

24 June 2020

The GloBE Income Inclusion Rule – Challenges Arising from EU Law

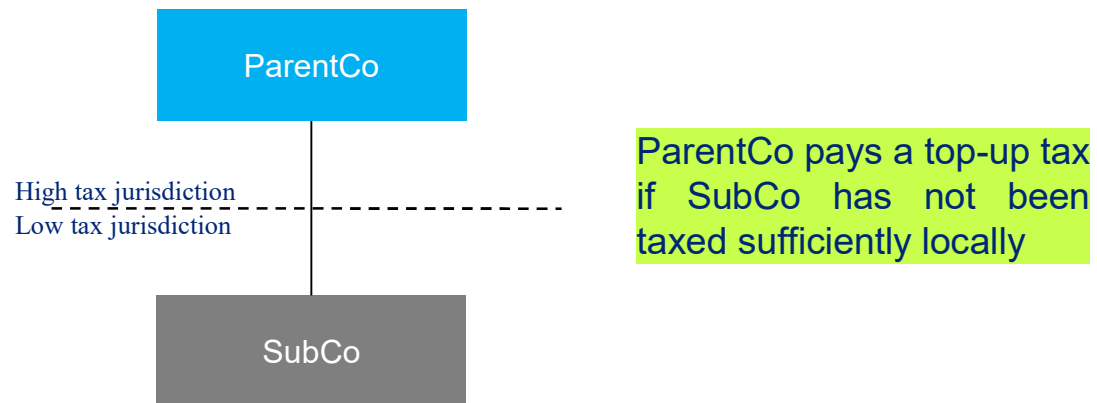
Workshop on Corporate Tax Practice and Inequality

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OECD GloBE – Pillar II

- After the BEPS Project the OECD/G20 has continued its work ("BEPS 2.0")
 - Pillar 1 – The allocation of taxing rights (new nexus and allocation rules)
 - Pillar 2 – The Global Anti-Base Erosion Proposal (GloBE)
- The aim of the GloBE Proposal is to combat remaining BEPS risks and tax competition among jurisdictions (i.e. stopping "the race to the bottom")
- The main element of the GloBE Proposal is the Income Inclusion Rule, which to some extent resembles CFC legislation



Challenges from EU law

- 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
- Relevant treaty freedom?
 - Free establishment, if rules are targeted at situations with "definite influence"
- Different treatment of comparable situations?
 - Probably yes, as the rule (only) targets cross-border situations
 - C-196/04 *Cadbury Schweppes* and subsequent case law on CFC legislation in MS
- Can the different treatment be justified (the rule of reason doctrine)?
 - Prevention of abuse of rights: Probably yes, but only if restricted to wholly artificial arrangements
 - Balanced allocation of taxing rights or related new justification: Possibly, but more uncertain. However, uncertainty could be reduced if implemented through a directive

Design options

1. Including an intra-EU substance carve-out
 - Pros: Safest route to ensure 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 a new ground, e.g. the need for establishing 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 also creates extra layer of administrative burden

Tentative policy advice: Alternative 2 implemented through a directive