LOB and PPT Rules from an EU Law Perspective

Kasper Dziurdź
Agenda

- Article 7 of the Multilateral Convention: **Prevention of Treaty Abuse**
  - Limitation on Benefits (LOB) Rule
  - Principal Purposes Test (PPT) Rule
  - Compatibility with EU law?
LOB Rule and EU Law

- LOB rule aims at avoiding **treaty shopping**

- Denial of benefits if a resident EU corporation is not listed on a recognised stock exchange

- Denial of benefits if a resident EU corporation is EU-owned instead of domestically owned

- Item-related exceptions
  - Active conduct of a business (but not holding, overall supervision or administration of a group, group financing, making or managing investments)
  - Owned by equivalent beneficiaries
  - Discretionary relief

... insufficient to overcome EU law concerns (item-based, not all activities, cliff effect, discretion)
Non-discriminatory exercise of retained taxing powers

 definition of the scope of a bilateral tax treaty

 Denial of a benefit in a cross-border (EU) situation

 EU law

 No obligation and “freedom” to avoid double taxation

 LOB rule

 Kerckhaert & Morres, Gilly, D.

 ACT Group Litigation

 Gottardo, Saint Gobain, Open Skies
PPT Rule – Relevant Elements

- **Subjective element**
  - Tax treaty benefit was one of the principal purposes ...

- **Objective element**
  - ... and would not be in accordance with the object and purpose of the relevant provisions of the Convention

- Focus on specific benefits and, thus, not only on the establishment (≠ Cadbury Schweppes)

- BEPS Action 6 Report an important means of interpretation under Article 32 of the VCLT
PPT Rule – Relevant Elements

- **Subjective element** (objective analysis)
  - Tax treaty benefits are as such inconclusive
  - Tax treaty benefits may tip the balance in favour of a particular transaction without being a principal purpose
  - Tax treaty benefits may be a business consideration

- **Objective element**
  - Aim to avoid double taxation in respect of *bona fide* exchanges of goods and services, and movements of capital and persons (including overall supervision or administration of a group, group financing, etc.)
  - Benefits depend on the object and purpose
PPT Rule – Objective Element: Object and Purpose

VCLT

- Wording
- Context
- Object & Purpose
- Commentary

PPT Rule

- Object & Purpose
- No Treaty Shopping
- Wording
- Context
- Commentary
- Other Means

...a single combined operation: object & purpose may have more or less weight than wording, etc.
PPT Rule and EU Law

- EU law requirements (including ATAD)
  - Tax treaty benefits cannot be denied if “genuine economic activity” for “valid commercial reasons”?
    - Tax treaty benefits alone a “valid commercial reason” or rather more than a purely fiscal advantage required?
  - Potential problem: denial of tax treaty benefits even though genuine exercise of a fundamental freedom

- PPT rule unlikely to cover genuine transactions
  - Specifies scope by emphasizing the object and purpose
  - Changes allocation of taxing rights (discretionary relief)
Shift of the Burden of Proof?

Rule
- Avoidance of Double Taxation

Tax authority

Exception
- Principal Purposes (subjective test)
- Object and Purpose (objective test)

Burden of proof a domestic issue

Shift of the burden of proof?
Conclusions

- Commission’s investigation: LOB rule NL/Japan
  - Concerns about recognised stock exchanges
  - Concerns about ownership requirement
  - Request for a reasoned opinion in November 2015
    - ... since then: no new developments?!
- Compatibility of LOB rule with EU law unclear
- Compatibility of PPT rule with EU law probable
- Multilateral Convention: better to avoid LOB rule and to choose PPT rule and discretionary relief
  - ... at least from an EU law perspective