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EU Direct Tax Newsalert

Draft Law transposing ATAD on hybrid mismatches presented to Portuguese parliament

On 30 January 2020, Law Proposal 10/XIV was presented by the Portuguese Government to the Portuguese Parliament. It partially transposes the EU's Anti-Tax Avoidance Directives (ATAD) 1 and 2, respectively Council Directive (EU) 2016/1164, of 12 July 2016, and Council Directive (EU) 2017/952, of 29 May 2017. The remainder provisions of ATAD 1 have already been transposed in Portugal following the publication of Law 32/2019, of 3 May 2019.

Article 68-A – Definitions

The draft law introduces Article 68-A, that reflects the recitals as well as Articles 4 and 9 of the ATAD. It includes definitions that are in line with the ATAD. Among others, the definition of hybrid mismatches (situations giving rise to deduction without inclusion or double deduction), double deduction, deduction without inclusion, associated enterprise and hybrid entity. This provision applies to tax years starting on or after 1 January 2020.

Article 68-B – Hybrid mismatches

The proposal also introduces Article 68-B, again reflecting the recitals as well as Articles 4 and 9 of the ATAD. This provision details the disallowed tax deductions resulting from hybrid mismatches, related with payments, or deemed payments, or that indirectly funds deductible expenditure. As foreseen in the ATAD, Portugal opted to allow the deduction to be carried forward to a subsequent tax period, deferring any adjustment until the deduction is set off against non-dual-inclusion income in the other jurisdiction. This provision also determines the income that should be considered considered for the purpose of assessing the taxable profit resulting from hybrid

mismatches. This provision applies to tax years starting on or after 1 January 2020. As foreseen in the ATAD, the provisions of Article 68-B shall only apply to tax years starting after 31 December 2022 in case of hybrid mismatches resulting from a payment of interest under a financial instrument to an associated enterprise, under certain conditions.

Article 68-C – Reverse hybrid mismatches

The proposal reflects Article 9a of ATAD 1 and 2 by introducing Article 68-C on reverse hybrid mismatches. It concerns nonresident hybrid entities that are regarded as Portuguese tax residents and taxed herein. This provision applies to tax years starting on or after 1 January 2022.

Article 68-D – Tax residency mismatches

New Article 68-D, concerning to tax residency mismatches, corresponds to Article 9b of the ATAD. It foresees the cases where Portugal is allowed to deny the deduction of costs incurred by a taxpayer having its registered office or place of effective management in the Portuguese territory, who is also resident in another jurisdiction, and those costs are deductible in both jurisdictions. This provision applies to tax years starting on or after 1 January 2020.

Next steps and takeaway

The draft Law closely follows the ATAD on hybrid mismatches. It is not expected that the final version to be published differs from the proposal. Since most of its provisions apply to tax years starting on or after 1 January 2020, taxpayers should start analysing existing structures and transactions that could potentially be affected by these provisions.

