

ESF Exploratory Workshop on

**HORIZONTAL TAX COORDINATION
WITHIN THE EU AND WITHIN STATES**

Vienna (Austria), 9-11 November 2010

Convened by:

Prof. Dr. Dr.h.c. Michael Lang

SCIENTIFIC REPORT

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1. Executive summary

a. General picture of the meeting

The ESF Exploratory Workshop on “Horizontal Tax Coordination within the EU and within States” was held at the Institute for Austrian and International Tax Law at Vienna University of Economics and Business over three days. In the evening of day one most participants arrived. Day two and day three were dedicated to the scientific programme.

The final number of participants was 29, coming from 15 different countries including not only EU Member States (for a detailed list see below). Unfortunately, one speaker (Mr. Danil Vinnitskiy, Russia) was prevented at short notice from taking part in the workshop. Therefore, there were only 29 participants and not 30 as we had anticipated.

Since the workshop took place at the premises of the Institute for Austrian and International Tax Law, the surroundings permitted additional informal interaction with the scientific staff working at the Institute. During coffee breaks lively discussions evolved also with non-participants of the workshop. Moreover, on day three (subsequently to the workshop) the Institute for Austrian and International Tax Law held the inaugural lecture of Prof. Pasquale Pistone which was also attended by several workshop participants. Therefore, discussions and informal talks could be continued in this framework as well.

In general, the atmosphere was very good. The format of the workshop, i.e. the small number of participants, invitational character etc., was very well accepted by all participants. The result was a very casual, relaxed and at the same time very productive come-together of like-minded tax law professors who were ambitious to come to new scientific conclusions. At the end of day three all participants emphasised how much they had learned during the workshop and how inspiring the meeting was. In other words, the workshop was a big success.

b. Scientific objectives and agenda

The Exploratory Workshop aimed to find out which role court judgments have played in the framework of tax harmonization in federal states and how decisive this impact was. In order to address this question, during the workshop representatives from several countries presented their national report on the issue of tax harmonization by courts. After the presentations, which were scheduled for 30 minutes, the other workshop participants could ask questions, comment with their own experiences or simply question the developments in the respective country. During these “interim discussions” no conclusions have yet been drawn. However, the presentations and discussions showed that in each country federal structures are designed in a different way and that the courts have different approaches to

the problems arising from federal structures. Therefore, the impact on harmonization in the field of tax law differs from jurisdiction to jurisdiction.

2. Scientific content of the event

a. Day 1: EU and European States

The workshop was started with a presentation by Prof. Joachim Englisch about the state of the field of ECJ case law and in particular about the harmonizing effects his judgements have. Prof. Englisch first described the notion of “tax coordination” between EU Member States and what relevance it has for the internal market. In this respect it needs to be distinguished between harmonized and non-harmonized areas of taxation within the EU. In the non-harmonized area of taxation the ECJ has acted as an “engine of (negative) integration”. The question was raised, if the ECJ was also an engine of international tax coordination. Moreover, it was emphasized that there was still no coordination in cases regarding double taxation because the ECJ does not feel competent to establish provisional or to interpret existing DTC allocation rules. Tentative conclusions for EU tax policy include streamlining Member States’ tax laws by soft law instruments, considering enhanced cooperation of Member States with similar interests etc. In the harmonized area of taxation the ECJ plays an important role in the *effective* coordination of harmonized national tax systems – by interpreting directives and their transposition into national law. Also in this area Prof. Englisch pleaded for increasingly using soft law instruments. Amongst others, he suggested fostering the debate on substantive tax principles and constitutional requirements and introducing a specialized tax court for actions in the field of harmonized taxation. The discussion that followed was concentrated on the use of soft law instruments, which was seen differently by the workshop participants. Also the implementation of directives and over-ambitious projects of the European Commission (like the CCCTB¹) were subject to discussion.

Prof. Madeleine Simonek continued with a presentation about fiscal federalism in Switzerland. First she described which taxes were levied on which level of the Swiss Federation (Confederation, Cantons, and Municipalities). Over years situations of double taxation were solved by means of constitutional principles. It was only in 2001 that the FTHS (Federal Tax Harmonization Statute) came into effect and since then tax coordination was

¹ CCCTB = Common Consolidated Corporate Tax Base.

explicitly ruled by this statute. The provisions aim to avoid double taxation arising from overlapping taxing powers on a cantonal and a federal level (vertical harmonization), as well as from overlapping taxing powers between two different cantons (horizontal harmonization). The Federal Supreme Court has the power to interpret those provisions. Several cases were presented at the workshop. In the discussion a comparison was drawn to the ECJ: the participants agreed upon the fact that the Swiss Supreme Court was very activist compared to the ECJ. It actually attributes direct effect to the power of the Constitution which prohibits double taxation. In contrast to the ECJ it really undertakes the task of allocating tax jurisdiction.

After drawing the picture of a non-EU country, there followed three presentations on fiscal federalism in EU Member States: Belgium, Spain, and Austria. Mr. Edoardo Traversa held the presentation on the Belgian system, where regions have autonomous taxing powers and therefore double taxation between the regions can arise. The Constitutional Court has developed two principles which guide the allocation of taxing powers between the authorities: the *non bis in idem principle* and the *proportionality principle*. Examples were given where the Constitutional Court had to decide which authority was competent to levy certain taxes. Interestingly, the Belgian Court has also developed the *principle of the economic and monetary union*, which follows the same patterns of EU law in respect of the protection of the economic freedoms. In Spain, where fiscal federalism is pretty strong, the State has the task to coordinate and to harmonize the entire fiscal system, to compensate the financial deficits between regions, to set general economic policies and finally to control and audit the system by ordinary jurisdiction and by an accountancy court. Even though the Spanish regional tax system has mainly been influenced by the Parliament (driven by the parties), several legal changes and principles of interpretation with respect to the allocation of taxing powers have their origin in the case law of the Constitutional Court and the Supreme Court. In Austria, there are federal, regional and municipal taxes. Tax competences are set out in the Federal Fiscal Constitution and the central legislator is entitled to allocate taxing rights between itself, the regions and the municipalities. According to case law of the Constitutional Court, regionally “invented” taxes must not be similar to the types of taxes levied on a federal level. Moreover, the “genuine link” principle – derived from international tax law – must be followed.

b. Day 2: Non-EU Countries

Day 2 was then dedicated to non-EU Member States. Prof. Walter Hellerstein began with a presentation on the role of the US Supreme Court in harmonizing US tax law. In the United States horizontal tax harmonization is based on several provisions in the Constitution which have been interpreted by the courts in relation to tax law provisions on several occasions.

Having little explicit guidance from the foundational text, there has been established a broad doctrinal framework by the courts, which has tended to limit regional forces of taxation. However, due to constitutional limits, the courts have often refrained from introducing rules that would have increased horizontal tax coordination. During discussion it was highlighted that the US Supreme Court chooses the middle-way between the ECJ and the Swiss Supreme Court in terms of activism in resolving multiple taxation. Whereas the ECJ refrains from allocating taxing rights and the Swiss Court decides on tax jurisdiction as if it was a legislator, the US Supreme Court at least resolves certain cases of double taxation. It was then suggested that the ECJ should follow the US Supreme Court rather than the Swiss model, because the latter goes too far.

Subsequently, Mr. Santiago Solórzano, a representative from Mexico, presented the situation of tax coordination between regions in Mexico. The Mexican Constitution designates certain areas of taxation where exclusive powers are given to either the Federation, to the States or – in very few cases – to the Municipalities. Matters not mentioned by the Constitution may therefore be equally taxed on all three levels. Since these matters form a majority, the creation of a coordinated tax system was crucial and was implemented by inter-regional agreements. The role of the Mexican Supreme Court in this tax coordination system is to interpret on the one hand the adhesion agreements and on the other hand the constitutional provisions relating to the allocation of taxing powers between the public bodies. Mr. Solórzano highlighted that there was an important difference in how the Mexican Supreme Court and the ECJ deal with double taxation: Whereas the Mexican Supreme Court has not been very activist in supporting its elimination or in justifying it as the result of a lack of coordination, the ECJ has delivered a series of judgments in this area (see above). During the discussion Mr. Solórzano then also emphasized that in the EU the efforts of non-binding communications and a model tax convention could in the long run lead to spontaneous harmonization, like it has happened in Mexico.

The next presentation was dedicated to the Brazilian system and was held by Prof. Luís Schoueri. In Brazil, taxes can be levied by the Federal Union, by States, and by Municipalities. Due to the structure of fiscal federalism major distortions of the Brazilian tax system arise. The complexity of the system, the lack of neutrality, and the multiplicity of taxes and tax regimes on goods and services (also fiscal competition in order to attract investments) are a major issue. So-called *complementary law* regulates the State's tax power limitations, the establishment of general tax norms, tax harmonization, and the settling of tax jurisdiction conflicts. If the application of complementary law does not succeed, the Supreme Court has to settle tax jurisdiction conflicts. Several cases were given as examples for vertical and horizontal tax jurisdiction conflicts.

Then, Mr. Sunil Gupta presented horizontal tax coordination from an Indian perspective. In India, competence to tax is divided between States and Unions. In some cases the competence is exclusive; in other cases taxation can be concurrent. The Supreme Court has exclusive jurisdiction to decide any dispute between Union and States, or between States inter-se; it also serves as guardian of the Constitution and in this function has to ensure the freedom of trade and commerce across the country. Consequently, the Supreme Court has ruled that taxes which directly and immediately restrict or impede the free flow of trade were a restriction. In a series of judgments the Court has developed certain general principles and therefore has played an important role in tax coordination between different regions.

In the last presentation Mr. Peter Gerangelos drew a picture of the Australian situation, which is rather different from other jurisdictions discussed before. In Australia, there exists a fiscal imbalance, since income tax is exclusively levied by the Commonwealth and also excise taxes and customs are only to a certain extent levied by the States. There is no *constitutional* provision which excludes the States from levying income tax; the reasons they do not do so are rather of political and economic nature.

3. Assessment of the results, contribution to the future direction of the field, outcome

At the end of day 2 there was a lengthy discussion on how to proceed and on what to do with the issues discussed during the workshop. It was decided that every participant will have the possibility to contribute in writing with comments and conclusions to the scientific project. All contributions will be collected and published in a book – together with the national reports (i.e. the papers presented at the workshop). A website has been launched by the Institute for Austrian and International Tax Law where all papers can be downloaded by the workshop participants and where the comments will be uploaded as soon as they are available. This website is password protected and only accessible to the participants of the workshop. By the end of 2010 all papers, contributions, comments etc. will be collected and the editing of the book can start.

4. Final programme

Tuesday, 9 November 2010

Evening *Arrival*

Wednesday, 10 November 2010

- 08.00 – 08.40 **Welcome & Coffee**
- Welcome address **Prof. Michael Lang**
- Presentation of the European Science Foundation (ESF)
- 08.40 – 09.40 “Tax Coordination between **Member States in the EU** – Role of the ECJ”
Joachim Englisch (Universität Münster, Münster, Germany)
- 09.40 – 11.25 Discussion
- 11.25 – 11.40 *Coffee / Tea Break*
- 11.40 – 12.10 “Tax Coordination Between Regions in **Switzerland** – Role of the Courts”
Madeleine Simonek (Universität Zürich, Zürich, Switzerland)
- 12.10 – 12.55 Discussion
- 12.55 – 14.25 *Lunch*
- 14.25 – 14.55 “Tax Coordination Between Regions in **Belgium** – Role of the Courts”
Edoardo Traversa (Université Catholique de Louvain, Louvain, Belgium)
- 14.55 – 15.40 Discussion
- 15.40 – 16.10 “Tax Coordination Between Regions in **Spain** – Role of the Courts”
José Andres Rozas (Universitat Abat Oliba CEU, Barcelona, Spain)
- 16.10 – 16.55 Discussion
- 16.55 – 17.10 *Coffee / tea break*
- 17.10 – 17.40 “Tax Coordination Between Regions in **Austria** – Role of the Courts”
Michael Lang, Lisa Paterno (Institute for Austrian and International Tax Law at WU,
Vienna, Austria)
- 17.40 – 18.10 Discussion
- 19.30 *Dinner*

Thursday, 11 November 2010

- 08.30 – 09.00 “Tax Coordination Between Regions in the **US** – Role of the Courts”
Walter Hellerstein (University of Georgia Law School, Georgia, USA)
- 09.00 – 09.45: Discussion

09.45 – 10.15	“Tax Coordination Between Regions in Mexico – Role of the Courts” Santiago Solórzano-Ureta (Mexico City, Mexico), report co-authored by: César A. Dominguez (Universidad de Guanajuato, Mexico)
10.15 – 11.00:	Discussion
11.00 – 11.15	<i>Coffee / Tea Break</i>
11.15 – 11.45	“Tax Coordination Between Regions in Brazil – Role of the Courts” Luis Eduardo Schoueri (University of Sao Paulo, Sao Paulo, Brazil)
11.45 – 12.30:	Discussion
12.30 – 14.00	<i>Lunch</i>
14.00-14.30	“Tax Coordination Between Regions in India – Role of the Courts” Sunil Gupta (Joint Secretary (Tax Policy and Legislation), Central Board of Direct Taxes in Ministry of Finance, New Delhi, India)
14.30 – 15.00:	Discussion
15.00 – 15.30	“Tax Coordination Between Regions in Australia – Role of the Courts” Peter Gerangelos (Sydney Law School, Sydney, Australia)
15.30 – 16.00:	Discussion
16:00 – 17:30	Coffee and vision
	Discussion of new lines of research and possible collaborations/networks / arrangements for follow-up activities
17:30	<i>End of Workshop and departure</i>

5. Final list of participants

LAST NAME	FIRST NAME	AFFILIATION
Daurer	Veronika	Institute for Austrian and International Tax Law (WU)
Dourado	Ana Paula	University of Lisbon
Dubut	Thomas	Université Paris I - Panthéon Sorbonne
Englisch	Joachim	Westfälische Wilhelms-Universität Münster
Gerangelos	Peter	University of Sydney, Faculty of Law
Gupta	Sunil	Ministry of Finance, Government of India
Gutmann	Daniel	Université Paris I - Panthéon Sorbonne
Haag	Maximilian	P+P Pöllath + Partners, Attorneys-at-law, Tax Advisors
Hellerstein	Wally	University of Georgia Law School
Herrera	Pedro	University of Madrid
Hohenwarter-Mayr	Daniela	Institute for Austrian and International Tax Law (WU)
Hongler	Peter	Universität Zürich
Kemmeren	Eric C.C.M.	Tilburg University
Lang	Michael	Institute for Austrian and International Tax Law (WU)
Lyal	Richard	European Commission
Nogueira, LL.M.	Joao Félix	University of Santiago de Compostela, Law School
Paterno	Lisa	Institute for Austrian and International Tax Law (WU)
Pistone	Pasquale	Institute for Austrian and International Tax Law (WU)
Rozas Valdés	José A.	Centro Universitario Abat Ploba Ceu
Schoueri	Luis Eduardo	University of Sao Paulo
Simader	Karin	Institute for Austrian and International Tax Law (WU)
Simonek	Madeleine	Universität Zürich
Solorzano Ureta	Santiago	Jáuregui, Navarrete y Nader, S.C.
Szudoczky	Rita	University of Amsterdam / IBFD
Tetlak	Karolina	Warszawa University / Weils, Gotshal & Manges, Poland
Traversa	Edoardo	Liedekerke Wolters Waelbroeck Kirkpatrick
Vanistendael	Frans	International Bureau of Fiscal Documentation, KU Leuven
Wathelet	Melchior	CMS-Bureau Francis Lefebvre (PARIS), University of Louvain
Weber	Dennis	University of Amsterdam / Loyens & Loeff

6. Statistical information on participants

LAST NAME	FIRST NAME	COUNTRY	M/F	AGE
Daurer	Veronika	Austria	F	<30
Dourado	Ana Paula	Portugal	F	30-50
Dubut	Thomas	France	M	<30
Englisch	Joachim	Germany	M	30-50
Gerangelos	Peter	Australia	M	>50
Gupta	Sunil	India	M	30-50
Gutmann	Daniel	France	M	30-50
Haag	Maximilian	Germany	M	30-50
Hellerstein	Wally	USA	M	>50
Herrera	Pedro	Spain	M	30-50
Hohenwarter-Mayr	Daniela	Austria	F	<30
Hongler	Peter	Switzerland	M	<30
Kemmeren	Eric C.C.M.	Netherlands	M	30-50
Lang	Michael	Austria	M	30-50
Lyal	Richard	Belgium	M	>50
Nogueira	Joao Félix	Spain	M	<30
Paterno	Lisa	Austria	F	<30
Pistone	Pasquale	Italy	M	30-50
Rozas Valdés	José A.	Spain	M	30-50
Schoueri	Luis Eduardo	Brazil	M	30-50
Simader	Karin	Austria	F	<30
Simonek	Madeleine	Switzerland	F	30-50
Solorzano Ureta	Santiago	Mexico	M	30-50
Szudoczky	Rita	Netherlands	F	30-50
Tetlak	Karolina	Poland	F	<30
Traversa	Edoardo	Belgium	M	<30
Vanistendael	Frans	Belgium	M	>50
Wathelet	Melchior	Belgium	M	>50
Weber	Dennis	Netherlands	M	30-50

Gender statistics:

Male: 21 Female: 8

Age statistics:

<30: 9 30-50: 15 >50: 5

Country representation:

Australia: 1 Austria: 5 Belgium: 4 Brazil: 1
 France: 2 Germany: 2 India: 1 Italy: 1
 Mexico: 1 Netherlands: 3 Poland: 1 Portugal: 1
 Spain: 3 Switzerland: 2 US: 1