Legal aspects of limiting undesirable tax optimisation techniques in the Czech Republic

Abstract

With the increasing globalisation and the related increase in the number of multinational companies, these companies are also trying to minimise their overall tax liability, which does not always correspond to the way in which the tax treatment in each country has been designed. The OECD was the first to address these efforts with its Action Plan against Base Erosion and Profit Shifting. Selected actions were implemented by the European Union in the form of a directive, thus obliging Member States to transpose them into their own national laws.

The Czech tax law has thus incorporated new rules preventing undesirable tax optimisation. The anti-abuse rule, which had already been applied through case law, has been enshrined in the Tax Administration Act and, unlike the directive, affects both the entire tax system and all tax subjects. Its wording also corresponds to the conclusions of the Czech courts rather than to the wording of the Directive and, in my opinion, better reflects current practice. Although its scope is very broad, it should be applied sparingly.

The interest limitation rule targets excessive in-group and out-group borrowing and is intended to penalize cases that are not covered by the thin capitalisation rule. In my view, however, given the de minimis threshold and the design of the rule, its impact is very narrow. At the same time, it excludes financial enterprises from its scope, to which, given the nature of their income, it would not apply anyway. It would thus be appropriate to adopt a measure similar to the Australian model.

The exit taxation rule reflects well the treatment in the directive and penalises contrived transfers of assets for the purpose of more favourable taxation. However, it seems very strict given the absence of any de minimis threshold and the vague definition of the assets to be transferred.

In my view, the rule against hybrid mismatches arrangements has been transposed insufficiently and does not correspond to the broad provisions of the directive, which may in some cases have

direct effect. It also addresses only the consequences of the differences, not their cause, i.e. the very essence of the differences between legal systems.

The taxation of a controlled foreign company rule is aimed at shell companies, and although well transposed, contains several interpretative problems, in particular the criterion of substantial economic activity. I conclude that although the explanatory memorandum describes the conditions for applying the criterion, the application of the fiction of inclusion of CFC income will always depend on the specific conditions, given the diversity and extent of the economic activity. The new proposal for a directive against shell companies contains very severe consequences for failure to meet the test set out there and I believe that it will not be adopted at EU level given the need for unanimous agreement by all of the Member States.

Klíčová slova: BEPS, ATAD, taxation