Conclusions of December 8 ECOFIN meeting

Council of the EU – Pillar Two – Unshell – FASTER – BEFIT – Transfer Pricing – Code of Conduct Group (Business Taxation) – Preferential tax measures – List of non-cooperative jurisdictions

On December 8, 2023, the final scheduled meeting of the Economic and Financial Affairs Council of the EU (ECOFIN Council) under the Spanish 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 (misuse of shell entities in the EU) and the FASTER Directive proposal (EU-wide harmonized withholding tax relief system).

In addition, the Spanish Presidency presented a progress report on the adjusted package for the next generation of own resources.

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 Spanish Presidency (second half of 2023).

Background

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

- advocating for the establishment of minimum and common standards on corporate taxation in all Member States;
- fighting tax evasion by large multinationals, which is estimated to cost the EU Member States 1.5 GDP points each year which is considered to equal the amount that is spent on housing and environmental protection.

In July 2023, the Council also published the CoCG's work program for the second half of 2023 under the Spanish Presidency. Key work items included:

- assessment of the progress made by jurisdictions in respect of EU listing criteria;
- work on the future criterion 1.4 on the exchange of beneficial ownership information;
- evaluation of the application of tax defensive measures applied by Member States towards non-cooperative jurisdictions;
- work on a further strengthening of the EU list and a gradual extension of its geographical scope.

For more information, please refer to E-News Issue 179 and Issue 181.

ECOFIN report – Update on files related to direct tax

The ECOFIN report details progress made in the area of direct taxation at ECOFIN level during the second half of 2023, as follows:

EU Minimum Tax Directive (Pillar Two)

The report notes that during the term of the Spanish Presidency, EU Member States approved a Council statement as well as an accompanying statement from the European Commission reconfirming their political support for Pillar One and Pillar Two of the OECD's BEPS project. In addition, the statements confirm the compatibility of the Safe Harbour rules and the Administrative Guidance that were agreed by the OECD/G20 Inclusive Framework with the EU Minimum Tax Directive. For more information, please refer to Euro Tax Flash Issue 527.

Rules to prevent the misuse of shell entities (Unshell)

Since the proposal was issued on December 22, 2021, the text of the Directive has been subject to discussions in the Council working groups. As previously reported, several compromise texts were submitted during the Czech and Swedish Presidencies but Member States were not able to reach agreement on the initiative (see Euro Tax Flash Issue 516).

The ECOFIN report notes that during the term of the Spanish Presidency work continued on this proposal. A compromise text was presented in September, including a two-stage approach:

- *first step:* automatic exchange of information based on a number of agreed hallmarks, that would take place together with the application of domestic tax consequences, where considered appropriate;
- *second step:* best practices on applying tax consequences to be exchanged between Member States and evaluated. A new Unshell proposal, including tax consequences, could be launched at that stage, if considered appropriate.

The report notes that, whilst the principle of a two-stage proposal was welcomed to some extent, several delegations expressed concerns that the approach would not provide a resolution on elements of the proposal that are still subject to discussions among Member States and therefore considered that further analysis is required. Following a suggestion made by the European Commission on an alternative way forward, the Presidency submitted a new proposal in November. The new version was based on a minimum standard and a included a toolbox of consequences. Nevertheless, the ECOFIN report notes that no agreement was reached and that further discussions will be needed in order to find compromise solutions on certain outstanding issues.

Faster and Safer Relief of Excess Withholding Taxes (FASTER)

The ECOFIN report notes that the proposed Council Directive providing for the "Faster and Safer Relief of Excess Withholding Taxes", issued on June 19, 2023, has been of high priority for the Spanish Presidency. The proposed Directive aims to make withholding tax procedures in the EU more efficient and secure for investors, financial intermediaries, and local tax authorities. For more details, see Euro Tax Flash Issue 517.

According to the report, the file has been subject to discussions in six Council working group meetings. The report notes that four compromise texts were discussed during those meetings providing for several amendments to the initial text proposed by the Commission, including:

- amendments to the rules in respect of issuance of the digital tax residence certificate;
- new provisions allowing certified financial intermediaries to assume the position of non-certified intermediaries, to facilitate the application of the relief and complete the information that must be reported to the tax administrations;
- amendments to the scope of information to be reported by certified financial intermediaries and other related provisions;
- clarification of the conditions under which Member States may reject the requests for quick refund, reducing the possibilities for fraudulent claims;
- new special provisions governing indirect investments;
- amendments to the provisions on late payment interest, liability, personal data protection and on evaluation of the future Directive.

As certain Member States requested the possibility of maintaining their current systems of relief at source from the withholding tax, the Spanish Presidency proposed to contemplate such a possibility, under specific conditions. The report concludes that substantial progress has been made but that further technical work is required.

Proposals for Council directives on BEFIT, on Transfer Pricing and on the Head Office Tax System

The report makes reference to three Council Directive proposals that were published by the European Commission on September 12, 2023:

- Council Directive on Business in Europe: Framework for Income Taxation (BEFIT)
- Council Directive on Transfer Pricing
- Council Directive implementing a Head Office Tax System for SMEs (the HOT proposal)

The ECOFIN report notes that during the Spanish Presidency three Council working party meetings were held to analyse the proposals. For more details, please refer to Euro Tax Flash Issue 521 and Issue 522.

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

The report notes that work during the Spanish 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.

In addition, the Spanish Presidency launched discussions to amend the agreements on the automatic exchange of financial account information with Andorra, Liechtenstein, Monaco, San Marino and Switzerland. According to the report, these amendments aim to improve international tax compliance and align with the changes made to the OECD Common Reporting Standard and other related adjustments.

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

The Code of Conduct Group's report, as approved by the ECOFIN Council on December 8, 2023 (Group's report) details the work performed during the Spanish Presidency.

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

The Group's report notes that:

- A new version of the Croatian Investment Promotion Act was implemented. In this regard, the Group stresses that the previous assessment remains valid such that the rollback notification is still pending and should be extended to the New Investment Promotion Act.
- As regards Ireland's digital games relief and Poland's amendments to its holding company regime, the Group's report notes that the draft assessments were considered and that the measures should be considered not harmful (although certain aspects of Ireland's measure will be monitored).
- In relation to Spain's support of start-up ecosystems regime, it was agreed that the measure does not need to be assessed by the Group.
- The report also 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.

With respect 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 following measures can be terminated as they do not seem to significantly affect the business location among the Member States:

- Greece's measure on patent tax incentive,
- Luxembourg's measure on intra-group financing, as well as
- Portugal's notional interest deduction regime.

The report further notes that the monitoring of the effects of following measures should continue in next year's monitoring exercise:

- Lithuania's new corporate income tax for companies implementing large projects,
- Romania's measure on reduction of income tax for maintaining/increasing own capital, as well as
- Poland's notional interest deduction regime and co-operative compliance program for large taxpayers.

In addition, the Group's report notes that the CoCG will analyse the effects of the notional interest deduction regime in Cyprus and the use of safe-harbour rules in Cyprus and Poland once relevant data is made available to it.

Assessment of cooperative compliance programmes in the EU

The Group's report points out that the CoCG reviewed the summary of the design and the main features of the existing cooperative compliance programmes (CCPs) in each Member State. The aim is 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. The report further notes that the Group agreed on the conclusions of the mapping exercise, including on monitoring the effects of the tacit rulings in the Italian CCP.

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 October 17, 2023 and published in the Official Journal on October 23, 2023. For more details, please refer to Euro Tax Flash Issue 526.

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

- *Criterion 1.1 (Automatic exchange of information - AEOI):* The Group's makes reference to the 2023 Global Forum peer review report on AEOI. The 2022 Global Forum peer review results and the commitments taken by those jurisdictions were reflected in the EU list update of February 2023.
- *Criterion 1.2 (Exchange of information on request - EOIR):* Botswana, Dominica, Serbia and Thailand were rated as *Largely Compliant* in the latest peer review published by the Global Forum on November 8, 2023 (see E-News Issue 187). Therefore, the report notes that the Group will recommend removing Botswana and Dominica from Annex II at the next update of the EU list.
- *New Criterion 1.4 (beneficial ownership information):* The report notes that whilst work on the design of this new criterion continued during the year, further work will be required.
- *Criterion 2.2 (tax regimes that facilitate offshore structures which attract profits without real economic activity):* The Group's report makes reference to the preliminary 2023 monitoring assessment for the year 2022 prepared by the Forum on Harmful Tax Practices (FHTP). According to the Group's report, the FHTP addressed soft recommendations on statistical data and compliance programmes to Anguilla, the Bahamas, Barbados and Turks and Caicos Islands as well as strong recommendations on exchange of information to Anguilla, the Bahamas, Turks and Caicos Islands and British Virgin Islands. It is further noted that the FHTP will reassess those recommendations in January 2024 and the CoCG will consider the results of the final assessment in respect of the February 2024 update of the EU list. In addition, the Group's report notes that the CoCG continues its specific monitoring for Collective Investment Funds and partnerships.
- *Criterion 3.2 (implementation of CbCR minimum standard):* The Group's report highlights that the CoCG started focusing on jurisdictions that joined the BEPS Inclusive Framework since January 1, 2018 and that were subject to the 2023 Global Forum peer review and have not fully implemented the global standard on CbCR. According to the Group's report, the CoCG asked those jurisdictions to provide information about resident Ultimate Parent Entities of multinational enterprise groups with a consolidated group revenue above the CbCR reporting threshold.
- *Defensive measures against non-cooperative jurisdictions:* The Group's report indicates that, at its meeting on November 22, 2023, the CoCG considered a proposal with a view to monitor the implementation of defensive measures. The report notes that work will continue on this basis.
- *Extension of geographical scope:* The Group's report notes that the CoCG discussed at its previous meetings, the possibility to extend the geographical scope of the EU listing exercise and agreed to include Brunei Darussalam, Kuwait and New Zealand.

Progress report on new own resources

The Spanish Presidency presented a progress report on the adjusted package for the next generation of own resources, which was published by the European Commission on June 20, 2023. The initiative adjusts and supplements the first basket of proposed own resources put forward in December 2021. The proposal includes a temporary new own resource based on company profits that would require each Member State to contribute a new levy equivalent to 0.5 percent of surplus corporate profits. For more details, please refer to Euro Tax Flash Issue 518

The progress report notes that most EU countries expressed general scepticism about the proposals and only few were ready to advance work on the adjusted package before the end of 2023. In particular, the progress report highlights initial reservations by EU Member States on the new statistical own resource based on corporate profits, questioning the added value of such a new own resource.

The progress report further notes that the majority of EU countries considered positively the potential introduction of the contributions based on receipts generated by the EU Carbon Border Adjustment Mechanism (CBAM). In addition, reference is made to some Member States that are open to further discussions on the EU emission trading system (ETS) parameters and on those new own resources that represent real “fresh money” (e.g. ETS2). For more information on CBAM and ETS, please refer to a dedicated KPMG report.

Next steps

Belgium will take over from Spain the Presidency of the Council of the EU in the first half of 2024. It is expected that the Belgian government will present its Presidency Program next week.

ETC Comment

It is anticipated that the Council working groups will continue working on all of the pending files. However, it remains to be seen which initiatives will be treated as priorities by the Belgian Presidency. As regards the misuse of shell entities, the European Commission recently noted that it is important to reach agreement on the proposed Unshell Directive before taking further steps in the fight against tax evasion and aggressive tax planning, including tabling a proposal in relation to the SAFE initiative.

During the Belgian Presidency, further discussions on the new package of own resources will also need to be monitored. Furthermore, the Chair of the CoCG recently informed Members of the European Parliament that the CoCG will start assessing tax measures of general application of EU Member States from January 1, 2024. According to the Chair, tax features of general application could include tax incentives for research or other broadly applied tax breaks. For more details, please refer to E-News Issue 187.

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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