ON THE ISSUE OF TAX HARMONISATION PROCESSES WITHIN REGIONAL ECONOMIC INTEGRATION

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Abstract

The tax harmonisation process is presented in the contemporary context of regional economic integration process. The authors suggest that there is a new inevitable economic reason for tax harmonisation within the economic units — namely tax base erosion and profit shifting. The tax harmonisation process in the EU is presented in a systematic way giving reasons and logic of the process. The EEU to certain extent resembles the process. Tax harmonisation within a supranational integration entity covers indirect taxation and only to a certain extent the direct taxation issues. It is consistent with the consequence of introducing the freedoms within the integration process. Another issue of taxation arising within regional economic integration is the allocation of fiscal powers between the member-states at supranational level.

Keywords

Tax, tax harmonisation, regional economic integration, EU, EEU

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1. INTRODUCTION

The jurisdiction to tax is part of the sovereignty of a State. However, this part of the sovereignty is now affected by the supranational unions and other forms of integrations. The aim of the article is to show certain issues of tax harmonisation as revealed in European Union and in the Eurasian Economic Union.

The methods employed in this research include the method of comparison, analysis and synthesis. The method of comparison is relevant due to the fact that economic integration processes follow certain patterns and share experience in the world of globalisation.

2. TAX INTEGRATION WITHIN THE ECONOMIC UNIONS AND ITS LEGAL HARMONISATION TOOLS

There are a few examples of international regional economic integration in the contemporary world and tax harmonisation is always an inherent part. The contemporary examples include the Andean Community,[3] the South-African Economic Community,[4] and the European Union.[5] The transboundary tax problems with neighbour-states are becoming more important for Russia due to its membership in the Eurasian Economic Union (EAEU). The Eurasian Economic

[3] http://www.comunidadandina.org.

[4] www.sadc.int.

[5] http://europa.eu/.

Union (EAEU) became reality on 1 January 2015 after the 29 May 2014 Agreement on the Eurasian Economic Union was signed.

A regional economic integration usually means that the states set closer economic and political relations due to the common interests, and shared economic problems. In order to stimulate the economic relations the states are trying to create four freedoms: freedom of goods movement, freedom of works and services movement, freedom of labour movement, and freedom of capital movement. Usually, the freedoms appear in the economic integration agenda one after another in the sequence as described. Taxation has an influence on all of the main freedoms and its harmonisation serves and enables the freedoms.

There is a wide academic discussion of the political, geopolitical and economic reasons underlying the European and Eurasian economic integration. It is suggested in certain publications that the Eurasian Economic Union is more politically or geopolitically driven and the economic expectations of the member-states are not met.[6] We would not agree with that. Usually, the will of the member-states politicians is important, but not enough for going through all the controversies and problems of the economic integration process. There should be much in common for the real economic integration: historical, economic or geopolitical factors. There should be some true and objective circumstances driving the economic integration and sometimes making the economic integration inevitable.

Nowadays the tax aspects of the integration trend have their own inevitable and virtual reason pushing the politicians and legislators. These reasons are the tax base erosion and profit shifting.

The phenomena of tax base erosion and profit shifting were quite recently recognised at the global level. The Organization for Economic Co-operation and Development elaborated the document Base Erosion and Profit Shifting Action Plan.[7] This document includes 15 actions, among them such well-known instruments as controlled foreign companies' rules, transfer pricing rules, and multilateral instruments.

[6] A Paralakh, Economic or Geopolitical? Explaining the Motives and Expectations of the Eurasian Economic Union's Member States [March 2018] 11(1) Fudan Journal of the Humanities and Social Sciences 31–48.

[7] http://www.oecd.org/tax/beps/beps-actions.htm.

Multilateral instrument (actions 15 of BEPS Plan) is the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS worked out by OECD which already unites more than 100 jurisdictions. The Convention offers solutions for governments to close the gaps in existing international tax rules. The exact measures to be implemented in bilateral tax treaties between states are based on a Model Tax Convention on Income and on Capital worked out by OECD.

The BEPS Action Plan also proposes the automatic exchange of information between tax jurisdictions. This exchange includes two kinds of information: financial information which is collected by national tax authorities from national financial institutes, and information about the spread of activity of multinational enterprises by tax jurisdictions (country-by-country reporting).

Country-by-country reporting is stipulated by action 13 of the BEPS Plan (transfer pricing). Tax jurisdictions which want to share information with other tax jurisdictions and are ready to implement in the national tax legislation relevant rules may join with the Multilateral Convention on Administrative Assistance in Tax Matters. BEPS Plan also consider possibility of exchange rules stipulating in bilateral tax conventions or in tax information exchange agreements.

Country-by-country reports shall be prepared by multinational enterprises and be provided to national tax authorites in the place of registration of the mother company, or in the place of registration of an enterprise's party who is authorised on the preparation of country-by-country reports.

Country-by-country reporting is included in the package of transfer pricing documentation which is recommended by OECD and includes three parts:

— national documentation (local file) — transfer pricing documentation of each company in a corporate group;

— global documentation (master file) — information about activity of the whole enterprise, main businesses, pricing and policies, etc.;

— country-by-country report — spreadsheets of revenue, profits, accrued and paid profit tax, fixed assets and headcount by tax jurisdictions.

Together, this package of transfer pricing documentation shall provide to all tax jurisdictions fully transparent information about the activity of the whole enterprise — allowing them to analyse links between real activity, earned profit and taxes to trace where the real source of profit is and where taxes shall be actually paid.

Due to the close economic relations between the states within regional economic unions, there are wide range of methods of tax optimisation leading to the erosion of tax base and profit shifting. Differences in tax regimes of different countries opens the opportunities even for non-taxation. Different level of tax burden leads to competition among the states for the tax incomes. General agreements stimulating the trade between the states are entered into regional economic agreements encourages taxpayers to optimize tax payments. Consistent tax harmonisation require transparency of the multinationals' activity[8] and financial statements preventing the profit shifting. In this respect the principles of taxation within an economic union aims to achieve taxation based on place of real activity where income is generated — where the value is created.

In the case of regional economic integration the tax agenda appears at the early stages and develops further. Each stage requires relevant legal instruments and poses specific issues.

The regional economic integration usually go through several stages which are regularly seen in existing economic unions stages.

The first and simplest form of integration is the zone of preferential trade.

The next stage is customs union. The third integration stage is a common economic area (common market). Once the common finance and monetary policy becomes feasible the development of regional economic integration can develop to the stage of economic union and envisage the prospective of a common currency. The economic union is considered to be the base for further political union with unified internal and foreign policy. Further economic integration may lead to foundation of confederation or even federation.

[8] Shashkova A.V. Pro et contra criminalization of corporate liability in the Russian Federation // Kutafin University Law Review. 2017. Vol. 4. No. 2. P. 544–554.

3. THE TAXATION COMPONENT OF THE EUROPEAN INTEGRATION PROCESS

The European Union (EU) includes these steps of integration. The European Community gives us a good example of a tax harmonisation process. The exclusive competence of the European Union, in particular, includes the regulation of the customs union and common trade policy, and the common competence includes the internal market of the Union and the economic cohesion of the Union. These competences allows the European Union to exercise authority in the field of levying customs duties, excise taxes and sales taxes. The European Union in this matter shows that the activity on the harmonisation of taxes on turnover should take place accurately, stage by stage, because the tax system has an influence on the budgets of member states. Powers to regulate turnover taxes, as well as excises and other indirect taxes are granted to the Council of the European Union (only unanimously and after consultation with the European Parliament and the Economic and Social Committee) by section 113 of the Treaty on the Functioning of the European Union, but only as much as necessary for functioning of the common market.

Initially the European Union was based on three communities: The European coal and steel community (ECSC) (the time limit of the founding treaty expired in 2002), the European Economic Community (EEC) and the European Atomic Energy Community (EAEC or Euratom). The communities were incorporated in the European Union and constituted the "first pillar". The other two pillars are: the Common Foreign and Security Policy and Police and Judicial Co-operation in Criminal Matters.

Originally the integration tax legislation was within the European Economic Community. The legal system of contemporary European Union absorbed the integration tax law of EEC. Some of the documents of the EEC are still in force although new documents were adopted on the majority of issues.

The integration tax law of European Union — besides the harmonisation of taxes -was amplified with tax administration issues including the mutual assistance of tax authorities. The sources of integration law of the EU include: the foundation treaties of the communities and the European Union, regulations, Directives, decisions of the supranational authorities and the rulings of the European Justice Court (ECJ). In fact all the sources are involved to some degree in the integration of tax systems. The integration tax law includes the national tax legislation in a complicated interaction with the supranational documents. From the practical point of view in order to get an idea of VAT taxation of certain supplies first of all one should address the legal system (including legislation, rulings and other sources) of the member-state where the supply takes place (for example, Value Added Tax Act of the UK) and then to the Directives and other sources of EU including the decisions of the ECJ. As we already noted above some of the Directives originally issued within the EEC are in force and still a part of the EU legislation.

As the main goal of the EU is the common market of goods, works, services, labour force and capital, tax integration customs fees and indirect taxes are involved. Direct taxes are involved only in the matter of capital movement freedom, and tax integration in part of the indirect taxes. The lack of tax integration in the sphere of direct taxes compared to indirect can be explained, for at the time of the signing of the Rome Treaty (1957), direct taxes seemed to not be important for the purposes of forming a “common market.”

Indirect taxes include turnover taxes, sales taxes, VAT and excises. These taxes were involved in tax integration in EU a long time ago. The unified taxable base, principles etc. were defined very early.

The first documents on the harmonisation of turnover taxation included:

— the Council Directive 67/227/EEC of April 1967 on the harmonisation of legislation of member states concerning turnover taxes (the First Directive),

— the Council Directive 77/388/EEC of May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (Sixth Directive),

— the Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover tax arrangements for the refund of value-added tax to taxable persons not established in Community territory (Thirteenth Directive).

In 2006 a new Directive on VAT was adopted: the Council Directive 2006/112/EC on common system of value added tax. The harmonisation of excises was related to the removal of customs control within the EEC and the EU. Firstly, the integration tax legislation defined the excise goods, taxable base, minimum rates and the calculation methods. Further harmonisation was then structured with reference to particular excise goods categories.

The excises on tobacco, for example, were harmonised with the following documents: the Council Directive 92/79/EEC of 19 October 1992 on the approximation of taxes on cigarettes, Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes; and Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco.

In respect of taxation of alcohol there were the following documents: Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages, and Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages,

The excise taxation of mineral oils was harmonised also in 1992 by the Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils and by the Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils. In 2003 the Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity was adopted.

In 2008 the harmonisation of excises came into the systematization phase and the new Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC.

The direct taxes are not totally harmonised in the EU in the same way that indirect taxes are. Only selected issues are covered by a limited number of Directives. The main Directives on direct taxation are:

— Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States,

— Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States,

— Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States,

— Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments.

The wording of the Directives' names suggests just how restricted the scope is of this integration legislation. It should be added however that some of the harmonisation problems in the direct taxation are resolved on the basis of the general principle of non-discrimination which arises from the foundation documents of the EU and which are widely applied by the ECJ. But it does not amount to a unified tax base, nor calculation method, nor rates. Attempts to work out projects on the harmonisation of direct taxes were underttaken several times in the years 1975, 1984, 1985, 1988, and 1992, but all of them failed as a result of a lack of consensus between member states and a general unwillingness to concede such a significant part of fiscal sovereignty as taxes on income.

Nowadays there is a fresh initiative on a common consolidated corporate tax base being discussed in the EU. The main points of these discussions are

— A common scope of rules for tax profit calculation;

— tax profit to be calculated based on activity in the European Union in common, not each member state separately;

— tax profit shall be spread by member states based on real activity of company in each member state;

— each member state may set own tax rate by which share of tax profit mentioned above will be obliged.

However, no serious steps are being undertaken at the present time and the main question is if the harmonisation of a tax base is still feasible. In general the small number of issues already harmonised for direct taxation are closely related to freedoms of capital and labour movement. It might be the case that the full harmonisation of direct taxation is not required for procurement of four fundamental freedoms and therefore will not supported by the member-states.

As we mentioned before the EU developed the new forms of cooperation (second and third pillar) and those included further cooperation of fiscal authorities of the member-states in the field of tax administration.[9] We can mention here the following documents:

— Council Regulation (EU) No. 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax;

— Council Regulation (EC) No. 2073/2004 of 16 November 2004 on administrative cooperation in the field of excise duties and

— Council Directive 2004/106;

— Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation

— Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

— Arbitration Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (Convention itself and the protocols). This Convention re-entered into force in 2004.

The European Union has its own system of revenues and its own budget. This system is based on Council Directive 70/24 dated 28 April 1970. According to this Directive there are specific sources of the EU's budget, namely mostly the fees received from member states on its funds, which also include tax funds. It is not a brand new approach, for by foundation treaty of The European coal and steel community (ECSC) (1951) the budget of this community was formed partly from sales taxes on coal, steel and their derivatives.

The tax system of the European Union includes agricultural taxes, customs fees on borders of European Union, and a certain share of

[9] AV Shashkova, Russian specifics of combating corruption [2015] 1(3) Kutafin University Law Review 51–68.

VAT which is collected in member states. Also it has the exclusive right of EU to impose tax on income earned by individuals who work in the European Union institutions. Agricultural taxes include the following taxes:

— tax on import and export of agricultural products from/to states who are not members of the EU;

— tax on sugar, paid by companies who are producing sugar in member states;

— tax on isoglucose, paid within the tax on sugar.

Regarding the revenue system of European Union it should be mentioned that the share of VAT paid to the budget of the European Union is collected on the basis of a fixed rate surcharge to the state rate of EU in each member state. The rate of the surcharge is established by Council Direction. VAT is one of the main sources of the EU budget.[10]

The practice of European Justice Court is a factor influencing tax harmonisation. The indirect taxation is closely related with free trade and "common market", therefore it is heavily regulated by supranational legislation acts of the European Union. This is the reason why the ECJ takes cases regarding indirect taxes especially related to interpretation and implementation in national tax legislation.

For direct taxes the situation is different. Competence to levy direct taxes is not provided for in the European Union in the foundation treaties, and member states do not want to surrender their sovereignty in this respect. As the ECJ is not authorised to interpret national tax law and bilateral tax treaties, cases based on tax law are likely to be rejected. Occasional cases which it hears involving direct taxes, consider not tax issues per se, but rather the common principles of European law (freedom for movement, "common market", non-discrimination, freedom of market competence, etc.). The following cases may be mentioned here:

— Case C-279/93 Finanzamt Koln-Altstadt v Roland Schumacker, ECJ, 14 February 1995 about taxation of non-residents;

[10] See G Tolstopyatenko, Evropeyskoye nalogovoye pravo: sravnitelno-pravovoye issledovaniye (The European tax law: comparative legal study) Moscow: Norma, 2001.

— Case C-446/03 Marks & Spencer Pic v David Halsey (HM Inspector of Taxes), ECJ, 13 December 2005 about consideration in tax profit of losses of daughter companies and branches;

— Joined Cases C-436/08 and C-437/08 (Haribo Lakritzen), judgement of 10 February 2011 about dividends taxation;

— C-196/04 Cadbury Schweppes Plc, Cadbury Schweppes Ltd v Commissioners of Inland Revenue, ECR, judgement of 12 September 2006 about legislation on controlled foreign companies

— Case C-324/00 Lankhorst-Hohorst GmbH v Finanzamt Steinfurt, ECJ, judgement of 12 December 2002 about leased financing.

The practice of the ECJ entails not only positive consequences. The main instruments for the protection of national tax jurisdictions such as rules of controlled foreign companies, thin capitalisation and transfer pricing rules are applied restrictedly or very widely by the ECJ. Sometimes member states resist providing tax incentives to resident corporate companies when they may be forced by the ECJ to provide the same incentives to transnational corporate companies.

In the current stage of integration much attention is paid to fair corporate taxation in the European Union. In 2015 the European Commission introduced an Action Plan for the Fair and Efficient Corporate Taxation in the EU,[11] which aims to prevent tax violations and tax evasion through transparency. Council Directive (EU) 2016/1164 of 12 July 2016 is aimed at secure transparent taxation in the EU, setting rules against forms of tax evasion which interfere with the functioning of the "common market".

The logic of the tax harmonisation was developed from the experience of international regional economic integrations and we see the example of the EU. The indirect taxation is the first area to be harmonised as the states are mostly interested in facilitating freedoms of movement of goods and services. The cooperation of fiscal authorities and other tax administration issues are addressed on the first stages in relation to indirect taxation, but the consistent basis for tax administration is considered only once the deep political integration process is in place. The harmonisation of direct taxation

[11] http://europa.eu/rapid/press-release_MEMO-15-5175_en.htm.

is usually an issue of less interest for member-states, postponed for the later stages of integration.

This logic of tax harmonisation is likely to be followed only within the development of international regional economic integration within the Eurasian economic union (which is in force since 1 January 2015).

Still, the Eurasian Economic Union, as example of customs union at the current moment of integration development, does not yet go beyond the scope of customs regulation. EAEU is empowered with its member states with the authority to set customs duty rates when importing goods into the territory of the union. These rates are set in the Common Customs Tariff of the Eurasian Economic Union, which is accepted by the Commission of the Eurasian Economic Union. Tax integration in Eurasian Economic Union is for indirect taxes, but for direct taxes it is very weak and still does not go far enough. As examples of current regulations on some issues of tax integration in EAEU, the following may be mentioned:

— section 72 of the Treaty about Eurasian Economic Union — the principle of a destination country in matter of indirect taxes shall be applied for movement of goods, works and services between member states;

— section 73 of the Treaty about Eurasian Economic Union — sets a rule for direct taxation of individuals of one state who work in another state — to be obliged to pay taxes on income equal to tax residents of this second state.

4. ALLOCATION OF FISCAL POWERS IN ECONOMIC UNIONS

It is inevitable that regional economic integration influences many domestic legal orders in a very complicated and controversial way. Certain constitutional issues are posed by the reality of economic integration.[12] Within the tax harmonisation process the issue of

[12] Roman Petrov and Peter Van Elsuwege, Post-Soviet Constitutions and Challenges of Regional Integration (Routledge 2017) 232.

reallocation of fiscal powers between the national and supranational authorities is very sensitive and problematic.

The following mechanisms to achieve harmonisation in the field of taxation in relation to fiscal powers can be identified in this respect: reservations on the restriction of discretion in the foundation treaties, the transfer (delegation) of powers to supranational institutes, and vesting powers in supranational institutes.

In practice, the direct inclusion of reservations about any limitation of fiscal powers of member-states in foundation treaties is not encountered as the tax system is an inseparable part of sovereignty of state. At the same time, such treaties may contain some general provisions that may serve as principles or guidelines in the exercise of sovereign fiscal powers by member states. For example, section 71 of the Treaty on the Eurasian Economic Union sets that "member states in mutual trade levy taxes, other fees and charges in such a way that taxation in the member state on whose territory the goods of other member states are sold is no less favorable than the taxation applied by this Member State under the same circumstances with respect to similar goods originating from its territory". Further, Article 72 indicates that the "collection of indirect taxes in the mutual trade of goods is based on the principle of the country of destination, providing for the application of a zero rate of value added tax and (or) exemption from excise taxes on the export of goods, as well as their taxation with indirect taxes on import".

The mechanism of the transfer (delegation) of state powers to supranational institutes is suggested by academics and practicioners, and even enshrined in some states at the constitutional level. At the same time, a tax system, as mentioned above, is so inherent to the sovereignty of the state such that it cannot be delegated to supranational institutes, especially considering the constitutional principle of taxation endorsed only by the parliament.

For example, even in the conditions of the functioning of the European Union, and in the presence of a pan-European representative institute (European Parliament), the Constitutional Court of Germany descided that the main source of legitimacy on the sovereign territory of Germany is the national parliament and the German state according to Constitution may *not* reject any part of its sovereignty.[13]

More often though the union is vested with selected and restricted powers. The union's institutions are authorised to act only within the powers clearly specified in the treaty on the union. There may be exclusive competence of the union and common competence of union and member states.

The international regional tax integration in legal terms is formed by means of substantive law documents. Substantive law documents include unified documents, treaties, recommendations, model laws etc. The regulation of the tax integration usually can be found in the internal legislation of the states,[14] in interstate documents and in the documents of the supranational institutions. The interrelation and hierarchy of these documents is complicated and ambiguous. In the tax law literature the whole system of those regulations is called integration tax law or community tax law.[15]

Integration tax law is quite complicated and some type of unified document encompassing all the taxes is simply not feasible. Such unified documents would not be accepteable nor signable for tax integration due to controversies, differences in the rules about tax base and political reasons. However, there are researchers who look to the draft of a unified tax code of EEU and the expectation by 2016 the EEU could have had a Unified Tax Code.[16] But it did not happen.

5. CONCLUSION

In this article we tried to show the process of tax harmonisation in a consistent and systematic path, using the example of the European Union. The process of tax harmonisation in the Eurasian economic

[13] AI Kovler, Evropeyskaya integatcia: federalistskyi proekt (istoriko-pravovoy ocherk) (European integration: federal project (history and legal essay) (Statut 2016) 154.

[14] Shashkova A.V. Financial & Legal aspects of doing business in Russia. M. 2011.

[15] See G Tolstopyatenko, Evropeyskoye nalogovoye pravo: sravnitelno-pravovoye issledovaniye (The European tax law: comparative legal study) (Moscow: Norma 2001).

[16] K. Boguslavska, The First Steps of the Eurasian Economic Union: Disputes, Initiatives and Results [2015] 170(1) Russian Analytical Digest.

union is still not so advanced, however it moves within the general trend and logic of the European integration. In the XXI century tax harmonisation has its own inevitable economic reason — namely tax erosion and profit shifting. The competition between the neighboring states for the tax revenues and the practices of multinationals push the tax harmonisation and tax integration processes into the regional economic integrations.

The process of tax integration sooner or later poses the question of allocation or reallocation of fiscal powers. The law provides the approaches to this redistribution, however none of them is ideal.

The tax integration as a part of international regional economic integration can achieve a more advanced level. However, harmonisation of taxes will never amount to a supra-national tax system, for example, a tax system of the European Union. Tax is a part of sovereignty which is still vested in a particular state, however the practice keeps on challenging this fundamental truth and it may be possible in an aligned political climate.

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