



Euro Tax Flash

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Euro Tax Flash from KPMG's EU Tax Centre



ECOFIN meeting on November 8, 2016

[ECOFIN – C\(C\)CTB – EU black list – Anti-money laundering – UBO – Third country hybrids – Dispute resolution mechanisms – Mandatory disclosure](#)

On November 8, 2016 the Economic and Financial Affairs Council of the EU (ECOFIN) discussed several initiatives regarding tax transparency, aggressive tax planning and the corporate tax environment in the EU. They also reached agreement on the criteria and the process for the establishment of an EU list of non-cooperative tax jurisdictions and on a proposal granting access for tax authorities to anti-money laundering information. The discussions focused on the relaunched proposal for a Common (Consolidated) Corporate Tax Base (C(C)CTB), the proposed directives on third country hybrids and on double taxation dispute resolution mechanisms, as well as tax authority access to beneficial ownership information. On November 9, 2016 the European Commission announced a public consultation on possible action in respect of advisors and intermediaries who facilitate tax evasion and tax avoidance.

Background

The current discussions and agreements build on the numerous actions already taken in 2016 in the context of the European Union's fight against aggressive tax planning and improving tax

transparency. Following the introduction of the Anti-Tax Avoidance Package on January 28 by the European Commission (see [ETF 273](#)), the Council agreed on the adoption of the Anti-Tax Avoidance Directive on July 12 (see [ETF 289](#)). In the meantime, on July 5, the European Commission unveiled new proposals to tackle terrorism financing and money laundering, as well as the next steps for tackling tax avoidance, including making beneficial ownership information accessible to tax authorities and the public (see [ETF 292](#)). On September 15 the Commission took the first steps to identify non-cooperative third country tax jurisdictions in order to build a blacklist (see [ETF 301](#)) and on October 25 it published legislative proposals on C(C)CTB, third country hybrids and double taxation dispute resolution mechanisms (see [ETF 303](#)).

C(C)CTB

An initial exchange of ideas took place on the relaunched CCTB and CCCTB proposals (see [ETF 303](#)). The two-step approach for introducing a common consolidated corporate tax base in the EU was generally welcomed, but at the same time there were clear reservations from various Member States on a number of aspects, in particular the complexity of the consolidation under the CCCTB and the impact on tax revenues. Concern was also expressed regarding the absence of intangible assets from the apportionment formula for dividing the tax base between Member States under the CCCTB as proposed.

Blacklists

Tax havens

The ECOFIN made progress as regards the establishment of an EU list of non-cooperative tax jurisdictions (see [ETF 301](#)) by agreeing both on the criteria for screening jurisdictions and the guidelines for the screening process.

Criteria

Three criteria, i.e. tax transparency, fair taxation and the implementation of anti-BEPS measures, will be used to assess whether jurisdictions are compliant.

(1) Tax transparency

The tax transparency criterion consists of three sub-criteria of which only two need be satisfied before July 2019:

- (i) Automatic exchange of information (AEOI): by 2018 must have committed to and started implementing the OECD's AEOI standard and have this in place as regards EU Member States. As from 2018 must be "largely compliant" under the OECD's AEOI standard.
- (ii) Exchange of information on request (EOIR): must be "largely compliant" under the OECD's EOIR standard.
- (iii) International exchange arrangements: must have made due progress towards effectively allowing EOIR and AEOI (and at a later stage beneficial ownership) with all Member States through the OECD's Mutual Assistance Convention or other arrangements.

(2) Fair taxation

The fair taxation criterion is fulfilled if the jurisdiction has no harmful tax measures in place which might fall under the scope of the Council's Code of Conduct on Business Taxation and if the jurisdiction does not facilitate offshore structures and arrangements aimed at attracting profits which do not reflect real economic activity. In the context of the latter, the question whether zero (or near zero) tax rates should be used as an indicator was referred back to the Code of Conduct (Business Taxation) group, which has to report back by the end of this year.

(3) Implementation of anti-BEPS measures

The jurisdiction will have to commit to the minimum standards of the OECD BEPS by the end of 2017. The effective implementation will be monitored and, at a later stage, the jurisdiction will have to receive a positive assessment in order to keep its position.

Process

According to the Guidelines, the screening of the relevant jurisdictions by the Code of Conduct Group (Business Taxation) should begin swiftly. Third countries will be notified about the screening process by the end of next January and the screening process is due to be completed by September 2017. Work on the related defensive measures, such as non-deductibility and withholding taxes, is ongoing with a view to endorsement by the Council by the end of 2017.

AML blacklist

Under the Fourth Anti-Money laundering directive (AMLD4, adopted on May 20, 2015) the Commission has been empowered to identify high-risk third countries that have deficient anti-money laundering/countering terrorism financing regimes in place. Based on AMLD4, the Commission adopted an EU list of high-risk third countries for anti-money laundering purposes on July 14, 2016. Obligated entities (i.e. mainly financial institutions) must apply enhanced customer due diligence measures when dealing with natural or legal entities established in the listed countries (see [ETF 292](#)). Introduction of this blacklist is part of the Commission's wider initiative for strengthening the fight against terrorist financing and should not to be confused with the EU list of non-cooperative tax jurisdictions as described above.

Hybrid mismatches with third countries

The proposed directive would be an amendment (ATAD2) to the Anti-Tax Avoidance Directive adopted in July (ATAD) as regards hybrid mismatches and is part of the Commission's new corporate tax package published on October 25, 2016 (see [ETF 303](#)). The presidency emphasized that this is a topic of high priority with the aim of reaching an agreement by the end of this year. If adopted, the new provisions would apply from 2019, i.e. in line with the main provisions of the current ATAD. The Member State discussions during the ECOFIN meeting on this measure were generally supportive.

The ATAD already addresses mismatches within the EU while this new proposal aims at tackling mismatches with non-EU countries. It also deals with mismatches involving permanent establishments, imported mismatches, hybrid transfers and dual resident mismatches with regard to third countries.

Ultimate beneficial owner information

Tax authorities access to beneficial ownership information

On November 8, the ECOFIN reached an agreement on the proposal granting of access for tax authorities to anti-money laundering information, especially customer due diligence information and information on beneficial ownership. This takes the form of an amendment to the Directive on Administrative Cooperation (DAC) in the field of direct taxation and referred to as "DAC5" (see [ETF 292](#)). The ECOFIN will adopt the Directive once the European Parliament has given its opinion.

Since the customer due diligence carried out by financial institutions has already started and the first exchange of information should be finalized by September 2017, the DAC5 should enter into force no later than January 1, 2018.

The Panama papers revelations highlighted the need for tax authorities to gain greater access to information. Under the current DAC, financial institutions have to look through passive non-financial entities to identify and report their beneficial owners. Applying that provision relies on

information held by authorities responsible for the prevention of money laundering. The proposed amendment aims at giving access to this information to tax authorities. It will, for example, allow them to monitor the proper application of the rules on the automatic exchange of tax information and help them to prevent tax evasion and tax fraud. It will also enhance the efficient administrative cooperation between Member States.

Anti-money laundering rules

During the ECOFIN meeting the Slovak Presidency updated the Council as concerns work on the anti-money laundering rules, especially with regard to the proposed Fifth Anti-Money Laundering Directive (AMLD5). AMLD5 seeks to improve access to beneficial ownership registers, so as to provide greater transparency about who really owns companies and trusts. It also provides for connecting the registers between Member States. The proposed directive is part of a February 2016 Commission action plan against terrorist financing.

The anti-money laundering legislation was also discussed by the European Parliament's PANA Committee on November 8, 2016. Commissioner Věra Jourová, responsible, inter alia, for the EU's anti-money-laundering policy presented the Commission's role and actions to implement and enforce EU legislation against money-laundering. Responding to a question from the Committee, she explained that the intention is that the national registers of beneficial owners which Member States are required to put in place under AMLD4 by June 26, 2017 will be replaced by a central register.

Dispute resolution mechanisms

The ECOFIN members stated their broad support for the Commission's proposal, which is aimed at improving the current system for dispute resolution on double taxation in the EU (see [ETF 303](#)).

Role of advisors and intermediaries

As announced during the ECOFIN meeting, the European Commission published its consultation, on "*Disincentives for advisors and intermediaries for potentially aggressive tax planning schemes*", which addresses both illegal arrangements as well as legal tax planning schemes. The Commission has taken due consideration of the need to ensure a level playing field between different service providers operating in different Member States and under different legal frameworks. Moreover and as expected, the Commission's emphasis is very much on disclosure rules, as opposed to some form of professional regulation. The policy options range from no EU-level action to various disclosure schemes and an EU Code of Conduct. The deadline for providing comments on the consultation is February 16, 2017.

Overview of upcoming action and expected developments

The technical work on all the C(C)CTB proposals has already started and discussions will continue during the upcoming Maltese presidency as well, probably with a focus primarily on CCTB at this stage.

According to the ECOFIN's conclusions, the Council would like to endorse the list of non-cooperative jurisdictions by the end of 2017.

As mentioned above, the Ministers approach was generally supportive as regards the initiative on third country hybrids and indicated that they could agree a general approach by the end of the year.

The European Parliament's ECON committee voted in favour of its report on DAC5 on November 10, 2016 and the plenary vote is scheduled for November 22, 2016. The outcome of the voting should be seen as an opinion which is not mandatory as the adoption of the proposal is only subject to ECOFIN (unanimous) approval.

AMLD5 as well as AMLD4, which has already been adopted, should be implemented by Member States in their national legislation by June 26, 2017. The presidency's aim is to reach an agreement on the AMLD5 proposal by the Council by the end of 2016, which would enable negotiations with the European Parliament (which also has to approve the proposal) to start early in 2017.

Member States will continue technical work on the proposal on EU Member States' double taxation dispute resolution mechanisms.

On the basis of the received feedback on the public consultation *Disincentives for advisors and intermediaries for potentially aggressive tax planning schemes*, as well as the political reaction, the Commission will consider and take appropriate action. At the OECD level, the BEPS Action 12 calls for a mandatory disclosure regime for certain tax planning strategies. The Council also recently [called](#) on the Commission to look into the possibility of "disincentives" against aggressive tax planning, inspired by BEPS Action 12.

EU Tax Centre comment

The developments reported above build on the increasing volume of EU measures aimed at combating perceived abuse of the traditional tax rules within the EU and beyond. However, notwithstanding the political and public support for many of the measures, it remains to be seen to what extent Member States will be prepared to give the necessary approvals. In particular it remains the case that many of the initiatives are subject to unanimous approval by Member States, which do not necessarily all have the same political and economic interests.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



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