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Euro Tax Flash from KPMG's EU Tax Centre

European Commission State aid decision on the UK tax treatment of multinational groups under the CFC regime

State aid – CFC regime – Group Financing Exemption - United Kingdom

On April 2, 2019, the European Commission announced its final decision on the state aid investigation into the UK Group Financing Exemption scheme, which allows certain transactions by multinational groups to be exempt from the otherwise applicable rules on Controlled Foreign Corporations (CFC) targeting tax avoidance. The decision confirms the Commission's preliminary view that this special exemption gives an unfair tax advantage to certain UK resident companies, in violation of EU State aid rules. It is now open to both the UK and the companies concerned to appeal the decisions before the General Court (and possibly later the Court of Justice of the European Union (CJEU)).

Background

The procedure is one of a series of State aid investigations recently launched by the EU Commission as part of EU initiatives in the areas of tax transparency, tackling harmful tax competition between Member States and tax avoidance, and is the first one focusing on the United Kingdom.

The investigation should be seen in light of earlier negative decisions by the EU Commission on tax rulings issued by Luxembourg and the Netherlands (in October 2015) (see ETF 262), by Belgium (in January 2016) (see ETF 271) and more recently by Ireland (see ETF 300) and Luxembourg (see ETF 339, ETF 372, and ETF 398).

The Decision

The UK CFC regime aims at preventing UK companies from using a subsidiary located in a low or no tax jurisdiction to avoid taxation in the UK. This is achieved by taxing profits that are considered to be artificially diverted from the UK, by allowing the UK tax authorities to reapportion the profits of certain non-resident subsidiaries to their UK parent company. However, an exception to the UK CFC rules was introduced in 2013 – the Group Financing Exemption – under which certain financing income (e.g. interest payments received on loans) does not have to be allocated to the taxable profits of the UK parent company, provided that such financing income received by the offshore subsidiary is derived from another foreign group company.

According to the EU Commission, this exemption creates a difference in taxation between profits derived at the level of the CFC from financing a foreign group company, which will not or only partially be subject to taxation in the UK, and other types of income, which will be subject to taxation in the UK under the CFC rules.

In particular, the Commission found that when financing income from a foreign group company, actually stems from UK activities, the Group Financing Exemption is not justified and therefore constitutes State aid under EU rules. As assessing whether and to which extent financing income derives from UK activities is not particularly burdensome or complex, the use of a general exemption rule in these circumstances is not justified. However, when financing income from a foreign group company is financed with UK connected capital and there are no UK activities involved in generating the finance profits, the Group Financing Exemption is justified and does not constitute State aid under EU rules. This is because assessing the exact percentage of profits funded with UK assets would be too complex and disproportionately burdensome.

It is now for the UK authorities to evaluate the number and the tax liability of the companies that have benefitted from the Group Financing Exemption as it was applied to profits derived from UK activities.

Next steps

This decision forms part of the standard state aid investigation procedure. The non-confidential parts of the decision are expected to be published in the next few months. It is now open to both the UK and the companies concerned to appeal the decision before the General Court (and possibly later the CJEU).

EU Tax Centre comment

Companies that have benefited from the unlawful aid will have two months from the date of the publication of the European Commission's decision in the Official Journal of the EU to appeal the decision before the General Court, irrespective of whether or not they were individually notified by the European Commission. Affected companies will probably have to review their individual circumstances and discuss provisioning, any disclosure implications and their analysis of any exposure position with their auditors. Groups may also wish to consider how to engage with HM Treasury and HMRC.

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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