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Public Country-by-Country Reporting: Corporate Law, Fiscal Law and the Principle of Unanimity

1. Introduction

On 1 June 2021, the Council of the European Union reached political agreement on a new directive[2] which shall oblige parent companies of corporate groups as well as standalone entities, whose annual turnover exceeds 750 million €, to disclose to the general public some key business numbers broken down to the countries where they have established business units. This includes sensitive proprietary information such as the number of employees, the level of pre-tax profits, the level of taxes accrued, and taxes paid and other items.[3] The final enactment of this directive in 2021 is not in doubt. The core element of this directive, the so-called "public country-by-country reporting", has been designed to prevent and to sanction corporate tax avoidance and in particular to expose those transactions inside a multinational firm, which disrupt the alignment between business profits and the real activities underlying those profits.[4]

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[2] For the final text of the directive see: European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, Annex to: Council of the European Union, Interinstitutional File 2016/0107(COD), Permanent Representatives Committee, Outcome of Proceedings, 9 June 2021, 9547/21; for harsh criticism as to the territorial scope of the new obligation see: Eurodad, EU fails to introduce real public country-by-country reporting – www.eurodad.eu (accessed: 1.06.2021).

[3] See: Art. 48c of the draft directive.

[4] European Parliamentary Research Service, Briefing: EU Legislation in Progress: Public country-by-country reporting by multinational enterprises, 26 April 2019.

Technically, this legislation will amend the Accounting Directive, which itself dates back to 1978 and which was consolidated in 2013.[5]

The Portuguese Government, which brokered the final agreement during their Presidency of the EU in the first half of 2021, stated the following: "Corporate tax avoidance and aggressive tax-planning by big multinational companies are believed to deprive EU countries of more than 50 billion euros of revenue per year. Such practices are facilitated by the absence of any obligation for big multinational companies to report on where they make their profits and where they pay their tax in the EU on a country-by-country basis. At a time when our citizens are struggling to overcome the effects of the pandemic crisis, it is more crucial than ever to require meaningful financial transparency regarding such practices. It is our duty to ensure that all economic actors contribute their fair share to the economic recovery."[6]

The legislative process, which has led to this outcome, goes back about five years.[7] Following several communications issued in 2015,[8] the European Commission put forward in 2016 a first proposal for a directive on public country-by-country reporting[9] which was favorably received

[5] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and repealing Council Directives 78/660/EEC and 83/349/EEC, O.J. L 182 of 29 June 2013, p. 19.

[6] P. Siza Vieira, *Portuguese Minister of State for the Economy and Digital Transition*, statement of 1 June 2021, www.consilium.europa.eu/en/press/press-releases/2021/06/01/public-country-by-country-reporting (accessed: 10.07. 2021).

[7] For a comprehensive discussion of earlier initiatives see: M. Christians, *Tax activists and the global movement for development through transparency*, [in:] Y. Brauner, M. Stewart (eds), *Tax, Law and Development*, Edward Elgar Publishing, Cheltenham–Northampton 2013, p. 288.

[8] European Commission, Communication from the Commission to the European Parliament and the Council on tax transparency to fight tax evasion and avoidance of 18 March 2015 COM(2015)136 final, p. 5: "The Commission will assess whether additional public disclosure of certain corporate tax information should be introduced, in a way which goes beyond administrative cooperation and provides public access to a limited set of tax information of multinational companies"; European Commission, Communication from the Commission to the European Parliament and the Council of 17 June 2015: A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2016)302, p. 13; see also: European Commission, Communication from the Commission to the European Parliament and the Council of 5 July 2016: Communication of further measures to enhance transparency and the fight against tax evasion and avoidance COM(2016/451)final, p. 3.

[9] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches of 12 April 2016 COM(2016/198)final.

by the European Parliament[10] but which ran into sharp resistance from a number of Member States. It became evident right from the start that it would be overly ambitious to hope for unanimous agreement by all Member States of the European Union. But it seemed possible to secure a solid majority of Member States to support the proposal. This led to the issue of which procedure to apply. Two legal bases came to mind:

1. One possible legal basis can be found in Art. 115 TFEU, which empowers the Commission and the Council in a general fashion to harmonize those existing laws in Member States, which affect the establishment and the functioning of the Common Market. There are two features, which render the underlying procedure "special": The European Parliament has a right to be heard under this procedure but no right to veto the proposed measure, and – even more important – legislation under Art. 115 TFEU requires a unanimous vote in the Council.
2. A more specific provision is Art. 50 Paras. 1 and 2 letter g TFEU, which is part of the chapter on freedom of establishment and deals with legislation in the area of corporate law. It enables the European institutions to secure equal safeguards for shareholders and other constituencies. This legislation follows the rules of the "ordinary procedure" where the consent of the European Parliament is required and a qualified majority of votes in the Council suffices to pass legislation.

The European Commission took the view that any legislation requiring large companies to disclose certain information to a wider audience – including the proposed legislation on public country-by-country reporting – would fall within the ambit of corporate accounting law, which has for more than fifty years been the object of legislation under Art. 50 Paras. 1, 2 letter g TFEU (and its predecessors).[11] The European Parliament where MPEs originally had "two differing interpretations of the proposal, seeing it either as a means of fighting tax evasion and avoidance, or simply as the public disclosure of information",[12] eventually sided with the Commission.[13]

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[10] European Parliament, Recommendation following the inquiry on money laundering, tax avoidance and tax evasion of 13 December 2017, P8_TA (2017)0491, Paras. 39–42 (under the heading "tax legislation").

[11] European Commission supra note 8, Explanatory Memorandum, p. 3, Para. 2.

[12] Council of The European Union, Interinstitutional File 2016/0107 (COD), Outcome of the European Parliament's proceedings, 17 July 2017, p. 2.

[13] European Parliament, Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2013/43/EU as regards disclosure of income tax information by certain undertakings and branches of 21 June 2017, A8-0227/2017 (Rapporteurs: Hugues Bayet, Evelyn Regner), p. 40 et seq. The European Economic and

The legal service of the Council took the opposite view.[14] It emphasized the fact that public country-by-country reporting is meant to influence taxpayer behavior and to identify cases of tax avoidance. Therefore, it should be qualified as fiscal law, which can only be harmonized under Art. 115 TFEU and which is excluded from the ordinary procedure for Internal Market legislation under Art. 114 Para. 1 TFEU. This follows from the explicit carve-out for fiscal provisions under Art. 114 Para. 2 TFEU. A substantial minority of Member States in the Council formally supported this position.[15]

While these controversial legal issues have not been solved in an authoritative manner until today, political pressure finally led to the agreement achieved on 1 June 2021. This article does not deal with the substantive merits of the new anti-avoidance tool. Rather, the following considerations attempt to disentangle the legal issues underlying a search for an appropriate legal basis. This is not merely of academic interest, given the fact that the Commission would like the European legislature to move forward with additional disclosure requirements such as a future directive requiring companies to disclose their "effective tax burden".[16]

2. The Legislative History of Country-by-Country Reporting

The current initiative to introduce "public" country-by-country reporting is connected to two earlier strands of European legislation, each of which has a different background and a different legal basis.

Social Committee supported the Commission's proposal without commenting on the legal basis (*European Economic and Social Committee*, Opinion, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches of 21 September 2016 (ECO/407)).

[14] Council of the European Union, Interinstitutional File 2016/0107 (COD), Opinion of the Legal Service of 11 November 2016, 14384/16.

[15] Council of the European Union, Interinstitutional File 2016/0107(COD), Joint Statement by Cyprus, Czech Republic, Estonia, Hungary, Ireland, Latvia, Luxembourg, Malta, Slovenia and Sweden of 28 November 2019, 14038/19.

[16] European Commission, Communication from the Commission to the European Parliament and the Council: Business Taxation for the 21st Century, 18 May 2021, COM(2021)251 final, p. 9.

2.1. EU Legislation on Country-by-Country Reporting

The first trajectory is informed by international tax policy. Action Item 13 of the BEPS Action Plan which was agreed by the G20/OECD and its Inclusive Framework in 2015 requires those countries which have signed up to the BEPS Action Plan to increase tax transparency with respect to some proprietary information relevant for tax assessments.[17] Multinational firms, whose annual turnover exceeds 750 million € shall supply their local tax authorities with a "master file" describing the overall business model and some general features of the firm, a "local file" supplementing details on the local business units and, last but not least, a "country-by-country report". This report is focused on some key numbers and indicators of profit generation, assets, payroll, etc., broken down on a per-country basis. This information is meant to be shared with other tax authorities around the world under bilateral or multilateral agreements for which OECD provided "model legislation".[18] While these country-by-country reports are not allowed to serve as the legally binding measuring rod for the allocation of taxing rights between countries[19] (which are solely governed by double tax conventions including the arm's length standard) they can serve as an informational tool for tax authorities, providing them with indicators as regards instances of profit shifting and base erosion.

Political agreement on this international exchange of information with regard to country-by-country reporting was only reached at the level of the G20/OECD because signatory states promised confidential treatment of any information conveyed to them by foreign tax authorities.[20] There was wide consensus that tax secrecy (and this was a major point particularly for the United States) is a building block of taxpayers' rights and tax legislation around the world, which should not be negatively impacted by newly established channels, which make country-by-country reports accessible to a large number of tax authorities. This original concept of country-by-country reporting, which belongs to mandatory "minimum standards" of the BEPS Action Plan, was implemented within the

[17] OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final Report*, p. 29, https://www.oecd.org/tax/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report-9789264241480-en.htm (accessed: 12.12.2023).

[18] *Ibidem*, p. 37.

[19] *Ibidem*, Para. 25.

[20] *Ibidem*, Paras. 44, 45, 57; V. Chand, S. Piciarello, *The Revamping of Public CbCR in Europe: much ado about nothing?*, Kluwer International Tax Blog, 1 June 2021, http://kluwertaxblog.com/2021/06/01/the-revamping-of-public-cbcr-in-europe-much-ado-about-nothing/ (accessed: 10.07.2021).

European Union by an amendment to the Directive on Administrative Cooperation in 2016.[21] This directive was enacted under the "special procedure" on the basis of Art. 115 TFEU.

From a political point of view this legislative history leads to the question of whether the current move towards public country-by-country reporting undermines the efforts of G20/OECD to establish a global standard established for confidential treatment of those reports. From a legal point of view the issue seems to be whether mandatory public country-by-country reporting can be introduced on a different legal basis than "private" country-by-country reporting, namely Art. 50 Paras. 1 and 2 letter g TFEU.

2.2. EU Legislation on Sector-Specific Public Country-by-country Reporting

The second source of the current legislation is corporate social responsibility. Aggressive tax planning by multinationals is viewed as an instance of anti-social behavior which firms should be obliged to report about to their shareholders and to the general public.[22] In recent years, the European Commission increased substantially the obligations of (listed) companies to provide insights in their business models and, in particular, information with regard to the effect their operations have on environmental and social goals.[23] Against this background, in 2013, the European institutions enacted two directives, which introduced targeted obligations to publicize country-by-country reports in specific economic sectors. One is the extractive and logging industry[24] and one is the banking industry:[25]

[21] Council Directive 2016/881/EU of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, O.J. L 146/8 of 3 June 2016.

[22] See below Fn. 56.

[23] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, O.J. L 330/1 of 15 November 2014; European Commission, Proposal for a Directive of the Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) N0 537/2014, as regards corporate sustainability reporting of 21 April 2021 COM(2021)189 final.

[24] For an overview of the legal and practical issues see: European Commission, Review of country-by-country reporting requirements for extractive and logging industries, Final Report, 2018.

[25] Article 89 of the Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential

1. As there is a palpable nexus between the profits derived by global extractive businesses and local instances of exploitation and political corruption in developing countries, the relevant firms are obliged to disclose country-by-country reports. This will enable the general public to form a judgment on the correlation between their profits and the political and economic situation in the countries where those profits have been generated.
2. For banks, the justification is a different one. Here, the fact that governments have provided (and still provide) implicit guarantees for the banking sector including large-scale bail-out programs plays a decisive role. The issuance of country-by-country reports in the banking industry has been justified in order to check whether those financial firms, which benefit from public funds, are willing to contribute their "fair share" to the government in return. Against this background, a major amendment to the Capital Requirements Directive includes a specific obligation for banks to disclose their country-by-country numbers to a wider audience to ensure trust in the financial system.[26]

In both cases, European legislation was built on Art. 50 Paras. 1 and 2 letter g TFEU. The Commission has taken the position that the current plan to introduce a generalized obligation for large firms to disclose their key tax numbers to the general public should not be characterized differently.

3. Background and Content of the Competing Treaty Provisions

Before we can form a judgment on the suitability of those two treaty provisions to serve as a legal basis for public country-by-country reporting it makes sense to describe in more general terms the aim and scope of each of those provisions.

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supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, O.J. L 176/339 of 27 June 2013.

[26] Recent empirical research indicates that the (unexpected) introduction of public country-by-country reporting for banks in 2013 did not trigger any noticeable reaction from investors, see: V.K. Dutt, C. Ludwig, K. Nicolay, H. Vay, J. Voget, *Increasing Tax Transparency: Investor Reactions to the Country-by-Country Reporting Requirement for EU Financial Institutions*, "ZEW – Centre for European Economic Research Discussion Paper" 2018, No. 18-019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3165410 (accessed: 10.07.2021).

3.1. Article 115 TFEU

3.1.1. Legislating for the Common Market

Article 115 TFEU is one of the most ancient pillars of European legislation. Its wording goes back to Art. 100 of the Treaty of Rome 1957 and it has remained largely unchanged since: "Without prejudice to Article 114, the Council shall, 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."

While this provision allows for wide-reaching harmonization of national laws in order to create and complete the Common Market, it requires a proposal by the Commission and a unanimous vote by the Council to pass such legislation. This unanimity requirement is meant to secure full support by all Member States' governments as the European Union encroaches upon areas formerly governed solely by national legislation. As regards the scope of legislation under Art. 115 TFEU one must understand that this provision does not address a specific field of law. Rather, all areas of legislation can be addressed under Art. 115 TFEU – provided that the legislative action at the level of the EU is required from the perspective of the establishment or the functioning of the Common Market. Article 115 TFEU is therefore not designed to empower the European institutions to enact whatever they want to. They must show that the harmonization of national legislation is necessary to establish and protect the European Market. This requirement is corroborated by the principle of "conferral" laid down in Art. 4 Paras. 1 and 5 Paras. 1, 2 TEU, which explicitly prohibits EU action outside specific legal bases provided under the Treaties. The need to avoid overly intrusive legislation is also strengthened by the principle of "subsidiarity" enshrined in Art. 5 Paras. 1, 3 TEU, which emphasizes the necessity for the European institutions to show that the aims and goals of EU action cannot be fulfilled as effectively or less intrusively at the level of the Member States.

Against this background, matters of direct taxation have been on the agenda of EU legislation under Art. 115 TFEU since the inception of the European Economic Community. As early as 1962, the "Neumark Report"[27] prepared by a number of experts from EEC Member States proposed wide-

[27] Europäische Wirtschaftsgemeinschaft, Kommission, *Bericht des Steuer- und Finanzausschusses*, 1962.

reaching harmonization measures covering not only business-related issues, like the corporate tax, but also legislation affecting the individual income tax and even inheritance tax. Over the years, many proposals to harmonize direct tax issues under Art. 115 TFEU were issued by the European Commission in order to tear down the fiscal borders between the Member States of the European Union but most of them floundered in the face of Member States' veto rights awarded by the unanimity principle. Member States did not want to give up their fiscal sovereignty easily. Still, some major projects like the Parent Subsidiary Directive, the Interest Royalty Directive or the Merger Directive were enacted over time, opening the doors for national business firms to establish subsidiaries and branches all over the territory of the European Union. This set of legislation was very much inspired by the theory of efficient allocation of resources within the EU and is fully in line with the underlying goal of the creation and completion of the Common Market.[28]

In recent years, the European Commission has reformulated its policy agenda in the area of taxation. The traditional goal to set free the economic forces of private actors has been moved to the back burner while the protection of the Member States' fiscal interests has taken center stage.[29] The most prominent example is the Anti-Tax-Avoidance Directive of 2016 (amended in 2017), which mandates Member States to implement a specific set of legal tools in their national tax laws in order to fight aggressive tax planning.[30] From a scholarly perspective, one might hesitate to confirm the compatibility of these anti-avoidance measures with the requirements of Art. 115 TFEU.[31] It could be argued that EU legislation under Art. 115 TFEU can only be passed in order to foster the economic freedom of European citizens and businesses but not to enable tax authorities to constrain that freedom. Taking a closer look, this criticism is ill-founded. It is true that it is not the task of the European Union to protect Member States' budgets at all costs and in all respects. But it can be said that the

[28] As to the limitations of tax harmonization in the context of tax competition see: W. Schön, *Tax Competition in Europe: The Legal Perspective*, "EC Tax Review" 2000, No. 2, p. 90.

[29] European Commission, Communication from the Commission to the European Parliament and the Council: A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, 17 June 2015, COM(2015)302 final; European Commission, Communication from the Commission to the European Parliament and the Council: Business Taxation for the 21st Century, 18 May 2021, COM(2021)251 final.

[30] Council Directive (EU) 2016/1164 Laying Down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market of 12 July 2016, O.J. L 193/1 of 19 July 2016.

[31] I. Lazarov, S. Govind, *Carpet-Bombing Tax Avoidance in Europe: Examining the Validity of the ATAD under EU Law*, "Intertax" 2019, Vol. 47, No. 10, p. 859.

benefits reaped by individuals and businesses in the Internal Market – namely, the freedom to allocate goods, services, capital and persons at wish within the European Union, justify some counterbalance when the use of those market freedoms leads to increased options for tax fraud and tax avoidance.[32] Against this background, European legislation enacted on the basis of Art. 115 TFEU can enable the Member States to fight tax fraud, tax evasion and tax avoidance, if this is linked to cross-border activities of individual or corporate taxpayers.[33]

Such reading of Art. 115 TFEU has been at the core of the directives on mutual assistance in fiscal matters ever since the first directive on administrative cooperation was enacted in 1977.[34] This directive has been amended many times since, in particular in the wake of the BEPS Action Plan 2015 which inspired the introduction of automatic exchange of information between tax authorities on rulings, arrangements and – last but not least – country-by-country reports submitted by large multinational firms.[35] This legislative practice has been undisputed for nearly 45 years now and it can be taken for granted that Art. 115 TFEU might also serve as a legal basis for other measures protecting public revenue – provided that they focus on cross-border business activities related to the Internal Market.

3.1.2. "Fiscal Provisions" under Art. 114 Para. 2 TFEU

When the European Economic Community was founded in 1957, Art. 100 EEC-Treaty (the predecessor to Art. 115 TFEU) was the only wide-reaching legal basis for European legislation on the Common Market. In 1987, Art. 100 EEC-Treaty was supplemented by Art. 100a EEC-Treaty, which is the predecessor to today's Art. 114 TFEU. This provision allows the European institutions to pass legislative measures related to the establishment or the functioning of the Internal Market under the "ordinary procedure" which requires the consent of the European Parliament and a qualified majority

[32] W. Schön, *Interpreting European Law in the Light of the OECD/G20 Base Erosion and Profit Shifting Action Plan*, "Bulletin for International Taxation" 2020, Vol. 74, No. 4/5, pp. 286, 289.

[33] In this respect the ATAD deserves criticism as it also affects purely domestic cases; see: D. Gutmann, A. Perdelwitz, E. Raingeard de la Bletiere, R. Offermanns, M. Schellekens, G. Gallo, A. Grant Hap, M. Olejnicka, *The Impact of the ATAD on Domestic Tax Systems: A Comparative Survey*, "European Taxation" 2017, Vol. 57, No. 1, p. 2.

[34] EU, Council Directive of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, O.J.L 336/15 of 27 December 1977, recital 3.

[35] Supra note 20.

of Member States representatives voting for the legislative measure in the Council. Against this background, most matters related to the internal market are no longer subject to legislation under Art. 115 TFEU but are dealt with under Art. 114 Para. 1 TFEU.

This access to the "ordinary procedure" under Art. 114 Para. 1 TFEU is subject to a small number of "carve-outs" under Art. 114 Para. 2 TFEU. One of these exemptions refers to "fiscal provisions" which can still only be harmonized under Art. 115 TFEU.[36] Taking a bird's eye view, it can be said that Art. 114 Para. 2 TFEU both confirms and constrains the power of the European Institutions to legislate in the area of taxation. On the one hand, it clarifies that fiscal issues are not outside the remit of the internal market and can be harmonized if this is required by its creation or completion under Art. 115 TFEU. On the other hand, it rules out to legislate in tax matters on the basis of the ordinary procedure under Art. 114 Para. 1 TFEU. From this follows that the borderline between "fiscal provisions" as mentioned in Art. 114 Para. 2 TFEU and other provisions affecting the Internal Market turns out to be decisive for the procedure to be followed, the level of involvement of the European Parliament, and the majority required in the Council for the passing of European legislation.

In two landmark cases decided by the European Court of Justice in 2004[37] and 2006,[38] respectively, the issue at stake was whether European legislation on administrative cooperation had to be qualified as falling within the ambit of "fiscal provisions". The European Commission (and the European Parliament) argued that "fiscal provisions" are provisions dealing with substantive tax law. Those provisions, which delineate taxable persons, taxable events, the tax base and the tax rate eventually define the tax burden of individuals and firms and are therefore also decisive for the size of the Member States' public revenues and budgets. Only these legislative measures should require the full consent of all Member States. The Court took a broader view. The Court clarified that also purely

[36] This article cannot go into the intense debate on whether to abolish the carve-out for tax legislation. While the Commission clearly wants to introduce qualified majority voting in (some if not all) areas of tax legislation – European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, Towards a More Efficient and Democratic Decision-Making in EU Tax Policy, 15 January 2019, COM(2019)8 final; M. van de Leur, *The European Union's Push to Abolish Unanimity on Tax Policy*, "International VAT Monitor" 2019, Vol. 30, No. 4, p. 141; R. Goulder, *Should the EU Scrap the Unanimity Requirement*, "Tax Notes International", 14 January 2019, p. 245, https://www.taxnotes.com/special-reports/tax-policy/should-eu-scrap-unanimity-requirement/2019/01/11/291kw (accessed: 10.07.2021); W. Schön, *Facilitating Entry by Facilitating Exit: New Paths in EU Tax Legislation*, "Intertax" 2018, Vol. 46, No. 4, p. 339.

[37] CJEU, judgment, 29 April 2004, *Commission* v. *Council*, C-338/01.

[38] CJEU, judgment, 26 January 2006, *Commission* v. *Council*, C-533/03.

administrative norms, which focus on the assessment and enforcement of tax claims, fall under the concept of "fiscal provisions" as they materially contribute to the effective levying of the tax, strike a balance between the power of the tax authorities and the protection of the taxpayer's individual rights, and therefore play a major role for the collection of public revenue just as much as substantive tax legislation.[39] Against this background, the statement in the preamble of the new directive – "Given that this Directive does not concern the harmonization of taxes but only obligations to publish reports on income tax information, Article 50(1) TFEU constitutes the appropriate legal basis"[40] – falls short of fully appreciating the wide scope of "fiscal provisions" as laid out in the Court's jurisprudence.[41]

From this line of the CJEU's jurisprudence it follows that the concept of "fiscal provisions" under Art. 114 Para. 2 TFEU is rather wide, including both substantive and procedural aspects of taxation. This statement also informs the interpretation of Art. 115 TFEU: Harmonization of fiscal law (both substantive and procedural), which is meant to contribute to the Common Market can be pursued on the basis of this treaty provision. It is hardly a surprise that the exchange of information between tax authorities as regards country-by-country reports has been based on Art. 115 TFEU.[42] Why should things be different for "public" country-by-country reporting?

3.2. Article 50 Paras. 1 and 2 letter g TFEU

Article 50 Paras. 1 and 2 letter g TFEU is ancient material of the 1957 EEC Treaty as well. But unlike Art. 115 TFE it is not placed in the chapter on common rules on the approximation of laws. It is part of the chapter on the freedom of establishment, which gives Art. 50 Para. 2 letter g TFEU its specific flavor. When the founders of the EEC declared the freedom of establishment for companies to be part and parcel of the Internal Market, they felt the need to introduce the option to legislate at the European level in order to strike a balance between the new freedom of companies and their management on the one hand, and the interests of shareholders and third parties on the other hand. Thus, they entrusted the European Parliament, the Council and the Commission to harmonize national legislation in the area of corporate law in order to achieve equal and substantial protection

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[39] CJEU, judgment, 29 April 2004, *Commission* v. *Council*, C-338/01, Paras. 63–67; CJEU, judgment, *Commission* v. *Council*, C-533/03, Para. 47.

[40] Supra note 1, recital 12.

[41] Opinion of the Legal Service, supra note 13, Para. 31.

[42] Supra note 20.

for shareholders and third parties to coordinate: "to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union."

Against this background, we have witnessed more than fifty years of ongoing European legislation in the areas of corporate law and accounting law based on Art. 50 Para. 2 letter g TFEU.[43] Starting with the First Company Law Directive in 1968 this line of legislation produced major landmarks of corporate law harmonization such as the Capital Directive of 1977, the Accounting Directive of 1978, the directives on domestic mergers and divisions as well as on single-member companies. In recent years, the focus of corporate law harmonization moved to cross-border situations, in particular the wide-reaching directive on corporate mobility,[44] which was enacted in 2019, and provides a common framework for cross-border mergers, divisions, and transformations within the European Union.

Nevertheless, both the underlying aims and the true boundaries of the scope of Art. 50 Para. 2 letter g TFEU have always been under debate. The focus of this debate relates to the constituencies, which are entitled to protective legislative measures under Art. 50 Para. 2 letter g TFEU. One thing is clear: Protection of shareholders (vis-à-vis the management of the firm or vis-à-vis the influence of blockholders) is at the core of this provision. They are the "members" explicitly mentioned in that treaty provision. But who are the "others" mentioned in Art. 50 Para. 2 letter g TFEU as well? Again, some groups evidently have to be named here: company creditors and employees whose legal and economic position is very much dependent on the wellbeing of the company. But does Art. 50 Para. 2 letter g TFEU go beyond these groups traditionally covered by the body of corporate law? The European Court of Justice answers this question in the affirmative. In a number of landmark cases related to the scope of protection administered by the accounting law directives, the Court held that any third party might benefit from harmonization acts under Art. 50 Para. 2 letter g TFEU. Thus, in *Daihatsu* the Court held that an association of car dealers was entitled to access the financial accounts of a foreign car manufacturer's local subsidiary, which supplied those dealers (the

[43] For an overview see: S. Grundmann, *European Company Law*. *Organization, Finance and Capital Market*, 2nd ed., Intersentia, Antwerp 2012.

[44] EU, Directive 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending EU, Directive 2017/1132 as regards cross-border conversions, mergers and divisions, O.J. L 321/1 of 12 December 2019.

association itself not being a creditor or a supplier of this firm).[45] And in *Axel Springer* the Court went so far to state that even competitors of small and medium-sized firms were entitled to enforce the firms' obligations to file their financial accounts with the local commercial registers as provided under the Accounting Directive.[46] While this line of jurisprudence ran into heavy criticism,[47] the Court has never taken any step towards constraining the powers of the European institutions to increase disclosure obligations for businesses under Art. 50 Para. 2 letter g TFEU.[48]

It comes as no surprise that the European Commission[49] in their proposal to legislate in favor of public country-by-country reporting and the European Parliament in its report[50] refer to the Court's judgment in *Daihatsu* in order to justify its choice of legal basis. If Art. 50 Para. 2 letter g TFEU provides a legal basis for the protection of any interest group somehow related to the behavior of corporate firms, and if its scope is not limited to a selected set of addressees, the scope of this provision can also encompass the interest of the general public to learn about tax-related key numbers of that firm. On the other hand, the Legal Service of the Council stated convincingly that the interest of the general public to receive information on corporate behavior has to be distinguished from the interest of the state to protect and increase public revenue.[51] Even if these two perspectives are somehow interrelated, a directive that puts tax enforcement in the center falls outside the scope of Art. 50 Para. 2 letter g TFEU.

4. The Aim of Public Country-by-Country Reporting

Given the wide scope attributed to both Art. 115 TFEU and Art. 50 Para. 2 letter g TFEU by the European Court of Justice it can be assumed that an obligation of a firm to disclose certain tax-relevant information to a wider audience can be based on both provisions alike. But this brings to the fore

[45] CJEU, judgment, 4 December 1997, *Daihatsu*, C-997/96; see also: CJEU, judgment, 29 September 1998, *Commission* v. *Germany*, C-191/95.

[46] CJEU, judgment, 23 September 2004, *Axel Springer*, C-435/02; CJEU, judgment, 21 June 2006, *Danzer*, T-47/02.

[47] W. Schön, *Corporate Disclosure in a Competitive Environment – The Quest for a European Framework on Mandatory Disclosure*, "Journal of Corporate Law Studies" 2006, Vol. 6, No. 2, p. 259.

[48] CJEU, judgment, 26 September, *Texdata*, C-418/11, Paras. 53–54.

[49] Supra note 1, recital 12.

[50] European Parliament supra note 12, p. 43.

[51] Opinion of the Legal Service, Paras. 23–24.

the decisive question: Which provision is the right one given the context of the new directive? As the Court has reiterated time and again, this is an objective issue subject to judicial review. In the first place, one has to look at the aims and content of this act of European legislation.[52] Is the aim of public country-by-country reporting to protect public revenue, to enforce tax claims and to change taxpayer behavior? This would lead us to Art. 115 TFEU. Or is the whole exercise about informing the general public about anti-social behavior, making shareholders and investors aware of "irresponsible" strategies chosen by the firm's management? This would seem to allow legislation under Art. 50 Paras. 1 and 2 letter g TFEU. And what happens if the new legislation shall promote both corporate responsibility and fiscal claims? According to the Court, this depends on the predominant purpose of the legislation in question: "If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component."[53]

From this starting point it is evident that the search for the "true" purpose of the legislation lies at the heart of the debate.

4.1. The Public and Academic Debate

Reading the political statements and the scholarly literature preceding the current legislation it becomes clear that all kinds of justifications have been put forward to motivate the introduction of public country-by-country reporting, some of them clearly linked to tax enforcement, some of them clearly linked to corporate social responsibility.[54]

A very obvious link to the field of corporate accountability can be established whenever it is proposed that shareholders should know about

[52] CJEU, judgment, 29 April 2004, *Commission* v. *Council*, C-338/0, Para. 54; CJEU, judgment, 26 January 2006, *Commission* v. *Council*, C-533/03, Para. 43; CJEU, judgment, 8 September 2009, *Commission* v. *Parliament and Council*, C-411/06, Para. 45; CJEU, judgment, 19 July 2012, *Parliament* v. *Council*, C-130/10, Para. 42; CJEU, judgment, 6 May 2014, *Commission* v. *Parliament and Council*, C-43/12, Para. 29.

[53] CJEU, judgment of 29 April 2004, *Commission* v. *Council*, C-338/01, Para. 55; CJEU, judgment of 8 September 2009, *Commission* v. *Parliament and Council*, C-411/06, Para. 46; CJEU, judgment, 6 May 2015, *Commission* v. *Parliament and Council*, C-43/12, Para. 30.

[54] For the U.S. debate see: J.D. Blank, *Timing and the tax authority. Thematic Report*, [in:] F. Barasan Yavaslar, J. Hey (eds), *Tax Transparency*, EATLP International Tax Series, "IBFD" 2019, Vol. 17, pp. 211, 223.

the attitude of "their" firm towards aggressive tax planning.[55] Aggressive tax behavior – so it is said – can contribute to adverse reputational effects damaging profit expectations and share value. In extreme cases, tax avoidance can even be related to illegal diversion of profits by the management to the detriment of the shareholders. In this context, public country-by-country reporting is meant to protect shareholders against management behavior, which directly diminishes the value of their investment. But it can be doubted whether shareholders will truly benefit from complicated fiscal information that is hard to digest and creates additional compliance cost at the level of the corporation.[56]

Going beyond this "enlightened shareholder approach", there exists the notion that shareholders and potential investors might be interested to learn about tax-related strategies of firms because they have a preference for pro-social behavior and would rather forgo extra profits from aggressive tax planning in order to comply with ethical standards.[57] This approach is very much in line with recent European legislation on corporate disclosure rules, which are meant to enable the shareholders and potential investors to make informed decisions about the management's attitude towards corporate social responsibility when they invest in firms.[58] Again, it seems possible to allocate this legislative goal to Art. 50 Para. 2 letter g TFEU.

The situation is less clear when one identifies as the goal of public country-by-country reporting the information to the general public about tax-related behavior of large firms. This goal seems to be at the heart of the current debate, and it goes far beyond issues related to the corporate form of a firm or the freedom of establishment under Art. 49 TFEU. Here we talk about a public debate on "big business", about "naming and shaming" and about additional support for and pressure on the fiscal authorities to prosecute illicit tax strategies with full force.[59] Moreover,

[55] N. Noked, *Public Country-by-Country Reporting: The Shareholders' Case for Mandatory Disclosure*, "Tax Notes International" 2018, Vol. 90, No. 14, p. 1501.

[56] M. Lagarden, U. Schreiber, D. Simons, C. Sureth-Sloane, *Country-by-Country Reporting Goes Public – Cui Bono?*, "International Transfer Pricing Journal" 2020, Vol. 27, No. 2, p. 91; W. Schön, *Tax and Corporate Governance: A Legal Approach*, [in:] *idem* (ed.), *Tax and Corporate Governance*, Vol. 3, Springer-Verlag, Berlin–Heidelberg 2008, pp. 50–51.

[57] A. Johnston, K. Sadiq, *Beyond Country-by-Country Reporting: A Modest Proposal to Enhance Corporate Accountability*, "New Zealand Universities Law Review" 2017, Vol. 27, No. 3, p. 569.

[58] Supra note 22.

[59] R. Seer, *Purpose and Problems of Tax Transparency: The Legal Perspective*, [in:] F. Barasan Yavaslar, J. Hey (eds), *Tax Transparency*, EATLP International Tax Series, "IBFD" 2019, Vol. 17, pp. 17, 35; S. Stevens, *Cutting-Edge Techniques to Collect Information from Taxpayers*, [in:] F. Barasan Yavaslar, J. Hey (eds), *Tax Transparency*, EATLP International Tax Series, "IBFD" 2019, Vol. 17, pp. 97 and 145. In developing countries where tax authorities are weak,

there seems to be the notion that public country-by-country reporting can somehow contribute to the "public trust" in the national tax system as such, including full enforcement of tax claims.[60] It is clear that doubts have been raised as to the risk of misinterpretation of the published numbers.[61] And it seems challenging to promote these goals under Art. 50 Para. 2 letter g TFEU even if we accept a wide concept of the protection of "others" under this provision.[62] These political aims are rather related to tax enforcement in general which – as we learned from the Court – falls under "fiscal provisions" within the ambit of Art. 114 Para. 2, Art. 115 TFEU.

Last but not least it is clearly one of the goals of both private and public country-by-country reporting to change tax-related behavior of firms. The management of the firm shall be incentivized to "align" profit allocation with real economic activities. Whether illegal or not, strategies that move intangible or financial assets to low tax jurisdictions shall be exposed, giving rise to intensified scrutiny both by the general public (in particular, the press and NGOs) and by tax authorities. It is suggested that firms want to avoid this kind of scrutiny and rather shy away from aggressive tax planning irrespective of the limitations set by the tax law itself.[63] Again, the relationship of this purpose of disclosure to the interest of tax authorities to constrain taxpayer behavior is much stronger than the impact on society at large or to specific shareholder and investor perspectives.[64]

4.2. The Directive

The directive itself presents us with a strange mix of both a tax-related and a CSR-related approach. What is more disturbing, the preamble to the directive has changed its wording and its tone manifestly between

public country-by-country reporting may well contribute to the enforcement of taxing rights, see: A.W. Oguttu, *Curtailing BEPS through Enforcing Corporate Transparency: The Challenges of Implementing Country-by-Country Reporting in Developing Countries and the Case for Making Country-by-Country Reporting Mandatory*, "World Tax Journal" 2020, Vol. 12, No. 1, p. 167.

[60] H. Gribnau, A. van Steenbergen, *Handle with Care: Transparency as a Means to Restore Trust in Taxation*, "Tilburg Law School Working Paper", Para. 8.2, https://www.researchgate.net/publication/349467308_Handle_with_Care_Transparency_as_a_Means_to_Restore_Trust_in_Taxation (accessed: 10.07.2021).

[61] V. Chand, S. Piciarello, *The Revamping of Public CbCR in Europe*…, supra note 19.

[62] For a fundamental critique see: W. Schön, supra note 46.

[63] There is some evidence that the introduction of "private" country-by-country reporting did have an effect on the organizational structure of multinational enterprises (L. De Simone, M. Olbert, *Real Effects of Private Country-by-Country Disclosure*, http://dx.doi.org/10.2139/ssrn.3398116).

[64] Opinion of the Legal Service, supra note 13, Para. 32.

the original proposal of 2016 and the final version agreed upon in 2021. This is particularly irritating as the content of the legal provisions in the directive prescribing the personal and material scope of the obligations of large firms to disclose key tax numbers to the general public (in particular Art. 48c of the Directive) did not change substantially between the drafting of the original proposal and the enactment of the final version.

From the legislative history it becomes evident, that the legislative motivation laid out in the preamble has been adjusted dramatically from a more tax-related purpose to a more CSR-related agenda.[65] Some of these changes were effected in early 2019[66] and additional adjustments were made in late 2019. At this point in time, the Finnish Presidency of the European Union explicitly proposed a number of changes to the directive's preamble hoping that: "clarifying the aim and content of the proposal could alleviate concerns regarding the legal base of the proposal, and pave the way for further negotiations at the Council. Several delegations as well as the Council Legal Service also highlighted this approach at the Competitiveness Council as well as at Economic and Financial Affairs Council."[67]

The first change to the preamble that deserves being mentioned is the fact that the preamble in the original proposal dealt heavily on the challenges of international tax avoidance, the need to align profit allocation with real activities for tax purposes and to improve tax fairness and tax transparency.[68] The "challenge posed by corporate tax avoidance" was therefore emphasized right in the first recital of the preamble and was called "a major focus of concern within the Union and globally."[69] This focus would justify the application of Art. 115 TFEU.[70] But this conceptual starting point has been fully erased in the final version of the preamble and replaced with the rather bland statement that "transparency is essential for a smooth functioning of the Single Market."[71] The draftsmen evidently felt the need to avoid any language that might make it necessary to employ the "special procedure" under Art. 115 TFEU.

[65] See also the large number of proposed amendments to the preamble coming from the European Parliament's deliberations – Council of the European Union, Interinstitutional File 2016/0107(COD), Outcome of the European Parliament's proceedings of 17 July 2017, 10932/17, p. 4 et seq.

[66] Council of the European Union, Interinstitutional File 2016/0107(COD), Presidency compromise proposal – State of Play of 17 January 2019, 5134/19.

[67] Council of the European Union, Interinstitutional File 2016/0107(COD), Information from the Presidency of 20 December 2019, 15285/19.

[68] Supra note 8, recital 1.

[69] Supra note 8, recital 1.

[70] Opinion of the Legal Service, supra note 13, Para. 9.

[71] Supra note 1, recital 1.

This new tone sets the scene for the ensuing parts of the preamble. Both the original and the final version refer to demands expressed by the European Parliament. In recital 2 of the original version the necessity to counter international tax avoidance was stressed: "The European Parliament in its resolution of 16 December 2015 on bringing transparency, coordination and convergence to corporate tax policies in the Union acknowledged that increased transparency in the area of corporate taxation can improve tax collection, make the work of tax authorities more efficient and ensure increased public trust and confidence in tax systems and governments."[72]

This passage has been replaced in the final version with the following reference to a different statement of the European Parliament, which leaves out any visible link to the position of tax authorities and tax collection: "The European Parliament has stressed the need for an ambitious public country-by-country reporting as a means of increasing corporate transparency and enhancing public scrutiny."[73]

And there is more: The original preamble contained an extensive reference to the BEPS Action Plan and its implementation under the Anti-Tax Avoidance Directive as well as the transposition of Action 13 of the BEPS Action Plan on country-by-country reporting into the Directive on Administrative Cooperation and domestic law.[74] We cannot find this passage in the final text – an evident attempt to cut the obvious ties with the fiscal background of country-by-country reporting in general.

A similar change of paradigm can be found when it comes to the way the ultimate goals of public scrutiny regarding corporate tax information are described. In the original proposal, recital 5 of the preamble contained the following language, which justifies the application of Art. 115 TFEU:[75] "Enhanced public scrutiny or corporate income taxes borne by multinational undertakings carrying out activities in the Union is an essential element to further foster corporate responsibility, to contribute to welfare through taxes, to promote fairer tax competition within the Union through a better informed public debate and to restore public trust in the fairness of the national tax systems."[76]

Paragraph 2 of the final version of the preamble reads as follows:

"In parallel with the work undertaken by the Council to fight corporate income tax avoidance, it is necessary to enhance public scrutiny

[72] Supra note 8, recital 1.
[73] Supra note 1, recital 2.
[74] Supra note 8, recital 4.
[75] Opinion of the Legal Service, supra note 13, Para. 11.
[76] Supra note 8, recital 5.

of corporate income taxes borne by multinational undertakings carrying out activities in the Union, as this is an essential element to further foster corporate transparency and responsibility, thereby contributing to the welfare of our societies."[77]

"Providing such scrutiny is also necessary to promote a better informed public debate regarding in particular the level of tax compliance of certain multinational undertakings active in the Union and the impact of this on the real economy. The setting of common rules on corporate income tax transparency will also serve the general economic interest by providing for equivalent safeguards throughout the Union for the protection of investors, creditors and other third parties generally, and thus contribute to regaining the trust of citizens of the Union in the fairness of the national tax systems".[78]

The following recital of the reframed preamble shows a similar ambiguous picture: "Public country-by-country reporting is an efficient and appropriate tool to increase transparency in relation to the activities of multinational undertakings, and to enable the public to assess the impact of those activities on the real economy. It will also improve shareholders' ability to properly evaluate the risks taken by undertakings, lead to investment strategies based on accurate information and enhance the ability of decision-makers to assess the efficiency and the impact of national legislations."[79]

Moreover, the legislators have proudly amended the original proposal by stating that: "by an unprecedented introduction of public country-by-country reporting (the Union) has become a global leader in the promotion of financial and corporate transparency"[80] and "[m]ore transparency in financial disclosure results in advantages for all since civil society becomes more involved, employees are better informed and investors less risk-averse. In addition, undertakings will benefit from better relations with stakeholders, which leads to more stability, along with easier access to finance due to a clearer risk profile and an enhanced reputation."[81]

These manifold explicit attempts to "modify" the aims and goals of the directive leave behind the impression of manipulation. Can it be true that a piece of legislation, which was not changed on its merits during the legislative process, and which was heavily attacked for lack of legal basis from inside and outside the Council, can be saved by a flurry of

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[77] Supra note 1, recital 2.
[78] Supra note 1, recital 2.
[79] Supra note 1, recital 3.
[80] Supra note 1, recital 4c.
[81] Supra note 1, recital 4e.

changes to the preamble? By "cheap talk"? And what are we to make of the fact that the Portuguese Presidency of the European Union announced the final agreement as a major step to ensure hefty tax payments by big multinational companies who are called upon to "pay their fair share"?[82] Did they take their own words seriously? It seems advisable that the reference to the aims and goals of legislation in the preamble should not be the only decisive factor when it comes to the identification of the right legal basis.

5. The Content of Public Country-by-Country Reporting

In its jurisprudence, the CJEU has made clear that "the choice of the legal basis for a (Union) measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure".[83] This prescription leads us to the "content" of the legislative measure, which did not change in the process of legislation. There are only some minor amendments, which try to accommodate the interest of businesses to protect commercially sensitive information and to accommodate fears not to create a competitive disadvantage for European firms when their global competitors are not subject to similar obligations.

The problem is that a closer look at the content of the mandatory disclosure provisions laid down in the new directive does not make us much wiser when it comes to the search for the right legal basis for public country-by-country reporting. It is pretty unclear – as *Hey* puts it – whether "legislative intention, the scope of published data and the effects of the publication match"[84] at all. As the information, which the company is obliged to disclose, will be accessible to shareholders, investors, the general public and tax authorities alike, one cannot draw a clear line from the content of the new provisions to the overall purpose and character of the new rules. While it is fair to say that tax authorities do not need that information as such (given the extensive information channels they control anyway, including "private" country-by-country reporting) it is evident that public pressure on taxpayers to accept full tax transparency

[82] Supra note 5.

[83] Supra fn. 50.

[84] J. Hey, *Transparency and Publicity*, [in:] F. Barasan Yavaslar, J. Hey (eds), *Tax Transparency*, EATLP International Tax Series, "IBFD" 2019, Vol. 17, pp. 193, 208.

will indirectly support the work of tax authorities substantially. Moreover, the behavioral changes brought about by the new rules might reduce tax avoidance and increase public revenue. But one big question remains: What do we actually know about the real-life implications of the new set of rules? Not much so far.

Against this background, analyzing the content of the directive will not enable us to make a final statement on the correct legal basis for the new rules on public country-by-country reporting.

6. The European Framework for Fiscal Legislation

In my view, one should approach the issue of the legal basis for this kind of legislation by taking a fresh look at the overall institutional framework of the European Treaties. In accordance with the principle of conferral, the European Union does not have the power to legislate freely in non-exclusive areas. It has to show a legal basis for its actions, and it has to respect the sovereignty of Member States in areas where the Member States have reserved the right to veto legislative action at the level of the EU. This has been the case for taxation law ever since 1957. Both Art. 113 (which governs the legislative powers of the European institutions in the area of indirect taxation) and Art. 115 (which governs the legislative powers of the European institutions in the area of direct taxation) guarantee each Member State the right to veto tax measures initiated by the Commission in the Council. This sovereign right has been retained and preserved under Art. 114 Para. 2 TFEU. This treaty provision carves out fiscal provisions from the field of application of the "ordinary procedure", which enables the Council to act under qualified majority voting.

As we have seen, the new rules for mandatory disclosure of key tax numbers easily fall within the ambit of the concept of "fiscal provisions" under Art. 114 Para. 2 TFEU. They affect the individual rights of taxpayers (both in their commercial behavior and as regards individual tax secrecy) and they affect the approach taken by Member States as to the way they go about tax assessments and tax enforcement. The new rules interfere massively with the relationship between the tax authorities and the taxpayers in the Member States of the European Union. This justifies the assumption that – when we compare Arts. 114 and 115 TFEU – one has to apply Art. 115 TFEU in just the same manner as Art. 113 TFEU in the field of indirect taxation.

Does this picture change because the new rules additionally fulfil a role in the context of corporate social responsibility? The Commission and the European Parliament are of the opinion that Art. 50 Paras. 1 and 2 letter g TFEU sidelines Art. 115 TFEU, given the "special" character of that treaty provision. But this argument is not persuasive. Article 50 Para. 2 letter g TFEU is just an emanation of the general legal basis for harmonization measures to be found in Arts. 114, 115 TFEU. It does not create institutional powers that would otherwise not exist under Arts. 114, 115 TFEU. One should rather assume that the carve-out formulated in Art. 114 Para. 2 TFEU for tax measures should be applied in the context of Art. 50 Para. 2 letter g TFEU as well. This is due to the fact that – and this is most important – the alternative between Art. 114 Para. 1 TFEU and Art. 50 Para. 2 letter g TFEU which are both following the "ordinary procedure" does not change the level of intrusion into the Member States' fiscal sovereignty at all. The fate of the directive's preamble shows this quite clearly: The principle of unanimity shall protect the Member States from interference by the European legislature in the field of taxation. This interference does not go away simply because the measure in question purports to pursue a second or even another predominant goal – namely, to promote corporate accountability. You cannot deprive Member States from their constitutional rights by changing the preamble without changing the material content of the legislation.

It is interesting to see that in the jurisprudence delivered by the Court in these matters, the Court regularly states that whenever a legislative measure touches upon two different areas simultaneously, and with equal relevance, one should apply both underlying procedures simultaneously.[85] But the Court does not give us a clear answer as to how to proceed if these two procedures are not compatible with each other, e.g., when both the ordinary procedure and the special procedure apply. The Court shows a tendency to favor the EU-friendly "ordinary procedure" over the "special procedure" as this path secures full involvement of the European Parliament and reduces veto rights for Member States.[86] In my view, the institutional framework of the European treaties demands in tax matters that the sovereignty of the Member States should be respected as far as possible. Against this background, the traditional principle of unanimity, which we still find in many places, including the flexibility

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[85] CJEU, judgment, 29 April 2004, *Commission* v. *Council*, C-338/01, Para. 56; CJEU, judgment, 8 September 2009, *Commission* v. *Parliament and Council*, C-411/06, Para. 47; CJEU, judgment, 19 July 2012, *Parliament* v. *Council*, C-130/10, Para. 44.

[86] CJEU, judgment, 11 June 1991, *Commission* v. *Council*, C-300/89, Paras. 18–20.

clause in Art. 352 TFEU, should form the residual baseline. This leads us to Art. 115 TFEU, which – I respectfully submit – is the true legal basis for the upcoming legislation on public country-by-country reporting.

7. Conclusion

The hotly contested issue of whether public country-by-country reporting can be introduced on the basis of a majority vote or on the basis of unanimity in the Council, has so far been discussed by reference to the "true purpose" of this new set of rules. The perspective taken in the debate oscillates between fighting corporate tax avoidance and protecting public revenue on the one hand, and shareholder control and public scrutiny of big business on the other hand. One of the less beautiful aspects of this debate lies in the fact that the European institutions over time "adjusted" the preamble of the draft directive in order to comply with the less demanding procedural set-up. It seems much more advisable to take a close look at the effect of the new legislation on the division of powers between the European institutions and the Member States and to accept the protective dimension of the principle of unanimity in this respect. If the Commission and the European Parliament want to pursue policies in the area of taxation, they should take on the Council and try to establish a unanimous vote than to resort to tactical moves which will finally undermine the constitution of Europe and the legitimacy of European legislation.

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Abstract

The article deals with the reporting obligations laid down by the European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU of 1 June 2021 (so-called "public country-by-country reporting") obliging certain corporate income taxpayers to disclose to the general public sensitive business information i.e., number of employees, level of pre-tax profits, level of taxes accrued, and taxes paid designed to prevent and to sanction corporate tax avoidance. The Author discusses whether such rules can be introduced based on the majority vote or on the basis of unanimity.

Keywords: Public Country-by-Country Reporting: Corporate Law, Fiscal Law, Principle of Unanimity