1994, the EU Commission presented updated recommendation on taxation of income received by non-residents in the states of employment. However, in that recommendation, the Commission changes its approach in comparison to the one presented in 1979. In particular, although

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the same deduction was not possible under the national legislation of the residence state and neither under the applicable double tax treaty the employment state reserved a right to tax the property in question obtained due to the mortgage arrangement in the state of residence.

[798] See para. 32 and 33 in Schumacker case 279/93.

[799] See para. 38 in Schumacker Case 279/93.

[800] See B. Terra, P. Wattel, *European Tax Law,* Ch. 21.4 (Wolters Kluwer Law & Business 2012) p. 980-994.

[801] See B. Terra, P. Wattel, *European Tax Law,* Ch. 21.4 (Wolters Kluwer Law & Business 2012) p. 984.

[802] The particular mechanism and calculations are provided on p. 986, in Terra, P. Wattel, *European Tax Law,* Ch. 21.4 Wolters Kluwer Law & Business 2012) p. 986.

[803] See article 7 para. 2 of the COM (79) 737 final, EU Commission Communication dated 13 December 1979 with the Proposal for a Council Directive concerning the harmonization of income taxation provisions with respect to freedom of movement for workers within the community, available at: http://aei.pitt.edu/12268/1/12268.pdf accessed on 6 October 2016.

[804] The member states however were expected to agree on the apportionment of the cost of refund with each other. See article 5 of the COM (79) 737 final.

it still advises member states to treat non-residents in the state of employment as if they were tax residents there, it recommends to make such treatment conditional upon on whether such non-resident receive in that state of employment *preponderant part of his income* and establishes treshhold of at least 75 % of its total taxable income.[805] The Commission additionally recommended the resident states not to grant deductions or other tax reliefs to the resident, who got similar advantages in the state of employment. The position taken by the Commission in 90-s is therefore different from the initially expressed ideas and was later followed by the Court.

The existing court practice in the EU, however, demonstrates that latest proposal of the Commission requiring "75% of total income to be earned in the state of employment" and the requirement of the court to "earn major part of income" in the state of employment to get tax treatment comparable to tax residents may not be sufficient to resolve the current problems, since the real life cases may be more complicated, involving more than two states and also situations where individual earns more or less equal amount of income in two or more states, not reaching therefore the established thresholds.

Due to divergence among tax systems, it is difficult to find one common solution or standardized principle for the issue with personal deductions that would simultaneously account for fundamental principles, satisfy the interests of member states by not impinging their tax sovereignty and also prevent tax measures hindering the free movement of persons. So far, due to the Commission's recommendations that were followed by the CJEU decisions and developed Schumacker doctrine, the rules applicable in the EU for personal income taxation from employment or self-employment are close to the international standards endorsed by the OECD, where the state of residence is responsible to account for personal circumstances of its individuals and where necessary provide personal deductions, even though sometimes disproportionate. Herewith, in the EU due to fundamental principle of non-discrimination, the state of source (employment) may also be required to provide the right for personal deduction and equal taxation of residents and non-residents, where "there is no objective difference between the two such as to justify different treatment in that regard".[806] Consequently, the residents and non-residents are considered to be in comparable circumstances where the non-residents undertakes significant part of its economic activity in the source state and earns major part of its income therein. Some scholars note that, although Schumacker doctrine may be clear in principle, it is not so straight forward and easy in implementation.[807] With this respect, implementation by member state also varies. Thus, for instance Austria, Germany, the Netherlands, Portugal and Sweden provide an option for non-resident workers to be taxed as residents on their worldwide income, however this option is usually linked proportionally to amount of income earned respectively on their territories.[808] Other countries, like Belgium, Denmark, Estonia, Finland, Hungary, Ireland, Latvia, Luxembourg, Spain, also allow use of tax deductions, but not all that are allowed to residents and also under condition that non-residents earn 75% and more income on their territories.[809]

By the way, apart from the above principles that member state try to follow in their domestic legislations, many of them also attempted to resolve the problem of taxing non-resident workers by bilateral tax treaty agreements. The provisions of respective agreements in many cases were modified to include provisions on exclusive taxing rights either by the member states of employment or by the member states of residence. In case of later, the problem of personal deduction and discriminatory treatment in the state of source is eliminated fully. While, in the first type of agreements, in order to prevent discriminatory taxation, member states of employment still have to account at least for Commission's recommendations in their national legislations.[810] Finally, some double tax treaties contain now special provisions on treatment of frontier workers and also definition of frontier

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[805] See article 2 para. 2 Recommendation 94/79/EC dated 21 December 1993.
[806] Schumacker, para. 36-38.
[807] The Impact of the rulings etc. ibid, p. 26.
[808] Ibid., p. 26.
[809] Ibid, p. 26.
[810] For example of main double tax treaties that have been amended to accommodate the issue with taxation of personal income in the EU see at http://www.europarl.europa.eu/workingpapers/soci/w16/summary_en.htm accessed on 3 March 2017.

zones.[811] Similarly, full tax discrimination is eliminated only in cases when residence states preserve exclusive taxing rights.

3.3.2.2. *Treatment of business related expenses incurred by individuals*

Individuals exercising the right of self-establishment and engaged as self-employed persons in the other member states may have difficulties with deductibility of business expenses incurred there in connection their professional activities aimed at earning income. The problem again arises in the situations, when self-employed person do provide services or exercises their professional activities in the member states, but are not considered there as tax residents and are therefore taxed on gross basis as it is acceptable under the international tax law principles. This issue represents a separate line of case law in the EU and is different from the doctrines developed with respect to the deduction of personal allowances and personal expenses of individuals. If, with respect to deduction of allowances and expenses incurred in connection with family and personal circumstances of individuals, the CJEU believes that it should be the state of residence, who is primarily responsible to account for such expenses, then with respect to recognition and account of business related expenses by individuals, the CJEU takes opposite position. Thus, the CJEU states that as long as the business expenses of non-resident in question are directly linked to the activity that generated taxable income, then the residents of the member states where the activity took place and the non-residents, which undertook that activity are placed in a comparable situation in that respect.[812] The Court continues that in those circumstances, a national legislation, which "refuses to allow non-residents to deduct expenses, whereas residents are allowed to do so, risks operating mainly to the detriment of nationals of other member states and therefore, constitutes indirect discrimination on grounds of nationality".[813] Herewith, such restriction in Gerritse case (234/01) was found by the CJEU contrary and precluding the freedom for provision of services under the EU law, rather than freedom for movement of persons. This, however, does not change the conclusion of the Court with respect to deduction of income related expenses.

The similar conclusion was reached by the Court in the case Scorpio (290/04). However in that case the Court elaborated further on the decision and clarified that member states are not obliged to account and allow for *immediate* deduction of business expenses, which are indirectly linked to the income, in view that such expenses can be taken into account if appropriate in a subsequent refund procedure under the national legislation of the member state, where the income is derived from.[814] In the later case Centro Equestere da Leziria Grande (C-345/04), the CJEU expressed its understanding of what constitutes the directly linked expenses. In view of the Court, it shall be understood as "expenses which have direct economic connection to the provision of services, which gave raise to taxation in that State and which are therefore inextricably linked to those services, such as travel expense or accommodation costs," whereas the place and time at which the costs were incurred are immaterial.[815]

So, in this line of cases the CJEU considers the residents and non-residents in a comparable situations with respect to the deduction of business related expenses and consequently places more obligations on the source member state to account for deduction of such expenses.

3.3.2.3. *PIT rates and related issues*

Finally, the last series of cases devoted to taxation of income from employment relates to the tax rates of personal income taxes. Many EU member states use progressive personal income tax rates for taxation of their residents, whereas non-residents may be taxed with the standard withholding income tax rate, which applies to gross income of individual and does not account for the personal circumstances of individual, its overall annual income, personal allowances and deductions. Application of progressive rate implies that the effective rate of tax increases as the level of income increases, which means that certain amount of income is taxable with zero or low income tax rate and the rate increases gradually and proportionately to the increase of personal income.[816] The

[811] See Explanatory memorandum to the EU Commission recommendation of 21 December 1993, para. 9.
[812] See decision dated 12 June 2003 in C-234/01, Arnoud Gerritse v. Finanzamt Neukolln-Nord, p.27.
[813] Ibid, see. Para. 28 and para. 55.
[814] See decision dated 3 October 2006, C-290/04, Scorpio, p. 52.
[815] See decision dated 15 February 2007, C-345/04, Centro Equestere da Leziria Grande, p. 25.
[816] See L.Burns and R.Krever in V.Thuronyi "Tax Law Design and Drafting", 1998; Ch.14, Individual Income Tax, p. 52.

underline reason for use of flat rate in case of non-resident is that because for the state of source it is often impossible to assess the personal circumstance of non-resident, its ability to pay and overall annual income, which is important to determine the applicable tax rate scale. Consequently, applicable withholding tax rate is usually set at an average value, and thus is lower than the highest personal marginal income tax rate applicable to residents. However, in certain cases the effective rate of withholding taxes may also exceed the highest personal marginal income tax for instance because it is levied on a gross basis, while the ordinary progressive rate scale is applied to net income.[817]

In a number of cases, the CJEU had to assess whether such flat withholding tax rates applicable to non-residents put non-residents in a less favourable or discriminatory positions in comparison to tax residents. As practice shows, an assessment of whether due to applicable tax rates, the non-resident individual is put in a less disadvantageous position than tax-residents in a particular member states, shall be assessed in each case separately, because the issue requires consideration of personal circumstances of individuals and also interaction between the member states tax systems, which will vary in each case. However, in general, the Court concludes that as long as the flat withholding tax applicable to non-residents "is not higher than that which would actually be applied to the person concerned in accordance with the progressive table, in respect of net income increased by an amount corresponding to the tax-free allowance"[818] the member states are not precluded from using it. In other words, in view of the Court, "with regard to the progressivity rule, non-residents and residents are in a *comparable situation*, so that application to the former of a higher rate of income tax than that applicable to the later and to taxpayer *who are assimilated* to them would constitute indirect discrimination prohibited"[819] by the EU law, in particular by article 57 TFEU. The same conclusion was expressed by the Court in an earlier case dealt with taxation of self-employed individual, where the Court underlined that article 49 on the right of establishment precludes member states "from applying to a national of a member states who pursues an activity as self-employed person within its territory and at the same time pursues another activity as a self-employed person in another member states, in which he resides, a higher rate of income tax than that applicable to residents pursuing the same activity where there is no objective difference between the situation of such taxpayers and that of taxpayers who are resident or treated as such to justify that difference in treatment".[820]

However, taken the complexity of issue and unpredictability whether the tax outcome will be discriminatory with respect to particular individual, in view of B.Terra and P.Wattel it is useful for the states to resolve the problem with potential discrimination by granting non-resident individuals an opportunity of adjust assessment upon request.[821]

3.3.2.4. Transfer of residence

Under the EU law, in addition to fundamental freedoms linked to economic activities, individuals may also enjoy the right to move and reside freely within the territories of member states subject to some conditions and limitations.[822] However, any discrimination on ground of nationality shall be prohibited.[823] With this respect, the CJEU has stated that any "provisions which prevent or deter a national of a member state from leaving his state of origin to exercise his right to freedom of movement constitute an obstacle to that freedom".[824] One of such measure which is highly debated in the EU is the "exit tax". Some time ago, the CJEU was recognising this type of tax and methods of its administration as not compatible with the EU fundamental freedoms,[825] whereas with the recent developments it is actually encouraged to prevent tax avoidance schemes.[826] In context of individuals, exit tax may be imposed upon emigration of persons from their countries of residence or when they relinquish the citizenship. The tax may be imposed on the basis of the gain that would result from a

[817] Ibid. p.52.
[818] See decision dated 12 June 2003, C-234-01, Gerritse, p.55.
[819] Ibid, para. 53.
[820] See decision dated 27 June 1996, C-107/94, Asscher, p. 62.
[821] See B. Terra, P. Wattel, *European Tax Law,* Ch. 21 (Wolters Kluwer Law & Business 2012) p. 976.
[822] See Article 21 para. 1 TFEU.
[823] See Article 18 TFEU.
[824] See decision dated 12 December 2012, C-385/00, de Groot, para. 79.
[825] See C-9/02 De Lasteyrie, see also C-470/04, N v Inspecteur van de Belastningsdienst Oost.
[826] See Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

hypothetical disposition of the taxpayer's assets, for example shares in companies (especially foreign), referred to as a mark-to-market regime, or on an alternative basis that measures an amount of previously un-taxed income that is attributable to the former jurisdiction of residence.[827] Exit tax may represent a serious hindrance for the free movement of persons, because in most cases it attempts to tax something, which does not yet exist – the gain, which was not yet realized by the taxpayer, but the cash payment with respect to which is required by the state of current residence.[828]

With this respect, earlier in 2004 the CJEU decided on the case de Lasteyrie (C-9/02), where it gave valuable interpretation of the freedom of establishment in the context of French legislation, under which individuals were taxed on unrealized increase of value of securities upon leaving France and abandoning tax residence there. In case in question, Mr Lasteyrie was taxed with respect to unrealized increase in value of shares held in French company upon his move from France to Belgium. In view of the CJEU, the application of exit taxation does not prevent a taxpayer from exercising his right of establishment, but this type of taxation is "nevertheless of such a kind as to restrict the exercise of that right, having at the very least a dissuasive effect on taxpayers wishing to establish themselves in another member state".[829] The Court concluded that a taxpayer who wishes to transfer his residence in another member state and exercise the right of establishment is subject to disadvantageous treatment in comparison to those who maintain their residence in the same member state. Taxation of residents on a realization basis and departing individuals on accrual basis constitutes an obstacle for the free movement in view of the Court.[830] The same opinion the Court had with respect to measures that member states may take to assure taxation of capital gain not at the moment of departure, but later in time, such as financial guarantees, suspension of payment until certain moment and other similar measures. The Court believed that such measures constituted the restrictive effect "in that they deprive the taxpayer of the enjoyment of the assets given as guarantee".[831] Herewith, in later case the Court added that it is appropriate for the member state of departure to assess the amount of income on which it wishes to preserve its tax jurisdiction taken that the tax is not charged immediately and there is no conditions attached to deferral. Although in view of the court the demand to present declaration upon transfer of residency was an administrative formality that may hinder exercise of the fundamental freedom, it was still in line with the principle of fiscal neutrality, as long as it was based on the fact that person has derived a taxable income while being a resident on the territory of the member state concerned, and moreover would serve as a basis to avoid double taxation later in time due to potentially conflicting rules between the member states of departure and new tax residence.[832]

Despite the above arguments, the CJEU opposed its own view in a later cases starting from in 2011. In *National Grid Indus*[833] the CJEU confirmed that the member states have rights to impose tax on migration of its tax residents because they is entitled to tax the economic value generated by an unrealized capital gain in its territory even if the gain has not yet actually been realized. Similarly, as in the cases with migration of individuals, the Court stated that the immediate recovery of tax claim is disproportionate.[834] Herewith, in contrast to its previous opinions, the Court recognised that actually deferral of taxes is associated with the risk of non-payment and costly tracing of assets by both – the taxpayer and tax authorities, and therefore stated that requirement for provision of a bank guarantee and charge of interest of deferred payment may be an appropriate measure by the member states.[835] Herewith, scholars believe that this development applies only to companies, while taxation of individuals remains under the principles developed in de Lasteyrie and N cases.[836]

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[827] See IBFD tax glossary for definition.

[828] For more on the same see, EU Commission Com (2006) 825 dated 19 December 2006, Communication from the Commission on Exit taxation and the need for co-ordination of member states' tax policies.

[829] See C-9/02 De Lasteyrie, para. 45.

[830] See C-9/02 De Lasteyrie, para. 46.

[831] See C-9/02 De Lasteyrie, para. 47. See also C-470/04, N v Inspecteur van de Belastningsdienst Oost.

[832] See also C-470/04, N v Inspecteur van de Belastningsdienst Oost, p.49.

[833] See decision dated 29 November 2011, *National Grid Indus*, Case C-371/10.

[834] Ibid, para. 65.

[835] Ibid. para.74.

[836] See V. Dabija, Exit Taxation in the European Union: Is there really a problem? p.18, 2015. See also T. Kaye, *Direct Taxation in the European Union: From Maastricht to Lisbon*, Fordham International Law Journal, p. 1257 (2012).

Although there were communications from the Commission and number of court decisions taken on this or similar issues that tirggered changes in the national legislations of member states, the problem of discriminatory taxation of non-resident employees still remains in the EU along with the problem of double taxation. As was outlined in the EU Commission Communication of 2010,[837] around 3-4% of total annual queries raised by the EU citizens concern tax issues. Cross-border employees still often undergo serious problems of tax discrimination, double taxation, problems in claiming tax refunds and in general difficulties in obtaining, understanding and complying with other member states' tax rules.[838]

3.3.3. Provision affecting personal income taxes and free movement of labour in the EAEU

Section XXVI of the EAEU Treaty contains principles regulating the movement of labour within the Eurasian Union. The principles envisage the right of individuals for both – employment under the employment agreement and provision of services under the civil contracts. With this respect, member states cannot impose and apply protective measures, envisaged in the national legislations for protection of their national labour market, unless otherwise is provided under the EAEU Treaty or the national measure in question is used to assure national security, including sectors of economy of strategical importance.[839] This is the only general provision in the EAEU that may give space for interpretation and in theory be invoked in tax related cases as fundamental freedom. Herewith, the provision is very general and should ever it be interpreted in a tax related case it is more likely to address potential discrimination only in the state, where the person would seek to find employment and exercise the freedom, but not the state of its origin or nationality. This is the major difference one could observe between the principle for the movement of workers under the EAEU Treaty and TFEU. Other provisions under section XXVI of the Treaty related to movement of labour are worded in a form of more detailed rules but on specific aspects, such as recognition of professional degrees, rights of individuals for social and medical care and other social aspects.[840]

Further on, in contrast to the EU, where the personal income taxation is regulated only by means of fundamental principles interpreted by the CJEU, the EAEU Treaty briefly addressed imposition of personal income taxes employees exercising the freedom for movement. Article 73 touches the surface of personal income tax requiring member states to impose equal tax rate on income from employment earned by tax residents of the other member states irrespective of tax residency status of an individual, promoting movement of labor in this way.

> "If, in accordance with its legislation and provisions of international treaties, a Member State is entitled to levy the income tax from a tax resident (permanent resident) of another Member State in connection with his/her employment in the first Member State, such income tax shall be levied in the first Member State starting from the first day of employment at the tax rates stipulated for such income of natural persons - tax residents (permanent residents) of the first Member State".

The article obliges member states of employment to apply equal tax rates of personal income tax to the income of employed persons (nationals of other member states) irrespective of whether such person is a tax resident or not. There is no differentiation between the general non-resident employees and frontier workers, as it is established in the EU. Partially it may be explained by the fact that in the Eurasian context frontier workers as such would not be so widely common as in the EU due to the geographical position of member states, distances between bordering cities and document control on the borders. The above provision therefore addresses the problem that labour migrants from other member states would face in employment states for the first few months, until they acquire tax residency status. The problem would in particularly arise for migrants going to work in Russia or Kazakhstan, where the rates of personal income tax on income from employment vary from 13% to

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[837] See EU Commission Communication dated 20 December 2010 "Removing cross-border tax obstacles for EU citizens", Com(2010)769, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011AE1169 accessed on 6 October 2016.

[838] See B. Terra, P. Wattel, *European Tax Law,* Ch. 4 (Wolters Kluwer Law & Business 2012) p. 202.

[839] See Article 97 para. 2 EAEU Treaty.

[840] For more information on the general provision for the movement of labour under the EAEU Treaty see S.Aliyev, Labour migration within the framework of Eurasian Economic Union, Praktika Integracii, No 4 (29), 2015. Original: С.Алиев, Трудовая миграция в рамках Евразийского Экономического Союза, Практика интеграции, No 4 (29), 2015.

30% and from 10% to 20% for residents and non-residents respectively.[841] In other member states there are currently equal tax rates applicable to residents and non-residents and this problem would not arise in the near future.

On the basis of principle envisaged in the article, which requires application of equal tax rate on employment income of residents and non-residents, it may be assumed that in accordance of EAEU Treaty, in the Eurasian context the discriminatory taxation of non-resident employees is in general considered as restricting the free movement of labour. Developing this idea further, one could assume that principle incorporated in this article, may generally be regarded as requiring equal taxation of resident and non-resident employees from other member states. However, unfortunately, the problem with taxation of income from employment is only partially addressed by this article since it addresses the tax rate, but not the tax base of personal income tax, which is as equally important to determine the tax liability. There are no official commentaries to the EAEU treaty explaining the reason, why the issue of tax base is omitted from the scope of this article. The author tends to believe that the issue with determination of tax base is not so obvious and therefore was not omitted deliberately, but perhaps has not been fully realized by the member states upon negotiation of Treaty as an obstacle for integration. By not giving guidance on determination of tax base, an in particular on deduction of personal allowances by source and residence states, the Treaty leaves it upon desecration of member states to decide. This is confirmed by one more provision in the Treaty, which says that:[842]

> Income of workers of a Member State generated as a result of employment in the state of employment shall be taxable in accordance with international treaties and legislation of the state of employment subject to the provisions of this Treaty.

The provision does not contain any new principle, but simply reiterate the right of the source state to tax income earned therein and reminds on applicability of double tax treaties. It therefore leaves the taxation of income from employment at full discretion of member states and does not elaborate further on whether resident and non-resident employees should be granted an equal treatment. The provision, however, precise that such taxation should be in accordance with the EAEU Treaty provisions.

As was discussed in the context of EU practice, the list of personal deductions and associated rules are usually determined and vary from one state to another, but often such deductions are reserved only for the tax residents. This also the situation in all EAEU member states, where the non-residents receiving income from employment are taxed on gross basis, whereas residents can account for deduction of personal allowances. Taken that this is the general approach of EAEU member states and also the practice of international tax law, the EAEU employments states will therefore still discriminate cross-border workers, until such workers acquire tax residency status therein. It looks like there will be inconsistency in the EAEU practice. The non-residents income from employment would be taxed with the rate that also applies to income of residents, but the tax base would nonetheless be different and higher in case of non-residents due to limitations in the national laws.

3.3.4. Intermediate conclusion

The fist fundamental difference between the TFEU and the EAEU Treaty is that the movement of labour is regulated under different freedoms. In the EAEU treaty it is regulated under specific provisions – "for the movement of labour", whereas in the EU, the same is regulated under the principle for the free movement of persons, which in addition to movement of workers, also regulate movement of self-employed persons and legal entities. Consequently, for comparative purposes, under this section the author considered the respective EU freedom only partially – to the extent it is applicable to the movement of workers, whereas its application to the movement of self-employed persons and legal entities is discussed and compared to the EAEU practice in section 3.4. of this work.

What concerns the substance of both freedoms under the EAEU Treaty and TFEU, then the author tends to conclude that the freedoms for movement of workers/labour are not exactly similar. In accordance with interpretation that this principle got in the EU practice, it protects workers from both perspectives – the perspective of their origin state of nationality and also from the perspective of the

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[841] See article 224 para. 1 of the Tax Code of Russia.
[842] See article 98 EAEU Treaty.

state, where they seek to exercise the freedom. Therefore, potentially discriminative tax measures shall be prohibited in both countries involved. In contrast, under the EAEU Treaty, the general principle, even if ever applied in tax related case, may assure potential protection from discrimination only in the state, where an individual would be exercising the freedom, i.e. state of employment or provision of services, but not the state of origin.

Further on, the EAEU Treaty is also different from the TFEU, to the extent that it incorporates particular rules on imposition of personal income taxation upon employment of nationals of one member state on the territory of another member state. In the EU laws (primary and secondary) no rules on the same were issued so far yet.

Based on this rule in article 73 of the EAEU Treaty, as a general conclusion, the author sums up that requirement for application of equal tax rate to the employment income of residents and non-residents in the EAEU member states signifies general adherence of the EAEU to the principle prohibiting less-favourable or discriminatory taxation of non-residents with respect to their employment income in the country of source. The responsibility to eliminate discriminatory or less favourable treatment at least in this minor form is imposed on the member state of employment (source of income). However, since, the EAEU Treaty does not comment on the second issue with determination of tax base, it is currently impossible to conclude whether the EAEU approach is fully or only partially different from the practice developed in the EU with respect to taxation of income from employment.

Nevertheless, the EAEU requirement on application of equal tax rates on employment income of residents and non-resident goes further than the principles established in the EU – the article in the EAEU Treaty partially regulates and even harmonized the method for application of personal income tax. At the same time, the problem with discriminatory taxation of cross-border (non-resident) workers would perhaps be less sensitive and visible in the Eurasian context in comparison to the EU. First of all, in general there is low likelihood that the problem of "frontier workers" will appear in the Eurasian region due to the fact that there are less chances for workers to live in one country and travel regularly to another, taken the geographical position of countries, distances between bordering cities and document control on the borders. Secondly, those cross-border employees who will actually migrate to acquire new job in other member state will perhaps suffer discriminatory tax treatment as non-residents only for short period of time until they acquire tax residency status. The lower scale of the problem, however, does not mean that the problem may be neglected, however it may be resolved as a secondary issue, which was probably also the intention of legislator. The principle envisaged in article 73 on partially equal tax treatment of resident and non-resident should be noted and it will be taken into consideration further in this work, upon analysis and comparison of principles regulating or influencing other fundamental freedoms.

Lastly, in contrast to the EU, where individual also have right to freely reside on the territories of other member states without having economic links therein, under the EAEU Treaty this right of individuals is not assured.

3.4. Fundamental principles free movement of capital and direct tax matters

3.4.1. Free movement of capital under the EU law

3.4.1.1. Introduction

Free movement of capital is the last of the four European freedoms being liberalized.[843] In contrast to other freedoms, which stand now in mostly the same form they were initially formulated with adoption of the Treaty of Rome, the freedom for the movement of capital has been subject to several amendments. As Snell notes, from a tiny provision in the initial EU Treaties it transformed into significant freedom, as a result of which the free movement of capital was liberalized not only within the EU, but also in the context of third countries.[844] Snell and also other authors state that, in contrast to other freedoms, the initial provision on the movement of capital in the EEC Treaty did not establish the non-discrimination principle as such, but instead called for gradual liberalization of cross-border capital movements between the member states to extent necessary to facilitate the achievement of

[843] See J.Snell, Free movement of capital: evolution as non-linear process, ch.18 in P.Craig, G.de Burca, The Evolution of EU law, Oxford, 2 ed., 2011.
[844] See, Ibid Snell.

free movement.[845] The provision did not have direct effect, as was interpreted by the CJEU, it only invited member states to work gradually on liberalization of the principle and abolishment of restrictions, but did not prohibit the use of existing restrictive or discriminatory measures.[846] Snell notes that with respect to other freedoms, the Court was more proactive and although there were no instruments yet on harmonization of the same, in practice the Court found the way in the wording of the provisions to rely on them directly to assure their realization. In contrast, because of the declarative form of the principle for the movement of capital and sensitivity of the question, the Court refused to take leadership in this respect.[847] With the initial wording of the provision aimed at regulation of capital movement, it would be impossible to achieve the single market economy pursued by the Union.

The full liberalization of the freedom took place only in 1994 with the entry into force of the second stage of the Economic and Monetary Union. Prior that the Commission acknowledged the importance of the capital movement for the single market[848] and with adoption of the Directive for capital movement in 1988 and later in 1991 of the Maastricht treaty the freedom was formally liberalized in the context of treaties. Direct effect of the principle was confirmed by the Court in 1988 of the Directive and then of article 63 in case Bordessa[849] and Sanz de Lera and others.[850]

3.4.1.2. The current freedoms

Currently, articles 63-66 of the TFEU deal with the freedom for movement of capital. They stand almost in the form adopted with the Maastricht treaty in 1991. In contrast to provisions of the EEC Treaty, these provisions, similar other fundamental freedoms are directly applicable.

Article 63 provides for fundamental rule stating that all restrictions on the movement of capital between member states and between member states and third countries shall be prohibited.[851] The same prohibition applies with respect to payments between Member States and between Member States and third countries.[852] As Dahlberg writes, the provision prohibits use of restrictive measures, which includes the use of direct and indirect discrimination, as well as non-discriminatory restrictions.[853]

Article 64 provides for the so called grandfathering clause, allowing countries to apply restrictive measures in relation to third countries, that were in force on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999.[854]

Article 65 provides for the list of exceptions from the general rule on free movement of capital and talks specifically about tax law. It states that without prejudice to the general rule, member states shall be able:

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[845] See Snell, see also Dahlberg, p.276.
Article 67, EEC Treaty
1. Member States shall, in the course of the transitional period and to the extent necessary for the proper functioning of the Common Market, progressively abolish as between themselves restrictions on the movement of capital belonging to persons resident in Member States and also any discriminatory treatment based on the nationality or place of residence of the parties or on the place in which such capital is invested.
2. Current payments connected with movements of capital between Member States shall be freed from all restrictions not later than at the end of the first stage.
[846] See Case, C-203/80, Casati.
[847] See Snell, Ibid. p. 550.
[848] Com(85) 310 final, White Paper on completing the internal market.
[849] See Case C-358/93 Bordessa.
[850] See Case C-163/94, Sanz de Lera and others, p.41.
[851] See article 63 para. 1 TFEU.
[852] See article 63 para. 2 TFEU.
[853] Dahlberg, p. 279.
[854] See article 64 TFEU.

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.[855]

Snell comments that the above limitation of the rule from tax policy perspective was intentionally inserted by the member states and delivered a mixed message in terms of the will of the states to liberalize the movement of capital, but at the same time to preserve their exclusive competence in tax law matters.[856] Usher notes that this matter was clarified in 2004 in the case Maninen, where due to the existence of para. 3 in article 65, which prohibits arbitrary discriminations, it was stated that despite formal authorization to restrict application of freedom based on taxpayers residence status or place of investment, the principle for regulation of capital movement shall be interpreted in line with the principles of non-discrimination regulating other freedoms and as applicable in tax law matters.[857] Respectively, based on the interpretation given the Court member states were disallowed to restrict movement of capital by imposing arbitrary and discriminatory tax measures based on the tax residency status of investment or the source of income.

In para. 2, Article 65 further notes that provisions of Chapter dealing with capital and payments *shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties*. Dalhberg explains that in this paragraph is established the interconnection between the freedom of establishment and freedom for movement of capital, implying that as long as the restriction is compatible with the first freedom, it shall be compatible with the latter to the same extent.[858] The opposite is also truth, if the measure is not compatible with the freedom of establishment, it is neither compatible with the principle for the free movement of capital.

Finally, para. 3 of article 65 already mentioned above, clarifies that the measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments.[859] Upon judgement, the Court has commented that the above limitations and the principle in para. 3 did not represent the new principles, but merely resembled the codification of principles proclaimed in the previous CJEU decisions on the movement of services and workers.[860]

3.4.1.3. General issues

Interestingly, but the term “capital” is not defined under the TFEU in the relevant chapter, which establishes the fundamental principles for the movement of capital. The term was settled in a case law of the CJEU, wherein a number of decisions was clarified that in as much as article 63 (ex. Article 56) “essentially reproduces the content of article 1 of Directive 88/361, and even though that directive was adopted on the basis of articles 69 and 70(1) of the EEC Treaty (currently articles 63 and 75 TFEU), the nomenclature in respect ‘movements of capital’ annexed to that directive (Nomenclature) still has the same indicative value, for the purposes of defining the notion of capital movements”.[861] The notion of capital movement provided in the Nomenclature is not exhaustive and includes directive investments, including 1) establishing of companies and branches; 2) investments into real estate; 3) operations in securities normally dealt in on the capital market, such as shares and

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[855] See article 65 para. 1 TFEU.
[856] See Ibid. Snell, p. 552.
[857] See J.Usher, The evolution of the free movement of capital, Fordham International, Vol 31:1533, 2008, p. 1550.
[858] See Dalhberg, p. 278.
[859] See Article 65 para. 3 TFEU.
[860] See Ibid, Snell p.55. See also Case C-35/98, verkooijen.
[861] See C-452/04 Fidium Finanz, para. 41. For the effect of nomenclature and the notion of free movement of capital see Case C-222/97 *Trümmer and Mayer*, para. 21; Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others,* para. 30; and Case C-513/03 *Van Hilten-van der Heijden,* para. 39.

other securities of participating nature, bonds, acquisition of securities dealt in on a stock exchange; 4) operations in units of collective investment undertakings; 5) operations in securities and other instruments normally dealt in on the money market; 6) credits related to commercial transactions or to the provision of services in which a resident is participating; 7) financial loans and credits; 8) securities, other guarantees and rights of pledge; 10) transfers in performance of insurance contracts; 11) personal capital movements; 12) physical import and export of financial assets and 13) other capital movements.[862]

Due to the extensive definition of the term capital given in the Nomenclature, and the fact that it is broader than any other freedom, as well as the fact that it is closed linked to each freedom, in tax practice arose the question about the primary applicability of the relevant freedom in the case where more than one freedom could in theory apply. For instance, establishment of branches and subsidiaries in other member states is envisaged simultaneously under two freedoms – movement of capital and freedom of establishment, which means that income received from such activity upon taxation may be protected under both freedoms. In many cases, the Court came to the conclusion that both freedoms apply in parallel. In pure intra-union context, the issue perhaps would not be of much importance as long as the principle of non-discrimination and level of protection granted under freedoms were the same. But the problem mattered in cases with involvement of third states, because they have been also granted the freedom for cross-border capital movement with the EU members, but not the access for other freedoms. As was explained in the previous section, in such cases the Court has developed principled guidance stating that only investments, which grant significant control or ability for investment to take decisions are recognised as exercise of the right for establishment. The rest, unless other freedoms apply, is protected under the freedom for movement of capital.

What concerns other cases with simultaneous involvement of the right for movement of capital and provision of services, the Court took the position that generally, but not always, the primary freedom to apply shall be the provision regulating services, whereas movement of capital is a secondary, but still interconnected part of the transaction.[863] The differentiation, again, if to consider it from the tax law point of view, was of particular importance in cases with involvement of third states.

3.4.2. Interpretation of the principle for the free movement of capital in tax cases – the EU experience

Violation of the principle for the free movement of capital from income tax point of view mainly appear in the cases with passive income. This is explained by the fact that upon realization of this freedom persons usually receive remuneration in a form of dividends, royalties, capital gains, interest, rental payments – whereas these types of income are considered as passive. From the home state perspective, restrictions appear upon different treatment of incoming payments – the income residents of that state receive from their investment into other member state. From a host state perspective, restrictions appear upon different treatment of outbound payments – the income paid to the resident of other member states on their investments made in the first mentioned member state (host state).

In general, it shall be said that there is not so many issues associated with taxation of income and principle for the free movement of capital (excluding issues with involvement of third states). This is so because many cases, which involved the movement of capital, in parallel also involved other freedoms, and the national measures discussed in those cases were considered on compatibility with these other freedoms.

3.4.2.1. Host state perspective – taxation of passive income

From a host state perspective, the issue between taxation and principle for the free movement of capital is usually associated with withholding taxes. In general, it is a standard practice that state collects income taxes at source upon payment of income to the non-resident. In view of the limited number of types of restrictions, there is no need to divide the section into subsections based on the type of issue discussed, because most of the issues concern imposition of withholding taxes by the

[862] See Annex 1 to the Directive 88/361 (Nomenclature).

[863] See Case C-204/90 Bachmann; see also Case C-484/93 Svensson and Gustvsson; see also Case C-118/96, Safir.

member states of source of the income. Instead, more interesting could be to group cases based on the type of income involved in the discussion.

3.2.3.4.1. Taxation vs. exemption of income – case of capital gains

Thus, in the Bouanich case, the court examined Swedish regime for taxation of income from repurchase of shares on the compatibility with the EU law.[864] In that case, individual non-resident n Sweden was taxed in Sweden with respect to income from repurchase of shares in the Sweden resident company on a gross basis and the income in question qualified as dividends. At the same time, individual, who were residents in Sweden were taxed on net basis at 30% income tax rate with respect to the same income, which, however, in their case was classified as capital gains. The CJEU found that regime to be restrictive with respect to the principle on free movement of capital, since resident and non-resident were taxed differently and resident received an advantage in accordance with the domestic legislation.[865] The CJEU tested article 65(3) as a possible justification. Article65(1) and (3), when read in conjunction allow member state to differentiate between resident and non-resident taxpayers, but at the same time prohibit arbitrary discrimination or a disguised restriction on the free movement of capital.[866] With this respect the Court stated that member states can treat residents and non-residents taxpayers differently only in cases, when such taxpayers are not in comparable situations. In the situation considered, the Court found taxpayers to be in a comparable situations, because the acquisition of shares was directly linked to the income they both received from repurchase.[867] In that case there was also ta treaty concluded between Sweden and country of residence of the taxpayer in accordance with which such taxpayer could deduct the nominal value of shares and pretend for reduced rate of withholding tax. The Court however noted that effect of the Convention could be taken into account, however, it is for the court of the member state to decide whether upon application of the tax treaty the tax outcome for the non-resident would change. The Court added that only equal treatment of resident and non-resident taxpayers in this case would be compatible with the Treaty freedoms.[868]

3.2.3.4.2. Taxation vs. exemption of income – case of dividends

With respect to dividends taxation and realization of the right for the free movement of capital, the issues are very similar to the issues raised upon taxation of dividends received upon realization of the freedom of establishment. The only difference is that, by the principle for the movement of capital are covered shareholders, which have no significant holding in the capital of the company paying the dividends. This is also the reason why there are more cases on compatibility of dividends taxation with the fundamental principles in the TFEU, because from 1990 the taxation of dividends between associated companies (with significant amount of shares) is regulated by the Parent-Subsidiary Directive, whereas minor shareholders (both individuals and companies) are not protected by the Directive.

In Amurta case,[869] the CJEU assesses the compatibility of the withholding tax on dividends with the principle on the free movement of capital. In that case, under the domestic law of the Netherlands, the inter-company dividends were exempt from withholding taxation under participation exemption regime, whereas dividends paid to parent companies established in the other member states were taxable at 25% WHT tax. In the facts of the case it was not stated anything on whether the dividends recipient in the Netherlands were liable to income tax with respect to the income in question. The CJEU held that: *"treating dividends paid to companies established in another Member State less favorably than dividends paid to companies established in the Netherlands is liable to deter companies established in another Member State from investing in the Netherlands and thus constitutes a restriction on the free movement of capital prohibited, in principle"* under the TFEU.[870] The Court has also reaffirmed its position regarding the comparability of the residents and non-residents in question of imposition of withholding tax at source. The Court stated that "as soon as a

[864] See Case C-265/04, Bouanich.
[865] See Ibid. para. 33.
[866] See article 65 para. 1 and 3 TFEU. See also Ibid. Weber above.
[867] See Ibid. para 40.
[868] See Ibid. para. 56.
[869] See Case C-379/05, Amurta.
[870] See Ibid., para. 28.

Member State, either unilaterally or by way of a convention, imposes a charge to income tax not only on resident shareholders but also on nonresident shareholders in respect of dividends which they receive from a resident company, the position of those non-resident shareholders becomes comparable to that of resident shareholders."[871] The Court did not justify the restrictive measure neither based on the need to safeguard the cohesion of the national taxation system, nor by the need to safeguard the allocation of taxing powers between the states.[872] The Court explained that the need for balanced allocation of powers could be used as justification only together with the need to prevent the risk of tax abuse.[873] However, the Court adhered to the position of the Netherlands with respect to the fact that there was double tax convention in place between the member states concerned in accordance with which, the companies established in Portugal were entitled to the full tax credit with respect to income tax paid in the Netherlands. The Court however noted, that if such measure as full tax credit is granted unilaterally by the member state – it cannot serve as a ground for justification of restrictive treatment, whereas in opposite situation, when such measure is agreed between the state by means of double tax treaty, then it could be taken as a basis for justification of restrictive treatment.[874] The Court left it for the national court to decide whether restrictive measure in question could be justified taken the effect upon application of the tax treaty between the member states.

Similar issue was discussed in the case Commission vs. Italy, where Italy was charging withholding tax on dividends distributed to the foreign parents and simultaneously exempting domestic parent companies.[875] Italy argued that this approach was motivated by the need to prevent potential tax avoidance, because natural persons residents in Italy were taxable with respect to dividends they receive from domestic companies, whereas Italy didn't have information whether ultimate recipients of the dividends in other member states were taxable on them therein.[876] Therefore taxation of foreign parents was undertaken by Italy in order to equalise the overall tax outcome with respect to dividends between natural persons residents in Italy and foreign companies and their ultimate shareholders. Italy acknowledged that situations of domestic and foreign parent companies were comparable, but believed that discrimination of foreign companies should have been justified by the requirements of the cohesion of the tax system and by the need to prevent tax evasion and avoidance.[877] The CJEU took the position that as long as withholding tax on dividends was paid in all situations with involvement of non-resident parent, but not in purely artificial transactions, the regime could not be justified based on the reason to fight tax avoidance.[878] The Court supported this argument by referring to the Directive for Mutual Assistance, with the use of which, Italy or another member state in a similar situation could get sufficient information from the other member states about the taxation of shareholder therein.[879] Herewith, the Court observed that in situations with third states, similar domestic regime would be compatible with the freedom in view of the absence of the Directive for Mutual assistance and justified for the overriding reason in the public interest concerning the fight against tax evasion.[880]

To sum up, issues arising in the host state with respect to taxation of income received upon realization of the freedom for movement of capital are very similar to the issues arising upon receiving income from realization of freedom for establishment. However, such issues are limited only to the income received in a form of passive income, in particular, often income in a form of dividends and capital gains. With respect to purely intra-EU situations the position, reasoning and justifications of the CJEU in the cases with involvement of freedom for the movement of capital are very similar to the position of the Court in the cases with involvement of the freedom for establishment.

[871] See Ibid, para. 38. See also Test Claimants in Class IV of the ACT Group Litigation, para. 68, and Denkavit Internationaal and Denkavit France, para.35.
[872] See Ibid., Amurta, para. 60.
[873] See Ibid. para. 56.
[874] See Ibid. para. 78-84.
[875] See Case C-540/07, Commission vs. Italy.
[876] See Ibid. para. 24.
[877] See Ibid. para. 26.
[878] See Ibid. para. 58.
[879] See Ibid. para. 60.
[880] See ibid. para. 75.

3.4.2.2. Home state perspective taxation of passive income

In the home state, persons who are investing capital abroad into other member states may also be subject to discriminatory tax treatment. The income of such persons received from foreign sources may be taxed less favourably than persons who receive the same types of income from domestic sources.

One of the first cases that dealt with this issue was Verkooijen. Mr. Verkooijen was a Dutch resident, he received dividends from the company established in Belgium, which were taxed at source at 25%. Mr.Verkooijen reported this income in the income tax form in the Netherlands, expecting the exemption of those dividends from tax in the Netherlands in view that domestically received dividends were exempt. Although the national measure in question was considered on compatibility with then effective article 67 of the EEC Treaty and Directive 88/361on movement of capital, the reasoning given by the Court are still valid also upon interpretation of current article 63 in the TFEU. The CJEU stated that: *"A legislative provision such as the one at issue in the main proceedings has the effect of dissuading nationals of a Member State residing in the Netherlands from investing their capital in companies which have their seat in another Member State. It is also clear from the legislative history of that provision that the exemption of dividends, accompanied by the limitation of that exemption to dividends on shares in companies which have their seat in the Netherlands, was intended specifically to promote investments by individuals in companies so established in the Netherlands in order to increase their equity capital".*[881] The Court added that *"such a provision also has a restrictive effect as regards companies established in other Member States: it constitutes an obstacle to the raising of capital in the Netherlands since the dividends which such companies pay to Netherlands residents receive less favourable tax treatment than dividends distributed by a company established in the Netherlands, so that their shares are less attractive to investors residing in the Netherlands than shares in companies which have their seat in that Member State".*[882] The Court concluded that such a measure constitutes a restriction to the free movement of capital. The restriction was not justified on the proposed public interest such as reduction of tax revenue.[883] Neither, the Court considered justified the measure on the basis of the reason to offset the advantage granted in other member state.[884]

In Haribo case[885] was discussed whether the imputation method for foreign dividends is compatible to the principle on free movement of capital, where domestic dividends are exempt. The Court held that imputation method is compatible with the freedom as long as it accounts for the underlined income tax paid by foreign corporation and does not amount in a higher tax burden than domestically received dividends. The Court also held that requirement to provide information on the tax paid in the member state shall not be considered as restrictive administrative measure, because member state may need to know this information in order to assess the tax due. The difficulty in case of portfolio shareholders to collect such information was considered by the Court as irrelevant and not the problem the home member state shall be concerned about.[886]

However, as was noted by Malherbe and others,[887] the treatment of incoming foreign dividends is not always incompatible with the principle for the movement of capital even when the overall tax burden suffered with respect to foreign dividends is higher. In the case Kerckhaert-Morres, the Court assessed compatibility of Belgian taxation of foreign dividends with the principle on free movement of capital.[888] In contrast to other two cases discussed above, the Belgian tax legislation in question did not distinguish between the sources of dividends, but simply taxes dividends in the hands of natural persons at the rate of 25% irrespective of the place from where dividends were sourced from and level of taxation applicable beforehand.[889] As a result, foreign dividends, due to taxation in the country of source and consequently in Belgium, resulted in a lower net amount that would result

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[881] See Case 35/98, Verkooijen, para. 34.
[882] See Ibid. para. 35.
[883] See Ibid. para.59.
[884] See Ibid. para. 61.
[885] See Case C-436/08, Haribo.
[886] See Ibid. para. 98 and 104.
[887] See Ibid, report Impact of the rulings..., p.72.
[888] See Case C-513/04, Kerckhaert-Morres.
[889] See Ibid., para. 17.

corresponding amount domestically. The Court, however, did not share the position of the taxpayer and claimed that there was no restriction imposed by the Belgian tax measure in question. In view of the Court, the circumstances and overall tax outcome in the discussed case, resulted from the fact of parallel exercise by the member states of their fiscal sovereignty.[890]

In contrast to the above situation, Belgian measure in accordance with which foreign dividends and interest, in case not subjected to withholding tax at the moment of payment in the country of source, were taxed in Belgium at a higher rate than domestic dividends (with WHT increased by the supplementary municipal taxes) was found by the Court to be in violation with the freedom for movement of capital.[891] The supplementary municipal tax did not apply to similar domestic payments from movable assets, because withholding tax on such payments was usually collected by Belgian intermediary and there was no need to declare that income once again. Although, the was also an issue whether national measure constituted restriction to the free provision of services, the Court considered that services by intermediaries was a secondary issue in that case and assessed the compatibility of the measure with the freedom for movement of capital.[892] The Court held that *"it should be stated that the imposition, by a Member State, of a supplementary tax on income from moveable assets from investments made in another Member State, as opposed to income from investments made in the first Member State, constitutes in itself unfavourable tax treatment which is inconsistent with the free movement of capital".[893]* The Court could not justify the measure neither on the basis of the need to preserve fiscal coherence, effectiveness of fiscal supervision, nor on the basis of practical difficulties connected with the collection of income tax on foreign income.[894]

A number of other cases was decided by the CJEU on a similar issue with the very same outcome,[895] based on which it may be concluded Interest payments – case 478/98, joined 155/08 and 157/08.

3.4.2.3. Intermediary conclusion

The principle for free movement of capital is a general principle and was not included to assure non-discriminatory taxation of investments. Vice versa, the fundamental provision preserves the right of the member states to treat foreign and national investors differently based on the difference in place of their residence or nationality, as well as the place of investments. The court however interpreted the whole provision in a way similar to the provision regulating freedom of establishment and non-discrimination principles as in the other tax related cases. Perhaps, this limitation on taxation was more intended to protect the tax base in situations with involvement of third states – because free movement of capital is the only EU freedom, which is equally available to the nationals of third states, in contrast to the rest of the freedoms, which are limited to pure intra-EU situations. Although, as mentioned earlier, the principle for the free movement of capital did not pursue an objective to achieve tax neutrality for investors and investments, within its context, the protection was eventually granted to various forms of passive income, which are not covered or received upon realization of other freedoms – e.g. dividends and capital gains from minor shareholdings. With respect to some other forms of passive income – e.g. royalties, interest, rents, proceeds from leasing – there is an often issue of classification – whether these types of income arise from realization of the freedom to provide services or freedom for movement of capital. Obviously, one cannot be separated from the other, when there is a provision of services, there also will be flow of capital. In the CJEU cases, the Court often takes the position that primary freedom realized is the movement of services than capital.

3.4.3. Freedom of establishment under the EU law

3.4.3.1. In general about the right of establishment under the EU law

Freedom of establishment in the EU context implies the right of individuals and companies of the EU member states to freely undertake activities in the other member states through establishing there companies or branches. In the TFEU it is incorporated under articles 49-55. The article 49, which defines the general meaning of "freedom of establishment" is worded as follows:

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[890] See Ibid. para. 20.
[891] See Case C-233/09, Dijkman, para. 47-48.
[892] See Ibid, see para. 34-35.
[893] See Ibid. para. 40.
[894] See Ibid. para. 56-62.
[895] See for instance, C-315/02, Lenz; Case C-319/02, Manninen; Case C-219/03, Commission vs. Spain.

> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

The right of establishment is equally available for the nationals of the EU member states and also companies established under the laws of EU member states.[896] Article 54 of the TFEU clarifies that "companies or firms formed in accordance with the law of a member state and having their registered office, central administration or principal place of business within the Union,[897] shall" for the purposes of the principles regulating the right of establishment be treated "in the same way as natural persons who are nationals of a member states". The companies or firms shall mean companies or firms constituted under civil or commercial law, including cooperative societies and other legal persons governed by public or private law, but excluding the non-profit organizations.[898] Further in this section the author will refer to the same simply as to "companies or undertakings or legal entities". As was interpreted by the CJEU, article 49 has direct effect, which means that nationals of the member states can rely on it directly in case of application by the member states of restrictive or discriminatory measures.[899]

The freedom of establishment under the EU law in particular includes the right of individuals and companies to establish business activities in other member states, either by working as self-employed persons or setting up new companies – which is referred in the literature as the primary right of establishment. The law equally covers the right of individuals and companies to set up agencies, branches or subsidiaries in another member states – which is often referred as the right for secondary establishment. The term "establishment" has also been interpreted by the CJEU. The freedom of establishment is differentiated from the freedom to provide services on the basis that the first one covers self-employed persons and legal entities, which tend to exercise economic activity in the other member state as a stable and continues activity and have their permanent presence in that state, whereas the second implies provision of services on a short-term basis, while remaining in the member state of primary establishment. The freedom of establishment has also to be distinguished from the freedom for movement of capital, because the later ones equally covers the right of persons from the third states to enjoy the benefits of the TFEU.[900] Since under both freedoms, the persons can receive the same types of income – e.g. dividends, there have to be guidelines on differentiation between the freedoms. In the case C-251/98 Baars, the CJEU stated that the right of establishment applies to situations, where the shareholder has a definite influence over the company's decisions and has a right to determine the activities of such a company.[901] As R. van Eldonk, S.den Boer note, although the concept of "definite influence" is not defined it is usually determined based on the size of the shareholding. Herewith, there is no certain threshold, which would be considered as giving the "definite influence", in contrast each situation is assessed independently in order to understand whether the person concerned has that definite influence or not. For instance, if the person is a 75%

[896] For discussion the issue of who and under which circumstances is covered by the freedom see M.Dahlberg, Ibid book. Ch.4, pp.140-149.
[897] For more discussion on the same, see M.Dahlberg, Ibid book. Ch.4, pp.144-149.
[898] See Article 54 para. 2 TFEU. For more on the scope of article 49 and non-profit organizations, see case C-182/83 Fearon vs. Irish Land Commission.
[899] See C-2/74 Reyners v. Belgium.
[900] For more on the difference and applicability of the freedom for establishment and freedom for movement of capital, see R. van Eldonk, S.den Boer, Freedom of establishment versus free movement of capital: continuing uncertainty, Practical Law, 2011. See also S.Hemels and others, Freedom of establishment or free movement of capital: is there an order of priority? Conflicting visions of national courts and the ECJ, EC Tax Review, Vol.1, pp.19-31, 2010, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959832
[901] See C-251/98 C.Baars, para 41.

or 100% shareholder, then for sure he is the one exercising control and definite influence.[902] However, in the situations with many minor shareholders, the person owning for instance 45% of shares may also be considered as having definite influence.[903] Herewith, the approach of the CJEU is criticized by the academics, who for instance believe that the Court fails to focus on whether the shares provide voting power to the shareholder, because shares may be of different nature and not all grant its shareholder the actual right to participate in the management of the company.[904] With respect to the same issue of determining and applying the freedom of establishment, in another case C-452/04 Fidium FInanz the CJEU clarified that in case both freedoms may apply, the one should rely on the freedom, which is more directly in point than the other and the measure in question should be assessed on its compatibility with the freedom to which it relates closer: where a national measure relates to more than one freedom at the same time, "it is necessary to consider to what extent the exercise of those fundamental liberties is affected and whether, in the circumstances of the main proceedings, one of those prevails over the other.[905] The Court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it".[906]

The article 49 requires primarily the member states of establishment (host state) to eliminate any restrictions on the right of establishment and assure provision of the same conditions to the foreign persons exercising the right of establishment as they grant to their own nationals. TFEU clarifies that this requirement is subject to the provisions of the Chapter relating to capital.[907]

As was elaborated by the CJEU and stated in a number of decisions, although the "provisions concerning freedom of establishment, is, according to its terms, aimed particularly at ensuring that foreign nationals are treated in the host member state in the same way as nationals of that state, it also prohibits the member state of origin from hindering the establishment in another member state of one of its nationals".[908] Therefore, EU law likewise prohibits member states from hindering the establishment in another member state of nationals residing on their territories.[909] This feature of the freedom does not follow explicitly from the wording of the article, however, this is the way the provision was interpreted by the CJEU and stated in numerous decisions. In its decisions in the case C-81/87 Daily Mail, the Court for the first time formulated its opinion with this resect by stating: "even though those provisions are directed mainly to ensuring that foreign nationals and companies are treated in the host member state in the same way as nationals of that state, they also prohibit the member states of origin from hindering the establishment in another member state of one of its nationals or of a company incorporated under its legislation which comes within the definition of article 48".[910] In addition to that, the Court added that without the interpretation of article in that way and its application from the perspective of host and home member states, it would be meaningless.[911]

3.4.3.2. Interpretation of the principle on the freedom of establishment in tax cases – EU experience

In general, article 49 requires member states to provide equal terms and benefits to the nationals and companies from other member states upon their establishment as companies or branches on its territory. This principle was well elaborated also in the sphere of income taxation and in general prevents member states from more burdensome taxation of persons exercising freedom of establishment. As was mentioned in the previous section, the prohibition of unequal treatment equally concerns treatment of its own nationals exercising the freedom in other member states and

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[902] See Case C-377/07 Test Claimants in the FII Group Litigation and Case C-470/04 N case.
[903] See Case C-282/07 Truck Center.
[904] See R. van Eldonk, S.den Boer, Freedom of establishment versus free movement of capital: Ibid.
[905] See for instance the Case C-71/02 Kärner, para. 47; Case C-36/02 Omega, para. 27;
[906] See for instance Case C-275/92 Schindler, para. 22; Case C-390/99 Canal Satélite Digital, para.31; Case C-71/02 Karner, para. 46; Case C-36/02 Omega, para. 26; and Case C-20/03 Burmanjer and Others, para.35.
[907] See Article 49 para. 2 TFEU.
[908] See C-251/98 C.Baars, para. 28. See also C-81/87 Daily Mail and General Trust, para. 16, see also C-264/96, ICI para. 21 and C-200/98 X and Y para. 26.
[909] See C-251/98 C.Baars, para. 29.
[910] See C-81/87 Daily Mail, para. 16.
[911] See Ibid.

also foreign nationals exercising the freedom on its territory. In this section, the author will summarise and group the major tax issues that may arise upon the exercise by individuals and companies of the right or establishment. As it became customary, the author will discuss tax issues from the home and host states separately, as well as separately will be also discussed issues associated with taxation of active and passive income.

3.4.3.2.1. Host state perspective – taxation of active income

From perspective of the host state and active income, the issues often arise around the taxation of local legal entities and branches of the foreign companies (rarely subsidiaries of foreign companies), on the basis that later may be taxed less favourably than local companies. With respect to branches of foreign companies and also subsidiaries of foreign companies, the fundamental principle in article 49 is interpreted as requiring the host state to treat such persons equally to the local companies, taken that they are in the similar or same circumstances. Importantly, the Court noted that not only companies of foreign parents should be treated equally to companies with local parents, but also that branches (permanent establishments) of such foreign companies should be treated equally to domestic companies if they are in objectively comparable situations.[912] Denial of this equal treatment between branches and companies (subsidiaries) would effectively make the right of establishment through branches less attractive for companies having their seats in other member states.

3.4.3.2.1.1. Exemption vs. taxability of income

The issue may similarly concern the determination of tax base and deductibility of certain expenses. For instance, in one of the first cases on this matter the CJEU considered the case Baxter.[913] Although the case didn't concern income taxes, it concerned special levy imposed in France on the use of proprietary medicinal products. The mechanism for calculation of this levy implied deduction of the expenditure associated with the scientific and technical research carried out in France. Baxter and the other applicants in the proceedings, which were subsidiaries of parent companies established in other member states, argued that the mechanism for deducting expenditure on scientific and technical research from the amount of special levy payable caused discrimination between French laboratories carrying out research mainly in France and foreign laboratories which have their principal research units outside France and therefore expenditures on scientific and technical research incurred by French companies with foreign parents would mostly be non-deductible in France because in much larger extent these undertakings will buy these types of services from its group.[914] The Court interpreted the law in a way that supported the position of taxpayer. The Court stated that member states are precluded in this particular case from allowing for deduction only of the costs associated with acquisition of services in question only in France. In view of the Court, the measure could not be justified in the name of effectiveness of fiscal supervision.[915] The Court added however, that it is not precluded by the law to require taxpayer to provide relevant documentary evidence that would enable French tax authorities to ascertain, clearly and precisely, the nature and genuineness of the research expenditure incurred in other member state.[916]

The principle formulated in that court case is however not an absolute, but in contrast is very specific because of the type of services involved. Would it be for instance any other type of service that is equally available in any country, it would be problematic for the taxpayer to claim discrimination on the basis that it can or wish to acquire such type of services only from its parent company or other group member and the deduction is prohibited. The example of the second situation was considered in the case Oy AA.[917] In that case, Finish legislation in question allowed Finish companies to make deductible financial transfers to the parent companies located in Finland, whereas similar financial transfers were non-deductible in case of transfer to parent located in other EU or non-EU member state. The peculiarity of the Finish system was explained by the fact that financial transfers in question, while being deductible for the subsidiary, were taxable in hands of the parent company. Nevertheless, the CJEU observed that the measure in question restricted the freedom of establishment

[912] See Case C-270/83 Avoir Fiscal.
[913] See Case C-254/97 Baxter.
[914] See Ibid. para.4.
[915] See Ibid, para. 19.
[916] See Ibid. para. 20.
[917] See Case C-231/05 Oy AA.

because differentiated between the companies established in Finland according to whether or not their parent company had corporate seat there and the companies with parent companies established outside of Finland were subject to less favourable treatment.[918] However, the Court found two possible justifications to upheld the Finish law. First of all, the CJEU noted that *"to accept that an intra-group cross-border transfer, such as that at issue in the main proceedings, may be deducted from the taxable income of the transferor would result in allowing groups of companies to choose freely the Member State in which the profits of the subsidiary are to be taxed, by removing them from the basis of assessment of the latter and, where that transfer is regarded as taxable income in the Member State of the parent company transferee, incorporating them in the basis of assessment of the parent company. That would undermine the system of the allocation of the power to tax between Member States because, according to the choice made by the group of companies, the Member State of the subsidiary would*

be forced to renounce its right, in its capacity as the State of residence of that subsidiary, to tax the profits of that subsidiary in favour, possibly, of the Member State in which the parent company has its establishment".[919] Secondly, the Court observed that *"it must be acknowledged that the possibility of transferring the taxable income of a subsidiary to a parent company with its establishment in another Member State carries the risk that, by means of purely artificial arrangements, income transfers may be organised within a group of companies towards companies established in Member States applying the lowest rates of taxation or in Member States in which such income is not taxed. That possibility is reinforced by the fact that the Finnish system of intra-group financial transfers does not require the transferee to have suffered losses."*[920] Having regard to both of these factors, the Court decided that the measure is question pursues legitimate objectives compatible with the Union law and justified by overriding reasons in the public interest, and is appropriate to ensuring the attainment of those objectives. Although this case concerns the deduction of financial transfers, but not specifically the deduction of expenses, it demonstrates the logic of the Court in interpreting the EU law and deductibility of cross-border payments within groups.

3.4.3.2.1.2. Tax rate

In the EU practice, the CJEU has held that application of higher income tax rate on income of permanent establishments of non-residents in comparison to resident companies is not a justified discrimination. The Court observed that as long as the tax base of permanent establishment and local companies are determined in the same way for income tax purposes, there should be no difference in treatment of such permanent establishment and local companies as regards the rate of income tax.[921] And any difference so introduced causes discrimination against companies having their seats in another member states.[922]

In addition to this, the CJEU also held that higher rate of branch profit tax applicable to permanent establishment in comparison to the rate applicable upon distribution of profits by subsidiaries is discriminatory taken that the tax base and tax rate of income tax paid by subsidiaries and permanent establishments in determined in the same way. The Court concluded that to prevent discrimination it is for the national legislation and the national courts to determine the tax rate "which must be applied to the profits made by branch … by reference to the overall tax rate which would have been applicable if the profits of a subsidiary had been distributed to its parent company".[923]

3.4.3.2.1.3. Losses

With the establishment of branch in another member state, the company may encounter the situation with offset and carry forward of losses. For instance, in the situation when the company is profitable and the branch is in a loss position – it would be question from the perspective of the home state of the company whether the losses of the branch could be offset there. In opposite situation, when the branch is in a profit situation and the head company is making loss, it is a question for the host state

[918] See Ibid. para. 31, 32, 42-43.
[919] See Ibid. para. 56. See also *Test Claimants in Class IV of the ACT Group Litigation,* para. 59).
[920] See Ibid. para. 58.
[921] C-311/97 Royal Bank of Scotland, para. 29 and 30. This particular case concerned 40% income tax rate in Greece applicable to branches of non-residents. As a result of decision, Greece has amended domestic legislation and introduced higher income tax rate also with respect to local companies.
[922] Ibid. para. 30.
[923] Case C-253/03 CLT-UFA SA, para. 27.

jurisdiction, whether it would allow offset of such losses by the branch against its profits. These questions may be answered differently and the availability for offset of losses will always depend on the wording of the domestic legislation of the member state concerned and the particular facts and circumstances of the taxpayers.

The court case on the same considered by the CJEU from the perspective of the host state (state where the branch was established) is the Futura Participations case.[924] This case concerned the compatibility of the Luxembourg domestic tax legislation on the carry forward of losses with the freedom of establishment. From the facts of the case, it is known that French company has established branch in Luxembourg. In 1986 the branch was in a profitable situation and applied for the right to carry forward of losses it incurred during the period from 1981 to 1986. In accordance with the Luxembourg legislation, the carry forward of losses was only possible in case those losses were economically linked to the activities in Luxembourg and in case taxpayer kept separate accounts related to its Luxemburg activities. In general, the taxpayer was not obliged to keep separate accounts on its activities in Luxembourg, but could simply be attributed with an income based on apportionment method. The question referred to the CJEU concerned the compatibility of the requirement imposed with the principle of freedom of establishment. The CJEU has held that principle regulating freedom of establishment does not preclude member state from requiring that losses be economically connected to the branch's activities there and that such requirement is in conformity with the fiscal principle of territoriality.[925] However, the second requirement on separate accounts the Court found to be contrary to the freedom of establishment and considered it to be sufficient for the taxpayer to be able to demonstrate clearly and precisely the amount of losses concerned by other means. The Court also argued in favor of use of directive 77/799 by the competent tax authorities for mutual assistance and provision of relevant information. From this case it is evident that the national legislation of Luxembourg did not impose different rules for carry forward of losses by branches (non-residents) in comparison to its domestic taxpayers, but in fact administrative requirement imposed on both was more burdensome for the branches than for the resident and this was the basis for the court to find this measure as contrary to the principle regulating freedom of establishment.

3.4.3.2.1.4. Eligibility of tax treaty benefits

The practice of the CJEU went as far as to establish that in accordance with the national treatment principle, the member states are precluded from exclusion of permanent establishment of foreign (non-resident) companies from tax treaty benefits that apply to resident companies.[926] It effectively means that permanent establishment of a non-resident may pretend for tax benefits provided by the treaty, between the state where it is established and any other state, including non-member states. Such requirement developed by the CJEU is contrary to the general norms of international tax law, in accordance with which only residents of contracting states are eligible for treaty benefits. The Court slightly explained its reasoning in the case C-55/00 *Elide Gottardo v INPS*, whereas summarized by the Commission was stated that based on the view of EU judges, in case member state enters into bilateral agreement, including tax treaty with a member or non-member state, the fundamental principle of equal treatment under the EU law would require that member state to extend "*to the nationals of other Member States the same benefits as those enjoyed by its own nationals under that agreement unless it can objectively justify its refusal to do so*".[927] With this respect, EU scholar Pistone notes that the above principle developed by the CJEU is not absolute and cannot apply in all cases, but instead may apply only in cases where foreign branches are in the similar conditions to the local subsidiaries.[928] In his view it would be too premature to require automatic application of treaty benefits to the branches in the state of their establishment. At the same time in view of another scholar Kostense, the decision of the CJEU regarding extension of tax treaty benefits to non-residents is not revolutionary, but in contrast is in compliance with the OECD Commentaries

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[924] See Case C-250/05 Futura participations SA and Singer v Administration des contributions.
[925] See Ibid, para. 20-22.
[926] See for instance, C-307/97 Saint-Gobain, para 57-63.
[927] See EU Commission, WD DOC (05) 2306 dated 9 June 2005, p.11, available at: http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/personal_tax/double_tax_conventions/eclawtaxtreaties_en.pdf accessed on 16 May 2017.
[928] P.Pistone, The Impact of Community Law on Tax Treaties: issues and solutions, Wolters Kluwers, pp.151-152.

to article 24 on non-discrimination, which allow extension of treaty benefits to permanent establishments of non-residents in triangular cases when income from shares is effectively connected with the capital of such permanent establishments.[929] As Kostense notes, this is not an absolute practice of all countries, but OECD members are encouraged to do so, whereas with the decision of the CJEU, the EU member states will be obliged to do so.

3.4.3.2.2. Home state perspective – taxation of active income

As discussed previously in this work, freedom of establishment requires elimination of potential barriers for cross-border establishment of branches and subsidiaries not only in the host state, where such establishments are organized, but also in the home state – from where the investments for the same derive from. As was already mentioned earlier, this obligation on the home state (or primary residence state from tax law perspective) is not directly envisaged by the TFEU, but instead was formulated by the CJEU.[930] In view of the Court it would be meaningless from the perspective of internal market to impose obligations solely on the host state and not home states,[931] because home state can equally impose restrictive measures on its own nationals and prevent or make it less attractive for them to invest into other member states.

3.4.3.2.2.1. Losses

The problem with offset of losses is also actual in case of the home state perspective. The problem in this case mainly concerns the right to offset losses incurred by the branch in the other member state. From the practice of CJEU in this question it may be generally concluded that member state is not allowed to impose different treatment of losses depending on whether they were incurred by the foreign and domestic PEs of local entity. In general, if the offset of losses is allowed in domestic situation, the same right shall be granted for cross-border situations. However, before granting the right to offset the foreign losses, the home state may be allowed to consider the situation and tax treatment of losses in the other member state – the state where the losses appeared – and only if there is no opportunity to offset the losses in that state (either due to the national law restriction or tax convention in place) – the home member state may be required to allow offset of those losses domestically. To support the same, the Author will illustrate several cases on the same.

In one of the cases on this matter, Lidl Belgium, the Court had to decide whether the article 49 on the freedom of establishment precluded national tax regime, which did not allow resident company to deduct losses incurred in the other member state by its permanent establishment, when that tax regime allowed offset of losses incurred by a resident permanent establishment.[932] The case was complicated by the fact that in accordance with the tax treaty involved, the home state was exempting profits of foreign permanent establishments and on these basis, it believed it was not responsible to account neither for the losses of foreign PE. Irrespective of the provision of the double tax treaty, the CJEU found that as long as national regime imposed different rules for domestic and foreign branches – it was restrictive.[933] However, further on, the Court considered that such national treatment was justified in view of the need to preserve the allocation of power to impose taxes between member states since the tax treaty in place allowed only the state of the branch to tax those profits. Therefore, should the home state allow to deduct losses from the profits of its resident company, it would lose the taxable revenue and it would never be compensated, since the profits of that branch were not taxable there according to the tax treaty. Secondly, the Court stated that automatic grant of the right to deduct foreign losses could result in danger that losses could be taken for deduction twice – in both states. This was the second reason based on which the Court justified the national measure in place.

In another case, Marks&Spencer, the Court deal with offset of losses but of foreign subsidiaries, where the UK company had challenged the UK national law, which didn't allow it to account for the

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[929] H.E. Kostense,The Saint-Gobain case and the application of tax treaties. Evolution or revolution?, EC Tax Law Review, Issue 4, 2000.
[930] See section 3 of this work. See C-251/98 C.Baars, para. 28. See also C-81/87 Daily Mail and General Trust, para. 16, see also C-264/96, ICI para. 21 and C-200/98 X and Y para. 26.
[931] Ibid. C-81/87 Daily Mail and General Trust, para. 16.
[932] See Case C-414/06, Lidl Belgium Gmbh & Co. KG v. Finannzamt Heilbronn, para. 14.
[933] See Ibid.para. 23-26.

losses of its foreign subsidiaries, whereas losses of domestic subsidiaries it could take for deduction because of the group taxation regime. In general, such situations are rare because of principle of territoriality enshrined in the international tax law, as long as non-residents subsidiaries are not taxed on their active income in the state of the parent company, neither their losses could be taken into account there. Interestingly, however, the Court had formulated different principle with this respect, which is slightly similar to the principle it further formulated with respect to branches. It stated that: principle regulating freedom of establishment does *"not preclude provisions of a Member State which generally prevent a resident parent company from deducting from its taxable profits losses incurred in another Member State by a subsidiary established in that Member State although they allow it to deduct losses incurred by a reside subsidiary"*.[934] However, it is contrary to the freedom of establishment *"to prevent the resident parent company from doing so where the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods and where there are no possibilities for those losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party"*.[935]

Whereas the approach of the Court in related to losses incurred by the branch in the other member state is reasonable and may be in line with the traditional concepts of international taxation, then the approach it developed with respect to losses incurred by subsidiaries in the other member states is breaking the fundamentals of the traditional concepts.[936] On the basis of this section, it may be generally concluded that the home state and origin of investments is obliged to allow offset of losses incurred by branches and subsidiaries of its resident company in the other member states as long as the same is allowed with respect to domestic losses and as long as there is no other way to account for these losses in the member state where they were incurred. This radical development will be in particular important in the countries under which national legislations exist so called group taxation regime.[937] In general, although radical, the principles were well accepted by the community – some were finding benefits not only for companies, which got a chance for immediate write-off of losses, but also for the state, which had no group taxation regimes and could benefit from shift of local losses to other jurisdictions.[938] There was also a hope that these developments would restart the discussion of the directive on cross-border loss transfer and bring positive results. Over the years once sees that this had not happen.[939]

3.4.3.2.2.2. Deductibility of costs associated with foreign companies

This is another issue based on which some of the CJEU cases could be grouped under one common title. The first case in this chain in the Bosal case, where the CJEU considered whether the freedom of establishment is restricted when the member state (the Netherlands) precludes the company resident therein from deduction of the costs associated with the holdings of subsidiaries in the other member state unless that costs are instrumental in making profits taxable therein (in the Netherlands).[940] The Court has found this regime as incompatible with the freedom of establishment and also provisions of the Parent-Subsidiary directive. With respect to the freedom of establishment the Court noted that limitation of deduction *"might dissuade the parent company from carrying on its activities through the intermediary of a subsidiary established in another member state since normally such subsidiaries do not generate profits that are taxable in the state"* of residence of the parent company.[941] With respect to the second point, the Court noted that article 4(2) of the Parent-Subsidiary directive left space to the member states with respect to question on deductibility of the

[934] See Ibid. para. 59.
[935] See Ibid.
[936] For initial position of the national court on this matter see Malcolm Gammie, 'The Impact of the Marks & Spencer Case on US-European Planning' (2005) 33 Intertax, Issue 11, pp. 485–489
[937] For more on the same see Marc P. Scheunemann, 'Decision in the Marks & Spencer Case: a Step Forward, but No Victory for Cross-Border Group Taxation in Europe' (2006) 34 Intertax, Issue 2, pp. 54–57
[938] See Mathieu Isenbaert, Caroline Valjemark, 'M&S judgment: the ECJ caught between a rock and a hard place' (2006) 15 EC Tax Review, Issue 1, pp. 10–17.
[939] See one of the latest cases on loss relief Case C-172/13, European Commission v. UK.
[940] See Case C-168/01 Bosal Holding BV.
[941] See Ibid. para. 27.

holding costs, however, it precluded less favourable taxation of cross-border activities in comparison to domestic situations.[942] The Court concluded that national measure in question could not be justified by reference to the need to preserve the coherence of the tax system, because in view of the Court "*unlike operating branches, parent companies and their subsidiaries are distinct legal persons and each is subject to a tax liability of its own, so that a direct link in the context of the same liability to ta is lacking and the coherence of the tax system cannot be relied on"*.[943]

Another case in this line is Keller Holding, where the Court had to consider similar issue on deductibility of costs at the level of the parent company, which were related to the holding of subsidiary in the other member state.[944] Keller was a parent company established in Germany, which claimed deduction of expenses associated with the interest on the capital borrowed to acquire its shareholding in the Austrian subsidiary and incidental administrative costs. According to the national law of Germany the deduction was denied in view that dividends received respectively were tax exempt in Germany. Herewith, as noted by the Court in a purely domestic situation, such deduction was allowed whereas in fact dividends from domestic subsidiaries were also exempt from tax in hands of the parent company. The CJEU came to conclusion that the regime in question put the companies like Keller in a less favourable situation than companies with domestic subsidiaries and dissuade them from carrying out activities through subsidiaries in other member states.[945] The Court neither found basis for justification.

From the above cases it may be concluded that the Court tempt to equalise tax treatment of expenses incurred with relation to the subsidiaries irrespective from the fact where such subsidiaries are established and the fact those subsidiaries are actually treated for tax purposes in the states of their establishments.[946] Neither the principle of coherence, nor the principle of territoriality were found by the Court as justified reasons.

3.4.3.2.2.3. Domestic anti-avoidance rules

Domestic anti-avoidance measure may be not compatible with the freedom of establishment if it treats foreign branches and subsidiaries less favourably than domestic companies. There are a series of cases considered by the CJEU in this respect, where the Court has developed certain principles and doctrines where in some cases such domestic measures could be justified. For instance, the Court has developed the notion of "abuse of law" in the EU context, in light of which a national measure, which restricts the fundamental freedom "*may be justified where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned"*.[947] It means that national regime may provide for anti-avoidance measures, which aim solely at foreign branches and subsidiaries and thus restrict the freedom of establishment, but only as far as those measures aim to prevent abusive practices.[948]

The first case in direct tax matters, where the issue of tax avoidance was discussed was the ICI case.[949] From the facts it is clear that ICI was a member of consortium, which owned a holding company in the UK through which many other trading subsidiaries were established in the UK (4) and other member and non-member countries (total of 23 such non-UK subsidiaries). The consortium relief regime in the UK allowed absorption of losses incurred by the subsidiaries at the level of consortium, but only in case when the holding company's business consisted wholly or mainly in the holding of shares or securities of [UK] companies which were its 90% subsidiaries. The definition

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[942] See Ibid. para. 28.
[943] See Ibid. para. 33-34.
[944] See Case C-471/04, Keller Holding Gmbh.
[945] See Ibid. para. 34-35.
[946] The same approach was followed in the case C-347-04, Rewe Zentralfinanz eG.
[947] See, to that effect Case C-324/00 *Lankhorst-Hohorst*, para.37; Case C-264/96 *ICI*, para. 26; Case C-9/02 *Lasteyrie du Saillant*, para. 50.
[948] See K.Lenaerts, Tax mitigation vs. tax evasion in the case law of the European Court of Justice, Teisės aktualijos, TEISĖ 2013 89, pp.219-237. For more on the definition of tax-avoidance in the cases see Rami Karimeri, 'A Critical Review of the Definition of Tax Avoidance in the Case Law of the European Court of Justice' (2011) 39 Intertax, Issue 6/7, pp. 296–316.
[949] See Case C-264/96 Imperial Chemical Industries (ICI) v. Kenneth Hall Colmer, summary of the case is available at: http://www.fieldtax.com/wp-content/uploads/2015/08/ICI-v-Colmer.doc-2.pdf accessed on 19 May 2017.

of the holding company was met by the taxpayer, except for the fact that most of its subsidiaries were established outside of the UK. On that basis, the UK tax authorities denied the right to use consortium relief. Their position was explained by the fact that the regime was designed in a way to prevent tax avoidance by preventing companies from offsetting their foreign losses in the UK and at the same time have profits in the foreign subsidiaries, which were not taxable in the UK. The CJEU found that regime to be contrary to the freedom of establishment in view that there was an inequality of treatment between the UK and foreign subsidiaries.[950] The Court did not accept the justification proposed by the UK, since as explained by the Court the regime was not aiming to circumvent purely artificial arrangements and higher number of foreign subsidiaries did not necessarily meant they were established with the purpose of tax avoidance, as well as the requirement to have "wholly or mainly" subsidiaries established in the UK, but not abroad in order to benefit from consortium relief did not exclude the opportunity for tax avoidance even with a low number of foreign subsidiaries. As noted by Lenaerts, in that case the Court did not elaborate on the issue of tax avoidance and did not establish criteria to define "artificial arrangements" in view that there was no need to do so in that case.[951]

The term "artificial arrangement" was further elaborated by the Court in a Cadbury Schweppes case.[952] In that case were challenged the UK CFC rules as applied to the subsidiaries located in other member state (Ireland) -although a low tax jurisdiction. The Court observed that application of CFC legislation to subsidiaries located in Ireland resulted in disadvantage for resident companies, with subsidiaries abroad in comparison to other resident companies with no subsidiaries or subsidiaries somewhere else, and as such hinder the exercise of the freedom of establishment by such companies, dissuading them from establishing, acquiring or maintaining a subsidiary in a member state in which the latter is subject to lower level of taxation.[953] The Court, however, added that such restriction could be justified by overriding reasons of public interest and unless it went beyond that was necessary to achieve that purpose, for instance it was noted by the Court that measure was justified if it aimed to target the wholly artificial arrangement circumventing the application of the legislation of the member state concerned.[954] The Court noted further that in assessing the intention of the taxpayer, one should take into account the objective of principle of the freedom of establishment: the *"objective is to allow a national of a member State to set up a secondary establishment in another Member State to carry on his activities there and thus assist economic and social interpenetration within the Community in the sphere of activities as self-employed persons.[955] To that end, freedom of establishment is intended to allow a Community national to participate, on a stable and continuing basis, in the economic life of a Member State other than his State of origin and to profit therefrom."*[956] Further on, as of the criteria of artificial arrangement the Court proclaimed "arrangements, which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory."[957] This constituted the subjective criteria. In addition to this the Court proclaimed that there should be also an objective factors tested to conclude whether the arrangement was artificial. Such objective factors should be ascertained by the third parties and include existence of premises, staff and equipment in the state of activities of the subsidiary. On the basis of the above, the Court made general conclusion that CFC legislation may be compatible with the EU law as long as it addresses solely artificial arrangements intended to escape the national tax normally payable. However, such rules cannot be applied where it is proven, on the basis of objective factors which are ascertained by the third parties, that despite the existence of tax motives that controlled company is actually established in the host member state and carries on genuine economic activities there.[958]

In another case C-311/08, SGI, the Court has found that transfer pricing legislation of the member states as such restricts the freedom of establishment, but may be justified in view of the need for

[950] Se Ibid. para. 22-23.
[951] See Ibid. K.Lenaerts, p.225.
[952] See Case C-196/04, Cadbury Schweppes.
[953] See Ibid. para. 46.
[954] See Ibid. para. 47 and 50.
[955] See C-196/04, Cadbury Schweppes, para. 53, see also Case 2/74 Reyners, para.21.
[956] See C-196/04, Cadbury Schweppes para. 53. See also Case C-55/94 Gebhard, para. 25.
[957] See Ibid. para. 55.
[958] See Ibid. para. 75.

balanced allocation of powers.[959] As was explained by the Court, if to allow taxpayers to manipulate their profits and losses and allow them to decide in which state to account for such profit and losses, it may undermine the balanced allocation of powers between the member states, since the tax base would be increased in one state and reduced in the other.[960] In addition to this, the Court stated the transfer pricing legislation may also be justified if it specifically targets only artificial arrangements designed to circumvent the legislation of the member states.[961] With respect to proportionality, the Court concluded that it should be with a national courts to decide whether the legislation in question goes beyond what is necessary and for instance imposes very burdensome compliance and administrative obligations on taxpayers.[962]

Over the years, the Court was also faced with the assessment of thin-cap national legislations on the compatibility with the freedom of establishment.[963] The thin-cap rule may be examined on compatibility with the principle for the free movement of capital – if for instances it targets all companies with no regard to the degree of relationship between them. In contrast, when rules aim to address related parties with significant holdings – applies the principle regulating freedom of establishment. In general, the Court observed that when application of thin capitalization rules is triggered by the location of the lending company – then such rules may be restricting the freedom of establishment, because such rules would be putting resident companies lending money from non-resident companies in a less favorable situation in comparison to those, who lend money from other resident companies.[964] However, the Court stated that rules could be justified in view to fight abusive practices if they apply to purely artificial arrangements where terms of transactions are different from those that would have been agreed upon arms' length basis.[965] The Court also added that taxpayer should have an opportunity to to provide an evidence of any commercial justification of their arrangements.

In the question of tax avoidance, the CJEU believes that EU law allows application of domestic anti-avoidance rules although they may be restricting the freedom of establishment, but only to the extent such rules are developed to target solely artificial arrangements that are used by the taxpayers to circumvent the national legislation of member states and avoid taxes normally due therein. The Court has proposed the standard of what shall be understood as "artificial arrangement", however, before one to conclude that arrangement is artificial based on this standard, other objective factors should be examined – such as availability of commercial reason. And as long as the arrangement has such commercial reason, or true business behind itself, despite it may aim to minimize taxes – it shall not be recognised as artificial. In addition, the Court concluded that it is the responsibility of the national court to assess the regime and transaction in question under the given criteria of "artificial arrangements".[966] At the same time, with respect to obligations of the parties to the domestic case: it shall be the responsibility of the tax authorities to prove that transaction is artificial or lacks the purpose or arm's length terms, whereas the taxpayer shall have the right to provide an evidence of any commercial justification of his arrangement.[967]

Within the framework of this section, it is noteworthy to mention that on 12 July 2016, the EU Council adopted the so called Anti-Tax-Avoidance Directive (ATAD).[968] *ATAD Directive lays down the rules against tax avoidance practices that directly affect the functioning of the internal market (GAAR provision and Exit Tax Rule), it simultaneously should address implementation of several action recommendations in the context of the initiative against BEPS, namely: CFC legislation, Hybrid Mismatches, Interest limitation rules.*[969] The Directive was adopted with a purpose to assure

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959 See Case C-311/08, Societe de Gestion Industrielle SA (SGI) v Etat belge.
960 See Ibid. para. 62.
961 See Ibid. para. 65.
962 See Ibid. para. 76.
963 See for instance, Case C-524/04 Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland, Case C-324/00 Lankhorst-Hohorst.
964 See Ibid. para 61.
965 See Ibid. para. 80.
966 To the same effect see Case C-126/10, Foggia.
967 To that effect see Case C-311/08, SGI.
968 See Council Directive 2016/1164/EU dated 12 July 2016, OJ L 193.
969 See T.Balco, X.Yeroshenko, How Are We Doing with BEPS Recommendations in the EU? in S.Rocha, Tax Sovereignty in the BEPS Era, Wolters Kluwers, 2017.

"minimum level of protection for national corporate tax systems against tax avoidance practices across the Union".[970] The Directive is not an instrument, which dictates the rules in substance, but instead establishes the minimum standard of the rules that should be in place in the member states in order to tackle tax avoidance. Therefore, in case certain member state did not have certain anti-avoidance rule in the their legislations, for instance regulating CFCs, under the Directive it is required to introduce such rules. In case when the rule already existed in the national legislation – it may be amended in order to meet the standards provided by the directive, and finally, if the national rule is stronger than the standards proposed in the Directive – it may remain as it is. It is too early now to assess the effect of this Directive, however, some scholars have commented that as long as the directive leaves a lot of options and choices for the member states in terms of drafting the nationals rules, it may fail to promote the level-playing field.[971] In addition, some scholars also believe that fundamental freedoms in the TFEU may be violated in different ways under the standards proposed in the Directive.[972] Anyway, now it is too premature to judge on the same, since it will depend on the way in reality the member states will draft national legislations. Moreover, the standards developed by the CJEU are not cancelled by the Directive, but instead should be relied and taken into account by the member states upon redrafting or introducing the national legislation.

3.4.3.2.3. Host state perspective – taxation of passive income

The types of passive income generated by means of exercising freedom of establishment mainly are dividends – from investment into shares of companies and capital gain from realization of the same. Therefore, the cases discussed in the following two subsections concern these types of income and application of withholding taxation in the host states and income taxes in the residence states. Although, there has been a directive adopted by the EU with respect to taxation of cross-border dividends – Parent-subsidiary directive[973] – there were still court cases arising on this matter. Partially it is explained by the fact that directive does not cover all types of entities and shareholders, similarly, not all member states were immediately bound by it, but instead were granted a right for gradual implementation of the directive into national legislation.

3.4.3.2.3.1. Exemption vs taxability of income – case of outbound dividends

From a source state perspective, in accordance with the decision of the CJEU, the taxation of the foreign shareholder on the dividends and exemption of the local shareholder with respect to the same is considered as a radical violation of the EU law. The first case in this line of cases was Denkavit followed by Commission v. Spain C-487/08 and number of other cases considered under the freedom for the movement of capital.

In the Denkavit case the CJEU considered the national measure under which foreign shareholder was subject to 25% withholding tax on outbound dividends from France, whereas domestic shareholder was almost exempt from tax in the similar situation. To determine whether foreign shareholder was discriminated by that treatment, the Court had to establish whether the local and foreign shareholders receiving dividends may be considered to be in the same or similar circumstances. In its previous decisions on this matter, the Court has stated that in the context of measures laid down to eliminate economic double taxation of profits in a form of dividends distributed by the resident company, the resident shareholder receiving dividends is not necessarily in a comparable situation with the shareholder located in another member state.[974] However, with respect to charge imposed on the income not only of resident shareholder, but also of a non-resident shareholder, on dividends, which they receive from a resident company, the situation of resident and non-resident shareholders

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[970] Ibid., at paras 2–3 of the Preamble to the Directive.

[971] For more on the same see Guglielmo Ginevra, 'The EU Anti-Tax Avoidance Directive and the Base Erosion and Profit Shifting (BEPS) Action Plan: Necessity and Adequacy of the Measures at EU level' (2017) 45 Intertax, Issue 2, pp. 120–137; see also Ana Paula Dourado, 'The EU Anti Tax Avoidance Package: Moving Ahead of BEPS?' (2016) 44 Intertax, Issue 6/7, pp. 440–446.

[972] See Christiana HJI Panayi, The Compatibility of the OECD/G20 Base Erosion and Profit Shifting Proposals with EU Law, 70(1/2) Bull. Intl. Taxn. 95–112, 101–102 (2015).

[973] See section 1.4.3. of this work, where the directive is discussed in more details.

[974] See to that effect C-374/04 Test Claimants in Class IV of the Act Group Litigation, para.57 to 65.

recipients of dividends becomes comparable.[975] Following this theory, the CJEU found resident and non-resident shareholders in the case in question to be in comparable situations and consequently considered different and more burdensome taxation of non-resident shareholder as non-justifiable discrimination. In that case the Court tried to justify the national measure in view that tax treaty concluded between France and another member state involved in the case provided for reduced rate of withholding tax, but in view of the Court the provision in the treaty failed to neutralise the effect of the national measure in France, because in fact inbound dividends were exempt from income tax in France and therefore no respective credit could be obtained by the taxpayer. In theory, in opposite situation, should the tax treaty provision mitigate the effect from applying national law, the national law could have been considered as permitted. However, as was noted by P.Martin, such neutralization of discriminatory taxation in the host state by the rules in the home member state is very rare in practice because of the requirements set by the CJEU in this respect.[976] In the later case on the same matter, the Court has clarified the issue of neutralization, where it stated that neutralization has effect only in case when the home state (state of residence) grants full tax credit with respect to income tax paid in the other member state.[977] But since this is very rare in practice and the ordinary tax credit cannot achieve the same result, the neutralization of discriminatory taxation by the residence state is seldom.

Another case considered by the Court with respect to potential discriminatory taxation of dividends received by non-resident was the case C-487/08 Commission v. Spain. From the facts of that case it is established that Spain applied different criteria for tax exemption of dividends received by resident and non-resident taxpayers. In case of residents, it was sufficient to hold shares for one year and have 5% or more in the capital of another resident company to have dividends exempt from both – withholding tax and tax in the hands of the recipient. In case of non-resident shareholder, the ownership threshold was established at 20% in order to be eligible for the exemption of dividends.[978] In view of the Commission, such differentiated treatment of residents and non-resident could have been incompatible with the EU law.[979] The Court found resident and non-resident companies to be in comparable situation with respect to the manner in which the state of source tries to mitigate economic double taxation and consequently the Court found that by imposing different criteria for exemption from the tax on dividends, Spain has failed to fulfil its obligations under the EU law. This case however, was considered by the Court in relation to the free movement of capital, but not the freedom of establishment.

3.4.3.2.3.2. Exemption vs taxability of income – case of outbound capital gains

Taxation of capital gains from realization of shares by the member state may be examined either under the principle regulating freedom of establishment, as well as under the freedom regulating free movement of capital – the choice depends on the level of ownership between the parent company and its subsidiary.[980] As is noted by Weber, there has been no cases considered by the CJEU with respect to taxation of companies on the capital gains from realization of shares.[981] However, there were cases related to taxation of individuals, taxation of companies with exit taxes on unrealised capital gains and they do represent important lesson with respect to taxation of capital gains in the source state. Thus, for instance in the Bouanich case discussed earlier in this work, the Court noted that individual non-resident shareholders cannot be taxed less favourably with respect to income received from (repurchase in that case) shares than resident shareholder, because they are considered to be in comparable situations.

[975] See Ibid. para. 68.
[976] See P.Martin, "Dividends and withholding taxes", pp.28 in G.Maisto, Taxation of Intercompany dividends under tax treaties and EU tax law, IBFD, 2012.
[977] See Case C-540/07 Commission v. Italy, para. 37-38.
[978] See Ibid. para. 5-8.
[979] See Ibid. para.9 where it is stated that Commission had addressed a formal letter on the same to Spain.
[980] See Case C-251/98, Baars, para. 22.
[981] See D.Weber, "Taxation of company on capital gains on shares: the EU Treaty freedoms", pp.40-56 in G.Maisto, Taxation of companies on capital gains on shares under domestic law, EU law and tax treaties, IBFD, 2013.

In view of the author, in general, principles developed by the CJEU with respect to taxation of non-resident shareholders on dividends, should be to the full extent applicable to taxation of such shareholders with respect to income in a form of capital gains.

3.4.3.2.3.3. Intermediary conclusion

In general, on the basis of the cases in this section, it may be concluded that resident shareholders and non-resident shareholders are considered to be in comparable situations with respect to the distribution of company's income they receive as long as the issue in question concerns the application of the withholding tax on the same. Therefore, different rules on taxation of dividends or capital gains with withholding tax applicable to shareholders and dependent on the place of residence of such shareholders are prohibited under the EU law. In practice it means, that for instance the rate cannot be less favourable when the tax applies to non-residents, and neither the conditions for exemption from or reduction of the rate of withholding tax cannot put foreign shareholder in a less advantageous position. Herewith, the positions of shareholders shall be assessed as a complete scenario – taking into account the availability to offset the withholding tax, either by means of national legislation or tax treaty, the existence of such tax treaty and other peculiarities of domestic legislations on income taxation that may exist and vary from case to case.

3.4.3.2.4. Home state perspective – taxation of passive income

This section will continue with the issues on taxation of dividends and capital gains, but will illustrate the same from the perspective of the country of residence of the shareholders. Income received from foreign sources (other member states) may be called simply as inbound payment. Since, as was mentioned earlier there is a parent-subsidiary directive that shall minimize the problems of economic double taxation (at least of dividends) there were not so many cases on taxation of dividends that fall under this category and the freedom for establishment, most of the cases on this issue were considered under the principle regulating free movement of capital. As was demonstrated in sections 4.1-4.3, such issues are often linked to the mechanism of national legislations aimed at elimination of economic double taxation, where for instance, income received from domestic companies is tax exempt or is subject to reduced taxation in comparison to the income received from foreign sources, which is taxed heavier.[982] In general, on this matter and movement of capital, the Court concluded that principles of the EU law prevent member states from treating foreign-sourced dividends less favourably than nationally sourced dividends, unless such a difference concerns the situations, which are not objectively comparable or is justified by the overriding reasons in the general interest.

3.4.3.2.4.1. Treatment of inbound dividends

One of the cases considered on compatibility of national legislation on treatment of incoming foreign dividends and freedom of establishment was FII Group Litigation case.[983] In that case, the UK rules were challenged on the basis that they differentiated between the foreign and nationally sourced inter-company dividends. Nationally sourced dividends when received by the shareholder were exempt from income tax, whereas foreign source dividends were subject to taxation, but with the right to use imputation credit. The Court commented that although, the rules are formally different and present administrative burden in case of the foreign sourced dividends, the rules are not restrictive as such, because in theory they allow to account for all income taxes paid abroad and only in case domestic tax liability was higher than taxes charged abroad, the shareholder would be liable to tax with respect to the difference. Herewith, to comply with the principle on the freedom of establishment, the tax so charged in the country of residence shall not exceed the tax charged on nationally sourced dividends.[984]

3.4.3.2.4.2. Treatment of inbound capital gains

Shareholders with companies in the other member state may also suffer disadvantageous taxation in the states of their residence with respect to their shares in those foreign companies, in comparison to shareholders with shares in domestic companies. Deduction of costs associated with shares in the foreign companies was already discussed under section 3.4.2.2. of this work. In this section, the

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[982] See Ibid. See IP/A/ECON/ST/2010-18, p.69-70.

[983] See Case C-446/04, Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue.

[984] See Ibid, para. 49-57. The same was also repeated by the Court in Case C-201/05 Test Claimants in the CFC and Dividend Group Litigation.

Author will discuss taxation of income arising from the realization of shares in the foreign subsidiaries.

In De Baeck, the Court considered the situation, when under the national rules, the income from realization of shares in the resident companies was exempt from tax, whereas income from realization of shares in the foreign companies was taxable.[985] The Court considered such treatment as restricting the freedom for establishment.[986] The Court could not apprised of any factor capable of justified that restriction.

3.4.3.2.4.3. Exit tax

The key example on application of exit tax on unrealised capital gain was discussed in the case National Grid.[987] Exit tax (also known as "departure tax") is a tax imposed on companies and individuals that move their residence to another jurisdiction. The tax so imposed is charged on the basis of the gain that would result from a hypothetical realization of the taxpayers assets, referred to as a mark-to-mark regime, or on an alternative basis that measures an amount of previously un-taxed income that is attributable to the former jurisdiction of residence.[988] In the National Grid case, the Court assessed whether national taxation at the moment of transfer of the residence of the company of unrealised gains relating to the assets of a company incorporated therein, without the right of the taxpayer to defer the payment of such tax until the time the gain is actually realised and without the right to account in the future for potential decrease of value of the assets (exit tax), is compatible with the freedom of establishment.[989] In view of the Court, immediate taxation of the unrealised capital gains was contrary to the freedom of establishment, in view that domestic companies upon transfer of their place of effective management within the country were not subject to such taxation.[990] However, the CJEU considered the regime to be justified on the basis of the need to preserve the balanced allocation of powers between the states and principle of territoriality. The Court explained that according to the principle of territoriality, the member state are entitled to tax the income accumulated during the time the taxpayer was resident of that state and impose the tax at the moment when taxpayer leaves the country.[991] The Court additionally stated that *"such measure is intended to prevent situations capable of jeopardising the right of the member state of origin to exercise its powers of taxation in relation to activities carried on in its territory, and may, therefore, be justified on grounds connected with the preservation of the allocation of powers of taxation between the member states."*[992] However, besides all, the Court considered the measure to be disproportionate as long as it required immediate payment of tax.[993]

3.4.3.2.5. Intermediate conclusion

In this section the Author has analysed application of the principle regulating freedom of establishment in different tax related court cases. As it is visible from the presented scenarios, although the principle is general and does not address specifically taxation systems in the member states, it applies in tax cases in order to assure creation of environment able to facilitate development of internal market and unhindered mutual investments between the member states. In accordance with interpretation given by the CJEU, in tax matters, member states are precluded from use of tax norms that may restrict or prevent cross-border investments. This prohibition equally concerns both – the member states from where investments are sources and also the member states to where investments are directed.

As for the question, what constitutes the "restriction", there is no concreate and definite list of tax measures that are restricting and preventing exercise freedom of establishment. But from the Court reasoning, some general principles may be formulated that to certain extent may be relevant also in the context of the Eurasian Union.

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[985] See Case C 268/03, Da Baeck.
[986] See Ibid. para. 25.
[987] See Case C-371/10, National Grid.
[988] Definition is taken from the IBFD Tax Glossary 2017.
[989] See Ibid. National Grid, para. 34.
[990] See Ibid. para. 40.
[991] See Ibid. para. 46.
[992] See Ibid. para. 46.
[993] See Ibid. para. 82.

First of all, the measure is considered as restricting the freedom of establishment if it subjects the persons, who are nationals of the different member states, but are in comparable situations from an economic and fiscal point view, to different tax regimes, or vice versa, when it subjects persons, who are in different positions from an economic and fiscal points of view, to the same tax treatment. The situation of comparability of circumstances of the taxpayers are assessed individually under each particular regime and even the situation. The CJEU has noted repeatedly that with regard to companies, it is their registered office, central administration or principal place of business that serves as the connecting factor with the legal system of a particular Member State, like nationality in the case of natural persons. To accept that the Member State of establishment may freely apply different treatment solely because these connected factor is situated in another Member State would deprive freedom of establishment of its substance.[994] As stated by the Court: "Freedom of establishment is thus designed to guarantee the benefit of national treatment in the host Member State, by prohibiting all discrimination based on the place where the registered office, central administration or principal place of business of a company is situated."[995] Herewith, from a tax perspectives, residents and non-residents are generally considered to be in different situations. However, when the national measure is drafted in a way to influence in particular non-residents, such measure could be found as violating the freedom of establishment, because majority of non-residents may be also the nationals of the other member states, and thus such measure would discriminate such nationals indirectly on the basis of their tax-residency.

From the host state perspective, member states are generally precluded from imposition of heavier taxation on branches and subsidiaries of foreign investors in comparison to branches and subsidiaries of domestic companies. Importantly, foreign branches shall be treated as local subsidiaries, so that foreign investor is not discriminated by the national tax measure because of his choice to exercise freedom of establishment through a branch, but not subsidiary. The above is true if foreign branches and subsidiaries are considered to be in objectively comparable circumstances to the companies with local parent.[996] This requirement equally concerns application of equal regimes for determination of tax base and application of equal tax rates. Paradoxically, but requirement for equal treatment of branches has even spread to application of tax treaties to branches, when the company of the branch is not resident in any of the contracting states, which are parties to the treaty. Further on, parent companies of foreign investors, although located in different member states, shall not be discriminated in comparison to national parent companies with respect to income they receive from a host state, in particular – dividends and capital gains. The Court has generally concluded, that with respect to the system on elimination of potential economic double taxation, parent companies may be in a non-comparable situations, but with respect to the tax imposed on the income paid to them directly – such companies shall be considered to be in comparable situations, although they are tax residents in different states. This effectively means, that withholding taxation of outbound payments to other member states shall be effectively equal to the taxation applied to local persons upon distribution of income.

From home perspective, in general are prohibited measures, which would prevent or demotivate the national of the member state to exercise his right for establishment in the other member states. As examples of such measures could be for instance, heavier taxation of income from foreign sources, in comparison to income received domestically, as well as excessively burdensome administrative requirements for instance to account in the member state of residence for the investments held abroad.

3.4.4. Provisions in the EAEU Treaty

3.4.4.1. Introduction

Last fundamental freedom envisaged as the core objective of the Eurasian Union is the movement of capital. Eliminating the obstacles for the movement of capital among residents of the EAEA member

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[994] See Case C-231/05, Oy Aa, para. 30, as well as see to that effect Case 270/83 *Commission* v *Trance,* para.18; Case C-330/91 *Commerzbank*, para.13; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others,* para.42; *Marks & Spencer,* para. 37; and *Test Claimants in Class TV of the ACT Group Litigation,* para. 43.

[995] See Case C-231/05 Oy Aa para. 30, as well as *Commission* v T*rance,* para.14; *Saint-Gobain ZN,* para.35; and *Test Claimants in Class IV of the ACT Group Litigation,* para.43.

[996] See Case C-270/83 Avoir Fiscal.

states is a necessary mean to strengthen the integration and to promote balanced and sustainable economic and social progress in the Union.[997]

This idea promoting free movement of capital was first included and elaborated in Agreement of 26 February 1999 on Customs Union and Single Economic Space between Belarus, Kazakhstan, Kyrgyzstan, Russia and Tajikistan. However, the principles and rules incorporated in that agreement concerned mainly the monetary policies of member states, including exchange controls, bank services, movement of currency and were very specifically and narrowly drafted, so that would hardly ever present any obligations on the member states' tax systems. Later on, the freedom for movement of capital was reaffirmed in Agreement on formation of Single Economic Space dated 19 September 2003, where however, no precise principles were provided on the same. On the basis of that agreement was further concluded additional agreement on Trade in Services and Investments in the States members of the Single Economic Space of 9 December 2010[998] and also Agreement on the creation of conditions on financial markets to ensure the free movement of capital dated 9 December 2010.[999] Both agreements were incorporated into the text of the EAEU Treaty and terminated with the entry into force of the latter.

In the current EAEU Treaty the term "capital" is not defined, although achievement of the freedom for the movement of capital is one of the main objectives of the Union. The previous agreements neither had definition of this specific term. The absence of the term "capital" illustrates that perhaps the EAEU Treaty and predeceasing agreements were to certain extent inspired by the EU treaties, where the term "capital" is also missing.[1000] However, what is more surprising is that the EAEU Treaty neither provides for definition of what shall be understood as the "free movement" of capital. Instead, one can find in the EAEU Treaty principles governing the "incorporation, activities and investment" in addition to specific principles regulating creation of financial markets. The Author of this work, understands the same as the substitution to the principle of "free movement of capital". However, what is important, once one start reading the provision regulating incorporation, activities and investments, it becomes clear that these principles substitute not only the principle regulating movement of capital, but also principles of what would be understood in the EU as the "freedom of establishment". Further in this section the Author will discuss in more details these principles, will compare them to the principles in the EU treaties and will assess their potential influence on formation of the tax systems of the EAEU member states. The idea of this section is to discuss the differences and similarities between the fundamental principles that govern the EU and EAEU, and also to see to what extent the EU experience in the sphere of tax harmonization and negative tax integration could be applicable in the EAEU environment. Further on in this section, the Author will use the terms "investment" and "establishment" activities as substitute to the term "capital movement".

In contrast to movement of labour, with respect to which tax aspects are addressed at least partly and explicitly by the EAEU Treaty, the taxation aspects associated with the movement of capital are not addressed explicitly in the Treaty. However, similarly, as with respect to the movement of services, the EAEU Treaty contains several general principles that shall regulate investment and establishment activities. These principles are incorporated under Part III of the EAEU Treaty "Common economic space" Section XV in the articles 65-69[1001] (further "Section") and elaborated in Annex 16 to the EAEU Treaty. This section and annex are based on the codified norms provided in earlier agreements on 1) Trade of services and investments in the member states of Single Economic Space dated 9 December 2010 and 2) Encouragement and mutual protection of investments in the member states of the Eurasian Economic Community dated 2008. The current agreement, however, goes further than two predeceasing agreements and provides for more advanced system for regulation of, in particular, services and investments.[1002] Further in this work, the author will consider these articles,

[997] See Commentary to the EAEU Treaty, Section Trade in Services, Incorporation, Activities and Investments, available at: http://www.brokert.ru/material/dogovor-ecraziyskiy-ekonomicheskiy-soyuz#13 accessed on 22 May 2017.
[998] Available at: http://docs.cntd.ru/document/902284815 accessed on 22 May 2017.
[999] Available at: http://docs.cntd.ru/document/902289290 accessed on 22 May 2017.
[1000] For discussion of the term "capital" in the EU context see section 3.4.1. of this work.
[1001] See articles 65-67 under Section IV Part III EAEU Treaty.
[1002] See Shumilov, 2015, ibid.

since they equally apply to incorporation, activities and investments. After that the author will consider separately in more details specific principles regulating each activity.

3.4.4.2. Common general principles for promotion of incorporation, activities and investments

Article 65 provides that this Section applies to all measures taken by the member states with regard to the incorporation, activities and investments,[1003] with exception of situations when the state (municipal) procurement transactions are involved or services delivered and activities carried out as part of the functions of the state government. The Article thus confirms the assumption that general principles incorporated in the EAEU Treaty Section XV equally concern the tax policy of the member states and require them to comply with their national tax legislations with the general principles in the EAEU Treaty.

Article 66 of the EAEC Treaty establishes unconditional obligations for the Member States by precluding them from possibility of introducing any new discriminatory measures with regard to trade in services, the incorporation and activities of persons of other Member States in comparison with the regime in force at the date of entry into force of the EAEA Treaty (1 January 2015). This norm assures: 1) inadmissibility of derogations from the Treaty reached (impossibility of "rollback", deliberalization) and is the first step towards liberalization of trade in services, institution, activity and investment; 2) fixes the current situation on the market and 3) stability and prohibition of deterioration of the regime granted to persons of the Member States in trade in services, institution, activity and investment.[1004]

Article 66 also provides for liberalisation of incorporation, activities and investments by prohibiting member states to introduce any new discriminatory measures with regard to the incorporation and activities of persons of other member states as compared with the regime in force at the date of entry into force of the Treaty (1 January 2015).[1005] It also obliges member states to conduct gradual liberalisation of mutual conditions for incorporation, activities and investments in order to ensure realization of freedoms.[1006] There was no similar obligation under the previous agreements on promotion of services, investments and capital movement. In Art. 11 of the old Agreement on promotion of services and investment was stipulated the obligation of the member states to meet and discuss at least once every 3 years the ways for greater level of liberalization.[1007] However, despite all the efforts of the Eurasian Economic Commission, this declarative duty was not followed by the member states, but also to the contrary, individual authorities of the member states attempted to increase or expand the list of exemptions, restrictions or additional measures and requirements for foreign persons or entities with foreign capital, including residents of the member states of the Customs Union and Single Economic Space.[1008] The old agreement did not provide for obligations to harmonize the legislation necessary for the liberalization of trade in services, incorporation and activities.[1009]

Finally, article 67 provides for the set of general principles that should govern the liberalisation of incorporation, activities and investments. First of all, it states that the liberalisation of incorporation, activities and investments shall be conducted with due account of international principles and standards through the harmonisation of the legislation of the member states and organizing mutual administrative cooperation between the competent authorities of the member states.[1010] It additionally

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[1003] See article 65 para. 2 EAEU Treaty.

[1004] See Ibid, Commentary to the EAEU Treaty, Section Trade in Services, Incorporation, Activities and Investments.

[1005] See article 66 para. 1 EAEU Treaty.

[1006] See article 66 para. 2 EAEU Treaty.

[1007] See Ibid. Commentary to the EAEU Treaty, Section Trade in Services, Incorporation, Activities and Investments.

[1008] See Ibid. Commentary to the EAEU Treaty, Section Trade in Services, Incorporation, Activities and Investments.

[1009] Ibid. Commentary to the EAEU Treaty, Section Trade in Services, Incorporation, Activities and Investments.

[1010] See article 67 para. 1 EAEU Treaty.

notes that in the process of liberalisation, the member States shall be guided by the set of following principles:[1011]

1) **optimisation of internal control:** gradual simplification and/or elimination of excessive internal regulations (which in view of the author may include requirement for revision of provisions on tax residency certificates in member states or requirement to improve the control over the beneficial ownership information)**, with account of the best international regulation practices** for specific service sectors and, when such practices are unavailable**, by selecting and applying the most advanced models of the Member States;**

2) **proportionality:** requirement for and sufficient levels of harmonisation of the legislation of the member states and mutual administrative cooperation for the efficient functioning of the services market, incorporation, activities, or investments;

3) **mutual benefit:** liberalisation on the basis of equitable sharing of benefits and obligations with account for sensitivity of service sectors and types of activities for each member state;

4) **coherence:** adoption of any measures relating to the trade in services, incorporation, activities and investments, including harmonisation of the legislation of the member states and administrative cooperation based on the following:

- no deterioration of mutual access conditions shall be allowed for any service sector and type of activities as compared to the conditions prevailing as of the date of signing the Treaty (29 May 2014) and the terms and conditions set forth in the Treaty;

- gradual reduction of horizontal restrictions retained by the member states.

5) **economic feasibility:** as part of the creation of a common market of services, liberalisation of trade in services on a priority basis with regard to service sectors most intensely affecting the cost, competitiveness and/or amounts of goods manufactured and sold in the internal market of the Union.

Article 67 is important since it establishes the obligations of the member states to harmonize (promote convergence) legislation as the main way and condition for liberalization, which are implemented in the manner provided for in the liberalization plans.[1012] It requires member states to conduct harmonization of legislations and competent authorities of the member states to engage in mutual administrative cooperation in order to facilitate liberalization of incorporation, activities and investments between the member states. Consequently, as long as article 65 explicitly says that provisions of the section concern all measures of the member state, then they equally concern tax measures. Further on, since liberalization and degree of cross-border incorporation, activities and investment depend on the direct tax systems of the member states, the author concludes that there are legal basis for tax harmonization of direct taxes in the EAEU member states provided in the EAEU Treaty based on the cumulative effect of articles 65 and 67 of the EAEU Treaty.

Article 68 belonging to the same Section XV of the EAEU Treaty provides for the principles for administrative cooperation, and in particular includes norms that shall govern the exchange of information. Article 69 of this Section requires member states to ensure transparency of national legislations, requiring them to post updated legislation on internet pages of relevant state institutions and also share the current draft of amendments or draft of new legislations, as well as allow for public discussions of the proposed legislations and implement the relevant mechanism for its realization. Furthermore, the states should explain the reason and purpose of the newly adopted legal acts.

These are the general principles that shall regulate and promote cross-border incorporation, activities and investments between the EAEU member states. Unlike the predeceasing agreements of 2010, the provisions of Section XV of the EAEU Treaty apply to the measures of the Member States affecting not only the supply but also the receipt of services, institution, activity, and investments. In this way, the member states incorporated the major parts of the predeceasing agreements in the EAEU

[1011] See article 67 para. 2 EAEU Treaty.

[1012] See Ibid. Commentary to the EAEU Treaty, Section Trade in Services, Incorporation, Activities and Investments.

Treaty, but added the provisions on investments, the rules of the single market and internal regulation (in terms of all licensing requirements and procedures).[1013] The declaration statements in the old agreements were replaced with the norms of direct effect up to the creation of a single markets in certain spheres.[1014]

In the next section the Author will provide definitions of each of these activities in order to differentiate between them and understood in which cases the principles regulating the same may apply.

3.4.4.3. Differentiation between the terms "incorporation, activities and investments"

Annex 16 to the EAEU Treaty defines incorporation as:

1. creation and/or acquisition of a juridical person (participation in the capital of a created or incorporated juridical person) with any organisational legal form and form of ownership provided for by the legislation of the Member State on the territory of which such juridical person is created or incorporated;
2. acquisition of control over a juridical person of a Member State through obtaining of an opportunity to, either directly or via third persons, determine decisions to be adopted by such juridical person, including through the management of votes granted by voting shares (stakes) and participation in the board of directors (supervisory board) and other management authorities of such juridical person;
3. opening of a branch;
4. opening of a representative office;
5. registration as an individual entrepreneur.
6. Establishment shall be carried out, among other things, for the purposes of trade in services and/or manufacture of goods.[1015]

From the first glance, the definition of this term is close to the concept of "establishment" in the EU law, since it provides for the right for primary and secondary establishments, either through subsidiaries or branches, as well as the right of individuals to engage into self-employment. In addition, it looks like the practice of the EU on the matter of distinguishment of establishment activity from capital activity is slightly incorporated into the provisions of the Treaty. In particular, the definition of the concepts already includes the clarification that incorporation means acquisition of a *substantial* part in the business, that would allow exercise of control over the acquired or incorporated juridical person, as well as it implies the right to take decision to be applied by such juridical person. Interesting, but the EAEU law also provides that exercise of such right shall be available either directly or through a third persons.

The term "activity" is defined as "business and other activities (including trade in services and manufacture of goods) conducted by juridical persons, branches, representative offices or individual entrepreneurs listed in points 2-6 of sub-paragraph 24 of this paragraph".[1016] The referred point is the definition of "incorporation", which means that only those persons and under those conditions provided under the terms "incorporation" are allowed to undertake activities in the territory of other member state.

Annex 16 defines the term *"investments"* for the purposes of agreement as:

> "tangible or intangible **assets** invested by an investor of a Member State into subjects of entrepreneurial activity on the territory of another Member State in accordance with the legislation of the latter, including:
>
> a. funds (cash), securities and other property;
> b. rights to engage in entrepreneurial activities granted under the legislation of the Member States or under a contract, including, in particular, the right to

[1013] Ibid. Commentary to the EAEU Treaty, Section Trade in Services, Incorporation, Activities and Investments.

[1014] Ibid. Commentary to the EAEU Treaty, Section Trade in Services, Incorporation, Activities and Investments.

[1015] Point 6 para. 24 Annex 16 to the EAEU Treaty.

[1016] Point 6 para 2 Annex 16 to the EAEU Treaty.

exploration, development, production and exploitation of natural resources;
c. property rights and other rights having monetary value."[1017]

And as it is provided further, investment also includes "incorporation" as a form of carrying out investment activity.[1018]

In view of the author of this work, the difference between the concepts of "incorporation" and "establishment" is not very precise and may present a challenge to interpret and apply them in practice. From the initial reading, it seems like "incorporation" implies acquisition of a substantial part in business, opening the business through the legal entity, branch, representative office or individual entrepreneurship. The term "activity" implies the carrying out of business activity through any forms provided under the term "incorporation". Whereas, "investment activity" from the initial point of view includes other capital investments, besides carrying out of business through a substantial shareholding or participation. This is the logic one can apply knowing the approach of the EU in this respect. However, as long as it is provided in the definition that investment also includes "incorporation" as a form of carrying out investment activity,[1019] this creates uncertainty and misleading understanding of the concepts and in general causes the question of whether there is a differentiation between the terms. Therefore, since no guidelines exist in respect of interpretation of these terms in the Treaty, nor court practice is launched on the same, the problem may appear in practice, when there will be the need to apply the principle regulating one or another activity to the type of income in question. For instance, if there is an income in a form of dividend – will it be protected under the principle regulating incorporation or investment activity? The dividend, as a form of income, representing the return on capital, may be paid out by the subsidiary established under the principle regulating incorporation activity, where the shareholder has a substantial holding and right of control. Equally, dividend may be derived from contribution of an intangible asset or the right for exploration activity in the company, as long as such contribution is legally administered as the contribution in exchange for shares. And since such activity is regulated by the principle regulating investment activity, then such dividends may be protected by the principle regulating investments. What if contribution of an asset resulted in a substantial holding – it will in theory make both principles applicable. But which one is prevailing? Assuming that principles regulating investment and incorporation activities are different, and in opposite, the national legislation has only one regime applicable to taxation of dividends, which may for instance be compatible with the principle regulating investment activity, but be in violation with the principle regulating establishment activity – there will be a need to decide, which principle shall apply and protect the dividends in question. First of all, it will be challenging because of the need to assess each situation on a case by case basis. Secondly, it may represent a gap for structuring the investment in certain "preferable" way.

Incorporation activity is regulated by Section 6 of the Annex 16, and Section 7 of the same annex regulates the investment activity within the Union. While analysing the principles regulating these activities, the author will aim to answer the question whether the investment activity and incorporation activity in terms of tax treatment are regulated in the same way and by the same or similar principles of agreement or whether the envisaged principles for both types of activities are worded differently and thus can have different impact on tax system of member states.

3.4.5. Principles regulating incorporation (establishment) activity within the EAEU

3.4.5.1. General principle – para. 24

Section 6 regulates the incorporation and activities within the territory of member states. Investment activities are covered in another section of the EAEU Treaty, which implies that perhaps the principles regulating each freedom are different.

[1017] Point.6, para. 7 Annex 16 to the EAEU Treaty.

[1018] Para.66, Ibid.

66. Одной из форм осуществления инвестиций является учреждение в понимании подпункта 24 пункта 2 настоящего Протокола. К таким инвестициям применяются положения настоящего Протокола, за исключением положений пунктов 69 - 74 настоящего Протокола.

[1019] Para.66, Ibid.

66. Одной из форм осуществления инвестиций является учреждение в понимании подпункта 24 пункта 2 настоящего Протокола. К таким инвестициям применяются положения настоящего Протокола, за исключением положений пунктов 69 - 74 настоящего Протокола.

General rule regulating the incorporation and activities between the member states is provided in para.24 and reads as follows:

> *"The treatment accorded by each Member **State to persons of any othe**r Member State in respect of establishment and activities shall be no less favourable than that accorded **under the same (similar) circumstances to its own persons on its territory**".*[1020]

This is the so called national treatment principle, that obliges member states to treat foreign investors in a way similar to the domestic (national) investors exercising activities in that member state. For instance, from a tax point of view, if the national of one member state establishes a company in the territory of another member state, that other member state will be precluded from imposition of less favourable taxation on that company or the national of the other member state, in comparison to the tax regime accorded to its own persons. The principle in the EAEU Treaty explicitly addresses only the country of potential investment (the country of source) or, in the EU language, the host state, and prohibits it to impose less favourable conditions on the investors coming from other member states. The principle is so narrowly and precisely drafted, that it would be hard to interpret it from the perspective of the home state of investor as it was done in the EU.

In the TFEU, the principle regulating establishment activity is more generally drafted and it allowed to interpret it from both perspectives – source and residence countries of the investor. As interpreted by the CJEU, from the position of country of residence of the investor (home state), it is prohibited to discriminate nationals investing into foreign member state in comparison to nationals, who invest domestically, and simultaneously, it is prohibited to discriminate nationals of other member state in the country of establishment or, using tax language, country of source of income. In the law of EAEU, it is only prohibited to treat foreign person with respect to incorporation or activities less favourably than that accorded to the national persons. In other words, under EAEU law it is prohibited to discriminate foreign investors from the position of a source country only. There is no requirement for the residence state to equally treat person, having activities abroad and those operating solely on its territory. For some time in the EU, it was also questionable whether the freedom of establishment creates obligations not only for the host state, but also for the country of residence (origin of investor) and prohibits state of origin to restrict the activities of its nationals on the territories of other member states. This issue was clarified by the CJEU in 1988 in the Daily Mail case[1021] and was further reaffirmed in many other CJEU decision on direct taxation.[1022]

> *"Even though those provisions are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58. As the Commission rightly observed, the rights guaranteed by Article 52 et seq. would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State".*

For comparative purposes, in the table below are presented the fundamental principles for establishment (incorporation) activities in the TFEU and EAEU Treaty.

TFEU	EAEU Treaty
Art. 49 **Within the framework of the provisions set out below,** restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. **Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State**	Para. 24. Annex 16 The treatment accorded by each Member **State to persons of any othe**r Member State in respect of establishment and activities shall be no less favourable than that accorded **under the same (similar) circumstances to its own persons on its territory.**

[1020] See para. 24 Section VI Annex 16 to the EAEU Treaty.
24. Каждое государство-член предоставляет лицам другого государства-члена в отношении учреждения и деятельности режим не менее благоприятный, чем режим, предоставляемый при таких же (подобных) обстоятельствах своим собственным лицам на своей территории.
[1021] See decision dated 28 September 1988 in the case C-81/87 Daily Mail, para. 16.
[1022] See decision of 16 July 1998 in case C-264/96 ICI, para. 21; decision of 18 November 1999 in case C-200/98 X AB and Y AB, para. 26; in case C-324/00 Lankhorst-Hohorst.

established in the territory of any Member State.

In view of the author, the freedom of establishment is formulated in quite general way in the TFEU and this allowed for its broader interpretation and elaboration by the CJEU also from the home state perspective, whereas in the EAEU Treaty the formulation of the principle regulating incorporation is quite precise and exhaustive and this limits the space for interpretation and manoeuvre. Unless interpreted otherwise or amended, the current wording of the general principle for incorporation activity in the EAEU Treaty will have dramatic outcome on the formation of common tax law principles in the region. The principle will thus allow home states to discriminate and restrict persons, who wish to establish their presence in the other member state. As a consequence, no similar principles of taxation will be promoted in EAEU as those developed by the CJEU on equal treatment by the residence (origin/home) state of foreign branches and subsidiaries to domestic companies, and neither requirement for equal treatment of shareholders with foreign and domestic holdings will be promoted. The author understands, that these principles are not applied universally in all cases in the EU, but only require equal treatment of comparable situations. But these general conclusions are formulated with the only purpose to emphasise that no similar principles may be developed in the Eurasian context due to the core limits established in the fundamental principle for incorporation and activity.

Further on, requirement of "similar or the same circumstances" that is included in the provisions of the EAEU Treaty are most likely inspired by the EU practice. Similarly, as in the EU, the term is not explained by the law and thus would need to be interpreted by the states perhaps in each particular situation, because it is critical and in case foreign and domestic investors are not in the same or similar circumstances with respect to the investment concerned, member state may discriminate the foreign investor by providing less favourable treatment. Therefore, the consequent question arises – as long as the term could have been inspired by the EU practice, could the respective logic of the CJEU on interpretation of the same apply in the Eurasian region? At the same time, it questionable that with the current capacities the Court of the EAEU would be able to interpret this term so that the latter becomes applicable in tax law matters of the member states.

In international tax law in general it is perceived that persons are in different circumstances, if they are residents of different states, and thus often it is allowed under double tax treaties to impose less favourable tax treatment for non-residents in comparison to residents, unless provided otherwise.[1023] In the EU tax law context, although different treatment of residents and non-residents cannot in itself always be regarded as discrimination within the meaning of the EC Treaty (Wielockx, paragraph 19),[1024] in many cases of both, active and passive income taxation, the CJEU held that non-resident taxpayers cannot be discriminated and taxed less favourably than residents since they are in a comparable situations.[1025]

In some other cases the CJEU also held that discrimination of companies established in the other member state based on the place of their registration also deprives the freedom for establishment.[1026] And as was repeated in the Denkovit, "*freedom of establishment thus seeks to guarantee the benefit of national treatment in the host member state, by prohibiting any discrimination, even minimal, based on the place in which companies have their seat (Saint-Gobain ZN, paragraph 35)".*[1027] This principle may be generally applicable in case of passive income taxation, where host member states shall be generally precluded from imposition of more burdensome withholding taxes on outbound payments, which can be any type of passive income, including dividends, interests, royalties, rents, capital gains and so on. In view of the author, this principle may also apply in the EAEU environment

[1023] See Commentaries to Article 24 OECD Model Tax Convention

[1024] Denkavit para.24

Herewith, ruled that in general states cannot apply the higher income tax rate with respect to non-residents without having a good reason to do so. (27 June 1996, Asscher, para. 49; see also Case C-55/98, Gerritse v Finanzamt Neukölln-Nord, 2003

[1025] For more discussion on the same, see section 3 devoted to direct tax matters of this work.

[1026] See Case 270/83, *Commission vs. French Republic*, 1986, para.18; Case C330-91, *The Queen v IRC vs. Commerzbank AG*,1993, para.13;Joint cases C-397/98 and C-410-98, *Metallgesellschaft Ltd and others, Hoechsr AG, Hoechst UK LtD vs. CIR, H.M. Attorney General*2001, para.42; and others.

[1027] Denkavit, para.22

and national regimes could be tested on compatibility with this principle. In addition, the author also believes that this could be actually one of the first issues to address in the Union – to equalise the conditions of equal treatment between national and foreign investors. This could have two positive impacts: first, it will facilitate creation of internal market by promoting equal terms of competition; and secondly, it will address the problem of harmful tax competition by harmonising the regimes for passive income taxation.

Additionally, the CJEU in its very first decisions on direct taxation held that permanent establishment of non-resident is considered to be in the same situation as the resident company of the member state concerned and thus, the member state is generally precluded from more burdensome taxation of income received by permanent establishment compared to taxation of income received by the resident company.[1028] However, with permanent establishments the situation is not always so straight forward because of the interaction of the regimes of two states and therefore in general requires assessment in each case.

With regard to the need to eliminate economic double taxation, the CJEU held that resident parent company and non-resident parent company are generally not in the same situations, and therefore, member state may upon granting of imputation tax credit (or other domestic measure) differentiate between residents and non-resident and it would not be considered in violation with the fundamental principles. Thus non-resident parent company may not be entitled to imputation tax credit similar to the resident one, and accordingly the responsibility to avoid economic double taxation in this case lies with the state of residence.[1029] In this respect the court held that obligation of the member state to provide foreign shareholder with the imputation tax credit on dividends would mean in fact that *"that state would be obliged to abandon its right to tax a profit generated through an economic activity undertaken on its territory".*[1030]

Taken that in the EAEU there is no yet any decision or guidance on how to distinguish whether the taxpayers are in the same or similar circumstances, in case necessary, the author will use as a guidance the approach developed by the CJEU for the purposes of interpreting the term *"under the same or similar circumstances"* in this work.

3.4.5.2. Limitations to the general principle

Coming back to the text of Annex 16, one can find a limitation to the incorporation principle. The next para. 25 states that: *each member State may perform the obligations referred to in paragraph 24 (general principle discussed above) through the provision of formally similar or formally different treatment to persons of any other Member State as compared to the treatment accorded by that Member State to its own persons. The treatment shall be deemed less favourable if it modifies the terms of competition in favour of persons of that Member State as compared to persons of any other Member State.*

In interpretation of the above by the author, the regime imposed on the national and foreign investors could be different as long as it does not affect the terms of competition. This provision again leaves the space for discussion and finding common understanding. In view of the author, any advantageous taxation of national persons in comparison to foreign investors would affect the terms of competition. Because when one interprets the rule in para. 25 from a tax perspective, it is about consideration of the rule from fiscal perspective, and any advantageous taxation means – advantage in monetary terms (tax savings) and as long as it is available only to certain group of persons, but not generally available it tends to disturb the terms of competition.

What concerns the aspect of "formally" similar or different – then in substance it also reminds the principle developed by the CJEU, when member states are allowed to have different regimes for nationals and foreigners, but only to the extent the regimes bring those taxpayers to comparable tax outcome, or, although the regimes are different, the difference is justified in favour of public interest, for instance, the need for effective fiscal supervision, coherence of national regimes or the need to prevent tax avoidance. Again, in the EU context, the rule on tolerance in the formally different regimes applicable to residents and non-residents was developed and interpreted gradually by the

[1028] See ECJ, 28 January 1986, *Commission v. French Republic,* Case C-270/83,

[1029] See Case C-374/404, *Test Claimants in Class IV of the ACT Group Litigation vs. CIR*, 2006, paras.58.59.

[1030] Ibid. para.59.

CJEU, whereas in the Eurasian practice, the principle was simply incorporated in the provisions of the founding treaty and perhaps is inspired by the EU practice. It remains questionable – which institution has the capacity to interpret the fundamental principles in the Agreement from a perspective of taxation and how soon these principles become applicable.

Member states can also derogate from the obligations provided in para.24 under few other circumstances, but the provided list of permitted derogations, in view of the author, does not concern tax related aspects.[1031]

There is one more provision in the EAEU Treaty that may be looks like potential limitation to principle of incorporation in tax matters. In particular, para. 7 of article 65 may be read and interpreted by one as if the general principle of incorporation and activities was not meant to influence the tax systems of the EAEU member states. Para. 7 Article 65 EAEU Treaty reads as follows:

> "(…) 7. No provision of this Section shall prevent the Member States from taking or adopting any measures: (…)
>
> > 4) inconsistent with **paragraph 24 of Annex 16 [general principle of incorporation and activities]** to this Treaty, provided that the difference in the actually provided treatment is aimed at ensuring equitable or effective imposition of direct taxes and their collection from nationals of another Member State or third states in respect of trade in services, creation and management, and that such measures shall not conflict with the provisions of international treaties of the Member States.

The above provision, read in conjunction with the provision on principle of incorporation, basically provides that member states may provide different tax treatment to the foreign and national investors, as long as such different regimes aim to ensure equitable or effective imposition of direct taxes and in particular their collection from nationals of another member states. However, such measures cannot violate the norms of international treaties [perhaps "double tax treaties"]. However, there is also para. 8, which, if read in conjunction with para. 7 clarifies its meaning and vice versa, in view of the author, reaffirms the application of general principle on incorporation and activities to direct tax matters. It reads as follows:

> "8. No measures stipulated in paragraph 7 of this Article shall lead to arbitrary or unjustifiable discrimination between the Member States or any disguised restrictions on trade in services, as well as on incorporation, activities and investments". In other words, the regime imposed on foreign investors can be different from the regime imposed to nationals to assure effective or equal collection of direct taxes from non-residents, but at the same time the regime cannot be imposed in a form of disguised restrictions on incorporation and activities.

These provisions definitely leave the space for interpretation. For instance, it is important to establish a common understanding of what constitutes *"equitable or effective imposition of direct taxes and their collection"*, as well as what is meant by *"disguised restrictions on incorporation and activities"*. Definitely, this is something that shall justify the tax policy or regime of the member states, under which the foreign investor is taxed less favourably than national investor in comparable circumstances. To the author these provisions remind the grounds for justification of restrictive taxation in the EU, which in general were adopted in public interest and include: the need for effective fiscal supervision, coherence of the fiscal systems and the need to prevent tax abuse. In view of the author, something similar may be covered under the meaning of the need to "*equitable or effective imposition of direct taxes and their collection*".

Rule-of-reason was developed by the CJEU in order to justify certain national measures that restrict exercise of the fundamental rights granted under the TFEU. The rule-of-reason applies also in tax related cases. In order to justify national measure based on the rule-of-reason doctrine, it shall meet simultaneously four conditions: 1) national measure should apply in a non-discriminatory way; 2) it should be justified based on the general interest; 3) it shall be adequate to ensure the achievement of

[1031] See points 30 and 32 Annex 16 to the EAEU Treaty. The provisions concern quantitative matters.

objective it aims to achieve and finally; 4) it shall be proportionate and not go beyond what is necessary to achieve the objective. [1032]In the case Gebhard, the CJEU proclaimed that these conditions of the rule-of-reason doctrine apply equally in relation to all freedoms.[1033]

Reasons for justification of discriminatory and restrictive measures

In the EU context, the need for effective fiscal supervision was accepted by the CJEU in the cases when member states restricted the fundamental freedoms with the national tax measures. Member states explained that sometimes they are not able to provide equal treatment to purely domestic and cross-border situations, because they have not enough information about the tax treatment and situation of the taxpayer in the other member state. In many cases the CJEU rejected this justification in view that Mutual Assistance Directive is available for the member states, with the use of which they can get necessary information. However, in cases when the need for fiscal supervision was closely linked with the objective to prevent tax abusive practices, the CJEU tend to accept this reason as justification. As noted by Binder and Pinetz, the CJEU applied differently the need for effective fiscal supervision in pure intra-union situations and in situations, where third countries were involved.[1034] They write that in case of situations with third countries, the EU tends to be more stringent, and in cases where the national measure would not be compatible in the intra-EU context, it is compatible with third countries. In particular, member states may for instance have less measures available to collect information about taxpayers in such third countries in comparison to taxpayers in other EU countries, and thus national tax measures could be stricter. Another justification accepted by the CJEU is need to assure the fiscal coherence – for instance, to assure that income was taxed at least once by either member state, or to assure that payment, which was deducted once in other state is subject to taxation in another – not to facilitate the abusive practice of deduction and non-inclusion.[1035]

It shall be noted that there is also a list of arguments that CJEU did not consider as sufficient justification to the discriminatory or restrictive national measures.[1036] For instance, the CJEU noted that measure cannot be justified based on purely economic reasons – in other words, if the measure is restrictive because it aims to collect more tax revenues for the state or stimulate investments exclusively on its territory – it is considered as economic reason – and was not accepted by the Court as sufficient justification in public interest.[1037] Similarly, the arguments concerning absence of tax-harmonization measures in the sphere of direct taxation were not accepted as justified reasons of restrictive measures. As proclaimed by the Court, the absence of harmonization at the level of the Union does not eliminate the obligation of the member states to comply with the fundamental freedoms.[1038] Dahlberg agrees with such position of the Court, since in his view it is a right approach and national tax legislation directly affects realization of freedoms, for instance for promotion of investments, and without such approach by the Court the achievement of the objective would be hampered.[1039] Further on, the restrictive national tax measure cannot be justified solely because it is applied to counter-balance the tax advantage received by a taxpayer in the other member state. However, in view of the author the position of the CJEU in this case is doubtful in terms of correctness. As was correctly noticed by Dahlberg, in the case where the Court denied this basis for justification, it failed to assess the overall situation of the taxpayer – e.g. tax treatment in the both states involved in the situation. The author believes that the overall situation of taxpayer shall be taken into consideration upon assessment of national tax measure on compatibility with the Union's law, this is required in order to prevent abusive practices by the taxpayers by use of the mismatches between the member states' tax systems.

[1032] See Ibid, M. Dahlberg, Ibid., p. 314.

[1033] See Case C-55/94, Gebhard.

[1034] A.Binder and E.Pinetz, Ensuring the Effectiveness of Fiscal Supervision in Third Country Situations, (2014) 23 EC Tax Review, Issue 6, pp. 324–331.

[1035] See Case C-35/98 Verkooijen, para. 56.

[1036] For a good overview of justifications accepted by the in direct taxation refer to M.Dahlberg, Book, pp. 233-275.

[1037] See case Case C-35/98 Verkooijen, para. 48.

[1038] See Case C-270/83, Avoir Fiscal, see also Case C-81/87, Daily Mail.

[1039] See Ibid. Dahlberg, Ibid, p. 333.

3.4.5.3. Most favourite nation principle

Continuing further with the principles for incorporation activities in the EAEU Treaty, the para.29 of the Annex 16 provides for principle of most favourite nation treatment in respect incorporation and activities. It states:

> "The treatment accorded by each Member State, **under the same (similar) circumstances**, to persons of any other Member State and persons incorporated thereby in respect of their incorporation and activities in its territory shall be no less favourable than that accorded to persons of third states and persons incorporated thereby".

Respectively, member states in addition to obligation to treat persons of other member state having incorporation on its territory equally to its own national persons, shall also treat them not less favourably than person of any other third states. However, this requirement does not imply the obligation of member states to provide the same tax benefits to the persons of other member states that are available to the persons of third states under respective double tax treaties or other specific tax agreements. This is clear from para. 7 article 65 EAEU Treaty, which says that member states may act contrary to the most favourite nation clause applicable to the right of incorporation as long as the difference is justified by the different provisions of certain double tax treaties or other tax agreements.[1040]

However, if by any reason, except for the specific tax agreement, the member state treats persons of the third states more favourably than under the general tax regime, which is also applicable to the persons of other member states, it should also extend the same favourable tax treatment to the persons of other member states, taken that persons concerned are in the same or similar circumstances.

There are several more specific provisions that relate or may be interpreted as related to taxation in the member states state, and they are worded as follows:

> 9. If a Member State maintains restrictions on trade in services, as well as on the incorporation, activities and investments, in respect of a third state, nothing in this Section shall be construed as obliging this Member State to extend the provisions of this Section to persons from another Member State if such persons belong to or are controlled by the said third state, and the extension of the provisions of this Section would lead to circumvention or violation of these prohibitions and restrictions
>
> 10. A Member State may not extend its obligations assumed in accordance with this Section on a person from another Member State in respect of trade in services, incorporation, activities and investments, if it is proven that this person of another Member State does not conduct any significant business operations on the territory of that (another) Member State and belongs to or is controlled by a person from the first Member State or a third state".[1041]

From a tax point of view, the above provisions authorise member states to use domestic anti-avoidance measures in cases, where the person of a third state tries to benefit from the principles incorporated under the EAEU Treaty and subsequent tax privileges. On top of this, in view of the author, the above provisions may constitute independent anti-abuse provisions capable to limit the EAEU Treaty benefits even in absence of specific domestic anti-abuse measures, in abusive situations.

3.4.5.4. Intermediary conclusion

EAEU Treaty provides for the set of principles that shall regulate cross-border incorporation and activities within the EAEU. If to draw the line between the EU and EAEU treaties, then principle of incorporation and activities in the EAEU would be the freedom of establishment in the EU. The right of incorporation includes the establishment of persons and companies of one member state in the territory of another member state in a form of legal entities, branches and individual entrepreneurs. The EAEU treaty tends to gradually liberalise this right and requires member states to work on

[1040] Para. 7 art. 65 EAEU Treaty.
"7. No provision of this Section shall prevent the Member States from taking or adopting any measures: (…)
5) inconsistent with paragraphs 27 and 29 of Annex 16 to this Treaty, provided that the difference in treatment is the result of an agreement on taxation, including that on the avoidance of double taxation, to which the respective Member State is a participant.

[1041] See para. 9 Article 65 EAEU Treaty.

harmonization of national legislations in order to ensure the same. Liberalization shall be governed by the principle of proportionality, economic feasibility, mutual benefit and coherence. The Treaty in general moves from declarative statements to concreate objectives and imposes obligations on the member states. Based on the study and analysis of the author, the obligations so imposed shall concern all national measures that may hinder promotion of cross-border incorporation and activities, including direct tax matters.

The fundamental principle regulating the cross-border incorporation and activities establishes the requirement for national treatment of the foreign investors as long as they situate in a comparable situation to the national investors. However, the tax regimes granted to the national and foreign investors could be formally different as long as they do not violate the terms of competition in favour of the nationals of the host member states. Similarly, the EAEU Treaty also clarifies that with respect to direct tax matters member states may keep different tax regimes imposed on national and foreign investors in view of the need to assure equitable or effective imposition of direct taxes and their collection, however, the regimes imposed in this way cannot represent arbitrary or unjustified discrimination, or disguised restrictions of rights granted under the EAEU Treaty. On the basis of the above, the author concludes that the above principles may require amendments of tax systems of member states if it is detected that current tax regimes treat foreign investors less favourably from a tax perspective than its own nationals who are under the same (similar) circumstances to the foreign investor, and such difference is not simply formal, but leads to creation of more favourable conditions for the national investors and is not the measure, which can be justified with a view to assure effective and equitable imposition and collection of taxes.

However, the author came to the conclusion that the national treatment principle is one sided or limited because it addresses and imposes obligations only to the host member states, but does not impose any respective obligations on the home member states of investors. This is the first and the major difference between the principle of incorporation in the EAEU Treaty and freedom of establishment in the TFEU. In view of the author, based on the EU experience, the principle of incorporation and activities shall be revised in the EAEU Treaty in order to allow its application also to the home states in order to protect persons, exercising the right of incorporation, also from the residence perspective and facilitate creation of single market and fair competition.

In general, the principle regulating incorporation and activities in the EAEU Treaty sometimes reminds the provisions of the TFEU and principles developed by the CJEU and it looks that it was to some extent inspired by the EU practice and interpretation of the EU principles developed by the CJEU. Consequently, the question is to what extent the practical experience of the EU in tax law matters may be useful in the EAEU context taken the similarities and differences in the legal provisions in the founding documents. Perhaps, at this stage one could in theory assume that the EU practice in interpreting and applying the freedom of establishment may be relevant to apply when interpreting the principle of incorporation in the EAEU Treaty, but only to extent it is applicable to the state of incorporation, but not the states of origin.

3.4.6. Principles regulating investment activity

3.4.6.1. Introduction

Last fundamental freedom to be discussed in this work is the freedom for investment activity in the EAEU. As was mentioned earlier, the author considers the principle regulating investment activities in the EAEU as substitute to what in the EU is known as the freedom for movement of capital. Therefore, further in this section the freedom in the EAEU Treaty will be analysed and where relevant – compared to the EU freedom for movement of capital.

Principles regulating investment activities in the EAEU are incorporated under articles 65-69 of the EAEU Treaty and Section 7 of the Annex 16 to the EAEU Treaty. The opening para. 65 in Section 7 states that the provisions of the section apply to investments done by investors of one member states on the territory of another member state starting from 16 December 1991. This means that all cross-border investments undertaken between the persons of the states for the last approximately 25 years are protected under the EAEU Treaty. The date of 16 December 1991 corresponds with the date when Kazakhstan got its independence after the dissolution of the USSR,[1042] and perhaps was

[1042] On 8 December 1991 was signed Belovezhny agreement on formal dissolution of the USSR.

chosen specifically to cover only those investment, which were done after the states got their independence.

As discussed in section 3.4.4., the term "investments" is quite broadly defined in the EAEU Treaty and includes investment of tangible and intangible assets, licences, but what's important, it also encompasses the "incorporation activity" as a form of carrying out investments.[1043] This may be logical, since incorporating a business is in fact the investment activity, but this causes the question on extent of applicability of the provisions regulating investments also to the incorporation activities and degree of prevalence of one principles over others in case of mutual applicability. With this respect, para.66 of the Annex 16 clarifies that to the incorporation activities, as to the form of investment activities, shall apply also the provisions regulating the investment activities, except for those provided under para. 69-74 of Annex 16 to the EAEU Treaty. As will be discussed in more details below, in general in many aspects, the incorporation activity is regulated by the principles envisaged for investment activities, but what's important for this work, is the fact that those, which are specifically excluded from the scope of applications are the only provisions that may be interpreted from a tax point of view. This consequently means that perhaps the intention of legislator, among others, was to assure that tax treatment granted to income realized under both freedoms may be different. In the next section the author will consider in more details the principle guiding the investment activities.

3.4.6.2. General principles regulating investment activity in the EAEU Treaty

Para. 68-76 of Annex 16 provide for the legal order and principles for protection of investments. Para. 68 establishes general principle for fair treatment of investment, it states that:

> *Each Member State ensures on its territory fair and equitable treatment of investments and investment-related activities conducted by investors of other Member States".*

The wording of the principle does not as such present an unconditional obligation for the member states, but simply calls member states to ensure equal and fair treatment of investments, including investments in a form of incorporation activities.

Further on, para. 69 established the requirement for national treatment of the foreign investors, but it does not apply to incorporation activities. It states that:

> *The treatment specified in paragraph 68 of this Protocol shall not be less favourable than the treatment accorded by the Member State in respect of investments and investment-related activities conducted by its domestic (national) investors."*

The provision in para. 69 somehow details what shall constitute "fair and equitable treatment". The principles in both paragraphs address only the member state of host or source, where investment will be directed and require such states to treat investment and investors of other states equally to domestic investors and investments. Additionally, in comparison to para. 24 and 25 of Annex 16, which apply to incorporation activities, para. 68 and 69 omits the wording *"under the same (similar) circumstances*", which upon interpretation may imply that foreign investor, exercising investment other than incorporation activities, shall be treated similarly to domestic investors irrespective of the fact that they may be not in comparable situations. It is not clear whether this was an intention of the legislator or simply the gap upon drafting of the law. However, taken the literal approach of interpretation of tax legislation that is common in the Eurasian region, it is very probable that principles may be interpreted as they are worded and in case the term "under the same (similar) circumstance" is absent, the competent authorities may indeed waive this requirement. In case of the TFEU, the principle regulating freedom of establishment also does not include requirement for the persons to be in a comparable circumstances, but this requirement was developed by the Court and is now inherent to each principle. Simultaneously, the principle regulating movement of capital under the TFEU, in contrast specifies that tax measures applicable to investors may be different depending on the place of their residence or investments. Despite this, however, the situations with application

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[1043] Para.66, Ibid.

66. Одной из форм осуществления инвестиций является учреждение в понимании подпункта 24 пункта 2 настоящего Протокола. К таким инвестициям применяются положения настоящего Протокола, за исключением положений пунктов 69 - 74 настоящего Протокола.

of principle for free movement of capital are still assesses on a case by case basis. It may be suspected that provisions of the EAEU Treaty could have been expired by the TFEU – and as long as there only one provision contains this requirement in the TFEU – the same was inserted into the EAEU Treaty – although freedoms were mixed up in this case.

Consequently, if to interpret the above provisions in para. 68 and 69, from tax point of view, then member states may be required to tax equally non-resident investors (who are usually foreign national) from other member states and resident national investors investing domestically, irrespective of their residency status, amount of investments, and tax regime in the countries of their residence. This is quite a demanding obligation, because as was demonstrated with the examples from the EU practice, states may be allowed to impose more discriminatory tax treatment with respect to non-resident investors, since such investors may be not in the same or similar situation with the residents or there may be specific circumstances that may require more burdensome taxation of non-residents – such as the need of fiscal supervision and prevention of tax avoidance practices.

Accordingly, in view of the author, obligations imposed on member states under the general principle regulating investments is stricter than obligation imposed on member state under the general principle regulating incorporation activity under the EAEU Treaty.

Agreement on encouragement and mutual protection of investments in the EurasES

The general principles discussed above, and also the terms discussed in the previous subsections of section 3 of this work, one can also find in the Agreement on encouragement and mutual protection of investments in the EurasES concluded between Belarus, Kazakhstan, Kyrgyzstan, Russia and Tajikistan.[1044] The agreement was signed in 2008, but in case of Kazakhstan entered into force only on 11 January 2016. It is an interesting fact, because first of all it entered into force the year after the EAEU Treaty entered into force, which already encompasses the same provisions, and secondly, because all other agreements, which were codified in the EAEU Treaty were terminated, while this one, although incorporated into the EAEU Treaty, entered into force as a stand-alone agreement. What could explain existence of similar provisions in several agreements? First, it could be because previous agreement was not in force for a long time, secondly it could be because EurazEC agreement was also signed by Tajikistan, which is not a member state and continues its effect with respect to obligations granted between current EAEU member states and Tajikistan. Finally, EurasES agreement contains additional limitations to the general principle that are not contained in the EAEU Treaty, and perhaps by restating the general principles in the EAEU Treaty, but omitting those limitations, member states tried to deactivate them. In the below paragraph, the author will discuss those limitations in the EurasES Agreement.

According to EurasES agreement, each contracting party preserved the right not to grant more favourable regime to the investors coming from the other contracting states than it was obliged to grant under the WTO founding agreement of 1994 and GATS, to which such party was subject to.[1045] These were perhaps provisions regulating trade related investment measures, as long as WTO prohibits national measures that would discriminate foreign investors. Neither, the contracting parties were obliged to grant to the persons of other contracting parties the regime more favourable than they agreed to grant under any other multilateral agreement concluded in relation to investments. These, for instance could be principles agreed independently by the contracting parties with the EU in a form of partnership and cooperation agreements, which also included provisions on investments and non-discriminatory taxation of foreign investors. Further on, the above limitation was supposed to enter into force independently for each contracting party as soon as it joins either the WTO or other multilateral agreement.[1046] Based on this, the author concludes that as long as the general principles regulating investing activities in the EAEU Treaty establishes the requirement for the national treatment, and this requirement is not limited by the similar provisions as in the EurasES Agreement, which allows contracting parties not to grant more favourable regime that it grants under other international agreements, the EAEU treaty thus presents more stringent obligations than the

[1044] See article 4, Соглашение о поощрении и взаимной защите инвестиций в государствах-членах Евразийского экономического сообщества, от 12 декабря 2008 года, принято Решением №396 от 12 декабря 2008 г, Межгосударственным советом Евразийского Экономического Сообщества.
[1045] See article 4, para. 5 Ibid. Soglashenie 2008.
[1046] See article 4, para. 5 Ibid. Soglashenie 2008.

EurazEC agreement.

3.4.6.3. Most favourite nation principle

Additionally, there is also the most favourite nation principle provided in respect of investment activities, which requires investors from member states to be in the same or similar circumstances as persons of third states to benefit from the MFN principle. Herewith, it should be noted that MFN principle does not apply to the treatment granted by member states to the persons of third countries on the basis of double tax treaties or any other agreement on tax matters.[1047]

> 70. The treatment accorded by each Member State, under the same (similar) circumstances, to investors of any other Member State, their investments and investment-related activities shall be no less favourable than the treatment accorded to investors of any third state, their investments and activities related to such investments.

It looks like the requirement of "same (similar circumstances)" in the general principle regulating investment was deliberately omitted by legislator, because in the most favourite nation clause it has this requirement. Herewith, even though it creates an additional obligation for the member states it may be necessary to have this principle formulated in the current form to ensure effective functioning and flows of investments between the member states. Herewith, para. 71 clarifies that investors from other member states may choose to rely either to the principle in para. 69 or para.70, which ever is more favourable and which ever they prefer.[1048]

3.4.6.4. Limitations to the general principle

Set of new rules are envisaged for regulation and full protection of intra-union cross-border investment activity. Thus, is introduced 1) principle requiring provision of equal and fair regime of foreign investments (para. 68); 2) national treatment principle (para.69); 3) most favourite nation principle (para. 70-71). One very significant drawback of the whole section is that member states preserve the right to restrict the activities of investors of other member states, as well as to apply and introduce other exceptions to the national treatment referred to in paragraph 69,[1049] which questions the overall effectiveness of these principles and creation of common investment space.

> 73. Each Member State shall, in accordance with its legislation, reserve the right to restrict the activities of investors of other Member States, as well as to apply and introduce other exceptions to the national treatment referred to in paragraph 69 of this Protocol.

To knowledge of the author, currently there is no tax measures imposed by the member states with the purpose to prevent or limit cross-border flow of investments between the member states, that would be reserved as the exception or restriction and included into the national list of the member states.[1050]

3.4.7. Difference between principles regulating incorporation and investments in the EAEU

Below author will **provide** a comparative table to illustrate the differences in principles regulating investment and establishment activities in the EAEU that were discussed in the above analysis. Table contains provisions retrieved from Annex 16, unless states otherwise.

Investment activity	incorporation activity
Definition	
7) "investments" means tangible and intangible assets invested by an investor of a Member State into subjects of entrepreneurial activity on the territory of another Member State in accordance with the legislation of the latter, including: - **funds (cash), securities and other property;** - **rights to engage in entrepreneurial activities granted under the legislation of the Member States or under a contract, including, in particular, the right to exploration, development, production and**	24) "incorporation": – creation and/or acquisition of a juridical person (participation in the capital of a created or incorporated juridical person) with any organisational legal form and form of ownership provided for by the legislation of the Member State on the territory of which such juridical person is created or incorporated; – acquisition of control over a juridical person of a Member State through obtaining of an opportunity to, either directly or via third persons, determine decisions to be adopted by such juridical person, including through the management of votes granted by

[1047] See para. 74 Annex 16 to the EAEU Treaty.
[1048] See para. 71 Annex 16 to the EAEU Treaty.
[1049] See para. 73 Annex 16 to the EAEU Treaty.
[1050] For more on the same, see section 3.4.8. of this work.

exploitation of natural resources; - **property rights and other rights having monetary value;** Additionally: **66. Incorporation within the meaning of sub-paragraph 24 of paragraph 2 of this Protocol shall constitute a form of investment. All provisions of this Protocol,** except for the provisions of paragraphs 69-74 **of this Protocol, shall apply to such investments.**	voting shares (stakes) and participation in the board of directors (supervisory board) and other management authorities of such juridical person; – opening of a branch; – opening of a representative office; – registration as an individual entrepreneur. Incorporation shall be carried out, among other things, for the purposes of trade in services and/or manufacture of goods;
General regulating principle	
68. Each Member State shall ensure on its territory fair and equitable treatment to investments and investment-related activities **conducted by investors of other Member States.** **69. The treatment specified in paragraph 68 of this Protocol shall not be less favourable than the treatment accorded by the Member State in respect of investments and investment-related activities conducted by its domestic (national) investors.**	24. The treatment accorded by each Member **State to persons of any othe**r Member State in respect of establishment and activities shall be no less favourable than that accorded **under the same (similar) circumstances to its own persons on its territory.**
Limitation to the general principle	
Absent	25. Each Member State may perform the obligations referred to in paragraph 24 of this Protocol **through the provision of formally similar or formally different** treatment to persons of any other Member State as compared to the treatment accorded by that Member State to its own persons. The treatment shall be deemed less favourable **if it modifies the terms of competition in favour of persons of that Member State as compared to persons of any other Member State**.
Requirement for persons of the other states to be in the same circumstances as persons of the state concerned to be treated equally	
Absent	Yes, persons should be in the same circumstances to be treated equally.
Most favourite nation principle	
70. The treatment accorded by each Member State, under the same (similar) circumstances, to investors of any other Member State, their investments and investment-related activities shall be no less favourable than the treatment accorded to investors of any third state, their investments and activities related to such investments.	29. The treatment accorded by each Member State, **under the same (similar) circumstances**, to persons of any other Member State and persons incorporated thereby in respect of their incorporation and activities in its territory shall be no less favourable than that accorded to persons of third states and persons incorporated thereby.
MFN principle (exceptions)	
74. The provisions of paragraph 70 of this Protocol shall not be construed as obliging a Member State to extend to investments and related activities of investors of other Member States the benefits of any treatment, preferences or privileges that are available or may be made available in the future to that Member State under international treaties on the avoidance of double taxation or other agreements on taxation, as well as the treaties referred to in paragraph 46 of this Protocol.	**Art. 65 of the EAEU Treaty:** 7. No provision of this Section shall prevent the Member States from taking or adopting any measures: 5) inconsistent with paragraphs 27 and 29 of Attachment 16 to this Treaty, **provided that the difference in treatment is the result of an agreement on taxation, including that on the avoidance of double taxation,** to which the respective Member State is a participant.

To conclude, the author will comment on the above points. First of all, the term “investment” is broader than the term “incorporation”, and as such also envisages incorporation activity as a form of investment. In many aspects, therefore, investments and incorporation activities are regulated in the same way under the EAEU Treaty. However, what is important from tax point of view, the general principles that may have influence particularly on the tax treatment of member states with respect to income derived from both types of activities, are different and, therefore, tax treatment of member states in respect of income received from investment and incorporation activities can also be different. In particular, both principles require provision of national tax treatment to be granted by member states to foreign persons, exercising investments and incorporation activities on their

territories. However, principle regulating incorporation activities is stricter in this respect because it requires foreign and national persons to be in the same or similar circumstances prior the national tax treatment could be granted to the foreign investors, whereas in contrast, the principle regulating investment activities does not require foreign investors to be in comparable position to national investors to benefit from the national treatment principle. It will be the matter of interpretation in practice, whether under the second principle it may be equally required for investors to be in comparable circumstances to benefit from the national treatment, however, so far, based on the literal reading of the provisions, the principle for incorporation activity is stricter with respect to foreign investors, while the principle regulating investment activity in contrast is more demanding with respect to member states, because it any require significant changes of the national legislations in order to comply with it.[1051] There is one more factor which speaks in favour of position that principle regulating investment activities is more stringent for the member states. In particular, for fulfilment of incorporation principle, the member states could impose regimes for foreign and local investors, which are formally different, but at the same time do not violate the terms of competition. There is no similar deviation from the principle regulating investment activity, and on the basis of which it may be concluded that treatment accorded under its principle shall be also formally similar between foreign and domestic investors.

In general, it is important to note that the principle regulating incorporation activity and investments are worded in a sort of limited manner, because they both address only the host states. Being more precise, principles provide for the obligation of the member states to treat foreign investors and their investments not less favourably than domestic investors, while principles do not impose obligations on the home member states to treat their own nationals who exercise their right of incorporation or freedom for investment activities in other member states equally to the nationals who do not exercise the same right or do the same domestically. The author believes that it is necessary to reconsider the fundamental principles regulating investment and incorporation activities in the EAEU Treaty to assure that they also address the home countries of investors and require them not to impose domestic measures, including tax measures, that would limit their investments to the territories of other member states. Secondly, as was already mentioned, it is also recommended to clarify on prevalence of one principle over another to avoid the conflict situation when both principles could apply.

3.4.8. National list of exceptions

Annex 16 starts from declaring that its provisions, including those regulating general principles for cross-border provision and receipt of services within the EAEU Union, incorporation, activities and investments, shall apply to all measures of member states affecting the same.[1052] The author concluded that based on this general principle, national tax measures are equally affected by the provisions of annex 16. However, member states preserve their right to deviate from the principles established in Annex 16 as long as they have specified the list of exceptions and limitations either as part of the EAEU Treaty or separately approved by the Supreme Economic Council. Such, so called "horizontal" restrictions maintained by the Member States in respect of all sectors and activities are determined in accordance with Protocol 2 to Annex 16. Another types of national lists of restrictions, exceptions, additional requirements and conditions deviating from the general principles shall be approved by the Supreme Council. The section below is devoted to consideration of both types of national restrictions that are maintained by the member states in order to understand the nature and basis of the same and also to understand if any limitations are maintained by the member states from tax policy perspective.

The second type of exceptions maintained by the member states that shall be approved by the Supreme Council of the EAEU may be based on the following principles and apply in the following situations:[1053]

1) In case of state participation in the capital or control of the legal entity;[1054]

[1051] For example of changes that may be required see section 4.4. of this work with analysis of national legislations on treatment of cross-border dividends.

[1052] See para.2 Annex 16 to the EAEU Treaty.

[1053] See para. 2 Annex 16 to the EAEU Treaty for the references to points, based on which the exceptions could be based.

[1054] See para. 15-17 Annex 16 to the EAEU Treaty.

2) With respect to the general principle regulating provision and receipt of services in the EAEU;[1055]
3) With respect to the general principles regulating incorporation and activities of persons of one member states on the territories of another member states;[1056]
4) With respect to the MFN principle granted upon provision and receipt of services;[1057]
5) With respect to provision and receipt of services - quantitative and investment limitations specified in the national lists or Protocol 2 to Annex 16;[1058]
6) With respect to incorporation and activities – quantitative and investments limitations in addition to those specified in para. 32 Annex 16, and allowed under national lists and Protocol 2 to Annex 16;[1059]
7) With respect to movement of labor as provided in national lists and Protocol 2 to Annex 16.[1060]

Inspite the fact that the EAEU Treaty has fixed the intentions of the member states to gradually reduce the exemptions and restrictions, in a sufficiently long term the domestic market of the Union will function with the existence of these restrictions and exemptions.[1061]

However, having reviewed the Protocol 2 to Annex 16 and also the national list of exceptions and restrictions approved by the Supreme Economic Council,[1062] the author noticed that member state in most cases do not claim any restrictions or exemptions that would be based on their national tax law. Exception to the same is only Belarus, which stated that it will continue to apply the terms and procedures for access, including restrictions of access to subsidies and other state support measures that will be determined by the legislation of Belarus and applied in full. Among the legal basis for application of terms and rules is also mentioned the Tax Code of Belarus.[1063] These measures will in particular apply in relation to cross-border services, incorporation and activities of foreign investors. Based on the content of Protocol 2, such measures shall not apply to investment activities of foreign investors in Belarus. There are no similar restrictions or exceptions reserved by the member states to be applied in accordance with their national tax laws.

Having studied the national lists of exceptions, the author concludes that although countries preserve rights to keep many exceptions and restrictions for provision of services, incorporation and investment activities, these restrictions are not based on the tax law of the member states. This is so, because restriction and exceptions in most cases are of more fundamental nature, than taxation, when they for instance establish deviations and allow discrimination based on the nationality of the person – for instance completely prohibiting the exercise of certain types of activities by the nationals of other member states, or limiting the rights to acquire property. Kazakhstan, for instance, grants only to its nationals or persons with permanent residence status in Kazakhstan to be registered and carry out activities as individual entrepreneurs in Kazakhstan.[1064] Therefore, as long as persons are restricted from carrying out many activities on the territories of other member states, these persons are therefore discriminated there based on the nationality status, it makes the issue of taxation to be of the secondary importance. However, what's interesting and important from a taxation point of view, although there are restrictions and exceptions from the principles provided under the EAEU Treaty, they do apply only in the selected spheres, often motivated by the social, cultural, defensive

[1055] See para. 23 Annex 16 to the EAEU Treaty.
[1056] See para. 26 Annex 16 to the EAEU Treaty.
[1057] See para. 28 Annex 16 to the EAEU Treaty.
[1058] See para. 31 Annex 16 to the EAEU Treaty.
[1059] See para. 33 Annex 16 to the EAEU Treaty.
[1060] See para. 35 Annex 16 to the EAEU Treaty.
[1061] See Commission report, 2015, Ibid, p.10.
[1062] See Ibid. Decision of Supreme Economic Council No. 112 dated 23 December 2014.
[1063] See point 1, Protocol 2 to Annex 16 to the EAEU Treaty
[1064] See Decision of the Supreme Economic Council of the EAEU No.112 dated 23 December 2014 as updated based on the Decisions of the Supreme Economic Council of the EAEU No.18 dated 8 May 2015 and No. 23 dated 10 October 2015, Решение Высшего Евразийского экономического совета от 23.12.2014 N 112 (ред. от 16.10.2015) "Об утверждении индивидуальных национальных перечней ограничений, изъятий, дополнительных требований и условий в рамках евразийского экономического союза", available at: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=187657&fld=134&dst=1000000001,0&rnd=0.05474796025221923#0, accessed on 3 June 2017.

or public interest, but nevertheless, the cross-border investments, trade of goods and services do happen between the member states in many other spheres, and in view of the author, as long as there are no general exceptions or restrictions from the principles of EAEU law that would be based on tax laws of the member states, the member states thus have to comply with their national tax laws with those principles established by the EAEU Treaty at least in those cross-border situations that already take place in the region. In other words, for instance, if Russian company already has a subsidiary in Kazakhstan and is for instance engaged into production of dairy products, that Russian company shall be treated as foreign investor under Annex 16 and therefore all tax measures applicable to its income received from Kazakhstan shall be no less favourable than those applicable to domestic companies. This may require establishment of equal tax regimes for taxation of profits received by that Russian company from its Kazakh subsidiary, such as dividends and capital gains primarily, but also interest or other inter-group payments. The same principle of equal treatment may apply to the Kazakh subsidiary of Russian company as well based on the principle regulating activities of foreign investors. Thus, the tax measures applicable to companies with foreign parent and measures applicable to companies with domestic parent companies shall also be equal.

To conclude, on the basis of review of the national lists of exceptions and restrictions, the author concludes that in general, member states do not reserve any rights to limit exercise of cross-border provision of services, incorporation, investments and activities by the use of national tax measures that would contradict to the general principles governing the same activities under the Union law. Exception to the above is Belarus, which reserved the right to apply certain national rules and measures in accordance with the Tax Code of Belarus that could limit the access of foreign persons to subsidies and other state support measures.

3.4.9. Direct effect – whether fundamental principles regulating services, incorporation and investment activities in the EAEU have direct effect as recognized in the EU

In the EU practice, the direct effect of the EU law was first acknowledged by the CJEU in the case Van Gend en Loos,[1065] which implies that persons of the member states can rely on the principle envisaged in the TFEU directly for protection of their rights before the national courts. For the EU practice, the question of direct effect of the EU legislation is of significant importance, because it means that not only the law is directly applicable, but also that national courts have to interpret it in accordance with the EU judicial practice and follow the principle of primacy of EU law over conflicting provisions in the national law.[1066]

In the EU practice, the provision qualifies as having direct effect if it meets the following three criteria: 1) it is clear and precise, 2) it imposes the obligation, which is unconditional and unqualified; 3) there is no discretion in the implementation of the obligation and finally 4) it intends to confer rights to individuals.[1067] The principle for the freedom of establishment was recognised as having direct effect in the Reyners case.[1068] The article in the EEC Treaty regulating the same was worded as follows: article 52 para.1:

> "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be progressively abolished in the course of the transitional period. Such progressive abolition shall also extend to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State".

Although, the article did not establish the principle of non-discrimination and the term "restrictions" required common interpretation, the Court found that article 52 provided an obligation to achieve the precise result and result shall be achieved by the end of transitional period irrespective of the fact that no secondary measures were taken with respect to the same. The Court concluded that "*Article 52 of the EEC Treaty produces as from the end of the transitional period direct effects in the relations between the Member States and their subjects and confers on individuals rights which the national courts must protect in so far as concerns the prohibition on discrimination based on nationality.*"[1069]

[1065] See Case C- 26/62, Van Gend en Loos v Nederlandse Administratie der Belastingen.
[1066] See Ibid, Woods and Steiner, chp. 5
[1067] See H.Barnett, Constitutional and Administrative law, 10 ed. Routledge, 2013, p.174.
[1068] See Case C-2/74, Jean Reyners v Belgian State.
[1069] See Case C-2/74, Ibid, response to the second question.

The freedom for movement of services was confirmed to have direct effect in the EU in the case 33/74,[1070] where the Court acknowledged that then effective article 59 and third paragraph of article 60 on the movement of services in the EEC Treaty had *"direct effect and might therefore be relied on before national courts, at least in so far as they sought to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a member state other than that in which the service is to be provided"*.[1071] Further on, the Court stated that the *"first paragraph of article 59 and the third paragraph of article 60 of the EEC treaty must be interpreted as meaning that the national law of a member state could not, by imposing a requirement as to habitual residence within that state, deny persons established in another member state the right to provide services, where the provision of services was not subject to any special condition under the national law applicable"*.[1072] Only overriding reasons relating to the public interest could have justified an exception to that principle, provided that it was proportionate to the objective.[1073] The provisions of the then enforced principle for the free movement of services were different from their current shape and as such did not impose clear principle of non-discrimination. Article 59 stated that:

> "Within the framework of the provisions set out below, restrictions on the free supply of services within the Community shall be progressively abolished in the course of the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person to whom the services are supplied".

The Court found the provision to have direct effect irrespective of the fact that it was conditional and did not have formulated the principle of non-discrimination, but only called for the member states to work on progressive abolishment of the restrictions for the movement of services. The Court stated that as long as the transitional period had expired, the article was no more conditional and could have direct effect. Although its wording recalls the wording of article 67 of the EEC Treaty on the movement of capital, which at that time did not have direct effect, and such did not contain precise principle of non-discrimination, it was supported by para. 3 of article 60 and if read in conjunction would allow for precise comprehension of the non-discrimination principle. Article 60 para. 3 was worded as follows:

> "Without prejudice to the provisions of the Chapter relating to the right of establishment, a person supplying a service may, in order to carry out that service, temporarily exercise his activity in the State where the service is supplied, under the same conditions as are imposed by that State on its own nationals".

Exactly this paragraph allowed the Court to state that articles established well-defined obligation for the member states, the fulfilment of which by the member states could not be delayed or jeopardized by the absence of provisions or actions of the Council as was expected under articles 63 and 66 of the EEC Treaty.[1074]

In contrast, the principle in the EEC Treaty regulating free movement of capital was not recognised as having direct effect for a long time, because in substance it did not provide for the non-discrimination principle, but only called for the EU member states to work on liberalization of the freedom. It was worded as follows: *"1. Member States shall, in the course of the transitional period and to the extent necessary for the proper functioning of the Common Market, progressively abolish as between themselves restrictions on the movement of capital belonging to persons resident in Member States and also any discriminatory treatment based on the nationality or place of residence of the parties or on the place in which such capital is invested."* The principle at that time did not require an absolute elimination of restrictions for the movement of capital, but only required elimination of such barriers as would be necessary to achieve the common market. This was perhaps one of the reasons, why I contrast to other freedoms, which neither provided for precise non-discrimination principle, this article was not found to have direct effect for a long time. The direct effect of principle regulating movement of capital in the EU was recognised only in 1988 in the cases

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[1070] See Case C-33/74, Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid.

[1071] Retrieved from the summary of the case 33/74, para. 1, available http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61974CJ0033 accessed on 30 May 2017.

[1072] Ibid. para. 2

[1073] See http://www.europedia.moussis.eu/books/Book_2/3/6/06/?all=1

[1074] See Case C-33/74, para. 25.

Bordessa[1075] and Sanz de Lera and others,[1076] when the directive was introduced and amended the wording of the freedom.[1077]

In the context of this work, it is necessary to determine whether the principles for incorporation and investment activities, as well as for the provision of services in the EAEU Treaty are having direct effect and whether persons of the member states can rely on them before the national courts. In the work below, the author will test these freedoms in the EAEU treaty based on the criteria established in the EU and then will also look whether there are specific local comments on the same.

Principle for incorporation in the EAEU Treaty stands as follows: "*The treatment accorded by each Member* ***State to persons of any othe****r Member State in respect of incorporation and activities shall be no less favourable than that accorded* ***under the same (similar) circumstances to its own persons on its territory****"*. With respect to the first criteria, the principle should be clear and precise to be regarded as having direct effect. From the first outlook, the principle looks clear – it addresses the states, where incorporation was undertaken or activities are carried out, and requires them to treat investors from other member states similarly as it treats its own domestic investors. However, the issue of what shall constitute as the "same or similar circumstances" may raise practical questions and concerns, whether it is clear enough. At the same time, the freedom of establishment in the TFEU might also raise similar issue on interpretation of the terms and question, for instance, of what is considered as "restrictions". However, although, the term may be interpreted differently depending on a situation, it does not preclude the principle from having direct effect. Despite the fact that the principle in the EAEU Treaty, may require analysis of each situation separately, in order to understand whether investors are in the same or similar circumstances, it does not make the principle less clear or precise, and thus, in view of the author, it may potentially meet the first criteria of direct effect test based on the EU experience. Based on the second criteria, the principle should impose unconditional and unqualified obligation. In view of the author, the principle, does sound as a rule and obliges member states to provide not less favourable regime with respect to foreign investors. In the EU practice, the notion "conditional" is perceived as for instance, the time frame upon which the measure shall be realized or certain condition that should be met first by the member states. In view of the author, the provision for incorporation activities in the EAEU treaty is not conditional, as long as it is absolute and thus it meets the second criteria. The third criteria require there to be no discretion granted upon implementation of the principle. This criterion may work not in favour of direct effect of the principle in the EAEU Treaty, because although the general rule does not contain anything that would grant the discretion, the limitation in para. 25 says that regimes granted to the foreign and domestic investors could be formally different, but only to the extent they do not violate the terms of competition. This provision in view of the author may present a degree of discretion for the member state, although such discretion is also limited and upon its exercise member states shall still stick to the main principle – not to impose less favourable conditions for the foreign investors. In the EU case, once on the matter of discretion, the CJEU stated that as long as the member state has exercised its discretion – e.g. has already introduced the measure or the measure was in place, it can no longer be argued that the member state still had to take measures to implement the provision and has discretion to do so.[1078] Based on this, taken that national tax systems of member states are functioning, it may be perceived that the discretion upon drafting of the national tax system of the member state was already exercised and that there is no more discretion left. Consequently, the author concludes that the principle of incorporation meets the third criteria as long as the tax systems of the member states are already formed and functioning, there is no discretion left to comply with the principle – the national tax systems either comply or do not comply with the principle. Finally, although addressed to the member states, the provision grants the rights for individuals for an equal treatment in the country of incorporation. As was stated by the CJEU with this matter: *"the Treaty is more than an agreement creating mutual obligations between the contracting parties (...) Community law (...) not only imposes obligations on individuals but also confers on them legal*

[1075] See Case C-358/93 Bordessa.

[1076] See Case C-163/94, Sanz de Lera and others, p.41.

[1077] See Council Directive 88/361/EEC of 24 June 1988, which eliminated all the remained restrictions between residents of the member states as of 1 June 1990.

[1078] See Case C-441/99, Riksskatterverket v. Soghra Gharehveran. See also Ch.5. L.Woods, Ph.Watson, EU Law, Ibid.

rights".[1079] Therefore, "*not only when an explicit grant is made by the Treaty, but also through obligations imposed, in a clearly defined manner, by the Treaty on individuals as well as on member states and the Community institutions*".[1080] The author believes that the same shall be true with respect to the EAEU law. Based on the above and taken the EU experience on the matter of direct effect, the general principle for incorporation in para. 24 of Annex 16 to the EAEU Treaty may have the direct effect and thus gives right for the nationals of member states to challenge the national tax measures on compatibility with the principle of incorporation in front of the local courts.

Principle for investment activities in the EAEU Treaty stands as follows: "68. *Each Member State ensures on its territory fair and equitable treatment of investments and investment-related activities conducted by investors of other Member States. 69. The treatment specified in paragraph 68 of this Protocol shall not be less favourable than the treatment accorded by the Member State in respect of investments and investment-related activities conducted by its domestic (national) investors".* With respect to the first criteria, the principle should be clear and precise to be regarded as having direct effect. In view of the author, the principle may be regarded as meeting the first criteria, because it is clear and precise in terms of requirement to treat foreign investors not less favourably than domestic investors conducting local investments. Is specifically addresses the host member states, where investment is directed. The principle does not contain any unclear terms that may require case-by-case interpretation. Based on the second criteria, the principle should impose unconditional and unqualified obligation on the member state in order to have direct effect. In view of the author, the wording of the principle may cause an issue, because the principle is formulated in a declarative form in a present tense, it depends on how the principle is read in practice. It may be read as a rule – as if member states already apply such regimes, and in case they do not – as an obligation to the correct the same. But also, the provision may be read as overall obligations of the member states, but without particular connection in time, from where on it applies and in this case the second criteria may be not met. The third criterion requires there to be no discretion granted upon implementation of the principle. From the general principle, it does not look that member states have any discretion. But, the existence of the right to limit the general rule by enlarging the list of national exception, may to certain extent constitute the discretion. Finally, the last criterion requires principle to confer the rights to individuals. In view of the author, the obligation imposed on the states, present the right for individuals to be treated equally to the national investors in the state of incorporation. To sum up, based on the EU interpretation of the direct effect doctrine, the principle regulating investments activity in the EAEU may satisfy all four conditions, however, taken that at any point of time member states may deviate from the general rule and enlarge the list of national exceptions, may present a kind of discretion and reduce the effect of the principle.

General principle regulating provision of services in the EAEU is formulated as follows: "21. The treatment accorded by each Member State in respect of services, service suppliers and service recipients of another Member State regarding all measures affecting trade in services shall be no less favourable than that accorded under the same (similar) circumstances to its own same (similar) services, service suppliers and service recipients".[1081] With respect to the first criterion, the principle sounds clear and precise – it imposes obligation for the member states to provide equal conditions for the foreign and local service suppliers and recipients if they are situated in equal or the same circumstances. Again, the condition of equal or same circumstances may require additional interpretation, but it shall not prevent the principle from being directly effective. To meet the second criterion, the principle shall be unconditional and unqualified. The provisions regulating provision of services are not conditional, neither there are any additional limitation applying to the general principle. With respect to the third criterion and discretion of the member states, then it may be again questionable whether the general principle regulating provision of services is not limited by the right of the member state to exercise discretion and limit the general principle by enlarging the national list of exceptions. Finally, the last criterion shall be met by the principle, because by imposing obligations on the member states, it equally provides rights for the recipients and providers of services. Overall, the general principle regulating provision of services is close to meet all criteria of

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[1079] See Case C-26/62, Van Gen den Loos.

[1080] See Ibid.

[1081] See para. 21 Annex 16 to the EAEU Treaty.

direct effect doctrine, with exception that member states may be have discretion upon its implementation as long as they preserve the right to enlarge national list of exceptions.

What concerns the EAEU law, then the EAEU law does not contain such principle as "direct effect". On 4 April 2017 the Court of the EAEU has issued an advisory opinion on request of the Belarussian Ministry of Justice.[1082] Although, the case concerned the competition law, the Court of the EAEU for the first time mentioned the direct applicability of the Union law and the fact that certain provisions in question (common rules on competition) do not need to be implemented in the national legislations of member states to become applicable there. In view of the local scholar, P.Kalinichenko, the Court has concluded that common rules for competition have direct effect and that with that decision the Court has started the introduction of this concept into the EAEU practice.[1083] In view of the author of this work, direct effect and direct applicability of law is not necessarily the same. Direct applicability implies that the law of the international treaty does not need to be incorporated into national legislation in order to becoming binding on it, whereas direct effect implies that the nationals of the state can directly rely on the provisions of international treaties signed by their states in front of the national courts. Thus, the author does not agree with Kalinichenko, that the EAEU Court has introduced the principle of direct effect into practice, but in contrast, the Court talked about direct applicability of law, which is the necessary precondition (although sometimes omitted) to regard certain law as having direct effect.[1084]

3.5. Intermediate conclusion

In this section the author has studied and compared the fundamental principles for incorporation and investment activities in the EAEU treaties to the fundamental freedoms for the movement of capital and establishment in the TFEU. In this study the author concludes that although the principles for the same in the EAEU Treaty are formulated in a very general matter, i.e. not specifically addressing taxation, they shall also be considered in member states' tax matters and tax harmonization, because the EAEU Treaty explicitly states that they shall apply to all the measures of the member states.

As a general observation, the author concludes that in many aspects the EAEU principles were inspired by the principles in the TFEU and also by their further interpretation and elaboration by the CJEU. However, although being inspired by the EU practice, the EAEU principles are not substantially the same as the EU and therefore, the EU experience in terms of application and interpretation of fundamental principles in a tax related questions may be applicable only partially.

First of all, the major difference between the EU and EAEU general principles for the movement of investments and establishment activities is the fact that the EAEU principles are more narrowly drafted and therefore are more limited that the EU principles. This is so because the EAEU principles may protect the persons from discriminatory or less favourable tax treatment only in the state of his investments, but not in the state of his nationality or origin. In the EU, the fundamental principles grant the protection in both states. And as it is demonstrated by the EU practice, it is essential to assure non-discriminatory tax treatment of persons from both perspectives in order to achieve fair competition and creation of single market between the states. On this basis, the author recommends to reconsider the fundamental principles in the EAEU Treaty and assure that member states of origin of persons investing in other member states are equally prohibited to impose more burdensome obligations on such persons in comparison to national investors investing solely within the boundaries of their member states' territories.

What concerns the similarities and differences in particular between the two EAEU principles, then the author came to the following conclusion. First of all, the term "investment" is broader than the term "incorporation", and as such also envisages incorporation activity as a form of investment. In many aspects, therefore, investments and incorporation activities are regulated in the same way under the EAEU Treaty. However, what is important from tax point of view, the general principles that may have influence particularly on the tax treatment of member states with respect to income derived

[1082] See Case No SE-2-1/1-17-BK.

[1083] See Kalinichenko, Paul: *A Principle of Direct Effect: The Eurasian Economic Union's Court pushes for more Integration, VerfBlog,* 2017/5/16.

[1084] See, L.Woods, Ph.Watson, EU Law, ch.5 Principles of direct applicability and direct effects, Oxford University Press, 2012.

from both types of activities, are different and, therefore, tax treatment of member states in respect of income received from investment and incorporation activities can also be different. In particular, both principles require provision of national tax treatment to be granted by member states to foreign persons, exercising investments and incorporation activities on their territories. However, principle regulating incorporation activities is stricter in this respect because it requires foreign and national persons to be in the same or similar circumstances prior the national tax treatment could be granted to the foreign investors, whereas in contrast, the principle regulating investment activities does not require foreign investors to be in comparable position to national investors to benefit from the national treatment principle. It will be the matter of interpretation in practice, whether under the second principle it may be equally required for investors to be in comparable circumstances to benefit from the national treatment, however, so far, based on the literal reading of the provisions, the principle for incorporation activity is stricter with respect to foreign investors, while the principle regulating investment activity in contrast is more demanding with respect to member states, because it any require significant changes of the national legislations in order to comply with it.[1085] There is one more factor which speaks in favour of position that principle regulating investment activities is more stringent for the member states. In particular, for fulfilment of incorporation principle, the member states could impose regimes for foreign and local investors, which are formally different, but at the same time do not violate the terms of competition. There is no similar deviation from the principle regulating investment activity, and on the basis of which it may be concluded that treatment accorded under its principle shall be also formally similar between foreign and domestic investors.

[1085] For example of changes that may be required see section 4.4. of this work with analysis of national legislations on treatment of cross-border dividends.

4. Testing national legislation of the EAEU on compatibility with the fundamental freedoms for investment and incorporation activities – case of dividends

4.1. Introduction

As was discussed in the previous part of this work, there are fundamental principles envisaged in the EAEU Treaty for the movement of services, investment and incorporation activities that create obligations for member states to harmonize and coordinate where necessary their domestic legislations so to assure equal, fair and non-discriminatory treatment of the nationals of all member states exercising the freedoms.[1086] The agreement assumes the liberalization of provision of services, establishment activities, investment and other activities,[1087] requiring states not to impose any discriminatory measures in relation to activities and investments exercised by the nationals of the other member states.

This obligation calls for the member states to review their domestic legislations in all spheres to eliminate and harmonize the provisions that may undermine the realization of freedoms and creation of single market.[1088] The author of this work concluded that the same obligation equally concerns the obligation of member states to review and adjust the domestic tax legislation.[1089]

For illustrative purposes, the author decided to demonstrate the practical implication the EAEU freedoms will have on the member states tax systems. As example, the author has chosen to demonstrate the implications on the national systems for taxation of dividends. The choice is justified in view of several factors. First of all, there are two freedoms in the EAEU Treaty that shall have influence on the systems for taxation of dividends – freedom for investments and freedom for incorporation. Secondly, the recipients of dividends, as the type of income, can be easily and often discriminated and subject to economic double taxation and also juridical double taxation due to interactions of two different national tax systems. And finally, based on the EU experience, discussed under section 1 of this work, harmonization of dividends taxation was number one in agenda for harmonization of direct taxes.

In view of the author, in the context of the EAEU the compatibility of national tax legislation with the fundamental principles of the EAEU Treaty should gradually have more importance and may soon require changes due to existing restrictions in the national systems for the cross-border movement of capital. The purpose of this section is to demonstrate practical implications, the EAEU freedoms will have on dividends taxation and potential areas in the national laws of the member states, that shall be amended. The section will start from explanation of problems with taxation of dividends, it will then continue with review of the national systems for dividends taxation in all EAEU member states and finally, it will conclude with result of the research and analysis per each country.

The liberalization of capital movement assumes increase in mutual investment between member states, including capital investments, investments in securities and real estate. Herewith, tax system in member states may preclude the growth of mutual investments by imposing discriminatory tax treatment on foreign investors and foreign income of nationals, precluding thus the realization of single market idea. It may require years in practice to identify the domestic law provisions in each member state that may be contrary to the purposes of the EAEU Treaty. And, therefore, even though the supranational agreement on EAEU entered into force, not much was done yet at the legislative level of member states to amend the domestic legislations with the new international obligations, neither were studies carried out in respect on compatibility of member states' income tax systems

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[1086] Similar obligation is provided in respect of different freedoms provided by the Treaty. Thus, member states are required to amend gradually their domestic legislation to establish freedom for provision of services, establishment activities, investment and other activities under Art. 67 EAEU Treaty
Harmonization of legislation is defined for the purposes of the Treaty as "means the approximation of legislation of the Member States aimed at establishing similar (comparable) legal regulations in certain spheres" and "Unification of legislation" means the approximation of legislation of the Member States aimed at establishing identical mechanisms of legal regulation in certain spheres as specified in this Treaty. Both terms are provided under Art. 2 EAEU Treaty and discussed in part I of this work.

[1087] Art. 66 of the EAEUTreaty

[1088] Art. 67 of the EAEU Treaty

[1089] With respect to the integration between the Eurasian countries, the need for tax harmonization was addressed by A.N.Mambetalieva in "Harmonization of tax legislation within the economic integrations (based on practice of the Customs Union and Common Economic Space)", 2013

with the EAEU fundamental freedoms.[1090] The European Union (the EU), as an example of economic union, is still going through the same process of harmonizing and integrating the tax legislation.[1091] Herewith, non-harmonized tax systems are considered as potential barrier towards the realization of single market economy.

In direct tax matters, non-harmonized (not coordinated) tax systems between member states may result in discriminatory taxation, in respect of both incoming foreign investments and incoming return on investment received by the nationals from investments into other member states, as well as create a tax competition between the member states and influence on the business decisions of multinationals with respect to location of investments.[1092] Herewith, as a rule, any investor expects as higher return on investment as possible, and where due to the tax regime, the after tax return on investment is lower than it could be if there would be no such discriminatory tax treatment imposed, it could discourage investors from investing into other member state, which would as a result ruin the realization of the single market idea.[1093]

Consequently, the taxation of dividends, as of income in a form of return on investments, is a more peculiar problem than taxation of other forms of income, resulting from investments – such as royalties, interest, rent or capital gains, because problem with taxation of dividends in a cross-border context is not only about arising juridical double taxation, but also about economic double taxation, which is not so common for other types of income.[1094] Whereas, juridical double taxation may be fully or partially eliminated due to existence of double tax treaties between the states, the problem of economic double taxation may be eliminated only by remedies existing in the domestic system of each member state,[1095] and more peculiar - economic double taxation is often hidden and unless eliminated, may potentially undermine the idea of single market for the movement of capital and freedom of establishment.

Generally, it should be noted that the extent of realization of single market depends on the exact wording of the underlined principle in the agreement, and only the correctly formulated principle may lead to actual establishment of single market. In part III of this work, the author has analyzed the fundamental principles incorporated under the EAEU Treaty. With respect to dividends taxation, there are two principles applicable in the EAEU Treaty: the freedom for incorporation activities and freedom for investments. In this section the author will test the compatibility of the EAEU member states' national legislations with these fundamental principles and will assess the extent of necessary amendments. Author will also analyze the domestic tax legislations of the EAEU member states in respect to taxation of dividends. In particular, the author will consider:

1. The Law of Armenia No.3P-155 dated 27 October 1997 on Income tax, updated as of 9 June 2010 (Tax Law of Armenia on Corporate Income tax)
2. The Law of Armenia on Personal Income Tax No. 3P-246-H dated 30 December 2010, updated as of 28 December 2013 (Tax law of Armenia on Personal Income Tax)
3. The Tax Code of Belarus No.71-3 dated 29 December 2009, and updated as of 30 December 2014 (Tax Code of the RB)
4. The law of the Republic of Kazakhstan No. 99-IV dated 10 December 2008 of the RK Kazakhstan), updated as of 15 January 2015

[1090] There are many works of local scholars reviewing the integration process between the states and development of legal framework of the Union (previously Eurasian Economic Community), however, the question on compatibility of income taxes with fundamental principles was not yet precisely addressed in the literature.

[1091] See, C. Remeur, Note of the European Parliament on the "Tax policy in the EU: issues and challenges", *European Parliamentary Research*, 2015, p.5, available at: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549001/EPRS_IDA(2015)549001_EN.pdf

[1092] For more on the analysis that dividends taxation may have on location of investments and business decisions of multinationals, see A. Oestreicher, R. Koch, "Taxation and corporate group structure – Evidence from a sample of European multinationals", 2012, available at: http://ssrn.com/abstract=2182115

[1093] Generally, according to the research undertaken by the UNCTAD in 2014, more than 50% of investors consider the fiscal measures existing in the countries as critical upon relocation of the capitals, as well as non-discriminatory tax treatment. See UNCTAD World Investment Report "Investing in the SGDGs: an action plan", p.109 and p.180, available at: http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf

[1094] Difference between economic and juridical double taxation will be explained in part 2 of this work.

[1095] Only economic double taxation arising from transfer pricing adjustments may be eliminated by tax treaties.

5. The Tax Code of the Kyrgyz Republic No. 230 dated 17 October 2088, updated as of 29 May 2014 (Tax Code of the KR)
6. The Tax Code of Russian Federation No. 117-ФЗ dated 5 August 2009, updated as of 29 December 2014 (Tax Code of the RF)

4.2. Dividends and problem of economic double taxation for single market

In this section the author will explain the concept of dividends taxation in order to illustrate the causes of economic double taxation and demonstrate its incompatibility with the single market idea. In economic terms, *dividend* is a return on equity invested capital. For company law purposes, dividend is a form of distribution of retained earnings to shareholders.[1096] At this point, the author would like to clarify that there are typically several ways to invest capital and depending on the way capital is invested also varies the type of income received in return.

The first way is to invest capital in a form of equity, meaning, for example, to acquire the shares of existing company or to open a new company and receive shares in return. This kind of investment generates dividends income. Equity contribution may be done in a cash form, but also in a form of intangible and tangible assets, such as: trademark, car or land. The investment contributed will no longer belong to the initial investor, but rather would belong to the legal entity, and in return would encounter the investor to receive the dividends, which are the retained earnings of the company, left as an after-tax profit and not reinvested further by the company.

Another way to invest is to provide capital in a form of the loan. By doing so, the investor preserves its right of ownership over the borrowed funds, and the investor is entitled to receive interest as a return on his investment, plus principal amount when the agreed duration of the loan expires.

Last major form of investment is to provide the right of the use of intangible property to the company, which would entitle the owner to receive the royalties and will preserve the control of the owner over the intangible property.

If to compare from the tax perspective the loan and equity financing, in many cases, the loan financing would be preferred by the investor over the equity financing for several tax reasons.[1097] First of all, interest payments are deductible for corporate income tax purposes (CIT) and therefore can reduce the taxable base of the company, whereas dividends payments are not deductible for CIT purposes and cannot reduce taxable profit, since dividends are distributed only after all taxes has been paid by the company.[1098] As a result, dividends are taxed at the corporate level, as a corporate profit, before being distributed to the shareholder, and additionally, may often be taxed at the moment of distribution to the shareholder with withholding tax, similarly to interest payments. However, the difference is that, interest will be taxed only once – at the moment of payment with the withholding tax because it is a deductible expense for the corporate income tax purposes, whereas dividends are taxed twice in the scenario explained – first as a part of corporate profits, and secondly with the withholding tax at the moment of payment to the shareholder.

Depending on the system, sometimes in addition to withholding tax, residence countries may impose income tax on dividends and also interest in the hands of the recipient of an income – e.g. one more level of personal or corporate income taxation. Where as a result, in a worst case scenario, interest would be subject to double taxation, and dividends would be subject to triple or even multiple level taxation, taken that corporate structures are often complex and may involve more than two of three level of shareholders.

However, states realize the negative influence of multiple level taxation on investments and try to prevent it – both: unilaterally within the domestic system, and also bilaterally in agreement with other states. Thus, in the presented scenario, many states in a purely domestic situation would allow to omit either a withholding tax, or to omit the tax at the personal level of recipient on the same income

[1096] Definition is retrieved from IBFD Glossary, available at: www.ibfd.org

[1097] For more on debt vs. equity tax consideration see R. Russo, *Fundamentals of tax planning*, IBFD, 2007, Part 8 “Financing activities”, p.107. Also see W.Schon, “Debt and equity: what’s the difference? A comparative view”, *Max Plank Institute for Intellectual Property*, Competition and Tax Law, Research Paper Series No.09-09.

[1098] See Graetz, Michael J. and Warren, Alvin C. Jr., "Income Tax Discrimination and the Political and Economic Integration of Europe" (2006). *Faculty Scholarship Series*. Paper 1614, available at: http://digitalcommons.law.yale.edu/fss_papers/1614, p.5-6

received, assuring that income is taxed only once – either with withholding tax or at the hands of the recipient of the income. Consequently, the problem of double taxation will be eliminated for interest income, whereas for dividends income it will remain, since dividends are taxed as part of corporate profits before being distributed and then taxed second time in the hands of the recipient of an income (either with withholding or income tax).

In general, double taxation is distinguished between *economic double taxation* and *juridical double taxation*. Juridical double taxation happens when the same income is taxed in the hands of the same person by two different states, and therefore may occur only in a cross-border situation. It may equally occur to various types of income: dividends, interests, royalties, capital gains, business income, income from trade and so on. For example, in respect of dividends such situation may arise when withholding tax applies at the moment of dividends distribution in one state and if the dividends received afterwards are also subject to tax in the hands of the shareholder in another state.[1099] It basically happens because each state has its own sovereign right to exercise tax jurisdiction over the income arising on its territory (known as "source principle") or over the tax residents, who might be physical persons and also companies, who qualify as tax residents in a particular state are thus are subject to worldwide tax liability therein (known as "residence principle").[1100] Most frequently, juridical double taxation arises when one state wants to exercise the right for the source taxation and another – for the residence based taxation. More rarely, juridical double taxation occurs because of the source-source principle conflict, or residence-residence principle conflict. Juridical double taxation is addressed by states with the double tax treaties, which allocate the taxing rights between the contracting states and provide for the methods to eliminate double taxation (credit or exemption method, as well as procedure of mutual agreement, when both states under the treaty have the right to tax). Tax treaties are quite effective mechanism to resolve the problem of juridical double taxation, assuming the instrument is constructed and implemented effectively.

Economic double taxation, conversely, occurs when the same income is taxed twice to different persons and may occur both in domestic and also cross-border situations. This is in particular the case of dividends, when dividends are first taxed as a part of corporate profits before being distributed, and then taxed second time at the moment of distribution with withholding tax or at the hands of the recipient with the personal or corporate income tax, depending on the nature of the recipient.[1101] In contrast to juridical double taxation, economic double taxation may be resolved by tax treaties only in very rare cases (e.g. my corresponding adjustment in case of transfer pricing case or by mutual agreement between the tax authorities). Thus, the problem of economic double taxation is left at the discretion of each particular state and its domestic tax system.

Herewith, domestic measures and regimes of dividends taxation may vary from one state to another and degree of economic double taxation of dividends will also vary among countries. What is similar, majority of the states tax dividends as the part of corporate profits, unless some special tax regime would apply and exempt corporate profits from taxation. However, states usually have different approaches with respect to taxation of dividends at the level shareholders.[1102] At this point, most likely that states treat differently the dividends in the hands of the recipient, and distinguish between domestic (dividends paid within one country between residents)[1103] and outbound dividends

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[1099] See Committee of Experts on International Cooperation in Tax Matters, Seventh session, 2011 Revision of the Manual for the Negotiation of Bilateral Tax Treaties, E/C.18/2011/CRP.11 Note

[1100] For more on the concepts of international taxation see R.Avi-Yonah, *International tax as international law: an analysis of international tax regime*, Cambridge tax law series, Cambridge University Press, 2007

[1101] Commission of the European Communities, COM(2003) 810 final, "Dividend taxation of individuals in the Internal Market".

[1102] For review of convergence and divergence in approaches adopted to the inbound dividends taxation in the EU countries, see C.Gabarino, "Taxation of EU cross-border corporate dividends: convergence and tax competition".

[1103] This term can be defined as dividend born by the company, which is a resident of the state concerned, and paid to the taxpayer, who is resident in the same state.

(dividends paid to non-resident),[1104] domestic and foreign dividends (often referred as "inbound" dividends),[1105] as well as between individual and corporate shareholders.

Further, the author will elaborate in general on different regimes applicable to dividends taxation, which is necessary to understand prior considering the specific country practices and assess the later on compatibility with the fundamental freedoms.

Classical method

Under classical system legal entity paying the dividends and shareholders are considered as two separate persons and dividends are taxed in full amount in the hands of both, e.g. as a part of corporate profits in the hands of the legal entity, and then in the hands of shareholders as a part of their own income. Thus, under the classical model dividends are subject to full double economic taxation.[1106]

Schedular tax system

This system usually imposes separate income tax on the entity paying the dividends and dividend's recipient, however, the rate applicable to the recipient may be lower than the usual PIT or CIT applicable to general type of income of such taxpayer. Under this system economic double taxation may be partially eliminated, especially in the countries where income tax rates are progressive, and where shareholders, who are usually subject to highest marginal income tax rate may benefit from the reduced rate granted in respect of dividends income.[1107]

Imputation method

This method functions in the similar way as tax credit does. Under this method, the payer and the recipient of the dividends are also considered as two separate taxpayers, where the former pays corporate income tax also on the dividends distributed further, while the recipient gets a right to offset CIT paid by the payer towards its PIT or CIT obligation with respect to the dividends received. Under this system economic double taxation may be eliminated in full extent.[1108]

Exemption system

Under this system, dividends are taxed only once: either at the corporate level as part of the profits of the company paying the dividends, and then exempt in the hands of the recipient of an income or vice versa, exempt from taxation as a part of the corporate profits, but taxed in the hands of the recipient.[1109]

Countries may use one of the systems listed above or combine several systems and apply one regime to tax one type of dividends, and another regime to tax another type of dividends.[1110] For example, very often country employs exemption system for domestic inter-company dividends, and thus fully eliminates economic double taxation for domestic multilayer companies. However, the same country may use classical tax system to tax dividends attributed to permanent establishment of non-resident located on its territory, thus causing more burdensome taxation of non-resident investor in comparison to domestic investor. Or, similarly, while exempting intercompany domestic dividends and further domestic redistribution of the same dividends, the country may withhold income tax on dividends redistributed to non-resident corporate shareholder, again causing more excessive taxation of non-resident investors. In the context of single market, such discrimination may require amendments to domestic tax system of the state sourcing the dividends. Herewith, this discriminatory regime may not be so obvious from the first glance. Suppose that country applies withholding tax of 30% on all dividends distributed to corporate shareholders, irrespective of their residence status.

[1104] This term can be defined as dividend born by the company, which is a resident of the state concerned, but paid to the non-resident taxpayer.

[1105] This term can be defined as dividends born by the non-resident company and received by the taxpayer, who is resident in the state concerned.

[1106] Supra note: Commission of the European Communities, COM(2003) 810 final, "Dividend taxation of individuals in the Internal Market".

[1107] Ibid.

[1108] Ibid.

[1109] Ibid.

[1110] For more how the process of dividends taxation was developing in EU with the influence of , see Graetz, Michael J. and Warren, Alvin C. Jr., "Income Tax Discrimination and the Political and Economic Integration of Europe" (2006). *Faculty Scholarship Series.* Paper 1614, available at: http://digitalcommons.law.yale.edu/fss_papers/1614 p.4

However, the law would also provide an exception, providing that further redistribution of the same dividends within the country shall not be subject to income tax. Herewith, unless the country specifies that redistribution of dividends paid to non-resident shall be equally exempt from further withholding tax, it is very probable that 30% income tax will apply again as withholding.

There may be variations of different approaches to taxation of dividends. Another example of differentiated treatment of dividends that may be contrary to the single market idea is to apply tax exemption of dividends at the level of individual resident shareholders, while not providing the same exemption from taxes to non-resident individual shareholder.

With respect to inbound dividends – dividends received from abroad by resident shareholders may be also discriminated.[1111] Assuming the domestic dividends are exempt, the foreign dividends may be subject to income tax,[1112] with the possibility to credit withholding income tax paid abroad. Foreign tax credit is a mechanism to eliminate juridical double taxation, but not economic. It helps to mitigate any withholding tax paid at the moment of dividends distribution, and usually do not exceed the amount of tax the shareholder would be required to pay domestically on the same amount of dividends. Herewith, foreign tax credit does not account for the income tax paid at the level of the parent company abroad that distributed the dividend concerned. To account for such income tax paid, the country would need to provide the imputation tax credit.

Of course, in general circumstances no countries are obliged to extend the favorable tax treatment available for domestically generated income to income generated from foreign sources. However, this may be required by the non-discrimination principles and obligation to eliminate any distortions with respect to investments under the principle for the free movement of capital and right for establishment within the single market framework.[1113]

However, any international agreement, whether it is agreement on establishment of the Eurasian Economic Union, or Treaty on the Functioning of the EU or Treaty on Creation of East African Community, or on establishment of any other similar undertaking, will formulate its fundamental principles, including principle of non-discrimination, in its own way and exact wording of these principles and freedoms will, therefore, have its own specific influence and implication for the member states obligations.

4.3. Principles of non-discrimination in the EAEU Treaty

In part III of this work, the author has analysed the fundamental principles for the incorporation activities and investments. The author has concluded that both of them may be applicable to dividends taxation and this may cause practical challenges upon determination of which principle shall protect the dividends. The challenge may arise because these two freedoms provide different levels of protection. First of all, the term “investment” is broader than the term “incorporation”, and as such also envisages incorporation activity as a form of investment. In many aspects, therefore, investments and incorporation activities are regulated in the same way under the EAEU Treaty. However, what is important from tax point of view, the general principles that may have influence particularly on the tax treatment of member states with respect to income derived from both types of activities, are different and, therefore, tax treatment of member states in respect of income received from investment and incorporation activities can also be different. In particular, both principles require provision of national tax treatment to be granted by member states to foreign persons,

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[1111] On compatibility of dividends relief only in domestic cases see J. Englisch, “Fiscal Cohesion in the Taxation of Cross-Border Dividends (Part One)”, *European Taxation*, July 2004

[1112] This is was the case of the Netherlands resulted as discriminatory under the EU law in Case C-35/98, Staatssecretaris van Financin v. B.G.M. Verkooijen, 2000

Alternatively, in case country does not fully exempt domestic dividends, it may tax it with the lower income tax rate in comparison to foreign dividends. In Austria this practice resulted in Case C-315/o2, Lenz v. Finanzlandesdirektion ftir Tirol, 2004

Similar kind of discrimination was detected in Finland, where Finland was providing tax credit to resident shareholders with respect to income tax paid by parent company, and not providing the same tax credit with respect to foreign investors. This issue was resolved in Case C-319/02, In re Manninen, 2004

[1113] For more how the process of dividends taxation was developing in EU with the influence of , see Graetz, Michael J. and Warren, Alvin C. Jr., "Income Tax Discrimination and the Political and Economic Integration of Europe" (2006). *Faculty Scholarship Series*. Paper 1614, available at: http://digitalcommons.law.yale.edu/fss_papers/1614

exercising investments and incorporation activities on their territories. However, **principle regulating incorporation activities** is stricter in this respect because it requires foreign and national persons to be in the same or similar circumstances prior the national tax treatment could be granted to the foreign investors, whereas in contrast, the principle **regulating investment activities does not require** foreign investors to be in comparable position to national investors to benefit from the national treatment principle. It will be the matter of interpretation in practice, whether under the second principle it may be equally required for investors to be in comparable circumstances to benefit from the national treatment, however, so far, based on the literal reading of the provisions, the principle for incorporation activity is stricter with respect to foreign investors, while the principle regulating investment activity in contrast is more demanding with respect to member states, because it may require significant changes of the national legislations in order to comply with it.[1114] There is one more factor which speaks in favour of position that principle regulating investment activities is more stringent for the member states. In particular, for fulfilment of incorporation principle, the member states could impose regimes for foreign and local investors, which are formally different, but at the same time do not violate the terms of competition. There is no similar deviation from the principle regulating investment activity, and on the basis of which it may be concluded that treatment accorded under its principle shall be also formally similar between foreign and domestic investors.

In general, it is important to note that the principles regulating incorporation activity and investments are worded in a sort of limited manner, because they both address only the host states. Being more precise, principles provide for the obligation of the member states to treat foreign investors and their investments not less favourably than domestic investors, while principles do not impose obligations on the home member states to treat their own nationals who exercise their right of incorporation or freedom for investment activities in other member states equally to the nationals who do not exercise the same right or do the same domestically. The author believes that it is necessary to reconsider the fundamental principles regulating investment and incorporation activities in the EAEU Treaty to assure that they also address the home countries of investors and require them not to impose domestic measures, including tax measures, that would limit their investments to the territories of other member states.

In the next section, the author will undertake the simulation study and will test the national legislations on compatibility with these freedoms.

4.4. Taxation of dividends in the member states

In this section the author will analyze the national legislation of the EAEU member states with respect to dividends taxation to verify if the national legislations comply with the fundamental principles envisaged in the EAEU treaty with respect to freedom for the right of incorporation and freedom for investment activities.

The author will concentrate on comparative per country analysis of outbound and domestic dividends taxation. In particular, the author will consider how the dividends are taxed in the hands **of individual shareholders** and whether there is a difference between the imposed regime for resident and non-resident individual shareholders. Should any difference be identified with respect to rates and imposition of WHT tax on dividends, it would be contrary to both principles taken the EU experience, where in most cases individual shareholders of different member states where considered to be in comparable situations when the issue concerned the determination of applicable withholding tax rate or in general the conditions for application of withholding tax.[1115] Should the resident taxpayer had a right to account for imputation tax credit, whereas such credit would not be available to non-resident shareholder, such difference in treatment would be considered as contrary to the freedom for investment activities, but compatible to the principle regulating the freedom of establishment. This approach again derives from the EU experience, where based on the CJEU decisions, the

[1114] For example of changes that may be required see section 4.4.6. of this work with analysis of national legislations on treatment of cross-border dividends.

[1115] For more on the same, see the summary of the EU practice on the same under section 3.2.3.4.2. and 3.4.3.2.3.1. of this work.

individual shareholders residents in different member states were not considered to be in comparable situations when the issue concerned the application of imputation tax credit.[1116]

The author will also compare the tax treatment of dividends in the hands of corporate taxpayers who are residents and non-residents having no permanent establishment in the member state concerned. Should any difference be identified with respect to rates and conditions for imposition of WHT tax on dividends, it would be contrary to both principles, as long as based on the EU practice, in general, such shareholders are considered to be in comparable situations.[1117] Whereas, should the resident taxpayer had a right to account for imputation tax credit, whereas such credit would not be available to non-resident shareholder, such difference in treatment would be considered as contrary to the freedom for investment activities, but compatible to the principle regulating the freedom of establishment. Such conclusion again is based on the EU court practice on the same.[1118]

Finally, the author will also compare the tax treatment of dividends in the hands of corporate taxpayers who are residents and permanent establishments of non-residents in the member state concerned. For tax system to be compatible with the fundamental principles, the permanent establishment should not be treated less favourably than domestic resident company. [1119]Should any differences be identified, the author will consider it as incompatible with the EAEU fundamental principles.

Since the Treaty do not impose the obligation of member states to treat incoming return on investment from other member states equally to the return on investments received domestically, for the purposes of this work, the author will omit analyses of inbound dividends in comparison to domestically received dividends.

The author will also review the relevant provisions of the double tax treaties, since application of double tax treaty may significantly impact on the final outcome of income taxation in the member states.

The comprehensive per country analysis and intermediate conclusion on compatibility of the systems with the fundamental principles in the EAEU Treaty will be presented further in part 4.4.6. of this work.

4.4.1. Overview of dividend taxation in Armenia

In contrast to other EAEU member-countries, the tax law of Armenia is not codified and, thus, corporate and individual income taxes are regulated by different laws - law on personal income tax[1120] and law on corporate income tax.[1121]

Armenian tax system is a mixture of classical and exemption systems. Standard corporate income tax rate is 20%.[1122]

Individuals. Individual shareholders in Armenia both residents[1123] and non-residents,[1124] are not subject to income taxation with respect to dividends income from Armenian sources.

Legal entities. With respect to corporate taxpayers, the situation is a bit different. Resident corporate taxpayers are effectively exempt from income tax on both domestic and foreign dividends: dividends, irrespective of their origin, are considered as income for the purposes of corporate income tax in

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[1116] See Case C-374/404, *Test Claimants in Class IV of the ACT Group Litigation vs. CIR*, 2006, paras.58.59. See also 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/2003/0810 final.

[1117] For more on the same, see the summary of the EU practice on the same under section 3.2.3.4.2. and 3.4.3.2.3.1. of this work.

[1118] See Case C-374/404, *Test Claimants in Class IV of the ACT Group Litigation vs. CIR*, 2006, paras.58.59.

[1119] See the EU practice in the section 3.4.3.2.1. of this work.

[1120] The law of the Republic of Armenia on Personal Income Tax, dated 22 December 2010 and updated as of 28 December 2013 (Tax law of Armenia on Personal Income Tax)

[1121] The Law of Armenia No.3P-155 dated 27 October 1997 on Income tax, updated as of 9 June 2010

[1122] Article 33 (Tax Law of Armenia on Corporate Income tax)

[1123] Article 7, p.1, Tax law of Armenia on Personal Income Tax

[1124] Article 9, p.1, Ibid.

Armenia,[1125] but, further on, taxable base is adjusted and dividends are excluded.[1126] Whereas, all non-resident taxpayers with no PE in Armenia are subject to 10% WHT[1127] tax on dividends.[1128]

Permanent establishments. With respect to permanent establishments of non-resident taxpayers, dividends, irrespective of their origin, are considered as income for the corporate income tax purposes in Armenia.[1129] Dividends are subject to withholding tax at the source of payment at the rate of 10%,[1130] and based on the author's understanding, further are also included into taxable base of permanent establishment for corporate income tax purposes.[1131] Standard corporate income tax rate is 20%.[1132] The law of Armenia on corporate income taxes does not clarify explicitly if taxpayer could account for paid 10% of withholding tax on dividends when assessing the total corporate income tax liability.

To conclude, tax regime of Armenia with respect to individual taxpayers is compatible with both principles: regulating the right of incorporation and freedom for investment activities.

With respect to corporate taxpayers, Armenia imposes withholding tax on dividends received by non-residents, while exempting resident taxpayers, which may be regarded as incompatible with both principles in the EAEU Treaty. Further on, based on the review of article 10 on dividends in the Armenian tax treaties, the author concludes that irrespective of whether the double tax treaty applies or not, the withholding tax rate cannot be reduced to 0% based on the conditions of the existing treaties so to assure equal "non-taxation" of non-residents.[1133] Based on the EU experience, such discriminatory treatment of non-resident shareholders may be incompatible with the fundamental principles for promotion of investments and incorporation activities also in view to assure effective taxation of non-residents and prevent potential tax avoidance. In the EU practice, the CJEU held that in order to assure supervision over effective taxation of income received by non-residents, the member states shall use the bilateral or multilateral instruments on mutual cooperation in tax matters between themselves, but not to impose discriminatory tax treatment on all the taxpayers from other member states.[1134]

Finally, foreign permanent establishments in Armenia are seriously discriminated in comparison to resident companies, since foreign permanent establishments are obliged not only to bear the withholding tax on dividends at source, but are also subject to tax at the corporate level on the same dividends, and it is not clear if tax credit is available to account for the withholding tax paid at source. Thus, the treatment of foreign permanent establishments in Armenia may be incompatible with both principles in the EAEU Treaty. Herewith, taken that there are double tax treaties concluded between Armenia and other states, the non-discrimination provision therein may require Armenia to treat foreign permanent establishments similarly to domestic resident companies, and accordingly the overall outcome may be compatible with the EAEU Treaty. In particular, the outcome of outbound taxation of dividends in the hands of the permanent establishments would be compatible in situations

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[1125] Article 7, p.2(ж) of the Tax Law of Armenia on Corporate Income tax

[1126] Article 26, Ibid.

[1127] Article 57, Ibid.

[1128] Article 53, p.1, Ibid.

[1129] Article 7, p.2(ж), Ibid.

[1130] Article 57 and 58, Ibid.

[1131] Article 56, p.2 and Article 57, p.2, Ibid.
2. Суммы, удержанные (изъятые) налоговым агентом в указанных размерах (WHT at 10%), считаются окончательной суммой налога на прибыль, уплаченной нерезидентом в Армении, за исключением случая, когда нерезидент осуществляет в Республике Армения деятельность через подразделение или признанное налоговым органом место, и этот доход является результатом деятельности подразделения или места.

[1132] Article 33, Ibid.

[1133] Author has reviewed the treaties concluded by Armenia with the EAEU member states. There is no treaty between Armenia and Kyrgyzstan yet, but the process was initiated by the states on 14 May 2015, for more news on the same see http://online.ibfd.org/kbase/#topic=doc&url=/data/tns/docs/html/tns_2015-05-19_kg_1.html&WT.z_nav=Navigation&colid=4913.

[1134] See for instance the Case C-540/07, Commission vs. Italy, descried in section 3.2.3.4.2. of this work.

with Belarus,[1135] Kazakhstan[1136] and Russia.[1137] Since there is no double tax treaty yet between Armenia and Kyrgyzstan, the regime imposed in Armenia towards the permanent establishment of Kyrgyzstani investor would be incompatible with the EAEU freedoms.[1138]

4.4.2. Overview of dividend taxation in Belarus

Belarus imposes classical tax system with respect to income taxation. Standard corporate income tax rate is 18%.[1139]

Legal entities. In respect of corporate taxpayers, economic double taxation is partially eliminated due to lower rate of withholding income tax applicable to dividends - 12%.[1140] Dividends received domestically do comprise a taxable base of the corporate taxpayers in Belarus.[1141] Such dividends are subject to withholding tax at the source of payment. Herewith, further redistribution of dividends between companies is not subject to additional withholding taxes.[1142]

In terms of discriminatory treatment of dividends, there is no obvious discrimination of corporate non-resident taxpayers. Outbound dividends are taxed equally with the domestically paid dividends. Foreign corporate taxpayers are subject to income tax with respect to the dividends they receive in Belarus.[1143] The rate of applicable withholding tax is 12%[1144] and may be further reduced by applicable double tax treaty.[1145] The tax code also provides that in extent dividends paid to non-resident represent the amount of redistributed dividends, they should be exempt from additional withholding tax at source, similarly to domestic redistributed intercompany dividends.[1146]

Permanent establishments. Dividends paid to the permanent establishment of non-resident by other Belarus company are subject to withholding tax at source. Herewith, redistribution of dividends between the resident companies and between resident company and foreign permanent establishment is not subject to additional withholding taxation.[1147] Rate of applicable withholding tax on dividends is 12%,[1148]and this is a final tax.

Individuals. Dividends received by an individual from the company or foreign permanent establishment in Belarus are subject to taxation in Belarus.[1149] Income tax from dividends should be withheld at source of payment[1150] at the rate of 13%,[1151] which is a standard personal income tax rate, and which is higher than the rate applicable to dividends received by corporations.[1152] Herewith, in case dividends are redistributed and were previously taxed with the withholding tax applicable to corporate shareholders, such dividends are no longer taxable.[1153]

Non-resident individual shareholders are taxed similarly to individual resident shareholders with respect to dividends income.

[1135] See article 24 p.3 o the Armenia-Belarus DTT
[1136] See article 23 p.2 of the Kazakhstan-Armenia DTT
[1137] See Article 23 p.3 of the Armenia-Russian DTT
[1138] This should be corrected with the treaty should one be concluded.
[1139] Article 143, p.1 of the Tax Code of the RB, as of 1 July 2015
[1140] Article 142 p.5, Ibid.
[1141] Article 126, p.1, Ibid.
[1142] Article 141, p.4, Ibid.
[1143] Article 146 p.1(1.4.), Ibid.
[1144] Article 149 p.1, Ibid.
[1145] Article 151 p.1, Ibid.
[1146] Ibid, See in conjunction Art.147 p.1.2. and Art. 146 p.1.4 and Art.141 p.4
[1147] Art. 141, p.4, Ibid.
[1148] Article 142 p.5, Ibid.
[1149] Article 1524, p.1, Ibid.
[1150] Article 159, Ibid.
[1151] Article 173, p1, Ibid.
[1152] The personal income tax rate was 12% until changes introduced with the law No.224-3 dated 30 December 2015.
[1153] Ibid, See in conjunction Art. 159 and Art.154 p.1.1 and Art.141 p.4
However, at this point, the amended legislation does not provide clarifications, whether the redistributed dividends would still require taxation by 1% PIT, since personal income tax rate in higher than corporate applicable to dividends, and in case the formula provided in art.141 p.4 applies, then the redistributed dividends are just exclude from the taxable base, despite they were taxed with the 12%, but not 13%.

To conclude, dividends paid by Belarus companies are generally taxed only once with the withholding tax and redistribution of such dividends, irrespective of the recipient is not subject to taxation. No discriminatory measures with respect to foreign investors and dividends income were noticed by the author.

4.4.3. Overview of dividend taxation in Kazakhstan

Similarly to other countries in the EAEU, under corporate income tax regime, dividends in Kazakhstan do not comprise a deductible expense for the company paying the dividends and thus, before being distributed to the shareholders, are taxed at the level of the company with the CIT at the rate of 20%.

Legal entities. To resolve economic double taxation of dividends for legal entities, tax system in Kazakhstan provides for exemption of dividends paid between the legal entities residents in Kazakhstan.[1154] Herewith, the dividends paid to foreign corporate shareholder are generally taxed at the rate of 15% at the moment of payment. This withholding tax may only be eliminated if the foreign corporate shareholder meets the specific conditions, such as: shareholding period of 3 years, is not a subsurface user company and its assets should not be comprised of more than 50% of shares invested in the subsoil use activities.[1155] The different treatment of resident and non-resident corporate shareholders with respect to dividends may thus be incompatible with both principles in the EAEU Treaty.

Individuals. The problem of economic double taxation in respect of tax resident individual shareholder is resolved by the means of schedular tax system, where the tax rate on dividends is lower than the standard PIT rate – 5% vs. standard 10%.[1156] In addition, domestically received dividends may be exempt from taxation in case such dividends were received from the legal entity, which is a tax resident in Kazakhstan. Herewith, taxpayer should hold the shares in such legal entity for more than 3 years and legal entity should not be engaged in the subsoil use activities during the period for which dividends were paid. In addition, the assets of such legal entity should not be comprised of more than 50% of shares invested in the subsoil use activities.[1157] This provision is quite generous, however is only allowed in case of domestically received dividends. Additionally, dividends, which were paid on securities, listed on the Kazakhstan Stock exchange (KASE) on the date of accrual, shall not be regarded as taxable income for the purposes of personal income tax.[1158]

The same exemptions from income tax on dividends are applicable in case of non-resident individuals. However, in case the conditions for exemptions are not met, the applicable withholding tax rate is 15% vs. 5% applicable to individuals residing in Kazakhstan. The difference in applicable tax rate may thus be incompatible with both principles in the EAEU Treaty.

Permanent establishments. The non-resident taxpayers having permanent establishment in Kazakhstan are subject to 15% WHT tax on dividends and have no possibility to be exempt from taxation. [1159] However, this is the final tax and corporate income tax does not apply additionally at the level of the permanent establishment in respect of such dividends.[1160] Dividend income is included into aggregate annual income of the permanent establishment in accordance with the general provision of art. 85 p.17, but as in the case of resident legal entities it is then subject to adjustments and is excluded from the aggregate annual income.

To conclude with respect to situation in Kazakhstan, non-resident investors are discriminated in Kazakhstan in many cases. Thus, if domestic dividends are fully and always exempt at the corporate level of shareholders, then the same dividends paid to non-resident investor with no permanent establishment in Kazakhstan are taxed with the withholding tax and only under certain conditions may also be exempt. This treatment may not be compatible with neither freedom to exercise investment activity, nor with the freedom to exercise right of incorporation. The application of double

[1154] See art.85 and art.99 Tax Code of the RK
[1155] Art. 193, para.5 subpara.3, Ibid.
[1156] Art. 155 (p.2), Ibid.
[1157] Art. 156, Ibid.
[1158] Para. 5 art. 156, Ibid.
[1159] Art. 143 (p.1), Ibid.
[1160] Ibid, See in conjunction Article 85 p.17 and Article 99 p.1

tax treaty would not make the regime compatible with the freedoms, but may only decrease the applicable withholding tax rate to a minimum of 5% in certain cases.

Situation is even worse with treatment of permanent establishment, which are taxed with 15% withholding tax on dividends and have no opportunity to reduce this tax or be exempt if qualify, which neither complies with the any of the fundamental principles considered in this work. However, the application of non-discrimination clause in the DTT may inline the outcome with the EAEU Treaty freedoms, particularly in situations with Armenian investors,[1161] Belarusian investors,[1162] Kyrgyz investors and investors[1163] from Russia.[1164]

Individual non-resident shareholders are taxed with the higher withholding tax rate, than domestic individual shareholders, which is not compatible with the neither freedom to exercise investment activity, nor with the freedom to exercise right of incorporation.

4.4.4. Overview of dividend taxation in Kyrgyzstan

As other states, Kyrgyzstan operates classical system with respect to dividends taxation, with some exceptions applicable to resident taxpayers. Standard corporate income tax rate in Kyrgyzstan is 10%.[1165]

Individuals. Dividends received domestically are included in the aggregate annual income of individual resident shareholder[1166], however are not subject to income tax.[1167] Neither withholding tax applies on dividends received by resident investors.[1168]

Dividends received by non-resident individual are generally subject to income tax withheld at source[1169] at the rate of 10%,[1170] unless special 0% tax rate applies to dividends received from domestic organization, subject to preferential tax treatment.[1171]

Legal entities. Similarly, dividends are included in the aggregate annual income of the resident corporate shareholder[1172], however, if received domestically are not subject to income tax.[1173] Dividends paid to non-resident legal entities are subject to 10% WHT tax.[1174] However, dividends received from organizations with preferential tax treatment are subject to 0% WHT tax.[1175] Application of double tax treaty can reduce the WHT tax at source.

Permanent establishments. With respect to permanent establishment of non-resident, dividends similarly to resident corporate shareholder are included in the aggregate annual income of PE,[1176] however, from the wording of the legislation, it is also not precisely provided whether the exemption provided for resident legal entities can also apply to permanent establishment of non-resident. However, since there is no special provision that would regulate this aspect in relation to PE, the

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[1161] See article 23 p.2 of the Armenia-Kazakhstan DTT
[1162] See article 24 p.2 of the Belarus-Kazakhstan DTT
[1163] See article 24 p.3 of the Kyrgyzstan-Kazakhstan DTT
[1164] See article 24 p.3 of the Kazakhstan-Russia DTT
[1165] Art.213 p.1 of the Tax Code of the KR
[1166] Article 165 p.5, Ibid
[1167] Article 167, p.24, Ibid.
[1168] Ibid, Art. 176 p.4
[1169] Article 165, Ibid.
[1170] Article 173 Ibid.
[1171] Article 167, p.24, Ibid.
Domestic companies qualified companies with large investments as are subject to 0% income tax rate, and also dividends distributed by such companies to both individual and corporate non-residents are subject to 0% WHT. As large investments are considered a domestic company with:
1) total revenue from realization of produced goods is not less that KGS 170000000, and
2) on a monthly basis during the taxable period personal income tax paid by such company is not less that KGS 150000, and
3) paid in capital is not less than KGS 10000000.
Additionally, the company should be engaged in production and realization of the produced goods.
[1172] Article 188, Ibid.
[1173] Article 189, Ibid.
[1174] Article 223 Ibid.
[1175] Article 223, Ibid.
[1176] Article 188, p.1 Ibid.

author of this paper tends to believe that general provision on the same should apply and therefore, permanent establishment should be regarded as domestic taxpayer and be eligible for exemption of dividends. In opposite the case, the non-discrimination article in the tax treaties with Belarus, Kazakhstan and Russian shall prevent more burdensome taxation of foreign permanent establishments. In case of Kyrgyzstan, there is still no double tax treaty in place.

To conclude, taxation of non-resident individual shareholders is not compatible with neither principle regulating right of incorporation, nor principle regulating right for investment activities, since resident individual shareholders are generally exempted from dividends, whereas non-resident individual shareholders may be exempted only if qualify. Neither double tax treaty could help to resolve this problem.

The same incompatibility is identified with respect to non-resident legal entities with no PE in Kyrgyzstan, where similarly double tax treaties of Kyrgyzstan cannot help to resolve this problem.

Herewith, tax treatment of PEs of non-residents looks compatible with both principles and there shall be no need to invoke non-discrimination principle in the double tax treaties. In case such need arises, the problem with discrimination shall be eliminated on the basis of tax treaties with all member states, except for Kyrgyzstan as long as there is no double tax treaty in place.

4.4.5. Overview of dividend taxation in Russia

Similar to other member states, Russia operates classical system of corporate income tax. Corporate income tax rate is 20%.

Individuals. Individual resident[1177] shareholders are taxed on dividends income with the 13% income tax applicable as withholding tax at the moment of payment.[1178] There are special exemptions from dividends taxation, which apply to both residents and non-residents in case of:

- revaluation of fixed assets (funds), when additional shares (units) are distributed among the shareholders or members, or when income is received as the difference between the new and original par value of the shares or property share in the authorized capital;
- reorganization and distribution of shares, units among the shareholders of the reorganised organizations.[1179]

Non-residents individuals are taxed with 15% WHT tax on dividends received from Russian based company, unless the rate is reduced under the double tax treaty, or the exemption mentioned above applies.[1180]

Legal entities. With respect to resident legal entities, the problem of economic double taxation of dividends is partially resolved by lower level of income tax, which is applied as final withholding tax of 13%[1181] to dividends paid between resident companies.[1182] Important to note that if there are several levels of dividends payments between companies that are residents in Russia, withholding tax in such case is applied only once (in other words in case of redistribution of dividends no withholding tax is applied).[1183] Intercompany dividends within Russia can also be subject to participation exemption. To qualify 4 criteria should be simultaneously met by the companies:[1184]

- The parent company should own at least 50% of the capital in the distributing company;
- Holding period should be at least 365 days continuously upon the date, when decision on distribution is taken;

[1177] Art. 224 (p.1) of the Tax Code of the RF

[1178] Статья 208. Доходы от источников в Российской Федерации и доходы от источников за пределами Российской Федерации

1. Для целей настоящей главы к доходам от источников в Российской Федерации относятся:

1) дивиденды и проценты, полученные от российской организации, а также проценты, полученные от российских индивидуальных предпринимателей и (или) иностранной организации в связи с деятельностью ее обособленного подразделения в Российской Федерации;

[1179] Art. 217 of the Tax Code of the RF

[1180] Art. 224 p.3, Ibid.

[1181] Art.284 p.3(1), Ibid.

[1182] Art. 251 p.1(50), Ibid.

[1183] Art. 275 p.5, Ibid.

[1184] Art. 284 p.3(1), Ibid.

- The amount distributed to Russian company should be no less than 50% of the total amount distributed.

However, the non-resident corporate shareholders with no permanent establishment in Russia cannot rely on participation exemption provided for residents and are taxed with the 15% withholding tax rate, unless the treaty provides otherwise.[1185] Additionally, upon withholding of 15% tax from non-residents, there is no imputation of any tax on dividends, which could have been already paid once in case of multi-layer structure of companies in Russia.[1186] Additionally, from 3 December 2013 Russia launched a new withholding tax of 30% in case the recipient of dividends income is a foreign nominee and the beneficial owner of the income is not disclosed.

Permanent establishments. What concerns permanent establishment of non-residents, then it is subject to the same rule with respect to corporate income tax as other resident companies. However, dividends received by such permanent establishment from other resident companies is usually subject to 15% withholding tax rate, unless the non-discrimination clause of double tax treaty applies.[1187] In the later case, the withholding tax rate is reduced to 13% (9% before 1 January 2015), similar to withholding applicable to the resident companies. What is interesting, however, is that in case of redistribution of dividends to permanent establishment, another withholding tax should apply.[1188] In other words, in contrast to resident corporate taxpayers, exemption from income tax upon redistribution of dividends does not apply to redistribution carried out to the permanent establishment.

To conclude, it looks like general regime applicable to dividends in Russia is discriminatory with respect to non-resident individual shareholders, who are taxed more heavily than resident individual shareholders unless the double tax treaty applies. This is not compatible with neither principle regulating right of incorporation, nor the principle for free movement of investments. If to assume that double tax treaty will apply, then the withholding tax will be reduced to a maximum of 10% in all cases except for Belarus, and thus the outcome would be compatible with the requirements of the EAEU Treaty, however in case of Belarus, the regime would still require amendments or revision of the DTT.

Non-resident corporate shareholders are similarly discriminated with the higher withholding tax rate, inability to apply for participation exemption and also inability to credit any tax on dividends paid at the lower level of corporate structure in Russia. This treatment of foreign shareholders is incompatible with both principles. The double tax treaties may only partially prevent the discrimination by reducing the withholding tax rate with all member states, except for Belarus.[1189]

Regime applicable to taxation of dividends by permanent establishment may also be incompatible with the EAEU freedoms, unless there is a double tax treaty imposed between the states that require taxation of permanent establishment similarly to resident companies. Thus, the regime with respect to permanent establishment will be compatible with both principles in case of Armenian investors,[1190] Belarusian investors,[1191] Kazakhstani investors[1192] and investors from Kyrgyzstan.[1193]

4.4.6. Intermediate conclusion

The author has analyzed the national legislations of the EAEU member states with respect to dividends taxation to verify if the national legislations comply with the fundamental principles envisaged in the EAEU treaty with respect to the right of incorporation and investment activities. Each national legislation was assessed in conjunction with applicable double tax treaties.

It was detected that only tax system of Belarus complies in full with the obligations provided under the current wording of the EAEU Treaty. Other member states would probably need to adjust their

[1185] Art.284 p.3(3), Ibid.
[1186] See Art.275 para.6, Ibid.
[1187] Art. 307 p.5, Ibid.
[1188] Art. 275 p.6, Ibid.
[1189] DTT with Belarus provides for 15% withholding tax for all corporate shareholders irrespective of the size of ownership.
[1190] See article 23 p.3 of the Armenia-Russian DTT
[1191] See article 21 p.2 of the Belarus-Russian DTT
[1192] See article 24 p.3 of the Kazakhstan-Russian DTT
[1193] See Article 24 p.4 of the Kyrgyz-Russian DTT

national legislations once the deficiencies are detected in practice. Alternatively, in some cases, when the deficiencies of the national tax systems may be corrected by application of the relevant double tax treaty, the double tax treaty concerned may need to be amended or concluded to do so.

In general, countries do have similar issues in their domestic tax systems that may be incompatible with the freedoms. This may be due to the certain coherence between the tax systems of member states, which could have been inspired by the CIS model tax code and common historical and legal background.[1194] Particularly, countries do not comply with the principles due to imposition of higher WHT on non-residents, where the residents are subject to the lower rate or are completely exempted from tax on the same income. In very few situations this is corrected due to application of double tax convention, which reduce the WHT so that actual treatment of non-residents and residents becomes similar.

Additionally, counties tend to discriminate towards foreign permanent establishments, but due to application of the non-discrimination clause provided in the double tax treaties these potentially discriminatory situations should be in most cases mitigated.

The table presented below is the comprehensive illustrative review of the methods and their compatibility with the fundamental freedoms.

Table 1.Compatibility of national tax regime with respect to dividends taxation and the EAEU fundamental principles[1195]

	Right for Incorporation			Right for Investments Activities		
	Non-resident individual shareholders	Non-resident corporate shareholders with no PE	Non- resident corporate shareholders with PEs	Non-resident individual shareholders	Non-resident corporate shareholders with no PE	Non- resident corporate shareholders with PEs
Armenia	V	X	X/ V(if DTT)[1]	V	X	X/ V(if DTT)[1]
Belarus	V	V	V	V	V	V
Kazakhstan	X	X	X/ V(if DTT)[2]	X	X	X/ V(if DTT)[2]
Kyrgyzstan	X	X	V	X	X	V
Russia	X/ V(if DTT)[3]	X	V (if DTT)[2]	X/ V(if DTT)[3]	X	V (if DTT) [2]

[1] Though general domestic regime is incompatible with the principle, the non-discrimination clause in the double tax treaties prohibits discrimination of PE and leads to the outcome, which is compatible with the principle. This does not apply to relationship between Armenia and Kyrgyzstan, since there is no double tax treaty enforced yet.

[2] Though general domestic regime is incompatible with the principle, the non-discrimination clause in the DTTs lead to the outcome, which is compatible with the principle.

[3] Though general regime is incompatible with the principle, the DTTs will make outcome compatible with the principle, except for the case of Belarusian investors.

One should note however that in case the fundamental principle would be broader it would also impose more responsibilities on the member states, and perhaps it will be done in the future once the states and the nationals realize the limitation envisaged in the current version of the EAEU Treaty. In particular, should the Treaty further provide for non-discrimination also of national investors investing into other member states (not foreign investors only), it would impose the obligation of the resident member states to envisage provisions for equal treatment of foreign and domestic income of such investors. The currently provided principles do not envisage for this obligation of member states to do so.

Taken the above analysis, the author believes the harmonization is nevertheless required to eliminate the discriminatory treatment of foreign investors, both individual and corporate, in particular with respect to application of WHT tax on dividends, where resident investors are exempt from this tax or are taxed with the lower level of WHT tax. To eliminate the discrimination, member states should either provide equal opportunities for investors to be exempt from WHT tax on dividends, or tax equally with withholding tax both – foreign and national investors irrespective of their tax residence status.

[1194] For more on the role of the CIS model tax code see N.Tyutyuryukov, V.Tyutyuryukov, G.Ternopolskaya, "Задачи модельного налогового кодекса стран СНГ на новом этапе интеграции", Налоги и финансовое право, No.7, 2012

[1195] The sign "V" means the regime is compatible, the sign "X" means the regime is not compatible, the sign "V/X (DTT)" means that regime may be compatible in case double tax treaty applies.

4.5. Conclusion

With the entry into force of the Treaty on establishment of EAEU member states would need to align their national laws, including tax laws, with the fundamental principles provided in the EAEU Treaty in order to achieve the ultimate goal of the Union to strengthen the economy and competitiveness of the member states by means of creation of single market for movement of goods, services, labor and capital.

In this part of the work the author has tested on compatibility the national regimes on dividends taxation with the principles in the EAEU Treaty, in particular with respect to the movement of capital (freedom for investment and incorporation activity). The issue of incompatibility of the national tax systems, in particular related to income taxation, with the EAEU fundamental principles is an important element to achieve the single market economy that has not been neither addressed, nor studied precisely yet in the region. As the result the findings of the work represent the first scholarly attempt to analyze this issue.

The author had identified major elements in the national tax systems of member states that conflict with the fundamental principles and could potentially deprive the Union from creating the single market. Thus, all member states except for Belarus would need to amend their national tax regimes with respect to taxation of dividends to align taxation of outbound dividends paid to non-residents with domestically distributed dividends. Thus, taken the above analysis, the author believes the harmonization of dividends taxation is required to eliminate the discriminatory treatment of foreign investors, both individual and corporate, in particular with respect to application of WHT tax on dividends, where resident investors are exempt from this tax or are taxed with the lower level of WHT tax. To eliminate the discrimination, member states should either provide equal opportunities for investors to be exempt from WHT tax on dividends, or tax equally with withholding tax both – foreign and national investors irrespective of their tax residence status.

The double tax conventions play a crucial rule in partial aligning taxation of dividends attributed to permanent establishments with the fundamental freedoms, by prohibiting member states to impose more burdensome taxation on PEs in comparison to domestic resident companies. However, despite in theory issue with discriminatory taxation of PEs in most cases in resolved, the taxpayers would probably need to apply for application of such non-discriminatory treatment provided in the double tax treaties. It was also identified that currently there is no double tax treaty in place between Armenia and Kyrgyzstan and as a result, issues existing in the legislation of these states may be either be corrected on the domestic level or process on concluding the treaty should be accelerated.

In general, it may take years for the states to realize that the national tax regimes need to me amended, discriminatory tax treatment need to be eliminated in to order to come closer to achievement of single market economy. The result of analysis demonstrates how crucial could be the obligations under international agreements and how tough it could be to comply, especially in such delicate area as national taxation, where states are used to exercise their sovereign powers.

5. Other tax related issues in the EAEU Treaty and practice

In this section the author will discuss separate issues in the EAEU law, which may also represent an issues upon harmonization of the tax law. The first subsection will address the issues with the sources of law in the EAEU, the hierarchy and interrelations among them, as well as will discuss the potential instrument that can be used in the region for tax harmonization. The objective of this subsection is to understand what may be considered as sources of tax law in the Union, the place of international tax agreements concluded within the Union and also separately by the member states and also to determine, which instrument may be used in the region for tax harmonization. The second subsection will present the case from the EAEU region, which involved discussion of tax issues brought by the taxpayers against the Eurasian Commission. The purpose of this subsection is to mediate on the potential role of judicial practice in the process of tax harmonization. As will be visible from the cases, so far the EAEU Court has been acting as passive institution not taking the liberty to decide on tax related cases.

5.1. Sources of law in the EAEU and their relationship with national legislations of member states

The sources of law of the EAEU are precisely listed in the EAEU Treaty and are comprised of the following:

1. EAEU Treaty
2. International treaties concluded within the Union;
3. International treaties of the Union concluded with a third party;
4. Decisions and dispositions of the Supreme Eurasian Economic Council, the Eurasian Intergovernmental Council, and the Eurasian Economic Commission.[1196]

Local scholars correctly outline that for the proper functioning of the Union and realization of its aims, it is important to clarify the subordination between the sources of the law of the EAEU (main Treaty, other international agreements, the decisions of the Union institutions) and the domestic law of member states,[1197] where particular importance shall be attributed to the decisions of supranational institutions and respective legal weight these decisions have on the territories of members. As practice of the Eurasian region demonstrates, unfortunately, such decisions and also international agreements taken within the framework of CIS were often neglected by member states, and only slightly better was the situation with the decisions and agreements taken within the Customs Union and EurazEC.

The local scholars link the problem of non-obedience to the fact that in most of the post-USSR republics, neither the constitutions, and nor other domestic laws, comment on the legal status of the decisions and agreements of supra-national organizations in relation to other international agreement and domestic law.[1198] There were attempts of scholars to determine the weight of legal acts taken by the supranational organizations within the CIS and EurazEC, however no practical recommendations were developed with this respect and therefore more research is needed on the subject.[1199]

[1196] See article 6 para. 1 EAEU Treaty.

[1197] See G.Vassiliyevich, S.Vassiliyevich, "On direct effect of the Commission's decisions", Eurasian Legal Journal, No.10(77), 2014. Original: Г.Васильевич, С.Васильевич, «О непосредственном действии актов Евразийской Экономической Комиссии», Евразийский Юридический Журнал, №10(77), 2014. See also A.Zybaylo, «The weight of EurazEC laws in the legal systems of member states", Eurasian Legal Journal, No.7(62), 2013, Ibid below.

[1198] In Kazakhstan and Russia, the international agreements have priority over the national legislations, but shall comply with the constitutions. However, by analogy, the place of decisions taken by supranational institutions is not clarified. See Constitution of Russian Federation art. 15, in the Constitution of Kazakhstan see art. 4(3). In Belarus, the situation is more complicated since the weight of international agreement is determined in accordance with the weight of domestic law, which enacted this international agreement and in case of contradiction of two equally important domestic act the later one will prevail. For more see art. 71 Law on normative legal acts of Belarus Republic and A.Zybaylo, «The weight of EurazEC laws in the legal systems of member states", Eurasian Legal Journal, No.7(62), 2013. Original: A.Зыбайло, „Место источников права ЕврАзЭС в правовых системах государств-членов», Евразийский юридический журнал, № 7 (62)б 2013.

[1199] See G.Vassiliyevich, S.Vassiliyevich, 10(77), 2014, Ibid. above. See also A.Kashirkina, A.Moroz, *International legal models of the European Union and Customs Union: A Comparative Analysis: monograph*, Institute of Legislation and Comparative Law under the Government of the Russian Federation, Contract (2012,

G.Vassiliyevich and S.Vassiliyevich having studied the situation of Belarus come to conclusion that it is necessary to amend the relevant national legislation of Belarus or issue the separate law for the same purpose - to clarify the legal status of decisions taken by supranational organizations, whereas such legal status may be determined differently with respect to each supranational organization to which Belarus is the party to. In such law, G.Vassiliyevich and S.Vassiliyevich suggest to follow the provisions of the founding agreements of each supranational organization in which the country participates, and, for example, if the EAEU Treaty provides that the decisions of its Commission shall be directly applicable and binding on member states, then such decisions shall be attributed with a higher legal weight than domestic law in order to remain effective.[1200] The scholars recommend this approach not only to Belarus, but also to other member states. In their view, incorporation of similar provisions in the national law will assure better implementation of decisions taken by the supranational organization and will remove the doubts regarding the role and status of such decisions. In addition to that, local scholar A.Zybaylo recommends member states to agree on the common method for implementation of decisions of supranational organizations in the domestic legislation in case this is required.[1201]

Although, the EAEU Treaty is slightly better in this respect than its predecessors and it partially comments on the supremacy of EAEU sources, the local researchers have correctly noticed that there are still outstanding issues regarding the relationship of these legal sources with the domestic legislations of the member states. Below, the author will summarise the issues discussed with this respect, as well as point out a couple of more issues she notices and will try to provide her opinion on the same and implications on the tax laws of member states.

5.1.1. Decisions taken by the Union institutions

The EAEU Treaty clearly provides for the hierarchical structure of the EAEU institutions and it reflects respectively the weight of their decisions.[1202] Thus, in case of contradiction between the decisions of the Supreme Council, the Intergovernmental Council and the Commission, the decisions of the Supreme Council should prevail over the decisions of Intergovernmental Council and the Commission. Respectively, the decisions of the Intergovernmental Council prevail over the Commission's decisions. Herewith, neither of these decisions can contradict to the EAEU Treaty and other international agreements concluded **within the Union**. Local scholars comment that no similar provision is provided with respect to institutional decisions and agreements concluded by the Union with third states.[1203]

What concerns the relationship between the decisions of institutions and the national law, then the decisions of institutions should in theory prevail over the domestic laws so that to assure that incompatibilities of national laws with the principles of the Union are eliminated by means of such decisions. There is, however, no so explicitly outlined provision in the EAEU Treaty on prevalence of decisions, however such conclusion, in view of the author, may be derived from the fact that the decisions of the EAEU Commission are binding and directly applicable and that member states shall bring their legislation in compliance. The same applies to the decisions taken by Intergovernmental Council and Supreme Economic Council, with the difference that they have to be incorporated by means of other national laws.

The Author of this work also notices that neither clarification is provided with respect to the relationship between the decisions of institutions and international agreements concluded by the member states. For example, in case of contradiction, would the tax treaty of member state (as a form of international agreement) prevail over the decisions of the Union institution? To answer this question, one first needs to understand, whether tax treaties are considered as a part of national laws of member states and in this case, they should probably comply with the decisions of institutions, or

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p.247. Original: А.Каширкина, А.Мороз, *Международно-правовые модели Европейского Союза и Таможенного союза: сравнительный анализ: монография* /отв. ред. А.Я. Капустин. М.: Институт законодательства и сравнительного правоведения при Правительстве РФ; юридическая фирма «Контракт», 2012, стр.247.

[1200] See G.Vassiliyevich, S.Vassiliyevich, 10(77), 2014, Ibid. above.

[1201] A.Zybaylo, «The weight of EurazEC laws in the legal systems of member states", Eurasian Legal Journal, No.7(62), Ibid.

[1202] See article 6 para. 4 EAEU Treaty.

[1203] *Pacta sunt servanda* principle.

whether they are treated not as part of national tax legislation, but as international agreements of member states, and in this case their hierarchical status is not clear. With respect to tax treaties, it is also important to note, that as an example of international agreement concluded by the member states not within the Union, such agreements are not considered as sources of law under the EAEU Treaty and therefore their status in the hierarchy of EAEU law is not clear. More on the same is provided in the section below.

Finally, the major deficiency with respect to the decisions of the EAEU institutions, is the fact that decisions of the EAEU Court are not listed among source of the EAEU law. As was discussed by the author in section 2 of this work, taken that decisions of the EAEU Court are binding only to the parties of the case, but not equally to all member states, then the fact that decisions are omitted from the sources of law, is not a mistake, but the real view and intention of the legislator. As was recommended by the author, the decision of the EAEU Court shall be attributed with the status of law in order to facilitate creation of the Union and realization of the freedoms.

5.1.2. International agreements taken within the Union and other agreements entered into by the Union and the member states

With respect to the relationship between the EAEU Treaty and other international agreements, including agreements concluded by the member states independently, the EAEU Treaty has superiority. Thus, the EAEU Treaty requires the international treaties of **the Union with a third party** not to contradict the basic objectives, principles and rules of the functioning of the Union.[1204] With respect to international treaties **within the Union**, it clarifies that in case of conflict between such treaties and the EAEU Treaty, the EAEU Treaty shall prevail.[1205] Herewith, the EAEU Treaty does not provide any clarification on the relationship between the international agreements concluded by the Union with **thirds states** and international agreements concluded within the Union by member states. In view of the author, there will be especially many more international agreements concluded within the Union (especially on a very sensitive issues, including issues of tax harmonization), and therefore, in order to exclude the judicial disputes on the issue on the hierarchy of law – the EAEU Treaty should clarify the hierarchy. In view of the author, all further international agreements concluded within the Union between the members will to a large extent complement the EAEU Treaty due to the number of gaps and unsettled issues therein, and this in view of the author, should put such future international agreements within the Union on the same or slightly below level than EAEU Treaty, but higher than agreements concluded by the Union with third states.

The EAEU Treaty also allows member states to enter with each other into bilateral agreements, which provide for closer integration than EAEU treaty itself. Herewith, such agreements shall not preclude member states from fulfilment of their obligations and rights under the EAEU Treaty and other international agreements within the Union.[1206] The EAEU Treaty neither precludes member states from conclusion of international treaties with third states as long as these treaties do not contradict to the principles and purposes of the EAEU Treaty.[1207] With respect to these two types of international agreements, the EAEU law clearly requires them to comply with the EAEU law and not to prelude member states from realization of responsibilities taken under other EAEU treaties. Herewith, the author doubts to which category under the EAEU classification belong the double tax treaties. Perhaps, those concluded with the third states could go to the second group, whereas what concerns double tax treaties concluded between the member states, it is questionable whether they are considered as international agreements for further integration between member states or not. What concerns the agreement concluded by the member states with the third countries, there is a requirement for these agreements not to contradict the principles and purposes of EAEU. At this point, the author is in doubt regarding the interpretation, since the provision is worded and may be interpreted in a way that it only concerns the future agreements of member states, but not the existing ones. The clarification is important if to question, whether the tax treaties concluded by member

[1204] See article 6 para. 2 EAEU Treaty.
[1205] See article 6 para. 3 EAEU Treaty.
[1206] See article 114 EAEU Treaty.
[1207] Article 114 EAEU Treaty.

states with each other and also third states, shall be compatible with the EAEU Treaty and if so, whether it applies to the previously concluded tax treaties as well.[1208]

Interesting example is the relationship between the EAEU Treaty, the agreements and decisions taken under its framework with the WTO rules. In particular, the previous agreements on the functioning of the Customs Union (enacted prior the adoption of the EAEU Treaty) provided for the obligations of member states to inline the customs union legislation with the WTO norms in a way it was envisaged in the respective accession agreements. As long as the customs union legal system, including domestic legislations of member states are not in line with the WTO rule, the WTO rules should prevail in case of contradictions, which in principal means that WTO rules may prevail the EAEU Treaty should there be any contradictions.

Another opinion of the EurazEC Court provided that the Customs Union norms cannot be interpreted in isolation from international customary rules, international agreements and other sources of international law recognised under article 38 of the Statute of the International Court of Justice. In other words, the EurazEC Court determined the that in case in the future the agreements under the dispute does not provide for the hierarchy of sources, they would have to be interpreted in accordance with the rules provided under the VCLT dated 1969 and WTO rules should only have priority in case of contradictions with the customs union law.

5.1.3. Domestic legislation and international agreements within the Union

With respect to the relationship between the domestic legislations and agreements taken within the Union, the situation is a bit clearer, because such agreements usually include provision on their legal status. Good example is the Customs Code of the Customs Union,[1209] which is soon to be replaced by the Customs Code of the EAEU. Both Codes are enacted by means of separate international agreement, where it is clearly provided that those Customs Codes prevail over the national legislations of member states and national measures shall only apply in case, which are not covered by the Customs Code. The customs regulation is therefore exercised by means of both international agreements and national laws of member states in the aspects, which are not regulated by the international agreements. Interesting example in this case is the regulation over the administrative and criminal responsibility for the violation of customs union law. On 5 July 2010 member states entered into Agreement on specifics of administrative and criminal responsibility for the violations customs law of the Customs Union and the member states and another Agreement on the legal assistance and mutual cooperation between customs bodies of the member states. Further on was taken the Decision of the EurazEC Intergovernmental Council No.50 “On international agreements of the Customs Union on the matters of cooperation in administrative and legal cases”, where the point 2 requires governments of member states to ensure compliance of national legislation with the both agreements mentioned above.[1210] This example illustrates one possible scenario of how the unification of national laws may be undertaken in the EAEU: as a first stage member states enter into international agreement on respective matter and further on, the same may be supported by the decision of the supreme body of the Union. Perhaps, the later decision is not always necessary, but may be essential in case member states delay the amendments to the national legislations to comply with international agreement.

WTO law has special status in the EAEU. The Annex 31 to the EAEU Treaty contains direct reference to the Agreement of 2011 on the functioning of the Customs Union in the multilateral trade system, where the relationship between the (current) EAEU law and the WTO law are defined.[1211] Under that agreement it is provided that starting from the date, any member state joins the WTO, the provisions of the WTO as they will be defined in the protocol on accedence of that member state to WTO, including obligations taken upon entry the WTO, are becoming the part of the Customs Union legal system, but only to the extent, they are attributed to the powers granted by the member states

[1208] From the EU perspective this issue was closely studied by T.O’Shea, *EU Tax Law and Double Tax Conventions*, Avoir Fiscal Limited (2008).

[1209] Annex to the Agreement of Customs Code of the Customs Union enacted by the decision of EurazEC Intergovernmental Council represented by the heads of the states No. 17 dated 17 November 2009.

[1210] This example is present in the article of K.Anopriyenko, “Legal responsibility for the violation of EAEU customs laws: lessons from the past and issues for unification. Original: К.Аноприенко, Правовая ответственность за нарушение.

[1211] See Balytnikov and Boklan, Ibid.

to the organs of Customs Union and to the relationship governed by international agreements, which are part of the Customs Union law.[1212]

5.1.4. Sources of tax law in the member states and intermediate conclusion

The author would organise the sources of tax law in the member states in the following groups:

1. National laws or tax codes
2. Various international agreements concluded by member states with respect to taxation, such as bilateral tax treaties for prevention of double taxation, agreements for exchange of information, recently entered OECD Multilateral Convention and any other similar sources of law;
3. The provisions of the EAEU Treaty related to taxation (articles 71-31, Annex 18), but also section XV in the EAEU Treaty and Annex 16 with some fundamental principles, which are important to consider in the context of direct taxes and which were analysed under section 3 of this work;
4. International agreements that can be concluded by the EAEU member states within Union framework, which will address tax issues;
5. Decisions of the EAEU institutes that will concern tax issues.
6. Soft laws, including model tax codes developed by the CIS Inter-parliamentary Assembly.

Almost the same classification of tax law sources in used in the EU, with exception only that the TFEU, international agreements within the Union and decisions of the bodies of the EU are all classifed as the "union law". In the EU context it is clearly established now that national tax legisations and bilateral treaties on taxation issues entered by member states have to comply with the Union law, without further distinction on sources of the union law. This new legal order was created with the entry into force of the Treaty of Rome, where the EU member states limited their competences in certain areas and agreed to adhere to other fundamental principles to achieve the objectives of the Union. The principle of prevalence of the Union law was further elaborated and enrished by the CJEU in Costa Enel case decision in 1964.[1213] As noted by T.O'Shea, the CJEU derived and formulated this principle on the basis of variety of factors, including: "the spirit of the Community treaties; from the fact that a new legal system had been established, which had created new rights for individuals in member states‘ legal systems; from the creation of the Community's framework and institutions; and from the limitations imposed on the sovereignity of the member states together with the transfer of powers to the community".[1214]

Based on the sections above, in the EAEU it may be neccessary to clarify few issues. First of all, it is necessary to introduce clearance on the status and relationship between the 1) decisions of the Union instituions and other international agreeents concluded within the Union by the member states – i.e. relationship between the double tax treaties concluded between the member states and the decisionsof the EAEU institutions; 2) relationship between the intrnational agreements concluded by the member states with third states and other sources of the EAEU law, including the decisions and inter-Union agreements. As will be discussed in section 5.3 of this work that deals with regional court practice, there is a problem with international agreements concluded by the member states with third states, when such agreements are involved in the judicial proceedings in front of the EAEU Court. In such cases, the EAEU Court simply refuses to take such agreements into consideration and to interpret them in view that they are not considered as sources of law in the EAEU and it does not have competence to interpret them.

Secondly, it is also neccesary to clarify the status of the previously concluded agreements within the EurazEC with respect to tax matters, such as "Concept on the fundamentals (basis) of tax law in EurazEC"[1215] and also perhaps to come back to the model tax codes developed under the CIS framework, because such instruments may be useful in the upcoming process of tax harmonization. Moreover, in the recently proposed actions by the Economic Council of CIS, which were discussed in section 1.5.2.1. of this work, there are very good points to act on and taken the stronger capacities of the EAEU than CIS, the member states could benefit from joint cooperation on the same matters.

[1212] See Balytnikov and Boklan, Ibid. p. 72.
[1213] See C-6/64 Costa Enel, where the provided for the same.
[1214] See T.O'Shea, *EU Tax Law and Double Tax Conventions*, Avoir Fiscal Limited (2008) p. 13
[1215] Dated 30 May 2007, available at: http://www.vkp.ru/104/106/118/339.html

The clarification of the status of those documents issued by the CIS institutions, or at least, the appraisal of the same, could facilitate and advance the work on tax harmonization in the region.

5.2. Instruments for tax harmonization

Under the EAEU law, there is no space for such legislative instruments as directives and regulations, which are used by the EU. The harmonization of legislation, therefore, in the EAEU should be carried forward either with the use of decisions taken by the Union institutions or with the international treaties concluded within the Union by the member states, or by both. There is no precise provision in the EAEU treaty, which would give clarity in this respect. Before moving to consideration of the current options, the author will provide examples from the previous regional treaties, because they in contrast to the EAEU Treaty included some provisions on the possible use of instruments for legislative harmonization.

In one of the previous agreements on the Customs Union and Single Economic Space dated 26 February 1999 (terminated with entry into force of EAEU Treaty) there was a special section devoted to approximation and unification of national legal systems, which provided that parties to agreement would take *agreed measures to approximate and coordinate the national legal systems ("measures for harmonization of legal systems"),* which in particular included:[1216]

a) coordination of actions in development of draft legal acts and other acts to amend the national laws;
b) conclusion of international agreements;
c) enactment of model laws;
d) enactment of decisions at the level of Intergovernmental Council[1217] or the Council of prime-ministerial level (meeting of heads of the governments);
e) other measures, approved by the Intergovernmental Council.

Along with that, the Intergovernmental Council had to decide which areas and which legal acts had to be harmonized, the order of harmonization and also the measures.[1218] There was also an interesting provision in the discussed agreement, in accordance with which, the Intergovernmental Council could take: 1) decisions that set the common measures for the member states, are binding in their entirety and are directly applicable; 2) resolutions, which are binding on member states, to which they are addressed, in terms of expected results, where, however, member states have freedom regarding the form and actions to achieve the result and 3) recommendations, which are not binding.[1219] All there reminds to the author, the EU instruments – regulations, directives and recommendations respectively. Herewith, the decision making mechanism also recalled the EU experience: the Intergovernmental Council could take decisions on the basis of initiative coming from the Integration Committee, after having consulted the Interparliamentary Committee and after having received approval from Council of prime-ministers (heads of governments).[1220] For the purposes of this work, the Author will not go into details on the definition and composition of each supranational body, because the idea at this point is only to demonstrate the concept and evolution. The Interparliamentary Committee also had a right to suggest the harmonization process and had the right to develop non-binding model acts.[1221] The model for legal harmonization in that Agreement dated 1999 very much reminded the EU model, and which was perhaps better than the current EAEU approach. Also, the old model included the possibility to harmonize the law by means of various tools, including the decisions of supranational organizations, international agreements and also soft law models.

There was another interesting agreement concluded under the framework of EurazEC named Agreement on the legal basis for the formation of the Customs Union and Single Economic Space

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[1216] See art. 56 Agreement on Customs Union and Single Economic Space dated 26 February 1999.
[1217] Intergovernmental Council was the supreme body of EurazEC represented by the presidents of the member states.
[1218] See art. 57 Agreement on Customs Union and Single Economic Space dated 26 February 1999.
[1219] See art. 58 Agreement on Customs Union and Single Economic Space dated 26 February 1999.
[1220] See art. 59 para. 1 Agreement on Customs Union and Single Economic Space dated 26 February 1999.
[1221] See art. 59 para. 2 Agreement on Customs Union and Single Economic Space dated 26 February 1999.

dated 26 October 1999,[1222] which provided for the basis for unification of the national laws and normative legal acts by means of:[1223]

a) exercise of agreed legal and normative policy, including the coordination of national legislative plans and plans for development and enactment of sub-legal acts; synchronized introduction of harmonized legal and sub-legal (podzakonnyi) acts, which were recommend by Intergovernmental Council at the level of presidents and the Council at the level of prime-ministers; introduction of amendments and additions to the national legislation in accordance with international agreements;

b) use of model laws, which were enacted by the Interparliamentary Committee;

c) mutual update on the legislative status, creation of integrated legal database, statistic and other socio-economic information.

In one of the decisions the EurazEC Court has confirmed that at earlier stages of the Eurasian Integration it should have been possible to have dual system of legal regulation: where the same area is regulated by both the international law norms and the national legal systems, where the good example is the customs regulation in the region: there is a common Customs Code of the Eurasian Union, there are decisions issued by institutions of the Union and also member state customs code and other laws on administrative and criminal liabilities apply on the issues, which are not covered by the code and decisions.[1224] T.Neshatayeva believes that this dual regulative system shall be considered as a specific feature of Eurasian Integration.[1225] It is interesting to note, that the EAEU Treaty as in many other areas, also in the area of harmonization and the use of instruments, stands behind the previously incorporated norms in predeceasing agreements. The EAEU Treaty instead of enforcing the previous norms, had changed it and to certain extent diminished, by not commenting and inserting clarity on the same.

Referrring to the core idea of Eurasian Economic Union, the Union was created to assure free movement of goods, services, capital and labor, as well as exercise of coordinated, agreed or single policy in the agreed areas. The types and degrees of policies as was discussed previously, the local scholars link these policies to the level of competence the Union has in one or another aspect. The author of this work finds it complicated to distinguish the policies and offers to review them once again from the perspective of question, how member states should achive these policies and how the Union may contribute towards this.

As was stated earlier, the ***single policy*** envisages the application of **unified** legal regulations by the member states, *including on the basis of decisions issued by Bodies of the Union within their powers.* Member states shall aim to achieve this policy only in the areas of customs, customs-tariff regulations, the system of tariff preferences and common measures of non-tariff regulations.[1226]

Coordinated policy means policy implying ***the cooperation*** between the member states on the basis of common approaches *approved within Bodies of the Union and required to achieve the objectives of the Union* under the Treaty. The definition here is broader, than definition of single policy, and calls member states to cooperate, which perhaps implies that member state should enter into additional intergovernmental agreements with each other where necessary. The approaches taken are, however, should be approved by the Union bodies. The definition is also broad due to the words "*required to achieve the objectives of the Union* under the Treaty" and the author assumes that coordinated policy in direct tax matters may fall under this category, because the coordination of tax policies may be necessary to achieve objectives of the Union – e.g. to achieve liberalization of investment and establishment activities, as well as to assure national treatment of foreign investors.

Agreed policy is defined as policy implemented by the Member States in various areas *suggesting the harmonisation* of legal regulations, *including on the basis of decisions of the Bodies of the Union*,

[1222] Соглашение о правовом обеспечении формирования Таможенного Союза и Единого Экономического Пространства от 26 октября 1999 года.
[1223] See art. 4 of the Agreement dated 26 October 1999.
[1224] See what was the original decision, and then the Court supported and elaborated on this theory in the later cases OOO "SeverAvtoProcat" and OOO "Dzhekpot".
[1225] T.Neshatayeva, Ibid, Zakon 2014.
[1226] See P.Myslivsky, "International legal framework for establishment of the Eurasian Economic Union and means for dispute resolution", dissertation, Российский государственный Университет правосудия, 2015.

to the extent required to achieve the objectives of the Union under this Treaty. The Author has difficulty to distinguish which areas should fall under the "agreed policy" and which should fall under the "coordinated policy". Nevertheless, trying to apply this definition, the Author assumes the following: in indirect tax matters, member states are invited to determine the direction, forms and orders for harmonization of national legislations (art. 71(3) EAEU Treaty) – which may indicate that member state shall have agreed policy in indirect tax matters.[1227] The phrase "*including on the basis of decisions of the Bodies of the Union*" indicates to the Author that for indirect tax harmonization may be used both – decisions of Union bodies and also agreements concluded between the member states.

The author believes that there should be a reason why the EAEU Treaty distinguishes between the coordinated and agreed policies. The author assumes that in the areas, where the Treaty requires "coordination", it is up for the member states to work on it, where the EAEU Commission may only advise or serve as a platform for the states to meet, but it cannot take any legislative actions. Whereas, the agreed policy implies that the EAEU institutions, in particular, the Board of the Commission may take necessary legislative actions.

Furthermore, there is a separate definition of the term *"harmonization of legislation"*, which shall mean the approximation of legislation of the member states aimed at establishing similar (comparable) legal regulations in certain spheres.[1228] And one more definition on the same is "unification of legislations", which implies approximation of legislation of the Member States aimed at establishing identical mechanisms of legal regulation in certain spheres as specified in the EAEU Treaty.[1229] The author has not witnessed a good attempt of local scholars to distinguish the definitions and illustrate their application in practice.

In the Tarasik case discussed in details in the next section of this work, the EAEU Court gives its understanding of legal harmonization under the EAEU law. The Court states that *"the EAEU Treaty is an international agreement, which accounts for the rights and interests of sovereign subjects of international law and is the reflection of their agreement, it determines the approximation of national legislations as a process, but not the single act with the adoption of which, the member states start to simultaneously use the unified norms in all the spheres of economic and business activities. At the current level of integration, the EAEU Treaty provides for the harmonization of national laws, but not unification".*[1230]

As *international agreements within the Union* are defined the international treaties concluded between the member states on issues related to the functioning and development of the Union, under which category, in view of the Author, could fall treaties on harmonization of certain tax aspects. The Author believes that if any decisions are taken on tax harmonization, they will probably be issued in the form of such international treaties, rather than decisions of the Union. This is so, because one of the deficiencies in the current EAEU Treaty is that there is no separate provision or section that would be devoted to the issue of harmonization or unification of law, especially in the tax matters. Therefore, unless such provisions are issued, by, for instance, the Supreme Economic Council, authorising the Commission or other intergovernmental institution to take decisions on tax harmonization nature, the international agreements between the member states remain as the primary instrument of tax harmonization. Another reason to use international treaties, but not the decisions of the Union, with respect to tax harmonization is the fact that member state would retain their sovereign powers in tax matters. As one of the examples of the fact, that member states prefer the use of international agreements to the decisions of the Union for legal harmonization, is the agreement on pensions for the EAEU nationals that is being discussed between the states and the draft of which shall be developed by the EAEU Commission during the 2017. Currently, the pension assurance is being regulated by individual national legislations, but certain challenges do arise upon cross-border movement of labour and this is going to be managed by the international agreement between the member state. The agreement will perhaps not harmonize all the aspects of pensions assurance, but instead will provide common rules for treatment of cross-border workers.

[1227] "Indirect tax matters" is the phrase that uses the Author, whereas the agreement says "taxes, affecting trade, so that not to violate competition and movement of goods, works and services".

[1228] Art. 2 EAEU Treaty.

[1229] Art. 2 EAEU Treaty.

[1230] See Decision of the Board of Appeal dated 3 March 2016 on IP Tarasik case, No. CE-1-2/2-15-KC, p.9.1.

5.3. Eurasian integration and the role of judicial practice

There were no cases considered by the EAEU Court that would directly concern the tax issues, however, few cases from judicial practice of EAEU and EurazEC courts are important and indirectly relate to the tax law. In this section the author will talk about the Tarasik case considered by the EAEU court to illustrate how the EAEU Treaty is being interted, to show how the Comission and the EAEU Court perceive themselves in relation to tax issues and EAEU law and to assess on a practical example the potential role, the suranational judicial system may have on formation of common tax system in the region.

5.3.1. IP Tarasik vs. Eurasian Economic Commission[1231]

IP Tarasik vs. Eurasian Commission is the first case decied by the EAEU Court, where an individual enterepreneur (IP) Mr. Tarasik from Kazakhstan brought the case before the EAEU Court for inaction of the Commission. Whereas, the issue of the case concerns the classification of the same good for customs and taxation purposes, there were discussed additional questions on the EAEU law and the competences of the Court and the Commission. The EAEU Court had considered the case two times – first time the decision was issued in favour of the Commission on 28 December 2015 by the Board of the Court, whereas in the second decision on 3 March 2016, the Board of Appeal upheld the decision of its colleagues. Both decisions were accomponied by the special opinions of two judges involved in the case (one per each), who disagreed with the majority of judges on the above decisions and provided their own views of the case. Below the author will summarise both decisions, as well as special opinions of the judges and where relevant, also provide the views of local scholars. The author will conclude with the paragraph representing her own view of the case.

5.3.1.1. Facts of the case

During the years 2012-2014, Mr Tarasik was importing cars from the United States to Kazakhstan, which he classifes as "trucks", which had truck chassis[1232] and under the customs declaration declared these cars accordingly under the code 8704, which stands for "motor transport vehicles for transportation of goods". The Customs Authority of Kazakhstan accepted this classification for customs purposes, however, for tax purposes they had considered those cars as "transport vechicles **with the passenger car type chassis** and the platform for cargo with the cabin for driver, which is separated from the cargo platform by the hard fixed partition" (further "vechicle with the passenger car chassis") and accrued the excise tax respectively. Should the classification given for customs purpose remained as "transport vehicles with the truck chassis", the cars would not be subject to excise tax under the Kazakhstani law.[1233]

Tarasik appealed the action of the Customs Authority to the national courts. The judicial trials of first, appeal and cassational levels were in favour of Tarasik, whereas the Supreme Court reversed the decisions of the lower courts and decided in favour of the Customs Authority. Having disagreed with the position of both Kazakhstani bodies, in October 2014 Tarasik brought the case before the EurazEC/EAEU Commission claimung that national authorities of Kazakhstan were violating the principles for the uniform application and realization of the international agreements, which form the legal basis of the Customs Union. In the initial application to the Commission, Tarasik had provided the following arguments to support his position and to explain how the national Kazakhstani authorities had violated international agreements.

1) First of all, Tarasik disagreed with the Customs Authorities, which classified transport vehicles "Nissan Titan" as motor transport vehicles with the passenger car chassis for tax

[1231] Case no. CE-1-2/2-15-KC decided on 28 December 2015 by the Board of the EAEU Court and 3 March 2016 by the Appeal Board of the EAEU Court.

[1232] The types of cars imported and concerned in the case were "Nissan Titan", "Toyota Tundra", "Ford-F150".

[1233] Art. 279 para. 6 Tax Code of Kazakhstan provides for the list of exercisable goods. The cars of the pick up type could only fall under one category from the list, should it be the “transport motor vehicle with the passenger car type chassis with a platform for cargo and with the cabin for driver, which is separated from the cargo platform by the hard fixed partition, with the volume of engine exceeding 3,000sm^3 (except for the cars adopted for the handicapped people”. So, the issue, was basically technical, whether the car was indeed a cargo car with the cargo type chassis or whether it was a cargo car with the passenger car type chassis, however, as will be seen later the discussion of the case went far beyond this and focused on the capacities of the Commission, the applicable laws, interpretation of the same, but not actually on the substance of the question.

purposes and as trucks with truck chassis for customs purposes.[1234] In his view, the classification given for tax purposes was contrary to article 3 of the Geneva Agreement of 1958, ratified by both Kazakhstan and the USA[1235] and to the Technical regulation on the safety of motorvehicles (TP TC 018/2011), approved by the decision of the Commission No. 877 on 9 December 2011 (further "Technical regulation No.877), because the Agreement required states to recognise the classification of cars and their components given by the manufacturer and neither of the above agreements provided for classification of motor transport vehicle with passenger car chassis, but instead had defined the transport cargo vehicles and its chassis.

2) Secondly, Tarasik claimed that customs officers did not have sufficient qualification and attestation, whereas the location of Central customs laboratory within the Customs Authority was contrary to the law of the RK on Technical Regulation No.603-II dated 9 November 2004.
3) Thirdly, Tarasik explained to the Commission that national authorities of Kazakhstan, including the courts, ignored the information of car manufacturer regarding the cars' types and the fact that manufacturer classifies the types of chassis as "cargo chassis".
4) Finally, Tarasik believed the Commission was supposed to consider his application and carry out monitoring procedure to assess the lawfulness of application of excise taxes in a given situation, taken that excise tax was considered as one of the customs payments and should have been assigned to the competence of the Commission.[1236]

In response to Tarasik, on 27 November 2014 the Commission sent the letter explaining that it did not have enough capacity to assess the actions and decisions of the Customs Authorities of Kazakhstan. In addition, the Commission noted that since the matter of the case concerned the excise taxation, where the exclusive competence belonged to the member states, the Commission had referred the application of Tarasik to the Committee of State Revenue of Kazakhstan.

5.3.1.2. Trial before the Board of the EAEU Court (first instance)

5.3.1.2.1. Position of Tarasik

Tarasik brought the case before the EAEU Court claiming incompatibility of inaction by the Commission with international agreements within the Customs Union, which as a result affected his rights as of entrepreneur and also asked for cancelation of the Commission's decision No.751 dated 16 August 2011 on classification of transport vehicles of "pick up" types[1237] as incompatible with the international agreements (further Decision No. 751 on classification of pick ups). As was discussed earlier (see section 2.2.2.3), under the EAEU law, Tarasik, as any other business person had a right to bring the case before the EAEU Court, however, only against the Commission decision, action or inaction. Business persons do not have rights to bring the case against the member state and neither has the Commission, which as a result limits the rights of parties, and consequently Tarasik could appeal only the inability or unwillingness of the Commission to resolve the case instead of appealing directly against the member state, whose practice assumingly had violated his rights.

Tarasik believed that by inaction, the Commission violated his rights since in his view it was supposed to monitor the situation, but failed to do so and as a result did not assess the compliance of the member state with:

2) the provision of Agreement dated 11 December 2009 with respect to establishment of bodies for control and investigative laboratories on the territory of the Customs Union;

[1234] Decision of the Central Customs Laboratory of Astana city of the Customs Committee of the Ministry of Finance of Kazakhstan dated 6 November 2012.

[1235] Full name of agreement: Agreement concerning the adoption of uniform technical prescriptions for wheeled vehicles, equipment and parts which can be fitted to and/or be used on wheeled vehicles and the conditions for reciprocal recognition of approvals granted on the basis of these prescriptions signed on 20 March 1958 in Geneva.

[1236] AT this point he referred to point 20 of the Order for decision making process by the Commission on classification of certain types of goods, approved by the Commission's decision No. 284 dated 2 December 2013. Available at: http://www.eurasiancommission.org/ru/Lists/EECDocs/635220167419705843.pdf accessed on 4 January 2016.

[1237] In the referred decision the Commission established criteria under which, the Pick Up type of cars are classified under the customs code 8704.

3) the Geneva Agreement of 1958 with respect to recognition of formal characteristics for the types of motor vehicles, which was originally determined by the manufacturer in the USA;
4) the Agreement on the Customs Union and Common Economic Space[1238] in part on application of unified system for collection of indirect taxes in trade with third states, which in view of Tarasik were not executed.[1239] He referred to the practice of Kazakhstan and Russia, which defined the objects for excise tax differently and in particular, the types of cars imported by him would not be taxable in Russia at all with excise tax.
5) other decisions of the Union bodies.

The application of Tarasik to the Court brought in new element – Decision No. 751, where the Commission establishes criteria for recognition of certain cars as "pick ups". On this basis, the Court almost refused to accept his case, since this issue was not discussed by Tarasik with the Commission. However, eventually, the Court considered it as related to other matters of the case and proceeded with the procedure.

5.3.1.2.2. Position of the EAEU Commission

The Commission objected the position of Tarasik. In its support, the Commission repeated what it stated in the letter response to the taxpayer that it did have competence to monitor over the action of national customs authorities and assess the way the excise tax is applied, since both areas were in exclusive competence of the member states. The Commission additionally noted, that Tarasik did not asked it to initiate monitoring, but instead asked for the measures with respect to actions of national customs authorities.

5.3.1.2.3. Decision of the Board

0. In the opening part of decision, the Board stated that it would not go beyond the questions, referred by the taxpayer and will be limited to review of arguments related to the inaction of the Commission.

1. In its decision, the Board first of all tried to define the term "inaction". In doing so, it referred to the national court practices of the member states and also the CJEU,[1240] and consequently defined "unlawful inaction" as non-performance or inadequate performance of responsibilities by the supranational institution (official), which were attributed to it by the law of the Union and, in particular, includes the non-consideration or partial non-consideration of application of the business person, provision of response, which does not address the substance of the issue, should the issue raised fall within the competence of such supranational institution (official).

2. Secondly, the Board had made an interesting, but surprising, and in view of the Author, incorrect conclusion regarding the obligation of the Commission to exercise monitoring procedure and respective outcome on the business persons. The Board concluded that the Commission had to exercise monitoring over compliance by the member states with international agreements on a regular basis in the areas, where the Commission had competence to act, but was not obliged to do so based on an individual request. The monitoring was defined by the Board as a comparative analysis of member states' legislations and the provisions of international agreements." Consequently, the Board concluded that the Commission should not be blamed for connivance, which led to non-execution of international agreements, because it was not obliged to initiate monitoring procedure based on individual request of the business person who disagreed with the actions of the national authorities, Moreover, the Board stated that the monitoring procedure was first of all legally meaningful to the member states, and therefore, non-realization of respective right by the Commission could not influence the rights of business persons.

3. With respect to the imposition of excise taxes, the Board referred to the Decision of the Supreme Court of Kazakhstan,[1241] which clarified that the imported cars were considered under the customs code 8704 "transport motor vehicles for transportation of goods", similar as is done under Russian practice with respect to the same types of cars,[1242] however, for tax purposes, it was noticed by the customs authorities of Kazakhstan and confirmed by the Central Customs laboratory, that the

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[1238] Dated 26 February 1999.
[1239] See the provisions, which provide for the same: article 9 para b) and article 12 point 4).
[1240] The EAEU court in particular referred to the Case C-302/87 European Parliament vs. European Council.
[1241] Decision of the Supreme Court of Kazakhstan dated 18 December 2013.
[1242] See Russian Court practice on the same the Decision of the Arbitration Court of Primorskij Kraj of the Russian Federation No. A51-6609/2012 dated 3 August 2012, available at: http://sudact.ru/arbitral/doc/xl0TmwOyc56q/. This case was referred to in the decision of Tarasik case.

imported cars, even though were intended for transportation of goods (cargo cars or trucks), had features of cars, that are subject to excise tax under the Kazakhstani law and that fact didn't change their classification as of cargo cars given under the customs declaration. The Board noted that classification for customs purposes did not depend on the type of chassis of the car, but instead depended on the purpose of use of the car. With respect to the above, the Board found the treatment of vehicles in question for tax purposes was appropriate and found that Commission was not required to initiate further monitoring procedure. The Board did not comment on the fact that actually manufacturer considered the cars in question to have cargo type chassis, but not chassis of a passenger type car and the fact, that reclassification of types of chassis, but not the cars was the result of the Kazakhstani customs authorities, which eventually made the product taxable with excise tax.

4. With respect to the requirement to assure the unified system for collection of indirect taxes in the trade with third states, which is provided under articles 9 and 12 of Agreement dated 26 February 1999, the Board noted that there is no requirement to achieve absolute similarity between the national tax systems. The Board noted that even though the indirect taxes are considered as part of the customs payments,[1243] the framework for imposition of tax incentives,[1244] determination of taxable base,[1245] amount of tax[1246] and rates,[1247] the form and timing of payment[1248] shall be determined by the member states. It also noted that except for the customs issues, which are directly addressed in the Customs Code of the Customs Union, the member states remain responsible for determination of the rest in accordance with their national rules. This is compatible with article 45 of the EAEU Treaty, which determines the capacities of the Commission with respect to customs regulation, but does not include capacity to regulate on determination of customs duties, VAT, excise taxes. The Board noted that under the current EAEU Treaty, the harmonization of excise taxes is limited only to the determination of rules in accordance with which the member states will be determining the directions, forms and order for further tax harmonization, which influences the mutual trade.

Further, the Board provided high level analysis of member state practice with respect to the determination of excisable goods and concluded that neither of states had linked the features of excisable goods with the features of products classification of the customs and foreign economic activity purposes. The Board noted that with respect to the unification of the tax systems, there were unified certain aspects, such as: 1) equalization of indirect tax rates with respect to imported and exported goods, so that domestic production of the member states is not treated more favourably than foreign; 2) indirect taxes apply based on the principle of destination; 3) no individual incentives should be granted upon exportation and importation of goods. The Board concluded that national tax legislation of Kazakhstan complied with the above principles, whereas other aspects of trade with the third countries would be unified further with the gradual development of integration and based on the agreement between member states.[1249] At this point, the Board implicitly underlined the role of the member states, but not of the Union institutions.

5. With respect to the argument of the taxpayer that Kazakhstan violates international agreements, in particular, Geneva Agreement of 1958 and Technical regulation of the Customs Union, by treating the cars as having chassis of passenger cars, whereas in international agreements such term is missing, the Board noted that it was untenable to relate the terms used for tax purposes and other non-tax agreements due to the different nature of spheres regulated by both legislations. While tax code regulates fiscal relationship, the Geneva Agreement and technical regulation impose rules and principles for the safety and environmental issues, and mismatches found between these types of law could not be considered as contradictions and violation of international agreements. This conclusion of the Board supported local scholars, whose opinion were requested by the Board prior the case was decided.[1250] Taken the above, the Board found that the Commission could not be blamed for inaction.

[1243] Article 70 point 1 Customs Code of the Customs Union.
[1244] Article 74 point 2 para. 3 Customs Code of the Customs Union.
[1245] Article 75 point 3 Customs Code of the Customs Union.
[1246] Article 76 point 4 para. 2 Customs Code of the Customs Union.
[1247] Article 77 point 2 para. 3 Customs code of the Customs Union.
[1248] Article 84 point 4 Customs Code of the Customs Union.
[1249] In accordance with article 18 of Agreement dated 26 February 1999.
[1250] A.N.Kozyrin, S.K.Leschenko.

6. The argument of the taxpayer regarding the location of Customs Central laboratory within the structure of the Customs authority was not considered by the Board. The Board stated that that issue did not relate to the circumstances, which required investigation under the given case on inaction of the Commission.

7. As a part of the decision, the Board also noted that previously made court decisions may be considered in the future similar cases and this is compatible with the principle of *persuasive precedent*, however, as such, the previously made decisions do not create the precedent.

5.3.1.3. Special opinion of the judge of the Board – Mr. K.L. Chaika

Under the EAEU law, the judges, who took part in the trial have a right to express their own individual view about the case should they disagree with their colleagues on the decision, which is taken by the majority.[1251]

As such, Chaika does not oppose the decision of the Board, however, shows the situation from a different perspective, comments on what he would expect the Board to do and how would it influence the final decision. Some details of the case also become more clear from explanation of Chaika, rather than from the text of the decision.

1. Thus, Chaika believes that the Board was supposed to assess the extent to which the norms of the Geneva Agreement and also the technical regulations provided under the Customs Union law are followed by the member states and the define the place these sources of law have under the EAEU law. Chaika stated that norms of international agreements first of all prevail over the domestic legislation of member states, and in particular this is explicitly provided under the general part of the Tax Code of Kazakhstan and one more time specifically under the section devoted to excise taxes, which requires to use the terms in the way they are defined under the international agreements and the law of the Customs Union.[1252] Chaika believes that the Board was supposed to confirm the universal status of the Geneva Agreement as of the source for technical regulations for the Customs Union laws. Under the Geneva Agreement, the parties to the agreement are required to mutually recognise the official classification attributed by the manufacturer to the cars and components, manufactured on their territories. Hereby, by changing the classification of chassis type, which was confirmed with the document issued by the manufacturer, the norms of Geneva Agreement are violated. From the documents presented by Tarasik, the cars in question had the cargo types chassis attributed officially by the manufacturer, whereas the Kazakhstani Customs authorities considered the cars to have passenger car type of chassis. In view of Chaika, the Board had to determine that by reclassification undertaken by the Kazakhstani customs authorities, the norms of the Geneva agreement were violated.

2. The second argument Chaika devotes to consideration of the norms of Kazakhstani Tax Code. Article 279 defines the list of goods subject to excise tax, whereas article 280 determines the rates, however, when doing so, it refers simultaneously to both - the customs codes attributed to the goods for the customs purposes and also the classification (description) of goods, which however is different from classification given for customs purposes.

Extract from Tax Code of Kazakhstan, art.280 para. 4

Product customs code	**Type of excisable objects**
from 8704	Motor transport vehicle with chassis of passenger type car, equipped with the platform for transportation of goods and cabin for the driver, which is separated from the cargo section by a hard fixed partition, and having engine volume more than 3,000 sm^3 (except for the cars adopted for the handicapped people).

In view of Chaika, the Board of the Court was supposed to assess the compatibility of the description provided under the Tax Code of Kazakhstan with the code of the customs classification. The Board found the above classification as appropriate, however, in view of Chaika, the Board had failed to take into account the specific definition provided further in the Tax Code of Kazakhstan under the

[1251] Article 70 point 1 Regulation on the functioning of the EAEU Court approved by the decision of the Supreme Council No.101 dated 23 December 2014.

[1252] Article 277-1 Tax Code of Kazakhstan.

section “Vehicle tax”, where the term “passenger type car” is defined[1253] and that definition exactly includes the description of the cars in question. Chaika argues that passenger type car shall be considered under the category 8703,[1254] but not under 8704, and that by giving additional characteristics under tax law norms to the product that are not envisaged under the common customs nomenclature, the functional purpose of the product changes and also changes the code of customs classification. In other words, having interpreted articles 279, 280 and 367 in the Tax Code of Kazakhstan, it follows that the description of transport motor vehicle in the Tax Code, by having additional characteristics as “chassis of passenger type car” allows for the tax law purposes to reclassify the product from the customs code 8704 “motor transport vehicles for transportation of goods “to 8703 “passenger type cars and others with the primary purpose for transportation of people”.

The term “passenger type chassis” is not defined anywhere, neither by the international law norms, nor by the domestic legislation of Kazakhstan. Chaika claims that it is only the Commission of the Union, which has exclusive capacity to determine the characteristics and classification of the products for the customs law purpose and approve the common customs nomenclature (codes) of the Customs Union, and none of the domestic authorities can determine the characteristics of products, which would differ from the common customs nomenclature. Chaika believes that there is no difference for which type of legal relationships/areas of law, the description is changed. He believes that states shall be governed by the nomenclature (codes and classification) approved by the Commission in any spheres and areas of legislation.

3. In the last part of his opinion, Chaika comments on the decision of the Board with respect to the monitoring procedure and respective obligations by the Commission. In his view, the Board was supposed to differentiate the terms “monitoring” and “control”, define the list of parties, who may call the Commission to initiate these procedures and assess whether Tarasik had such a right. Having presented his arguments and one of the EurazEC Court decision,[1255] Chaika concludes that both the member states and business person shall have a right to ask the Commission to initiate the monitoring and control procedure. In case of the business person, Chaika underlined that application to the Commission against the actions of the member states is the only tool available to the business persons to protect its rights attributed by the EAEU law. Consequently, should the taxpayer (business person) reasonably justify the violation of his rights, the Commission shall have no right to deny execution of monitoring and control procedure. On this basis, Chaika concludes that it was not appropriate by the Commission to refer the case to the national state revenue committee instead of trying to investigate the situation and open the monitoring procedure. Chaika concludes that in his view the Board was supposed to recognise the refusal of the Commission to open monitoring and control procedure as inaction of the Commission, which violated the entrepreneurial rights of the business person.

5.3.1.4. Trial before the Appeal Board of the EAEU Court

5.3.1.4.1. Position of Tarasik

Tarasik has appealed the decision of the Board of the Court. In its position, it basically supported its initial request but in argumentation heavily relied on the opinion expressed by Chaika.

5.3.1.4.2. Position of the EAEU Commission

The Commission objected over the position of Tarasik. In particular, it asked the Court not to accept for trial the point regarding the monitoring procedure, which was not asked by Tarasik upon his initial application to the Commission, but instead he asked to challenge the actions of Kazakhstani tax authorities, which in view of the Commission did not fall within its competence. Commission believed that the trial should only deal with questions, that were initially addressed to it by Tarasik.

The Commission opposed the view that Geneva Agreement comprises the law of the EAEU and therefore did find itself responsible for its monitoring by the member states.

[1253] Article 376 para. 1-1) Tax Code of Kazakhstan.

[1254] Customs code 8703 stands for passenger type cars and other transport motor vehicles, with the primarily purpose to transport the people (except for motor transport vehicles covered under the code 8702), including the trucks for transportation of both people and cargo, vans and racing cars.

[1255] In his opinion Chaika refers to the EurazEC court decision in the “OOO “Vichunaj-Rus” case dated 7 October 2014.

The Commission also stated that Tarasik did not present enough arguments to support his statement regarding the necessity to use the terms defined for the technical regulation and customs law purposes also for the tax law purposes in Kazakhstan.

5.3.1.4.3. Decision of the Appeal Board

The Appeal Board fully upheld the decision of the Board, while having slightly elaborated its decision with the additional arguments.

1. The Appeal Board first of all had agreed with the definition of "inaction by the Commission" formulated by the Board of the Court.

2. The Appeal Board had also agreed with the Board that the Commission did not have obligation to start monitoring procedure upon the application of taxpayer, since monitoring and control are regular functions exercised by the Commission and are not connected to the individual requests. The Appeal Board repeated that for initiation of monitoring procedure based on individual request the Commission should be presented with justifications confirming that norms in the national legal system of the member state did not comply with the norms of international agreement of the Union and Customs Union and that there is diverse practice in application of those norms by the member states, which in view of the Court were not presented by Tarasik. Additionally, the Appeal Board noted that monitoring procedure shall not be considered as supranational control function exercised by the Commission, since this function may also be exercised based on the information provided by the member states, and as the result the monitoring only helps to identify the problematic issues, which prevent unified and effective legal regulation, helps to formulate the main proposals for enhancement of Union law and harmonization of national legislation.

Additionally, the Board of Appeal noted that the monitoring procedure shall not be exercised by the Commission in the spheres, where it does not have competence to act, and therefore in the given situation there was no need to differentiate between the functions of "monitoring" and "control", since the issue in question was out of the Commission scope of competence.

3. The Appeal Board found it unnecessary to investigate on the issue of compliance between the Tax Code of Kazakhstan with the Customs Union customs nomenclature (codes and classifications), since legislation regulate on the different spheres and in the given situation had no impact on the decision of the case related to inaction of the Commission. The Appeal Board supported the conclusion of the Board, which stated that imposition of indirect taxes is in the exclusive competence of the member states and the features of products subject to excise taxes does not depend on the features of the same products for the customs purposes and customs nomenclature, and although the customs code are mentioned in the tax law they are not determining upon decision to impose excise tax.

4. The Appeal Board also considered that the Commission was not responsible for assessment whether Kazakhstan or any other member state complied with the norms of international agreement, which was not considered as source of law of the Union since the Commission does not the require capacity to do so.[1256] In particular, the Board of Appeal found that Commission did not have to investigate whether Kazakhstan complied with Geneva Agreement, since Geneva Agreement was not an agreement concluded within the Union and participation of Kazakhstan to the Agreement did not influence the formation of the Customs Union at that time. Consequently, the Appeal Board found wrongful the statement of Tarasik (eventually of Chaika) that the Geneva Agreement is compulsory for the EAEU member states and that the Commission was supposed to investigate the compliance of the member states with the same.

5. The Appeal Board supported the opinion of the Board and shared the view that national authorities had not to interpret the terms used in the Tax Code in accordance with the meaning those terms had under the technical regulations or the terms used for the customs law purposes.

5.3.1.5. Special opinion of the judge of the Appeal Board – T.N. Neshatayeva

Special opinion of the judge T.N.Neshatayeva is full of new details, which were not presented in the previous two decisions and opinion of her colleague. Thus, in the opening part of her opinion, Neshatayeva notes that because of the reclassification the taxpayer "had paid the amount twice for the same product as if he was importing two different products". To the author it is not clear what

[1256] The sources of the EAEU law are provided under article 6 para. 1 EAEU Treaty and do not include international agreements concluded independently by the member states between each other or the third states.

was meant by Neshatayeva, whether she meant that customs duty was paid twice also due to the reclassification for tax purposes or whether she considers that payment of excise tax is the same as payment of customs duty and that is why the taxpayer "had paid twice for the same product"? This remains as a question for the author.

Neshatayeva openly opposes the Court decision and claims that procedural and also material norms of EAEU law were violated in particular by the Board.[1257]

1. First of all, she disagrees with the manner the Board of the Court considered the issue and applied the law. Neshatayeva claims that the Board was wrong having based its decision to the basis of national law without having analysed the norms of applicable international law. In her view the Board was supposed to indicate the international sources of law, which regulate on the issues of importation of cargo (truck) cars, their classification and also the ability to reclassify the same. Neshatayeva believes that together with the Commission, the Board of the Court had failed to indicate the issue in the case, which had to be considered by supranational institutions and instead focused on the issue of excise taxation, which is attributed solely to the competence of the member states. Neshatayeva believes that the Board had violated the fundamental norms of EAEU law by having applied and interpreted the national law, whereas EAEU law does not include national laws as the sources of law that can be used by the EAEU Court in the judicial trial.[1258]

> **Extract from Annex 2 to the EAEU Treaty.**
> 50. In the exercise of justice, the Court shall apply:
> 1) the generally recognised principles and regulations of international law;
> 2) the Treaty, international treaties within the Union and other international treaties to which the states that are parties to the dispute are participants;
> 3) decisions and dispositions of the Bodies of the Union;
> 4) the international custom as evidence of the general practice accepted as a rule of law.

Neshateyeva states that this article in the EAEU law serves to protect the national sovereignty of the member states and prevents the supranational court from acting as the supreme national court, and neither allows it to affirm or oppose the decisions of the later.

2. In the second argument Neshatayeva says that the Board of the Court failed to analyse whether the Commission is liable for inaction. Neshatayeva says that three criteria that the Court was supposed to analyse to determine the same were not analysed properly and instead the Court focused on discussion of monitoring procedure, which was not asked for by Tarasik. Under the EAEU law, three criteria to check to determine whether the Commission is liable for inaction are:

> 1) whether the Commission had competence to consider the application;
>
> 2) whether there was a fact that rights and interests of business person granted under the EAEU Treaty or other international agreement within the Union were violated;
>
> 3) compatibility of contested decision or action (inaction) by the Commission to the EAEU Treaty or other international agreements within the Union.

Neshatayeva also believes that the Board went beyond the issues addressed by the applicant by having analysed the issue of monitoring procedure, and on this basis violated the norms of the EAEU law.[1259]

3. Neshatayeva formulates her own understanding of "inaction" based on the international customary rules. Accordingly, she finds the Commission liable for inaction mainly on the basis that in the response to Tarasik the Commission did not address the substance of the question and did not provide its opinion on the "possibility of reclassification of the cardo cars".[1260]

She additionally claims that the Court was supposed to recognise the inaction of the Commission as contrary to the EAEU law in view that the main objective of the Union is to achieve the common

[1257] She refers to points 50, 101 Annex 2 to the EAEU Treaty and point 45 subpara. 1 Regulation on the functioning of the EAEU Court.
[1258] Article 50 Annex 2 to the EAEU Treaty.
[1259] Point 45 Regulation on the functioning of the EAEU Court.
[1260] This is a literal translation of the phrase from the opinion of Neshatayeva. Neshatayeva claims that by doing so the Commission violated the norms of point 11 Order on the way to consider the applications of business persons dated 19 March 2013.

market for the free movement of goods, services, labor and capital – and for this purpose it is necessary to reduce (eliminate) the non-tariff barriers, which among others, includes the non-unified legal practice, which results in differentiated approaches and procedures of control and monitoring in the spheres of national trade policy, including customs policy upon importation of goods to the EAEU territory. In support of her statement regarding the differentiated legal practice she referred to the court practice of Russia and Kazakhstan, where in her opinion the term "the truck" (motor vehicle for transportation of goods) was determined differently.

4. Finally, Neshatayeva criticizes the Court for violation of competitiveness principle,[1261] which as she states shall prevent the Court from opposing the arguments of the applicant (taxpayer, less powerful party) on its own initiative, where such arguments were not opposed by the opponent (Commission, party with stronger power than applicant), and by doing so, supporting the position of the Commission. Overall, in view of Neshatayeva, the Board of the Court supported the position of the Supreme national court while ignoring the international law rule and using "inappropriate corporative approach", whereas the Appeal Board of the Court was independently looking for the arguments to oppose the arguments of the applicant. In her view, in such situation, the taxpayer has no real chances to protect his interests before the supranational Court.

5.3.1.6. Opinion of the Author

In view of the author, this case, and few more that will be coming in the nearest years are fundamental ones for the region, where along with the material issues will be discussed the general principles of the EAEU law, where the Commission and the Court are to position themselves and the law of the EAEU in front of the people of the Union and also the foreign community. The enforcement practice by the Court and the Commission will serve as a base for further integration, and the stronger will be the position of these institutions, the stronger will be the foundation for development of the Union.

The case in question is a complicated one, and it is not only because of the material issue in question, but because there is no practice yet and common understanding on the interpretation of the EAEU law and there are disputable opinions regarding the position of the Union institutions and their competences. The author of this work, would like to comment partially on the decision of the Court and also on the special opinions presented by both judges. The author will limit herself to the discussion of taxation matters and briefly, the issue of competence of institutions and its relation to taxation.

5.3.1.6.1. Does the Tax Code of Kazakhstan indeed contradict to the norms of the Customs Union in the section on excise taxation?

The Author would like to express her disagreement with the position of Chaika regarding the incompatibility of the Kazakhstani tax law provisions with the Customs Union norms.

First of all, Kazakhstan is free to determine its jurisdiction to tax and to define the list of products subject to excise tax. Kazakhstan is also free to introduce special meaning of the terms for the tax law purposes and this is very common practice, not only for Kazakhstan, but for all countries, to have terms defined in the national tax codes specifically for the tax purposes and these definitions may be very different from the usual meaning these terms have under the civil, commercial, investment or other areas of law. For example, in Kazakhstani Tax Code there is a special article 12, which provides a long list of terms, which shall have special meaning for tax purposes, such as dividends, royalties, interest and many others. Similarly, the term "passenger vehicle" may and has the special definition under the Tax Code of Kazakhstan, which is different from the definition this term has under the customs union law. This term is incorporated under article 367 and is mainly important for application of appropriate rate of property tax on transport vehicles, and due to the definition provided, it is most likely that pick-up types of cars will be treated as passenger car for the purposes of property tax on vehicle. Herewith, Kazakhstan cannot be blamed for inappropriate classification. Such norms are mainly introduced for convenience, because Kazakhstan equally can have provision, which would say that these types of pick up cars remain the cargo cars, but we apply to them the same tax rate as to the passenger car types. And it is the sovereign power of Kazakhstan to decide which rate to apply and how to determine the tax base. Therefore, although the Commission has the power to introduce, manage and approve the Customs Nomenclature and member states have to

[1261] Point 53 Annex 2 to the EAEU Treaty, Article 18 Regulation on the functioning of the EAEU Court.

follow it for the customs law purposes, member states remain free to have their jurisdiction and sovereign power to give the terms special meaning for the tax law purposes, even though these terms have their own meaning under the customs law, as well as to determine the applicable taxes, ways for calculation of tax base and applicable rates.

Regarding the relationship between the terms provided under international agreements and terms defined under the national laws, the first ones should prevail provided that international agreement is concluded on the same subject matter – e.g. terms in the double tax treaty for elimination of double taxation will prevail over the domestic terms and this is specifically provided under the treaty. However, if international agreement is not related to taxation, it is very unlikely that the terms defined therein will prevail over the specific terms for the tax law purposes provided under the domestic law. The same logic applies to the tax treaties, where it is impossible to use the term defined therein for tax law purposes, such as "immovable property" for other areas of national law than taxation, for example for the civil law. Lex specialis even though incorporated under the domestic law will prevail over the lex generalis although defined under international agreement.

Herewith, Chaika argues that Article 277-1 of the Tax Code requires, where necessary, application of special terms as they are defined under the Customs Union law. However, this requirement applies only to the excise tax section and shall not be applied to the property tax on vehicle discussed above. Further on, for excise tax purpose, the Kazakhstani tax code does not change the description of the customs nomenclature, but simply impose excise tax on goods, which in addition to the features recognised for the customs law purposes and provided under customs nomenclature, have additional features, and simultaneously include: 1) motor transport vehicle; 2) having chassis of the passenger car; 3) having platform for transportation of goods, which is separated with the hard fixed separator from the cabin for driver; 4) with the engine capacity more than 3,000 sm^3. Having reviewed the description of goods under the customs codes 8703 and 8704 one would notice that these features required under the excise tax do not contradict to description of goods under any of the codes, but only compliment the description, and for sure do not change the classification of cars. Moreover, any car, whether it is a truck, or passenger car type under the customs law or technical classification may have the above features and consequently be recognised as excisable good under the tax code of Kazakhstan. Equally, if Kazakhstan eliminates the references to the customs nomenclature in the tax code, it will not influence the outcome of excise taxation, because the tax applies not for all goods classified under the codes 8703 and 8704, but only those which satisfy the above conditions from 1) to 4) and codes of customs nomenclature are provided in the tax code only for the ease of use of the law. It is also an absolute right of Kazakhstan to link the definition of excisable good to the technical characteristics of goods. Herewith, in view of the Author, if the features of excisable goods are linked to the technical characteristics of goods, then the presence or absence of such characteristics shall be tested and determined in the way they are determined under the technical regulations, e.g. as they were defined by the manufacturer and as is provided under the accomponied technical documentation.

At this point arose the problem of the case. The Kazakhstani customs authorities instead of referring and using the data regarding the technical characteristics of cars from the available accompanied technical documents, undertook their own test in the Central Customs Laboratory in Kazakhstan, which in view of the Author was incorrect action taken that documents were available. The action of Customs Laboratory would be appropriate, if as the result of the laboratory check it would be identified that original (truck) chassis were replaced with the passenger chassis and this became the reason to reclassify the chassis, however, there is no information on this in the case and reclassification became solely the responsibility and will of the customs authorities. Therefore, this remain as issue for the discussion further.

5.3.1.6.2. Failure of supranational institutions to determine the core of the problem

Continuing the idea above, the Author supports the special opinion of Chaika in respect the fact that the Commission and also the Court failed to account for the fact that the issue of the case had arisen solely because of the actions of Kazakhstani customs authorities. This fact is tremendously important to notice, because the core of the problem, is not the material tax law of Kazakhstan, its compatibility with the customs law of the Union, but the actions of the Customs Authorities which led to the result that the car in question, which was not supposed to be excisable good in accordance with its original technical characteristic and provisions of the Kazakhstani tax code, became excisable good due to

conclusion made by the Kazakhstani customs laboratory. Somehow, the Court failed to make this fact clear, almost ignoring that there were documents of manufacturer, which confirmed the type of chassis and that issue arose primarily because of the actions of national customs authorities.

More precisely, the issue arose because the Customs Authorities of Kazakhstan had reclassified the "chassis" of the car from "cargo (truck) type" as was provided by the manufacturer to the "passenger car" type of chassis. The non-recognition of original technical characteristics of the chassis determined by the manufacturer, led to taxation of the car under the excise tax regime, but also to the violation of Geneva Agreement, in accordance with which (art. 3) the member countries are supposed to recognise the original technical characteristics provided by the manufacturer. In view of the Author, the Geneva Agreement is applicable in the given scenario, irrespective of the fact that it has different purpose than fiscal matters and mainly serves for the safety and environmental issues. In view of the Author, it is applicable to the extent there is a need to determine the characteristic of the car in question – and in particular, whether the car has chassis of a truck or a passenger car? As long as there is a document issued by manufacturer, which provides answer to this question and assuming the car and its components were not subject to modification, the characteristic provided by the manufacturer and documented shall be respected in any spheres of activity, whether it is tax law or safely law measure, the chassis will preserve its technical characteristic and will remain to be the chassis for any purpose. And consequently, as long as the Tax Code makes reference to the technical characteristic of the car, the law, which regulates on the same shall be applied to answer the question, what type of chassis the chassis are.

5.3.1.6.3. Whether the issue in question was indeed the responsibility of the Union?

Herewith, even though the above arguement may be valid in substance, it is very problematic to prove that the Commission had right to overview the compliance of Kazakhstan with the Geneva Agreement, because Geneva agreement, as any other international agreement concluded or entered by the member state independently and not for the purposes of regional integration, is not considered as source of law of the EAEU and there is no direct responsibility of the Commission to assess whether the norms of such agreement are respected. The Judge Chaika and the taxpayer tried to argue that the norms of technical regulations of the Customs Union, which are harmonised with the requirements of the European Economic Commission of the UN and based on the norms of Geneva agreement were violated as well, because those norms do not contain the tem "truck with passenger car chassis", but they use the term "truck and its chassis" and the use of the first term in the national legislation violates the above regulations.[1262] In view of the author, these arguments are blurry and even though they try to bring the case closer to the competence of the Commission, they fail to do so. The author also questions what would be the good argument to formally make the Commission responsible for this case. In fact, the violation of law and the rights of taxpayer most likely took place, it took place because of the actions of the national state authority, the taxpayer didn't find adequate level of protection of his rights under the domestic law and justice, the issue is not directly regulated by the EAEU law, however, the outcome does have influence on the importation regime of goods from the third states on the territory of the Customs Union.

5.3.1.6.4. Did the Commission missed the chance to pose itself as the body responsible for monitoring over the compliance of national tax law systems with the EAEU law?

In view of the Author, even though it is difficult to find the link between the responsibility of the Commission and violation of the member state agreement with the third country/countries, the Commission was not supposed to automatically redirect the case to the national authority. In view of the Author, the Commission could have looked into the case more precisely and try to be more proactive in a way to formulate the problem and present it in front of the member states. The author believes that the Commission expressed itself as a weak body and actually missed the chance to initiate at least the discussion with the member states on the need to work towards further tax harmonization of indirect taxes, which was envisaged under the Agreement dated 26 February 1999 as was correctly noticed by Tarasik and is currently aimed by the EAEU Treaty.

[1262] See the position of applicant described in the decision of the Board dated 28 December 2015 and para. 2.3. of the special opinion of Chaika dated 28 December 2015.

The Author believes that the Commission shall not automatically withdraw the case from consideration and investigation if the case somehow concerns taxation. With this case, the Commission posed itself as the body, which does not have competence to look into taxation matters, which in view of the Author is not entirely correct. First of all, although the exclusive competence to impose and regulate over tax law belongs to the member states, the member state shall not exercise this right contrary to the EAEU law, because otherwise the imposed regimes may violate the rights of the business persons attributed under the EAEU law. In the EU, it is an accepted principle of law, which was formulated by the CJEU, however, it has not been yet pronounced in the EAEU context. The Commission, is the sole body, which has the general responsibility to ensure the compliance of member states with the EAEU law and the realization of the EAEU agreements and objectives.[1263] Although, the Commission does not have the right to legislate on the tax matters, it shall have the right to notify the member state on the need to align national tax law system with the principles and rules provided under the EAEU law. At this point, it shall be also remembered that for this purpose the Commission has two available instruments – the binding decisions, non-binding recommendations,[1264] and in case of hesitation, it may at least start from the non-binding recommendations where necessary. The above reasoning the Author derives from the EU practice, however, she believes that this principle is very obvious and shall be fully applied in the EAEU environment, however, she understands that it may take quite some time for the Court to formulate the same.

Second argument, which supports the view that the Commission has certain responsibility over taxation issues is the fact that there is a special section on Tax within the Commission's structure and in addition there is a consultative committee established under the Commission for the purpose to consult with the member states on the matters, on which the Commission has competence to take decisions (decisions are binding!).

> **Extract from the Annex 1 to the EAEU Treaty.**
>
> 7. In order to ensure efficient functioning of the Union, the Commission shall have the right to establish consultative bodies for holding consultations on specific issues governed by decisions of the Commission.

For more information on the Tax Consultative Committee see section 2.2.2.3. of this work.

Along the decision on the case, the author noticed that the Commission even more diminished its own role as of supranational institution by stating that it does not have competence to overview and assess whether the actions of the national state authorities are lawful, since under the law it was not given the capacity to "take measures against the actions of national customs authorities". In view of the Author, the Commission undertook very literal interpretation of the law and it is fraught with the negative consequences in the future cases. The author believes that if the Commission is responsible to ensure realization of the EAEU law, it by default has the right to assess not only the compliance of national legislation with the EAEU rules, but also the way the national legislation is applied and interpreted by the national state authorities.

Further on, the author would like to comment on the way the EAEU Court and the Commission interpret the capacities of the Commission. In view of both, the Commission shall only act within the areas it is competent to – e.g. exercising monitoring procedure only within the areas specified under point 3 of Annex 1 to the EAEU Agreement, which in particular includes currently 19 areas and does not include "taxation" as a separate sphere. Instead, in view of the author, the list includes areas, the regulation of which implies regulation over the related taxation issues, such as: the customs regulation, customs tariff and non-tariff regulation (where under the Customs law, the indirect taxes are considered as customs payments), establishment of trade regimes with the third countries, macroeconomic policy, competition policy, industrial and agricultural subsidies, natural monopolies, mutual trade in services and investments, financial markets. To achieve any common policy on the above areas, member states have to realise that coordination and dealing with non-harmonized tax issues will be necessary since tax barriers will be important limitation towards achievement any common policies and markets in the above spheres. In view of the author, the competence of the

[1263] See point 4 Annex 1 to the EAEU Treaty.

[1264] See point 13 Annex 1 to the EAEU Treaty. The Commission may also issue the dispositions, but dispositions have mainly the organizational and administrative nature.

Commission to exercise monitoring procedure shall not be necessarily limited strictly by the areas provided, but instead concern any legal matter, which prevent realization of aims determined under each of the above areas, including tax matters.

5.3.1.6.5. A few words regarding the monitoring procedure?

What concerns in general the monitoring procedure, the author supports the argument of Chaika and also believes that the business person shall have the right to ask the Commission to initiate control and monitoring procedure. This belief is derived from the fact that the Commission is supposed to act as a dispute resolution body, to whom the business person shall refer the case prior being able to raise the case before the EAEU Court.[1265] In this respect, the rules of the EAEU law are different from the EU law, in the extent that under the EAEU law, this procedure, first of all entitles the Commission to work jointly with the member states and the taxpayers on the interpretation of the EAEU law, but also in view of the author, by default requires the Commission to look into the case precisely (undertake monitoring?) and make an attempt to assist in resolution of problem, rather than formally redirect the case to the national state authority. The Commission, by having formally considered the case, but not actually achieving any result, did not realise its full competence to act as a body for dispute resolution and in fact transferred the burden to resolve the case from its own shoulders to the shoulders of the Court.

In the present case, in view of the author, the Commission exaggerated the situation by stating that Tarasik did not ask it to undertake the monitoring procedure, whereas in view of the author expressed above, the taxpayer did not have to necessarily ask for such action, but instead should be by default undertaken by the Commission should it receive a claim with reasonable argumentation from the taxpayer that his rights are violated and certain international agreements or decisions are not complied with by the member state.

By providing its opinion on the monitoring procedure, the Appeal Board diminished even further the role of the Commission by saying that the monitoring was a kind of platform for mutual discussion of problematic areas, whereas by the law it is provided that upon the result of monitoring procedure the Commission is able to send member states notifications on the need to align national legislation with the norms of the Union and the decisions are binding, but not recommendative.[1266]

5.3.1.7. Final remarks

It is a complicated, but also interesting case. In view of the Author, this case demonstrates the limitations of the EAEU law and also challenges with its enforcement. First of all, the scope of the EAEU law does not include international agreements, concluded by the member states independently and not for the purpose of the EAEU law, and consequently, the Commission is not entitled to assess whether the member state complies with the norms of such agreement. In the case concerned it is the Geneva agreement, however, under the same group would be also tax related agreements of the member states, such as: double tax agreements on prevention of double taxations, agreements for exchange of information and administrative assistance, partnership agreements of member states with the EU and others.

Secondly, the fact that the member state cannot be brought before the EAEU court signifies the fear of the member state to be challenged in front of the community, but also means very restrictive areas of issues that can be brought before the Court. The given scenario is a confirmation of the same, in the case it is very difficult to prove that solely because of the actions or inaction of the Commission, the business rights of the taxpayer were violated, because in fact these rights were violated by the member state, but the law is structured in a way that member state cannot be challenged directly for such violation.

It seems like the principle that is well known in the EU – as an obligation of national law to comply with the EU fundamental principles in any areas of law, including taxation, is yet to be determined in the EAEU, and shall it not happen, the objectives of the Union will remain on a paper in a declarative form, but not result in full realization.

It seems like the Commission, and also the Court, intentionally diminish the competence of the Commission to deal with tax related matters, because as was discussed by the author in part 2 of this

[1265] In case the application was not presented to the Commission, the Court will deny to accept the case on the basis of violation of procedural rules.
[1266] Point 43 subpara. 4) and point 13 Annex 1 to the EAEU Treaty.

work, the Commission may have competence to act on tax matters and supervise the compliance over the member states based on the legal wording of the EAEU Treaty and its current organizational structure.

6. Conclusion

The author of this work has undertaken the review and analysis of the Treaty on Eurasian Economic Union from the perspective of tax law with the objective to identify and analyze the legal and institutional basis for potential tax harmonization in the region. The analysis was undertaken on comparative basis with the EU and Treaty on the Functioning of the European Union to indicate the similarities and differences in the structures of the unions, legal and institutional basis incorporated therein for tax harmonization and potential lessons the EAEU may inherit from the EU. On the basis of the study the author proposed potential recommendations for enhancement of the system and principles in the EAEU.

The work has started from explanation of the link between the regional economic integration and tax harmonization, identifying the understanding of the same in both unions, the reasons both unions proclaim as leading towards tax harmonization and general legal basis provided in the founding treaties for tax harmonization. The author has identified that in the EU, the term harmonization was not defined and until today there is no common understanding of the same. However, taken the practice, the harmonization of taxation in the EU presumes approximation of the national laws by several means: positive harmonization by means of issuance of directives at the level of the Council of the EU, the negative harmonization, by means of the judicial work undertaken by the CJEU and also the soft law measures, such as the communications and recommendations issued by the Commission. The common feature of the EU measures is that they do not lead to unification of the law, but instead, are gradual processes, leading only to harmonization of certain aspects to smoothen the cross-border operations and realization of fundamental freedoms. In contrast, in the EAEU, the term harmonization is defined as "as the processes of approximation of national legislations either by trying to make them similar or comparable or to unify the same." Thus, the term in the EAEU is very broad and as harmonization in the EAEU is understood both – the process of making the national law similar and also the process of making it unified. Therefore, when the EAEU Treaty or other decisions of the EAEU institutions address tax harmonization notion, it may be about the full unification of the law, and also about the simple approximation, unless specifically defined. What concerns the reasons for tax harmonization, then both unions have approximately the same reasons. As primary reasons, it is considered necessary to eliminate barriers for realization of fundamental freedoms, as secondary reasons, countries realize that gradually the issue of tax competition between the member states is becoming another reason for harmonization and finally, the will of the states to fight tax evasion and avoidance is also the reason for tax harmonization and adoption of simultaneous measures to address common problems. With respect to legal basis for tax harmonization, the author has identified similarities in the founding treaties, to the extent that in both unions the explicit tax harmonization is required only in relation to indirect taxes, whereas direct taxes are not addresses specifically. Having reviewed the above, the author has undertaken the review of integration stages both unions have passed and tax issues that were harmonized at each level of integration and respective tax policies the unions were persuading. The EU experience has basically started from the conclusion of the Treaty of Rome and consequent development through the stages of common market, the single market and internal market. As the EU experience indicates the primary tax issues that were addressed were indirect taxes, in particular VAT. Herewith, there were also early attempts in the EU for harmonization of taxation of income and shareholders, but it initially failed due to inability of the states to agree on the matter due to the high sensitivity of the issue. Herewith, the review of the EU experience also indicates that gradually countries are forced to pursue income tax harmonization in view of the need to fight tax competition between themselves and also the tax avoidance by taxpayers. Based on the close review of integration stages and tax harmonization aspects in the EU, the author concluded that at the initial stages of integration the members are motivated to pursue tax harmonization in order to eliminate barriers for realization of the Union's aims and freedoms, whereas at the later stages and closer integration, the members are forced to pursue the same by other market forces, including harmful tax competition and tax avoidance. What concerns the EAEU experience, then since the Union is very young, the author has reviewed the predeceasing stages of integration, including the CIS, EurazEC and formation of the Customs Union

and Single Economic Space under the framework of the same. The author has found that in addition to partly harmonized principles for collection of indirect taxes in the EAEU region through the international agreements between the states, the EAEU has inherited the set of soft law measures and instruments for tax harmonization, including the model laws and various agreements on common principles of tax law, which may be a good base for further harmonization and strengthening the approaches of the states. Having reviewed the experiences of both Unions, the author has concluded that both Unions are similar in terms of addressing indirect taxes first, but at the same time, both Unions used different instruments to achieve the same. If the EU used the hard law instrument of supranational nature, such as directives, and soft law instruments, such as recommendations and communications by the Commission, then in the EAEU region, were mainly used international agreements concluded between the states on certain issues, but not the supranational instruments. With respect to soft law measures, it looks like in the EU they had more influence on the formation of national tax systems, than in the EAEU, which may be also explained by the existence of CJEU, which sometimes takes the liberty to refer to the soft law instruments and thus upholding them in this way. In general, from the first section of the work, the author has concluded that although the Unions have certain similarities in their objectives, such as fundamental freedoms for the movement of goods, services, labour and capital, and also both realize the need to harmonize tax legislation to facilitate realization of the same, the Unions are currently at the very different stages of development and also have differences in the historical background and legal traditions, which eventually influences different approaches the unions may take to pursue tax harmonization. At the same time, the author has concluded that both unions aim to achieve similar fundamental objectives of economic integration, which are not possible to be achieved without harmonization to certain level of direct and indirect taxes and it is only the matter of time and approaches the unions take to act on the same.

In the second part of the work, the author continued with detailed review and analysis of the institutional structure and basis for tax harmonization in both unions. The author has reviewed separately the organization of each union and institutions therein, as well as functions and capacities each institution has to act in tax matter as legislative, executive or judicial body. It general, the author concluded that unions have different structures, although some names of institutions sound similar. In the EU, each institution has a supranational nature and is independent in its functioning, or better to say, none of the institution is subordinated to another, although legislative decisions may be taken with the mutual agreement and consultation. In the EAEU, the primary organization is different – it is hierarchical, with the Supreme Economic Council being at the top of the hierarchy and in charge of many different aspects, and having power to override any decision of the lower standing institution. The overall structure of the EAEU also impacts the way tax harmonization will be undertaken in the region. What concerns more detailed analysis, then the author paid particular attention to the analysis of powers and functions of the commissions, the courts and the councils in both unions. The commissions in both unions are very different institutions in their nature from one each other, although they have the same names, they, in view of the author, are not comparable. In the EU, the Commission plays the role of the guardian of the EU law and participates in the legislative process by issuing the legislative proposals and assisting countries in reaching the consensus for adoption of supranational laws. To supervise the compliance of member states with the EU law, the EU commission was attributed with a special function to initiate infringement procedures against the member states and bring then in front of the CJEU and overlook over their correct implementation of CJEU decisions. In the EAEU, the Eurasian Commission is considered as the sole executive body of the Union and in general has more functions and responsibilities attributed to it. First of all, it is a legislative body, which independently may adopt binding decisions for the member states, including the decisions on harmonization of certain aspects in the spheres attributed to its competence. Herewith, in view of the author and based on the research and analysis undertaken, the Commission shall be able to adopt decisions also in tax sphere. This is so because there is a consultative committee established to work on tax matters and such committees in general can be established only with respect to matters, in which the Commission is competent to take decisions. Another finding based on which the author believes in the competence of the Commission to work on tax matters, is the general provision in the EAEU Treaty, which authorises the Union to take necessary measures for realization of the single market idea, whereas as the single market is defined the area where the free movement of goods, services, labour and capital is assured. What concerns the issue of shared or exclusive right to legislate on tax matters, then there is no such terms used in the region. However,

the author believes, that it cannot be exclusive right of the Union, because there is no legislative basis to conclude on the same. Therefore, it may be that both, the Union and the member states are called to work on tax harmonization jointly and thus sharing the competence. Herewith, in regional judicial practice, the EAEU Court takes the opposite view and believes that tax matters are in exclusive competence of the member states, which in view of the author is a not correct conclusion achieved by the Court. Secondly, the Eurasian Commission is also considered as a guardian of the EAEU Treaty and shall supervise the compliance by the member states with the union law. Herewith, in fact, if to compare the power of the Eurasian Commission with the European, then Eurasian Commission has no effective power to monitor the compliance of member states with the EAEU law, because it cannot initiate anything like infringement procedure, and neither it can bring the member state in front of the EAEU Court, which significantly diminish its role as of a supervisory body. In this respect, the Eurasian Commission can issue the individual decision addressed to the member state asking it to comply with certain EAEU law provision, but, as long as, there is no judicial way to enforce the decision, it stays in the consideration of member state whether to comply or not. Additionally, the decision of the Board of the Commission can be anytime overruled by the Council of the Commission, or other upper standing institution, which diminishes the role of the Commission even further. Finally, the Eurasian Commission is also empowered to function as dispute resolution body and before any application may be sent to the EAEU Court, it shall be addressed for resolution to the Commission, and only if the Commission cannot help parties to resolve the case, it may be proceeded to the EAEU Court. Thus, the Commission, in fact is also responsible for interpretation of the EAEU law, which is reverse to the EU order. So, in general, if in the EU, the Commission is the executive body with the right to make legislative proposals, then in the EAEU, the Commission formally is the executive, legislative body with also the features of the judicial body, but in practice in the tax related matters has very limited capacity to exercise its functions. The potential recommendations for strengthening the EAEU Court position were drafted by the author.

What concerns the Court of the EAEU, then it also is not equivalent to the CJEU and may hardly ever with the currently attributed function contribute to the negative tax integration in the region. This is so because, first of all, the EAEU Court cannot issue preliminary rulings based on request from the national courts. It can issue advisory opinions of non-binding nature solely based on the request of the specially authorised authorities of the member states, and therefore cannot contribute towards common understanding of the EAEU law in all cases. Secondly, as was mentioned earlier, the EAEU Court cannot consider cases with involvement of the Commission and the member states, where the later one would be suited for non-compliance with the EAEU law. Consequently, only in limited cases, the EAEU Court can influence the understanding of the member states of the EAEU law and also influence its implementation in the national systems. Finally, if the decision of the EAEU Court is not followed by the member state or institution, it is the Supreme Economic Council, which shall act as a last resort to enforce the decision. Overall, the EAEU Court is not so powerful as the CJEU and therefore may have very little influence on formation of the national tax systems in accordance with the EAEU law. The potential recommendations for strengthening the EAEU Court position were drafted by the author.

With respect to other institution, in the EAEU there is no institutions similar to the Council of the EU and neither there is a supranational Parliament. The absence of parliament, member states explain by their will to limit their cooperation to the economic matters only and they believe that in this case the functioning of the supranational parliament is not required. What concerns the institution that would be similar to the Council of the EU, then there is in general no capacity attributed to the competent authorities of the EAEU member states to bind their country to any decision. The competent authorities of the EAEU member states may only support the functioning of the Commission at the level of the consultative committees, but as mentioned, none of the expressed positions or proposals within the framework of such cooperation, may bind their governments. Instead, the cooperation in form of the councils is carried out in the EAEU at the level of top governmental positions and is comprised of the Council of the Commission represented by the deputy prime-ministers, the Intergovernmental Council represented by the prime-ministers and the Supreme Economic Council at the level of presidents. Some scholars criticise such institutional structure in view that it will not assure the realization of the Union’s aim, but instead was created to serve the member states intentions and protect their interests. On the basis of analysis undertaken in this work, the author has drafted several recommendations that could improve the functioning of the institution

and equalize their functions with the roles they should play. Thus, in view of the author, it should be clarified in the EAEU law the role of the Commission in tax matters and the types of decisions it is authorised to make in tax matters – whether these are decision notifying member states on the need to comply with the law or whether these are the decisions harmonising certain tax aspects, or both. Currently, the role of the Commission is not clear in this respect: the Commission participates to the work with the member states on resolving of certain tax issues, it also issues the decisions asking, but not requiring member states to comply with certain norms, herewith, when the tax issue was addressed in the supranational Court, the EAEU Court stated that tax issues are in the exclusive competence of the member states and the Commission therefore shall and may not interfere. In view of the author, the interpretation given by the EAEU Court on the role of the Commission is misleading and its role and decisions' making power shall be clarified at the legislative level. Secondly, the author believes that similar as in the EU, these should be the member states participating upon the decision making process and adoption of certain instruments of tax harmonization, but not solely the Commission – as it is currently envisaged in the EAEU law. Finally, with respect to the Commission, the author also believes it is necessary to empower the Commission with the right to bring the member state in front of the EAEU Court for non-compliance of the later with the provisions of the EAEU law. With respect to the EAEU Court, first of all, the author believes that jurisdiction of the Court shall be enlarged to cover all other issues in relation to interpretation the EAEU law, but not only those specifically provided now in the EAEU treaty. Secondly, the Court shall receive the right to issue preliminary rulings, or as they are known in the EAEU, the advisory opinions, on request of the national courts. Finally, it is necessary to include the decisions of the EAEU Court, in the sources of law in the Union, so that they become obligatory for compliance for all the member states, but not only to the parties to the case.

In the third part of the work, the author considered and analysed the fundamental principles for the movement of goods, services, labour and capital as envisaged in the EAEU Treaty and compared them to the principles in the TFEU. The analysis and comparison was carried out from a tax law perspective to understand the way the fundamental principles may be interpreted and the extent of tax harmonization that would be required and would be possible to achieve to realize the same principles. The comparison was undertaken to assess the degree to which the EU experience may be relevant and applicable in the EAEU reality. In general, the author concluded that fundamental principles are formulated differently in both treaties and this inevitably will have outcome on the level of tax harmonization that would be possible to achieve in the EAEU. Fundamental principles envisaged under the EAEU Treaty for the movement of goods are very similar to the principles regulating free movement of goods in the EU. In both cases, the EU and the EAEU, the fundamental principles affecting free movement of goods in larger extent concern customs duties and similar payments, whereas tax payments associated mainly with the movement of goods are covered under the separate articles, providing guiding principles and basis for harmonization, which are quite similar in both unions. The level of similarity also indicates that the EU experience in terms of indirect tax harmonization may be very appropriate and useful in the EAEU region. With respect to the movement of services, in view of the author, from a tax law perspective, the fundamental principles in the EAEU treaty are formulated well and based on the wording, they should provide sufficient legal basis to prevent common types of tax discrimination associated with the cross-border provision of services based on the EU lessons, including both direct and indirect tax measures. The author believes that there are legal basis to reach similar decisions, as were reached in the EU practice, on the cases with most likely forms of tax discrimination associated with the movement of services. What concerns movement of labour, then based on the analysis, there is no general fundamental provision in the EAEU Treaty that could assure elimination of tax berries for cross-border workers from tax perspective. Instead, there is a specific provision requiring member states to treat equally resident and non-resident workers and apply to them the same tax rates. However, the provision does not address the tax base, which is equivalently important issue. In view of the author, the fundamental principle for the movement of workers in the EAEU shall be rewritten to assure that member states are required to eliminate any barriers and distortions that may prevent free movement of workers. Such provision may be general, so that it applies to all matters, including taxation. Finally, with respect to movement of capital, the fundamental provision is absent as such, together with the definition. Instead, one can find in the EAEU treaty the fundamental principles for investment and incorporation activities, which jointly, in view of the author, substitute the missing

principle for the movement of capital. Herewith, as research indicates, the fundamental principles in both cases are drafted narrowly than in the EU and address only the perspective of the recipient member state (or "source" state in tax law context). It requires the source state to eliminate all potential discriminatory treatment of foreign investors and investments, but not imposing the same requirement with respect to the treatment of its own nationals investing to other member states. The principles are so narrowly drafted that they would not allow broader interpretation and, therefore, in view of the author, they should be amended in order to ensure absolute non-discrimination of both – incoming and outcoming investors, otherwise, the idea of the free movement of capital would not be completed. Consequently, taken the current principles, the EU rules developed by means of the directives and principles formulated by the CJEU would be potentially applicable only in half. Additionally, in view of the author, there should be made a differentiation within the EAEU freedoms for investment and incorporation activities, because currently, the same types of income – e.g. active income, capital gains and dividends, may be realized under the both freedoms and therefore may be protected by both of them. However, as long as these principles are not the same, but one is stricter than the other, it is necessary to clarify at legislative level on the types of income that are protected by each principle respectively. Finally, the principle for investment activities, is very demanding in view of the author, because it requires equal treatment of foreign and national persons in all cases, irrespective of the fact that such persons may be in different positions, as does the principle for incorporation activities. Perhaps, this is issue is not so important in other spheres of law, but as long as it is critical in tax law matters and in order to protect the sovereign interests and rights of the member states, the author believes that principle for investment activities shall also be amended and drafted in the same way as the principle for incorporation and require persons to be in the same or similar position to the person in question in order to pretend for the national treatment.

In the fourth part of the work, the author has tested the national tax systems of member states on their potential compatibility with the principles for the movement of investment and incorporation activities. To illustrate the potential impact these principles may have in practice on the national tax systems, the author chose to test them on example of dividends taxation, because dividends may be protected by both freedoms – however, level of protection under each is different. It was detected that only tax system of Belarus complies in full with the obligations provided under the current wording of the EAEU Treaty. Other member states would probably need to adjust their national legislations once the deficiencies are detected in practice. Alternatively, in some cases, when the deficiencies of the national tax systems may be corrected by application of the relevant double tax treaty, the double tax treaty concerned may need to be amended to do so. In general, countries do have similar issues in their domestic tax systems that may be incompatible with the freedoms. This may be due to the certain coherence between the tax systems of member states, which could have been inspired by the CIS model tax code and common historical and legal background. Particularly, countries do not comply with the fundamental principles due to imposition of withholding tax on income of non-residents, where the residents are exempted from tax on the same income or granted with a lower income tax rate. In very few situations the effect of the national tax system is mitigated due to the application of double tax convention, which reduce the withholding tax so that actual treatment of non-residents and residents becomes similar. Additionally, counties tend to discriminate towards foreign permanent establishments, but due to application of the non-discrimination clause provided in the double tax treaties this situation should be mitigated.

In the last part of the work the author has considered other relevant issues related to formation of the common tax systems. Thus, was addressed the issue with the sources and also the status of laws in the EAEU, which may require additional elaboration at the legislative level. First of all, international treaties concluded independently by the member states, including double tax treaties, are not considered as sources of law in the EAEU and consequently, as practice shows, when the issue concerned involves among others interpretation of EAEU law in conjunction of such international agreements, the EAEU Court takes a step aside and refuses to take such international agreements into consideration. Additionally, the hierarchy between such international agreements of member states and decisions of the EAEU institutions is not clear. Therefore, the author believes that for the future establishment of harmonized tax systems in the region, it is of the primary importance to review the EAEU treaty to include international treaties concluded by the member states into the sources of law in the EAEU and also clarify their relation with the decisions of EAEU institutions. Further on, the author also recommends to include the decisions of the EAEU in the list of sources

of the EAEU law to assure its absolute power and application. With respect to instruments that can be used for tax harmonization purposes, the author believes that the most appropriate instrument would be the international agreements concluded by the member states within the EAEU framework. This is so because the legal status of such instruments is clear and also, because, in this way member states may have more control over the measures taken for harmonization, rather than leaving the same to the sole competence of the EAEU Commission taken its current structure. Finally, with respect to the instruments of tax harmonization, the author also believes that work undertaken by the CIS Inter-parliamentary Council shall be upheld and considered at the EAEU law, because it may bring additional value, resources and necessary ideas taken its long lasting experience. In the last section of part 5 the author also discussed the recent court practice in the EAEU and considered in details the case, which involved discussion of tax related issue. It was noted by the author, that currently, the EAEU Court diminishes its own and also the role of the Commission to deal with tax matters, because based on the analysis undertaken by the author, the Commission and the EAEU Court shall be competent to consider the issues with involvement of the national tax systems.

In overall, the author has undertaken the fundamental review of the EAEU Treaty from a tax law perspective. The comparison of the same with the TFEU and the EU experience in tax law matters allowed the author to indicate deficiencies in the institutional and legal structure of the EAEU and provide potential recommendations for improvement of the same to facilitate realization of the Union's aims also from a tax law perspective.

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7. Council Directive 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation

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