Euro Tax Flash from KPMG's EU Tax Centre

European Commission proposes new rules on cross-border reorganizations

Cross-border mergers – Company law – Anti-abuse

On April 25, 2018, the European Commission proposed new company law rules setting out common EU-wide procedures for the cross-border relocation of companies, but which are also aimed at ensuring protection of employee rights and preventing tax abuse.

Background

The proposal is part of the European Commission's Digital Single Market Strategy and its wider initiatives towards a fairer Single Market. As there is no harmonization between EU Member States and due to certain administrative hurdles, companies may be discouraged from reorganizing cross-border. As clarified by the Court of Justice of the EU in October 2017 (see the Court's decision in the *Polbud* case C-106/16), the EU freedom of establishment includes a company's right to convert into an entity governed by the law of another Member State, provided that certain conditions are met.

The European Commission is therefore taking steps toward encouraging businesses to pursue the opportunities available under the Single Market, by proposing to make it possible to create a company online – amendments to Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, and to perform cross-border reorganizations without incurring unnecessary red tape, while protecting the rights of employees, shareholders and creditors and preventing abusive practices – amendments to Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions.

Anti-tax abuse measures in the European Commission's proposal

The proposed new rules include a mechanism whereby the Member State of departure in a cross-border conversion is required to stop the operation where the harmonized procedures are used to set up artificial arrangements, including those aimed at obtaining undue tax benefits. An individual review should be conducted in each specific case, having regard to all relevant facts and circumstances. The competent authorities of the Member State of departure will not authorize the cross-border conversion if, following the review, they determine that the operation represents an artificial arrangement aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members.

Where the competent authorities of the departure Member State has serious concerns that the cross-border reorganization constitutes an artificial arrangement, they would be required to perform an in-depth assessment of the facts and circumstances. The assessment would be carried out by taking into account at least the following characteristics of the establishment in the destination Member State: the intent, the sector, the investment, the net turnover and profit or loss, number of employees, the composition of the balance sheet, the tax residence, the assets and their location, the habitual place of work of the employees and of specific groups of employees, the place where social contributions are due and the commercial risks assumed by the converted company in the destination Member State and the departure Member State. In the case of medium-sized and large companies, an independent expert would be involved in the factual analysis of these elements, which only represent indicative factors in the overall assessment and should not be assessed by the authorities in isolation.

Where an in-depth assessment is carried out, the company and all other parties that may submit observations on the conversion (employees, creditors, shareholders) may also be heard as part of the assessment. This may also be extended to any other interested third parties, in accordance with the national law of the departure state. The competent authorities have two months to make a final decision as regards the (pre-conversion or pre-division) certificate that attests compliance with all the relevant conditions.

EU Tax Centre comment

It is interesting to note that the European Commission is pursuing its anti-tax avoidance agenda not only directly, through specific tax measures (see, for example the Anti-Tax Avoidance Directives - ATAD), but also somewhat incidentally through extensive reporting obligations (see the recent amendments to the Directive on Administrative Cooperation) or by proposing the introduction of anti-abuse rules in legislation that is not tax-specific. The text of the anti-abuse measures resembles that used, for example, in the general anti-abuse rule in the ATAD. However, the detailed guidelines on the in-depth analysis to be carried by the competent authorities that have serious concerns about certain operations and the involvement of an independent expert are welcome clarifications.

Should you have any queries, please do not hesitate to contact KPMG's EU Tax Centre, or, as appropriate, your local KPMG tax advisor.

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