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Global Tax Alert

News from EU Tax Services

EU Council adopts directive on exchange of information on tax rulings, agrees on other corporate tax issues

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Executive summary

On 8 December 2015, the Economic and Financial Affairs Council of the European Union[1] (ECOFIN) formally adopted a legislative proposal which aims at the exchange of information of tax rulings.[2] According to this proposal, information related to cross-border tax rulings and advance pricing arrangements is to be exchanged among Member States. The new rules shall be applied starting 1 January 2017.

The ECOFIN agreed on amendments regarding the Code of Conduct and the Code of Conduct Group.[3] Also, it discussed anti-base erosion and profit shifting (BEPS) related items and concluded on aspects of a future proposal for a Common Consolidated Corporate Tax Base (CCCTB) directive.[4] It was announced by Mr. Gramegna (Finance Minister of Luxembourg) in his function as incumbent president of the ECOFIN that the Commission will present a full package on transparency and on taxation in January, respectively early 2016. Mr. Gramegna also said that an anti-BEPS EU directive was agreed upon by the Member States' finance ministers.

Detailed discussion

This Alert summarizes the most relevant issues with respect to the pending EU initiatives on corporate taxation.

Building a better working world

Legal adoption of tax rulings exchange directive

The ECOFIN adopted the legislative proposal on which it agreed politically on 6 October 2015.[5] Having formally adopted amendments to the Directive on the Automatic Exchange of Information, one of the elements of the Commission's transparency package presented on 19 March 2015[6] has been concluded. That said, the adopted amendments are less than the initial scope of the Commission's legislative proposal, since certain conditions have been eased. The newly adopted rules still give rise to expectations of increased transparency and cooperation among Member States on tax matters.

EU response to OECD BEPS report recommendations

As regards anti-BEPS conclusions, Mr. Gramegna said that the "EU is and will [be a] frontrunner in the implementation of OECD[7] BEPS recommendations." According to Mr. Gramegna, the goal of the Luxembourg Council presidency was to prepare work and agree on aspects of an anti-BEPS directive. He concluded that the topic will be revisited under the next (Dutch) Council presidency.. Commissioner Dombrovskis added that "we [i.e., the Commission] intend to present early next year a package which includes a series of legislative and non-legislative measures to implement coordinated control measures against tax optimization. Europe needs to be at the forefront of the agreed OECD measures, but we need to avoid a situation where 28 Member States do this with 28 different systems. So, there needs to be a coordinated approach." He further stated that the package will also cover non-EU countries in respect to tax good governance on tax measures.

With respect to the implementation of OECD anti-BEPS recommendations via EU legislation, the ECOFIN tasked the Commission to present a legislative proposal regarding OECD BEPS Actions 2 (hybrid mismatches), 3 (Controlled Foreign Company rules), 4 (interest limitation rules), 6 (general anti-abuse rule), 7 (permanent establishment status) and 13 (country-by-country reporting). Prior to implementation, further technical analysis shall also be carried out. The Commission shall take account of the consideration already given to these issues within the Commission's on-going work, notably with respect to the CCCTB. On the basis notably of OECD BEPS Action 6, the insertion of a common anti-abuse clause is envisaged in the context of the recast of the Interest and Royalties Directive. A similar clause was adopted for inclusion in the Parent-Subsidiary Directive in 2014, with the deadline of transposition into Member States' domestic law by the end of 2015. The ECOFIN notes, however, that such implementation shall not preclude the application of Member States' domestic legislation or agreement-based provisions aimed at preventing BEPS.

CCCTB

The ECOFIN discussed the current state of play of the work currently carried out on the way to future legislative proposal on a CCCTB. It considered the recent work carried out so far in relation to a future CCCTB proposal and the two-staged approach currently planned. The first stage would be the legislative proposal for an introduction of a CCTB – i.e., a common tax base with regard to corporate taxation but without consolidation. The presentation for such a legislative proposal is currently scheduled for 2016. This would be followed by the introduction of a consolidation element at a later stage.

The former 2011 CCCTB directive legislative proposal not only provided for a common consolidated corporate tax base but also included a number of provisions aimed at reducing opportunities for aggressive tax planning by corporate groups. As such, it is linked with the recent OECD anti-BEPS recommendations which have received support from both the European Council and G20 summits. In light of this, the Luxembourg presidency started consultations on a possible split of the proposal, so as to focus on international anti-BEPS aspects. Thus, from the latest statements delivered by the Council as well as by Commissioner Dombrovskis, it is expected that aspects of suggested measures directed against aggressive tax planning shall be carved out from a future CCCTB directive legislative proposal and be integrated in an anti-BEPS directive proposal. It should not go unnoticed that prior to the recent ECOFIN meeting, a consolidated text (which should be made available in due course to the public) was presented at the Commission working level. It is understood that this document reflects the international anti-BEPS aspects that had so far been submitted to a working level group for technical examination. It can reasonably be expected that it may serve as a possible basis for further work on a future anti-BEPS directive. Hence, the Commission will be tasked to deliver two packages of legislative and non-legislative proposals:

- New legislative proposals for a re-launch of the CCCTB project
- A separate anti-BEPS package of legislative and non-legislative measures

Code of Conduct

The EU Code of Conduct dates from December 1997. Although not a legal document, it is used at the Council level to assess the potential harmfulness of tax measures adopted (or in the process of being adopted) by Member States. A working group has been set up to oversee its implementation. Although the Code of Conduct is soft law, it (and the Code of Conduct Group), the political dimension has meant that Member States have respected (and responded to) its decisions. The ECOFIN concluded that the mandate of the Code of Conduct Group should be better used and strengthened, including discussion of a mandate that profits should be subject, as appropriate, to an effective level of tax within the EU, notwithstanding the competencies of Member States in the area of taxation. The ECOFIN expects the work on the strengthening of the mandate to be finalized in the first half of 2016. The governance, transparency and visibility of the Code of Conduct shall also be enhanced. Thus, Mr. Gramegna said during the press conference after the ECOFIN meeting, the finance ministers of the EU seek further efficiency and improved visibility of Code of Conduct Group.

Among other things, the Group is asked to develop general guidance to prevent tax avoidance and BEPS activities. Through its guidance, it should seek to ensure an effective implementation at the EU level of the relevant OECD BEPS recommendations not covered by the EU legislation, and in accordance with the Group's new Work Program. Especially, it should produce guidance on OECD BEPS recommendations on Actions 5 and 8 to 10. In addition, the geographical reach, i.e., in relation to third countries, of the principles of the Code of Conduct will be broadened.

Implications

With this ECOFIN meeting it becomes more apparent that the Member States have further paved the way for an ever tighter future regulative framework with respect to corporate taxation within the EU.

It remains to be seen which aspects of the anti-BEPS package will ultimately be addressed by means of legislative measures and which by means of non-legislative measures. Also, in regard to certain other issues, the latest ECOFIN meeting's communication remains silent. In this respect, for example, the official ECOFIN's stand on the Shareholder Rights Directive's proposal for tax-related country by country reporting, including the publication of tax ruling information, remains open. Nevertheless, under the Luxembourg Presidency, work was pushed forwards as regards a common ground on anti-BEPS aspects among all 28 Member States, with all 28 Member States finding consent.

Endnotes

1. The EU Council members are the finance ministers of all the EU Member States.
2. http://www.consilium.europa.eu/en/press/press-releases/2015/12/08-ecofin-cross-broder-tax-ruling/.
3. http://www.consilium.europa.eu/en/press/press-releases/2015/12/08-ecofin-conclusions-business-taxation/.
4. http://www.consilium.europa.eu/en/press/press-releases/2015/12/08-ecofin-conclusions-corporate-taxation/.
5. See EY Global Tax Alert, *EU Council reaches political agreement on the automatic exchange of information on tax rulings*, dated 6 October 2015.
6. See EY Global Tax Alert, *EU Commission initiates infringement procedure agains France on 3% dividend tax*, dated 19 March 2015.
7. Organisation for Economic Co-operation and Development.

For additional information with respect to this alert, please contact the following:

Ernst & Young GmbH Wirtschaftsprüfungsgesellschaft, Munich

- Dr. Klaus von Brocke +49 89 14331 12287 klaus.von.brocke@de.ey.com
- Andreas Wohlhöfler +49 89 14331 11284 andreas.wohlhoefler@de.ey.com

Ernst & Young, LLP (United Kingdom), London

- Chris Sanger +44 20 7951 0150 csanger@uk.ey.com

Ernst & Young LLP, Washington, DC

- Rob Thomas +1 202 327 6053 rob.thomas@ey.com

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