Belgium | Deloitte Tax | 22 June 2016

Corporate tax alert
Belgium

Political agreement reached on EU Anti-Tax Avoidance Directive

Context

On 28 January 2016, the European Commission released an Anti-Tax Avoidance Package that, amongst others, included a proposal for an Anti-Tax Avoidance Directive ('ATAD') (see earlier Deloitte alert).

On 25 May 2016, the ECOFIN was unable to reach a political agreement on a compromise text for the proposed ATAD, and therefore decided to continue working on the proposal with the aim of reaching an agreement on the ATAD at the ECOFIN meeting of 17 June 2016 (see earlier Deloitte alert).

With no objections raised by the Member States during the silence procedure that ended 20 June 2016 at midnight, political agreement on a final compromise text of the ATAD has now been reached. The ATAD will be formally adopted at a future ECOFIN meeting.

The ATAD provisions at a glance

General

The ATAD contains five anti-tax avoidance rules which partly implement the OECD's BEPS recommendations in the EU, but clearly go further than the OECD approach. These rules are (i) an interest limitation rule, (ii) an exit taxation rule, (iii) a general anti-abuse rule, (iv) controlled foreign company rules and (v) rules on hybrid mismatches between national tax systems.

The ATAD provisions are conceived as minimum standards against tax avoidance, and therefore generally do not preclude Member States from applying provisions that go beyond the ATAD's provisions (i.e. are stricter than the ATAD).

The ATAD applies to all taxpayers that are subject to corporate tax in one or more Member States, including permanent establishments ('PEs') in one or more Member States of third country tax residents.

The main modalities of each of the anti-tax avoidance rules will be discussed below.

Interest limitation rule

The interest limitation rule provides that - as a general rule - 'exceeding borrowing costs' of a taxpayer are only deductible in the tax period in which they are incurred up to 30% of its 'EBITDA':

- The notion of 'exceeding borrowing costs' is defined as the excess of deductible 'borrowing costs' (i.e. interest expenses and 'equivalents') over taxable interest income and 'equivalents'.
- 'EBITDA' is calculated by adding the tax-adjusted amounts for exceeding borrowing costs and for depreciation and amortisation to the taxable income in the Member State (i.e. excluding tax-exempt income).

The ATAD provides for a number of optional derogations from the above general rule. In particular, Member States have the right (but not the obligation) to:

- allow taxpayers to deduct 'exceeding borrowing costs' up to EUR 3M (a threshold to be considered for the entire group);
- allow 'standalone' entities (i.e. entities that are not part of a 'consolidated group for financial accounting purposes' and have no associated enterprise or PE) to fully deduct 'exceeding borrowing costs':
- exclude 'exceeding borrowing costs' incurred on loans which were concluded before 17 June 2016 (but not to any modifications thereafter);
- exclude 'exceeding borrowing costs' incurred on loans used to fund 'long-term EU public infrastructure projects' as defined in the ATAD;
- allow taxpayers to calculate 'EBITDA' at a group level (as defined under national tax law), in certain circumstances;
- under certain conditions, allow taxpayers that are part of a 'consolidated group for financial accounting purposes' to apply two group escape clauses which would allow them to deduct 'exceeding borrowing costs' in excess of 30% of EBITDA, based on either an equity/total assets-ratio or a group EBITDA-test.
- exclude 'financial undertakings' (as defined in the ATAD) from the general rule's scope.

Finally, the ATAD grants Member States the right (but not the obligation) to provide for carry-forward mechanisms (without time limitation) for 'exceeding borrowing costs' that could not be deducted, possibly combined with (i) carry-back rules (for a maximum of 3 years) for such non-deductible 'exceeding borrowing costs' or (ii) carry-forward rules (for a maximum of 5 years) for unused interest capacity.

Exit taxation rules

According to the final compromise text, Member States must - in principle (some exceptions apply) - levy tax on the hidden gains on transferred assets at the time of exit (i.e. the market value less their value for tax purposes), in case of and to the extent that the Member State of exit loses taxing rights over the transferred assets due to:

- a 'transfer of assets' from the head office ('HO') to a foreign PE;
- a 'transfer of assets' from a PE in a Member State to a foreign HO or PE;
- a 'transfer of tax residence' abroad; or
- a 'transfer of business carried on by a PE' in a Member State abroad.

Where the transfer occurs vis-à-vis another EU Member State or an EEA State with which a 'qualifying agreement' on the mutual assistance for the recovery of tax claims is in place, the ATAD nonetheless obliges Member States to provide taxpayers with an option to pay the exit tax due either immediately or in instalments over 5 years. In case of deferral, Member States have the right to (i) charge interest and (ii) require taxpayers to provide a guarantee.

The ATAD also provides a list of cases in which the deferral is immediately discontinued and the exit tax debt becomes recoverable, such as the sale or other disposal of the transferred assets or the business of the PE or the subsequent transfer of transferred assets, tax residence or business of the PE to a third country (except for subsequent transfers to EEA States with which a 'qualifying agreement' exists.

Finally, the ATAD provides that in case of transfers vis-à-vis other Member States, the receiving Member State must accept the value established by the Member State of exit as starting value of the asset for tax purposes, except where this value does not reflect 'market value'.

General anti-abuse rule (GAAR)

Similar to the GAAR included in the amended EU Parent-Subsidiary Directive, the ATAD GAAR provides that Member States are obliged to disregard an arrangement (or a series thereof) and calculate the tax liability accordingly, in case this arrangement (or a series thereof):

- has 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 the applicable tax law; and
- is not genuine with regard to all facts and circumstances, i.e. to the extent it has not been put into place for valid commercial reasons reflecting economic reality.

Controlled foreign company (CFC) rules

The ATAD - as a general rule - requires a taxpayer's Member State to include CFC income of a CFC in the tax base of that taxpayer. For the purposes of the ATAD, a CFC is defined as (i) an entity or (ii) a PE of which the profits are not subject to tax or are exempt in the taxpayer's Member State, in case:

- the taxpayer holds, individually or together with affiliates, a direct or indirect 'stake' of more than 50% in the entity; and
- the actual corporate income tax ('CIT') paid by the entity or PE is (effectively) lower than half of the CIT that would have been due in the taxpayer's Member State.

As a general rule (specific exceptions may however apply), the CFC income to be included in the tax base consists of:

- non-distributed items of income mentioned in a list (including income from financial assets, IP, shares (incl. gains), financial leasing, insurance, banking and other financial activities and certain intra-group sales and services income); inclusion may however not occur if the CFC carries on a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances (although Member States may decide not to apply such exception to CFCs located in third country non-EEA States); or
- non-distributed income arising from non-genuine arrangements which have been put into place for the essential purpose of obtaining a tax advantage (i.e. to the extent that the CFC would not own the assets or bear the risks generating (part of) its income if it were not controlled by the taxpayer who exercises the relevant significant people functions).

The final compromise text also provides some rules on how to calculate and allocate the amount to be included in the taxpayer's tax base, which specify among others that (i) for CFC income mentioned under the first bullet, CFC losses may not be included in the tax base but may be carried forward and taken into account in subsequent tax periods and (ii) for CFC income mentioned under the second bullet, the inclusion must be limited to the amounts generated through assets and risks which are linked to the significant people functions carried out by the controlling taxpayer (calculated in accordance with the arm's length principle).

Finally, the ATAD also provides rules to mitigate double taxation which amongst others provide that a tax credit (in accordance with national law) must be granted for foreign taxes paid by the CFC and that the tax base must be reduced when the non-distributed CFC income is actually included in the controlling taxpayer's tax base through e.g. a dividend or capital gain.

Rules on hybrid mismatches

The rules on hybrid mismatches included in the compromise text apply only where (i) situations between 'associated enterprises' that are established in different Member Mtates (and structured arrangements between parties in Member

States) (ii) give rise to a ‘double deduction’ or ‘deduction without inclusion’ as defined in the ATAD (iii) which is attributable to differences in the legal characterisation of a financial instrument or entity.

In that case, the Member States are obliged to counter the hybrid mismatch by:

- only granting a deduction in the Member State where the payment has its source, to the extent that it concerns a ‘double deduction’; and
- denying the deduction in the payer’s Member State, to the extent that it concerns a ‘deduction without inclusion’.

The Council added a statement to the ATAD in which the European Commission is requested 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 an agreement by the end of 2016.

Transposition in national law

As a general rule, Member States must transpose the ATAD provisions into national law by 31 December 2018 at the latest, and apply those provisions from 1 January 2019.

By way of derogation, Member States (i) must only transpose the exit tax provision by 31 December 2019 at the latest and only apply said exit tax from 1 January 2020 and (ii) may, in relation to the interest limitation rule, benefit from a grandfathering rule if they apply targeted national rules for preventing BEPS risks which are equally effective. These Member States can still apply those equally effective measures until the end of the first full fiscal year following the date of publication of the agreement between the OECD members on the official website, on a minimum standard with regard to BEPS Action 4, or at the latest until 1 January 2024.

Contacts

If you have any questions concerning the items in this alert, please contact your usual tax consultant at our Deloitte office in Belgium.

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