The Influence of EU Tax Law on the EU Member States' External Relations: an Overview

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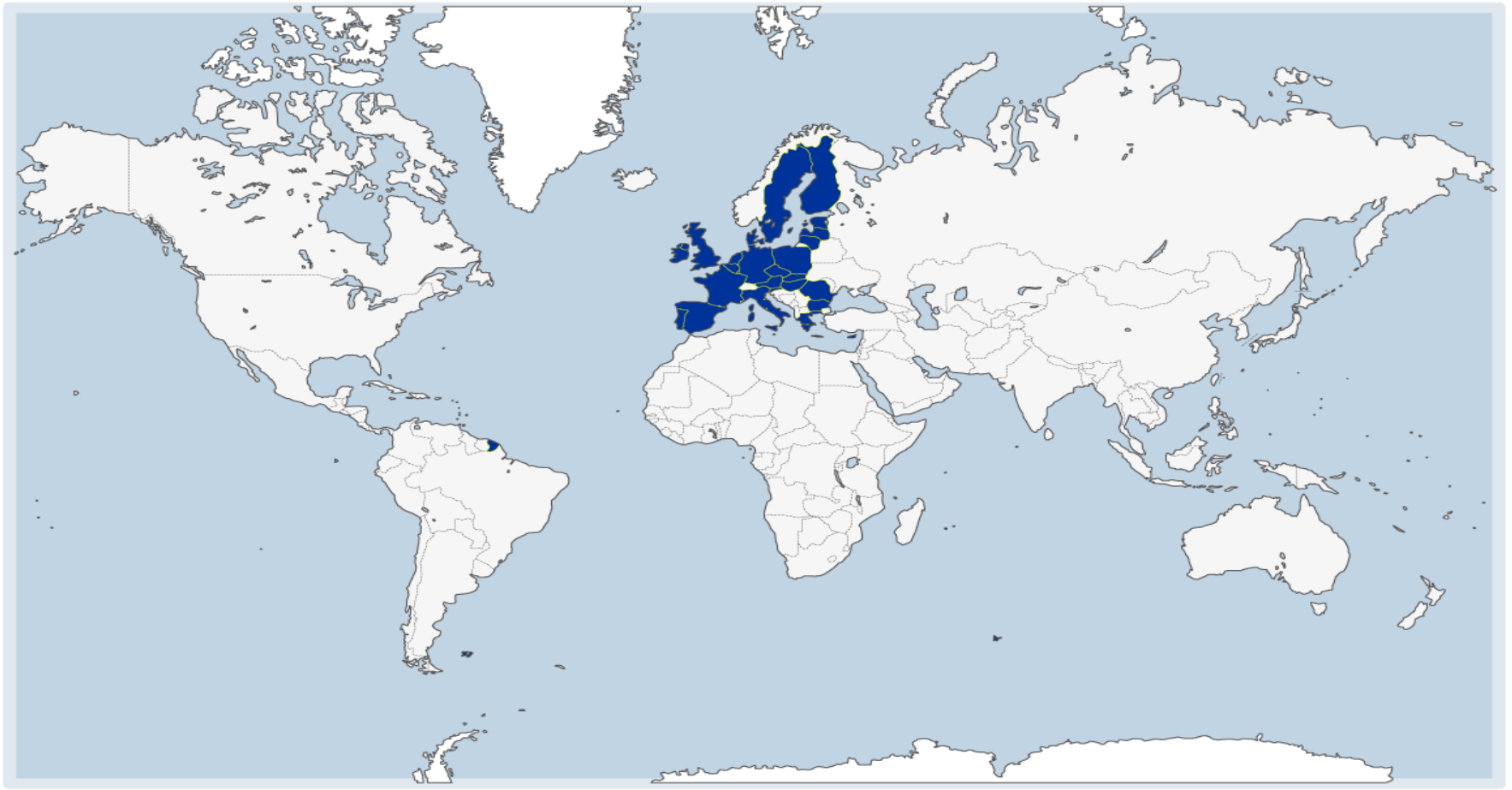
International economic integration does not stop at the European borders



“European economic openess”: why?

- European Commission (2006):

  “***European economic openness is vital for creating jobs and growth in Europe and for our international competitiveness***. Openness to global trade and investment increases our ability to exploit the benefits of an effective single market. It exposes the domestic economy to ***creative competitive pressures***, ***spurring and rewarding innovation***, providing access to ***new technologies*** and ***increasing incentives for investment***.”

  “***Europe must reject protectionism***. Protectionism ***raises prices*** for consumers and business, and ***limits choice***. In the medium term, protecting import-competing sectors from fair external competition diverts resources away from more productive sectors of the economy. As our prosperity depends on trade, others’ reciprocal obstacles would damage our economy.”

How does this affect Member States' competence in the field of direct taxation towards non-EU Member States?

- Negative integration: case law → CJEU interpretation of EU free movement provisions in the field of direct taxation

- Positive integration: EU tax legislation & EU tax policy

“European openess” and negative integration in the field of direct taxation

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CJEU has demonstrated competence to interpret EU free movement provisions vis-à-vis non-EU Member States

- Article 63 TFEU, EEA-Agreement, numbrous EU Association-, Partnerschip- & Cooperation Agreements, Agreement with Switzerland on the free movement of persons
  - Free movement of capital, persons/establishment and/or services between EU and non-EU Member States, although with varying intensity

  - CJEU tends to interpret broadly in the field of direct taxation (e.g. *FII 2*, *Itelcar*, *Santander*, *Ettwein*), although significant (but fragmented) derogations in favour of the Member States apply:
    - Free movement of capital not applicable in case of direct tax measures solely designed for MNEs (e.g. *Kronos*, *FII 2*)
    - Standstill clauses may grandfather existing restrictions
    - More room for Member States to successfully rely on justification grounds (e.g. *Rimbaud*)

But are there limits to the CJEU's competence in the relations with non-EU Member States? Perhaps!

- Article 65(4) TFEU (Lisbon Treaty) → shift of competence from CJEU to EC/Council to interpret free movement of capital ex Article 63 TFEU in the field of direct taxation vis-à-vis third countries?
  - "*The Commission* or, in the absence of a Commission decision within three months from the request of the Member State concerned, *the Council, may adopt a decision* stating that *restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties* in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market. The Council shall act unanimously on application by a Member State."

- To date, this new procedure has never been applied

But are there limits to the CJEU's competence in the relations with non-EU Member States? Perhaps!

- EEA-Agreement: CJEU competent only as far as the Union is concerned

- APC Agreements (mixed agreements): CJEU competent only far as the Union is concerned (*Demirel*)
  - CJEU is competent to interpret the provisions of mixed agreements that come within the powers of the Union (e.g. free movement of workers)
  - But (perhaps) no competence to interpret provisions which come within the exclusive competence of the Member States
    - Does direct taxation fall within the powers of the Union in the meaning of this case law? Perhaps more clarity in pending direct tax case *Secil*, C-464/14
      - » NB: Dutch SC has never raised preliminary questions in direct tax cases in the context of APC Agreements

And what about extended CJEU competence in the relations with non-EU Member States?

- Voluntary adoption of Union law in the Member States' associated/ dependent territories to which Union law does not (fully) apply (e.g. overseas countries and territories)

  - The Netherlands: Bonaire, Saint Eustatius, Saba
  - To be considered as non-EU Member States to the extent these territories are not bound to the TFEU provisions (*Prunus*)
  - But perhaps CJEU still competent, by analogy to *Leur Bloem*, to the extent the Dutch legislator decides to gradually (and voluntary) incorporate Union law in the local laws of these territories

“European openess” and negative integration in the field of direct taxation: conclusion

- CJEU has demonstrated competence, but significant restrictions may apply

- In any case, CJEU case law does not result in comprehensive (pan-European) approach in the field of direct taxation; CJEU decides on case-by-case basis …

- … and it is not concerned with obstacles stemming from disparities (e.g. international juridical double taxation)

- Hence, there is still a case for EU legislation and coordination (positive integration) vis-à-vis non-EU Member States

“European openess” and positive integration in the field of direct taxation

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“European openess” and positive integration: the various types of EU competence

- Internal competence
- External competence
  - Express
  - Implied

- In all cases, EU competence can be shared or exclusive

Internal competence and non-EU Member States in the field of direct taxation

- Union can use the internal powers conferred on it in order to specify the treatment which is to be accorded to nationals of non-EU Member States …
  - E.g. proposed CCCTB Directive, (draft) anti-BEPS directive
  - Becomes exclusive once exercised (e.g. *Opinion 1/94*)

- … but can the Union tax whoever it wants or are the limits on the Union's external competence based on customary international law?
  - *Cf*. extraterritorial effects under Article 3(1)(e) of the FTT Directive proposal (2011) and Article 4(1)(g) and (2)(c) of the FTT Directive proposal (2013)
  - CJEU 30 April 2014, C-209/13: CJEU not competent to answer as long as these provisions have not definitely been established/implemented

Express external competence and non-EU Member States in the field of direct taxation

- Article 64(2) and Article 64(3) TFEU: free movement of capital
  - Adoption of Union measures on the movement of capital to or from third countries involving direct investment — including investment in real estate — establishment, the provision of financial services or the admission of securities to capital markets
  - Controversial whether competence is exclusive or not
  - To date, these provisions have not been applied in the area of direct taxation

Express external competence and non-EU Member States in the field of direct taxation

- Article 207(1) TFEU: express external competence for "foreign direct investments" since the entry into force of the Lisbon Treaty
  - Union's common commercial policy must be based on uniform principles, particularly in regard to … foreign direct investment …"
  - Hence, through the entry into force of the Lisbon Treaty, the Union's common commercial policy includes foreign direct investments as well
  - But to date, this provision has not been applied in the area of direct taxation

Express external competence and non-EU Member States in the field of direct taxation

- But Article 207(1) TFEU potentially could significantly hit Member States' competence vis-a-vis non-EU Member States in the field of direct taxation. Two examples:
- Under the Lisbon Treaty the Union has become exclusively competent to negotiate and conclude Bilateral Investment Treaties with non-EU Member States under this provision
    - But what about Member States' competence to negotiate/ conclude tax treaties with non-EU Member States…?!
    - And what about impact of the new EU investment policy on international tax policy (e.g. BEPS)?
        - *Cf*. Article 1(3)(c) of the draft text of the EU/US TTIP: only investment protection if company carries on substantive business operations ("substance test")
        - Anti-BEPS legislation through the backdoor?

Implied external competence and non-EU Member States in the field of direct taxation

- Union is also competent to act in its external relations if such is necessary for attaining one of the Union's objectives (*in foro interno, in foro externo)*
  - E.g. EU/Swiss agreement on the taxation of savings, including benefits equivalent to those laid down in PSD/IRD (Article 15)
  - Can become exclusive if internal competence can be effectively exercised only at the same time as the external competence
    - But there must be a clear nexus between the exercise of internal and external competence
  - Union likely exclusively competent as far as the taxation of savings is concerned
  - But also exclusive competence as far as PSD/IRD benefits are concerned? Council declaration: no; controversial in scholarly literature

“European openess” and positive integration in the field of direct taxation: conclusion

- Little positive integration towards non-EU Member States up until date in the field of direct taxation …

- … but this may change in the future due to implementation of anti-BEPS and related rules in the Union (anti-BEPS Directive, (C)CCTB) and (possibly) following the new EU’s exclusive competence for foreign direct investment

- In any case, allignment with CJEU case law and new EU investment policy is necessary when designing new European direct tax rules vis-à-vis non-EU Member States for the sake of coherency

  → Towards a comprehensive EU policy in the field of international tax law?

Questions….?

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The External Competence of the EU in Direct Taxation: an Overview

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