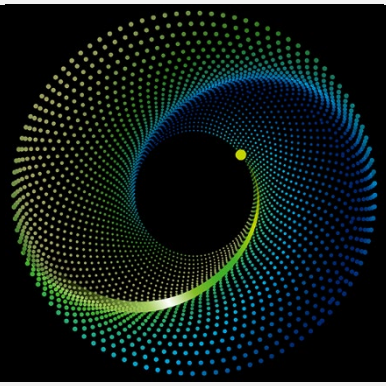

Global Business Tax

International tax alert

EU Commission presents two new directives aiming to introduce a minimum corporate tax and tackle misuse of shell entities

Two and a half months after 137 countries agreed to a corporate minimum tax in a deal brokered by the OECD, the EU Commission presented its proposal for a directive to implement the minimum tax in the EU, along with a directive that should make it hard to evade taxes through shell companies.

Pillar Two global minimum tax in EU

On 22 December 2021, the European Commission published a Proposal for a council directive on ensuring a global minimum level of taxation for multinational groups in the Union ("draft directive").

The draft directive is based on, and will implement in the EU, the global minimum tax model rules published by the G20/OECD inclusive framework on BEPS on 20 December 2021 ("OECD inclusive framework model rules"). The OECD inclusive framework model rules are designed to ensure that large multinational groups pay corporate income taxes at a minimum level of 15% in every country in which they operate. They include a main rule generally applied at the parent company level (the "income inclusion rule") and a backstop rule where the income inclusion rule is not applied (the "undertaxed payments rule"').

The draft, once adopted as a directive, would be required to be transposed by member states into their domestic legislation by 30 June 2023 and would apply as from 1 January 2024.

Dig deeper

Comments

Businesses will want to understand the compliance and administration requirements for group companies in the EU, and how these compare to the OECD model rules. Whilst broadly similar, businesses will be keen for the "OECD standard template" for global minimum tax return information also to be used within the EU, in order to minimize unnecessary compliance costs.

Businesses will be concerned that the timetable does not allow for a public consultation on the draft directive, particularly since the OECD inclusive framework model rules had limited public consultation.

The draft directive will require unanimity of the EU Council, and as such it is possible that there may be amendments, within the confines of needing to implement the OECD inclusive framework rules in a manner consistent with the global agreement. In particular, it remains to be seen whether all EU member states are prepared to approve the Pillar Two global minimum tax directive before there is more certainty on the proposals for the implementation of Pillar One.

Misuse of shell entities for tax purposes

On 22 December 2021, the European Commission released a draft for a new directive laying down rules to prevent the misuse of so-called “shell” entities for tax purposes in the EU and amending Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC), referred to as the “Unshell initiative”.

The draft directive relates only to intra-EU situations, and the European Commission already has announced a new directive to be published in 2022 to respond to the challenges linked to non-EU shell entities.

The objective of the directive is to target cases involving “the setting up of undertakings within the EU which are presumably engaged with an economic activity but that, in reality, do not conduct any economic activities” with the aim of capturing all undertakings and legal arrangements that can be considered or deemed to be considered as resident in a member state for tax purposes and are eligible to receive a tax residency certificate in a member state. To target such cases, the draft directive lays down a “substance test,” imposes additional tax compliance obligations on taxpayers, provides forsanctions, and extends the scope of automatic exchange of information between member states.

The draft, once adopted as a directive, would be required to be transposed by member states into their domestic legislation by 30 June 2023 and would apply as from 1 January 2024.

Dig deeper

Comments

If an entity is considered a shell (I.e. because the company is presumed to be a shell further to the substance testing and the company failed to rebut said presumption) it will not be able to rely on the benefits of the tax treaty network of its member state and/or to invoke the Parent-Subsidiary resp. Interest-Royalty Directive. Furthermore, a flow-through approach will be applied: payments will in principle be subject to the standard withholding tax at the level of the payer and will, as a rule, be taxed in the state of the shell's shareholder. Note, however, that the shell's Member State would remain free to continue to consider the shell as a resident for tax purposes and apply tax on the relevant income and/or assets as per its national law.

Given the cross-border nature of aggressive tax planning, tax avoidance and tax evasion, Member States' authorities will automatically exchange information on all entities in scope of the new reporting obligation, regardless of whether these are shell entities or not. Most importantly, the proposal will enable Member States to request another Member State to conduct a tax audit of any suspicious entity (I.e. a company which is believed not meeting its obligations under the Directive) and communicate the outcome to the former Member State in a reasonable time frame.

No need to say that the implementation of the draft directive would lead to additional compliance obligations for all businesses in scope, as well as for the tax authorities in the member states.

However, the EU Council still needs to agree unanimously on the draft text of the directive. It is obviously possible that the draft text will be subject to changes throughout the negotiation and adoption process.

Key take away

Businesses that are in scope are encouraged to assess the impact of the draft texts on their group structure and operations, and to closely follow up the negotiation and adoption process of both directives.

Contacts

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