Greece transposes the rules of the EU Anti-Tax Avoidance Directive

On Friday, 5 April 2019, the Greek Ministry of Finance submitted a bill to the Greek Parliament transposing part of the EU Anti-Tax Avoidance Directive ("**ATAD**"). The ATAD provides for harmonised measures against corporate tax avoidance practices across the European Union, consistent with OECD BEPS conclusions. Although the ATAD rules apply to corporations and entities that are subject to corporate taxation, the bill expands their scope of application to both corporations and private individuals.

The draft bill modifies existing domestic tax rules, by transposing the following ATAD provisions:

- the Interest Barrier Rule (currently set out in art. 49 ITC),
- the Controlled Foreign Corporation Rule (currently set out in art. 66 ITC), and
- the General Anti-Avoidance Rule (currently set out in art. 38 Law 4174/2013).

The new rules are set to apply for tax years starting from 1 January 2019.

Greek taxpayers, corporations and private individuals participating in domestic and cross-border transactions within the EU or with third countries will need to assess the impact of the modified and harmonised EU rules on their operations. Going forward, Greek tax authorities and national courts are anticipated to interpret and apply the revised rules, taking into account CJEU jurisprudence, which has jurisdiction to interpret domestic legislation transposing EU Directive rules.

The summary below refers to the bill as submitted to the Greek Parliament and may be subject to revisions up to the voting of the law, in which case we will update you accordingly.

Interest Barrier Rule

- A company's "exceeding borrowing costs" are tax deductible in the tax period in which they are incurred only up to 30% of the company's earnings before interest, tax, depreciation and amortisation (EBITDA).

- The 30% limitation does not apply to exceeding borrowing costs up to the amount of Euro 3M.

- Taxpayers are entitled to carry forward indefinitely, exceeding borrowing costs above the 30% limitation.

- "Exceeding" borrowing costs are defined as the amount by which the deductible borrowing costs of a company exceed taxable interest revenue and other economically equivalent taxable revenue.

→ *The definition of "borrowing costs" is significantly extended to encompass standard interest expenses on all forms of debt, other expenses economically equivalent to interest expenses and expenses incurred in connection with the raising of finance, including payments under profit participating loans, imputed interest on instruments such as convertible bonds and zero coupon bonds and the finance cost element of finance lease payments.*

- For purposes of application of the 30% limitation, the EBITDA is calculated by adding back to the taxable income the tax-adjusted amounts for exceeding borrowing costs, as well as the tax-adjusted amounts for depreciation and amortisation. Tax exempt income shall be excluded from the EBITDA of the company.

- The modified rule excludes several types of financial undertakings such as credit institutions, insurance companies, and specific institutions for occupational retirement.

- Due to the absence of a Greek tax grouping regime, Greece has neither opted for the application of the special rules for groups of companies, nor excluded standalone companies from the scope of the interest limitation rule (i.e. companies not being part of a consolidated group and with no associated enterprise or permanent establishment).

Controlled Foreign Corporation rule ("CFC")

- The undistributed income of a low-taxed subsidiary or permanent establishment the profits of which are not subject to tax or are tax exempt in Greece ("CFC") shall be re-attributed to the shareholder or the head office and be subject to Greek income tax.

→ *The CFC rule explicitly applies to Greek tax resident private individuals and legal entities controlling a foreign CFC.*

- A foreign entity is classified as a CFC, provided that the following conditions are cumulatively met:

a. the Greek shareholder by itself, or together with its associated enterprises holds directly or indirectly more than 50% rights in the capital of the CFC

→ *A new definition of "associated enterprises" is introduced, deviating from the term "related parties" under art. 2 of the ITC (e.g. 25% minimum holding threshold instead of 33%).*

b. the actual corporate tax paid on the CFC's profits is less than 50% of the corporate tax that would have been charged on such profits in Greece

→ *The previously applicable rule focused on the nominal tax rate, instead of the actual tax paid by the CFC in the state of tax residence, referring to non-cooperative jurisdictions or preferential tax regimes.*

c. 30% or more of the income before taxes accruing to the CFC falls within the following categories (the "passive income" approach):

- interest or any other income generated by financial assets,

- royalties or any other income generated from intellectual property,
- dividends and income from the disposal of shares,
- income from financial leasing and income from insurance, banking and other financial activities and
- income from invoicing companies that earn sales and services income from goods and services purchased from and sold to associated enterprises, adding no or little economic value;

→ *The new rule extends the definition of "passive income" to income derived from intra-group sales of products or services, if adding no or little economic value. On the other hand, rentals, which are covered by the current CFC rule, are not listed in the revised provision of the bill.*

- CFC rules do not apply to companies or permanent establishments resident in EU/EEA Member States provided that such entities carry on a substantive economic activity supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances. In such case, the tax authorities bear the burden to prove the absence of a substantive economic activity.

→ *The new rule explicitly refers to elements indicating substantive economic activity, echoing CJEU jurisprudence.*

- The revised rules provide that the income re-attributed to the taxpayer in Greece shall be classified as business income, subject to income tax according to the tax rates applicable for private individuals and legal entities, as the case may be.

- The revised rules provide explicitly for the tax treatment of any distributions made by the CFC, as well as of the capital gain from the disposal of shares in the CFC, the application of a tax credit relief mechanism for eliminating double taxation in Greece, as well as the tax treatment of foreign losses.

- Listed companies, previously exempt from the CFC rules, fall within the revised CFC rules.

General anti-avoidance rule ("GAAR")

- The revised rule allows tax authorities to ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances (non-genuine arrangements).

→ *The revised rule adopts the main purpose test, instead of the essential purpose test adopted by the previously applicable provision, thus potentially extending the scope of application of the rule. It adopts however, the economic reality test, thus not being triggered in the event of genuine tax efficient structures.*

- Tax authorities bear the burden to prove the existence of a non-genuine arrangement that has as its main purpose (or one of its main purposes) a tax advantage, in line with the proportionality principle.

- An arrangement is non-genuine to the extent that it is not put into place for valid commercial reasons which reflect the economic reality. The indicative list of the circumstances that tax authorities take into account upon the determination of genuine arrangements remains unchanged.

- The GAAR applies to direct taxes for corporate and private individuals, as well as to a number of taxes falling into the scope of the Code of Procedures (e.g. VAT, stamp duty, property taxes). The GAAR aims to fill in gaps, which should not affect the applicability of specific anti-abuse rules, such as the application of the CFC rules and the specific anti-abuse rule of the EU Parent and Subsidiary Directive.

- Additionally, the rule applies to both domestic and cross-border arrangements within the EU or vis-à-vis third countries. It is also clarified that special anti-abuse rules included in the tax treaties for the avoidance of double taxation (i.e. principal purpose test) supersede the domestic GAAR to the extent that the artificial arrangement was put into place for obtaining a tax treaty advantage.

- A Decision by the Governor of the Independent Authority for Public Revenue shall determine the implementation of the rule and any other relevant matter given that, according to the international best practices, the GAAR applies exceptionally to artificial tax avoidance schemes. Upon the interpretation of the rule, the jurisprudence of the CJEU shall be used as an interpretative tool by the tax authorities.

Should you wish to discuss further how the EU ATAD implementation may affect you or your business, please contact:

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