Executive summary

On 8 March 2016, the Economic and Financial Affairs Council of the European Union (ECOFIN) which is made up by the Finance Ministers of all European Union (EU) Member States announced conclusions for new rules regarding the Code of Conduct on business taxation.1 With these conclusions, the work of the ECOFIN sub-group which oversees whether the Member States are in compliance with the Code of Conduct should be made more effective and transparent.

Detailed discussion

By first adopting the Code of Conduct on business taxation in 1997, the Member States agreed to roll back any existing tax measures that constituted harmful tax competition and to refrain from introducing any such measures in the future. An ECOFIN sub-working group oversees whether the Member States are in compliance with the Code of Conduct. When assessing measures of Member States with respect to the Code of Conduct’s objective, the group considers several criteria. Thus, when assessing whether such measures are harmful, the Code of Conduct group should take account of, inter alia, whether:2
1. Such advantages are accorded only to nonresidents or in respect of transactions carried out with nonresidents (ring-fencing)

2. Advantages are ring-fenced from the domestic market, so they do not affect the national tax base (ring-fencing)

3. Advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages (substance)

4. The rules for profit determination on respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the Organisation for Economic Co-operation and Development (OECD)

5. The tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way (transparency).

In its recent meeting, the ECOFIN reached the following conclusions on new rules:

- The Code of Conduct Group is recalled to develop guidance on the interpretation of the gateway criterion and its application
- The Code of Conduct group should actively use existing sub-groups and establish new sub-groups where appropriate
- One subgroup will address clarification of the third and fourth criteria (i.e., substance and internationally accepted principles) of the Code of Conduct and another subgroup will address dialogues with relevant third countries
- The High Level Working Party on Taxation is invited to decide on the need to request this second sub-group at a later stage to address issues related to the communication on an external strategy for effective taxation
- Guidelines, i.e., by reference to clear and objective criteria, for a notification of tax measures to the Code of Conduct group should be developed
- Measures to speed up decision making within the group have been considered
- The necessity to increase transparency is emphasized
- More substantial six-monthly Group reports to the ECOFIN are called for
- The Code of Conduct Group should explore initiatives to further inform the public on the results of meetings

Based on the conclusions, it becomes apparent that a new Code of Conduct sub-group should address issues in relation to the Commission’s communication on the external strategy for effective taxation which was presented on 28 January 2016.3 Also, the ECOFIN and the Dutch Presidency intend a further decision to be made by the end of June 2016 on the revision of the group’s mandate.

Implications

These conclusions follow the ECOFIN’s conclusions on the Code of Conduct agreed upon on 8 December 2015.4 By concluding the above, the ECOFIN underlines that certain actions as proposed by the OECD Base Erosion and Profit Shifting (BEPS) Action Plan should not be implemented by EU legislative acts. Rather, the Code of Conduct group should survey their respective implementation in the Member States from an EU perspective. The conclusions reflect the approach that the Code of Conduct group could also address issues arising from the patent or intellectual property boxes concepts in the Member States. Hence, the approach the Code of Conduct group will take regarding such knowledge box concepts could have implications on the currently pending (or halted) scrutiny of some Member States’ patent box concepts. By agreeing on the conclusions in relation to criterion 3 and 4, the ECOFIN seems to underline that the Code of Conduct Group should be the EU’s competent body to oversee the implementation of OECD BEPS Actions 5 and 8-10 within the EU’s Member States. It should not stay disregarded that the ECOFIN stresses the development of guidance on the interpretation and application of the gateway criterion, too. At the moment the Code of Conduct applies to measures which provide for a significantly lower effective level of taxation than that which applies generally in a Member State. As hinted by the Code of Conduct Group last year5 this could be expanded to include measures which provide for a level of taxation below a particular effective tax rate. Hence, in relation to this no final decision has been made yet. Though, it becomes clear that the scope of the Code of Conduct Group’s work could be expanded in the future.

Other legislative developments

Another part of the anti-tax avoidance package is the EU Commission’s proposal of the new Anti-Tax Avoidance Directive (ATA Directive).6 It is intended to “lay down rules against tax avoidance practices that directly affect the functioning of the internal market.” A sub-group of the ECOFIN will meet on 18 March 2016 to discuss this
directive proposal on a working-level. The currently presiding Dutch Presidency seems to be committed to reaching a political agreement on this Directive before its term ends on 30 June 2016. Thus, the Dutch Presidency is planning for an agreement of all Member States’ Finance Ministers on the proposed ATA Directive on 25 May 2016. In order to reach this goal the Dutch Presidency seems open to accept a split of the proposed ATA Directive into two. A first-staged legislative proposal would involve a directive which focuses on measures which directly derive from the respective action points as suggested by the OECD BEPS action plan in October 2015. This includes rules on controlled foreign companies taxation, interest limitation, hybrid mismatches and a general anti-abuse rule. Though, it has to be acknowledged that the Commission’s proposal does not propose a direct transposition of the measures as suggested by the OECD BEPS action plan. Rather, it goes beyond these suggestions in certain aspects. Then, a second-staged legislative proposal would involve a directive which focuses on measures which go beyond the OECD BEPS action plan. The latter measures would include rules on exit taxation and a switch-over clause, measures which are not addressed by the OCED BEPS action plan but from work carried out in relation to a future Common Consolidated Corporate Tax Base.

Endnotes

6. See EY Global Tax Alert, European Commission releases anti-tax avoidance package designed to provide uniform implementation of BEPS measures and minimum standards across Member States, dated 28 January 2016.
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