Сессия Европейско-Азиатского правового конгресса, Уральская государственная юридическая академия, Екатеринбург, 5 – 6 июня 2014

The enforcement of tax liability in cross-border cases in the light of the EU Court's practice

Daniel Deak

Full Professor, Head of Business Law Department, Corvinus University of Budapest, President, Hungarian Branch, IFA

1. Tax treatment of inbound and outbound investments

Taxation at source versus the relief at source options (moving in); extension of taxation power (moving out)

- a matter of an inbound (moving in) tax problem, comparable to the outbound (moving out) tax problem of the global and automatic exchange of information

Shift of taxation power from the source jurisdiction to the residence one

- the EU Court has not yet dealt with the problem that the domestic authorities of Member States treat non-domestic financial intermediaries with domestic clients engaged in cross-border investment in a discriminatory way (e.g., in respect of the EU Savings Tax Dir.)

1. Options and limits of tax coordination across the border

The inbound tax problem can be managed

- by way of contracting out through qualified intermediaries or
- by means of harmonisation, introducing a single (European) fiscal passport in addition to the single banking licence (where tax information is to be transferred from a residence MS to a source MS)

Harmonisation has still its limits because

- the asymmetric tax treatment of Member States is not precluded, disparities and restrictions will not be removed unless they are discriminatory
- conflicts of CEN and CIN jurisdictions can hardly be reconciled

1. Options and limits of tax coordination across the border

The outbound tax problems could be managed by way of

- four models: FATCA, EU Savings Tax Directive, OECD authorised financial intermediary system – Swiss anonymous withholding agreements
- financial institutions are interested in multilateral solutions, and FATCA has been a catalyst of the globalisation of regulations
- contracting out (through revenue share agreements)
- through the adjustment of taxpayers to BEPS standards, resolving clashes between formal and beneficial owners in the long term

Limited chances for the solution of the outbound tax problem:

- the global automatic exchange of information is to be implemented unilaterally (e.g., with FATCA), resulting in extraterritoriality (inviting for cooperation non-domestic FIs with cross-border income)
- harmonisation has its limits
- harmonisation is still not precluded within the € Land through enhanced cooperation (the examples for which are FTT, CCCTB and the EU Savings Tax Dir.)

1. Options and limits of tax coordination across the border

Extending the automatic exchange of information between EU tax administrations, as part of the intensified fight against tax evasion:

under the Commission proposal, dividends, capital gains, all other forms of financial income and account balances, would be added to the list of categories which are subject to automatic information exchange within the EU

Proposal for a Council Directive, amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation [COM(2013) 348 final)

Pilot multilateral exchange facility of five EU Member States (DE, FR, ES, IT, UK), announced on 9 April 2013:
- they would exchange the same type of information amongst themselves as they will exchange with the USA under FATCA;
- the logic of this initiative was to avoid the need to trigger the Most-Favoured Nation (MFN) clause in the Administrative Cooperation Directive;
- under Article 19 of this Directive, Member States are bound to provide any EU partner that requests it with the same level of information as they provide third countries, if this is more than provided for under EU law

Press release of the European Commission, 12 June 2013

1. A bogus solution for the administrative tax problem of the emigration of capital

Policy of anonymous withholding tax

- it is easier to administer a withholding tax regime than a residence based reporting system, although the former suggests fragmentation on an international scale that would increase compliance costs
- undermines the tax morale on an international scale
- bank secrecy seems to be unjustified if it is used against the residence county's tax claims
- weaker governments (at the expense of the residence country?) versus the concept of a balanced social contract

Switzerland prefers to hold policy instruments as follows:

- anonymous withholding tax (Rubik) agreement
- improvement of the exchange of information Article of bilateral double tax treaties, introducing "grosse Auskunftsklausel", with particular regard to the adjustment to international money laundering rules (turning from a substandard practice to a standard one)
- increased care to be taken about the possible tax liability of foreigners in their residence country (?)

Der Bundesrat der Schweizerischen Eidgenossenschaft, Strategie für einen steuerlich konformen und wettbewerbsfähigen Finanzplatz; Diskussionspapier, 22. Februar 2012

1. The inner logic of FATCA?

A catalyst of globalisation in the process of developing law in clusters (being as a phenomenon of clumping together)

“Denn wenn das Glück es so daß ein mächtiges und aufgeklärtes Volk sich zu einer Republik (die ihrer Natur nach zum ewigen Frieden geneigt sein muß) bilden kann, so gibt diese einen Mittelpunkt der föderativen Vereinigung für andere Staaten ab, um sich an sie anzuschließen, und so den Freiheitszustand der Staaten, gemäß der Idee des Völkerrechts, zu sichern, und sich durch mehrere Verbindungen dieser Art nach und nach immer weiter auszubreiten.”

Immanuel Kant, “Zum ewigen Frieden; Ein philosophischer Entwurf”; *Immanuel Kant Werke in sechs Bänden*, Wilhelm Weischedel (Hrsg), Wissenschaftliche Buchgesellschaft, 7. Aufl., Darmstadt, 2011; p. 211

2. Switch over to internationalisation and constitutional guarantees

Reference to the lack of democratic legitimation of international matters is not relevant
- either to the case of German resident taxpayers in respect of foreign taxation power,
- or to the case of foreigners in respect of German taxation power

Es verstößt nach alledem nicht gegen die Grundsätze des demokratischen Rechtsstaats im Sinne des Grundgesetzes, wenn die deutsche Rechtsordnung durch das Zustimmungsgesetz österreichische Abgabenansprüche anerkennt und für im Inland vollstreckbar erklärt. Einen Mangel an demokratischer Repräsentation in Österreich kann der Beschwerdeführer deshalb, gemessen an den Maßstäben der deutschen Verfassungsordnung, ebensowenig mit Erfolg rügen, wie dies ein Ausländer tun könnte, der von der Bundesrepublik Deutschland aufgrund eines vergleichbaren Sachverhalts und nach Maßgabe einer entsprechenden Vertragslage in Anspruch genommen würde.

Beschluss des Zweiten Senats vom 22. März 1983 -- 2 BvR 457/78 — in dem Verfahren über die Verfassungsbeschwerde des Herrn R... - mittelbar gegen Artikel 1 Satz 1 des Gesetzes zu dem Vertrag vom 11. September 1970 zwischen der Bundesrepublik Deutschland und der Republik Österreich über Reichs- und Amtshilfe in Zoll-, Verbrauchersteuer- und Monopolangelegenheiten vom 29. Juli 1971 (Bundesgesetzbl. II S. 1001), Para. 107

2. Switch over to internationalisation and constitutional guarantees

Priority of Community law to the law of Member States

3 … the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.
4 However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

Case 11-70 *Internationale Handelsgesellschaft*, ECR 1970, p. 1125

2. Switch over to internationalisation and constitutional guarantees

The EC Directive including aviation activities in the Community scheme for CO2 emission allowance trading does not infringe

- either the principles of customary international law,

- or the provisions of the 'Open Skies' Agreement;

all airlines – including those of third countries – will henceforth have to acquire and surrender emission allowances for their flights arriving at and departing from Union airports

129 … the fact that, in the context of applying European Union environmental legislation, certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question, in the light of the principles of customary international law capable of being relied upon in the main proceedings, the full applicability of European Union law in that territory (see to this effect, with regard to the application of competition law, Ahlström Osakeyhtiö and Others v Commission , paragraphs 15 to 18, and, with regard to hydrocarbons accidentally spilled beyond a Member State's territorial sea, Case C−188/07 Commune de Mesquer [2008] ECR I−4501, paragraphs 60 to 62).

Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö*, ECR 1993, p. I-01307, Para. 30; Case C-366/10 *Air Transport Association of America*, ECR 2011, Para. 129-130

As it appears from the legal cases of *Wood Pulp* and *Air Transport Association of America*, the EU law has not been found inconsistent with the international customary law principle of the prohibition of extraterritoriality

2. Justification of the EU FTT through enhanced cooperation

36 It is clear that the objective of the contested decision is to authorise 11 Member States to establish enhanced cooperation between themselves in the area of the establishment of a common system of FTT with due regard to the relevant provisions of the Treaties. The principles of taxation challenged by the United Kingdom are, however, not in any way constituent elements of that decision. First, 'the counterparty principle' corresponds to an element in the 2011 proposal mentioned in recital 6 of that decision. Second, the 'issuance principle' first appeared in the 2013 proposal.

38 Further, and irrespective of whether the concept of 'expenditure resulting from implementation of enhanced cooperation', within the meaning of Article 332 TFEU, does or does not cover the costs of mutual assistance and administrative cooperation referred to by the United Kingdom in its second plea, it is obvious that the question of the possible effects of the future FTT on the administrative costs of the non-participating Member States cannot be examined for as long as the principles of taxation in respect of that tax have not been definitively established as part of the implementation of the enhanced cooperation authorised by the contested decision.

C-209/13 *UK v EU Council*

2. Justification of the EU FTT: involvement in the scope of t non tax law of the markets of goods and factors

Liberalisation of the services of commercial and investment banks	What to liberalise?	What to tax?
Cross-border movement of goods	Duty concessions (not relevant)	Reverse charge-based indirect taxes (not relevant)
Cross-border movement of services	Money market and related capital market transactions through GATS	Reverse charge-based or B2C based indirect taxes; taxation of one-time supply of services
Cross-border movement of payments and capital	Spill over of services into investments through commercial presence under GATS	Direct taxation of capital on a worldwide basis; taxation under the issuance of securities principle
Cross-border movement of persons	Free movement of experts, freedom of establishment	Direct taxation of labour on a worldwide basis

Note: Liberalisation of the services of commercial and investment banks through home country licensing on a consolidated basis – establishing public law nexus on the extended personal scope of taxation (extraterritoriality?)

3. State of the art in the EU withholding taxation

Relief procedure (immigration of capital)

- relief at source, setting off tax amounts to be refunded against taxes remitted in the source Member State, or at least quick refund procedures, refund in a reasonable period of time, use of simplified formats for refund applications to be filed electronically, single contact point with the public authorities

Responsibilities of financial intermediaries (immigration of capital)

- shifting the responsibilities of information and payment of tax to foreign financial intermediaries if necessary by passing pooled withholding tax information and applying withholding tax relief at source, introduction of proportionate and non-discriminatory conditions for fulfilling legal obligations, self-certification through financial intermediaries, joint audits, use of external auditors

Commission Recommendation on Withholding Tax Relief Procedures COM(2009)7924 final

3. Inbound & outbound investment cases before the EU Court of Justice

NON-DOMESTIC PERSONS WITH DOMESTIC INCOME (MOVING IN)	DOMESTIC PERSONS WITH CROSS-BORDER INCOME (MOVING OUT)
Fokus Bank (right of non-resident shareholders to be heard)	C-446/03 *Marks & Spencer* (proceduralisation of substantive law)
C-267/09 *Comm. v Portugal* (no appointment of a tax representative)	*Persche* (it is for each MS to decide for the request of information)
Santander (no justification of the exclusion of cross-border tax benefits by referring to the principle of the effectiveness in fiscal supervision)	C-262/09 *Meilicke* (determining the degree of detail and the form of evidence must not be discriminatory)
DFA Investment Trust (no justification of the exclusion of cross-border tax benefits by referring to the principle of the effectiveness of fiscal supervision)	*FKP Scorpio* (production by the taxpayer of a certificate in a procedure for taxation at source)
	Truck Center (non-comparability regarding the non-domestic beneficiaries of capital income)
	X NV (withholding tax at source versus registration and local declaration)
	Sabou (right of defense as a fundamental and absolute right; no individual rights conferred by the EU Tax Assistance Dir.; no recognition of the taxpayer's right to be informed of, and to take part in formulating, a cross-border request, and to take part in examinations of witnesses)

<u>Domestic investors / non-domestic FIs with cross-border income (EU Savings Tax Dir. ?)</u>

4. Transition from bilateralism to multilateralism?

Overcoming the premodern status of “ius gentium”
- by consensus of nation states
- through “ius cosmopoliticum” (republicanism)

Process of making law: reason – consensus – freedom – rule of law (categorical imperative)

State sovereignty is something made, not assumed, it is a tissue of legal organisation, not a mere point of reference

Jeremy Waldron, “The rule of international law”, *Harvard Journal of Law & Policy*, Vol. 30. No. 1 (Fall 2006); p. 21

Citizens are ends in themselves, the state is not an end in itself

4. Transition from bilateralism to multilateralism?

A need for innovations in the international tax regime because:

- nation states are bound to an obsolete idea of state sovereignty, and

- suffer at the same time from the asymmetry in the disseminating of tax information

As an alternative to the ready-made law of international business

- companies and their managers could seek to find the proper law to be generated by themselves, provided that they are becoming engaged in discourse both with each other and with the national and international public authorities;

- there should be an emerging forum of discussions and dispute resolution where ethical and other meta-juridical considerations are also to be built in the process of law-making;

“Peregrini”:

- even if they are not fully-fledged citizens of a particular state for several reasons, they can benefit from the equal (economic) treatment before the law in a host state that would be generous enough to extend to them a number of rights;

- as a kind of compensation, multinationals and the professionals who support them are also expected to behave themselves on the basis of corporate social responsibility

4. Transition from bilateralism to multilateralism?

Dissemination of humanitarian values as a means of imperialism?

“»Menschheit« ist ein besonders brauchbares ideologisches Instrument imperialistischer Expansionen und in ihrer ethisch-humanitären Form ein spezifisches Vehikel des ökonomischen Imperialismus.”

Carl Schmitt, *Der Begriff des politischen*, Duncker und Humblot, Bln, 1979; p. 56

On the contrary: human rights cannot be considered as a matter of morality – law cannot in fact be reduced to the notion of legal norms that can be enforced through a nation state – law and nation states are not necessarily interdependent (example: the autonomous EU legal order)