Key Conference Takeaways and a Glimpse into the Future

Chair: Adolfo Martín Jiménez [Professor of Tax Law at University of Cádiz, Vice-chair IFA Permanent Scientific Committee]

Report by: [Ricardo García Antón] | [Tilburg University]

Panel members:

- Guglielmo Maisto | [Professor of Tax Law at Universitá Cattolica di Piacenza, Founding Partner of Maisto e Associati, Chair of European Region of IFA]
- Kris Bodson | [Senior Director EMEA Taxation and Policy at Johnson & Johnson]
- Daniel Gutmann | [Professor of Tax Law at Université Paris-1 Panthéon-Sorbonne, Partner CMS Francis Lefebvre]
- Sigrid Hemels | [Professor of Tax Law Erasmus University Rotterdam State Counsellor in the Advisory Division of the Dutch Council of State]

The concluding plenary session was divided into three blocks: Part 1) takeaways of the previous plenary sessions of the congress by D. Gutmann, S. Hemels and K. Bodson; Part 2) open issues in the current context; Part 3) What is next?

Part 1: takeaways from other panels

D. Gutmann stressed that ATAD 1 and 2 have not achieved a coherent degree of harmonization in the EU due to the great number of choices the Member States have to implement the Directive. In addition, there is also a need for coordination of ATAD measures among themselves or with other EU Directives and proposals, including Unshell (ATAD 3) or SAFE . In this line, S. Hemels also outlined that ATAD 3/SAFE proposals pose many challenges and issues in terms of legal certainty, coordination with other rules, problems of interaction with tax treaties and primary EU law that are difficult to solve satisfactorily for taxpayers and tax administrations. K. Bodson expressed the concerns of MNEs that the current EU tax policy might make the life of business more difficult, which has relevant effects on the decisions to invest and the activity they carry on in the EU. She pointed out that MNEs would like to have: (i) more legal certainty, (ii) more sensitivity on their needs and consultation in the early stages of the legislative decision-making process, (iii) more effective dispute resolution mechanism, (iv) more trust between tax authorities and the industry.

Part 2: open issues in the current context

G. Maisto started by addressing issues on anti-avoidance and Pillar 2. Pillar Two or the EU Pillar 2 Directive do not include any anti-avoidance provisions. Yet, he gave some practical examples to illustrate that Pillar 2 rules could be abused by MNEs. Would domestic GAARs/Article 6 ATAD/Abuse of EU law (CJEU case law) be used to fight abuse in the Pillar 2 context? That is an open issue. Another open issue that G. Maisto addressed is the lack of harmonization of penalties in the EU in general and in the Pillar 2 context. Lack of harmonization and different approaches in this field may also cause relevant distortions from a common market perspective.

The current complexity and proliferation of EU anti-avoidance rules also poses intricate problems of interpretation. D. Gutmann explored the question of whether the OECD materials could serve as preparatory work to interpret unclear concepts in the EU directives, whether the OECD materials comply with the same goals attributed to EU law and the unclear case law in this respect. Additionally, D. Gutmann and S. Hemels remarked the potential linguistic issues that may arise when the OECD texts are included first in a Directive that is translated into different EU official languages and then in domestic legislation. In this process, the concepts or wording of different terms may be transformed and not fully correspond to the original OECD materials or are difficult to apply in domestic law, because there are no similar corresponding categories. This will raise issues to interpret and apply the anti-avoidance Directives and drafts, but also with particular intensity in the context of Pillar 2.

In the last section of Part 2, A. Martín Jiménez explained the new profiles of tax disputes that the EU anti-avoidance legislation may trigger. First, he pointed out that the issue of compatibility of tax and investment treaties between Member States and third countries with the EU anti-avoidance and Pillar 2 Directives is less important than it may appear from the EU law perspective. Although much discussion has taken place on whether those treaties will block the application of the Directives if a broad interpretation of article 351.1. TFUE is adopted, the CJEU has recently rejected that interpretation outright in a non-tax case: when treaties with third countries that are incompatible with EU Directives cannot be interpreted in conformity with EU law, they have to be disapplied and do not benefit from the protection granted by article 351.1. TFEU. From an EU standpoint, a, with some nuances, 'tax and investment treaty override' by EU anti-avoidance and Pillar 2 Directives is possible (what third countries will think is another matter).

This basically moves the discussion of challenging EU anti-avoidance and Pillar 2 to the domain of compatibility of EU Directives with EU primary law. A. Martín Jiménez explained that in the past the CJEU has applied a strict ('manifest error') standard to control the EU legislator. But as a consequence of the decision of the German Constitutional Court of 5 May 2020, which challenged the European Central Bank asset purchase program and the *Weiss* judgement of the CJEU, to declared them *ultra vires* and disproportionate, the CJEU has become more conscious of the need to strictly control the EU legislature: only in 2022 the CJEU declared void provisions of three different directives because they breached fundamental EU law principles or rights. Two of them had a direct connection with EU tax anti-avoidance or fraud rules. This may mean that the CJEU is likely to be more active in this field in the future, also in connection with EU anti-avoidance and Pillar 2 Directives.

R. García Antón added that those judgments could be reframed into a general reaction of courts at EU and national level against an EU legislator much more inclined to favor the interest of the tax administration. Both CJEU and national courts are now re-equilibrating the balance with judgments that move in the direction of enhancing the protection of taxpayers' rights. At the domestic level, national courts are engaging in a fundamental dialogue in this respect with the CJEU and seem to be worried with fundamental issues in the EU anti-avoidance rules such as (1) the protection of legal certainty (see for example the pending preliminary requested by the Belgian Constitutional Court - C-623/22) – on key concepts of the DAC6); or (2) coordination on the overlapping of the different anti-avoidance rules such as GAARs and SAARs (i.e. the role of economic substance in transfer pricing on the abuse threshold in PPT/GAAR) and protection of taxpayers' rights (see the pending Dutch case C-585/22, BV)

Part 3: what's next?

The panelists suggested some principles that they thought should probably be considered in the design of future EU direct tax policy:

- Simplicity. The overlapping of anti-avoidance and new measures yields enormous complexity (i.e. Pillar 2 and CFC, interest barrier, anti-hybrid rules, GAARs, transfer pricing rules, DAC 6 plus Unshell and SAFE proposals). Forthcoming initiatives like BEFIT will bring yet another layer of complexity with difficult interaction with other rules (i.e. Pillar 2, ATAD). The OECD is already suggesting that simplification is needed, so maybe it is time to consider whether the EU could be the frontrunner in this field.
- Clarity and legal certainty. The current EU anti-avoidance and Pillar 2 Directives are all but clear in many aspects. This is a problem since many day-to-day transactions are affected by the thread of not always coherent and sound application of anti-avoidance rules by tax administrations (e.g. business restructurings, financing, holding companies, etc.). It may also be high time to think about mechanisms that could further enhance legal certainty within the EU. Several examples were mentioned, including the possibility of creating a sort Committee for direct tax issues along the lines of the VAT Committee; a system of advanced preliminary rulings at EU level; the revival of groups like the EU Joint Transfer Pricing Forum that provide pragmatic guidance to business and administrations; the use of the recast procedure to consolidate texts of EU direct tax directives and avoid inconsistencies; or further enhancements of the dispute resolution mechanisms.
- Rule of law: Some thought should be given to how to improve the participation of stakeholders, citizens and national Parliaments in the design of EU tax legislation and whether the new Directives are reaching the limits or go beyond what the EU legislative procedure dominated by the Member States (and not Parliaments) may achieve.
- Tax policy is much more than fighting avoidance or fraud: Once there are so many tools to fight tax avoidance and fraud at the EU level, maybe it is time to think that tax policy is much more than that and calls for directly connecting tax policy with EU trade policy, the removal of obstacles to do business in the EU, simplification and promotion of economic competitiveness of EU business.