How alone is 'standalone' in the EU Anti-Tax Avoidance Directive (ATAD)?

Vermeulen, H.

Publication date
2016

Document Version
Final published version

Kluwer International Tax Blog

CCCTB, EU/EEA, OECD, PERMANENT ESTABLISHMENTS

How alone is ‘standalone’ in the EU Anti-Tax Avoidance Directive (ATAD)?

Hein Vermeulen (**Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam, EU Direct Tax Group (EUDTG) PwC**) / **October 19, 2016** / **1 Comment**

The Anti-Tax Avoidance Directive (ATAD) is the European answer to the phenomenon of BEPS: Base Erosion and Profit Shifting. Characteristically for tax avoidance by Base Erosion and Profit Shifting, is that it takes place within multinational groups (MNE’s). Therefore, the ATAD applies to these groups of companies. Nevertheless, the European Commission has chosen to also apply the ATAD to ‘standalone’ entities. However, when implementing the ATAD a Member State could decide not to apply one part of it, the earnings-stripping provision, to standalone entities. This is the case when the entity is not part of a consolidated group for financial accounting purposes nor has an associated enterprise or permanent establishment (PE). Therefore, a standalone entity is not necessarily confronted with the earnings-stripping provision. That is, when a certain Member States indeed choses to exclude standalone entities from this provision.

To me, it is not yet fully clear how this relates to the standpoint of the Directorate-General Competition in the context of EU State aid that companies of MNE’s and standalone companies should be to be treated equally.

What is clear is that an entity with a PE abroad can be subject to the earning-stripping provision. For this is that it is not considered as a standalone entity. What is striking is that the ATAD – unlike the Parent-Subsidiary Directive – does not provide for a definition of the concept of a PE.

So, how should we interpret this concept? To me it is without doubt that the concept should have a Union Law meaning, which is to be explained by the EU Court of Justice (CJ). The CJ, however, does not consider it unreasonable for the Member States to base their bilateral tax agreements on international practice and the Model Tax Convention drawn up by the Organisation for Economic Cooperation and Development (OECD Model Tax Convention). This already follows from *Gilly* (C-336/96). Although DG Comp follows the same track in its 2016 Notice on the notion of State aid, the Commission is also of the opinion that the at arm’s length principle follows directly from art. 107 TFEU.

Nonetheless, I expect that when interpreting the concept of a PE guidance will be taken from art. 5 of the OECD Model Tax Convention. After all, this PE definition was already part of the 2011 proposal for a Common Consolidated Corporate Tax Base (CCCTB or 3CTB). And it is clear that ATAD is inspired by this proposal. Indeed, a 3CTB is the end goal of the Commission. The Commission plans to arrive at the 3CTB through stages. Firstly, by the ATAD, secondly by a 2CTB (without Consolidation!) and, thirdly, by a 3CTB. This 4th quarter the Commission will launch a proposal accordingly. The Commission is of the opinion that a mandatory single European corporate tax base will be effective in coping with tax avoidance through Base Erosion and Profit Shifting, that is, within the EU. After all, a common corporate tax base will not leave room for mismatches between the Member States as a result of differences in the legal characterisation of financial instruments or entities and those differences surface in the interaction between the legal systems of two Member States.

The conclusion therefore should be that an entity with a PE within the meaning of the OECD Model Tax Convention cannot be considered to be standalone. Moreover, one can conclude that an entity with a so-called fictitious PE should be considered to be a standalone entity. An example of a fictitious PE is real estate held by a foreign entity, which is covered by art. 6 of the OECD Model Tax Convention. Such an entity with foreign real estate, which does not qualify as a PE under the OECD Model Tax Convention, will therefore be a ‘loner’ in the sense of the earnings-stripping provision.

---

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