Conclusions of June 16 ECOFIN meeting

Unshell – DAC8 – Automatic exchange of information – Code of Conduct Group (Business Taxation) – Preferential tax measures – List of non-cooperative jurisdiction – Beneficial ownership information – Defensive measures – Extension of geographical scope

On June 16, 2023, the final scheduled meeting of the Economic and Financial Affairs Council of the EU (ECOFIN Council) under the Swedish Presidency of the Council took place.

During the meeting, the ECOFIN Council approved a report to the European Council (the ECOFIN report), which provides an overview of the progress achieved in the Council on a range of direct tax measures, including on the so-called "Unshell" Directive proposal and the most recent amendment to the Directive on Administrative Cooperation (DAC8).

The ECOFIN Council also approved a report by the Code of Conduct Group ('CoCG' or 'the Group') on its work performed during the term of the Swedish Presidency (first half of 2023).

Background

On January 1, 2023, Sweden succeeded the Czech Republic in holding the Presidency of the Council of the EU during the first half of 2023. According to the program published by Sweden, key priorities from a direct tax perspective included:

- work on measures aiming to prevent tax evasion, tax avoidance, aggressive tax planning and harmful tax competition, such as updating the EU list of non-cooperative jurisdictions;
- enhancing tax transparency and reinforcing the exchange of relevant information within the EU;
- strengthening EU administrative cooperation on taxation.

In February 2023, the Council also published the CoCG's work program for the first half of 2023 under the Swedish Presidency. Key work items included:

- review of progress made by jurisdictions in relation to amending or abolishing preferential tax regimes – e.g. foreign source income exemption regimes (criterion 2.1) – and the implementation of substance requirements under the OECD Forum on Harmful Tax Practices (FHTP) global standard on substantial activities for no/nominal tax jurisdictions (criterion 2.2);
- discussions on the future criterion 1.4 on the exchange of beneficial ownership information;
- enhancing the effective application of national tax defensive measures towards non-cooperative jurisdictions;
- discussion on a gradual extension of the geographical scope.

For more information, please refer to E-News Issue 168 and Issue 171.

ECOFIN report – Update on files related to direct tax

The ECOFIN report details work and developments in the area of direct taxation performed at ECOFIN level during the first half of 2023 as follows:

Rules to prevent the misuse of shell entities (Unshell)

Since the legislative proposal was issued on December 22, 2021, the text has been subject to discussions in the Council working groups. As previously reported (see Euro Tax Flash Issue 496), compromise texts were submitted on parts of the proposal during the Czech Presidency but Member States were not able to reach agreement on the text.

The ECOFIN report notes that during the term of the Swedish Presidency further partial compromise texts and background notes for certain elements of the proposal were prepared and discussed in a number of working group meetings. It is also noted that progress was made on several issues, such as scope, substance criteria, tax consequences, tax residency certificates and reporting deadlines. While reportedly a full compromise text was circulated in March, the ECOFIN report notes that further discussions will be needed in order to find compromise solutions on certain outstanding issues.

Recent amendment to the Directive on Administrative Cooperation (DAC8)

The ECOFIN report notes that a compromise text for a Council Directive amending Directive 2011/16/EU was agreed at ECOFIN level on May 16, 2023, with a view to adopting the Directive (DAC8) once the opinion of the European Parliament has been issued and legal-linguistic revisions have been completed. Key features of DAC8 include:

- extension of the EU tax transparency rules to cover crypto-assets and e-money;
- extension of the automatic exchange of advanced cross-border rulings to cover rulings issued in respect of individuals;
- introduction of new requirements, and strengthening of existing requirements to collect and exchange information on TINs for a number of the reporting obligations introduced by the various versions of DAC;
- amendments to the reporting of cross-border arrangements (DAC6) to comply with the CJEU decision in case C-694/20 in relation to the obligations of reporting intermediaries which are bound by legal professional privilege;
- a common system of minimum penalties for serious non-compliance offences, which was included in the earlier proposal by the European Commission and that would have been applicable both to existing and proposed disclosure requirements was removed in the agreed compromise text.

With the exception of TIN related provisions, Member States would need to transpose the Directive by December 31, 2025. The rules would become applicable as of January 1, 2026 (with some exceptions). For more details, please see Euro Tax Flash Issue 512.

Automatic exchange of tax-relevant information with non-EU jurisdictions

In addition, the report notes that work during the Swedish Presidency also focused on the exchange of tax information with non-EU jurisdictions, particularly as regards personal data protection issues. The report notes that further work is required to ensure the continuous functioning of the international exchange of information framework with non-EU jurisdictions.

Work performed by the Code of Conduct Group during the Swedish Presidency

The Code of Conduct Group's report, as approved by the ECOFIN Council on June 16, 2022 (Group's report) details the work performed during the Swedish Presidency.

Current state of the standstill and rollback review process in relation to preferential tax measures

The Group's report notes that a newly identified Romanian measure (exemption from payment of a tax that is specific to certain activities for the taxpayers in the field of HORECA) does not need to be assessed – the measure is a prolongation of previous exemptions granted as a direct consequence of the interruption of business activity for the taxpayers concerned that were particularly affected during the COVID-19 crisis.

As regards Ireland's digital games relief and Poland's amendments to its holding company regime, the Group's report notes that descriptions of these measure were approved and that the Commission is expected to prepare draft assessments.

In relation to the newly identified regimes in Croatia (investment promotion act) and Spain (support of start-up ecosystems), the Group agreed to pursue the assessment procedure in the second half of 2023. Furthermore, the report notes that the standstill review of Romania's profit tax exemption for companies with innovation and R&D activities is kept on hold until the relevant national legislation is adopted.

In relation to measures that were subject to scrutiny and put under annual monitoring in order to assess their impact on business location decisions, the Group's report notes that the monitoring of the abolished safe-harbour rule (2013 Guidance intermediate companies) in Cyprus can be terminated once Cyprus has provided complete data for 2019, 2020 and 2021. The monitoring of Poland's measure on use of safe-harbour rule (2013 Guidance intermediate companies) should continue, to give to Poland the opportunity to provide complete data for 2020 and 2021.

Assessment of cooperative compliance programmes in the EU

The Group's report notes that a summary regarding the specific design and the main features of the existing cooperative compliance programmes (CCPs) in each Member State was approved. In a next step, the Group will examine the CCPs in Member States to ensure that CCPs do not go beyond the primary aim of ensuring tax compliance and do not result in substantive benefits that may lead to a lower tax liability.

Update on the EU listing exercise and defensive measures against non-cooperative jurisdictions

The Group's report details the work performed with regards to the revised EU list of non-cooperative jurisdictions ("Annex 1") and commitments taken by cooperative jurisdictions to implement tax good governance principles ("Annex 2" or "grey list"). The most recent amendments to the two lists were approved by the ECOFIN Council on February 14, 2023 and published in the [Official Journal](#) on February 21, 2023. For more details, please refer to Euro Tax Flash [Issue 506](#).

According to the report, developments in relation to the EU listing exercise following the latest revision of these lists include:

- *New criterion 1.4 (exchange of beneficial ownership information):* the CoCG resumed work and explored a more comprehensive approach to the design of a new criterion 1.4. However, the report notes that further work will be required.
- *Criterion 2.1 (preferential tax regimes):* Qatar was previously granted until March 31, 2023 to reform its harmful foreign source income exemption regime. The report notes that Qatar has adopted and ratified secondary legislation within the deadline and is in the process of issuing accompanying administrative guidance. The report further notes that the assessment of the reform by the CoCG is ongoing with a view to reaching conclusions in time for the October 2023 update of the EU list. In addition, the report notes that, in April 2023, the Forum on Harmful Tax Practices (FHTP) qualified a preferential tax regime in Jordan as "not harmful (amended)", subject to the adoption of final legislative amendments. The assessment of the reform is ongoing at CoCG level.
- *Revised state of play of defensive measures:* the annex of the Group's report provides a revised state of play of the implementation by Member States of defensive measures against non-cooperative jurisdictions (as at January 1, 2023). In this context, the report notes that further work is required in autumn, particularly, on how to measure the effectiveness of identified defensive measures. For more details on defensive measures adopted by EU Member States against non-cooperative jurisdictions, please refer to a KPMG's dedicated [webpage](#).
- *Extension of geographical scope:* The report notes that the CoCG discussed a Commission's proposal to extend the geographical scope of the EU list. According to the report, further work is required to decide the approach to be used for selecting jurisdictions.

ETC Comment

Sweden will be succeeded by Spain in holding the Presidency of the Council of the EU in the second half of 2023. Spain has not yet published a list of priorities and it is currently unclear how the snap general elections in July may influence the work program of the Spanish Presidency.

However, it is anticipated that the Council working groups will continue work on Unshell to find compromise solutions on the outstanding issues. In addition, the Spanish Presidency will likely start technical discussions with Member States on a Commission proposal for a common withholding tax relief and refund framework referred to as FASTER, once that file has been released (expected later this month) and a public consultation on the file has ended – see E-News [Issue 157](#) for more information . The same will be the case for the Commission's initiative to introduce a new common corporate tax system in the EU referred to as BEFIT (expected to be released on September 12, 2023) – see Euro Tax Flash [Issue 504](#) for more information.

Lastly, according to the adopted EU Minimum Tax Directive, the Commission is required to submit a progress report to the Council on the implementation of Pillar One by June 30, 2023. According to EU officials, the Commission is considering publishing an EU Pillar One Directive once the Multilateral Convention on Pillar One has been finalized by the Inclusive Framework with the aim to trigger and promote wider implementation of Pillar One at global level. Alternatively, the Commission is committed to putting forward an alternative legislative proposal by the end of 2023, if agreement at international level on a Pillar One solution is not reached.

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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