Euro Tax Flash from KPMG's EU Tax Centre

ECOFIN meeting of December 6, 2016

ECOFIN – C(C)CTB – Beneficial Ownership Information – Hybrid mismatches – Financial Transaction Tax

At its meeting on December 6, 2016 the Economic and Financial Affairs Council of the EU (ECOFIN) adopted the proposal to grant access for tax authorities to anti-money laundering information. The Council further welcomed the corporate tax reform proposals presented by the Commission on October 25, 2016, including the C(C)CTB, and discussed the progress on the 2013 proposal aimed at introducing a financial transaction tax. The Council did not reach an agreement on the proposal aimed at extending the recently agreed rules on hybrid mismatches to third countries.

Background

The current discussions built on the numerous actions already taken in the context of the European Union's fight against aggressive tax planning and improving tax transparency.

C(C)CTB

The ECOFIN adopted conclusions on the Commission's corporate tax package of October 25, 2016 (see ETF 303).

The ECOFIN particularly welcomed the proposal on a Common Corporate Tax Base (CCTB) and on a Common Consolidated Corporate Tax Base (CCCTB). It noted the two-step approach and supported the view that work primarily should be focused on the rules for calculating the common tax base. Tax consolidation should be considered without delay once discussion on the elements of a common tax base has been concluded.

The Finance Ministers noted the ambitious timeline proposed by the Commission for the C(C)CTB and the dispute resolution proposals and called for their swift examination.

Tax authorities' access to beneficial ownership information

The ECOFIN formally adopted the proposal granting 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 is referred to as 'DAC5'. The new rules will apply as from January 1, 2018. For more information on the DAC5 proposal, please see ETF 292 and ETF 304.

During the meeting on November 8, 2016 ECOFIN reached an agreement on the proposal after which it was submitted to the European Parliament. The Parliament went further than the Commission's original proposal by suggesting that the information obtained by the tax authorities should be automatically exchanged between Member States (see the press release). The automatic exchange was not, however, included in the final text of DAC5 as adopted on December 6. According to European Commissioner for economic and financial affairs Pierre Moscovici, the Commission should come up with a separate proposal in this respect taking into account the related developments, particularly the ongoing pilot project for exchange of such information initiated by the G5 and the outcome of the proposed amendments to the Anti-Money Laundering Directive.

EU Anti-Tax Avoidance Directive 2 - hybrid mismatches with third countries

On December 6, 2016 EU Member States failed to reach agreement on amendments to the hybrid mismatch rules contained in the Anti-Tax Avoidance Directive (ATAD 1).

According to the compromise text issued on December 2, 2016, the proposed amendments (that would take the form of a directive, 'ATAD 2' to amend ATAD1) would have extended the scope of the rules to hybrid mismatches between EU Member States and third countries, as well as some mismatches that were not fully covered, such as certain types of hybrid permanent establishments and financial instrument mismatches. A new provision on reverse hybrid entities was also included. In addition, ATAD 2 was intended to bring the rules into line with the rules recommended by the OECD in the 2015 Final BEPS Report on Action 2.

From comments made during the debate of EU finance ministers on the proposals it appears that a number of last minute changes were made to the draft text of ATAD 2, including changes regarding the carve-out provisions. A number of Member States indicated that they were not in a position to approve the revised text, and needed more time to consider, including in some cases approval from their national parliaments. The Netherlands considered that the timing laid down in the proposed text, which provides that Member States should implement ATAD 2 by December 31, 2018 and apply the provisions as from January 1, 2019, should be deferred.

Financial Transaction Tax

Member States participating in the enhanced cooperation discussed the state of play of introducing a financial transaction tax (FTT). FTT was first proposed in September 2011 with the aim to ensure a fair contribution of the financial sector to the costs of the financial crisis, avoid fragmentation of the Single Market and create appropriate disincentives for transactions that do not enhance the efficiency of financial markets. Now 10 Member States are aiming to move forward with the initiative under the enhanced cooperation procedure. (see ETF 211, see ETF 238 see ETF 227)

At the end of 2015 Austria, Belgium, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia, Spain (FTT10) issued a statement setting out areas where agreement had been reached as well as areas that were still open. The FTT10 indicated that a decision on the open issues should have been made by the end of June 2016. (see ETF 267)

At a meeting of the Working Party on Tax Questions of 25 October, 2016 the FTT10 indicated that further negotiations on FTT would continue on the basis of the agreed broad lines relating to a number of the key building blocks (e.g. scope of taxable transactions in shares and derivatives, territoriality, transaction chain, market maker exemption, etc.). This basic agreement would still have to be transformed into a legal text, where a number of issues would have to be refined further (for more information see the October 2016 Presidency note on the state of play on the FTT). The proposal will require unanimous agreement of the FTT10, after consulting the European Parliament. All Member States can participate in discussions on the proposal, but only the FTT10 can vote.

On 6 December 2016 the ECOFIN meeting was informed that the FTT10 is working on a number of open questions and trying to reach a compromise on the core elements.

Code of Conduct Group Report – New guidelines

As a separate agenda item, the EU Code of Conduct Group on business taxation presented its regular report for endorsement by the ECOFIN meeting. This included guidelines on the issuance of tax rulings by Member States.

The guidelines cover:

- the process of granting a ruling, in particular that rulings should be issued in writing and should be binding on the tax authority;
- the term of a ruling and subsequent audit/checking procedure, in particular that APAs should only be granted for a fixed period of time, should be reviewed before being extended and be periodically validated;
- the publication of tax rulings that are of general application to the affairs of other taxpayers in similar circumstances.

Next steps

On December 1, 2016 the Dutch government and the majority of the Dutch Parliament have decided that the Netherlands will not support the relaunched proposal by the European Commission for a C(C)CTB. Next months' discussions may show how other countries will react.

Further discussion on the ATAD 2 proposal is now deferred until Malta takes over the EU Presidency in the first half of 2017.

It cannot be predicted at the moment when the European Commission will issue a revised text of the proposal on FTT. The German Minister of Finance Wolfgang Schäuble noted during the ECOFIN meeting, that reaching common results would hopefully encourage other Member States to join, as enhanced cooperation for such an important issue is not sufficient in his view.

EU Tax Centre comment

In view of the unanimity voting rule, and the Dutch position on the C(C)CTB proposal it appears that the proposal will not be adopted in its current format. However, there would then, in principle, remain the possibility of proceeding under enhanced cooperation.

As and when it is finally adopted, the ATAD 2 will be an important milestone in the European Commission's policy against aggressive tax planning, irrespective of the outcome of the C(C)CTB discussions. However, further action can be anticipated in the course of 2017, in particular in relation to the initiative to develop a 'black list' of non-cooperative jurisdictions outside the EU. 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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