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A Mysterious Study in the Code of Conduct Report 1999 and a Rumoured French Connection

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Let's go back a few weeks, to March 18, 2015. The EU Commission announces its much heralded Tax Transparency package. The package contains a surprise element: the link to the Code of Conduct Report of 1999. To refresh memories: this report, lead by a UK national, contained 66 harmful tax measures. The 66 could be split into 40 intra-EU and 26 for mainly dependent and associated territories. In 1999, the EU contained 15 member states. Out of these 15, 2 had no harmful measures: the country of the chair and Sweden. The Benelux countries together had 20 out of the 40; Ireland had 5 and France had 4. Countries like Greece, Italy and Portugal each had 1 and Spain had 3 harmful measures. I recall at the time eyebrows were raised because of the selection of and allocation to countries of harmful tax measures. However this was long forgotten and stored away.

The reference to the Code of Conduct report of 1999, in the Transparency package, reminded me of the suspicions at the time about nature of the process. Certainly today, with the benefit of hindsight, it is of interest to review the decision process (including the blatant disregard of the Dutch objections as voiced in over 20 footnotes). Such review is called for if only bearing in mind what was said later –during the financial crisis- about the administrative affairs of Greece, Italy, Portugal and Spain. I assume that the newly installed European Parliament Tax Rulings Committee, with a French Chairman (Alain Lamassoure) will look into this matter, if only to learn from what happened or did not happen. After all, the header of the press release announcing the new chair quoted Lamassoure "This is about transparency and justice".

However, this is not what I regard as the mystery surrounding the Code of Conduct Report. Had it not been for the Transparency package I would not have recalled and combined various signals and pieces of information received since 1999. What is the issue? Paragraph 26, page 10, of the Code of Conduct Report (23.11.1999, SN 4901/99), reads as follows:

"26. The Commission appointed consultants to undertake a comparative study across Member States of administrative practices in taxation. Member States presented a number of comments on that study. The Group took note that the capacity of national authorities, whatever their level, to take account of individual cases varies among Member States and may have an influence on the location of business activity within the Community, even though this capacity may not give rise to an identifiable measure or practice that can be described and assessed by the Group. At this stage the Group decided to add four measures to the list of potentially harmful measures and to move them into an accelerated assessment process."

The study mentioned about administrative practices was never published. The reason for not publishing was not clear. The reference in the Report that parts of it were apparently used in the Code of Conduct Report indicate not only the existence of the study but also an unwillingness to publish. In today's world where countries compete and taxpayers must be more transparent than ever before the time has come to question the decision not to publish. The report was prepared by the UK Law firm Simmons and Simmons. Strong rumour has it the report was not published because the French administration did not like it and certainly did not want it out in the open.

Will the (French-perhaps not relevant but noteworthy given the rumour around non-publication of the 1999 study) chair of the EP Committee dealing with the transparency package request publication and if not, what will be his reason not to do so? Arguments like, we have today 28 member states and not 15 or, a 1999 report surely is outdated do not sound convincing. The more so against the background demanding full transparency of the taxpayer and tax authorities. I suggest, the EU Commission not only releases the 1999 report on administrative practices but at the same time commissions a new report on the same topic for all 28 member states.

After all, tax rulings, the main topic of the Transparency package is an administrative practice; it is relevant to know what the various administrative practices are in the member states, as done in the 1999 report that was suppressed and never published. The Commission Staff Working Document dated 18 March, 2015, SWD(2015) 60 final, shows very clearly in Annex 3, "Legal aspects of practice of tax rulings for companies across members states", why a new report on administrative practices is required. The list and the processes mentioned in the annex hide an enormous difference in procedures. It is relevant to let these be surfaced and shown to all involved: taxpayers, tax authorities, EU citizens and politicians.

Since I'm at it, I would like to raise the following issue: France announced recently a new incentive to give the economy a boost (additional depreciation for one year of 40% above the original cost). This no doubt will help for companies in France to accelerate their decisions to invest but will also cause companies outside France to reconsider switching their investment to France. Is this harmful tax or is this an incentive that's acceptable. I would like to argue –no doubt like France- that it is an incentive however, I fear that countries suffering from the investment switch to France will challenge the move by the taxpayer and adjust profit allocations between that country and France. Hence a harmful tax measure for them. This all points to a rapid solution for the EU tax landscape to be reformed in line with the major markets EU companies compete with, US, China, India. Hence, introduction of a CCCTB; consolidation from the start.

TJK

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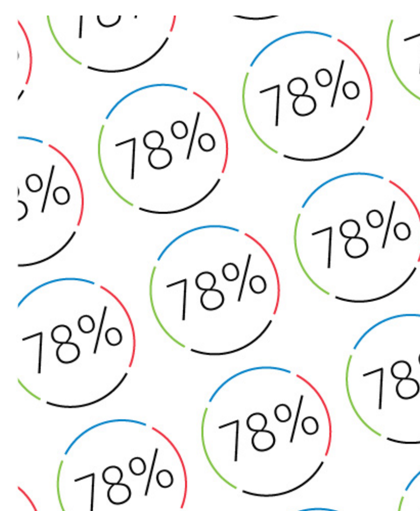

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