TaxAlert

European Commission presents its new Anti-Tax Avoidance Package

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On January 28, 2016 the European Commission unveiled its new Anti-Tax Avoidance Package. As already announced, this includes two legislative proposals, addressing certain anti-base erosion and profit shifting (BEPS) issues and non-public country-by-country reporting (CBCR), as well as a common approach to tax good governance towards third countries and recommendations to tackle treaty abuse. The new package aims at addressing tax abuse, ensuring sustainable revenues and fostering a better business environment in the internal market.

Background

The legislative proposals should be seen in the context of the European Commission's Action Plan for Fair and Efficient Corporate Taxation, launched in June 2015, and the final recommendations issued by the OECD in October 2015 on their 15 BEPS Action Points. According to Commissioner Moscovici, the new package not only aims at implementing, in a coordinated manner, the OECD standards at the EU level, but goes beyond these recommendations.

Details of the Commission's package

Anti-BEPS Directive

In its June 2015 Action Plan, the Commission announced its intention to re-launch its proposal for the CCCTB. The Luxembourg Presidency subsequently put forward the idea of splitting off certain international anti-BEPS aspects of the CCCTB proposal that would lead to an "anti-BEPS Directive". In December 2015, the Council of the European Union released the first details of a possible draft EU directive addressing certain BEPS issues. The European Commission's proposal builds up on this initial draft.

The proposed rules lay down common minimum rules in the areas of interest limitation, exit taxation, switch-over clause, general anti-abuse rules (GAAR), controlled foreign companies (CFC) and hybrid mismatches. These standards are intended to provide a minimum level of protection for Member States and national implementing rules may therefore go further. Contrary to the December Council's text, the current proposal does not address issues related to the artificial avoidance of permanent establishment (PE) status, but the issue is covered by the European Commission Recommendation on the implementation of measures against tax treaty abuse (see below).

Interest limitation

The proposed interest limitation rules would apply to companies resident within the European Union or the European Economic Area (EU/EEA) and would take the form of an earnings stripping rule (limitation up to the higher of a 30% fixed ratio or EUR 1,000,000) and, subject to conditions, a group equity/assets rule.

Exit taxation

The proposed exit tax rules would apply to certain cross-border transfers of assets or residence within the EU or to non-EU countries. The rules broadly reflect EU case law on this and provide for a tax deferral mechanism for transfers within the EU/EEA. In case of transfer within the EU, the receiving Member State will also have to accept the same market value as defined by the home Member State as the starting value of the assets for tax purposes.

Switch-over clause

The switch-over clause would be limited to non-EU situations and means a credit for foreign tax would apply instead of an exemption. Contrary to the

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Council's initial proposal for an effective tax rate test, this defense mechanism would be triggered when the income received is taxed at a statutory rate lower than 40% of the rate applicable in the receiving Member State. No artificiality test is foreseen.

GAAR

The rules, which are intended to reflect EU case law on this, would require EU Member States to ignore arrangements that did not comply with the standard, which would comprise both a motive test and a substance test.

Controlled foreign companies

Unlike the Council's initial proposal, the proposed rules would apply to both EU and non-EU CFCs. The CFC's income would become taxable if certain thresholds are met as regards ownership (50%), effective tax rate (40%), and passive income (50%). Whereas non-EU CFCs would be subject to an objective test, EU/EEA CFCs would only be caught if they involve purely artificial arrangements. A carve-out clause for EU financial undertakings is also provided.

Hybrid mismatches

Contrary to the Council's initial text, the proposal only covers intra-EU situations involving hybrid entities and hybrid instruments. According to the new text, the tax characterization used by the source Member State has to be followed to ensure consistent tax treatment within the EU. Despite the absence in the proposal of rules on hybrids involving third countries, the recommendations of the EU Code of Conduct Group on hybrids involving third countries may impact existing structures and practice.

Country-by-Country Reporting

The European Commission's package also includes a proposal to implement country-by-country reporting to local tax administrations, as well as the exchange of the reports between them. This takes the form of an amendment to the current EU Directive on Administrative Cooperation (DAC) in the field of direct taxation (2011/16/EU).

The rules, which intend to reflect the OECD recommendations in BEPS Action 13, would only apply to multinational enterprises (MNEs) with a minimum consolidated group turnover of EUR 750 million. Based on the proposal, the relevant reporting entity would have to submit to the tax authorities of its residence Member State certain information (including turnover, pre-tax profit, income tax paid and accrued, number of employees, capital, tangible assets, and business activities) on an annual basis and for each tax jurisdiction where they do business. The residence Member State would then have to automatically exchange data with the other relevant Member States (i.e. where the MNEs are either resident or subject to tax through a permanent establishment).

The European Commission indicated that impact assessments addressing inter alia the issues relating to public CBC reporting should be finalized by the end of March 2016. Based on this analysis, the European Commission intends to present a decision on this in early spring 2016.

External Strategy for Effective Taxation

Finally, the European Commission follows up on the EU-wide approach to third-country non-cooperative tax jurisdictions developed within the framework of the June 2015 Action Plan. Building in particular on its 2012 Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters (C(2012) 8805), the European Commission proposes the following key measures:

- updating the EU tax good governance criteria developed in the 2012 recommendations, including transparency, information exchange and fair tax competition;
- promoting tax good governance at the global level, via the negotiation of tax good governance clauses and state aid provisions in bilateral and regional agreements with third countries;
- assisting developing countries in meeting tax good governance standards;
- developing an EU process for assessing and listing third-country non-cooperative tax jurisdictions;
- revising the EU Financial Regulation to prevent EU funds from being channeled through low or no tax jurisdictions.

Recommendation on Tax Treaty Abuse

The recommendations are intended to reflect the OECD work on BEPS Action 6 (Treaty Abuse) and 7 (Artificial Avoidance of PE status).

The European Commission thus generally endorses the tax treaty GAAR based on the principal purpose test proposed by the OECD. However, the recommendation also stresses the necessity to align the wording proposed by the OECD with case law of the Court of Justice of the European Union (CJEU), by introducing a reference to "genuine economic activities" when assessing an arrangement's compatibility with such a test.

Finally, Member States are encouraged to implement the new provisions of Article 5 of the OECD Model Tax Convention when concluding or revising tax treaties, especially when addressing issues related to the artificial avoidance of PE status.

Next steps

The two legislative proposals will now be submitted to the European Parliament for consultation and to the Council for adoption by all Member States. If approved, the proposal on country-by-country reporting will have to be implemented into domestic legislation by the end of 2016, and be applied from January 1, 2017. Although the proposal for the Anti-BEPS Directive

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does not provide for a specific implementation date, Commissioner Moscovici has already expressed on several occasions his conviction that a quick adoption should be possible.

The Council and the European Parliament will also have to endorse the Tax Treaties Recommendation and Member States should follow it when revising their tax treaties. Once endorsed by the European Parliament, Member States should also formally agree on the new External Strategy and decide on how to take it forward.

The European Commission is expected to publish a revised proposal addressing the Common Consolidated Corporate Tax Base (CCCTB) initiative in the autumn of 2016, as well as a proposal on enhancing dispute resolution procedures in the summer of 2016.

KPMG's comment

The proposals outlined above are likely to undergo changes as the political debate develops. However, both Commissioner Moscovici and the new Dutch presidency have already expressed their intention to adopt the anti-BEPS directive before the end of the Dutch six-month mandate. Therefore a relatively quick adoption of the standards laid down in today's proposals cannot be excluded.

Should you require further assistance in this matter, please contact your KPMG tax advisor.

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