MAS – Master Class
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International selskabsskat – nye tiltag

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Dagsorden

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Tiltag fra OECD

- Status på BEPS-projektet
- ”BEPS 2.0”- Pillar I & II
  - Fokus på Pillar II fra et EU-perspektiv

Tiltag fra EU

- Status på ATAD
- Fair & Simple Taxation
- Status on CCCTB
- ”Own Resources”
- EU Black List

Tiltag fra OECD

OECD BEPS 2.0

2015

- BEPS Report on Action 1 – Addressing the Tax Challenges of the Digital Economy: More work to be done, solution in 2020…

2020 (October)

- Addressing the Tax Challenges of the Digital Economy – Report on Pillar I Blueprint
  - New taxing rights to market jurisdictions (new nexus and profit allocation rules)
- Addressing the Tax Challenges of the Digital Economy – Report on Pillar II Blueprint
  - A right to ”tax back” where other jurisdictions have not excersized their primary taxing rights

2021

- Aim to reach political agreement in mid 2021

Pillar II – GloBE

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Aim: To mitigate remaining profit shifting linked to the digitalising economy (and originally also to curb tax competition between states)

Idea: To allow all countries to ”tax back” profits where other countries have not sufficiently exercised their primary taxing rights

Design: A systemic solution designed to ensure that all internationally operating businesses pay a minimum level of tax

Content: New rules by way of changes to domestic law and DTTs

- January 2019 – Policy Note
- May 2019 – Programme of Work
- November 2019 – Public Consultation Document
- October 2020 - Report on Pillar II Blueprint

Pillar II – GloBE

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Rule	Mechanics	Details from blueprint
Minimum tax	1) **<u>Income inclusion rule</u>:** Taxation at parent of income in controlled entities locally subject to low taxation 2) **<u>Switch-over rule</u>:** Taxation at HQ of income in branches locally subject to low taxation	• A top-up tax to reach a minimum level of tax • Draws heavily on definitions and concepts used in BEPS 13 (CbCR) • Euro 750 million threshold • Reliance on financial accounting standards • A jurisdictional blending approach • Top-down coordination rule
Tax on base eroding payments	3) **<u>Undertaxed payments rule</u>:** No deduction for payments to a related party if payments are not subject to sufficient taxation. 4) **<u>Subject-to-tax rule</u>:** Treaty benefits only granted if the income is sufficiently taxed in the other state.	• A backstop to the income inclusion rule • Applies many of the same definitions and concepts as the income inclusion rule • But the subject to tax rule should apply to individual payments and the low-tax trigger should rely on the nominal CIT

Pillar II – GloBE

Overview of the report (source: p. 16 of the report itself)

Pillar II – GloBE

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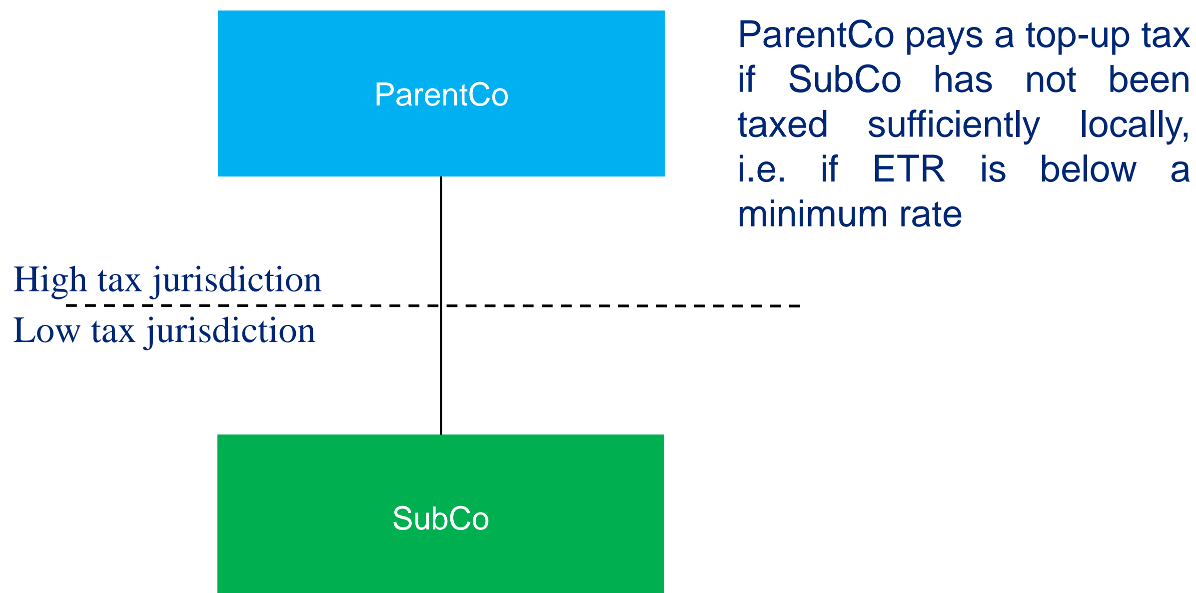
Plenty of outstanding issues:

- Still no decision on the minimum rate to be applied
- How to co-exist with US GILTI-rules and existing CFC regimes?
- Carveouts that reduces the GloBE tax base continue to be a point of discussion → The blueprint focuses on a formulaic substance-based carveout based on payroll and tangible assets
- The switch-over rule and the subject-to-tax rule requires changes to existing tax treaties → A new multilateral instrument contemplated
- Discussions on whether the rules could be implemented in a staggered manner (one at a time)
- The report leaves the door open to development of specific dispute prevention and resolution rules
- If agreement on Pillar I fails → Unclear whether countries mainly interested in Pillar I would agree to Pillar II on a stand-alone basis

Pillar II – Income Inclusion Rule

- The main element of Pillar II is the Income Inclusion Rule (IIR) complimented by switch-over rule
  - The untertaxed payments rule (UTPR) is a kind of backstop
  - The subject-to-tax rule (STTR) protects source states (with lower administrative capacities)
- The IIR to some extent resembles CFC legislation…



The IIR and EU Law

ARTICLE

A General Income Inclusion Rule as a Tool for Improving the International Tax Regime – Challenges Arising from EU Primary Law

Peter Koerver Schmidt*

Intertax, vol. 48, issue 11, pp. 983-997

Main aims:

1) To assess the IIR in light of EU primary law (fundamental freedoms)
2) Identify design options for MS
3) Discuss pros and cons of the identified options

IIR – EU Law Assessment

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- MS have retained competence in direct tax matters, but…
  - The competence must be exercised in line with EU law, e.g. the fundamental freedoms
    - Non-discrimination between domestic and cross-border situations
    - The starting point is that the fact that a taxpayer has sought to profit from tax advantages in another MS cannot, in itself, deprive the taxpayer of the right to rely on the relevant treaty provision

- Relevant treaty freedom?
  - Based on CJEU case law on CFC legislation: Free establishment is the relevant freedom, if the rules are targeted solely at situations with ”definite influence”
    - C-196/04 Cadbury Schweppes
    - C-201/05 Test Claimants in the CFC and Dividend Group Litigation
    - C-135/17 X GmbH
    - E-3/13 & E-20/13 Fred. Olsen and Others and Petter Olsen and Others
  - IIR: Probably the same distinction should be made

IIR – EU Law Assessment

- Different treatment of comparable situations?

  - The IRR (only) targets cross-border situations, i.e. the parent company only has to include income from foreign subsidiaries not domestic ones

  - CJEU case law on CFC legislation:
    - It entails different treatment of comparable situations
    - It does not matter that the group as such does not pay more tax than that which would have been payable if the income had been generated by a domestic subsidiary →
    - For the CJEU the decisive issue appears to be that the parent company – seen in isolation – experiences a disadvantage

  - IIR: It appears to entail different treatment of comparable situations, even though the IIR only entails top-up taxation

IIR – EU Law Assessment

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- Can the different treatment be justified (the rule of reason doctrine)?
  - CJEU case law on CFC rules
    - Prevention of abuse of rights may justify, but only if restricted to wholly artificial arrangements
      - Subjective element on the intention to obtain a tax advantage
      - Objective circumstances showing… (relevant factors: physical existence in terms of premises, staff and equipment)
    - Balanced allocation of taxing rights? Mentioned but not explored by CJEU
  - IIR and justifications?
    - Probably possible to ensure compatibility by including a ”substance carve-out”
    - ”Balanced allocation” or related ”new” justification?
      - Possibly, but more uncertain
      - However, the IIR has a broader scope and the uncertainty may be reduced if implemented through a directive (full harmonization), as the CJEU seems to be more lenient in such situations as long as the directive can be seen to serve the interest of the internal market…

IRR – Design Options for MS

- Already identified
  - Including an intra-EU substance carve-out
  - Justify the the rule on other grounds, e.g. ”balanced allocation” or a variation hereof

- A third possibility?
  - Try removing any discriminatory effects by applying the rules also to purely domestic situations
  - Like the current Danish approach to CFC legislation?
    - But is the Danish approach bulletproof?
    - It still entails de facto different treatment, as the Danish parent company – seen in isolation – only experiences a tax disadvantage in the cross-border situation
    - But then again, the IIR has a broader scope…

Pros and Cons of Design Options

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1. Including an intra-EU substance carve-out
   - Pros: Safest route to ensure alignment with EU primary law, reduces the sovereignty infringement
   - Cons: Undermines the policy goal of mitigating tax competition (also for real activities), and could entail proliferation of demands for carve-outs

2. Justify the the rule on ”balanced allocation” or on a new ground, e.g. the need for establising a level playing field…
   - Pro: Better in line with the policy goal of the GloBE Proposal
   - Con: Less clear whether ECJ would accept such justification

3. Try removing any discriminatory effects by applying the rules also to purely domestic situations
   - Same as under alternative 2, but creates extra layer of administrative burden

Tentative policy advice: Alternative 2 implemented through a directive

Tiltag fra EU

Status on ATAD

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Overview - Member States' ATAD Implementation

- The Commission’s report only deals with interest limitation rules, CFC rules and the GAAR (application deadline 1 January 2019)

- Not covering exit taxation and hybrid mismatches (application date 1 January 2020/2022)

- Key takeaways:
  - MS have made extensive use of the optionalities available
  - 4 MS have not yet fully complied with their obligations to adopt and notify transposition measures (Austria, Denmark, Spain and Ireland)
  - Other infringement procedures have been opened/closed
  - Currently hard to see ATAD as a truly unified response to BEPS – but better than no coordination at all?
  - More comprehensive report expected in early 2022

Fair & Simple Taxation

Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy

•Part of the Tax Package adopted by the Commission on 15 July 2020 (also DAC 7 and ”Tax Good Governance”)

•Aims at making taxation fairer, greener and fit for the modern economy

•Only a first step – next steps to be presented before the end of the year in an ”Action Plan for Business Taxation in the 21st century”

- Postponed due to OECD delay on Pillar I & II

•The action plan sets out two kinds of actions

- Measures aimed at reducing tax obstacles
- Intiatives helping MS to enforce existing rules

Fair & Simple taxation

Examples from the action plan

- Pilot project on cooperative compliance framework – aims to simplify reporting requirements (2021, Q1-Q2)
- Establishment of expert group on transfer pricing (2021, Q1)
- Implementation of Standing Committee for dispute resolution (2021, Q3)
- Digital solutions to levy taxes at source to facilitate tax payment and collection (2022)

- Key takeaways
  - Multiple initiatives to be expected from the Commission in the comings years
  - The Commission stands ready to act if no global agreement is reached on Pillar I and II

Status on CCCTB

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Proposal from 2016 - Common Corporate Tax Base (2CTB)

Proposal from 2016 - Common Consolidated Corporate Tax Base (3CTB)

- Currently the proposal is “dormant”
- A small part implemented through ATAD
- The European Commission is assessing whether other parts can be proposed/implemented bit by bit
- Revenue from CCCTB could potentially contribute to the Union’s “own resources”…

”Own Resources”

- Longstanding debate on ”own resources” to the EU
  - Today the EU mainly relies on direct contributions from MS
  - EU’s vast borrowing to pay for pandemic recovery has reignited the discussions
  - European Parliament is strongly in favor

- EP Report - Own Resources
  - Ideas for raising ”own resources” have been floated, e.g. revenue from:
    - Financial transaction tax (FTT)
    - EU-wide digital services tax (DST)
    - EU Turnover Tax
    - The Emissions Trading System (ETS) and a new carbon adjustment mechanism (CBAM)
    - Penalty for non-recycled plastic

- (Some) MS more reluctant or against the idea
- Negotiations currently taking place

EU Black List

- The EU list of non-cooperative jurisdictions for tax purposes consists of a Blacklist and a Greylist (observation list)
  - Aims at helping EU Member States deal more robustly with countries that encourage abusive tax practices.
  - Encourage positive change in these countries through cooperation – not naming and shaming.
  - The list is based on a continuous and dynamic process of screening countries against international tax standards and engaging with countries which do not comply.
  - Criteria relate to tax transparency, fair taxation, the implementation of OECD BEPS measures and substance requirements for zero-tax countries.

- The following 12 countries were on the blacklist as of 12th March 2020:
  - American Samoa, Cayman Islands, Fiji, Guam, Oman, Palau, Panama, Samoa, Seychelles, US Virgin Islands, Trinidad and Tobago, Vanuatu.
  - October 2020: Cayman Islands and Oman to be removed, Barbados and Anguilla to be added

EU Black List

EU Sanctions

- The EU Blacklist is directly linked to EU funding

- Funds from such instruments cannot be channeled through entities in blacklisted countries.

- Further there is a direct link to the EU Blacklist in other relevant legislative proposals, including:
  - Transparency requirements for intermediaries (DAC6), a tax scheme routed through an EU blacklisted country will automatically be reportable to tax authorities.
  - The public Country-by-Country reporting proposal also includes stricter reporting requirements for multinationals with activities in blacklisted jurisdictions.
  - The Commission is examining legislation in other policy areas, to see where further consequences for blacklisted countries is to be introduced.

EU Black List

Member State Sanctions

- EU Member States are encouraged (only based on soft law) to apply at least one of the proposed defensive measures as listed below as of 1 January 2021.
- The defensive measures include:
  - Non-deductibility of costs
  - Controlled Foreign Company (CFC)
  - Withholding tax measures
  - Limitation of participation exemption on profit distribution

EU Black List

- Member States should ensure that they apply at least one of the following administrative measures in the tax area:
  - Reinforced monitoring of certain transactions.
  - Increased audit risks for taxpayers benefiting from the regimes at stake.
  - Increased audit risks for taxpayers using structures or arrangements involving these jurisdictions.
- Some Member States have their own domestic blacklists
  - E.g. Netherlands, Spain, France, Germany, Luxembourg, Sweden

Opsummering

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