

Income from Capital and Fiscal Sovereignty: Linking rules as a solution to double non-taxation created by cross-border hybrid financial instruments

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introduction

The increasing mobility of capital flows and cross-border investment evidences the existing asymmetries in the tax treatment of income from capital and major gaps between jurisdictions. This project analyzes specific measures proposed by the OECD and the EU, and already established in some States, against base erosion and profit shifting, and especially those related to avoiding double non-taxation through the use of cross-border hybrid financial instruments.

main structure

Hybrid financing: the problem

Asymmetries and loopholes mainly arise from the different qualification of rights and payments derived from cross-border situations.

Analysis from a corporate and tax law comparative perspective.

- Debt/Equity financing. Concepts under corporate and tax law.
- Conflicts of qualification: domestic and DTC analysis.
- Institutional Hybrid Instruments (IHI): from “genuine” ACE to JCP.
- Contractual Hybrid Instruments (CHI): aggressive and non-aggressive tax planning.

Fiscal Sovereignty and distribution of taxing rights: the effects

Lower or double non-taxation as consequence. Analysis of the international system of distribution of taxing rights.

- DTC as a complete distribution of taxing rights. Single tax principle?
- DTC measures for preventing double non-taxation. A DTC aim?
- DTC, EU Law and domestic legislation regarding hybrid instruments.

Linking rules: a solution?

Concept and purpose. Main consequences regarding business financing and the international distribution of taxing rights. Feasibility and efficiency. Problems derived by the “solution”.

- Concept of linking rules: OECD/EU approaches.
- Lack of importance of legal nature. Conflict of application.
- The application of linking rules under DTC and domestic law.
- The implementation of linking rules within the EU.

issues & questions

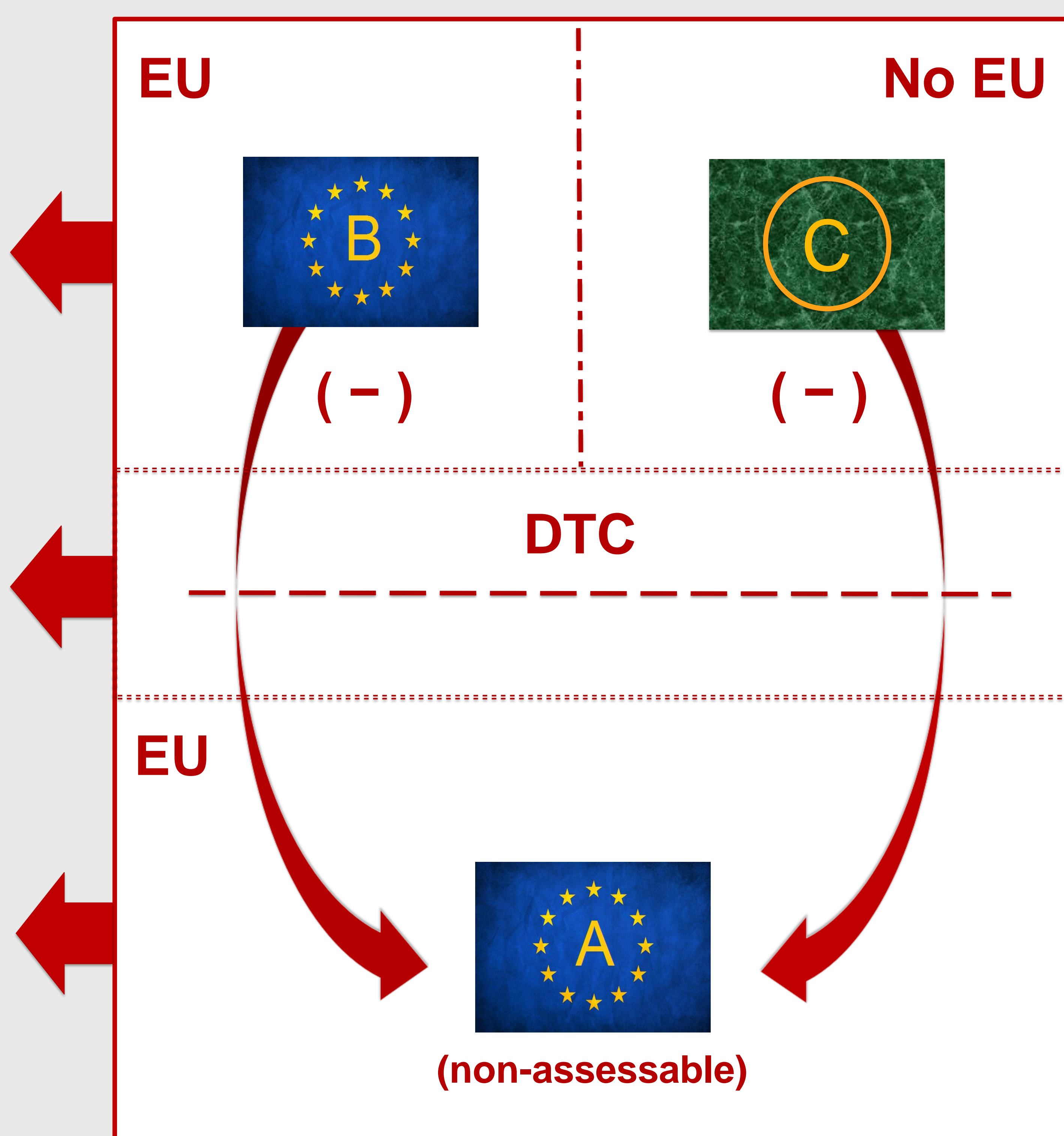
D/NI scheme

issues & questions

- Intended deduction?
- Domestic qualification
- Treaty qualification
- Linking rule? Parent-Subsidiary Directive

- Treaty measures
- Parent-Subsidiary Directive.
- Single tax principle? Who should win?

- Subordination? Who should lose?
- Unilateral recovery of taxing rights?
- (Un)necessary *substance over form* criteria?
- (Un)necessary qualification?



- Intended deduction?
- Aggressive tax planning?
- Domestic qualification
- Treaty qualification

- Treaty measures
- Parent-Subsidiary Directive?
- Single tax principle? Who should win?

- Only payments?
- Treaty override?
- Legal meddling?
- Discrimination?
- Double taxation