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Intra-group financial transactions and the arm's length principle: a comparative and normative analysis

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PROPOSITIONS

Accompanying the PhD thesis

Intra-group financial transactions and the arm's length principle: a comparative and normative analysis

by Arjen van Herwaarden

1. Countries' pre-2020 administrative guidance and case law on the application of arm's length reasoning/the arm's length principle to intra-group financial transactions are not fully aligned with each other and OECD transfer pricing guidance published in 2020 in part lacks specificity and clarity. Therefore, uncertainty exists as to the appropriate application of arm's length reasoning to intra-group financial transactions.
2. Arm's length reasoning is ill-suited to determine the tax consequences of intra-group financial transactions because it is impossible to apply what constitutes a theoretically correct application of arm's length reasoning in general to intra-group financial transactions.
3. The objectives of arm's length reasoning and the Ottawa taxation framework principles developed by the OECD (neutrality, efficiency, certainty and simplicity, effectiveness and fairness, and flexibility) constitute a suitable framework for establishing the preferable ('second best') approach to determining arm's length terms for intra-group financial transactions.
4. The 'group credit rating approach' constitutes the preferable ('second best') approach to determining arm's length terms for intra-group financial transactions, that is arm's length terms are to be determined on the basis of the credit rating of the group to which the borrowing group company belongs.
5. The view expressed in the OECD Transfer Pricing Guidelines that an intra-group lender which does not control the lending risk is entitled to at most a risk-free return is at odds with arm's length reasoning.
6. In order to modify the text of the OECD Transfer Pricing Guidelines consensus among the OECD member states is required. This leads to less than fully clear guidance.
7. The Court of Justice of the European Union would benefit from the installation of a special tax chamber.
8. The Dutch Supreme Court is not to be applauded for introducing the following vague criterion: an intra-group loan which would become profit-sharing in substance if it would carry an arm's length (amount of) interest is for tax purposes a 'non-business motivated loan' (*onzakelijke geldlening*).