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Tax rulings: Don't throw out the baby with the bath water | La Tribune | 30 April 2015

Tax rulings granted by tax administrations to businesses – are now under scrutiny. But should they really be thrown out? By Jean-Pierre Lieb, Partner with EY Société d'Avocats

Rarely has an administrative practice had so many fairy godmothers gathered around its cradle: in the wake of the OECD's work on erosion of tax bases, in December 2014 France's Parliament approved a measure requiring companies to disclose to the French Tax Administration (FTA) certain rulings issued by foreign authorities. The media then turned their spotlight on practices in certain countries, until the European Parliament decided to set up a special commission on tax rulings. Then the European Commission took up the issue: starting from five cases under investigation in respect of State aid, it proposed a directive organizing the systematic exchange of rulings between tax administrations. Instead of allowing a calm and reasoned analysis of a valuable, essential tool for good administration, this political and media agitation has introduced considerable confusion into the debate.

Tools for legal certainty

The first point of confusion leads to focusing on the tool rather than on its use. The primary objective of rulings and other advance decisions, prior agreements or authorizations, is to allow a legal entity or private individual to ask its administration how it should understand a rule of law which is not always applied with complete clarity. They are thus above all tools for legal certainty, the use of which the OECD has promoted for years, emphasizing the contribution of advance agreements to transfer pricing. The FTA issues over 20,000 (1) tax rulings per year without this giving rise to any suspicion whatever.

A sometimes benevolent, even accommodating tax system

So why so much distrust? Simply put, because the conditions of fiscal competition, especially in Europe, have changed profoundly over time. While it was structured around niche areas intended to attract investors in the mid-1990s, the European tax environment has progressively taken on the form of general measures on the tax base, but mainly a decrease in rates. Competition has also shifted from the arena of tax policy to that of administrative practices, which are the bases for a benevolent and even accommodating tax system. Still, how can explicit clarification of a tax rule by means of an administrative decision, even if it were to result in a purely symbolic tax charge, be held to be questionable?

This is where the second point of confusion comes in, between the issues of fair taxation and of tax treatment that does not comply with community regulations, notably with regard to State aid. The first refers to a political debate made even more sensitive by the fact that States are confronting growing debts and budget deficits that they are struggling to get under control; the second concerns the purely legal question of compliance with European competition law. In this respect, no one would deny that economic players and States interact in an open, market economy. Economic players must keep their shareholders happy by offering them value creation; States are accountable to their citizens for their ability to create conditions for growth, an objective which justifies an attractive economic policy. Taxation is often a key component of this policy. Thus, it is inevitable that the former seek to benefit as much as possible from the advantages that the latter may offer them.

The European presidency under media pressure

This leads us to the third point of confusion that interferes with the debate: for States, this misunderstanding results in failing to distinguish between competitive tax policy and harmful tax policy; for companies, in tax planning and fraud. To the same extent that the former are necessary for market efficiency, the latter are damaging to fair competition. However, their respective borderlines are difficult to establish, shifting and subjective, and over the years have been assessed less and less in legal terms and increasingly in moral ones. The draft European Commission directive currently appears to be the political response of a presidency under media pressure.

Enhancing understanding of neighboring States' practices

By organizing the exchange of rulings, the Commission imposes transparency which gives each State enhanced monitoring of its neighbors' practices. However, by systematically receiving these exchanges, the Commission also endows itself with a very powerful information-gathering tool that allows it to achieve two objectives: in the short term, to add information to investigation files which it continues basically to lack; more fundamentally, to strengthen its role in verifying compliance with State aid rules. This change in level is far from being inconsequential. It shifts the institutional balance to the detriment of States by granting the Commission a broadened right to scrutiny, not only of tax policy but of administrative practices as well. This is an area of national sovereignty *par excellence*, for which unanimity is still required. Further, it will necessarily result in administrations neglecting or even rejecting a very useful tool, leaving companies helpless when faced with the risks of *ex post facto* tax audit. Imposing order on a potentially harmful tax competition by requiring increased transparency between States is praiseworthy and legitimate. Sacrificing a tool that ensures business certainty (and therefore a driver for investment and growth) on the altar of the European Commission's ambitions for power would be disastrous.

(1) Tax rulings: securing initiatives and plans, Study by the French Administrative Supreme Court (*Conseil d'État*), March 2014