Anti-Hybrid Measures in the Parent Subsidiary Directive and the EU's Competence to Harmonise

European Tax Blog
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Please refer to the post at Werner Haslehner, Kluwer International Tax Blog.

Last post, Danie van der Walt debated a debate on recent BEPS-related changes to European tax rules with his colleague Vincent De Tonne on the Kluwer Tax Blog. I would like to follow up on this with a brief切入点 on the Parent Subsidiary Directive, which is a part of the Anti-Hybrid Measures workstream led by the European Commission in the current BEPS process.

The Parent-Subsidiary Directive (77/96/EEC) is the European equivalent of the US Internal Revenue Code Section 1248, under which an obligation to tax is in theory imposed on the recipient state upon distribution of profits from the subsidiary to the parent. The directive would not normally apply to debt; however, a number of Member States have adopted interest limitation rules in addition to the directive.

The directive itself and is also distinct in its obligation to tax from the newly introduced Interest and Royalties Directive, which primarily ensures that a Member State can apply its own GAAR to “tax” abusive arrangements by way of substituting an arrangement that is not genuine with another one. It does not require a Member State to implement the rule.

The obligation to tax comes in two forms: first, the tax obligation related to the distribution of dividends; and second, the tax obligation related to the distribution of interest and royalties.

The Parent-Subsidiary Directive only includes the equivalent of the OECD’s “defensive” rule by imposing an obligation on the recipient Member State to “tax” such payments.

The anti-hybrid measures have increased the pressure on tax-motivated behaviour in certain areas, such as the comforting of trusts and tax havens. However, there is a need for a clear and open discussion regarding the requirements, which directly relates to the necessity and proportionality of the measure.

While the word “tax” (fiktiver Verlust) (e.g. a disregard for purposes of a net wealth tax) trigger the obligations to tax:

- Why a rule on “deduction” but not for “mandatory” profits, although both are on the same economic base?
- Why does it have to be “the” rule for profits, when there has been a year-by-year discussion at the G20 to lower the Double Taxation Avoidance Agreement (DTAA) threshold or investing in companies not covered by the Parent Subsidiary Directive (making the CJEU’s decision – which contrasts with case law on company law directives – rather more

The Parent-Subsidiary Directive applies to certain payments, including:

- Capital gains
- Royalties

At first sight, this appears sensible. Uncoordinated tax regimes create market distortions; therefore, there is no equivalent obligation to tax in the Interest and Royalties Directive or any other directive)

Why avoid double non-taxation for capital returns from equity, but not from debt investment? (as

The Commission claims that the Parent-Subsidiary Directive addresses distortions caused by hybrid mismatches, which are tax devices that allow entities to obtain a tax advantage in the Member State of origin and to avoid tax in the Member State of destination.

This is not the case. The Parent-Subsidiary Directive leaves Member States free to adopt any measure they consider appropriate to prevent double non-taxation, provided that it is compatible with EU law.

The most important protection in this respect is the antidiscrimination clause in the Treaty on the Functioning of the European Union.

If these observations – which in the end all relate to the necessity and proportionality of the measure in light of the potential consequences – are true, it may even result in situations where it is preferable to exclude provisions of the directive from a directive.

The directive’s amendment is thus hardly necessary to ensure the positive impact of the directive on the Internal Market. If double non-taxation were effective to achieve its objective of avoiding double taxation without it; the amendment is thus hardly

The Parent-Subsidiary Directive still fits the description of the anti-hybrid measures

In addition, the Parent-Subsidiary Directive itself is not affected by the tax avoidance general and anti-avoidance provisions in the directive.

It is often difficult to distinguish the legal from the economic base of an arrangement in order to determine whether it is genuine or not.

The Parent-Subsidiary Directive does not contain any guidance as to how such tax should be calculated. The directive does not require a Member State to tax in such cases.

However, this should not be seen to amount to an obligation to tax, not least because there can be no guidance as to how such tax should be calculated. The directive does not require a Member State to “tax” such arrangements by way of substituting an arrangement that is not genuine with another one. It also needs to be noted that, if the tax is too low to be effective, the directive would be just as

The Commission claims that the Parent-Subsidiary Directive regulates intra-group transactions.

If these observations are true, it may even result in situations where it is preferable to exclude provisions of the directive from a directive.

Who is responsible for the implementation of the Parent-Subsidiary Directive? There is no rule in the directive itself and is also distinct in its obligation to tax from the newly introduced

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