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Global Tax Alert

EU: Public CbCR fails to move forward in latest European vote

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Executive summary

At the European Union (EU) Competitiveness Council (COMPET) meeting on 28 November 2019, ministers representing the 28 current EU Member States failed to reach agreement, in a majority vote, on whether tax and financial information contained within Country-by-Country (CbC) reports should be made available to the public.

Of the Member States, 14 (Belgium, Bulgaria, Denmark, Finland, France, Greece, Italy, Lithuania, Netherlands, Poland, Portugal, Romania, Slovakia, and Spain) voted in favor of the proposal, while 12 (Austria, Croatia, Cyprus, Czech Republic, Estonia, Hungary, Ireland, Latvia, Luxembourg, Malta, Slovenia, and Sweden) voted against. Germany abstained, while the United Kingdom (UK) failed to vote.

COMPET brings together ministers responsible for trade, economy, industry, research and innovation, and space from all Member States.[1] While not traditionally a configuration of the EU institution in which tax policy issues are developed, the vote was held at COMPET due to the Directive in question being an accounting, and not a tax, Directive. The vote centered on whether to amend Accounting Directive 2013/34/EU (the Directive). In order to pass under the required Qualified Majority Voting (QMV) model, the draft Directive required the support of 16 Member States.

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Prior to the COMPET meeting, Cyprus, the Czech Republic, Estonia, Hungary, Ireland, Latvia, Luxembourg, Malta, Slovenia and Sweden issued a joint statement opposing the proposal, stating that COMPET "is not the appropriate Council configuration for adopting a general approach on this proposal."

Amendments to the Directive would have required in-scope multinational enterprises (MNEs) or standalone undertakings with total consolidated revenue in excess of €750 million (approximately US$830 million) in each of the past two consecutive financial years to disclose an array of tax-related information, including the income tax they paid in each Member State.[2]

As a result of the vote, amendments to the Directive will not be passed into law. It may, however, be revised and put forward to COMPET for approval a second time.

The COMPET vote was based on the first reading of a new compromise paper,[3] in which the Finnish Presidency also proposed a grandfathering rule, under which Member States could defer the release of sensitive information for a period of six years. This would have extended the grandfathering rule included in a January 2019 compromise paper,[4] which set the limit at four years.

Detailed discussion

Background

On 12 April 2016, the European Commission proposed to amend the Accounting Directive (Directive 2013/34/EU). The proposal built on the Base Erosion and Profit Shifting (BEPS) work of the Organisation for Economic Cooperation and Development (OECD), in particular Action 13 on CbC reporting (CbCR). However, it went a step further, requiring large MNEs and stand-alone undertakings operating in the EU to draw up and publicly (on the website of the MNE or undertaking) disclose income tax information, including a breakdown of profits, revenues, taxes and employees.

The European Commission's proposal was presented under Article 50(1) of the Treaty on the Functioning of the European Union (TFEU). On 13 July 2016, the Working Party on Company Law requested the Legal Service of the Council of the EU to give a written opinion on the legal basis of the mentioned proposal. It was specifically asked whether the proposal should be adopted on the legal basis of Article 115 TFEU (which requires unanimous consent), instead of on the basis of Article 50(1) TFEU (which requires a qualified majority). The Legal Service of the Council of the EU concluded on 11 November 2016, that the proposal must be based on Article 115 TFEU. For the legal basis to be changed by the Council, nevertheless, unanimity is required.

Thereafter, the European Parliament's Committee on Legal Affairs, pursuant to Rule 39(3) of the Rules of Procedure, decided of its own motion, to provide an opinion on the legal basis of the proposal amending the Accounting Directive. The Committee considered that there is a link between transparency and public scrutiny. It concluded on 12 January 2017 that the proposal must be based on Article 50(1) TFEU, instead of Article 115 TFEU. This opinion contradicted legal advice given to the Council of Member States in November 2016.

EU meeting and vote

At the COMPET meeting on 28 November, Member States' Economy and Finance ministers failed to reach agreement under a majority vote. Under QMV a majority of 16 Member States were needed for the Directive to advance, as opposed to unanimity, which is required for tax proposals under Article 115 TFEU.

Under the majority voting system on which instruments under Article 50(1) TFEU are legislated for, each Member State receives a weighted number of votes according to population, as opposed to a single vote per Member State, under Article 115 TFEU.

At the COMPET vote, the UK failed to vote, and Germany abstained. Of the other 26 Member States, 14 voted in favor of the proposal and 12 were against.

The vote was based on the first reading of a compromise paper, Council paper 14038/19, in which the Finnish Presidency of the Council of the European Union,[5] in place until 31 December 2019,[6] proposed a grandfathering rule under which MNEs could defer the release of sensitive information for six years.

If the vote *had* passed, the Directive would have moved into law, but all affected Member States would then have had the right to appeal, claiming for annulment before European Court of Justice.

Implications

Notwithstanding its failure to pass, the vote on whether to amend the Directive illustrates that tax and financial transparency is at the very top of the agenda of the newly-composed European Parliament and Commission. If adopted, it would have had implications for both EU-headquartered and non-EU-headquartered undertakings, including significant concerns on behalf of companies in regard to whether sensitive business information and trade secrets would be fully protected in the future.

Furthermore, with a relatively close vote occurring, the issue of whether CbCR information is made available to the public will be raised again in the future. That will occur as soon as 5 December, during the next ECOFIN meeting[7] where the Swedish delegation will inform the Council about its concerns regarding the legal basis of the proposal. For this, the Swedish delegations submitted a note to the Council describing its positions.[8]

Finally, it is worth noting that, post-Brexit, the dynamics of European policy-making may shift and that smaller Member States in particular may be able to drive tax policy in a more proactive way in the future, should QMV ever be implemented. Companies should therefore closely monitor the activities of the Commission, Parliament and other EU institutions as this and other tax developments continue to develop.

Endnotes

1. See https://www.consilium.europa.eu/en/council-eu/configurations/compet/.
2. Full information on scope and items required to be reported are set out in EY Global Tax Alert, *European Parliament votes in favor of public Country-by-Country reporting in first reading*, dated 7 July 2017.
3. A paper prepared before the meeting, containing a series of revised clauses that the working party preparing the amended Directive thinks may be acceptable to MEMBER STATES.
4. https://data.consilium.europa.eu/doc/document/ST-5134-2019-INIT/en/pdf.
5. https://www.consilium.europa.eu/en/council-eu/presidency-council-eu/.
6. And to be succeeded by Croatia on 1 January 2020.
7. https://www.consilium.europa.eu/media/41619/05-ecofin-provisional-agenda.pdf.
8. https://data.consilium.europa.eu/doc/document/ST-14810-2019-INIT/en/pdf.

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