# Kluwer International Tax Blog

## Understanding the EU Anti Tax Avoidance Package – Study on Structures of Aggressive Tax Planning and Indicators

Jakob Bundgaard (CORIT advisory) · Tuesday, February 23rd, 2016

When the EU Anti Tax Avoidance Package was launched by the European Commission, a Study on Structures of Aggressive Tax Planning and Indicators was released simultaneously as Taxation papers – Working paper N. 61- 2015, which is available: here.

Reading the Study provides a good basis for understanding the reasoning behind the Anti Tax Avoidance Package. Having been one of the authors preparing the report for the Commission I thought that it would make sense to share some of the findings in this forum.

Context, purpose and methodology
In the wake of the financial crisis and the subsequent economic downturn, corporate tax avoidance and tax planning have received a great deal of attention from policymakers and the media. The topic is high on the political agenda within the OECD/G20, the EU and a number of individual countries, which have increased initiatives to ensure that taxation duly takes place where economic value is generated and where the economic activity is actually carried out.

Against this background, the EU Commission finds it necessary to improve the knowledge of the tax laws and practices of EU Member States, which may expose particular jurisdictions to aggressive tax planning (ATP). As a result, the study was commissioned to:

1. Identify model ATP structures
2. Based on the ATP structures, identify ATP indicators which facilitate or allow ATP
3. Review the corporate income tax systems of the EU Member States by means of the ATP indicators, in order to identify those tax rules and practices (or lack thereof) that result in Member States being vulnerable to ATP

The study carried out by Ramboll and Corit Advisory, with the support of a network of independent national tax experts, is the first one of its kind. It reviews and assesses the corporate income tax systems of all EU Member States using a tailored methodology that is systematic, simple and easy to communicate. Although a more in-depth and circumstantiated analysis would be needed in order to investigate and possibly address specific cases of national tax systems being at risk of aggressive tax planning, it is hoped that this study provides useful information for policy makers with a view to improving the functioning of the national tax systems of EU Member States.

ATP structures

In order to identify relevant ATP indicators, ATP structures representing all major empirically proven channels for profit shifting have been identified and described.

The selection of model ATP structures was inspired by the OECD's BEPS reports as well as other tax literature, and has been supplemented from the authors' professional experience and knowledge. This has resulted in the seven model ATP structures which are presented in the list that appears immediately below. The study considers four well-known corporate tax structures identified by the OECD, and adds an additional three model ATP structures. The seven model structures are:

• A hybrid financing structure
• A two-tiered IP structure with a cost-contribution arrangement
• A one-tiered IP with a cost-contribution arrangement
• An offshore loan structure
• A hybrid entity structure
• An interest-free-loan structure
• A patent-box ATP structure

The ATP structures identified in this study include only those which qualify as ATP structures in terms of the definition set out by the European Commission Recommendation on Aggressive Tax Planning . According to this definition, ATP consists "in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability. It may result in double deductions (e.g. the same cost is deducted both in the state of source and residence) and double non-taxation (e.g. income which is not taxed in the source state is exempt in the state of residence)".

ATP indicators
ATP indicators can be generally defined as those generic characteristics of a tax system which have the potential to facilitate ATP. Technically, an ATP indicator can take the form of a specific piece of legislation or case law, but it can also take the opposite form, namely the absence of such legislation.

A total of 33 ATP indicators were identified and assessed in the context of the study, 27 of which have been derived directly from the model ATP structures. For the purpose of the study, a typology of indicators was constructed to reflect the manner in which they facilitate ATP.

The character of how indicators facilitate ATP can be either active or passive. An active ATP indicator is one which can directly promote or prompt an ATP structure. Often, it is the active indicators that are the main source of the tax benefit offered by an ATP structure. By contrast, a passive ATP indicator is one which does not by itself promote or prompt any ATP structure, but which is necessary in order not to hinder or block an ATP structure. A third category, the lack of anti-abuse ATP indicators, represents the lack of rules aimed at counteracting the avoidance of tax.

Based on the discussion and definitions above, the study distinguishes between these three categories of indicators. Additionally, the absence of some anti-abuse and passive ATP indicators can combine with others into sets which are capable of facilitating the same or similar types of ATP structure.

It should be understood that no value judgement is intended by the nomenclature used in this study. Member State tax rules found to be ATP indicators for the purpose of the Study may well pursue perfectly valid objectives. A final judgement of such rules would require a detailed analysis of their actual design and application that takes into account to what extent the rules are safeguarded, e.g. through anti-abuse provisions. Such detailed analysis has been outside the scope of the Study.

Member State assessments
Using as its basis the list of ATP indicators, a questionnaire was designed for the purpose of factual primary data collection. The questionnaire was completed by individual national tax experts (NTEs) who provided up-to-date information on the tax system of each of the 28 Member States by reference to the ATP indicators. Questionnaires filled in by NTEs were sent for comments to the representatives of each Member State.

The questionnaire responses were analysed centrally in order to assess individual MS positioning by reference to the list of ATP indicators.
The total number of indicators varies widely between Member States, ranging from four to seventeen. Active indicators are found in fifteen Member States, with three Member States having three active indicators. All Member States except two have indicators showing a lack of anti-abuse rules. Finally and not surprisingly, passive indicators are found in all Member States. Most Member States exhibit between three to five passive indicators.

General observations
A number of interesting general observations can be derived by comparing the results across the EU Member States.

Subject to further analysis, these observations could imply that scope exists for Member States to tighten their anti-abuse rules in order to counter base erosion by means of financing costs.

All twenty-eight Member States exhibit indicators that fall under the interest cost theme, and twenty-four Member States have at least two indicators within this category that combine into a set. This suggests that base erosion by means of financing costs can occur.

ATP via no or favourable taxation of dividends is also important, even though to a lesser extent. Thirteen Member States show a combined set of indicators in the area of dividends received and dividends paid. This may be taken as an indication that in many Member States, rules to counter ATP based on the tax-free flow-through of dividends are already better-established in this area than in the interest area. In this context, it is noted that at the time of data collection, thirteen Member States did not apply any beneficial-owner test when accepting a claim for a reduction or exemption of withholding tax.

In the area of anti-abuse rules, this study finds that half of Member States – specifically, fourteen – do not have CFC rules. Additionally, with the exception of Denmark, Spain and (partly) Hungary, no Member State has rules to counter the mismatching tax qualification of a local partnership or company by another state (typically the state of the owners).

It is also worth noting that almost all Member States (specifically, twenty-six of them) have been reported to have general or specific anti-avoidance rules which are capable of countering parts of the model ATP structures considered in the Study. However, this should not be taken to represent a ban of ATP structures. It appears that the rules in place can be only partially efficient to prevent these structures.

Finally, the appendix of the study identifies indicators which could prompt ATP structures if they are found in third countries' corporate income tax systems. Such a list could comprise a basis for joint work between Member States to prevent ATP by companies resident in these jurisdictions.

---

*To make sure you do not miss out on regular updates from the Kluwer International Tax Blog, please subscribe here.*



This entry was posted on Tuesday, February 23rd, 2016 at 12:05 am and is filed under Tax Planning
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.