ECOFIN agrees EU-wide rules in Anti-Tax Avoidance Directive

29 June 2016

In brief

Political agreement on the Anti-Tax Avoidance Directive (ATAD) was reached by the EU Member States in the Council of the EU, meeting through its Economic and Financial Affairs (ECOFIN) Council on 17 June. The agreement was subject to certain reservations which expired on 20 June.

ATAD is part of the *Anti-Tax Avoidance Package (ATAP)* originally presented by the EU Commission (EC) on 28 January 2016. The agreement requires all Member States to enact laws that largely implement G20/OECD base erosion and profit shifting (BEPS) outcomes on interest limitation rules, hybrid mismatches and controlled foreign companies (CFCs) as well as additional measures on exit taxation and a general anti-abuse rule (GAAR). The switch-over clause to require a tax credit rather an exemption on certain income, providing a minimum effective tax rate, was dropped as part of the compromise agreement.

Building on our EUDTG Newsalert of 21 June, which explained the different parts of ATAD, this bulletin provides more context, analysis and insight into the agreement's implications.

ATAD may have a bigger impact in some Member States than others (particularly those that don't currently have CFC rules for example). But most Member States will have to make some changes to their existing tax regime. The directive's aim is to ensure consistent implementation of certain anti-avoidance provisions (including some of the key OECD BEPS actions) across the EU Member States. In that sense the directive could be seen as creating a 'level playing field' throughout the EU.

There remain potential concerns over whether certain matters should have been considered at an individual Member State level rather than an EU level (subsidiarity), or whether some aspects breach the 'fundamental freedoms' written into the EU Treaties.

In detail

Background

ATAD aims to ensure the coordinated and coherent implementation of G20/OECD BEPS recommendations published in October 2015. But it also goes further and addresses two areas not covered by the OECD's BEPS project.

In its press release coinciding with the agreement on ATAD, the European Commission (EC) said that

"Once implemented, this legislation will put an end to the most common loopholes and aggressive tax planning schemes currently used by some large companies to avoid paying their fair share of tax."

It provided three examples regarding Member States taxing:

- profits that are moved to low-tax countries where the company does not have any genuine economic activity (CFC rules)
- gains on assets such as intellectual property that have been moved from the EU's territory (exit taxation rules) and
- avoidance schemes that are not covered by specific anti-avoidance rules (general anti-abuse rule or GAAR).

Of these topics, only CFC rules were included in the BEPS project. The other topics covered by ATAD which were within the BEPS project were interest deductibility limitations and hybrid mismatch rules.

Observations: EU Member States that have not started to make BEPS project changes to their domestic tax system will now have a legal requirement to do so, if the existing tax rules do not comply with the EU's broad template of minimum standards. Those EU Member States that have already started to implement the OECD-agreed proposals, or considered they already complied, will need to consider any differences between the EU and OECD requirements. All countries will now need to review existing exit tax and GAAR rules (whether anti-abuse or anti-avoidance) or introduce appropriate new laws. It is unlikely that many States will be fully compliant and some will have considerable changes to make.

Where the application of ATAD gives rise to double taxation, recital (5) notes that taxpayers should receive relief through a deduction for the tax paid in another Member State or third country, as the case may be. Therefore, it states, the rules should:

"… not only aim to counter tax avoidance practices but also avoid creating other obstacles to the market, such as double taxation".

The EC's press release and recital (5) are perhaps rather misleading. ATAD's effects are not limited to tax being denied by the movement of value out of the EU: for example, the exit charge applies to assets moved within the EU. ATAD does not contain effective obligations for Member States to avoid double taxation and potentially gives rise to double taxation in a number of respects noted below.

Overview and impact

Scope

ATAD will apply to all taxpayers (including permanent establishments or PEs) that are subject to corporate tax in Member States (Article 1). It does not extend in a particular State to transparent entities that are not subject to tax in that State.

The proposed directive includes minimum standards to be enacted. It would not prevent Member States from having other anti-avoidance rules designed to give greater protection to corporate tax bases, whether in domestic legislation or by agreement with other countries (Article 3).

Observations: Significantly, there is no Impact Assessment related to these proposals, a matter pointed out by several Member States particularly in relation to interest deductibility, although the EC obliquely referred to other work done.

To the extent that de minimis rules in some articles allow countries to exclude some MNEs from scope, reducing the compliance burden on both business and revenue authorities, the de minimis threshholds are fixed sums (EUR 3m, EUR 750,000 etc.). It seems unlikely that these amounts could be amended in the future to reflect changes in purchasing power, as the unanimity principle might make this difficult.

Fiscal sovereignty and subsidiarity

EU Member States have retained their fiscal sovereignty in the field of direct taxation. This extends to both the design of measures to determine taxing rights under national law, and to the allocation of taxing powers through tax treaties.

However, although the ability to determine and allocate taxing rights falls within the exclusive competence of Member States, those taxing rights must be exercised in compliance with EU law, including the 'fundamental freedoms' enshrined in the Treaty on the Functioning of the EU (TFEU), EU Directives, and EU State Aid rules.

Under the principle of subsidiarity, no action is taken at an EU level unless it is more effective than action taken at a national level.

Recital (3) states that it is necessary to set a common minimum level of protection for the internal market in specific fields and that:

"As these rules would have to fit in 28 separate corporate tax systems, they should be limited to general provisions and leave the implementation to Member States as they are better placed to shape the specific elements of those rules in a way that fits best their corporate tax systems."

Observations: In this regard, notably, the OECD in its BEPS work recognised in many areas that countries needed flexibility to implement their recommendations in a manner consistent with the policy objectives of their overall tax systems (see, for example, the work on CFC rules).

In addition, it will be necessary to consider proportionality and that these proposals are not more restrictive than is necessary to achieve their aims, as the EC suggests.

Legality and treaty freedoms

The only reference to the TFEU fundamental freedoms in ATAD is the need specified in recital (12) for the CFC rules to comply with them. This aims to limit the impact of the rules in the EU and EEA to cases where the CFC does not carry on a substantive economic activity (see further below).

Observations: The fundamental freedoms of most direct relevance in the context of the ATAD more generally would seem to be the freedom of establishment within the EU, and the free movement of capital, which applies to movements of capital both between EU Member States and between EU Member States and third countries.

Interaction with treaties with non-EU countries

The agreed compromise on ATAD recognises that the treatment of hybrid mismatches with third, i.e. non-EU, countries will need particular consideration and requires more work. While there are other references to the avoidance of double taxation, ATAD is relatively silent on where taxing rights should arise and how to deal with any disputes that may result.

Observations: The interactions of these measures with obligations established under double tax treaties with non-EU countries will need to be considered carefully.

Interest limitation rules

The stated aim of the proposals in proposed Article 4 on limiting interest deductibility is to discourage MNEs from reducing the tax base through inflated group financing. However, it is not limited to net interest but to wider 'excess borrowing costs' (with a number of terms defined in Article 2).

The cost side of the equation involves also other equivalent costs a taxpayer incurs when borrowing funds, including:

- payments under profit participating loans
- imputed interest on instruments such as convertible bonds and zero coupon bonds
- amounts under alternative financing arrangements, such as Islamic finance
- the finance cost element of finance lease payments
- capitalised interest included in the balance sheet value of a related asset, or the amortisation of capitalised interest
- amounts measured by reference to a funding return under transfer pricing rules, where applicable
- notional interest amounts under derivative instruments or hedging arrangements related to an entity's borrowings
- certain foreign exchange gains and losses on borrowings and instruments connected with raising finance
- guarantee fees for financing arrangements and
- arrangement fees and similar costs related to borrowing funds.

The revenue side of the equation involves taxable interest revenues and other economically equivalent taxable revenues that the taxpayer receives according to national law.

Subject to options a Member State may adopt, including a group carve-out rule, any excess borrowing cost incurred by a taxpayer is initially deductible in that period up to 30% of the taxpayer's EBITDA (excluding any tax-exempt income) for that period.

A Member State may allow:

- full deduction if excess borrowing of the taxpayer's group doesn't exceed EUR 3m
- full deduction if the taxpayer is a standalone entity i.e. not part of a consolidated group for financial accounting purposes (and has no 25% associated company and no permanent establishment (PE))
- grandfathering of loans concluded before 17 June 2016 (and not changed after that date) and
- the exclusion of loans for EU long-term infrastructure projects (on exclusion also of income from the project in EBITDA and subject to possible scrutiny over State aid as noted in recital (8)).

The group carve-out rule broadly applies in relation to consolidated entities under IFRS or local GAAP (or other standard if a Member State specifies) and allows a Member State to permit:

- full deduction if the proportion of equity to the taxpayer's total assets is at least 98% of that of the group or
- a proportionate deduction by reference to the ratio of the group's external excess borrowing costs to the group's EBITDA.

A Member State may also allow an unlimited carryforward for non-deductible borrowing costs of a period (with or without a carryback of up to three years or a carryforward for up to five years of qualifying, but unutilized EBITDA).

The exclusion from the calculations that Member States may adopt for financial undertakings (as defined) is temporary. The recitals (at paragraph (9)) note the intention is to propose specific rules when discussions, at the OECD and elsewhere, about the specific nature of the issues involving banks etc. are more developed.

Observations: The EU has opted to allow the carryforwards and carrybacks permitted by the G20/ OECD report on BEPS project Action 4, but applying limited time frames as indicated. It has also chosen a percentage of EBITDA within the permitted corridor of limitations (at the upper end). Having noted above that ATAD provides minimum standards which Member States can toughen, recital (6) notes this might include, for example:

- a ratio percentage of less than 30%
- stricter limits on the time or amount of unused interest available for non-current year use or
- "an alternative measure referring to a taxpayer's earnings before interest and tax (EBIT) and fixed in a way that it is equivalent to the EBITDA-based ratio".

The OECD's discussion draft on its group carve-out rule, which is due to be published on 6 July, may provide more talking points as regards the equivalent ATAD measure.

There are a number of interactions with EU law that will require consideration, including whether the measures satisfy the proportionality test. Note that in the Thin Cap GLO case (*Test Claimants in the Thin Cap Group Litigation* C-524/04) concerning the application of freedom of establishment to cross-border thin capitalisation rules, the CJEU ruled that, in order for such limitation rules to be proportionate, taxpayers must have the opportunity to provide commercial justification for excess interest expense.

Exit taxation rules

The Article 5 measures aim to prevent tax base erosion with tax jurisdiction transfers without any ownership change (with a number of defined terms in proposed Article 2). As noted, there is no equivalent provision in the G20/ OECD BEPS report.

The market value (arm's length) of the assets involved in the transfer minus their tax value (written down or otherwise) is to be taxed where a taxpayer:

- transfers assets (between a head office and its PE, or between PEs) out of a Member State or
- transfers its tax residence out of a Member State (except to the extent they remain connected with a PE there) or
- transfers its PE out of a Member State.

In line with CJEU case law, the tax could be deferred and paid in instalments over five years (with interest and/or guarantee in accordance with rules in the Member State) if the transfer is within the EU (or the EEA to the extent the country has signed up to mutual assistance on recovery claims). The basis of the asset would then equal that same market value in the transferee state.

The outstanding tax debt becomes immediately recoverable if:

- the transferred assets are disposed
- the transferred assets are subsequently transferred to a non-EU country (or EEA country as above)
- the taxpayer's tax residence or its PE is subsequently transferred to a non-EU country (or EEA country as above)
- the taxpayer goes bankrupt or is wound up or
- the taxpayer defaults on an instalment and doesn't correct it within a reasonable time, not exceeding 12 months.

There is an exemption for most temporary transfers where there is intent to return the assets to the transferor state within 12 months. This exemption will not apply to asset transfers related to financing securities, assets posted as collateral, or where the asset transfer takes place in order to meet prudential capital requirements or for the purpose of liquidity management.

The same market value is to be accepted by a transferee Member State as the tax value of an asset, unless this doesn't reflect its market value. It is uncertain whether this is a reference to the market value in the transferor State being potentially different from the market value in the transferee State or something else, given that the exit charge is based on market value. For the purposes of this ATAD element, 'market value' is defined as:

"the amount for which an asset can be exchanged or mutual obligations can be settled between willing unrelated buyers and sellers in a direct transaction".

Observations: While many Member States already have exit rules, the nature of the current proposals would probably need changes to existing legislation (e.g. Germany, Netherlands, Italy, Belgium and Spain).

The proposal specifics include the option to defer tax payment to ensure compliance with CJEU case law, which has held that the immediate taxation of unrealised gains on migration (*National Grid Indus BV* C-371/10) or on the transfer of assets between EU Member States within the same legal entity (*Commission v Portugal* C-38/10, *Commission v Spain* C-64/11, *Commission v Denmark* C-261/11) is contrary to the freedom of establishment.

General anti-abuse rule (GAAR)

Article 6 aims to tackle abusive tax practices not yet dealt with through other specific provisions. As noted, there is no equivalent provision in the G20/ OECD BEPS report.

The proposal is effectively a direction for tax authorities to apply a standard EU-wide GAAR to ignore an arrangement or series of arrangements where the essential purpose is to obtain a tax advantage that defeats the object or purpose of the tax provision, and where the arrangements are regarded as non-genuine.

The tax liability would then be 'calculated in accordance with national law'.

The limit to 'wholly artificial arrangements' required for intra-EU transactions to ensure compliance with the EU fundamental freedoms and case law (see Legality and Treaty Freedoms above) is intended to be achieved here by defining non-genuine as "not put into place for valid commercial reasons which reflect economic reality".

Observation: Considering the very detailed GAARs in some countries and the experience many tax authorities have had in trying to use them effectively, the short principles-based wording here without the body of guidance, which typically goes with many domestic versions, seems to create risks of significant uncertainty for taxpayers. A brief PwC survey confirmed a degree of uncertainty as to whether the existing GAARs of some Member States would require changes. Note that EU case law (including *SIAT* C-318/10) has established that anti-avoidance provisions need to be well defined in order to meet the requirement of legal certainty.

Controlled Foreign Company (CFC) rules

Proposed Articles 7 and 8 aim to eradicate the incentive of shifting income to low or no tax jurisdictions. This would be achieved by re-attributing non-distributed income of a low-taxed CFC, which is not a publicly listed company, to its parent company.

Principal criteria that must be assessed before requiring re-attribution of a subsidiary include:

- the parent's interest in the entity, involving consideration of whether it (together with associated enterprises) represents broadly more than 50% of the entity's voting power, capital or entitlement to profits
- the entity being subject to a low tax rate, determined as 50% of the rate applicable in the parent State (the directive expresses this as its actual rate being lower than the difference between the rate that would have been charged on it in the parent State and its actual rate)
- the entity being involved in non-genuine arrangements, as specified below, and the parent State does not exclude it as being below a de minimis size (with accounting profits of no more than EUR 750,000 and non-trading income of no more than EUR 75,000; or of which the accounting profits amount to no more than 10% of its operating costs for the tax period) and
- the entity not being excluded by the parent State as having specified passive income that is no more than one third of its total income or, in relation to an entity which is a financial undertaking, no more than one third of its specified passive income is from transactions with the parent or its 25% associated enterprises.

The provisions apply with the necessary adaptations in relation to an exempt PE and its head offices (HO).

The amount attributed to the parent/ HO is the non-distributed income:

- derived from a CFC's specified passive activities which, if the CFC is in the EU/ EEA, doesn't carry on substantive economic activity there (a State can choose whether to apply a similar activity requirement for third countries) or
- arising from non-genuine arrangements involving the CFC which have been put in place for the essential purpose of obtaining a tax advantage.

Both the substantive economic activity test and the non-genuine arrangements test reference assets and people, and the latter also considers undertaking risk. These conditions are to ensure compliance with the EU fundamental freedoms and case law, as determined in *Cadbury Schweppes* (C-196/04). This case concerned the compatibility of the UK CFC regime with the freedom of establishment. The CJEU held that, although the rules restricted the freedom of establishment, this could be justified based on prevention of tax avoidance, provided the rules only applied to "wholly artificial arrangements intended to escape the national tax normally payable". The CJEU went on to state that CFC rules "…must not be applied where it is proven on the basis of objective factors… that, despite the existence of tax motives, that controlled company is actually established in the host

Member State and carries on genuine economic activities there". As regards application to non-EU countries, it may still be necessary to consider whether the free of movement of capital is relevant (as this can apply in transactions with non-EU countries), and if so whether the provisions are consistent with this freedom if the 'commercial get-out' is not extended to third countries. In addition, the provisions will also need to satisfy the proportionality test.

Essentially the calculation means using:

- the tax rules of the parent's Member State in relation to passive income attribution (ignoring losses other than carryforwards), applied in proportion to the parent/ HO entitlement to receive profits, and
- the arm's length principle in relation to non-genuine arrangement income generated through assets or risks linked to significant people functions carried out by the parent/ HO.

There is an appropriate offset of distributed amounts against such attributed income. Any undistributed amounts taxed under these provisions would offset any gain on disposal of the entity.

Observations: Approximately half of the 28 Member States currently have CFC rules. So close to half the Member States will have to introduce CFC regimes and some of the others will have to change their existing regimes. In the discussions resulting in the Action 3 recommendations in the G20/ OECD BEPS report, it appears similar problems were identified and it was only possible to provide some broad-ranging building blocks for the countries that wanted to incorporate a CFC regime.

As the OECD noted in the BEPS Action 3 report "because each country prioritises policy objectives differently, the recommendations provide flexibility to implement CFC rules that combat BEPS in a manner consistent with the policy objectives of the overall tax system and the international legal obligations of the country concerned". There is some analysis included in that report about EU legality and CJEU case law, but it may warrant a more thorough review.

The double taxation safeguards in the EU measures are less clear than those included by the OECD given that the OECD recommended a credit for foreign taxes actually paid, including CFC tax assessed on intermediate companies. This is absent from the EU measures, unless it is intended to be implicit in the reference to the use of the parent company Member State rules. Specifically, it is uncertain whether a Member State would be allowed under ATAD to refrain from applying its CFC rules on low-taxed income of a sub-subsidiary if and insofar as the intermediate State also applies CFC rules (the wording regarding low taxation only refers to the State of the sub-subsidiary).

Note that the low level of taxation in the EU measures is now framed against the rate that would have been charged on the CFC rather than the parent's effective tax rate as originally proposed by the EC or the average tax rate of Member States as in the common consolidated corporate tax base (CCCTB) proposal. This will give rise to different results based on the parent's jurisdiction.

Hybrid mismatch rules

Article 9 aims to prevent outcomes where there is a double deduction or a deduction with no income inclusion. It seeks to address mismatches between Member States' tax systems arising due to the use of hybrid entities or hybrid instruments. Hybrid mismatches between Member States and non-EU countries will be further examined.

Under the treatment in the ATAD, a situation that would result in:

- a double deduction is to be deductible only in the Member State where the payment has its source, and
- a deduction and non-inclusion is to be treated as non-deductible in the State of the payer.

In Annex II to ATAD is a reservation that the position in relation to third countries will be further reviewed:

"The Council requests the Commission to put forward a proposal by October 2016 on hybrid mismatches involving third countries in order to provide for rules consistent with and no less effective than the rules recommended by the OECD BEPS report on Action 2, with a view to reaching agreement by the end of 2016."

Recital (13) goes a little further and suggests that this additional work should also consider other hybrid mismatches such as those involving PEs. The OECD is due to publish a discussion draft on 15 July as regards the potential inclusion of branch/ PE mismatches in a revised BEPS Action 2 recommendation, which may inform the EU debate.

Observations: There is a question as to whether the denial of a deduction by the payer simply because there is no inclusion of the income by the payee is consistent with CJEU case law which has indicated that the fact that payments are taken into account in another Member State cannot justify discriminatory treatment in the source Member State (see, inter alia, *Philips Electronics* C-18/11).

There remains a risk of non-uniform adoption of the hybrid rules which may potentially result in more double taxation and controversy. This could impact investment decisions. Companies and other investors outside the EU may hesitate to locate profitable operations or make other substantial funding commitments in jurisdictions that apply these concepts in a manner likely to result in double taxation.

The takeaway

ATAD may have a bigger impact in some Member States than others (particularly those that don't currently have CFC rules for example). But most Member States will have to make some changes to their existing tax regimes.

While some of the measures have been changed since their initial proposal by the EC to better align them with the OECD BEPS project and owing to issues around implementation in some Member States, the EC and the Council (the Member States) and its six-monthly rotating Presidency (Netherlands), pressured by the EU Parliament and public opinion, decided to fast-track it within a mere five months. Since the EU Parliament has already issued its opinion, the new rules will now soon be formally adopted by the Council and become law within 20 days of the directive's publication in the Official Journal of the European Union.

The parallel EC Recommendation in ATAP on G20/ OECD BEPS treaty abuse and PE status agreed proposals is still being discussed.

The CCCTB is still the EC's ultimate goal. It hopes to introduce new legislative proposals in November 2016. It will likely be a two-stage process: the first part would be to harmonise the tax base; the second would be the remainder including consolidation across the EU and allocation of profit to Member States (which could apply their own tax rates).

Member States will generally be required to adopt these ATAD measures in their domestic law by 31 December 2018, such that they apply no later than 1 January 2019. However, there are a limited number of exceptions. One exception applies to exit taxation where new rules must enter into law by 31 December 2019 and apply from 1 January 2020. For interest limitation where Member States have targeted rules that are equally effective to the ATAD rules, those member states have until the earlier of

- the end of the first full fiscal year following the date of publication of an agreement between the OECD members on a minimum standard regarding BEPS Action 4 and
- 1 January 2024.

Let's talk

For a deeper discussion of how these issues might affect your business, please call your usual PwC contact. If you don't have one or would otherwise prefer to speak to one of our global specialists, please contact the below:

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