

Kluwer International Tax Blog

The Contents of EC Tax Review, Volume 30, Issue 5-6, 2021

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We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

Rita de la Feria, On the Evolving VAT Concept of Fixed Establishment

The relevance of the concept of fixed establishment (FE) for the EU VAT system can hardly be over-stated. Similarly to the concept of permanent establishment (PE) for income taxes purposes, the term plays a central role in VAT, and is consistently relied upon by the legislator, for both determining the place of supply of services, and establishing the right to deduct input VAT. Yet, despite its significance, the term is far from clear, and in recent years, the debate over its definition and scope, primarily in the context of our global digital economy, has intensified.

This Editorial considers the evolution of the concept of FE in EU VAT and the recent CJEU decision in Titanium in the context of the Court's previous case law. It argues that existing inconsistencies are a mere reflection of the difficulties in providing an adequate response to the significant challenges posed by the globalization and digitalization of the economy. It further contends that whilst providing an effective and definite response to these challenges will likely require legislative reform, in the meantime the Court has a significant role to play in limiting the distortive impact of those challenges. Until now, its case law has often provided short-term relief to these challenges – even if not necessarily in a consistent and principle-based manner – however, as the recent decision in Titanium demonstrates, dealing with them on a longer-term basis will unavoidably require not only making difficult choices, but re-assessing established jurisprudence.

Joachim Englisch, Non-harmonized Implementation of a GloBE Minimum Tax: How EU Member States Could Proceed

Since July 2021, more than 130 member countries of the G20/OECD Inclusive Framework (IF) have committed themselves to pursuing a 'common approach' on an international effective minimum tax regime. This political agreement implies that member countries who wish to implement such a tax regime have to streamline its design by modelling it after the so-called Global Anti-Base Erosion Proposal ('GloBE') that the IF has developed as 'Pillar 2' of its work

program on tax challenges arising from the digitalization of the economy. This article explores how individual EU Member States could implement this agreement in conformity with EU fundamental freedoms also absent – or ahead of – harmonizing EU legislation to this effect. It is demonstrated that design alternatives to the often proposed extension of the carve-out for ‘substance-based’ activities exist and should be pursued. In particular, EU Member States could extend the minimum top-up tax approach to domestic entities of in-scope multinational enterprises (MNEs). Alternatively, they could also convert GloBE into a form of unitary minimum taxation.

Carla De Pietro, The GloBE Income Inclusion Rule and Its Global Character: Complexities Underlying Its Fully Effective Application

This article focuses on the complex challenges affecting the relationship between different tax systems (national, international and EU) within a context, like the current GloBE project, which is looking for appropriate tax measures applying on a global scale. In fact, the need of developing tax measures with a global character requires specific attention to be given to issues concerning the effectiveness of these measures in light of the relationship between the relevant tax systems.

More specifically, within the framework of this article, the analysis aimed at evaluating the possibilities of guaranteeing a fully effective application of the GloBE income inclusion rule has been conducted on the basis of two crucial factors, i.e. (1) the compliance of the income inclusion rule with international tax treaty law and with EU tax law, and (2) the coordination between international tax treaty law and EU tax law.

Bruno Peeters, The Design of Covid-19 Recovery Contributions: Taxes or Social Security Contributions?

To cover the large financial spending caused by the Covid-19 pandemic, countries worldwide are forced to take substantial fiscal actions. This contribution takes a closer look at the extent to which EU law has an influence (restrictive or otherwise) on the freedom of Member States to opt for (additional) taxes and/or social contributions as a means to finance the (additional) deficits in their social security system. First, a brief numerical overview will be given of the various sources of financing and expenditures of social security in the European Union (II). Subsequently, the question will be addressed to which extent the concept of social security contributions under European Union law interferes with the national definition of taxes (III). The most relevant rulings of the European Court of Justice (CJEU) in this respect will be discussed (IV) followed by a number of final considerations (V).

Roberto Iaia, Article 6 ATAD and ‘Non-genuineness’ of Arrangements

Article 6 Anti-Tax Avoidance Directive (ATAD) provides a General anti-abuse rule (GAAR), applicable to all taxpayers subject to corporate tax in one or more EU Member States. The GAAR refers to ‘non-genuine’ arrangements. However, it is unclear whether ‘non-genuineness’ describes real and/or simulated arrangements. The article aims to analyse this issue, in light of a literal, multilingual approach and through a teleological and historical-systematic interpretation of the

provision.

Dennis Weber & Jorn Steenbergen, *The (Absence of) Member State Autonomy in the Interpretation of DAC6: A Call for EU Guidance*

DAC6 concerns the spontaneous exchange of information on potentially aggressive tax arrangements. With the implementation of DAC6 into the national laws of the Member States comes a lot of uncertainty, along with diverging interpretations among Member States. In this article, the authors analyze the autonomy of Member States in the definition and interpretation of the concepts used in DAC6. The authors also analyze the relevant sources of the interpretation of DAC6, such as the relevant BEPS reports. The authors argue that DAC6 lays down a uniform framework for the spontaneous exchange of information of potentially aggressive tax arrangements. Member States do not have a margin of discretion regarding the interpretation of the concepts that are essential to the uniform framework. Other concepts may leave a margin of discretion for the Member States, such as several concepts used in the Hallmarks. In their margin of discretion, the Member States must ensure the full effectiveness of Union law. On the basis of that, the concepts must be defined (and interpreted) in line with the object and purpose of the Directive. Member States should use BEPS Action 12 as a source of interpretation and illustration insofar DAC6 is based on this report.

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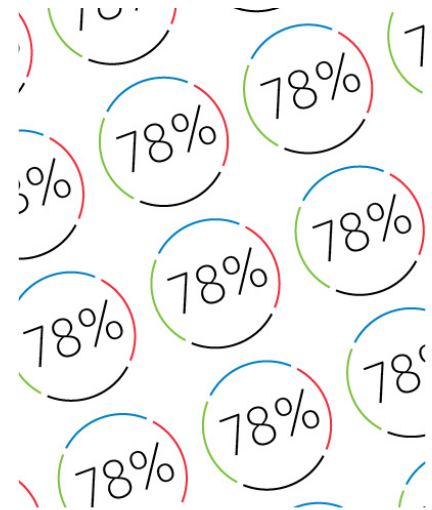
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