Hybrid Mismatches After the ATAD

Theoretical Aspects of International Cooperation in Tax Matters

Abstract

This dissertation argues that the current approach toward hybrid mismatches, *i.e.* linking rules, is ineffective and that EU Member States should consider and adopt other solutions to hybrid mismatches, in particular coordination rules, to achieve single taxation of cross-border income if it is their tax policy goal. I make this argument to help tax policymakers deal properly with hybrid mismatches while also achieving greater legal certainty for taxpayers and tax administrators. While pursuing my claim, I touch on the essential elements of current international taxation, describe certain sets of hybrid mismatches, discuss policy implications of hybrid mismatches' outcomes, and show what linking rules are and that they have many shortcomings. Consequently, I discuss various alternative solutions to hybrid mismatches and point out that coordination rules can be a better method to pursue. Using the preparatory discussion, I examine the Czech anti-hybrid mismatches rules and argue that EU Member States can, to some extent, still use coordination rules as a solution to hybrid mismatches under the ATAD.

My analysis leads to practical and theoretical conclusions. I show that the academic literature does not consistently define some forms of hybrid mismatches, show that the G20/OECD BEPS Project Action 2 and the ATAD's aims are not substantial single taxation based on value creation but only *formal* single taxation "*no matter where*" or in the EU. I also show that hybrid mismatches represent the incoherent treatment of domestic-only and cross-border situations by income tax law. Therefore, I argue that using coordination rules is a reasonable solution that prevents some hybrid mismatches altogether instead of dealing only with their outcomes. Then I show that using coordination rules can be a feasible and even preferable approach because linking rules are easy to tax plan around; this fact can be frustrating for countries if *substantial* single taxation is actually the tax policy aim of

a particular EU Member State. Describing the situation of the Czech Republic as a particular EU Member State, I also identify loopholes of the current Czech anti-hybrid mismatches rules. Moreover, I illustrate that the implementation does not cover some situations of hybrid transfers and reverse hybrid entities, and thus the European Commission could begin an infringement procedure against the Czech Republic. Besides, I argue that since the linking rules tax policy goal is not *substantial* single taxation but merely *formal* single taxation, the deduction/low-taxation outcome does not violate linking rules, which is important in case tax administrators want to use the GAAR to deal with such cross-border situations. Finally, I suggest that the international legal custom of taxing hybrid mismatch arrangements once could arise in limited cases, but the arguments for its existence are inconclusive for now.

The dissertation's scope and methodology bound the argument of the dissertation. The dissertation deals only with hybrid entities, debt-equity hybrid financial instruments, and hybrid transfers and does not deal with permanent establishment mismatches, timing mismatches, and other forms of mismatches in cross-border settings; the formulary apportionment solution and some special forms of the income tax treatment of debt and equity are also outside of the dissertation's scope. The dissertation uses primarily doctrinal discussion, using from time to time normative and empirical research to support the doctrinal argument. However, further empirical research about the effectiveness of linking rules and coordination rules in the future would be beneficial. Thus, the dissertation's primary aim is to join the doctrinal discussion about the conceptual issues involved with hybrid mismatches and to show that academics should consider the fact that countries can have single taxation as their tax policy goal in some situations.