European Commission Action Plan to strengthen fight against tax fraud and tax evasion

Introduction

On 6 December 2012, the European Commission (the Commission) published a Communication entitled An Action Plan to strengthen the fight against tax fraud and tax evasion (COM(2012) 722 final). The Action Plan sets out steps to enhance administrative cooperation between Member States and to support the development of the existing good governance policy. It identifies a series of specific measures that could be developed now and over the next several years, provided that there is the necessary support from the Member States.

Simultaneously, the Commission sent the Member States two specific Recommendations that are included in the Action Plan's proposals for new initiatives: one on tax havens (adoption of a common definition and creation of a “toolbox” of defensive measures) and one on aggressive tax planning (inclusion of a preventive clause in Member States' Double Tax Conventions and adoption of a General Anti-Abuse Rule in Member States' national legislation).

This Alert summarizes key points from the Action Plan. A more extensive analysis of the Action Plan will be forthcoming.

The European Commission Action Plan

The Action Plan addresses three different categories of activity: existing initiatives, newly proposed initiatives and future initiatives.

Existing initiatives
The Commission urges the Member States to start using the already existing instruments that the Council has adopted for administrative cooperation, such as Council Directive (2011/16/EU) which provides for...
enhanced information exchange between tax authorities of the Member States on certain income and financial products.

In addition, the Commission urges the Council:

- to adopt the 2008 proposed revision to the Savings Taxation Directive;
- to conclude the 2009 draft anti-fraud and tax cooperation agreement with Liechtenstein and to adopt the draft mandate for the Commission to enter into similar negotiations with four other neighboring third countries; and
- to adopt the 2012 proposal for a Quick Reaction Mechanism against VAT Fraud and the 2009 proposal for an Optional Application of the VAT Reverse Charge Mechanism (of which only the greenhouse gas emission portion was adopted in 2010).

Newly proposed initiatives

The Commission calls on the Member States to give new impetus to the “European Union (EU) Code of Conduct on Business Taxation,” because the Code of Conduct Group has found it increasingly difficult to achieve tangible results. In this regard, the Commission, for example, recommends extending the activities of the Code of Conduct Group to special tax regimes for individual shareholders, for expatriates, and for wealthy individuals.

The Commission also presents two new instruments to improve administrative cooperation in the area of direct taxation: the “TIN on EUROPA” portal (which provides samples of official identity documents to facilitate the identification and recording of Taxpayer Identification Numbers) and an online checking system similar to VIES (VAT Information Exchange System) regarding the format of TINs. The Commission further has adopted an implementing regulation to provide for standard forms for exchange of tax information and introduces an IT application for these forms in all EU languages that will be deployed as of 1 January 2013.

In addition, the Commission’s new initiatives include two recommendations to the Member States calling for coordinated EU action on tax havens and on aggressive tax planning:

Recommendation on tax havens

The Commission recommends an EU-common approach to identification of tax havens, which it defines as countries that do not comply with minimum standards of good governance in tax matters. Minimum standards in this sense are met if the third country applies the principles of transparency and exchange of information and does not operate harmful tax measures in the area of business taxation according to the “EU Code of Conduct on Business Taxation.” The Commission calls on the Member States:

- to participate in coordinated “black listing” of third countries identified as tax havens;
- to suspend or terminate existing Double Tax Conventions with “black-listed third countries”; and
- to offer closer cooperation and assistance to “developing not black-listed third countries”;
- to promote the conclusion of bilateral cooperation programs with not black-listed third countries.

Recommendation on aggressive tax planning

The Commission recommends that Member States coordinate common actions to resolve so-called double deductions and double non-taxation cases. Double non-taxation in this sense is defined as a situation “where income is not taxed by any of the tax jurisdictions involved.” In order to resolve certain risks of double non-taxation:

- Member States are encouraged to ensure, in the context of their Double Tax Conventions, that income may only remain untaxed in a Contracting State if it is subject to tax in the other Contracting State (which may be either another Member State or a third country). The Recommendation includes a provision which Member States are asked to include in their treaties to this effect.
- Similarly, Member States that avoid double taxation by exempting foreign income through unilateral measures are called upon to adopt provisions preventing double non-taxation.
- Finally, Member States are asked to adopt a General Anti-Abuse Rule (GAAR) and, in that respect, a suggested provision is included in the Recommendation.
Future initiatives
In the Action Plan, the Commission announces its intention to propose a legislative amendment of the Parent-Subsidiary Directive to address use of hybrid loan structures. The Commission also acknowledges that real effects in the area of mismatches involving hybrid loans and hybrid entities will require political support from the Member States.

Other short-term actions (by December 2013) include:
- in collaboration with the OECD (Organisation of Economic Co-operation and Development), the development and promotion of EU IT tools and formats for the cross-border exchange of information;
- the preparation of an EU taxpayer’s code (containing rights and obligations for both taxpayers and tax administrations);
- the promotion of stronger cooperation with other law enforcement bodies, including a legislative proposal with respect to the Anti-Money Laundering Directive to include tax crimes as predicate offenses to money laundering; and
- the facilitation of tax audits (including paving the way for possible future joint audits) by facilitating, within the EU, the presence of foreign officials in tax administration offices and at taxpayer offices.

Medium-term actions (by December 2014) among others include:
- the development of IT solutions for automatic exchange of information between Member States on specified categories of income;
- the creation of an EU Taxpayer Identification Number (TIN);
- the development of methodology and guidelines to improve access to information on financial flows by tax administrations;
- the extension of the Eurofisc system to direct taxation (to detect and disseminate information on fraud schemes and trends and aggressive tax planning); and
- the alignment of administrative and criminal sanctions for tax offenses.

Longer-term actions (beyond 2014) include:
- the creation of a methodology for joint audits;
- the facilitation of mutual direct access to national databases in the area of direct taxation; and
- the development of a proposal for a single legal basis for administrative cooperation for all taxes (instead of four different instruments, as currently is the case).

Impact
The Action Plan and the Recommendations may lead to legislative proposals and/or amendments to existing Double Tax Conventions, as well as proposals for revisions to the EU directives. Furthermore, the section on tax havens seeks to extend the definition beyond the OECD’s current categorization based on lack of transparency and exchange of information; and, as such, potentially represents a renewed focus on low tax jurisdictions, following the rapid adoption of Tax Information and Exchange Agreements by many countries.

Since direct taxation generally falls within the competence of the Member States themselves, it remains to be seen whether all Member States would be willing to accept and endorse the various specific actions proposed by the Commission once they become more defined. Moreover, at present, EU legislative proposals on tax matters require unanimous approval of all Member States in the Council and all Member States may not be in favor of the policy responses that the Commission intends to develop.

A revision of the Parent-Subsidiary Directive to address double non-taxation arising from the exploitation of hybrid loans may therefore not be imminent. However, one should not underestimate the impact that this particular Communication may have, given that it originated from a clear mandate from the Council of Europe on 2 March 2012 and therefore is backed and monitored by the EU Member States themselves.

Finally, even without action on the Recommendations that require approval of all Member States, the release of the Action Paper and Recommendations, itself, may well have an impact on administrative practices applied by the tax authorities in various Member States.
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