ECOFIN agrees on new "de minimis" anti-abuse rule and expansion of the automatic exchange of information

Executive summary

On 9 December 2014, the European Union's Economic and Financial Affairs Council (ECOFIN), a configuration of the Council of Europe which is made up of the economics and finance ministers from all European Union (EU) Member States and relevant European Commissioners, agreed on two key tax measures designed to tackle tax avoidance and unfair tax competition:

- A new “de minimis” anti-abuse clause within Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States\(^1\) (Parent-Subsidiary Directive or PSD)
- The expansion of the mandatory exchange of information between EU tax authorities

“I applaud the two milestone decisions taken by Finance Ministers today, which open up a new front in our fight against corporate tax avoidance and aggressive tax planning,” said Pierre Moscovici, European Commissioner for Economic and Financial Affairs, Taxation and Customs.

Detailed discussion

Background

On 25 November 2013, the Commission presented a proposal for a Directive amending the PSD. The proposal had two main objectives:

- To fill a loophole of the current PSD text by tackling hybrid loan mismatches within the scope of its application
- To introduce a general anti-abuse rule in order to protect the functioning of the PSD
During the course of negotiations on the proposals to make amendments to the PSD, Member States deemed splitting of the Commission proposals necessary, to allow for early progress in the field of hybrid loan mismatches, while also noting that the part of the proposal relating to the general anti-abuse rule required further discussion as Member States had expressed different views on it.

As a result, on 8 July 2014, the Council adopted the Directive to amend the PSD, which contained provisions aimed at closing the tax loophole generated by hybrid loans arrangements. The amending Directive has already entered into force and Member States have to transpose its provisions into national law by 31 December 2015.

New “de minimis” anti-abuse clause
The second part of the November 2013 proposal, for a new “de minimis” anti-abuse clause, was agreed at the ECOFIN meeting of 9 December. The resulting Directive will allow Member States to put in place stricter or more specific domestic provisions or double tax treaty anti-abuse provisions. Member States will have until 31 December 2015 to transpose both clauses into national legislation.

The “de minimis” anti-abuse clause results in In Article 1, paragraph 2 of the PSD being replaced by the following paragraphs:

2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements that, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage which defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.

An arrangement may comprise more than one step or part.

3. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

4. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse.”

The Commission confirms that the proposed amendments to Article 1, paragraph 2 of the Parent Subsidiary Directive are not intended to affect national participation exemption systems in so far as these are compatible with the Treaty provisions.

ECOFIN approves to expansion of the exchange of information
ECOFIN also reached political agreement on the automatic exchange of information between the tax authorities of the EU’s 28 Member States.

The Commission had proposed a revision to the Administrative Cooperation Directive in June 2013 as part of its drive to further increase tax transparency in Europe. The revision is also a direct response to the new Global Standard on automatic exchange of information agreed to by G20 Finance Ministers in February 2013, which aims to ensure full tax transparency and cooperation between tax administrations worldwide in fighting tax evasion. A draft of the revision was agreed to by ECOFIN on 14 October 2014. The changes to the Directive brings interest, dividends, gross proceeds from the sale of financial assets and other income, as well as account balances, within the scope of the automatic exchange of information.

Member States will start exchanging information automatically under the revised directive for the first time by the end of September 2017, along with other OECD “earlier adopters.” Austria announced that it will join the other member states in doing so by the same date, thereby not making full use of a derogation it obtained when political agreement was reached in October 2014.

Financial Transactions Tax and Patent Box
Background notes to the ECOFIN meeting issued by the Commission on 5 December included the language that It (ECOFIN) will also be called on to agree on the tax treatment of patent boxes (intellectual property tax regimes), under a code of conduct on business taxation. And it will take note of ongoing work on the introduction of a financial transaction tax in 11 member states, with a view to further work in 2015. No mention of either issue was made in the press release issued after the ECOFIN meeting.
Future developments on the exchange of rulings notes
While no specific proposals were issued at the conclusion of the ECOFIN meeting, reference was made in the ECOFIN press release to a commitment to further extend the automatic exchange of information to include tax rulings made by countries, with a legal proposal to be presented in early 2015.

This follows earlier commitments by the Commission to do so, as well as a written request\(^5\) from the Finance Ministers of France, Germany and Italy in recent weeks that new rules should be introduced to include mandatory and automatic exchange of information on cross-border tax rulings (including Advance Pricing Agreements in the field of transfer pricing), a register identifying beneficiaries of trusts, shell companies and other non-transparent entities, as well as additional measures against tax havens.

Implications
Member states will have until 31 December 2015 to transpose the second amendment of the Parent-Subsidiary Directive by introducing an anti-abuse rule into national law. The same deadline applies for transposition of the July 2014 linking rule amendments to tackle hybrid loan mismatches.

While Member States are required to apply the linking rule only to situations that fall under the scope of the PSD, they are free to decide to give it rule broader application should they wish.

As noted, Member States will start exchanging information automatically under the revised Administrative Cooperation Directive for the first time by the end of September 2017.

With political agreement now reached on both sets of proposals, companies should assess the potential impact on the way they do business. Companies should also continue to closely monitor European developments, in particular the proposals for an expansion to the automatic exchange of information to include tax rulings made by countries.

Endnotes
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