Euro Tax Flash from KPMG's EU Tax Centre

KPMG provides feedback on European Commission evaluation of the Anti-tax Avoidance Directive

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Key Summary:

On September 11, 2024, KPMG member firms in the EU submitted a response to the European Commission's call for evidence for the evaluation of the Anti-Tax Avoidance Directive.

KPMG welcomes the opportunity to comment on the implementation, functioning and future-proofing of the Directive, as well as on its relevance in the current economic and regulatory environment.

The KPMG submission includes considerations regarding the interaction of ATAD with the EU Minimum Tax Directive and feedback on a number of areas where further clarity and certainty would be welcomed. We also provide comments on the adequacy of the deductibility threshold and de minimis rule and the scope of exclusions for long-term public infrastructure projects.

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European Commission – Anti-tax Avoidance Directive – Interest Limitation Rules – Exit Taxation Rules – General Anti-Abuse Rules (GAAR) – Controlled Foreign Company (CFC) Rules – Anti-Hybrid Mismatch Rules

Background

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On July 12, 2016, the Council of the European Union (EU) adopted the Anti-Tax Avoidance Directive (ATAD I) Directive (EU) 2016/1164. The Directive is a separate and distinct initiative from the OECD's Base Erosion Profit Shifting (BEPS) plans; however, the Directive was designed to implement and build on the proposals announced as part of the BEPS initiative in October 2015, in an attempt by the European Union to harmonize the adoption of anti-BEPS measures into local laws across EU Member States.

On May 29, 2017, the Council of the EU adopted a Directive (ATAD II – Council Directive (EU) 2017/952) to amend the hybrid mismatch measures in ATAD I. The Directive extends Article 9 to include hybrid mismatches between EU Member States and third countries and introduces rules on hybrid permanent establishment (PE) mismatches, hybrid transfer, hybrid financial instrument mismatches, dual resident mismatches, reverse hybrid mismatches and imported mismatches.

ATAD I and II therefore contain five specific measures:

- Article 4: Interest Limitation Rules
- Article 5: Exit Taxation Rules
- Article 6: General Anti-Abuse Rules (GAAR)
- Articles 7 & 8: Controlled Foreign Company (CFC) Rules
- Article 9: Anti-Hybrid Mismatch Rules

In August 2020, in line with the requirements of Article 10 of ATAD, the Commission produced an interim report for the European Parliament and Council (COM(2020) 383 final), providing a preliminary overview of each Member States' implementation of the ATAD measures. This report was a first step in the evaluation process and determined that the Commission would produce a comprehensive evaluation report on the measures in ATAD.

The ATAD evaluation is expected to provide evidence on the implementation of the Directive, to what extent its objectives have been achieved, and whether the measures need to be amended in the future. According to the European Commission, this offers a unique opportunity for the rules to be updated to better reflect the current environment, to deliver on the EU's objectives of administrative simplification and to provide more clarity and certainty to taxpayers.

KPMG's feedback

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KPMG member firms in the EU[1] were pleased to provide comments on the implementation, functioning and future-proofing of the Directive, as well as its relevance in the current economic and regulatory environment.

The key points highlighted in the KPMG submission can be summarized as follows:

- The interaction of ATAD with the EU Minimum Tax Directive creates an additional level of complexity and has created a risk of double taxation, which should be addressed at EU level. In particular, we recommend that ATAD is amended to exempt from CFC regimes those groups that are in scope of Pillar Two.
- Based on our practical experience with the application of ATAD, we note a number of areas where further clarity and certainty would be welcomed, such as with regard to the treatment of capitalized interest costs for the purposes of the interest limitation rules, and issues related to group taxation in the context of the anti-hybrid rules.
- We also recommend that the adequacy of the deductibility threshold and de minimis rule and the scope of exclusions for long-term public infrastructure projects are revisited to better reflect the current economic environment and international environment.

Each of these points is addressed in further detail in our response, available here.

[1] The comment paper was produced on behalf of KPMG member firms located in the EU forming part of KPMG's Europe, the Middle East & Africa (EMA) region. Throughout the submission, "we", "KPMG", "us" and "our" refer to the network of independent member firms operating in the EU.

ETC Comment:

Following the conclusion of the feedback period on September 11, 2024, the Commission is expected to adopt its evaluation on ATAD during the third quarter of 2025.

The complexity of ATAD is increased by the differences between Member State regarding its implementation. KPMG's EU Tax Centre conducted a survey of our member firms in August 2024 to ascertain whether each of the five ATAD measures had been fully transposed by Member States. The survey also sought to understand the approaches taken by Member States when incorporating the ATAD measures into domestic law. A summary of the findings of this survey are included in our EU Anti-Tax Avoidance Directive – Member State Implementation Overview report.

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

Additional relevant links

- KPMG's webpage on ATAD

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