

Erasmus Universiteit Rotterdam

The Return of the CC(C)TB…

"Tax competition within the EU – Is the relaunched CCCTB a solution?"

ACTL, Amsterdam, 28 January 2017
Maarten de Wilde (dewilde@law.eur.nl)
EUR / Loyens & Loeff

ERASMUS UNIVERSITEIT ROTTERDAM

Introduction



Erasmus Universiteit Rotterdam

1. Issue: Tax competition within EU

2. Suggested solution: The relaunched CCCTB

3. Issue resolved?

ERASMUS UNIVERSITEIT ROTTERDAM



Erasmus Universiteit Rotterdam

Ad 1. The Issue

“Tax competition within the EU”

ERASMUS UNIVERSITEIT ROTTERDAM

Tax competition within EU



Erasmus Universiteit Rotterdam

- **Tax competition?**
  - A matter of diverging average effective tax rates (AETRs) and investment location decisions of multinational enterprises (MNEs)
- **Problematical?**
  - Differentiating between ‘fair tax competition’ and ‘harmful tax competition’

ERASMUS UNIVERSITEIT ROTTERDAM

MNE responses to AETR diffs.



Erasmus Universiteit Rotterdam

- **MNE responses**
  - Tax-induced shifting of real investment
  - Tax-induced shifting of ‘paper’ investment
- **Tax law: only latter problematical**
  - ‘Fair’ tax planning
  - ‘Unfair’ or ‘aggressive’ tax planning (ATP)
    - Base Erosion and Profit Shifting (BEPS)

ERASMUS UNIVERSITEIT ROTTERDAM

Country responses to AETR diffs.



Erasmus Universiteit Rotterdam

- **Country responses**
  - Tax-induced competing for real investment
  - Tax-induced competing for ‘paper’ investment
- **Tax law: only latter problematical**
  - ‘Fair’ tax competition
  - ‘Unfair’ or ‘harmful’ tax competition (HTC)

ERASMUS UNIVERSITEIT ROTTERDAM

Addressing HTC & ATP in EU



Erasmus Universiteit Rotterdam

- **Work done in EU addressing HTC**
  - Code of Conduct
  - Peer pressure soft law approaches
- **Seems to have been quite successful**
  - EU Member States' HTC measures have been pushed back
  - Focus Code of Conduct Group has shifted recent years:
    - Third countries' HTC practices
    - Addressing disparities / mismatches

ERASMUS UNIVERSITEIT ROTTERDAM

Addressing HTC & ATP in EU



Erasmus Universiteit Rotterdam

- **Recent work done in EU addressing ATP**
  - Anti-mismatch rule Parent Subsidiary Directive (PSD)
  - General anti abuse rule ('GAAR') PSD
  - Anti-Tax Avoidance Directive (ATAD)
  - ATAD 2 (proposal)
  - Directive on Administrative Cooperation (DAC)
- **Successful to so why still CCCTB?**
  - Underlying root causes, ill-designed tax regime, left untouched
    - Taxable presence tests (nexus) – PE, POEM, POInc.
    - Separate Accounting / Arm's Length Pricing
    - Nominal return to equity tax base standard

ERASMUS UNIVERSITEIT ROTTERDAM



Erasmus Universiteit Rotterdam

Ad. 2 The suggested solution

"The relaunched CCCTB"

ERASMUS UNIVERSITEIT ROTTERDAM

CCCTB – The Solution?



Erasmus Universiteit Rotterdam

- **Q rephrased**
  - Would CCCTB provide incentives for artificial tax base shifting within EU potentially reinvigorating undue tax competition responses of EU Member States?

- **CCCTB: *"A holistic solution"***
  - Coordinated approach would resolve many issues
  - Remaining disparity would be 'tax rate differential'

- **Q: Arbitrage potentials under sharing mechanism?**

ERASMUS UNIVERSITEIT ROTTERDAM

Sharing mechanism: arbitrage?



Erasmus Universiteit Rotterdam

- **Sharing mechanism**
  - Formulary apportionment
  - Fair geographical approximation of corporate profit
  - $$\text{Share Group Member A} = \left(\frac{1}{3}\frac{Sales^{A}}{Sales^{Group}} + \frac{1}{3}\left(\frac{1}{2}\frac{Payroll^{A}}{Payroll^{Group}} + \frac{1}{2}\frac{No\ of\ employees^{A}}{No\ of\ employees^{Group}}\right) + \frac{1}{3}\frac{Assets^{A}}{Assets^{Group}}\right) * CCCTB$$
- **The idea**
  - Locating firm inputs at origin (supply side)
  - Locating firm outputs at destination (demand side)
- **If mechanism does that**
  - Hypothesis: profit shifting & tax rate competition would revolve around ‘fair’ shifting of real inputs and outputs

ERASMUS UNIVERSITEIT ROTTERDAM



Erasmus Universiteit Rotterdam

Ad. 3 The issue resolved?

"Potentials for artificial tax base shifting and undue tax competition"

ERASMUS UNIVERSITEIT ROTTERDAM

Sharing mechanism: peculiarities



Erasmus Universiteit Rotterdam

- Using common international tax law concepts to establish taxable presence
- Using factor allocation approaches inconsistent with inputs at origin and outputs and destination
- Risk: potential for arbitrage through ‘factor manipulation’
- Problem: factor manipulation seems to fall outside CCCTB-GAAR

ERASMUS UNIVERSITEIT ROTTERDAM

Potentials for ‘factor manipulation’



Erasmus Universiteit Rotterdam

- **‘Labour factor manipulation’**
  - Through ‘payroll group members’
- **‘Sales factor manipulation’**
  - Through ‘beneficiary group members’
- **‘Sales factor inflation’**
  - Through ‘beneficiary group members’ engaging into ‘shareholding-revenues-carrousels’

ERASMUS UNIVERSITEIT ROTTERDAM

‘Payroll group member’



- **Payroll factor allocation (1/3 * EU-wide tax base)**
  - ‘Group member’ ‘wage payor’, or;
  - ‘Group member’ *“Control and Responsibility”*
- **‘Payroll group members’**
  - Payroll factor mobility because of payroll group member mobility

Erasmus Universiteit Rotterdam

ERASMUS UNIVERSITEIT ROTTERDAM

‘Beneficiary group member’



Erasmus Universiteit Rotterdam

- **Sales factor allocation (1/3 * EU-wide tax base)**
  - Re portfolio investments (‘PIs’) and hedge transactions
  - ‘Group member’ *“Beneficiary”*
- **‘Beneficiary group members’**
  - Sales factor mobility because of beneficiary group member mobility
- **US experiences**

ERASMUS UNIVERSITEIT ROTTERDAM

‘Sales factor inflation’



Erasmus Universiteit Rotterdam

- **Sales factor allocation (1/3 * EU-wide tax base)**
  - Re *“exempt revenues”*
  - ‘Group member’ *“Beneficiary”*

- **‘Beneficiary group members’**
  - ‘Sales factor inflation’ through ‘shareholding-revenue-carrousels’
  - Circular streams of exempt dividends and capital contributions
    - Effect on tax base calculation? No, participation exemption
    - Effect on tax base sharing? Yes
    - Nb. Financing of circular streams with intra-group debt across water’s edge perhaps even tax-deduction for intra-group interest; BEPS 2.0!

ERASMUS UNIVERSITEIT ROTTERDAM

Time will tell but…



- Risk: substantial parts of EU-wide tax base potentially mobile as of entry into force CCCTB
- Tool: EU Member State may only dispose of a single instrument to affect MNE ‘paper’ investment location responses: tax rate reduction
- Effect: ‘race to bottom 2.0’?

Erasmus Universiteit Rotterdam

ERASMUS UNIVERSITEIT ROTTERDAM

So, perhaps…



Erasmus Universiteit Rotterdam

- Introduction of ‘factor presence tests’
  - Payroll: location of work performed / wages paid
    - Inspiration: Article 15 OECD MTC
  - Sales: location of customer / gross receipts
    - Inspiration: VAT remote seller rules, VAT place of supply rules
- Exclusion from sales factor: gross receipts from PIs and hedge transactions
  - Inspiration: Multistate Tax Commission
- Inclusion in sales factor: only gross receipts that contribute to taxable income production
  - Inspiration: US State Taxation

ERASMUS UNIVERSITEIT ROTTERDAM

Wrap-up



Read some more?

- http://www.erasmuslawreview.nl/tijdschrift/ELR/2014/1/ELR-D-13-00013

Contact details:

- Maarten de Wilde, PhD, LLM
  - Erasmus University Rotterdam
    - dewilde@law.eur.nl
  - Loyens & Loeff
    - Maarten.de.wilde@loyensloeff.com

Erasmus Universiteit Rotterdam

ERASMUS UNIVERSITEIT ROTTERDAM