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EURO TAX FLASH
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ECOFIN reaches political agreement on non-public country-by-country reporting

Commission's Working Program – EU Anti-Tax Avoidance Package - Administrative Tax Cooperation - Mandatory Exchange of Information - Country-by-Country Reporting - DAC 4

On March 8, 2016 the Council of the EU (ECOFIN) reached political agreement on the European Commission's proposal to implement country-by-country reporting to local tax administrations, as well as the exchange of the reports between them. This is a first step towards the formal adoption of the European Commission's proposal, which was included in its Anti-Tax Avoidance Package published on January 28, 2016 (see ETF 273). The ECOFIN also adopted conclusions on the strengthening of the Code of Conduct.

Background

The new reporting and exchange requirements, which take the form of an amendment to the current EU Directive on Administrative Cooperation (DAC) in the field of taxation (2011/16/EU) should be seen in the context of the European Commission's Action Plan for Fair and Efficient Corporate Taxation, launched in June 2015 (see ETF 253), and the final recommendations on BEPS Action Point 13 issued by the OECD in October 2015. The exchange between tax administrations of tax-related information on the activities of multinational companies should enable Member States to identify risks of tax avoidance and better target their tax audits.

Political agreement reached on the amending Directive

The ECOFIN reached political agreement on several aspects of the proposed Presidency compromise text and will submit an amended version for formal adoption, once the UK parliament has lifted its reservations.

The proposal, which aims to broadly reflect the OECD recommendations on BEPS Action 13, will only apply to multinational enterprises (MNEs) with a minimum consolidated group turnover of EUR 750 million. For fiscal years commencing as of 2016, the relevant reporting entity of such an MNE group will have to submit to the tax authorities of its residence Member State (within 12 months after the last day of the reporting fiscal year of the group) certain tax-related information on an annual basis and for each tax jurisdiction where the group operates. The residence Member State will then have to automatically exchange the collected data with the other relevant Member States, where the MNE is either resident or subject to tax through a permanent establishment.

The main open issue remaining concerned the mandatory nature of the secondary reporting requirement for EU subsidiaries, where, broadly, the ultimate parent entity of the MNE group is not an EU tax resident and there is no reporting or exchange obligation, whereas such secondary reporting is optional under the OECD recommendations. Following a proposal by the German Minister of Finance, all Member States agreed to make this reporting obligation mandatory, to the extent that it could be postponed until 2017.

Clarifications were also added to the European Commission's initial draft proposal on inter alia the following aspects:

- *Use of the exchanged data:* local tax authorities may launch further enquiries into the MNE's tax arrangements on the basis of the information exchanged, but they are not allowed to use it as a basis for a transfer pricing adjustment;
- *Deadlines:* the period for exchanging the reports between Member States will be extended to 18 months for the first report covering fiscal year 2016 (15 months for the subsequent reports);
- *Penalties:* the obligation for Member States to report to the Commission which penalties have been imposed and how, has been deleted.
- *Limits:* a new recital was added to the proposal emphasizing that the information exchanged does not lead to the disclosure of trade secrets, while the explicit reference to the impossibility of invoking Article 17(4) of the current DAC, which allows Member States to refuse to exchange information on the grounds of trade secrets, was deleted.

Conclusion on the Code of Conduct Group

The ECOFIN also adopted conclusions on the strengthening of the Code of Conduct. These foresee an enhancement of the governance, transparency and working methods of the Group.

Efficiency will be improved by speeding up the assessment of potentially harmful tax regimes, with an earlier and more frequent involvement of the Council of the EU, including the presentation of substantive bi-annual reports and regular reporting sessions from the chair of the Group. Public access to information on the group's ongoing and past work will also be enhanced, and the publication of the Group’s guidelines and decisions will be examined.

Next steps

Reaching political agreement in ECOFIN is a first step towards the formal adoption of the directive, which will still require the unanimous approval of all the Member States. The legislative proposal has also been submitted for consultation to the European Parliament, which has not yet given its opinion - the vote in plenary session on the recommendations issued by the Economic and Financial Affairs (ECON) Committee being scheduled for May 10, 2016. Although the Council is required to take the European Parliament's opinion into account, it is not bound by the latter’s position and the recommendations included in the ECON draft report have not been included in the compromise text.

The future adoption by the EU of such reporting and exchange requirements will ensure that all Member States, including 7 non-OECD members, exchange information in a consistent manner as from fiscal year 2016. The Anti-Tax Avoidance Package published by the Commission in January (which included this CbC proposal) had already been welcomed by the OECD, after 31 countries had signed the Multilateral Competent Authority Agreement for the automatic exchange of CbC Reports.

EU Tax Centre Comment

This is the first proposal of the Commission’s Anti-Tax Avoidance Package to reach political agreement within the ambitious six-week timeframe set-up by the Dutch Presidency in January. Although the final text still needs to be formally adopted, this rapid consensus constitutes another indication of the EU’s strong political will to effectively tackle tax avoidance. While the European Commission emphasized during the meeting that the current proposal does not include public disclosure of the information reported, impact assessments addressing this issue are being finalized and the European Commission intends to present a proposal in April 2016.

Should you require further assistance in this matter, please contact the EU Tax Centre or, as appropriate, your local KPMG tax advisor.

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