TaxAlert

Details of Draft EU Anti-BEPS Directive Released

December 2015

Action Plan on corporate taxation

The Council of the EU discussed recent corporate taxation initiatives launched in June 2015 by the European Commission in the context of the Action Plan for Fair and Efficient Corporate Taxation, which are also supported by the European Parliament. The proposals for (1) a Directive on a Financial Transaction Tax and (2) a Directive on a Common Consolidated Corporate Tax Base (CCCTB) were discussed and (3) the new Directive on automatic information on tax rulings was formally adopted by the ECOFIN on December 8, 2015.

Anti-BEPS Directive

The Luxembourg Presidency put forward the idea of splitting off certain international anti-BEPS aspects of the CCCTB proposal that would lead to an 'anti-BEPS Directive'. Subsequently, the European Commission's initiative for the implementation of a separate 'anti-BEPS Directive' was welcomed by the most Member States as an effective means to address anti-base erosion and profit shifting issues in a swift and coordinated manner at EU level, as well.

The Council has now released details of the possible draft EU directive. The proposal derives from discussions at the technical level and EU Member States will now have to review them and make their positions clear. Further work is required on a number of key aspects. The issues covered reflect some international aspects of the proposal for an EU Common Consolidated Corporate Tax Base, including those that are directly linked to OECD BEPS Actions. (The Commission announced its intention to re-launch its proposal for the CCCTB and is currently conducting a public consultation on the CCCTB proposal as a whole.)

Details of proposed text for Anti-BEPS Directive

The proposed rules lay down standard, de minimis, rules in the following areas:

a. Definition of permanent establishment

b. Controlled Foreign Companies

c. Switch-over clause

d. General anti-abuse rules (GAAR)

e. Exit taxation

f. Interest limitation

g. (Possible) hybrid mismatches

Permanent establishments

The proposed rules on permanent establishments (PEs) are primarily aimed at the 'artificial avoidance' of PE status. They address the 'preparatory and auxiliary' exceptions, related party combined activities, and the concept of dependent and independent agents.

Controlled foreign companies

The proposed controlled foreign companies (CFC) rules only apply to non-EU CFCs. The CFC's income would only be taxable if certain thresholds were met as regards ownership, effective tax rate, and passive income.

Switch-over clause

The switch-over clause would also be limited to non-EU situations and would mean a credit for foreign tax applying instead of an exemption. Again, this would be subject to certain thresholds being met.

GAAR

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.

Exit taxation

The proposed exit tax rules would apply to certain cross-border transfers of assets or to residence either within the EU or non-EU countries. The rules broadly reflect EU case law on this.

Interest limitation

The proposed interest limitation rules would take the form of an earnings stripping (fixed ratio) rule and a group equity/assets rule.

Hybrid mismatches

These proposals cover both EU and non-EU situations involving hybrid entities and hybrid PEs. They reflect ongoing work on soft-law solutions by the Code of Conduct Group.

KPMG's Comment

The proposals outlined above are likely to undergo changes as the political debate develops. Certain areas are noted as requiring further work, such as the transposition of the soft-law approach on hybrids to a hard law approach, and opposition from certain EU Member States has been noted in respect of various text passages. It is clear that a lot of issues still need to be resolved if EU Commissioner Moscovici's ambition to present the new proposals next January are to be met.

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

Contacts:

Partners

Gábor Beer
Partner, Head of Tax Advisory
T: +36 1 887 7329
E: gabor.beer@kpmg.hu

dr. Csaba László
Senior Partner
T: +36 1 887 7420
E: csaba.laszlo@kpmg.hu

Indirect Tax Advisory and Compliance Services

Zoltán Farkas
Director
T: +36 1 887 7439
E: zoltan.farkas@kpmg.hu

Zsolt Srankó
Manager
T: +36 1 887 7460
E: zsolt.sranko@kpmg.hu

Corporate Tax, Deal Advisory and M&A Tax

Gábor Zachár
Director
T: +36 1 887 6690
E: gabor.zachar@kpmg.hu

dr. András Németh
Director
T: +36 1 887 7261
E: andras.nemeth@kpmg.hu

Mihály Gerhát
Senior Manager
T: +36 1 887 7180
E: mihaly.gerhat@kpmg.hu

dr. Helga Kiss
Senior Manager
T.: +36 1 887 5569
E.: helga.kiss@kpmg.hu

Eszter Somogyi
Manager
T.: +36 1 887 6636
E.: eszter.somogyi@kpmg.hu

International Tax

Bálint Gombkötő
Director
T: +36 1 887 7159
E: balint.gombkoto@kpmg.hu

Zsófia Pongrácz
Senior Manager
T: +36 1 887 7374
E: zsofia.pongracz@kpmg.hu

Global Mobility Services

Attila Zoltán Arányi
Director
T: +36 1 887 7304
E: attila.aranyi@kpmg.hu

Gabriella Joó
Senior Manager
T: +36 1 887 6630
E: gabriella.joo@kpmg.hu

Andrea Szűcs
Manager
T: +36 1 887 6589
E: andrea.szucs@kpmg.hu

Transfer Pricing Advisory Group

Mihály Gódor
Director
T: +36 1 887 7340
E: mihaly.godor@kpmg.hu

Szabolcs Végh
Senior Manager
T: +36 1 887 7213
E: szabolcs.vegh@kpmg.hu

Tax Advice for the Financial Services Sector

Gábor Farkas
Senior Manager
T: +36 1 887 7415
E: gabor.farkas@kpmg.hu

Balázs Pethő
Senior Manager
T: +36 1 887 7368
E: balazs.petho@kpmg.hu

Accounting Advisory, Bookkeeping and Payroll Services

Ágnes Rakó
Director
T: +36 1 887 7438
E: agnes.rako@kpmg.hu

Legal Services

dr. Dávid Bosznay
Attorney-at-law
T: +36 1 887 7311
E: david.bosznay@kpmg.hu

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