**Combating tax evasion and avoidance: EU and Kazakhstan’s experiences**

Avoidance of tax provisions is an outcome of the infinite struggle between the principles of legal certainty on one side and freedom of business activity on the other: between the legal form of the commercial operations and the substance of the aims pursued by the taxpayers.

Defining tax avoidance has been always a nearly impossible quest for tax lawyers. In Continental Europe, however, it could be said that the notion of "avoidance" is strongly embedded to the concept of "abuse" of a right, being an "abuse", according to the Roman law tradition, the exercise of a right inconsistently with the general principles of correctness, good faith or even with the basic rules of ethics. Therefore the definition of avoidance is not purely legal, but it depends also on other disciplines which influence it. In EU law qualifying avoidance is even more complex as the law of the Union is nearly deprived of any influence by other systems of values, the only general principles to rely on are the fundamental freedoms and the nondiscrimination principle both enshrined in the Treaty. That is why when in recent cases the Court had to rule on the "abuse of law" it did its best to find principles or values to build the concept on. The results were different in direct tax and in VAT cases: the notion of abuse can be wider in some of them and narrower in some others as far as it depends on the background to the specific provisions discussed. In case of the VAT the system is more complex and the court has to strike a balance between the need for neutrality of the tax and the coherence. In direct tax cases only the Treaty is applicable, and together with it the freedoms bestowed upon the taxpayer who can make the most of them in any case, unless the purpose of the scheme implemented is only to save taxes.

The Italian tax system has always been fragmented and missing of general, overarching principles applicable to the taxes as such: no common procedural rules, different compliance duties and an unclear Statute of limitation (as it changes tax per tax and according to the phase of activity by the Revenue service).

In this respect Tax law has never been codified in the Italian legal experience, nor are there are currently sound proposals in this sense. The lack of common, shared rules applicable to different taxes determined, as consequence the impossibility to address avoidance in the same way for direct taxes, VAT and local ones.

The purpose of this contribution is therefore less far-reaching. The basic assumptions are that (1) the problems avoidance raisesare not limited to tax law and (2) it is necessary to analyse avoidance of law in order to understand better the features and the characteristics of it when dealing with tax law. Another assumption is that (3) the EU tax harmonisation via regulations, directives, soft law and ECJ case law progressively compels the legal systems of the different member States to converge on specific characteristics necessarily found in all the tax planning schemes to be qualified as avoidant, even if these conditions might change from tax to tax. However this final result will be difficult to achieve as the fight against tax avoidance is intrinsically national in its roots, depending as it does on factors that do not necessarily belong to the tax systems; coming back in this way to.

Anything started with the 2013 BEPS Action plan inspired by the OECD and, with that, the need to reconsider traditional rules in International taxation law. Apparently, principles set out in the mid of the twenties by the League of Nations were not considered any longer adequate to address the most complicated tax planning schemes enacted by MNE, including the use of hybrid financial instruments, transparent entities and so on. Currently, international literature has explored at large the most significant aspects of the BEPS Action plan.

No one, however, would have argued that some of those policy guidelines would have been transformed into legal binding rules by national legislators and, less than that, in a directive passed by the European Council and thus binding on each Member State (2016/1164).

Avoidance was indeed just one of the issues addressed by the BEPS Action plan, and perhaps not even the most important. The situation that prompted the project was the intolerable asymmetry that emerged trough years between the place where wealth is generated and the one where taxation occurs.

The traditional symmetry between these two has been progressively eroded by the development of technology (mostly IT), and the consequent difficulties to assess where value is created or how the value chain is structured. According to the traditional – classical – paradigm taxation should occur in the place where ability to pay is assessed (or detected) thus generally in the place of residence of the taxpayer or, alternatively, in the source place when he operates through a permanent establishment of its business. Normally, this happened in the very same place where taxpayer had its domicile, being he or she and individual or a legal entity.

The decision to intervene in the field of international tax avoidance was taken by the European Commission for the reasons mentioned above and arguably also because some States had already begun to legislate (unilaterally and without coordination) on topics and issues addressed by the PEBS Action Plan. More precisely, in 2014 – 2015, during the latest BEPS stage some States in the Union enacted new provisions to address the issue of tax avoidance: amongst them the UK and Italy.

Italy reacted to the challenges of international avoidance using both (improved) Criminal law provisions as way to put under pressure the management of the multinationals under audit procedure and changing the anti-abuse regulations, enacting for the first time in recent history a GAAR.

In August 2015, after a long time, the Italian legislator actually approved and implemented a modern General anti avoidance rule (GAAR). It is probably the first example in history of Italian tax law to have a provision of this kind, with such a broad potential application, and suitable to be implemented either in income taxes, VAT but also on local duties and fees (actually, only Customs duties are exclude from its application).

In this way, apparently, Italy has followed the approach pursued by many other Countries in and outside the Union, which are one after another drafting similar provisions in the attempt to escalate the struggle against the similar problem: tax avoidance.

The development of an anti-abuse doctrine, which to some extent can be considered equivalent to a GARR for the effect on the taxpayer rights and duties, was facilitated in Europe due to the lack of tailor-made (specific) anti-abuse provisions both in the Treaty ad in derivative legislation (Regulations and Directives as well).

In the past, most of the anti-abuse provisions enacted in Europe were either based on the judge made law (such as in the case of VAT) or alternatively connected to the beneficial ownership status just line in the case of directives related to passive income, including “Interest and Royalties ” and “Parent - Subsidiary” ones.

It is probably due to the efforts made by the OECD in this direction that the EU insisted on the necessity to have a more comprehensive tool made available to domestic legislators to tackle abusive situations, since domestic (unilateral) provisions in the past didn’t demonstrate to be the best solution. The “Transparency Package” also proved to be effective in creating the background conditions for this proposal to be passed by the European Council .

The Anti Tax Avoidance Directive (ATAD-1) is perhaps the most important goal achieved so far by the European Union in the struggle against international avoidance and evasion: it makes the most of the findings and recommendations OECD summarized in the BEPS action plan.

ATAD-1 has the ambitious purpose to provide a common level playing field in the struggle against tax avoidance. The starting point of it consists in the fact that, on one side, avoidance is possible because some Member States haven’t got a sufficiently developed set of rules applicable to events like these, or just because the ones they have are not entirely consistent with the fundamental freedoms of the Treaty.

On the other side the EU Commission observed at the opening of the Directive that the level of avoidance or base erosion within the EU and also from the EU to outside has reached a level that can not be tolerated any longer.

It is evident in the text of the Directive that the two phenomena are, however, stressed with different accents. On one side the Commission criticizes the profit shifting phenomenon within the EU and on the other side it is more aggressive with the one affecting the members States and involving Countries that are not part of it. These two situations, being not identical under law, are addressed with different means and ways in the text of the Directive.

It is therefore appropriate to conclude that European Union seems to take two different approaches to tax avoidance or, in other words, appears to consider tax avoidance with a double standard, depending on where the eroded profits are allocated: the anti-avoidance measure are tighter in the second case, more relaxed in the first one. It’s arguably the need to strike a balance between the implementation of the EU fundamental freedoms and the struggle against tax avoidance that determined this outcome. In other words, profits shifting is not considered entirely inappropriate if it occurs within the Union: it’s a matter of legal perspectives.

An analysis of the positive provisions suggested by the Commission makes it possible to identify five different tools to be considered as adequate to deal with international tax avoidance. They are: (1) a limitation on a possibility to deduct passive interests; (2) a more comprehensive discipline on Exit taxation; a (3) GAAR; (4) redefined CFC regulations and eventually (5) some tools to deal with hybrid mismatches (basically, a tie-break rule).

The impact of the Directive is, therefore, selective and aimed at direct taxation. Apparently neither VAT, not Customs duties or excises, are considered in the scope of it even if in these two latter fields the EU has a much broader power to intervene.

The reasons for this are to be found in the fact that the European text, ever since its first draft, had been so much inspired by the OECD Recommendations (which in their side are lacking from a specific attention on the field of indirect taxation) that other taxes were not considered as a priority or, in the case of VAT, adequately addressed by the judge-made law, or the Abuse of law doctrine.