European Council formally adopts binding general anti-abuse rule in Parent-Subsidiary Directive

Executive summary

On 27 January 2015, the European Council formally adopted a binding general anti-abuse rule to be included in the Parent-Subsidiary Directive (PSD). This new rule aims at preventing Member States from granting the benefits of the PSD to arrangements that are not “genuine,” i.e., that have been put into place to obtain a tax advantage without reflecting economic reality. The clause is formulated as a “de minimis” rule, meaning that Member States can apply stricter national rules, so long as they meet the minimum EU requirements.

Detailed discussion

The PSD aims to remove double taxation in the case of profit distributions made by a subsidiary located in one Member State and received by its parent located in another Member State.

In November 2013, the Commission proposed amending the Directive to stop it from being misused for the purposes of tax avoidance. Two amendments were proposed:

- Provisions designed to prevent corporate groups from using hybrid loan arrangements to benefit from double non-taxation under the PSD
- Introduction of a general anti-abuse rule

In July 2014, the Council adopted a specific linking rule that seeks to prevent corporate groups from using hybrid loan arrangements to benefit from double non-taxation under the PSD. The deadline for transposition of the linking rule is 31 December 2015.
Since then, work has continued on the general anti-abuse clause, the aim of which is to stop the PSD from being misused for the purposes of tax avoidance, and to achieve greater consistency in its application in different Member States. In December 2014, political agreement was reached on the wording of the general anti-abuse rule, whereby in Directive 2011/96/EU, Article 1(2) is replaced by the following paragraphs:

"2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that 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."

On 27 January 2015, the Council formally adopted the binding general anti-abuse rule to be included in the PSD. Member states will have until 31 December 2015 to implement the general anti-avoidance rule into national law. In applying the general anti-abuse clause, the Council anticipates that Member States will endeavor to inform each other when information may be useful to the other Member State.

Implications

The amendments must be seen in light of the Action Plan against tax evasion and tax fraud released by the European Commission in December 2012 and the Organisation for Economic Co-operation and Development project on Base Erosion and Profit Shifting.

Member States are required to apply the general anti-avoidance rule only to situations that fall under the scope of the PSD. Member States may apply stricter national rules, however, as long as they meet or surpass the minimum EU requirements.

Finally, the Council will take into consideration the binding anti-abuse provision in its future work on a possible anti-abuse provision to be included in the Interest & Royalty Directive.

Endnotes

1. The European Council is the EU institution that defines the general political direction and priorities of the European Union. It consists of the heads of state or government of the member states, together with its President and the President of the Commission.
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