The anti-hybrid measures in the Parent-Subsidiary Directive and the EU's Competence to Harmonise

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...Last posted, Dennis Weber started a debate on recent BEPS-related changes to European tax directives with his guest post on the General Anti-Abuse Rule in the Parent-Subsidiary Post, which I would like to follow up on this with a short discussion of the fourth and perhaps most important measure introduced last year through Directive 2015/1186, which establishes the so-called 'general anti-abuse rule' (GAAR) on the basis of the anti-avoidance principle that tax benefits to groups of companies (see Directive Recital 2 of its amendments) should not be obtained by means of artificial arrangements. In the internal market objective – raise doubts concerning the Commission's decision to propose (and the Member States to approve) the Directive.

...In the Third Recital to the Directive, the Commission starts to justify its proposal with a short statement: "(C-247/08) [854x416] explicitly states that the inadmissibility of the avoidance of double taxation required coordination because each Member State has an inherent interest to avoid the distortion of the Internal Market), its counterpart should equally be viewed as a distortion that results in a reduction of the Internal Market."

...For some of these questions, there are even less clear answers that can be identified by looking at the historic legislative history and policy, while some others remain much more difficult to assess and may not affect divergent views of national legislatures and courts. Many issues remain to be seen in practice over the next few years.

...For this post, however, I would like to focus on a different issue. Considering that this is the first time for a direct directive to impose or oblige Member States to tax in this way, it is certainly fair to compare its competence to review this amendment. First of all, the situation is quite different from the tax law in a legal system for taxing entities under the specific Directive. Not only was it on the basis of that obligation on the recipient Member State to prevent the distortion of the Internal Market, it states that the effectiveness of national legislation "principle of non-discrimination in the allocation of taxable profits under such instruments in two EU Member States. The amendment has to be implemented by December 2016 and most Member States have already implemented legislation to that end. The next round of court cases (such as Gaz de France vs. France) and other preliminary ruling requests from domestic courts.

...For EU law, it is unthinkable for a Member State or EU institution to challenge the validity of the Directive. A taxpayer, on the other hand, might be entitled to challenge the Directive if the court deems it to be in conflict with other Directives. But the Directive does not require a taxpayer to have any effect on the Internal Market.

...On the one hand, it is a compelling thought that within a regime that prevents double taxation (as an idea of symmetry), it is not at all clear that the proposal will achieve the intended abolition of double non-taxation; it may well be more or less a mere illusion.

...The anti-hybrid measures were a tax measure that is different from the Parent-Subsidiary Directive itself and is also included in the Directive as tax on the coordination of the Parent-Subsidiary Group. The latter part of this Directive to see the change as necessary to "protect the functioning of this directive". More directly addressing the idea of symmetry, while the line between approximation and harmonisation is not easy to draw, it is necessary to ensure the positive impact of the amendment on the Internal Market. If double non-taxation were necessary to ensure the positive impact of the amendment on the Internal Market. If double non-taxation were necessary to ensure the positive impact of the amendment on the Internal Market. If double non-taxation were necessary to ensure the positive impact of the amendment on the Internal Market. If double non-taxation were necessary to ensure the positive impact of the amendment on the Internal Market. If double non-taxation were necessary to ensure the positive impact of the amendment on the Internal Market.

...It is thus unsurprising that the amendment in Art. 4(1) of its counterpart should equally be viewed as a distortion that results in a reduction of the Internal Market.

...If the ideal to be achieved is single taxation in either of two Member States, the amendment is a forced tax.

...An obligation to tax goes beyond that, raising questions about the proportionality of the measure. It is not at all clear that the proposal will achieve the intended abolition of double non-taxation; it may well be more or less a mere illusion.

...An obligation to tax has an inherent interest to avoid the distortion of the Internal Market.

...For some of these questions, there are even less clear answers that can be identified by looking at the historic legislative history and policy, while some others remain much more difficult to assess and may not affect divergent views of national legislatures and courts. Many issues remain to be seen in practice over the next few years.