

Kluwer International Tax Blog

Who is “Business”? Notes for the 2019 IFA Congress in London

Johann Müller (International tax professional) · Tuesday, January 15th, 2019

As we approach the halfway mark between the 2018 IFA conference in Seoul and the 2019 one in London, I want to clear up some issues around “Business” as in stakeholders in tax discussions. Classically these stakeholders are “Government”, “Academia” and “Business” (plus the last 10 years “Civil society”).

So, who should “Business” be?

Setting the stage: IFA 2018 – reactions to the EU digital tax proposals

One of the most discussed topics at IFA 2018 was the EU Commission’s proposals for “[Fair taxation of the Digital Economy](#)”. In short, there is a long-term net income tax with digital profit allocation rules proposal and an interim 3% turnover tax proposal. See the previous link and this [Q&A from the Commission](#).

Speaker after speaker spew criticism in panel after panel; a US lawyer strongly argued how this would hurt US business and a member of the Danish Confederation of Industry followed suit. Other academics and consultants from both sides of the Atlantic chimed in and but for the lone representative from the EU, all agreed with each other that this was not a good thing. Absent from the whole discussion was:

1. any reference to obvious parallels between the EU proposals and US state taxes (see hereafter);
2. anyone from business, in particular – as this is the EU – anyone from a significant EU digital company or group of companies.

US state taxes

- Many, if not most, US states tax the income and sales from companies from other US states; more and more on the mere occurrence of sales in their territory. E.g. a company in Pennsylvania selling for more than USD 500.000 per year to residents in California, is subject to California income tax even if it has no physical presence in California.
- In addition, there are “[Finnigan](#)” and “[Joyce](#)” states. If a company is selling in a Finnigan state, it may also be taxable in that state even it has no taxable presence in that state, but a sister company has. This is because Finnigan approaches nexus on a group level, not a per company level.
- Then there are [throwback rules](#) where a state will tax income with no nexus to it, simply because no other state has (e.g. Pennsylvania has a territorial tax system, so California could in theory tax

other income which Pennsylvania “should have taxed” but did not). For excellent overviews, see the [US Tax Foundation website](#).

- In 2018 the US Supreme Court decided the [Wayfair case on digital taxation in South Dakota](#). The [decision itself](#) gives an excellent summary of why digital taxes are deemed to be fair.

Me thinks that the US speakers on the IFA 2018 panels need a hard think on exactly how much they undermined the legitimacy of IFA’s claim of representing unbiased, academic discussions on topics of international taxation, before they return to the IFA table in 2019.

Who is “Business”?

Tax consultants are not “Business”

I guess:

- most governments would take offence if government consultants present themselves as “Government” even when they are not government employees, but only advise governments;
- likewise, most academics would not be happy with someone without a phd, or teaching at a university, presenting themselves as “Academia”, just because they advise “Academia”; and yet
- no one seems to take issue with tax consultants presenting themselves as “Business”, even when actually they are actually just advising MNEs about tax.

Obviously, tax consultants have businesses; a few of them are MNEs in their own right. As such, grouping tax consultants with “Business” may be forgivable at first as a mistake made upon superficial consideration only. But it is no excuse upon further consideration. Tax consultants and business have vastly different, often opposite interests:

- Business thrives in a lack of tax controversy, tax consultants loose revenue;
- Business thrives when laws are clear, tax consultants loose revenue;
- Business thrives when compliance burdens are light, tax consultants loose revenue;
- Business thrives when laws do not contradict each other, tax consultants loose revenue;
- Business growth slows down in complex tax driven structures, tax consultancy fees soar.

Tax consultants are a highly specialized, densely populated profession. If at University you score 90% for an exam, you have done well; if as tax consultant your advice is 90% accurate, you are liable. International tax consultants are generally expected to know 100% of the laws of one country in one broad tax area (VAT, corporate income tax, inheritance tax, etc.). With the complexity of taxation across countries, they are also a desperately needed profession. But that does not mean that they know “Business” or should represent it.

Fact is, most tax consultants (and I have been one myself for many years), do not know “Business”. They know their tax laws, as they should. They are asked about their tax laws; they are not asked about actual supply chain management, they are not asked about marketing strategies. Most tax consultants have never been in business. They are used to being the upper class of their organisations, “the fee earners”. That is not the same as being an in-house tax professional.

When you are an in-house tax professional:

- you are a back-office support function; you are part of what transfer pricing specialists call “low risk routine services”;

- you are supposed to take care of compliance, avoid hitting the press, avoid paying too much tax (but generally also not draw attention for paying too little) and avoid tax disputes or make them go away as quickly, cheaply and quietly as possible. All of this at the lowest reasonable cost and use of resources;
- you are not supposed to know everything of the laws of one country, you are supposed to know the practicalities of the laws of the countries for your group, where your group operates; and
- you are above all supposed to be practical and compliance minded.

And this why the US lawyer and other tax consultants on the IFA panels could easily lambast the EU proposals. They paid no attention to the relative simplicity and legal certainty of a 3% turnover tax. Instead, if business had to pay tax in Europe at all, they preferred the complexity of a net income tax. Thereby they implicitly preferred endless compliance, endless mounts of TP documentation, application of complex Authorised OECD Approaches to profit allocations, benchmark studies, tax disputes, court cases, mutual agreement procedures, legal uncertainty – and all the fees that go with that.

Would “Business” really prefer all that? I doubt it.

US “Business” is not always aligned with EU business

A second issue is that US business and EU business may have different interests when it comes to doing business in Europe. For many years, many US MNEs were used to paying single digit taxes on their international income. This was due to Dutch Irish sandwiches and other widely available structures for US MNEs to avoid sub-part F income in the US. The US de facto subsidized US MNEs to grow internationally by letting them pay very little tax on their international earnings. This has not been the case for most other OECD and EU economies whose CFC legislation has not been left with such blatant and widely exploited loopholes.

So European MNEs have to compete with US MNEs in the European market at vastly different effective tax rates, because Dutch Irish sandwiches do not work for German, French or Italian MNEs. For European MNEs, the EU Digital tax proposals would indeed help level the European playing field.

Imagine any other debate about creating a level playing field:

- one would expect there to be representatives of those in whose favour the field is tilted. One would not be surprised to hear them either argue that the field is not tilted that badly or that the field is now being tilted too much in the opposite direction.
- AND ONE WOULD EXPECT there to be representatives of those against whom the field has been tilted to date.

But at IFA 2018 they were not there. There was no representative from Spotify, there was no in-house representative from any European MNE, there was only one representative from the confederation of Danish Industry, but Denmark is not known for its international digital presence and I have no what idea what the confederation based its opinion on or who they talked to (which was very much line with that of the US).

So one is left to wonder what European digital MNEs were thinking about this. I got some idea at a subsequent conference for international in-house tax professionals in Europe. The group noted that there was a lot of Nordic governmental lobbying going on against the proposals, but it was unclear

whom they lobbyist thought they were helping (EU businesses or US businesses) or what alternatives they had (other than maybe unilateral actions). Among the in-house tax professionals themselves, it was clear that this is complex material. Most feared more tax, more complexity, more disputes, whilst actually desiring the opposite. Not many seemed in favour of a 3% tax, but all wanted simplicity, legal certainty and less disputes.

In short “Business” in the EU were a lot more nuanced about the EU proposals than “Business” was presented as at IFA 2018.

Wishes for IFA 2019 and beyond

1. In discussions about international corporate taxation, tax consultants should not be used represent the interest of business. Tax consultants are necessary group on their own, but their interests are opposite of those of business, they do not know business and they should be recognized as such.
2. US business should not be used to represent global business when the topic being discussed is about leveling the playing field of global business against the tilt in favour of US business.
3. IFA is in a unique position to run an unbiased, academic debate on matters of international taxation, should construct their panels as such and instruct their panelists not to withhold relevant information (think US state tax) just further their own arguments.

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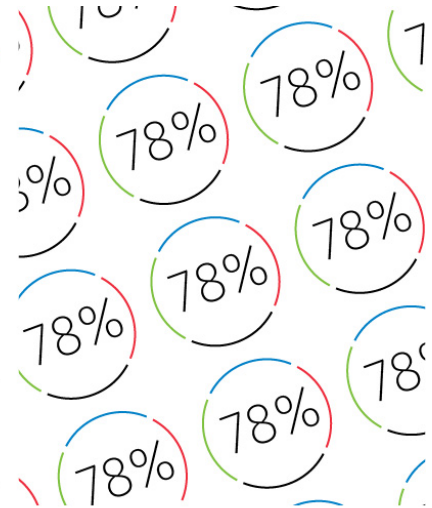
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