IMPRESSIONS FROM KROMANN REUMERT’S EU TAX LAW CONFERENCE
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In October 2015, Kromann Reumert held its first annual EU tax law conference jointly with Amsterdam Centre for Tax Law. The conference addressed the new EU General Anti-Abuse Rules (GAAR) in the EU Parent/Subsidiary Directive (2011/96/EU) and the European Commission's investigations of local tax ruling practices on Advance Pricing Agreements (APAs). Implications in terms of legal uncertainty for taxpayers was a recurring theme throughout the conference.

Professor Dennis Weber acted as chair and the European Commission was represented by Director Karl Soukup.

TOWARDS A LEVEL PLAYING FIELD IN EU TAXATION

Large differences in global and EU Member State tax rates provide incentives for associated enterprises to shift profit to low tax jurisdictions using prices and conditions that independent enterprises would not agree to (non-arm’s length transfer pricing). This is harmful for competition in the EU and, if tolerated by Member States on a selective basis, it may also constitute illegal State aid to favoured undertakings. In June 2014, the Commission launched in-depth investigations of corporate taxation of Apple (Ireland), Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg). Shortly after the conference in Copenhagen, the Commission then issued two highly anticipated decisions. On 21 October 2015, it thus decided that alleged tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands were selective and illegal under EU State aid rules.

At the conference, Director Karl Soukup from the Commission stressed that “every State aid case is judged on its own merits, exclusively from a State aid point of view, based on facts and following due process.”

Other speakers however also pointed out that combining State aid enforcement tools with soft law measures, the Commission has successfully prompted the Member States and the Council to tackle harmful tax practises at the EU level. The threat of individual investigations may thus also have an arm-twisting effect on Member States that are otherwise reluctant to address tax law matters at the EU level. The recent amendment of the Parent Subsidiary Directive to comprise a minimum anti-abuse rule is a pertinent example of how the Commission has successfully facilitated horizontal, EU level responses to corporate taxation issues.

Both individual State aid investigations of for instance APAs, as well as common minimum anti-avoidance rules ultimately benefit businesses by creating a level playing field in the area of corporate taxation. However, here and now the recent developments also entail uncertainty for taxpayers.
THE SPEAKERS

Direct taxation falls within the competence of the Member States. Still, Member States should exercise this competence in a way that is consistent with EU law. Consequently, EU tax is very much case law based. It also means that individual enforcement actions before the domestic courts and the Commission’s use of enforcement powers against Member States constitute important drivers of policy developments. The mix of speakers reflected this and included practitioners, policy makers and academics:

- Prof. Dr. Dennis Weber, Amsterdam Centre for Tax Law (chair)
- Prof. Gerard Meussen, Radboud University Nijmegen (EU GAAR)
- Dr. Tom O’Shea, Queen Mary University of London (EU GAAR)
- Prof. Dr. Niels Winther-Sørensen, PwC (EU GAAR)
- Alex Chadwick, Baker & McKenzie (EU GAAR)
- Director Karl Soukup, European Commission (EU State aid)
- Dr. Rita Szudoczky, Vienna University of Economics (EU State aid)
- Dr. Klaus Sieker, Flick Gocke Schaumburg (EU State aid)
- Vinod Kalloe, KPMG Meijburg & Co Tax Lawyers Amsterdam (EU State aid)

EU GENERAL ANTI-ABUSE RULES (GAAR)

The first part of the conference addressed the new EU GAAR in the Parent/Subsidiary Directive. The Directive exempts dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes. In 2015, the Council introduced a common minimum anti-abuse rule in order to prevent abuse of the Directive by taxpayers who fall within the scope of its application. The Danish legislator “estimates” that there is no significant material difference between the Parent/Subsidiary Directive GAAR and the OECD GAAR despite different wordings, but leaves it to be resolved by the Court of Justice of the EU.

EXAMPLE: NEW ANTI-ABUSE RULE

The Commission has previously discussed the scope of the EU GAAR in a memo of 25 November 2013, where the Commission gave an example concerning dividend withholding taxes. Member State A has withholding taxes on dividend payments to parent companies resident in a non-EU-country X. Member State B has no withholding taxes on dividend payments to parent companies in country X.

If a subsidiary in Member State A is owned directly from country X, there will be withholding taxes on profit distributions. If the parent company in country X sets up an intermediate subsidiary in MS B, the withholding tax in Member State A can be avoided. Member State A cannot have withholding taxes on profit distributions to a parent company in another Member State under the Parent/Subsidiary Directive.
According to the Commission memo, the anti-abuse rule could be applicable in Member State A if the set-up is a wholly artificial arrangement where the essential purpose for the insertion of the intermediate company in Member State B is to avoid the withholding taxes in MS A, e.g. a letterbox company with no substance. As a consequence of the application of the anti-abuse rule, the benefits of the Directive (including the non-application of the withholding) would be denied.

**SOME THOUGHTS BY THE SPEAKERS**

- There is a shift in attitude on limits between acceptable tax planning and unacceptable tax evasion.
- In the end, every GAAR, be it a domestic GAAR, the GAAR in the EU Parent/Subsidiary Directive or the new OECD GAAR, is applied by national tax courts in domestic tax disputes.
- Moreover, the application of a GAAR literally takes place on a case-by-case basis, depending on the facts and circumstances of the litigated case in question.
- National supreme courts and the CJEU may provide general guidelines. However, in the end, every case is decided on its own merits.
- A genuine fear in the present BEPS euphoria may be that Member States and OECD Members too eagerly apply the abuse of tax doctrine.
- Moreover, this will have a serious negative effect on the European Internal Market.
KROMANN REUMERT RECOMMENDS

- Groups operating in the EU need to assess if arrangements previously covered by the Parent/Subsidiary Directive comply with the new GAAR standard.

- Notably, arrangements not established for valid commercial reasons that reflect economic reality do not benefit from protection.

- Moreover, groups operating in the EU should pre-empt burden of proof issues and secure documentation for facts and circumstances that can demonstrate - based on an objective analysis - that an arrangement is not abusive.

- If a group cannot rely on the Parent/Subsidiary Directive, it should consider if the applicable Member State tax rules comply with the freedom of establishment and/or the free movement of capital.

EU STATE AID

The second part of the conference addressed the interplay between State aid rules and direct taxation. Over the past 15 years many Member States have introduced rules preventing base erosion techniques, including rules against thin capitalization, rules against hybrid mismatches, rules against treaty shopping etc. Some Member States also have had to repeal measures of harmful tax competition.

More recently, the Commission has critically assessed local APAs, i.e., a type of ruling that determine, in advance of intra-group transactions, an appropriate set of criteria (method, comparables and adjustments etc.) for the determination of the transfer prices for those transactions over a fixed period of time.

APAs have significant advantages in terms of providing legal certainty and reducing administrative and compliance burdens. However, APAs can also infringe State aid rules when they deviate from the general tax rules and favourable treatment benefits individual undertakings. The EU Commission needs to establish that the country under investigation has conferred an advantage on a selective basis to a company distorting competition and affecting trade between Member States.

Determining the existence of an advantage requires the Commission to establish a point of reference. The Commission has chosen as point of reference the arm’s length principle as elaborated in the OECD Transfer Pricing Guidelines. It must further demonstrate that the advantage has been conferred on a selective basis.
SOME THOUGHTS BY THE SPEAKERS

- Tax administration must ensure that transfer pricing arrangements mirror market terms.

- If not, aggressive transfer pricing can be employed to transform active income from economic activity into mobile royalty and interest payments, which can be shifted and attributed to low/no taxation jurisdictions.

- State aid control continues to form part of the Commission’s efforts to combat tax evasion and tax fraud.

- The Commission reviews each case on its own merits and exclusively from a State aid point of view.

- Considerable methodological issues remain unresolved, including what sort of comparison the Commission should make in the cases of APAs.

- State aid investigations of non-arm’s length transfer pricing are likely to have significant deterrent effect in that taxpayers and tax administrations will be rather reluctant to apply for/grant unilateral transfer pricing rulings.

- Countries will offer to multinational enterprises other tax breaks, e.g. patent boxes, further reduction of the corporate tax rate, notional interest deduction, etc.

KROMANN REUMERT RECOMMENDS

- The recent investigations should be seen in the broader context of the fight against tax evasion in the EU, however, undertakings in good faith may also be illegally favoured.

- Undertakings should thus critically reassess if intra-group agreements covered by an APA mirror terms to which an unrelated party would have agreed, i.e. market terms.

- Other types of tax measures may also be challenged and the Commission’s investigations are not confined to APAs.

- State aid should therefore form part of undertakings general compliance assessments.