



PwC's EU Direct Tax Group

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EU Direct Tax Newsalert

EU countries reach political agreement on Anti-Tax Avoidance Directive

The EU-28 Finance Ministers reached political agreement on 21 June 2016 on the Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (also known as ATAD). Ministers decided not to include the switch-over clause originally proposed by the European Commission (EC).

The ATAD sets out certain minimum standards that Member States need to adhere to in several areas covered by the OECD work on BEPS including interest deductibility limitations, controlled foreign company (CFC) rules and rules to tackle hybrid mismatches. The ATAD goes however further and also sets out rules for exit taxation and a general anti-abuse rule. Whereas the ATAD stipulates minimum standards to be applied to all taxpayers subject to corporate tax in one or more Member States, it does not prohibit other anti-avoidance rules designed to give greater protection to the corporate tax base.

Key provisions in the ATAD:

- **Deductibility of interest:** A rule restricting net borrowing costs to 30% of the taxpayer's EBITDA, optionally with a EUR 3m threshold. Standalone entities may be excluded from the scope. Within consolidated groups, Member States may allow full or partial deduction of exceeding borrowing costs under 'group ratio' conditions. Member States may exclude loans concluded before 17 June 2016, loans used to fund long-term EU public infrastructure projects, and financial undertakings. Carry-forward of non-deductible exceeding borrowing costs may be allowed without time limit (with an option also to include carry-back for up to 3 years or carry-forward of unused interest capacity for up to 5 years). A grandfathering clause that will end at the latest on 1 January 2024 was agreed for national targeted rules which are "as effective as the fixed ratio rules" to be applied for a full fiscal year following the publication date of an OECD agreement on a minimum standard. Member States that wish to opt for this derogation will need to notify this before 1 July 2017 to the EC which will assess the effectiveness of the national targeted rules.
- Rules for **exit taxation** that require taxation of market value minus tax value for assets, permanent establishments (PEs) or residence relocated by a taxpayer out of a Member State's taxing jurisdiction. Deferral via five year instalments is available within the EU/EEA,

subject to interest, guarantees and recapture provisions. Exit tax does not apply to temporary transfer of certain financial assets.

- A **general anti-abuse rule** allowing tax authorities to ignore non-genuine arrangements where (one of) the main purpose(s) is to obtain a tax advantage that defeats the object or purpose of the tax provision. Arrangements are regarded as non-genuine to the extent they are not put into place for valid commercial reasons which reflect economic reality.
 - **CFC rules** prescribing taxation with credit at taxpayer (i.e. shareholder/head office) level of certain non-distributed income of CFCs. Entities of which the voting/capital/profit rights are (in) directly owned for more than 50% and non-taxed PEs are CFCs if their actual corporate tax paid is lower than the difference between the corporate tax that would have been charged in the Member State of the taxpayer and the actual corporate tax paid by the entity or PE. Upon future distribution or disposal, there is a deduction of previously included income. Member States may apply certain 'de minimis' carve outs and there are certain exceptions for cases of substantive economic activity and for genuine or non-tax driven arrangements.
 - **Rules addressing mismatches between Member States arising due to hybrid entities or hybrid instruments.** To the extent a hybrid mismatch results in a double deduction, the deduction shall only be given in the Member State of source. Insofar resulting in deduction without inclusion, the Member State of the payer shall deny deduction. The EC is asked to put forward a proposal by October 2016 on hybrid mismatches involving third countries with rules consistent with and no less effective than the recommended rules in OECD BEPS Action 2, with a view to reaching agreement by the end of 2016.
- As a next step, the ATAD will be submitted to a forthcoming Council meeting for adoption. The ATAD will enter into force on the 20th day following its publication in the Official Journal of the EU. Member States are required to adopt and publish ATAD-compliant provisions by 31 December 2018 at the latest (exceptions are provided), with the provisions applying from 1 January 2019. These deadlines will be extended with one year for the rules on exit taxation.

