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Legal certainty in the field of taxation

Why does it matter ?

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Achieving Tax Certainty in a World of Uncertainty

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What is legal certainty ?

- Legal certainty in **domestic laws**
- Legal certainty in **EU Law** (among others CJEU, C-318/10, SIAT, point 58)
 - “the requirements of the principle of legal certainty, in accordance with which **rules of law must be clear, precise and predictable** as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings”*
- Legal certainty and **factual certainty**

Importance of legal and factual certainty

- Absence of legal and/or factual certainty may have **adverse effects on investment and trade** and influence locations decisions (IMF/OECD Tax Certainty Report 2017)
- From the perspective of tax administrations, **taxpayer behavior** may also lead to uncertainty (aggressive tax planning and lack of cooperation, IMF/OECD Tax Certainty Report 2017)

Sources of tax uncertainty

- **Sources of uncertainty** (IMF/OECD 2017 Tax Certainty Report) may *inter alia* be linked to:
 - The operation of tax laws (unexpected/retroactive changes, transitional/temporary provisions)
 - The drafting of tax laws (unclear, poorly drafted statutes)
 - Ineffective and unpredictable implementation of tax laws
 - Emergence of new business models (for example the digital economy)
 - Interaction of several tax systems in a cross-border context

Tax certainty in the Post-BEPS world

- The OECD/G20 BEPS initiative aims at "fixing" the international tax system on the basis **coherence, substance and transparency**
- The **policy shift from unilateralism to multilateralism** (i.e. common international standards) would be expected to reduce uncertainty in a cross-border context
- However, the BEPS initiative only includes **4 minimum standards**: Harmful Tax Practices (**Action 5**), Treaty Abuse (**Action 6**), Country-by-Country Reporting (**Action 13**), Effective dispute resolution (**Action 14**)

Some tax certainty challenges in the Post-BEPS world

- Uncertainty in the interpretation and application of **some minimum standards**, for example the **Principal Purpose Test** (“PPT rule”) in the area of Treaty Abuse (Art. 7(1) MLI):

*«Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was **one of the principal purposes** of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would **be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement**»*

- Relation with EU primary and secondary law

Some tax certainty challenges in the Post-BEPS world

- **Heterogeneous implementation of BEPS recommendations**, for example BEPS Action 7 (Artificial Avoidance of PE Status)
- Even where the recommendation is implemented, uncertainties may remain for example in the area of profit attribution in relation to BEPS Action 7

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Some tax certainty challenges in the Post-BEPS world

- Development of **unilateral measures** for example in the area **of the digital economy**
- Adoption of turnover taxes as "interim measures" ?
- Does an interim measure achieve tax certainty ?
- Risk of double taxation and compatibility with national law and supranational laws ?

Some tax certainty EU challenges

- **Low level of harmonization (Anti-Tax Avoidance Directive)**
- **Possible tensions with EU primary law (fundamental freedoms and state aid law)**
 - National legislation putting into effect an option granted by a directive may be directly reviewed in light of EU primary law (for example ECJ, judgment of 8.3.2017, Euro Park Service, case C-14/16)

Some tax certainty EU challenges

- **Possible tensions with EU primary law (fundamental freedoms and state aid law)**
 - Notably uncertainties in light of **state aid review and broad interpretation of selectivity criterion** under art. 107(1) TFEU (C-20/15 P - Commission v World Duty Free Group), see recently for example recently State Aid SA.44896 (2017/C ex 2017/NN) – United Kingdom CFC Group Financing Exemption
 - Impact of **free movement of capital on third countries** (ECJ, judgment of 24.11.2016, SECIL, case C-464/16), see also recently **pending C-135/17 on German CFC rules**

Conclusions

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