

# **Tackling Aggressive Tax Planning in the European Union - Recent Developments**

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## Important recent developments

- Digital Economy Group publishes report: May 2014
- Amendment to Parent-Subsidiary Directive: October 2014
- Amendment to Mutual Assistance Directive: October 2014
- Proposal for the automatic exchange of information on tax rulings: March 2015

# Group on Taxation of Digital Economy

- Mandate to provide a broad overview of taxation issues linked to digital economy, looking at both indirect taxes such as VAT and direct corporate taxation.
- Report on 28 May 2014 endorses BEPS work on Action 1 but makes some concrete suggestions.
- Consensus on the destination principle – taxation at the place of consumption of all digital goods and services.
- Suggestions for the destination-based VAT system for some digital services\* to be expanded to all goods and services (in business-to-consumer transactions) in the future.
  - \*More specifically, suggestion for the EU Mini One Stop Shop (MOSS) which covers business-to-consumer sales of telecommunications, broadcasting and electronic services to be expanded into a broad One Stop Shop (OSS) to cover all business-to-consumer transactions.

# Amendment to Parent Subsidiary Directive

- Proposal made on 25/11/13 (See COM(2013) 814 final) and approved 20/6/14
- To tackle hybrid loans and mismatches
  - Art 4(1)(a) to provide that where a parent company, by virtue of its association with its subsidiary, receives distributed profits, the Member State of the parent company shall refrain from taxing such profits to the extent that such profits are not deductible by the subsidiary of the parent company.
- Updates anti-abuse rule by requiring Member States to create a common anti-abuse rule to prevent them from granting benefits of the directive to arrangements that do not reflect economic reality.

# Amendment to Mutual Assistance Directive

- Breakthrough of ECOFIN October 2014
- Amendment of Mutual Assistance Directive 2011/16/EU (Exchange of Information directive).
- Member States agreed on a Commission proposal to apply the widest possible scope of automatic exchange within Europe, to mirror the global standard of automatic information exchange agreed by the G20.
- From 2017, Member State tax authorities will automatically exchange information with each other on most categories of income and capital held by private individuals and certain entities.
  - Austria to be given an additional year to apply the new rules, to allow it sufficient time to make the necessary technical adaptations.
  - Savings Directive to be finally repealed to ensure there is one standard of automatic exchange.

# Tax Transparency Package

- Commission's Work Programme in December 2014 – commitment to clamp down on tax evasion and tax avoidance, to ensure that taxes are paid in the country where profits are generated.
  - Among 23 initiatives see **A Fairer Approach to Taxation**: *“An Action Plan on efforts to combat tax evasion and tax fraud, including measures at EU level in order to move to a system on the basis of which the country where profits are generated is also the country of taxation; including automatic exchange of information on tax rulings and stabilising corporate tax bases.”*
- 18 February 2015: Commission announced that it will present a Tax Transparency Package, including a legislative proposal for the automatic exchange of information on tax rulings, in March.
  - This is considered as a foundation for a fairer and more transparent approach to taxation in EU
  - CCCTB to be re-launched in March 2015

# Tax Transparency Package

- Problems with existing regime (MARD 2011/16/EU)
  - Possibility of exchange on a spontaneous basis under certain circumstances
  - Discretion
  - Secrecy
- Proposal for automatic exchange of information on tax rulings on a quarterly basis
  - Types of rulings
  - Partially retroactive effect
  - Standard form and database to be created
  - Domestic rulings and natural persons excluded
  - If agreement, to be effective from 1 January 2016

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# Tax Transparency Package

- The cross-border transaction may involve, but is not restricted to, the making of investments, the provision of goods, services, finance or the use of tangible or intangible assets and does not have to directly involve the person receiving the advance cross-border ruling.
- Ruling defined as ‘any communication or other instrument or action of similar effect, given by or on behalf of a member state, regarding the interpretation or application of its tax laws’

# **The End**

**Thank you!**

# The State Aid prohibition

- Art 107 TFEU (ex Art 87(1) EC):

*Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.*

# Aggressive Tax Planning and State Aid

- Four high profile Commission decisions
  - Apple, Fiat, Starbucks, Amazon
- Important question is whether the tax rulings under investigation allowed the MNE beneficiaries to depart from market conditions in setting the commercial conditions of intra-group transactions.
- Member States renounce taxable revenues = State resources.
- The Commission compares the transfer prices used with those of a *third party prudent independent market operator*.
  - Linkage of the prudent independent market operator test with the arm's length principle
  - Commission's own transfer pricing standards?
  - Stricter than OECD TP Guidelines?
- Commission's main argument: Existence of advantage and selectivity are satisfied when arm's length principle not complied with.

# Aggressive Tax Planning and State Aid

- Issues of concern to the Commission:
  - Tax rulings negotiated rather than substantiated by reference to comparable transactions
  - Tax rulings agreed a long time ago without any revisions
  - Doubts as to the appropriateness of the transfer pricing method and/or inconsistencies in the application of the method chosen
  - Acceptance of a fixed tax base or a tax base which can vary only marginally or cap and floor mechanisms
  - Inconsistencies with the OECD TP Guidelines
  - Limitations of the transfer pricing report (or no report)
  - Ruling agreed in very short period of time
  - Royalty rates not in line with market conditions
- **Overall the Commission appears to reject the economic rationale underlying the APAs.**