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Alignment in International Tax Law – Are we heading towards Revival of the CCCTB Proposal?

Jakob Bundgaard (CORIT advisory) · Tuesday, February 10th, 2015

It is well known that the world's economies have turned into a global economy during the last decades. Moreover, it is nowadays common knowledge – also outside the professional tax community – that states are fighting each other for tax revenue, while multinationals are trying to reduce their tax burden through tax planning that may be considered aggressive in the eyes of the wider public. These tendencies seem to have brought along increased alignment of national corporate tax regimes, as the states' room for manoeuvre is under growing pressure.

The debate on whether a coherent international tax regime exists is not new. However, recent developments have shown that the contours of such a regime may be expected to become increasingly clear in the years to come. One of the driving forces obviously is the OECD project on base erosion and profit shifting (BEPS), which among other things includes proposals for specific additions and amendments to be implemented directly in domestic tax law.

Within the EU, however, other factors appear to be even more important. Despite the fact that harmonization through adoption of directives historically has proven to be difficult, EU law has had a significant impact on the design of national tax rules through negative integration. Accordingly, based on the free movements the European Court of Justice (ECJ) has helped curbing discrimination in the field of direct taxation by prohibiting tax rules that entail the disadvantaging of cross-border operations as compared to domestic operation. In particular, the ECJ case law has affected the design of member states' anti-avoidance provisions, resulting in greater alignment. As an example member states' CFC-regimes could be mentioned, as most of the regimes now include an exception with respect to subsidiaries that cannot be considered wholly artificial arrangements.

Moreover, in recent years an increasing amount of state aid cases have been opened concerning member states' direct tax rules, as these rules are considered to discriminate by favoring certain undertakings or the production of certain goods. The recently opened cases against Ireland, The Netherlands and Luxemburg have gained huge public attention, partly because they concern the well-known multinationals Apple, Starbucks, Amazon and Fiat. The attention reached even higher levels when the International Consortium of Investigative Journalists on 5 November 2014 made hundreds of tax rulings from the Luxembourg tax authorities publicly available. In this regard the Competition Commissioner Margrethe Vestager has already confirmed that the Commission will initiate an investigation in order to find out whether Luxembourg's tax rulings, as well as other member states' tax rulings, should be considered illegal state aid.

These state aid issues are for sure interesting from an academical and technical point of view. However, from a tax harmonization perspective the political side effects of “LuxLeaks” may prove to be even more interesting. Thus, the political debate following the release of the tax rulings appears to have revived discussion on the Commission’s proposal for a common consolidated corporate tax base, which has more or less been kept in the drawer since it was released in 2011. From within the EU, Competition Commissioner Margrethe Vestager has expressed hopes that the leak will give political momentum to the adoption of the CCCTB proposal, and Commissioner for Taxation Pierre Moscovici has stated that he will give high priority to advancing the CCCTB proposal.

What is more important, however, is that (some) member states are again discussing the possibilities of introducing CCCTB, as it has become increasingly clear that a common set of rules may be the only effective way to mitigate aggressive tax planning taking advantage of some member states’ favorable tax regimes or mismatches between member states’ tax systems.

Only time can show whether the current political momentum is strong enough to advance the CCCTB proposal. However, given the focused efforts of the OECD and the European Commission, as well as the current widespread public attention concerning tax avoidance, more international alignment of national tax rules is to be expected. Accordingly, in the course of 2015 OECD plans to release 8 additional BEPS reports and the Commission will – as stated in its Roadmap on BEPS in the EU – continue to work on soft and hard law measures in this area. Thus, in sum, the direction towards greater international alignment of national tax rules seems clear, whereas the pace and scope remains uncertain.

This post was written by Jakob Bundgaard and Peter Koerver Schmidt (CORIT advisory).

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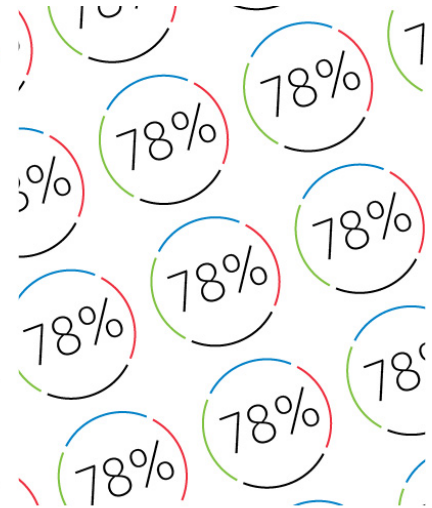
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This entry was posted on Tuesday, February 10th, 2015 at 11:00 am and is filed under [CCCTB](#), [EU/EEA](#), [State Aid](#)

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