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Is the EU council about to confirm the existence of an EU at arm's length principle?

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On 21 June 2017, the European Commission released its Proposal on transparency rules for tax intermediaries. It primarily seeks to address concerns raised by the ECOFIN Council and the European Parliament in trying to investigate and tackle the role of intermediaries in tax evasion and tax avoidance schemes of multinational companies.

New rules impose an obligation on intermediaries (i.e. legal and natural persons active in consulting business, banking and legal sectors, tax advisory and accounting practice etc.) to disclose information with tax authorities on certain cross-border activities and legal structures that bear the indicators of tax saving arrangements. This information shall be exchanged automatically between national tax authorities in order to scrutinize cross-border activities of group companies in view of preventing aggressive tax planning.

Nevertheless, this Proposal has a broader impact and includes clarification on the definition and characteristics of a potentially aggressive scheme concerning transfer pricing. In particular, the Annex to the Proposal provides for a mandatory disclosure when there is:

"An arrangement or series of arrangements which does not conform with the ***arm's length principle*** ***or*** *with the* ***OECD transfer pricing guidelines****, including the allocation of profit between different members of the same corporate group".*

Now, where does this come from and what does it mean? In recent high profile State aid cases (like Starbucks, Apple, the Belgian Excess Profit Rulings, Amazon and GDF Suez/Engie) the European Commission claimed that Member States should comply with *"the arm's length principle under Article 107(1) TFEU*, independently of whether states have incorporated it into their national legal systems and in what form". This at arm's length principle encompasses the equality principle and is to ensure that no company, that is part of corporate group of undertakings, is treated more favorably under a normal application of the ordinary corporate tax system in a Member State as compared to stand-alone companies. Hence, in the State aid investigations into tax rulings and transfer pricing, the European Commission does not refer to the at arm's length principle derived from the OECD Model Tax Convention, but proposes its own interpretation of the at arm's length principle under Article 107(1) TFEU.

In this context, the question arises as to whether this EU notion of the at arm's length principle can yet be applied beyond the domain of State aid, so even before we hear from the European Courts on that matter? In my view it is not a surprise that the European Commission is trying to impose and enforce its anti-tax avoidance policy by any means, because tackling tax avoidance and evasion is still amongst the highest political priorities of this Commission. However, if the Council agrees on adopting this version of the Proposal with the proposed Annex as it is, it will open many disputes in Europe as to the far-reaching impact of applying an EU at arm's length principle, the scope of which is yet uncertain. The influence and subsequent criticism of this approach may further reach other initiatives, such as the recently adopted Anti Tax Avoidance Directive (ATAD). In result, if the Council agrees with this Proposal, we will have a separate concept of the EU at arm's length principle established and functioning on its own in different areas of taxation, without the Courts having had a chance to review this approach of the European Commission first. From my point of view, not awaiting Court scrutiny of the pending cases on tax rulings and transfer pricing concerning the existence and application of the EU at arm's length concept would be a rather unwelcome scenario, and will lead to uncertainty for companies and the whole investment climate in Europe.

If the Proposal is adopted, the amended Directive is aimed to enter into force on 1 January 2019.

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