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RUTH MASON: Thanks for joining this session of the Oxford Virginia Legal Dialogues. I'm Ruth Mason. I'm the Edwin S. Cohen distinguished professor of law and taxation at the University of Virginia, and an affiliated-- actually, now I'm the Faculty Director of the Virginia Center for Tax Law. My co-convener for today is Tsilly Dagan. She's professor of tax law at Oxford University and one of the Directors of the MSC and taxation at Oxford faculty of law.

The purpose of this workshop is to foster communication between tax scholars and nontax scholars. I think by now everyone knows our format. Tsilly and I like to invite an academic that we admire to choose a work for discussion that was written by a nontax academic that they admire. Then we invite the author of the work to discuss it with us here online.

All of our sessions are open to the public. And to find out more about upcoming sessions, you can join our mailing list or watch social media for announcements. So first, I'd like to introduce our commentator for today. We're delighted that Georg Kofler is joining us from the Vienna's Research Institute for International Taxation.

Georg is an incredibly prolific scholar and an active member of several research networks, including that he's a member of the permanent scientific committee of the International Fiscal Association, IFA, and the ECDA task force for CFE tax advisors, Europe. In addition to being a professor at VU, Georg has taught at NYU, UF, University of Sydney. And before teaching at VU, he was a professor at the University of Linz where he was the head of the Tax Law Institute.

On a more personal note, Georg is one of my closest friends, and sometimes co-author, and perhaps most importantly, former student. You didn't think I would get away with not saying-- let you get away with me not mentioning that. OK. So we're delighted that Georg chose a piece authored by Robert Schutze who joins us today. Robert is a professor of European and global law at Durham University in the United Kingdom.

Robert is a constitutional scholar with particular expertise in the law of the European Union and constitutional federalism, which we're going to hear about today. He co-founded the Global Policy Institute with the political scientist David Held, and he's visited as a fellow or as a professor at various places, including Harvard.

Georg and Robert have in common that they are both prolific scholars. And I'm not going to give even a brief bibliography of Robert's work, it would take too long. But I do want to mention for those interested in the particular topic of this session, Robert's award winning book, *From Dual to Cooperative Federalism: The Changing Structure of European Law,* which is available from Oxford University Press where Robert's also a joint co-editor of the yearbook of European law, OUP's flagship journal on the law of the European Union.

So welcome too, Georg and Robert. Before we jump into the paper I want to just note the format. So Georg will comment, Robert will respond, and then Tsilly and I will make some remarks or ask some questions to which either of you, Georg or Robert, may respond. And then we'll open up the conversation to participants. So if you want to be in the queue, use the Raise Hand function. Click Participants, and then Raise Hand.

Note that this session is recorded, and that the first part before the Q&A may be posted on our website. Our website includes all of our prior sessions. So you can check those out after today. OK. So please convey our name and institutional affiliation in the chat so that we who's here, and so that we can give that information to Robert after the session in case he wants to follow up. So without further ado, let me turn things over to Georg.

GEORG KOFLER: Thank you very much. Thank you very much, Ruth and Tsilly, for the kind invitation, and it's a true pleasure to be here, and it's even more of a pleasure that Robert accepted the invitation to discuss a general topic with us that is very close to what the text community is currently discussing.

So before talking about the paper, I should note that the text area has seen or the direct text area has seen a kind of revolution, at least since 2013 there's 2016 in the European Union, where we move from European regulation dealing with the removal of obstacles to more anti-tax avoidance perspective on the internal market.

And for many of us in the tax world that raised a lot of issues where the authority of the Union to regulate so the competence starts and where it ends. And it might be the case for many of us tax people that we see some of the constitutional issues too simplistic, or perhaps we overcomplicate them.

And I think this is an excellent format to link what we discussed in the tax world with a general European constitutional law. And I think Robert's paper is a great starting point to dig a little bit deeper in the current issues that we face in the tax world, and perhaps get the general constitutional perspective on what we are discussing.

I have-- as for people who me know that this is what I do, I have prepared some slides just to walk through the main topics, and also to focus what I would like to discuss and where I would like to see answers to which problems we have. OK. So Robert's paper is comparative in nature dealing with the internal and external limits of Union wide market regulation.

And that's a common theme in the US, where we have a federal body and we have the US states, and also the European Union, where we have the member states. But we also have the supranational body. And in such a wide market, it's kind of a common, or at least a similarity, that there are rules to regulate commerce or economic activities in a Union-wide matter.

In the US, the main provision for that is the Commerce Clause, and it links to the 10th Amendment because the Commerce Clause also has the idea that the things that are not transferred to the federal state, so the Congress, remained with the states or the people. With a similar starting point in the European Union, which is the principle of conferral, so only the powers conferred to the European Union are with the European Union. Everything else is retained by the member states.

And it is basically the very simple and basic setup, which also raises the question, which we will discuss is, what are the limits and the breadth of this conferral? In the European direction, that's usually called positive integratior because regulation is seen as being the internal market closer together. So it's positive in the sense that we have an active movement towards a market integration.

There is also another side that both the US and the EU system share, which we call in the European Union, negative integration. This is largely done in the European Union by way of the fundamental freedoms by the removal of discriminations. And then yes, it has a very interesting counterpart, that's the Dormant Commerce Clause, which is interpreted by the US Supreme Court also as prohibiting discrimination based by varying or disparate state regulations.

And I think this is a point where Ruth is probably the most prolific scholar globally on dealing with Dormant Commerce Clause issues, also in the tax area. But we will focus on the first portion, the positive integration. I think the rules, and since I am a European Union person, have some similar starting point. We see that, and we will see the author on next slide. On the left side, we have the US constitutional law.

So we have this Commerce Clause, that it is the power of Congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, which is supplemented by the 10th Amendment, which limits that power to provide limited power to a certain extent. And we have a similar setup in the European Union, and I've put Article five here as a starting point, where we have this principle of conferral that only the powers conferred to the Union belong to the Union. The remainder is kept by the member states. And this is supplemented by two principles which might pose some, at least, procedural or political limits, the principle of subsidiarity, so that the Union shall only act if the member states cannot do the job alone.

That's very simplified in the principle of proportionality so that the Union can only act in a proportionate manner to target a specific problem. What Robert does in his paper is he discusses the limits set by the case law, basically, to both the Commerce Clause and the internal market competencies. I will focus a little bit on the internal market in the European Union and then come back to the Commerce Clause, also, perhaps to see some comparisons later on. But just to give everybody a basic setup how the internal market competences work in the European Union, I have tried to put the main provisions here on the slide.

So in the Union, we start with the question, which kind of competence might the Union have? And there are two types, two main types. One is exclusive, so only the Union can regulate in these areas, and one is shared. So it's a competence that both the member states and the Union enjoy. And one of the main shared competencies is the internal market.

So the Union-wide market in the internal market, is defined in a programmatic way in Article 26 of the Treaty on the Functioning of the European Union, is basically an internal market without internal borders, where all economic factors, goods, labor, services, capital can move freely. Of course, this is kind of a goal and not a reality because we still have the fragmented text markets in the European Union, but from the spirit, internal borders should be removed.

And how is this done? We have three provisions that are interesting. How there are many more competence provisions in the treaties? But three are relating somewhat to the topic that we are discussing today. We have Article 113, dealing with indirect taxation, which was seen as one of the main hindrances when the treaties were created in the 1950s because it's so obvious that customs duties are disparate turnover taxes might be a problem for economic integration. And then, what we see now is we have a general rule in Article 114 for the internal market, in general.

But this harmonization rule does not apply to fiscal measures, so direct taxation is out of the picture for 114 and it's still in Article 115. Why is this relevant? And Robert makes this point very clearly in his paper, Article 114 is, basically, the kind sibling to Article 115 because it was put in late in the treaty, and it has two advantages for general harmonization. First, it doesn't require unanimity, so it's a maturity-based provision. So it doesn't have a strict sovereignty backstop in the sense that all member states have to agree. Maturity is sufficient. Of course, there are political backstops.

And it is under the ordinary legislative procedure, which means that the Council and the EU parliament together decide. So it's what was previously called the co-decision procedure. In Article 115, we are still living in the world of the 1950s, in the limited sense, because here in the text area, and Article 115 is used for tax harmonization, the Council is the only deciding body, so there is no involvement of the EU parliament except for having to be consulted, and the Council has to act unanimously. So a single member state can veto tax harmonization. And the special procedure, so the Council alone, and it also has a further limit.

And then Robert also points out in his paper that under Article 115, we can only have directives, which need to be implemented by the member states, but we cannot, for example, have decisions targeting only or addressed only to one state actor, and we cannot have decisions, for example, in establishing Union bodies, all things that would be possible under Article 114.

So if you take a look, and this is what Robert's paper is dealing with, are the limits to the internal market competence. And I think that the limits are quite similar from a legal perspective in terms the notions are used for Article 114 of the general rule and Article 115 for tax, that it needs to serve, to a certain extent, the establishment of functioning of the internal market to achieve the goal of full economic integration.

And establishment and functioning have two different meanings. One, deals with the obstruction to do freedom, so obstruction of the fundamental freedoms or the free trade. And the other one, the other prong, deals with distortions of competition. And the limits of these words or of these functions have been pointed out by the Court of Justice, and Robert develops the ideas that, for example, not every tiny distortion gives a competence to harmonize. It has to be an appreciable distortion of competition, for example, and not any obstacle that might, in the future arise, gives the power to deal with potential fragmentation.

So future post potentially arising things, but the obstacles have to be likely. So there is some, I think, a low threshold, but there is a threshold that not everything can be harmonized by the European Union, and similar developments can be found in the case on the Commerce Clause in the US. It's not a one-to-one parallel, but it's similar developments that there has to be some kind of appreciable problem that needs to be regulated.

So what are the regulatory powers, and Robert deals with regard, for example, regulation? What is regulation? What is prohibition? Can you, for example, create commerce under the Commerce Clause? And Robert points out the *US Obama Care* case, where the Supreme Court ruled that the creation of commerce where no commerce exists is not covered by the Commerce Clause, for example. So there are some features that might be interesting then for the tax discussion.

Perhaps, one point, the sovereignty backstops that we have in the European Union deal with, as I mentioned already, that only directives can be issued. There is a special procedure the unanimity requirement. Those are all kinds of second-level sovereignty backstops that are not similarly present in the US constitutional law. We see that in the European Union, some sensitive areas are not subject to majority voting but subject to unanimity. And we have seen this when it comes to the sanctions now in the Russian war against Ukraine. This is a sensitive external political issue. So there is also a unanimity requirement.

But of course, some people don't like unanimity. So we will come back to that in a second. Now, let me relate a couple of these points to the tax area. Initially, and you can see some of those directives go back in the proposals to the late 1960s, there was the idea to use direct tax harmonization to remove obstacles.

So it's very known, interest-royalties directive, parent-subsidiary directive, merger directive, they're all created. You can call them pro-taxpayer directives because they were meant to integrate the market more closely, allow European companies to grow, to merge, to have several subsidiaries all over Europe, and to compete on a global basis with US multinationals, for example. So we can call them pro-freedom directives.

In the last couple of years, we have seen a couple of directives which reversed our picture on EU harmonization. So in the past, EU harmonization for tax people was giving more freedoms and giving rights. Now, it has flipped since, basically, 2016. The directives are giving more entitlements, or more rights, or more protections to member states and putting additional burdens on taxpayers, if you see it simplified. One example, is the anti-tax avoidance directive from 2016, where the Union legislator created the obligation for member states to introduce certain anti-tax avoidance measures. For example, CFC rules, or interest limitations, or exit tax rules.

So things that are not required by the fundamental freedoms, which are not required to close integrate the economic activities of taxpayers or of companies, but rather to create a level playing field, sometimes, and argument to ensure fair taxation, to serve the internal market as a whole, to create fairness, so there are all kinds of subtext arguments now, which has nothing to do anymore with creating freedom rights for taxpayers.

So I mentioned a couple of points here on the slide, there is the introduction of obligations to tax that might even be the creation of new taxes. We have seen that with the proposal for the digital services tax, and also those directives to a certain extent regulate purely internal situations. So provisions that apply also for economic situations inside a single member state. The interest area for the tax aficionado among us, is one rule that applies irrespective of whether transactions across the board are purely internal.

So the use of the directive as a tool of harmonization has moved from removing barriers and removing obstacles to kind of creating additional safeguards for member states' budgets. Also, we see second-level arguments with regard to the global minimum taxation, for example, which is based on OECD discussions and it would only apply to cross-border situations since that would create a problem for the fundamental freedom. So in light of the fundamental freedoms, the directive has been expanded beyond the OECD rules to cover purely internal situations within single member states.

So we see the second-level argument is, well, the directives want to take all OECD discussions into European Union legislation, and to prevent or avoid frictions with the freedoms, they are extended to domestic situations to, at least, facially remove discriminations, and there are a lot examples. So one point that might be interesting also for tax people is the unanimity requirement, which is certainly not a legal limit in the narrow sense, but it's a strong political limit to tax harmonization.

It has been criticized by many, the European Commission has put out a note that they will try to circumvent it. Sometimes, successfully, as we see in the regulation for windfall profit taxation, which is based on the emergency competence and the Article 122 and not on a tax competence. So there are all kinds of, shall I say, features now in the use of the treaty to harmonize taxes outside of unanimity, and the European Commission even mentioned Article 116, which is a very broad anti-disparity rule, and it's pretty unclear if that could be used.

There is an old statement from the [INAUDIBLE] Commission where they say you cannot use Article 116 for full harmonization, but we will see how that develops. Basically, that the sovereignty aficionados have received further firepower by the Fiat case recently, and Ruth has already written on that, where the Court of Justice used the sovereignty in the tax area, that member states still enjoy, to transfer to the state aid discussion, and the court said, well, since we have such a limited firepower as the Union in the area of direct taxation, it is still the autonomy of a member state to set its own tax system. So only the autonomously set tax system can be the comparator for state aid discussions.

So the Union cannot simply invent a pan-European standard to set a benchmark for state aid. It has still to be rooted in a member-state system. So the court also approved that sovereignty perspective with regard to the state discussions, just as a side note. Two short final points, and then I hand over. One point that we are discussing very intensely is the question whether international law can put an external limit to the use of EU competences.

And this is specifically interesting in the tax area because some of the EU directives deal with third country situations, either third country taxpayers or third country investments by European taxpayers, and some of those provisions arguably conflict with existing tax treaties of the member states or bilateral international agreements. And the question there, is this really in line with the European spirit that directives can be used to simply override international tax treaty obligations of the member states?

And our text word discussion, and I'm not sure if this is at the end of the picture already, focuses a lot on Article 351. And in the text, well, we basically read it in the following way, we say, treaties between the member states, they are simply subject to the supremacy of Union law. So it's basically not a problem, and the treaty override through directives is basically OK. When it comes to tax treaties with third countries, we use Article 351 and say, pre-accession treaties are somewhat protected, so they stay in place but need to be renegotiated, perhaps post-accession treaty.

So once a member state has joined the Union, are not protected by Article 351 with a following subtext discussior because the problems do not arise with regard to what Article 351 covers by its wording. Because it only covers, by its wording, conflicts between international treaties and the EU treaties. But here, the problems that we see in the text area arise between tax treaties and EU directives and the implementation. So it's not a question of international law versus primary EU law. It's international law versus secondary EU law.

And what we derive from the case law is that the Article 351 idea also applies to directives, at least in spirit, and then the question is, what about directives that are issued now? So do they count? Do we take the issuance of a directive to determine whether tax treaties should be dealt with this post-accession or pre-accession because the problem arises only by passing the directive? So is there some kind of mutatis mutandis application if a directive creates the incompatibility of a tax treaty, for example, with Union law?

And final point, very briefly. Once the Union starts regulating third country situations, we enter a completely new world of competence, and that's the treaty making competence of the European Union. Because there are some provisions that say that, of course, the European Union is an international body, so it can conclude international agreements, and it does so frequently. And it has the competence to do that in certain areas, and in some other areas, which are kind of closely related, this competence would be exclusive, so only the European Union could do that, and member states would have lost their legal authority to conclude treaties or international agreements with third countries.

And the question that we are discussing is, if the whole development, for example, with regard to, let's say, pillar two or pillar one, so the OECD work on global tax standards, if those OECD ideas and transposed into EU directives, they regulate the global picture, so inbound investments into the Union, outbound out of the Union, then the question is, will we end up in a situation that all those tax questions related to pillar one and pillar 2 will not be able to regulate that in member states tax treaties with third countries, but rather that only the Union has the legal competence to conclude tax treaties with the US, for example?

So this is also kind of one competence question that came to my mind when I read Robert's paper. Sorry, I think I have, probably, two minutes too much. Thank you very much for the time being.

RUTH MASON: Well, that was a lot. [LAUGHS] Robert [LAUGHS]

ROBERT SCHUTZE: Thank you very much, Georg, and thanks again, also, to the city for organizing this and for inviting me. Thanks very much. This was almost a crash course on the EU and constitutional law in the context of taxation.

I wonder how to go through all of these points, but maybe I'll just raise a few issues in relation to each aspect of your excellent presentation, and then maybe in the discussion, we can come back to some more detailed aspects of it. As Georg was saying, that in a way, like in the US, you always need to think in terms of two strategies with regard to EU integration, and that is this positive and that negative integration. And I think most of the articles that I, for example, have read from Ruth as well as relate mainly to the negative integration side, and I've also worked on this to some extent.

But today, we're looking at the positive integration side, and there's a number of provisions and a number of principles that Georg already mentioned. I think in the context of taxation, the two key provisions are Article 114 and 115, and as was said, it's an interesting way how Article 114 was meant to really help the harmonization effort within the context of the European Union after the single European Act, but the second paragraph of that provision excludes taxation from that as being one of the most sensitive areas that the member states wanted to keep the old regime alive.

And that's why Georg was absolutely right to concentrate on Article 115, which is the older variant of this harmonization power within the Union. And you're also right to mention Article 116, and I think among the EU constitutional lawyers, this is now also an interesting provision because there has been a number of related debates to what extent that is something that can be used to circumvent the limitations that you outlined in the context of Article 115.

And I mean, politically and constitutionally, I would be more than in favor of this, but of course, the legal basis is relatively indeterminate in a sense that you don't really quite know what is the legislative procedure, if there is a legislative procedure to be followed, and it seems to be an extremely supranational legal basis. So to some extent, the member states would regard this as a nuclear option, and I mean, for those of you who are not so familiar with the provision, it basically allows the Commission to suggest harmonization if there are distortions of competition that cannot be addressed by Article 115.

And so it is a relatively strong legal basis there, but just recently another article has just been published in the *European Law Review* for those tax lawyers that are interested looking specifically at this provision. Maybe one additional article that could also be mentioned is Article 352, so this is just one further up from Article 351. And Article 352 is the most general legislative competence of the European Union, and so to some extent, you could also look at that as a potential base of harmonization and legislation with regard to taxation in the European Union. But it does have the same problem as Article 115, it requires unanimity within the Council, so some of the issues are identical.

Perhaps the difference to Article 115 is that you could also use regulations, for example. I think this is generally open to any form of measures that are there. And even though Article 115 has interpreted, or the Court of Justice has interpreted, some of the limits on Article 115, like the direct effect criteria in relatively generously, and 352 doesn't have that at all. So there's always this sort of very general provision that is also there in the background, absolutely.

And maybe one aspect that I throw in as a constitutional eccentricity, one could think about also implied powers within the context of the EU. I mean, this has happened famously in the context of external relations, and why not think of that in the context of fiscal relations also? But that would, again, be highly controversial, and it doesn't look to me, at least not now, that the Court of Justice would go down this route. But I'm just putting this out there so if it ever came to the fact that the pressure on the Union to harmonize taxation or to even adopt the EU Union tax out of trial and maybe creative ways to think about that.

And maybe quickly, on Georg's comment in the moving from the constitutional elements to the legislative elements. And I think this is something that I also found interesting, and I think a lot of tax lawyers noticed this. Hey, I think I also mentioned this move from this pro-freedom or liberalization directives towards a much more restrictive understanding that seems to consolidate national tax powers rather than to remove distortions of competition or obstacles to trade. I mean, especially in the context of the [INAUDIBLE] one or two, where I think that there have been some constitutional problems, and you raised some too, on this.

And this is probably where some of the constitutional questions on tobacco advertisement really come into the equation, and that's to what extent a directive that seems to be rather giving more power to the member states, or consolidating more powers, restricting if you're embedding forms of distortions. And are actually entitled to be adopted on the basis of Article 115 and 114, and that's absolutely the critical question there, were these cases, like tobacco advertisement in the EU or in the context of the US, the cases that the paper looks at in the first part, are really coming in?

And maybe just on this, I mean, the court has been very relaxed again on Article 114 and 115, post-tobacco advertisements. So many constitutional lawyers have spoken of a false dawn, if you like, in terms of some of the limitations. So perhaps there is some hope for the tax lawyers in the European Court of Justice, would probably be relatively light touch when it comes to enforcing some of the limitations that tobacco advertisement has introduced, such as the removal of obstacles, having some form of positive liberalization effort, or when it comes to the functioning of the internal market. Some form of removal of a substantive distortion of competition that is being there.

So there is a little bit of hope there because I guess the post-tobacco advertisement and jurisprudence has been relatively light touch, again, on some of these restrictions that have been introduced. And I guess the main issue would be in relation to unanimity voting. I think that in terms of competences, it's the Court of Justice has been relatively pro-flexibility or pro-union, even if the Union, like in the directive, gives back competences to the member states.

So maybe they would be harder with it. I think in a way, maybe the revolution, when it comes to positive integration for the future, might actually. Also, when it comes to looking at ways to circumvent the unanimity requirements, or the political safeguards, or federalism that are there. Maybe, third point, and I think also important, Ruth has mentioned that there is another element that is interesting, which is probably part closer to the negative integration provisions than the positive integration provisions. But what they call to spend an awful lot of time tracking, maybe that's development of giving to some extent powers back to the member states, and that is state aid.

State aid to use these categories that Ruth, and Georg, and also I, have used still follows this per-country rules. So I think that even though the Court of Justice has been invited many times now by the Commission to adopt an overall, if you like, or federal approach when it comes to the standard of assessment, it's been using as a frame of reference still the member state and so that to some extent makes it harder. I think also in the context of negative integration to really try to tackle the problem of tax avoidance, for example, or tax evasion when it comes to this state aid provision.

So in a way, these are perhaps for people who would like to see further integration on taxation rather negative or maybe more, and more hindering developments when it comes to the jurisprudence of the court. Lastly, looking also at the external relations side, as Georg mentioned, this was not part of the paper, but I think it's an excellent mosaic to add to that picture. The course had been quite robust when it comes to Article 351 in the past.

So this is a provision that basically says that any form of international agreements that the member states have brought into the Union and is protected by that provision, so the supremacy of European Union law does not apply, but article 351(a) does not apply to inter-state agreements of the member states. So all bilateral tax agreements among the member states, basically, that conflict with the European Union or out. And it only protects agreements with third countries, and there was Georg saying, only when it comes to pre-accession or pre-European Union.

But for anything that falls into it, the court has been tough. So it's been said that all European Union law, basically, prevails over some of these international agreements of the member states, be it primary or secondary law, so even a directive would be valuable and would be enough to, basically, invalidate or suspend, I think is the better word, in bilateral text agreement, for example, that one state has with the third country.

Lastly, to look at the external side of any eventual Union legislation, again, I think that you predicted what will happen. I think that the competence provisions there in the treaties and Article 3,2, so Article three, paragraph two of the TFEU, which says that when it comes to internal legislation, this is one of the variants of Article three, paragraph two, and the so-called [INAUDIBLE] principle, when it comes to the adoption of internal Union legislation, the external competence of the Union becomes exclusive.

So this is also one of the reasons perhaps why the member states were incredibly careful when it comes to the harmonization of tax matters because as soon as you do that actually after this [INAUDIBLE] principle, or Article three, paragraph two, the member states will be deprived of any of these competences externally. And so this reflex or constitutional reflex is indeed something that would definitely apply to what you were referring to. So the irony there of course, is it's the same development as when it comes, for example, in other areas. And that an international norm that is adopted by the European Union, so OECD standards that are adopted by the European Union, will ultimately deprive the member states from negotiating those issues subsequently.

The EU will adopt an exclusive competence in that. I mean, the parallel probably there. The closest one is perhaps in the context of trade, but in trade, it's by definition an exclusive competence of the Union. So that's perhaps not the best example, but an example could be environmental policy, where this has happened, where the member states in the Union negotiated some standards internationally in an international organization. The Union adopts it internally by means of legislation, which has the effect of depriving the member states in the future from negotiating again any international agreement.

The Union would just take over. And that could be a side effect of the implementation of some maybe at least one positive consequence, positive in the sense of pro-Union and positive competence of the implementation of the OECD rules here. So even if, to some extent perhaps, it returns some powers to the member states internally. Externally, there might be that reflex via this [INAUDIBLE] principle that actually externally the Union will in the future negotiate for the member states. Some of these elements that are there.

So perhaps there is at least one positive thing for the Union even with these more member state protecting harmonization measures that you were referring to as a tendency under Article 115. So perhaps a bit for the member states there. They gain some power internally, but ultimately a bit of success for the European Union as well externally. I'll stop here, and maybe we will have some questions from the floor. Thank you very much, again [INAUDIBLE]. And I look forward to any questions.

RUTH MASON: Great. So Georg, do you want to respond to that?

GEORG KOFLER: I have a lot of pressure myself, so I'm kind of putting myself at the end of your queue.

RUTH MASON: So this discussion was really interesting, but it's sort of like everything, right? I mean, it really made me think about a lot of questions and a lot of issues. So I want to just, without being excessively coherent about it, say things that came to my mind as you're both talking. So one, Georg said, well, what happens if we pass pillar one or pillar two as a directive? Does this mean that the member states can lose external competence in tax treaties? And Roberts says, yeah, that could be a consequence.

Well, OK. But these directives are-- so in formulating the directives, the European member states are worried about violating the fundamental freedoms. So they want to apply the same rule internally as externally. So does this mean that you pass a directive and the states lose all control over corporate law because they've lost external control, but the external control implies now full internal control over corporate taxation? So that's a question that I had, and one of the things bringing it back to comparative that's supposed to justify the US states' retention of concurrent authority under the Dormant Commerce Clause is the idea that Congress can't regulate everything.

That there are going to be things that come up that Congress can't get to because it's got more important things to do. So now, are we imagining that the Commission is going to have a ministry of finance and an administrative apparatus to issue regulations in the administrative sense that are going to be needed to implement pillar two? On the scope of the power of the European Union and the idea that under Article 15, in order to have confidence, you have to have something that affects the functioning of the market, and there's the question of whether that just means facilitating the taking off barriers or whether that could mean reducing regulatory competition among the states.

It is an orthodox, sort of widely accepted idea in the United States that, using the Commerce Clause, Congress can facilitate or constrain. So Congress could say you can't trade in a certain thing. And that's accepted in the United States, but it's also thought that we don't really know what interstate commerce is, right? It's the broadest power that Congress possesses, but still, it's limited in some way. And so we constantly have these questions about what is commerce.

But one idea is that Congress should be understood to possess the power to regulate whenever there's a collective action problem. So this is sort of the inverse of subsidiarity. You can't regulate if the states can solve the subsidiarity, but in the US, we look at it from the opposite direction, that is Congress should ought to be interpreted to regulate anything that the states are incompetent to regulate. If there's a problem they can't solve on their own, then we should understand that Congress has the power to solve it. So if there's tax competition, then we would say Congress can solve that problem.

One thing that we haven't talked about that I think is really important and a significant difference between the US and the EU concerns the democratic deficit, at least for tax. Where these text directives, if they're passed or passed by the Council, they're not passed by the elected representatives of voters in the various member states. Let's see, so I have so many other things. But let me just say one more thing. So we've talked about positive integration. We've talked about negative integration. The Dormant Commerce Clause, the Commerce Clause, and the fundamental freedoms, and the Article 115, let's say, or Article 114.

There may be something that's in between that doesn't fall into any of those categories, which is federal solidarity. So it's not entitlement. It's obligation. So we could talk comparatively about what membership in a federation or quasi-federation, whatever you want to call it, what obligations this implies for states vis-a-vis the central government but also vis-a-vis each other. And then what obligations that membership implies for states towards residents of other states, citizens of other states.

I have lots more, but let me stop there because I'm not the only person here. So Robert, I don't know if you want to respond to that or collect more comments.

ROBERT SCHUTZE: Maybe I'll stop with that because there were quite a list of things already. We would give some people also some time if they want to ask a question.

RUTH MASON: Oh, yes, don't forget to raise your hand if you have a question.

ROBERT SCHUTZE: Thank you so much. Let me start from the back. So I think that in terms of solidarity and maybe linking this also to this idea of competition between legal orders or competition of text orders, if you like, within the member states, I think that this, in my view, has been discovered not just by the OECD issues of tax avoidance. But that's been a problem in the EU for quite some time, though, in terms of both the internal market, but also I think when it comes to the harmonization.

In the harmonization context, of course, because of unanimity. And so I think that the weakest link, if you like, are the member states that has the lowest-- probably the lowest tax rate is probably not willing to necessarily harmonize up that tax rate. And so I think that there is a question of solidarity with regard to both. And I think one of the countries that, of course, has been targeted as being complicated is, for example, Ireland-- both with regards to I think that the solidarity with regard to corporation taxes and the harmonization is concerned as well as, of course, in the case law, there are numerous cases now that deal with violence, special tax arrangements when it comes to the fundamental freedoms.

So absolutely, I think that there is a question at the level of the member states for solidarity that perhaps comes out of being part of a bigger bloc and perhaps to have an almost a moral or constitutional obligation to limit that competition of fiscal orders or a race to the bottom that's taking place. But, of course, legally I think that's-- certainly for the harmonization, that's going to be hard to impose simply, because the treaty says unanimity.

Which brings me to the democratic deficit point. I think this is often used by constitutional lawyers as the argument against saying that there is a democratic deficit simply because every single member state to some extent, could veto that piece of harmonization or legislation that's there. Of course, you are right that it's a matter of the Council. And so the National parliaments are out.

But you could say that the national governments are meant to be agents of these national parliaments. So in a way, perhaps, you could say that when it comes to all legal competencies of the Union that require unanimity, to some extent, this argument has been made-- the democratic deficit perhaps is not so strong. It becomes stronger to some extent or for some, when it comes to qualified majority voting, simply because in some areas of the treaty the European Parliament is not yet a co-legislator when it comes to the Council.

And so there is, to that extent, a structural deficit when-- it comes to democratic input within the European Union. But for example, for Article 114, that would be there. It would be the ordinary legislative procedure, so symmetric rights between the European Parliament and the Council.

Moving backwards, Article 115, absolutely. I think that there are some limits. And you're right. I mean are the great expert when it comes to the Commerce Clause. I think that there are also some limits that the new federalism in the 1990s in the US has generated, and I think Sebelius or the Obama case also introduces I think some constitutional limits to the Commerce Clause. So not everything that is allowed.

And I agree with you that these federal competences or Union competences should really be used in order to attack collective action problems. So I think that when it comes to tax competition, for example, you could argue that this is really the way to deal with it. Though, I thought in the US, also Congress hasn't really been so active.

I mean, question mark when it comes to adopting federal harmonization measures when it comes to taxation. I thought there were only one or two. And issues where this has happened and whereas the rest really is still subject just to the domain Commerce Clause limitations for the states there.

So maybe an interesting question for me would be then to you, what's the matter there? Because in the Union, I could certainly-- for the European Union, it is about unanimity. So you are as weak as-- if you like the weakest member state. That's there. But in the US, you could imagine that the simple majority rules that exist would generate much more legislation when it comes to tax harmonization. And yet, that doesn't seem to-- that doesn't seem to be the case there.

Moving upwards to your second point, I think from constitutionally when it comes to the administration of an executive powers of, say, for example, the implementation of OECD standards and so forth [INAUDIBLE] control, I'm more positive that the Union would have that competence. Because under Article 114, there is a number of cases where the Court of Justice has said that the internal market competence is not just the legislative competence, but also an executive competence.

So the limits that the Union has under Article 114 could also be used to the same extent to establish, for example, an administrative structure, agencies, and even take individual decisions when it comes to taking a decision. Because Article 114 now allows for the adoption just of measures, so that has been taken by constitutional scholars to also allow for the adoption of administrative decisions, for instance. So to that extent, I'd say it's possible, I think, for number 2 to-- I wouldn't worry that the administrative elements are lacking when it came to the implementation of some of these measures.

And finally, for the Pillar One and Pillar Two in the external competencies question, you're right. I mean, I didn't mean to imply that within the scope of Union legislation anything that falls within it would be externally preempted or that would be an external competence. When it comes to this [INAUDIBLE] principle, the Court of Justice has said that not anything that falls within the scope of internal Union legislation would become an exclusive external competence of the Union. But only to the extent that this internal legislation would be affected.

Now, whatever that means, and, again, there are no clear cut constitutional criteria. But the court has, for example, said that when it comes to minimum harmonization, internally, that to the extent that the member states are still able to go beyond that standard, they would probably then also still be able to conclude international agreements. So the internal freedom that is there for the member states, in theory, could also be an external freedom.

So in that sense, not anything that falls within the internal text legislation would then preempt the member states from concluding any international agreements. There would be a limit, even if it's in-- even if it's not always very clear but there would be a limit to say that not everything would be depriving-- would be depriving the member states of concluding international agreements.

RUTH MASON: OK, I hadn't thought about these issues previously, but, I mean, it's striking me is that-- this Pillar One and Pillar Two accepted as a directive has much broader implications than I had really thought about before today. But, Georg, do you have a follow up?

GEORG KOFLER: So very briefly, just to combine the Ruth and Robert's responses. So the democratic deficit that we have with unanimity voting only under the special legislative procedure by on the Council is active, raises a number of also domestic constitutional problems and further problems with the external competence just to make-- the mean case. The people in the OECD are people from the National Tax Administrations. The people in the Council are people from the national administrations.

So whatever the OECD decides and will be implemented under Article 115, there is not even a national parliament involved in those states. The supremacy, of course, of EU law leads to the complete switch of domestic constitutional protection, so the principle of equality. For example, in our domestic constitutions has no value anymore, because everything is done on the level of administrations basically. And then that picks up on Ruth's question with Pillar One, Pillar Two.

But you can also think about the common consolidated corporate tax base or the [INAUDIBLE] as it is called in the future, where we might have complete corporate tax-- some tax base harmonization at least. And this could in my view, clearly trigger the external competence of the Union, I mean Pillar One needs to be implemented by a multilateral convention, so that the implementation tool is already international.

And if the EU passes a directive, the directive might say in this internal Union act, that the implementation of the act, which requires this multilateral global agreement, is also in the hands of the Union. So we might have a situation that from the beginning to the end, no parliament was ever involved. And we have completely changed the international tax structure from a European perspective.

And that kind of feeds back in this democracy and democratic deficit discussion that all the previous tax treaties, for example, where parliament is typically-- national parliaments are involved typically would be overridden by Union legislation and Union external treaty making power, where no domestic parliament was ever involved. So you can imagine cases where I think this can become a real issue that things happen to also avoid scrutiny by parliament. So I kind of see the risk a little bit.

RUTH MASON: Robert, did you want to respond to that?

ROBERT SCHUTZE: Yes, if I can. I mean I think it's an excellent point, maybe just some thoughts on it. So of course, you pinpoint the main problem of our times. Now, that I think that after these forces of globalization were really unleashed in mainly the second half of the 20th century, a lot of the powers have been delegated to the executive and in the form of negotiating international agreements. The European Union is part of that trend to, if you like, look for supranational solutions outside the member state.

And so the modus operandi there is really inter-governmental, in the sense, that it's the governments, no, the executive that is negotiating or bargaining on certain types of solutions. And there is-- you are right-- absolutely, an enormous danger that the national parliaments are really outflanked when it comes to their input into fundamental choices now from climate change, to taxation, to international trade standards, and so forth.

I think that the answer that you could suggest when it comes to-- and maybe, to some extent, the unanimity rule within the Council is then not an answer, because you're right, in a way, it's still the same administrative agents or tax experts that are also then in the Council that have been in the OECD. Though, I think that there are ways that the European Union has developed methods of allowing parliaments to do this.

So for example, it's not so much that the European Union dictates it. But it allows it is when it comes to an Article 352, where in the context of Germany, but also prior to Brexit the United Kingdom, and also in Denmark, before the national executive goods could give an agreement in the Council on a certain type of measure. It needed to get a parliamentary entitlement from the national parliament.

And, of course, this is hard. Because I think that in a way it ties the hands of the minister who is going to be in the Council. But it's not been-- that's perhaps the point that I wanted to make-- it's not been prohibited by the Union. So it is up to each of the national parliaments to determine to what extent it wants to have an imperative mandate to use that parliamentary term in which it wants to tie its own executive to a certain resolution that the parliament has taken when it comes to it.

Of course, I mean, it undermines, to some extent of course, the bargaining element within the Council and so forth. But that would be one national solution that the European Union has not prevented from doing so not ideal mean, it would mean that the national parliaments would always have to shadow the European Union. And I think this is already very hard.

But if it was limited to certain sensitive areas, I think you could potentially introduce this. I mean the alternative, of course and maybe this is my preferred option is, of course, to involve the European Parliament. So I think that if you accept the idea that the European Parliament does have legitimate democratic legitimacy, as I would, for example. I've never bought into this no demos theory, for those of you who don't know what I'm talking about. Some academics argue that there could never be any democratic legitimacy within the European Union, because the European Union doesn't have any demos that sort of supports that parliamentary structure that exists.

I don't believe that. So I think that for me, the idea that you have regular elections, you have an instrument and an institution that is there for democracy in the form of the European Parliament could compensate for that lack of national democracy. So one solution, of course, could also be to just insist on involving the European Parliament in the ordinary legislative procedure. And that could be good for all tax managers, no-- [CHUCKLES] -- from 352 to 115 or 116 for that matter. And if-- that's perhaps one way to solve that dilemma, that you don't involve national parliaments, because it would be complicated to actually create that sort of imperative mandate structure, but you rather have the European Parliament really controlling, checking, amending a legislation that's there.

On the external aspects-- maybe. I think there, you could argue that there is, again, the same solution that you could have-- it's not perfect. Because when it comes to the negotiation of international agreements, the parliament now after the Lisbon Treaty is able to-- or is entitled to give its consent for all areas that internally require consent or codecision. And so again, if you then say you democratize some of the harmonization basis within the treaty-- Article 15, 14, maybe 352-- this would also have an external reflex on the external conclusion of external agreements in that the European Parliament would be entitled to at least consent to these agreements.

Again, this is, of course, not perfect, because consent here really means take it or leave it. And so oftentimes, the European Parliament is then facing this dilemma. Does it want to block the entire international agreement on the one hand, because it disagrees with Article 305 of that international agreement or does it let this go through? And again, that creates to some extent, a form of democratic deficit. So it's again, not a perfect solution. But there is a bit of perhaps a better picture than no democratic involvement whatsoever.

RUTH MASON: Tilly?

TILLY: Yeah, hi, thanks. So disclaimer, I'm neither a constitutional lawyer nor an EU lawyer, so please excuse the [INAUDIBLE] of my comments. But your discussion, which was fascinating for me was raised a question-- and particular the discussion of the accountability and the question of the existence of [INAUDIBLE] the point for me of what about the people and really to what extent is the European Union community of people rather than states.

And it may be interesting to go back to the paper and to the comparison with the US in asking whether-- are we watching an evolutionary process in which unions become more or less integrated? Is this some kind of a historical or sociological process or just something that's doomed to stay as a Union of states, but not look at the people.

And the reason I'm interested in this question takes me back to tax. Because tax, at least for me, is not just about the market. Tax is really what uniquely links the state and its people. And it has a lot to do about people's identity and the identity of the community of people that's incorporated in the state. And that might be the reason why the states of the European Union have chosen to leave tax out of the jurisdiction of the European Union to start with. Again, something I'm just speculating on. And it would be interesting to try and think about the distinction within the tax system itself, between what is market related and what's not market related to make that kind of distinction.

One thing that, Georg, you said in your presentation, kind of surprised me. Because you were talking about the process from more freedom, to the people, to more power to the states. And when you're thinking about this in the European Union context, I was wondering whether it's really about more freedom, because more freedom to the people really facilitates the race to the bottom that Ruth was talking about. Well, the more power to the states, allegedly, protects state sovereignty and the ability of states to facilitate community.

But to tie all that back into where I started from, the question of state sovereignty kind of made me thinking, what is really the purpose of us protecting sovereignty? I mean, are we protecting sovereignty for the sake of the states? Or should we-- possibly, are we-- protecting sovereignty in order to protect the people of the state?

Again, something that Ruth alluded to in the terms of solidarity, right? So Ruth was talking about solidarity between states and between states and the federal government. But I wonder if we could talk about any kind of solidarity between the people of the European Union or the people of the US, and what difference would this make?

RUTH MASON: Robert.

ROBERT SCHUTZE: And this time in team and tender with Georg, perhaps, as there were also some issues addressed. Thank you very much, actually. I think I would say that the European Union self-understanding has been that it's moved away from just a purely international organization of states towards an understanding that also includes the people or individuals. So I mean the classic way is just to look at it in the context of, for example, questions of direct effects where the treaties themselves have been seen to give in subjective rights. But even more importantly, I think since the Maastricht Treaty, you have certainly a move also of thinking of national peoples being active agents also in the political context of voting for the European Parliament and the European Parliament being increasingly involved in the internal and external actions of the Union.

And so I think that in many ways, I think that the Union would be seen as a union of states and peoples today, if you allow me this-- in a way, perhaps that you could link it to the United States where, I think you have also this ambivalent or this idea of a dual nature that the union of state is a union of states, but also of a union of individuals that are being united there.

I think there are certainly elements there. I mean turning your argument. If you accept that on its head, it's one of the things that I personally find interesting as a constitutional lawyer. And I think some people have made this argument before. If we do have representation of the individuals already at the European level via the European Parliament, my standard taxation at the European level. So why do we have a situation where it is representation without taxation? And you could argue that I think that the bonds that have been created by the Union are now so strong that you could actually say that taxation powers are an implicit power of the European Union. Because I think that bond is there.

And I think that you mentioned it, that bond is strong. And it's so strong that the American Revolution was started on it in some ways. Not just the American Revolution, also the British Civil War in the 17th century has a tax origin. So I mean tax issues are maybe the most personal issues for a lot of people now. And so yeah, if you lose half of your salary or 40% of your salary, I think that this is a major personal issue when it comes to income tax, for example, what the state is an incredibly strong element there.

So I wonder if-- I mean, if that democratic legitimacy of the Union to some extent is already there, to actually create a fiscal union. And I mean, we've seen in recent times, I think pushes for the Union to really do this. I don't if you follow to some extent the COVID, the next generation developments on the how to fund the COVID assistance that the Union has been given. But there is now, of course, again, a vibrant discussion on what could be tax powers of the European Union that are there.

And so one needs to find them. It's not so easy. And in a way, these harmonization competencies don't seem to allow for tax powers themselves. They only seem to allow for harmonization of national law. But there are possibilities in the treaties, I think, that have yet to be exploited when it comes to also establishing tax powers.

Though, you're right. I mean, maybe very quickly and then I pass on to Georg, that tax always has been a very sensitive issue. And it's been sensitive for the Union in the internal market.

We didn't talk too much about it. But when it comes to the ordinary constitutional principles in the internal market and the fundamental freedoms, the Court of Justice has developed its own special principles for tax measures. Because it doesn't want to apply the same very interfering principles-- for example, the principle of mutual recognition when it comes to taxation. And so similarly it's been in the past very hands off when it comes to harmonization or the adoption of tax measures.

I hope that this will change. I think that the link between representation and taxation is there, and maybe that will also to some extent address the question that you asked, whether this is a matter for who are we protecting sovereignty for-- is it the states or is it the people? I guess that if we look at these global phenomena at the moment, the tax-- these extremely complicated tax arrangements where, ultimately, hardly any of the member states knows whether it's able to tax one of these multinational corporations or not.

And all but these multinational corporations are even able to export their profits outside the European Union because free movement of capital also allows for the export of capital to third countries. I think that's a situation where if you want the sovereignty of the Union or the sovereignty of the people of Europe are really at stake. And I think that the Union should really act to do something about this.

[INTERPOSING VOICES]

RUTH MASON: Yeah.

GEORG KOFLER: Only very briefly. So I agree with all of the statements. Now that I think about it, I'm not sure if the practice in the European Union is kind of legally driven or politically driven. Because all the harmonization and also what we might call [INAUDIBLE] tax payer harmonization only deals with corporate taxpayers.

So it's not the people that the EU tax legislation really covers. It's corporations. So also the representation question is perhaps only a second-tier question. And that seems to be the program of the European Commission for a long time to focus on corporate taxpayers.

I'm not sure if this is kind of politically driven [INAUDIBLE] your arguments that we want to be kind of more positive to individuals exercising their freedoms. And we can be strict with regard to corporate taxpayers doing that. But it kind of strikes me, perhaps, as one distinguishing point where we might find some also legal rationale why we focus on corporates and not on individuals.

And for the second question, I think-- or the second point, I think it's a question of how cynical you want to be. Take, for example, the exit taxation in the [INAUDIBLE]. Exit taxation means you leave a country, so you exercise one of your freedoms, you establish yourself somewhere else, or you move your residence somewhere else. And at the moment you leave your country, that country will tax you on you are appreciated the value of your assets without the need that you have realized the gain. So you don't have a cash flow, but you still taxed.

And under the case law of the court-- the freedom case law that's permitted to a certain extent, if there's a proportionality escape that you can spread the tax payment over a couple of years. But there is no EU fundamental freedom requirement to have an exit tax, because it's anti-freedom. Still, the [INAUDIBLE] puts an obligation on the member states to have such an exit tax.

And now the question is, is this really leveling a playing field to be of an internal market rational to have an obligation to have such a tax or is it something different? And if it's something different, it's very hard for me to link the specific item, for example, to the establishment of functioning of the internal market.

Now, we can find meta arguments, which you kind of underlying your points. That you say, OK, the internal market needs to have member states. Because without member states, no internal market. Member states need funding and budget. So the existence of the member states as part of the internal market needs a solid budget.

And for that, we need solid taxation. So kind of a very remote-made argument where anti-tax avoidance in the broadest sense should be something that is good for the functioning of the internal market. But for me, it's already-- if you see-- if you take tobacco advertising or the court case, it's-- I should say a remote document, but certainly in the sovereignty area.

RUTH MASON: Thank you. Angela.

[INTERPOSING VOICES]

ROBERT SCHUTZE: If we still have a bit of time, I agree, Georg, maybe here. I think that one of the interesting bits for companies is-- you're right that the representation/taxation nexus is not so strong there. Even though you could say that the taxation duties are imposed by the fact that the corporate charter used to be a grant that was given by a state to that company. So in a way, you could say that you pay for your life, if you like, but by being subject to taxation.

And maybe very quickly, I think this is a fascinating point. I think one of the reasons why I think that the court was so conservative-- I mean, conservative in a sense-- no, sorry, the Union legislature was so conservative in the sense of allowing for these exit taxes and the codification of the national jurisprudence and so forth there is that positive harmonization is not forthcoming.

So I think that-- one of the possible hypothesis is there could be that because positive integration is blocked, the court doesn't want to push negative integration. Because in the past when it comes to regulatory barriers of trade, I think what happened is that it pushed negative integration-- for example, in Cassis de Dijon, but all of the other cases on the internal market, because it wanted to push member states into adopting a legislation ultimately. At least, that's what I think.

So it wasn't so much the principle of mutual recognition as an automatic form, but it was putting pressure on the member states to go into the council and to hammer out a deal under these positive integration measures. And that hasn't happened in the context of fiscal measures for-- whether it's still unanimity or other political reasons that are there. And maybe what you see now is that the Union recognizes that you can't solve that problem by means of positive integration, because you have a number of [INAUDIBLE] in member states that are ultimately not willing to make any compromises when it comes to tax harmonization.

And so the only way is perhaps to then give them all of the member states more powers under the internal market provisions-- sorry, the fundamental freedoms. Maybe just a question mark there. Thanks, sorry, Ruth. [INAUDIBLE]

RUTH MASON: Fascinating. So, Angela.

ANGELA: Thank you for this fascinating discussion, Georg and Robert-- Robert, Ruth, and then [INAUDIBLE] I think it was very interesting for all of us. I just want to say some reflections from my side. Because I think the whole competence discussion within the European Union is ultimately about what the EU can do and what it cannot do. And I just wanted to go through some of the points that you made and see maybe offer my reflection on this.

Ultimately, the limitations to the competence of what the EU can do in tax are twofold. On the one hand, it's unanimity. On the other hand, it's substance. Because we have to have an article in the treaty that tells you this is the legal ground.

So on the unanimity, I think the way the discussion has been unfolding, specifically in the tax context, was can we escape 1145. Can we use another legal basis? And this hasn't been mentioned today, but country-by-country reporting is an example when we try to use another legal basis because it offers us advantageous procedure in terms of [INAUDIBLE] unanimity.

What if we don't have agreement, but we cannot use other legal basis, then we still have this 116. And that's a very intriguing discussion on whether it's a nuclear bomb, whether we will ever see it being used or not. So this is where we are politically.

In terms of what I think is more interesting from a legal point of view is when we take 115, are there actually any limits? The only reading of the limits we can find when we read 114, and the jurisprudence of the court on that article, right? But what we do know-- the big takeaways is like that review by the Court of Justice, for EU Court, and we have an article which is defended by the unanimity voting. So the court is likely to be even more reluctant to police the limits of the competence exercise under 115.

I don't think I would be very provocative to say, do we actually have limits under 115? And I think Georg alluded to that when he was speaking about meta arguments-- what about exit tax? Is this really speaking to the development of the internal market? And I think that's a very interesting discussion.

Is there really a limit-- anything that will push us from 115 into 352. And I think my view would be that on where we current stand, it would be very hard to find example in the tax field that will not fall under 115 that you would seriously have to look elsewhere.

In terms of democratic deficit, I wanted to comment a bit on this. Because the last time we amended the treaty was really a long time ago. It may not feel like a long time ago, but it was a long time ago. And I think the role of the parliament has changed at the political level. The parliament is much more active. There have been these committees where the parliament was much more vocal about tax issues.

So in my view, when we come again to discussing the treaty provisions, there will be a very substantive discussion on the role of the parliament in relation to tax matters. And I think we might see that being something discussed. I agree that the member states are very reluctant to forego unanimity. But if the discussion is different, like what should be the role of the parliament, there we may see some changes that are long overdue on this.

And the final point on competition that I wanted to make, which we kind of touched upon a bit when we spoke about pillars and the implementations for the EU, is really the impact on the competence of the EU-- what has been happening currently with the international tax debate when the OECD is developing substantive provisions, and then they are implemented by the European Union. We have that discussion in relation to EU and member states when they speak about implementation of directives, copy pasting, et cetera. And we have that dynamic now developed between the OECD and the European Union.

So before we even get into discussion what will happen to the competence of member states versus the EU, I thought one angle, which we didn't touch upon, is that the impact on the competence when it comes to that dynamic between the inter-governmental body and the EU. Thank you for this time.

RUTH MASON: Robert.

ROBERT SCHUTZE: Thank you so much, Angela. I think I start with the last one, again, because it's true that we didn't look at that relationship in terms of, say, international organizations dealing with tax and the impact that they have on the European Union. I mean, correct me if I'm wrong, but it's mainly recommendations that the OECD issues. These would not be seen as internationally binding norms. I'm not sure, so that's why I'm double checking with you.

ANGELA: The reality, Robert, is it depends on, which hat on you probably will be answering that-- with which hat you will ask me to answer that question. But if broadly speaking, there are different types of conclusions originating from the OECD. There are minimum standards, and there are recommendations, and there are best practices. So there will be a range of decisions, but then they could all be implemented within the EU through our hard law measures. So there will be a range, Robert. So I don't distinguish.

ROBERT SCHUTZE: So I think that in any event, I think even if it was soft law, then it would still-- having a form of indirect effect, I think, on European Union law. Not so much in that it, say, preempts the Union from adopting its own legislation, but rather that probably any form of legislation or maybe even some primary laws-- I'm not so sure-- I think might be interpreted in the light of some of the OECD recommendations or the soft law conclusions that are being adopted.

I think where you are truly right to point this out-- if it came to an international tax agreement at the European Union, for example, concludes whether it's-- it ever were the case that it concludes a [INAUDIBLE] tax agreement, for example, with another-- with a country, then the status of those international agreements in the Union legal order is above ordinary legislation.

So I think unlike, for example, in the US, an international agreement that is seen to have direct effect within the Union legal order, because the Union is an honest legal system, would actually prevail over internal legislation that is there. So it would be direct-- I mean, in theory, if it has direct effect, it would be directly applicable just like legislation. And it would have a status that is above ordinary legislation in the EU. So to that extent, it would also limit the powers of the European Union to adopt any form of fiscal harmonization, for example, if that was the case.

But I'm not sure for the OECD. So that's why I'm not an OECD expert to what extent these norms are seen as treaty norms or internationally-binding norms. I think that they will probably be characterized more as for as norms of soft law, norms as a recommendation to be addressed to the member states.

Working backwards for the second element, I think that in terms of the European Parliament, you are absolutely correct to point out that the European Parliament is rattling in its cage to get more powers for the Union when it comes to fiscal measures. And they are mainly, of course, in the context of an aspect that is not so much to do perhaps with tax harmonization. Though, that's also the case when it comes to, for example, some of the issues like tax avoidance. But it's in relation to the Union's own fiscal capacity.

So I think there the Union parliament has been saying for a long time in its resolutions, the Union needs to get its own fiscal powers. And I mean a former president of the parliament even spoke of the need of a Copernican revolution when it comes to fiscal competences of the European Union. But the parliament, I'm not sure how much power it ultimately has in terms of pushing that agenda through. I think that it's fairly limited there.

And finally, I think on terms of the constitutional limits on Article 115, I mean, Georg has already said it. It partly depends on these two alternatives. So I think it all depends-- is it establishment or functioning? Because the legislation even that is restrictive to the establishment of the internal market, such as these exit taxes that without a doubt into free movement of companies when they move from state A to state B could potentially still be justified by removing these distortions of competition.

And I think that would probably be the trump argument here. To say that a German-- a formerly German company doesn't no longer establish itself in Germany, but rather goes to Ireland because it's afraid of some taxation disadvantage that it might have under German legislation as opposed to in other legislation. And so that movement itself would be seen probably as a distortion of competition when it comes to the freedom of choice of companies to establish themselves within the internal market.

And that would be the big question, to what extent maybe these two elements need to be balanced. I think that I also hadn't thought about it. To what extent you can really justify a Union legislation that admittedly removes distortions of competition, but at the same time, introduces barriers of trades that are technically maybe unacceptable.

And I'm not sure. I think at the moment, as far as I know, the Court of Justice uses these two variants-- establishment and functioning in Article 114 and 115 as alternatives. So it doesn't balance them. So if you fulfill one, you basically have the competence to deal with it. And it would be harder.

I mean, maybe there is one way to look at this by saying that the Union legislature is also bound by the fundamental freedoms. So you would say the Union has the competence to adopt this type of legislation that establishes barriers in the internal market, but that Union legislation would violate the fundamental freedoms themselves.

But this is really also a bit controversial. Because in many ways, the fundamental freedoms are often seen to be addressed to the member states and not necessarily to the European Union. So you'd have to make the argument that the Union is also bound by these fundamental freedoms and that the Union legislature would be limited.

It wouldn't be able to establish, let's say, major restrictions on the free movement of persons, or companies, or something else that might be justified by this idea of removing distortions of competition but violate the fundamental freedoms. But that is another really interesting constitutional question that I would also have to look at to what extent that is the case that the Union legislature is itself bound by the fundamental freedoms.

So in a way, I think that, to translate it into US terms, it would be to say to what extent is the US Congress acting under the Commerce Clause bound by the Dormant Commerce Clause. And in a way, this is kind of very strange. [CHUCKLES] Yeah.

RUTH MASON: There's a good answer to that, which is not at all. It's completely clear in the United States that Congress could stop cross-border commerce if it wanted to. But this-- we are out of time now. We had such an amazing, such an interesting conversation. I have lots more questions. I know that there are more questions posted in the chat, which we will save for you and send to you, Robert.

But I just want to say, thank you both, Georg and Robert, for this amazingly interesting discussion. Tilly and I are really glad to have you here. And we will continue to do these sessions so everybody look on social media for the post of the next session. Thank you.

ROBERT SCHUTZE: Thank you very much, especially to Georg for a wonderful presentation and to Ruth and Tilly for having me. And thank you also for the questions. And I'll hope I can join the other meetings maybe in the future too. Thank you.

RUTH MASON: Great.

GEORG KOFLER: Big thank you from my side. It was wonderful to have you all be invited.